

United States District Court
Southern District Of Indiana
Indianapolis Division

INDIANA DEMOCRATIC PARTY,)
and MARION COUNTY)
DEMOCRATIC CENTRAL)
COMMITTEE,)

Plaintiffs,)

v.) CAUSE NO: 1:05-CV-00634-SEB-VSS

TODD ROKITA, in his official)
capacity as Indiana Secretary of State;)
J. BRADLEY KING, and KRISTI)
ROBERTSON, each in their official)
capacities as co-directors of the Indiana)
Election Division,)

Defendants,)

**MEMORANDUM IN SUPPORT OF DEFENDANTS’
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants Todd Rokita, in his official capacity as Indiana Secretary of State, and J. Bradley King and Kristi Robertson, in their official capacities as co-directors of the Indiana Election Division, submit this memorandum in support of their motion to dismiss the Complaint. Pursuant to Article III of the United States Constitution, this Court lacks subject matter jurisdiction over this case because the asserted injuries of the Plaintiffs are not fairly traceable to the conduct of the Defendants.

STATEMENT OF FACTS

This is a constitutional and statutory challenge to a new Indiana law, Public Law 109-2005, that requires voters to present photo identification issued by the state or the federal

government when voting at the polls on election day. The Plaintiffs are the Indiana Democratic Party and the Marion County Democratic Central Committee. According to the Complaint, they are dedicated to “electing candidates of the Democratic Party to public office in Marion County, and throughout Indiana” (Complaint ¶ 2) The Democrats do not assert their own rights, but instead assert the rights of “those registered voters who associate with them and who will be voting, or who desire to vote, in future elections” (Complaint ¶ 3)

In their Complaint, the Plaintiffs assert that Public Law 109 “will be enforced at the precinct level by unelected partisan election workers” (Complaint ¶ 28) They also complain that the law will require voters to obtain photo identification “before appearing at the polls” or when appearing before “the County Election Board or the Circuit Court Clerk by Noon of the Monday following the election in order to have the voter’s provisional ballot counted” (Complaint ¶ 31; *see also id.* ¶¶ 9, 16) The Complaint challenges the Defendants to show a compelling government interest in “conditioning the right of a registered and otherwise qualified voter to vote and to have his or her vote counted upon the possession and display at the polls, or later before the County Election Board or Circuit Court Clerk” the required photo identification. (Complaint ¶ 21) In sum, the Plaintiffs claim injury because the law will “deter many registered and otherwise qualified voters . . . from exercising their constitutional right to vote” and “disenfranchise certain registered and otherwise qualified voters” (Complaint ¶¶ 18, 17) These injuries will occur, they assert, unless “Defendants are preliminarily and permanently enjoined by this Court from enforcing” Public Law 109. (Complaint ¶ 17)

The Defendants are the Secretary of State of Indiana and the Co-Directors of the Indiana Election Division. By statute, the Secretary of State is denominated the state’s “chief election official” (Ind. Code § 3-6-3.7-1), which means that he is the designated state official for purposes

of enforcing, for example, voting accessibility rights for the elderly and handicapped under 42 U.S.C. § 1973ee. The Secretary of State also has other duties concerning state elections. *See* Ind. Code § 3-6-3.7-2; Ind. Code § 3-6-4.2-2. The Indiana Election Division is established within the office of Secretary of State and is comprised of two co-directors, appointed by the governor for four-year terms, who may not be members of the same political party. Ind. Code §§ 3-6-4.2-1, -3, -3.2. The Division's duties include assisting in the implementation of those provisions of the Help America Vote Act (HAVA) that require making polling places more accessible to individuals with disabilities (*see* 42 U.S.C. §§ 15421 through 15425) and in preparing and distributing ballots for all federal and state offices. Ind. Code §§ 3-6-4.2-2.5, -12, -12.5. The Election Division is also required to instruct all members of the county election boards and the county boards of registration of their duties under Indiana and federal election law during election years. Ind. Code § 3-6-4.2-14.

In Indiana, county election boards, which are comprised of the circuit court clerk (*ex officio*) and two persons appointed by the circuit court clerk, one from each of the major political parties of the county, are the arbiters of whether individual votes are counted. Ind. Code §§ 3-6-5-2, -14. Where a voter attempts to vote but is challenged for any reason at the polls, the voter may cast a provisional ballot and the county election board, before Noon on the second Monday following the election, will determine whether the voter is qualified to cast the ballot. Ind. Code §§ 3-11.7-5-1, -2 (effective July 1, 2005). Similarly, where a voter's absentee ballot is challenged for any reason, the county election board, at the same time it considers provisional ballots, will determine whether to count the absentee ballot. Ind. Code § 3-11.5-4-15.

