

**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,)

**REPLY 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 reply memorandum in support of their motion to dismiss the Amended Complaint.¹ The Democrats concede that “there is little doubt” that county election boards “would be proper defendants” in a challenge to Public Law 109-2005. (Dem. Mem. at 15) Yet, for whatever reason, instead of amending to dismiss the Secretary of State and Election Division co-directors and sue instead one or more county election boards, the Democrats amended their complaint only to add more irrelevant allegations in a desperate effort to retain these defendants in the case. This Court still lacks jurisdiction over this case.

¹ The parties have executed and filed a Joint Stipulation providing that the Defendants’ Motion to Dismiss and supporting memorandum are to be applied to the Plaintiffs’ Amended Complaint.

ARGUMENT

I. The Defendants Have Not Challenged—Yet—The Plaintiffs’ Ability to Assert Associational Standing

In the motion to dismiss now pending before the Court, the Defendants have challenged the Democrats’ Article III standing on the grounds that the Democrats have failed to sue any defendants to whom their asserted injuries are fairly traceable or from whom they can get any meaningful relief. At this point in the case, the Defendants have not asserted that the Plaintiffs as political parties lack the capacity to assert the rights of “those registered voters who associate with them.” (Amended Complaint ¶ 3) To be sure, Defendants may ultimately raise such a standing challenge, but only if this case first survives the Defendants’ motion to dismiss and only if the law and the facts disclosed in discovery ultimately support such a challenge. For now, however, the Democrats’ defensive arguments concerning associational standing do not respond to any issues raised in the Defendants’ motion.

II. The Eleventh Amendment Only Underscores The Need To Dismiss This Case

The Democrats argue that, if the Defendants in fact do not have the power to provide the relief that the Democrats seek, if they really have no connection to Public Law 109-2005, then the Eleventh Amendment also could be used as grounds for dismissal of this case. Accordingly, they contend that because the Defendants have *not* asserted an Eleventh Amendment challenge, the Defendants have implicitly conceded “some connection” to enforcing Public Law 109-2005, which renders them vulnerable to this lawsuit. (Dem. Mem. at 10)

Some federal courts have indeed held that the *Ex Parte Young* exception to the Eleventh Amendment does not apply where the state official sued does not have “the requisite enforcement connection” with the challenged law. *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002); *see also id.* at 846 (collecting cases). This theory would appear,

however, to be coterminous with the Defendants' Article III argument and is perhaps even an alternative way for state officials to raise the same justiciability objection. So understood, this theory does not seem to add anything to the analysis of Defendants' motion to dismiss. Indeed, faced with this same Eleventh Amendment argument, the Seventh Circuit has (in a case cited by the Democrats) ruled that "[t]echnically . . . it is not the Eleventh Amendment that bars the plaintiffs' action for prospective injunctive relief against the governor; it is their inability to show that he bears any legal responsibility for the flaws they perceive in the system." *Hearne v. Bd. of Educ. of City of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999).

Regardless, Defendants' decision to cast their justiciability objection as a matter of Article III doctrine rather than as a matter of Eleventh Amendment doctrine in no way amounts to some sort of implicit concession of any capability of enforcing Public Law 109-2005. Nor, given that Article III's jurisdictional requirements are nonwaivable, can the Defendants concede some vague, highly general "connection" to enforcement of the challenged law in order to support jurisdiction. Either the Defendants have the power to enforce the law or they do not; they cannot, in other words, agree by act or omission to confer jurisdiction on this Court that does not already exist. *See E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1428 (7th Cir. 1996) ("[P]arties may not consent to subject matter jurisdiction.") (citing *Sosna v. Iowa*, 419 U.S. 393, 398 (1975)). In fact, even if the Defendants had not raised this jurisdictional challenge, the Court would have had an independent duty to satisfy itself that the case meets the requirements of Article III. *See Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) ("Jurisdiction is a threshold issue, normally not litigated at all; and the court has an independent duty to satisfy itself that it has subject-matter jurisdiction.").

That said, because “a mere failure to raise an Eleventh Amendment defense in court is not treated as a waiver” (*Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 871 (7th Cir. 1999)), to the extent that the Democrats have outlined a valid Eleventh Amendment objection to this Court’s jurisdiction, the Defendants hereby urge the Court to dismiss this case for that added reason. *See also Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (“[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.”).

