

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

PLAINTIFFS’ JOINT REPLY IN SUPPORT OF MOTION TO STRIKE

The Democratic Plaintiffs and the Crawford Plaintiffs, by counsel, submit this joint reply in support of their Motion to Strike portions of the Memorandum in Support of Summary Judgment and the Appendix of Evidence of the State Defendants. The State Defendants have relied on unsworn, and in many instances, hearsay materials that do not fit within any exception to the hearsay rule for the purpose of establishing material facts in support of their own motion for summary judgment and in opposition to the Plaintiffs’ respective motions. Because certain of

these documents are not admissible under the Federal Rules of Evidence and none of them comport with the standards of Federal Rule of Civil Procedure 56 regarding the form of evidence, the Plaintiffs moved to strike them, as well as any references to them in the State Defendants' Memorandum in Support of Summary Judgment.

I. Hearsay Exhibits

The State Defendants claim that the exhibits that the Plaintiffs have moved to strike as containing inadmissible hearsay are not really hearsay because they are not being offered for the truth of the matter. To the extent that such materials are not being offered for the truth of their contents, however, they are irrelevant and cannot establish genuine issues that either support or oppose summary judgment.

The materials that the Plaintiffs have moved to strike as hearsay relate primarily to two evidentiary points. The State Defendants have argued that the Photo ID Law is a reasonable response to the existence of voter fraud and the public's concerns about it.¹ As a matter of evidence, however, it is undisputed that the State has been unable to identify a single instance of in-person voter fraud having ever occurred in Indiana. (State's Brief in Support of Summary Judgment p. 13). Because the Photo ID Law was enacted in response to a problem that does not exist in this state, the State Defendants have cited numerous documents purporting to reference instances of voter fraud occurring in other states. The State Defendants have also cited polling data indicating that the public is concerned about the integrity of elections, and from this general concern about election integrity, surmise that the Photo ID Law is an appropriate way to address

¹ The hearsay exhibits that relate to these two points are Exhibits 4-8, 10-20, 22-26, 28-30, and 71.

those concerns.

It is beyond dispute that the documents at issue are hearsay to the extent that they are being offered to prove that voting fraud actually exists or that the public is concerned about it. Apparently conceding this point,² the State Defendants now argue that there is no need to prove these facts. The State Defendants claim that the documents are not hearsay because they are not being offered to prove the existence of such fraud or the public's concerns about it; rather, they are being offered to prove that this sort of information exists. Because this type of information exists, the State Defendants conclude that the General Assembly could have relied upon it as a means of justifying the new and substantial burdens placed upon voters by the Photo ID Law. The State Defendants suggest that the ordinary rigor necessary to ensure the veracity and reliability of evidence does not attach to proof of such "legislative" facts.

The State Defendants' assumptions about the applicable evidentiary standards fail to take into account the fact that the Photo ID Law is subject to strict scrutiny because of the severe burden it imposes on the right to vote. (*See, e.g.*, Democratic Plaintiffs' Brief In Support of Summary Judgment pp. 28-35). Although laws subject only to rational basis review "are not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," *FCC. v. Beach Communications, Inc.*, 508 U.S. 313, 315 (1993), the factual underpinnings of laws reviewed under heightened scrutiny, particularly those implicating

² The State Defendant's argument is inconsistent with their brief, in which they claim that such fraud exists as a matter of fact. For instance, the State Defendants assert that "Legal cases as well as newspaper and other reports confirm that in-person voter-identity fraud, including voter impersonation, double votes, dead votes, and fake addresses, plague federal and state elections." (State Defendants' Brief in Support of Motion for Summary Judgment p. 3). To the extent the State Defendants are now conceding that they have no admissible evidence that would prove in-person voter identity fraud outside of Indiana, the Plaintiffs accept this admission.

First Amendment rights, are subject to a more exacting review of legislative facts. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (“[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake”); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (“the deference afforded to legislative findings does ‘not foreclose our independent judgment of the facts bearing on an issue of constitutional law’”) (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989)); *see also*, William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 Tul. L. Rev. 1261 (March, 1998).

The Supreme Court has stated that it ordinarily will sustain statutes “on the basis of hypothesized justification” only where it is reviewing the statutes “merely to determine whether they are rational.” *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002). Thus, the state was required to produce evidence justifying the burdens on commercial speech at issue in that case, and the Court held that it had failed to provide sufficient justification. *Id.* (“If the First Amendment means anything, it means that regulating speech must be a last – not first – resort.”). Similarly, the Court has required governmental defendants seeking to justify laws that are subject to strict scrutiny in the equal protection context to document past discrimination in the jurisdiction and demonstrate narrow tailoring, which requires the presentation of adjudicative rather than legislative facts. Kathryn Abrams, *The Legal Subject in Exile*, 51 Duke L.J. 27, 67-68 (October 2001) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503-04 (1989)). In *J.A. Croson*, the Court found that “it is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by competent institutions.” 488 U.S. at 503-04. The