Indiana's new voter identification law, Public Law No. 109-2005, requires voters who wish to vote at the polls in any election to present valid photo identification issued by either the

state or federal government. Ind. Code § 3-5-2-40.5 (effective July 1, 2005); Ind. Code §§ 3-11-8-25, -25.1 (effective July 1, 2005). This requirement does not apply to those who cast an absentee ballot or to those who reside and vote at state licensed care facilities. Ind. Code §§ 3-11-8-25, -25.1 (effective July 1, 2005); Ind. Code § 3-11-10-1.2 (effective July 1, 2005). An absentee voter who wishes to vote in the circuit court clerk's office before an absentee voter board, however, must provide proof of identification. Ind. Code § 3-11-10-26 (effective July 1, 2005). The photo identification requirements do not apply to those absentee voters who mail in their absentee ballot or who are visited by the absentee voter board because they are confined with illness or injury. Ind. Code § 3-11-10-1.2 (effective July 1, 2005).

A voter who is required to produce such identification at the polls but is unable or declines to do so may receive and cast a provisional ballot. Ind. Code § 3-10-1-7.2(d) (effective July 1, 2005). The county election board will count the provisional ballot if the voter personally appears before the circuit court clerk or county election board before noon of the second Monday following the election and then provides proof of identification and executes an affidavit attesting that the voter is the same person that cast the provisional ballot. Ind. Code § 3-11.7-5-2.5(b) (effective July 1, 2005). The county election board also will count the provisional ballot if the voter instead executes an affidavit before the circuit court clerk or county election board stating that either (1) the voter is indigent and is unable to obtain proof of identification without payment of a fee; or (2) the voter has a religious objection to being photographed. Ind. Code § 3-11.7-5-2.5(c) (effective July 1, 2005).

ARGUMENT

Because the Defendants Do Not Enforce the Voter ID law, the Case is Not Justiciable

Under Article III of the United States Constitution, this Court lacks subject matter jurisdiction over this case because the Plaintiffs lack standing in that the injuries they assert are not fairly traceable to the conduct of the Defendants. The Defendants have no authority to enforce the voter identification requirements of Public Law No. 109-2005, yet enforcement of that law is what the plaintiffs have asked this court to enjoin. No injunction against these Defendants will enable registered voters to have their votes counted without presenting acceptable photo identification at the polls or to their county election board. The decision whether to count individual votes lies with the county election boards.

Standing turns on whether the plaintiffs have a personal stake in the controversy and “whether the dispute touches upon the ‘legal relations of the parties having adverse legal interests.’” *O’Sullivan v. City of Chicago*, 396 F.3d 843, 853 (7th Cir. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Such considerations are especially important when state laws or the actions of state officials are at stake because the federal courts must ensure that the principles of federalism are not contravened. *Id.* at 854.

To have standing a plaintiff must demonstrate: 1) a personal injury; 2) fairly traceable to the defendant; 3) that is likely to be redressed in the event of a favorable ruling from the Court. *Plotkin v. Ryan*, 239 F.3d 882, 884 (7th Cir. 2001); *see also O’Sullivan*, 396 F.3d at 854. The injury must be causally related to the defendant’s action and not the result of the independent action of some third party. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Also, it must be likely, not just speculative, that a favorable ruling from the court will redress the Plaintiffs’ injury. *Id.* at 561.

The second and third elements of standing require that “a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). This is important because only the parties that actually enforce the challenged statute will be able to redress the asserted injury. It is not enough that the government officials have the ability to give advice about a statute, and “[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.” *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 113-14 (3d Cir. 1993) (holding that the school district officials, not the Attorney General or state Secretary of Education, were the proper defendants in a challenge to a contractor residency requirement).

Here, Public Law 109 does not even mention either the Secretary of State or the Election Division. To be sure, both offices undertake important duties relating to elections (*e.g.*, the Secretary of State is denominated the state’s “chief election official” under Indiana Code section 3-6-3.7-1, which makes him responsible for enforcing voting accessibility rights for the elderly and handicapped (42 U.S.C. § 1973ee)), but those duties do not include the ability to enforce the new voter photo identification law. And while the Election Division has the duty to provide instruction to county election boards concerning enforcement of the election laws, it does not control the enforcement actions of the boards (or the precinct workers designated by the county boards).