III. The Amended Complaint Notwithstanding, The Plaintiffs Do Not Complain Of Cognizable Harm Fairly Traceable To The Defendants

A. Training election workers does not cause voters harm but rather ameliorates any potential for harm resulting from inconsistent enforcement standards

The central thrust of the Democrats’ standing theory is that voters (or at least those the Democrats claim to represent as an association) will be injured if the Defendants are permitted to educate those boards and their local election workers concerning enforcement of Public Law 109-2005. Despite the Democrats’ failure to present any evidence on this matter, Defendants certainly do not deny that they educate and train county election boards and their poll workers in the ways described on page 12 of the Democrats’ memorandum, including with respect to the new voter photo identification law.

But it is counterintuitive, to say the least, for the Democrats to say that injuries to voters will arise if the Defendants are able to educate local poll workers in a way that will result in uniform application of the law. (*See* Dem. Mem. at 12) (describing, as an exercise of power that supports justiciability, how Defendants will “insure the consistent, state-wide implementation of SEA 483”) Enjoining the Defendants from educating county election boards and poll workers would be more likely to injure voters than to help them because it may lead to inconsistent

application of the law (and perhaps generate as-applied equal protection complaints against county election boards). Indeed, at least as a matter of hypothesizing an injury traceable to these defendants, it would make more sense for the Democrats to sue the Defendants for violating voters' equal protection and voting rights by *failing* to educate county election boards to enforce Public Law 109-2005 in a uniform way. Accordingly, the education of county election boards and poll workers—admittedly the responsibility of Defendants—does not inflict any injury on the Democrats or their voters.

B. The Defendants' views of Public Law 109-2005 and their important election responsibilities do not make them proper defendants

The Democrats also argue that, because the Secretary of State has supported the passage and enforcement of Public Law 109-2005 and is denominated the “chief election official for the State of Indiana,” he and the other Defendants can be expected to “take all measures at their disposal to effectuate those requirements.” (Dem. Mem. at 11) Defendants do not dispute these assertions, but those claims do not transform this lawsuit into a justiciable case or controversy under Article III.

First, it is true that the Secretary of State vigorously supports Indiana's new voter photo identification law. However, contrary to the Democrats' suggestion, merely endorsing a law without the duty to enforce it does not render a public official vulnerable to a pre-enforcement challenge. In fact, the one decision cited by the Democrats where a court relied on an official's endorsement of a law to deem him a proper defendant was *reversed* on exactly this issue. *Waste Mgmt. Holdings Inc. v. Gilmore*, 64 F. Supp. 2d 537, 543 n.6 (E.D. Va. 1999), *vacated in part by* 252 F.3d 316, 331 (4th Cir. 2001). On appeal, the Fourth Circuit vacated the district court's entry of judgment against the Governor of Virginia, even though it affirmed judgment against other public official defendants, because the Governor had no authority to enforce the challenged law.

252 F.3d at 331. On the public endorsement issue (albeit as cast under the Eleventh Amendment), the court ruled that “[t]he fact that he has publicly endorsed and defended the challenged statutes does not alter our analysis. The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute.”² *Id.*

Second, the Democrats identify several important powers and responsibilities of the Defendants related to elections, including the Secretary of State’s role as the state’s “chief election official.” (Dem Mem. at 3-5, 12, 17-18) Notwithstanding these various duties, however, the power to enforce Indiana’s new voter photo identification law—*i.e.* to reject the votes of those who cannot produce proper photo identification—is not among any of the Defendants’ powers or responsibilities. The Democrats contend that educating poll workers about Public Law 109-2005 amounts to enforcing it. But no matter how enthusiastically the Defendants may (or may not) be about Public Law 109-2005, and no matter what they do to instruct the county election boards, they have no “measures at their disposal” (Dem. Mem. at 11) to control whether those boards will enforce Public Law 109-2005. *See Libertarian Party v. Marion County Bd. of*

