

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, )  
 et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 TODD ROKITA, et al., )  
 )  
 Defendants, )  
 )  
 \_\_\_\_\_ )

WILLIAM CRAWFORD, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 MARION COUNTY ELECTION BOARD, )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 STATE OF INDIANA, )  
 )  
 Intervenor. )

No. 1:05-CV-00634 SEB-VSS

**STATE DEFENDANTS’ OPPOSITION TO  
PLAINTIFFS’ JOINT MOTION TO STRIKE**

Plaintiffs propose the Court strike 42 exhibits and three persuasive authorities from the State Defendants’ Memorandum in Support of their Motion for Summary Judgment and accompanying Appendix. *See Ind. Democratic Party v. Rokita*, 05-cv-00634, Docket Nos. 77, 79 (S.D. Ind. Nov. 30, 2005). Plaintiffs argue that these materials may not be used to establish facts for purposes of summary judgment for three

reasons: (1) some of the exhibits and/or authorities are unsworn documents and, therefore, do not comply with requirements of Rule 56(c); (2) some of the exhibits belong to categories of evidence not recognized by Rule 56(c) and, therefore, do not strictly conform to the Rule; and (3) some of the exhibits are inadmissible hearsay documents not permitted by Rule 56(c).

### **SUMMARY OF ARGUMENT**

Plaintiffs have filed a motion to strike merely as a substitute for asserting a genuine dispute with the State Defendants' Statement of Material Facts. They do not have any materials to submit to rebut the State's materials, so instead they seek to strike the State Defendants' exhibits. The Court plainly disfavors the use of the motion to strike in this fashion. Local Rule 56.1(f) provides that "[c]ollateral 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." *See* L.R. 56.1(f).

Regardless, it is the content rather than the form of the exhibits that determines their admissibility for purposes of supporting or opposing a motion for summary judgment. An objection based solely on form—*i.e.* that the exhibits are not the traditional pleadings, depositions, answers to interrogatories, admissions, or affidavits listed in Rule 56—takes an excessively formalistic approach to Rule 56. Indeed, Plaintiffs seek to strike two books and two academic-journal articles cited as persuasive, non-legal authority, which are not included in the State's Appendix of Evidence and, therefore, not subject to Rule 56(c). What is more, the exhibits that Plaintiffs contend are inadmissible hearsay are not offered for the truth of the matters asserted, but instead they are merely offered as support for the General Assembly's policy judgments.

More broadly, however, the State Defendants rely on these materials not to establish historical or “adjudicative” facts, but instead to establish “legislative” facts. For example, the State does not intend to establish definitively that the reported incidents of fraud occurred. Instead, the State intends to establish that a public record exists from which the General Assembly could reasonably conclude that in-person voter fraud occurs and needs to be prevented and that the publicity about voter fraud affects public confidence regarding the integrity of elections. Courts across the nation—including this one—frequently and uncontroversially rely on newspaper accounts and other accounts of public events as justification for legislative action. There is nothing special about this case to preclude this Court from doing the same.

## ARGUMENT

### I. Defendants’ Exhibits Comport With Rule 56.

#### A. It is permissible to cite persuasive authority in a brief in support of a motion for summary judgment.

Plaintiffs ask the Court to strike portions of Defendants’ brief, including citations to the following authorities: John Fund, *Stealing Elections* (2004); Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* (1996); Victor M. Norris & Michael F. Smith, *Photo Finished: Calling Into Question Michigan’s Roadside Driver License Confiscation Law*, 74 Mich. B.J. 410, 412 (1995).<sup>1</sup> The Plaintiffs’ primary objection to the use of these persuasive authorities is that the information contained within them is hearsay and cannot be tested in a judicial setting for accuracy. Plaintiffs’ Brief at 4. The Plaintiffs mischaracterize the Defendants’ use of these persuasive authorities. For

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<sup>1</sup> Although these items were not exhibits, Plaintiffs moved to strike these persuasive authorities.

example, the State does not seek to prove as a historical fact that “14 dead people voted” in St. Louis, as suggested by Plaintiffs. Plaintiffs’ Brief at 4. Instead, the State cites persuasive authority for the more general proposition that national instances of in-person voter fraud are reported widely by reputable publishers and authors, including Encounter Books (publisher of *Stealing Elections*) and Crown Publishers (publisher of *Dirty Little Secrets*). This includes the very recent (and uncontradicted) assertion by the Commission on Federal Election Reform (the Baker-Carter Commission) that voting fraud occurs, even if it is undetectable. *See State’s Ex. 1*, at 18. The State Defendants also cite the Baker-Carter Commission Report to show that, despite the lack of extensive evidence of in-person voter fraud, the U.S. Department of Justice considers assertions of such fraud worthy of criminal investigations. *See id.* at 45.

