UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, | ) | |
| vs. | ) | CAUSE NO: 1:05-CV-0634-SEB-VSS |
| TODD ROKITA, *et al.*, Defendants. | ) | |
| WILLIAM CRAWFORD, *et al.*, Plaintiffs, | ) | |
| vs. | ) | |
| MARION COUNTY ELECTION BOARD, Defendant, | ) | |
| and | ) | |
| STATE OF INDIANA, Intervenor. | ) | |

**PLAINTIFFS' BRIEF IN SUPPORT OF JOINT MOTION TO STRIKE**

The Plaintiffs, Indiana Democratic Party and the Marion County Democratic Central Committee (referred to collectively hereinafter as the "Democratic Plaintiffs"), along with William Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition of Housing and Homeless Issues, and Joseph Simpson (referred to collectively hereinafter as the

"Crawford Plaintiffs") have filed a motion to strike portions of the Memorandum in Support of Summary Judgment and Appendix of Evidence of the State of Indiana, the Indiana Secretary of State, and the Co-Directors of the Indiana Election Division (referred to collectively hereinafter as the "State Defendants"). The Democratic Plaintiffs and Crawford Plaintiffs, by counsel, in accordance with Local Rule 7.1(a) jointly submit this Brief in Support of their Motion to Strike.[1]

The State Defendants' Memorandum is filled with references to unsworn, hearsay documents that the State suggests should be taken as fact. Indeed, almost the entirety of the State Defendant's "Statement of Material Facts Not in Dispute" is founded upon such references. The State Defendant's reliance upon such documents for the purpose of establishing factual matters is contrary to Fed. R. Civ. P. 56, and all such material should be stricken.

In considering a summary judgment motion, the Court may consider any material that would be admissible or usable at trial, including properly authenticated and admissible documents or exhibits. *Smith v. City of Chicago*, 242 F.3d 737, 741 (7th Cir. 2001); *Woods v. City of Chicago*, 234 F.3d 979, 987-88 (7th Cir. 2000); *Colan v. Cutler-Hammer, Inc.*, 812 F.2d 357, 365 n.14 (7th Cir. 1987); *see also*, *Scott v. Edinburg*, 346 F.3d 752, 759 (7th Cir. 2003)

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[1] Plaintiffs recognize that Local Rule 56.1(f) provides:

> Collateral motions in the summary judgment process, such as motions to strike, are disfavored. Any dispute regarding the admissibility or effect of evidence should be addressed in the briefs.

The Court has recently stated its preference that litigants interpret this rule as requiring that such disputes be addressed in the brief "in the absence of good reason to file a stand-alone motion challenging evidence." *Raines v. Chenoweth*, 2005 WL 1115804 *2, n.3 (S.D. Ind. 2005). Plaintiffs file this motion separately because of the large number of objectionable documents submitted by the State and because they believe the significance of the numerous constitutional and statutory issues before the Court compels Plaintiffs to focus primarily on those issues in their briefs rather than on evidentiary disputes.

(documents must be authenticated in order to support or oppose summary judgment). The facts on summary judgment must be "established through one of the vehicles designed to ensure reliability and veracity – depositions, answers to interrogatories, admissions and affidavits." *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985). When a party seeks to offer evidence through other types of exhibits, such exhibits must be identified by affidavit or otherwise made admissible in evidence. *Id.*

Hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). Unless hearsay evidence fits within one of the exceptions to the hearsay rule, then it cannot be used to support the factual contentions in a summary judgment motion. *Id.* at 743. In *Eisentstadt*, the Seventh Circuit held that a newspaper article containing statements purportedly made by officials of the defendant was inadmissible to prove the truth of the matter contained therein – namely that such statements were made by the officials. *Id.* at 742-43.

Here, the State has sought to prove the existence of voter fraud on a national scale by citing to newspaper articles, reports and documents from other states reporting on alleged instances of fraud. The State has also repeatedly cited to a book entitled "Stealing Elections" by John Fund, which purports to recount instances of voting fraud.[2] It is charitable to refer to this material as inadmissible hearsay, because in many instances it is hearsay within hearsay within

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[2] The State's reliance on Fund as a "scholar" is troubling given his avowed partisan activities, suspect journalism, and political activism. Fund "served as the [Wall Street] Journal's unofficial emissary to the Republican right...more activist than a journalist. He ghosted one of Rush Limbaugh's books and spoke frequently at conservative events." Conanson, Joe, The Hunting of the President: The Ten-Year Campaign to Destroy Bill and Hillary Clinton (St. Martin's Press, 2000), at 77 (describing Fund's involvement with right-wing groups, including that of Floyd Brown, the sponsor and instigator of the now infamous Willie Horton ad during the 1988 presidential campaign).

hearsay. There is absolutely no way to test in the judicial setting whether the information being reported is accurate or not, and obviously, the Plaintiffs have had no opportunity to do so.[3] The State's "statement of facts" amply demonstrates why such documents cannot be used to support or oppose a motion for summary judgment.