Yet the Complaint nowhere asserts that the Plaintiffs (or those they claim to represent) are injured by the Secretary’s duties toward the elderly and handicapped or the Election

Division's educational efforts.¹ Instead, the Complaint repeatedly makes it clear that the injury being asserted is that Public Law 109 will "disenfranchise certain registered and otherwise qualified voters" (Complaint ¶¶ 17, 18) because it "condition[s] the right of a registered and otherwise qualified voter to vote and to have his or her vote counted upon the possession and display at the polls, or later before the County Election Board or Circuit Court Clerk" the required photo identification. (Complaint ¶ 21) The asserted possibility of such injury is why the Plaintiffs complain that Public Law 109 "will be enforced at the precinct level by unelected partisan election workers . . ." (Complaint ¶ 28) and why they seek an injunction against "enforcement" of Public Law 109. (Complaint ¶¶ 4, 17, 28, 41)

However, as the Complaint itself makes clear, any injuries to registered (or otherwise qualified) voters owing to Public Law 109 may occur, if at all, at the hands of county election boards, which are entirely independent of the Secretary of State and the State Election Division. The county election boards established under Indiana Code § 3-6-5-1 must among their responsibilities "[c]onduct all elections and administer the election laws within the county." Ind. Code § 3-6-5-14. Under Public Law 109, a voter who is challenged because of the voter's inability or unwillingness to provide identification may cast a provisional ballot under Indiana Code Article 3-11.7 and then may personally appear before the circuit court clerk or the county election board to present identification. The county election board makes the determination as to whether the provisional ballot will be opened, processed and counted. Neither the Secretary of State nor the Election Division may change the law or override a county election board's decision as to when a ballot should be counted, so no asserted injuries are fairly traceable to them.

¹ There is no challenge, for example, to that provision of the Indiana Code that requires the Election Division to educate county election boards, Indiana Code Section 3-6-4.2-14.

This Court has already held that it has no subject matter jurisdiction to adjudicate lawsuits against the Indiana state officials who have no authority to provide the relief the plaintiffs seek. In *Libertarian Party of Indiana v. Marion County Board of Voter Registration et al.*, 778 F. Supp. 1458, 1459 (S.D. Ind. 1991), the political parties sued (on behalf of themselves rather than their members) individual state officials to try to obtain paper and computer tape copies of Marion County voter registration data. This Court ruled that the claims against the members of the Indiana State Election Board were not justiciable because the Marion County Voter Registration Board could provide all requested relief and the State Election Board could not discipline or remove members of the county board. *Id.* at 1461. Similarly, in *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002), the court lacked jurisdiction over a city ballot text dispute brought against the California Secretary of State because the city was not required to follow the Secretary's directions when running its municipal elections.

The lack of connection between the Secretary of State or the Election Division and the Plaintiffs' asserted injuries also means that not even a favorable ruling from this Court will redress those injuries. Again, one of the critical elements of standing is that the asserted injury is likely to be redressed in the event of a favorable ruling from the Court. *Plotkin*, 239 F.3d at 884. However, if the Court were to enjoin the Defendants from enforcing Public Law 109, the Defendants would have no power to carry out that injunction. The county election boards have the power to enforce the statute at issue; they are not subject to the Defendants' control or personnel decisions. Of course, it is entirely possible that the county election board might be persuaded by an opinion from the Defendants, as enjoined by this Court, that Public Law 109 is invalid, but because the Court's injunction would not be directed at them, the county board

members would not be bound by that advice.² And for a lawsuit to be justiciable under Article III, redress must be “likely” to follow from a favorable decision and not be merely “speculative.” *Lujan*, 504 U.S. at 561. This Court therefore has no jurisdiction to consider this case.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and pursuant to Article III of the United States Constitution.

Respectfully submitted,

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² Indeed, an order from this Court directing the Defendants to give specific advice to the county election boards concerning how to implement Public Law 109 in a constitutionally valid manner would seem to constitute an “advisory opinion” in the most literal sense. In any event, as the Court is aware, the Marion County Election Board has already been sued in state court by two public officials and some political advocacy groups who are seeking a state court declaration that Public Law 109 is invalid and an injunction preventing the Marion County Election Board from enforcing it. *Crawford v. Marion County Election Board*, No. 49D12-0504-PL-16207 (Marion County Superior Ct. No. 12, filed April 28, 2005).