When citing these sources, the State if nothing else is directing the Court’s attention to persuasive non-legal authority, a plainly permissible and common practice. “Modern courts often cite common nonlegal sources, such as general encyclopedias or dictionaries; they have been known to cite such diverse common nonlegal sources as newspapers, songs, poems, books, and movies.” Colleen M. Barger, *On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials*, 4 J. App. Prac. & Pro. 417, 420-21 (2002).

This common practice was noted in the April 1990 Federal Courts Study Committee Report which acknowledged the increasing importance of the use of non-legal sources in federal-court opinions. *See John J. Hasko, Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 L. Libr. J. 427, 428 (2002). “The practice of law in the United States has come to depend increasingly on other disciplines. Courts

rely on nonlegal resources to support, and in some cases to shape, their opinions.” *Id.* at 427. From 1989 to 1998, the Supreme Court handed down 942 signed opinions, and in 40% of those opinions, the Justices used non-legal authority to support their arguments. *See id.* at 430; *see also* William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 L. Libr. J. 267, 286-88 (2002) (finding citations to non-legal periodicals and treatises regularly appear in briefs presented to the Supreme Court and in Supreme Court opinions). Clearly, if it is not only permissible, but also encouraged for the federal courts to rely upon secondary, non-legal authority to support their arguments, its use by a party in its summary-judgment brief should not be the subject of a motion to strike.

**B. Because Defendants’ exhibits are not cited for the truth of the matters contained therein, none of the materials is hearsay.**

The Plaintiffs alleged that the following exhibits must be stricken because they are inadmissible hearsay:

- (1) Newspaper articles—State Defendants’ Exs. 5, 8, 10-17, 19, 25, 29-31, 71;
- (2) Oral Statements—State Defendants’ Exs. 7, 24, 28;
- (3) Letters/Press Releases/Lists—State Defendants’ Exs. 18, 26, 76;
- (4) Committee Report—State Defendants’ Ex. 4;
- (5) Websites—State Defendants’ Exs. 6, 32-34;
- (6) Polls—State Defendants’ Exs. 22, 23;
- (7) Article—State Defendants’ Ex. 20.

However, none of these exhibits is hearsay because none is “offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c). These exhibits are offered *not* to assert the truth or accuracy of each instance of alleged voter fraud reported

by newspapers, studied by the commissions, investigated by the Department of Justice, discussed on the Senate floor by legislators, or testified to before the Commission on Federal Election Reform. Instead, each is offered to establish that a legislative body would have a body of evidence to support reasonable conclusions that (1) voter fraud exists; (2) the public is concerned about it; and (3) requiring photo identification at the polls would address these problems.

The bulk of Plaintiffs' hearsay objections relate to newspaper articles.<sup>2</sup> The general rule, affirmed in the Seventh Circuit, is that the contents of newspapers articles are not admissible to prove the truth of the statements therein, but so long as a newspaper article is not offered to show the truth of the matters contained in them, then it is not considered hearsay and is admissible. *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999). In *Martin*, the Court of Appeals considered an Indianapolis News article, which was submitted in opposition to a motion for summary judgment, to show that the declarants had made the statements attributed to them. *See id.* at 613. The fact and publication of these statements—not the truth of anything stated therein—demonstrated that artists, their supporters, and the public had expressed opinions that the sculpture was socially valuable and newsworthy. *See id.* The Court in *Martin* admitted the newspaper and magazine articles stating, “[t]hese statements are offered by Martin to show that the declarants said them, not that the statements are, in fact, true.” *Id.* (citing *Martin v. City of Indianapolis*, 982 F. Supp. 625, 630 (S.D. Ind. 1997)) (emphasis in original).

Other courts have reached similar conclusions. *See Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir.1993) (materials, including

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<sup>2</sup> This is especially odd in light of the Plaintiffs' reliance on such materials in their brief. *See Dem. Exs. 16-19, 21, 28.*

newspaper articles, which may not have been admissible at trial were appropriately submitted by the non-moving in opposition to motion for summary judgment); *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 390, 398 (5th Cir. 1961) (newspaper article which described a fire in the tower of a local courthouse in 1901 admissible because necessary, trustworthy, relevant, and material); *Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395, 414 n.8 (N.D. Ill 1984) (newspaper articles are admissible non-hearsay when submitted to prove that information contained therein was available to the public); *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (non-moving party opposing motion for summary judgment with hearsay documents need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment).

The same analysis applies here. The exhibits are not offered for the truth of the matters asserted, but instead to show that there was a reasonable basis for the General Assembly to conclude that there was a history of voter fraud and that public confidence in elections could reasonably be swayed by this information. Thus, the exhibits are not considered inadmissible hearsay evidence and may be considered on a motion for summary judgment.