² Other cases the Democrats cite where a Secretary of State has been sued either did not address this issue or involved circumstances where the Secretary of State could provide meaningful relief. *See Papasan v. Allain*, 478 U.S. 265, 272, 282 n.14, 288 (1986) (observing that the Secretary of State has supervisory authority concerning the trusts and lands at issue); *Nelson v. Miller*, 170 F.3d 641, 644 n.2 (6th Cir. 1999) (expressly noting that the defendant did not challenge her status as a party, in contrast with a case that had been dismissed on this issue); *Los Angeles County Bar Assoc. v. Eu*, 979 F.2d 697, 700, 704 (9th Cir. 1992) (rejecting Eleventh Amendment argument because the Secretary of State would have the duty to certify elections for the new judgeships demanded by the lawsuit); *Stevenson v. State Bd. of Elections*, 794 F.2d 1176, 1177 (7th Cir. 1986) (stating that challenge to filing deadline was properly brought against individual commissioners of the State Board of Elections where state statute (Ill. Rev. Stat. ch. 46 § 10-2 (now codified at 10 Ill. Comp. Stat. Ann. 5/10-2)) required filing be done with the Board); *Dann v. Blackwell*, 83 F. Supp. 2d 906, 908-10 (S.D. Ohio 2000) (enjoining the Secretary of State from exercising authority to file a complaint to enforce a campaign finance law pursuant to Ohio Rev. Stat. § 3517.103).

Voter Reg., 778 F. Supp. 1458, 1461 (S.D. Ind. 1991) (dismissing the Indiana State Election Board because it did not have the authority to discipline or remove members of the Voter Registration Board—*i.e.*, it had no “measures at its disposal” to control local enforcement of the law).

The Democrats have not shown, for example, that the Secretary of State’s general responsibility for performing “all ministerial duties related to the administration of elections by the State” (Ind. Code § 3-6-4.2-2(a)) includes the specific responsibility of deciding whether registered voters who do not present the requisite photo identification will have their votes counted. The same is true with respect to the Division’s duty of “enforcement of the election laws” on election day. Ind. Code § 3-6-4.2-13. If that general law enforcement power and the use of police radios were enough, then the State Police would be necessary parties under Rule 19 of the Federal Rules of Civil Procedure because complete relief could not be granted without them. But the State Police are not appropriate parties, of course, because they, like the Election Division, have no power to decide whether to count the votes of those who do not present photo identification.

The Democrats also attempt to support the justiciability of this case by reference to the Defendants’ roles in enforcing the Help America Vote Act (Ind. Code § 3-6-3.7-2(4), -(5); 3-6-4.2-2.5) and the National Voter Registration Act (Ind. Code § 3-7-11-1), on the theory that these are “two of the federal enactments Democrats claim will be violated by the photo identification requirements” of Public Law 109-2005. (Dem. Mem. at 17) It is again true that the Defendants have specific, important roles to play in enforcing those two federal statutes. *See, e.g.*, Ind. Code §§ 3-6-4.2-10(b)(1)(A); 3-6-4.2-14(a); 3-7-26.3-17; 3-7-17-3, -4, -5; 3-11-6.5-2.1; 3-7-26.3-22; 3-6-4.5. But the Democrats do not seek to enjoin enforcement of HAVA or NVRA; they seek to

enjoin enforcement of Public Law 109-2005. There is no alchemy through which the Defendants' powers under HAVA and NVRA become the power to decide whether to count the ballots of those who do not present proper photo identification.³

The Democrats also briefly contend—albeit only in a footnote—that even if the Defendants have no power to enforce Public Law 109-2005 for injunctive relief purposes, declaratory relief requires “different considerations.” (Dem. Mem. at 13 n.3, quoting *Roe v. Wade*, 410 U.S. 113, 166 (1973)) Regardless of the meaning or merit of that assertion, however, the Declaratory Judgment Act is simply a cause of action, not a substitute for Article III standing. See *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 436-37 (7th Cir. 1994) (“The case-or-controversy requirement of Article III applies with equal force to actions for declaratory judgment as it does to actions seeking traditional coercive relief.”) (quoting *Foster v. Ctr. Township of LaPorte County*, 798 F.2d 237, 242 (7th Cir. 1986)). And the problem here is precisely that, because the Defendants do not cause (and cannot remedy) the injuries that the Democrats assert, the parties do not have “adverse legal interests.” Any decision on the merits in this case—even if in the form of declaratory relief only—would therefore amount to an advisory opinion, all the more so in light of the Defendants' advisory role in connection with election procedures.