For instance, the State cites Fund's book, Brief at 3, "for the proposition that in the 2000 elections in St. Louis, 14 dead people voted." Not only are excerpts from the book not provided, unless Fund himself witnessed 14 "dead" people voting, which is presumed to be unlikely, any assertion by him in his book that this happened is hearsay. Plainly such information cannot be accepted as evidentiary material.

Similarly, the State cites a series of newspaper articles from Florida, Maryland, Georgia, New York, Pennsylvania, Washington and other locales that reported upon alleged instances of fraud occurring in those states. (State's Exhibits 5, 8, 10-17, 19, 23, 25). Likewise, the State has even cited an unsworn opinion piece by an editorial board. (State's Exhibit 30). The State also cites unsworn reports and articles prepared by non-governmental entities, which suffer from the same defects as newspaper articles. (State's Exhibits 6, 20, 22, 26). Once again, such documents are indisputably hearsay, they do not fall within any exception to the rule, and are inadmissible. *Eisenstadt*, 113 F.3d at 742-43. Not only are they hearsay, but each of the allegations reported in these documents are unsworn. There is simply no way to verify the truth or falsity of any of the

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[3] It is also worth noting that none of the documents at issue was identified by the State defendants in their initial disclosures made pursuant to Fed. R. Civ. P. 26(a)(1)(B). Nor were those disclosures ever supplemented as required by Fed. R. Civ. P. 26(e). Accordingly, not only were the Plaintiffs unable to test the accuracy of these hearsay assertions because none of the witnesses have been available at any time, Plaintiffs were completely unaware that the State intended to rely upon them until such time as it filed its Motion for Summary Judgment on December 1.

assertions.

The State cites as evidence statements and opinion pieces made by public officials and others, both to the press and in unsworn statements before governmental bodies. (State's Exhibits 7, 24, 28-29, 31, 71). The danger of utilizing such statements as evidence, which have not been subjected to cross-examination and are taken out the proper context, is demonstrated by the State's reliance upon comments attributed to former Congressman Lee Hamilton that "Indiana was right to adopt a voter ID law." (State's Brief at 12; State's Ex. 71). In fact, Congressman Hamilton has stated that he has no opinion regarding whether Indiana's law meets statutory or constitutional criteria. (Democrats' Ex. 24). Similarly, the State cites to statements made by Senator Kit Bond on the floor of the Senate regarding information the Senator received about voting irregularities in St. Louis as if the Senator's statements could establish the hearsay facts he was reporting. (State's Exhibit 7). These documents are inadmissible as unsworn hearsay.

Other documents are from governmental sources, and as such, some may fall within the hearsay exception for public records and reports. Fed. Rule of Evidence 803(8). However, some of the governmental documents do not appear to fit within this exception. (State's Exhibits 18). For instance, the State has cited its Exhibit 18, a letter from the Department of Justice to Senator Christopher Bond, for the proposition that dead voters had cast ballots in Georgia, but this information was itself derived from a report in the Atlanta newspaper. This is another instance of hearsay within hearsay, making the exhibit inherently unreliable even if it fit within the hearsay exception for public records.

Finally, much of the information contained within these unsworn documents, particularly as it relates to the allegations of fraud in other states, is irrelevant on its face. The State cites

articles that relate to the issue of double voting and persons living outside the city limits voting. That sort of fraud would not be prevented by the Photo ID Law. Individuals with ID can double vote just as easily as individuals without ID if they are registered in multiple places. Likewise, individuals who reside outside the jurisdiction can fraudulently vote with ID if they have a registration.

WHEREFORE, for all the foregoing reasons, the Plaintiffs respectfully request that their Motion to Strike be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of December, 2005, a copy of the foregoing pleading was filed electronically upon 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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