**C. Authenticity is no barrier to the State Defendants' exhibits.**

Plaintiffs' allegation that many of the documents are not properly authenticated simply misses the mark. Authentication of exhibits by affidavit is but one indicia of reliability, the essence of admissibility. "Authentication relates only to whether the documents originated from [its alleged source]; it is not synonymous to vouching for the accuracy of the information contained in those records." *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982).

Federal Rule of Evidence 902 provides:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

...

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority;

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

Accordingly, the following exhibits are self-authenticating under Federal Rule of Evidence 902 and, therefore, cannot be stricken merely for lack of a supporting affidavit: newspaper articles (State Defendants' Exs. 5, 8, 10-17, 19, 25, 29-31, 71); governmental commission reports (State Defendants' Exs. 4, 9); Department of Justice press releases and publications (State Defendants' Exs. 2, 35); Indianapolis Marion County Public Library website (State Defendants' Ex. 32); United States District Court for the Southern District of Indiana website (State Defendants' Ex. 36); Indiana State Department of Health website (State Defendants' Exs. 48-49); United States Transportation Security Administration website (State Defendants' Ex. 77). For the remainder of the State's exhibits that are not self-authenticating, the content of such exhibits would be admissible even though the form of such exhibits does not strictly comply with Rule 56.

Similarly, Plaintiffs argue that Defendants' exhibits are improper under Rule 56 because they are unsworn documents rather than pleadings, depositions, answers to interrogatories, admissions, or affidavits. *See* Plaintiffs' Motion, at ¶ 3. However, the contention that only depositions, answers to interrogatories, or admissions meet the test of Rule 56 arises from an overly formalistic interpretation of the Rule, which requires materials submitted in support of summary judgment to be admissible, but it does not

limit the form of such materials. In other words, it is not the form of the evidentiary material that controls admissibility, but the content of such material.

The evidence need not be in admissible *form*; affidavits are ordinarily not admissible evidence at a trial. But it must be admissible in *content*, in the sense that a change in form but not in content, for example a substitution of oral testimony for a summary of that testimony in an affidavit, would make the evidence admissible at trial.

*Winskunas v. Birnbaum*, 23 F.3d 1264, 1267-68 (7th Cir. 1994). Even more directly, the Seventh Circuit has ruled that Rule 56 “does not *require* that all supporting material be submitted in affidavit form. Sworn testimony is not the only basis on which summary judgment may be granted . . . the court may consider any material that would be admissible or usable at trial.” *Woods v. City of Chicago*, 234 F.3d 979, 987-88 (7th Cir. 2000) (internal citations and quotations omitted).

## **II. The State Defendants’ Exhibits Establish Legislative, Not Adjudicative, Facts, And Courts Frequently Rely On Similar Materials In A Variety Of Contexts.**

Although the Federal Rules of Civil Procedure contain no specific provisions related to legislative facts, courts frequently distinguish between legislative and judicial facts. *See A Woman’s Choice—East Side Women’s Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (holding that the constitutionality of an abortion statute “must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges”); *see also Klinger v. Dir., Dep’t of Revenue*, 366 F.3d 614, 621 (8th Cir. 2004) (Richard Arnold, J., dissenting) (“What is at stake is a question of ‘legislative fact,’ the kind of fact that is expressly or implicitly ‘found’ by a legislative body when it enacts a law, rather than ‘judicial fact,’ the kind of fact that has to do with who did what and the

effect that activity had on the parties to the case.”), *judgment vacated by* \_\_\_ U.S. \_\_\_, 125 S.Ct. 2899 (2005).

Moreover, in constitutional cases where the plaintiff alleges that a statute is facially unconstitutional, courts frequently rely on exactly the sort of evidence that Plaintiffs have moved to strike to determine if the legislature’s actions were justified. *See, e.g., McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 115-33 (2003) (relying on various reports and articles published in a wide variety of sources to establish history of concern regarding soft money); *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976) (relying on various agency reports); *A Woman’s Choice—East Side Women’s Clinic*, 305 F.3d at 688-90 (relying on data and studies regarding similar effect of similar abortion statute in other states, including article published in the *Journal of American Medicine*); *Nat’l Coalition of Prayer v. Carter*, No. 02-0536-C, 2005 WL 2253601, at \*1-2 (S.D. Ind. Sept. 2, 2005) (relying on trade-journal articles and other sources to establish that “[t]he ability of telemarketers to intrude into the privacy of Indiana residents and inundate them with sales calls has been similarly well-documented”).

Here, the State Defendants proffer the contested exhibits to support the Indiana General Assembly’s rationale for requiring photo identification and for distinguishing between in-person voters and absentee voters. To rule in favor of the State Defendants, it is not necessary for the Court to make a factual finding concerning the evidence in the State Defendants’ exhibits. Rather, it is only necessary for the Court to conclude that the General Assembly’s decisions to require photo identification and to treat in-person voters and absentee voters differently are reasonable. *See Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 n.12 (3d Cir. 2004) (Lipez, J., concurring)

(noting the difference between legislative and adjudicative facts and noting that the Supreme Court has taken judicial notice of legislative facts “in evaluating the rationality of statutes”).