³ In their statement of facts, the Democrats identify other powers, duties and responsibilities of the Defendants related to elections, including the Secretary of State's *ex officio* membership on the three-member Recount Commission, the Secretary's duty to certify the results of federal elections, and the Election Division's responsibility for preparing and distributing ballots. (Dem. Mem. at 3-4) However, the Democrats have not provided any arguments or explanations as to why those particular responsibilities somehow make their asserted injuries fairly traceable to the Defendants. Therefore, the Defendants need not address the irrelevance of each of these other responsibilities with respect to this lawsuit.

C. Enjoining Defendants will not provide voters relief from the Voter ID Law

Another problem for the Democrats is that educating and training county election boards does not proximately inflict the injuries that the Amended Complaint expressly asserts and that are the gravamen of this action: the alleged wrongful disenfranchisement of voters who cannot produce or who object to producing the proper identification at the polls or to their county election boards. (*See* Amended Compl. at ¶¶ 4, 16-20, 31, 40). Yet in the event that Public Law 109-2005 is declared invalid, without an injunction from this Court directed at the county boards rather than the Defendants those boards will still be able to enforce the voter photo identification law and still be able refuse to count the votes of those voters who fail to present the proper identification. Ind. Code §§ 3-6-5-2, -14; 3-11.7-5-3. And courts again, merely educating or advising others about the law does not render one susceptible to a lawsuit seeking relief from injuries caused by enforcement of the laws. *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113-14 (3rd Cir. 1993).

In sum, it's not as if county election boards will be unable to enforce Public Law 109-2005 in the event the Defendants are enjoined from educating those boards about the laws (or from approving forms to use)—though again enforcement may be less uniform in that event. Accordingly, an injunction against these Defendants is not reasonably likely to provide the Democrats (or, rather, their voters) with relief from their asserted injuries, and this Court lacks jurisdiction over this matter as a result. *See, e.g., South East Lake View Neighbors v. Dep't of Hous. & Urban Dev.*, 685 F.2d 1027, 1037-38 (7th Cir. 1982) (holding that injury was not likely to be redressed by the court where enjoining federal funding would not prevent housing project from being finished and occupied).

IV. Even If Other Defendants Are Added, The Court Has No Jurisdiction To Adjudicate The Democrats' Claims Against These Defendants

In a closing footnote to their memorandum, the Democrats advise the Court that in the event of dismissal, the Democrats will immediately move to amend their complaint yet again, this time to add “appropriate non-State defendants.” (Dem. Mem. at 18 n.4) So long as the current Defendants are dismissed from the case, they take no position as to whether the Democrats should be permitted to amend their pleadings under Federal Rule of Civil Procedure 15(a) to name the proper defendants.

In no event, however, would it be appropriate to retain these Defendants in the case even if others are added. Federal courts simply have no jurisdiction to adjudicate lawsuits against those to whom the plaintiffs' alleged injuries are not fairly traceable and who cannot provide the relief sought, even if others in the case can. *See, e.g., Waste Mgmt Holdings Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (dismissing Governor for lack of jurisdiction but affirming judgment as to other defendants); *Libertarian Party v. Marion County Bd. of Voter Reg.*, 778 F. Supp. 1458, 1461 (S.D. Ind. 1991) (dismissing state officials for lack of jurisdiction notwithstanding presence of other proper defendants in the lawsuit).

Moreover, the Court should be aware that a separate lawsuit challenging the validity of Public Law 109-2005 that was originally filed in state court against the Marion County Election Board has now been removed to this Court. It bears the caption *Crawford v. Marion County Election Board*, 05-0804 (S.D. Ind.), and has been assigned to Judge Hamilton. The Attorney General is still considering whether to intervene in that action under 28 U.S.C. § 2403. Even if he does, and even if that suit is or could otherwise be properly consolidated with this suit, for the reasons stated above, this Court still has no jurisdiction to adjudicate this lawsuit against the Secretary of State or the co-directors of the Election Division.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' opening memorandum in support of their Motion to Dismiss for Lack of Subject Matter Jurisdiction, this Court should dismiss this action 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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