Put another way, unlike most situations where a party offers evidence to the Court and asks the Court to declare that a historical fact did or did not occur, State Defendants are merely asking the Court to recognize that a legitimate basis exists for the General Assembly to draw the conclusions and distinctions it has drawn. In a sense, it is asking the Court not to determine that the exhibits are correct, but only that the General Assembly would be entitled to rely on them. Legislatures are not required to make specific legislative findings in order to enact a statute,<sup>3</sup> and “[c]ourts regularly go beyond explicit legislative findings to determine the governmental interest underlying a piece of legislation.” *Maryland Right to Life State Pol. Action Comm. v. Weathersbee*, 975 F. Supp. 791, 796 (D. Md. 1997).

In *Maryland Right to Life PAC*, plaintiffs challenged a Maryland public ethics law limiting the involvement of regulated lobbyists in political committees. *See id.* at 793. In support of its motion for summary judgment, the State submitted several exhibits, including newspaper articles, reports, and books relating to legislative ethics and lobbying. *See id.* at 796. The plaintiffs moved to strike the items as inadmissible hearsay. *See id.* at 795-96. The State responded to this motion by arguing that the disputed exhibits were not offered to prove “adjudicative facts,” but instead were offered

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<sup>3</sup> Courts frequently rely on reports and articles that are part of a statute’s legislative history. *See Buckley*, 424 U.S. at 29 n.31. Indiana does not have a formal legislative history, but in terms of this Court’s fact-finding mission, relying on the materials submitted in this case is no different.

to prove “legislative facts,” including a description of the political climate that led to the enactment of the statute. *See id.* The Court agreed and admitted materials that pre-dated the statute. *See id.* at 796.<sup>4</sup> Likewise, this Court should deny Plaintiffs’ motion to strike and consider the disputed exhibits as evidence supporting the General Assembly’s justifications for enacting the Voter ID Law.

Indeed, the Plaintiffs’ motion raises latent structural weaknesses in how constitutional challenges are sometimes litigated. In constitutional cases, the legal standards are rarely uncontroverted, and the parties naturally offer arguments on all theories that may conceivably apply. Historical facts are rarely significant on the merits of facial constitutional disputes, but legislative facts and opinion testimony are often at least arguably relevant to one or more legal standards that the court may apply.

The Federal Rules of Civil Procedure and the Local Rules pertaining to summary judgment do not distinguish between legislative and adjudicative facts, but instead simply require that the parties clearly “designate” all “undisputed material facts.” *See Fed. R. Civ. P. 56; L.R. 56.1.* In ordinary cases that turn on disputes concerning historical or adjudicative facts, this procedure is very important for enabling courts to identify any genuine issues that may remain for trial and for otherwise isolating pure issues of law for summary disposition. In cases that turn on legislative facts, however, the fact that an individual plaintiff may dispute facts upon which the legislature may have relied is largely irrelevant. In this sense, therefore, the State Defendants were probably not obligated to designate the materials challenged by the Plaintiffs’ motion as factual evidence. And, indeed, the State Defendants take the position in their opening brief, and

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<sup>4</sup> Arguably, even those items that post-dated the legislation should have been admitted as demonstrating what a legislative body could consider if necessary.

again in their reply brief, that (perhaps aside from evidence related to standing) there really are no “material facts” at issue. *See* State’s Brief at 12-13; State’s Reply at 1-2. This follows directly from the notion that this case turns, at most, on legislative facts, not historical facts.

Regardless, in order to avoid any technical breach of the Federal and Local Rules, the State Defendants, in accord with past practices, included in their designation of undisputed facts all “facts” and “evidence” that support the General Assembly’s decisions with regard to the Voter ID Law. *See* State’s Brief at 2-12. It is important to bear in mind, however, that the State Defendants would not anticipate a trial on the facts presented in these materials should the Plaintiffs have a basis for disputing them. All that matters is that the facts presented in these materials, whether true or not, support the General Assembly’s policy judgments underlying the Voter ID Law. *See Mass. Med. Soc. v. Dukakis*, 637 F. Supp. 684, 692 (D. Mass. 1986) (“I conclude that rules of evidence and procedure fashioned for resolving adjudicative fact disputes were not designed for resolving non-adjudicative fact disputes and, at the least, must be reexamined before being applied in resolving non-adjudicative fact disputes.”). Accordingly, the Court should not strike any of the exhibits tendered by the State Defendants.

**CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs' motion to strike.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2006, a copy of the foregoing 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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