Court further observed that: “If all a state or local government need do is find a congressional report on the subject . . . , the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.” *Id.*

The State Defendants have presented no evidence that the General Assembly actually relied on these materials they seek to admit. Not only are there no findings in the legislation indicating the specific reasons the General Assembly believed this law was necessary, but there is no evidence that the General Assembly had any of this information before it during the legislative process. Indeed, many of the documents did not even exist at the time the General Assembly enacted the law, including the Carter-Baker Commission Report.³ In *Maryland Right to Life State Political Action Comm. v. Weathersbee*, 975 F.2d 791 (D. Md. 1997), a case that the State relies upon, the Court refused to permit the introduction of any exhibits that post-dated the legislative body’s action as proof of legislative facts. *Id.* at 796. Moreover, in that case, the Court permitted the introduction of other documents that pre-dated the law’s enactment because they were attached to affidavits or because they were included within the legislature’s files and part of the legislative history. *Id.* Here, the State Defendants have not attached these documents to affidavits, nor have they presented any evidence that the documents were part of the legislative history.

Lacking evidence that the General Assembly considered these documents or the matters discussed within them during the legislative process, the documents are essentially irrelevant for the purpose the State Defendants now claim because of the heightened scrutiny that applies to the

³ The documents that were created or published after the April 27, 2005 enactment of the Photo ID Law are Exhibits 1-5, 8, 11, 18, 29-30, 71.

Photo ID Law. They are also irrelevant because, with few exceptions, they say little about the existence of the very narrow category of alleged voter fraud upon which the Photo ID Law could conceivably have any impact – in-person voter identity fraud. By way of example, the Photo ID Law would have no impact on fraud associated with double-voting or multiple voting, referenced in documents provided regarding elections in St. Louis, Missouri and the State of Washington, since voters registered in multiple locations could easily present their photo identification at multiple locations. (State Defendants’ Exhibits 3, 8-9). Similarly, the Photo ID Law would not prevent instances where votes are cast by persons that were never listed on the voter registration rolls, such as allegedly happened in Washington or Wisconsin, since there is no information that these voters impersonated someone else already listed on the voter registration rolls. (State Defendants’ Exhibits 3-5). The Law does not address circumstances like those in Florida where persons outside the Miami city limits voted since it appears that those individuals registered and voted in their own name. (State Defendants’ Exhibit 10).

Likewise, the polling data cited by the State, even if there were evidence that it was considered by the General Assembly, does not support the proposition that the Voter ID Law is necessary. Although there may be skepticism about the fairness of elections, such general skepticism cannot support every burden placed on the voting populace. The polls at issue had nothing to do with the specific issue of in-person voter identity fraud, and say nothing about the public’s perception of that particular problem.

The State Defendants claim that it is permissible for them to cite to newspaper articles for the purpose of proving that statements reported in them were actually made. Even if this were correct, it is unclear how this helps the State because proving that a statement was made does not

prove that in-person voting fraud exists, that the public has a negative perception of the integrity of elections, or that the General Assembly considered such matters; it would prove only that someone or some organization commented on these topics. Clearly, such documents are unreliable for the purpose of proving any of these matters because in most cases they contain hearsay within hearsay, and in some cases additional layers of hearsay. In any event, the better rule regarding the admissibility of newspaper articles for the purpose of proving that something was said or not said is set forth by the Seventh Circuit in *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742-43 (7th Cir. 1997), which held that a newspaper article is hearsay even for that point, and indicated that the reporter herself would need to be deposed in order to establish the statements that were actually made to her.

The State Defendants also claim that it was acceptable for them to cite to the John Fund book “Stealing Elections,” as well as other hearsay documents, as persuasive authorities. Again, the State Defendants appear to be backing away from their initial characterization of this as “factual” material, and now merely assert that the Fund book and other similar materials are offered for the “general proposition that national instances of in-person voter fraud are widely reported by reputable publishers and authors.” (State Defendants’ Brief in Opposition to Motion to Strike at 4). The Plaintiffs do not object to the State Defendants’ citation of such materials in an effort to support their legal arguments. The Plaintiffs do object, however, to the citation of such material within the “Statement of Material Facts Not in Dispute” or elsewhere for the purpose of establishing a factual record because it is not admissible evidence, regardless of whether the facts are characterized as “legislative” or “adjudicative.”

II. Unsworn Exhibits

There is significant overlap between the exhibits that the Plaintiffs have moved to strike because they are hearsay and those that are unsworn, and therefore not compliant with Fed. R. Civ. P. 56. The State Defendants claim that the unsworn documents are self-authenticating and need not be sworn to be admissible for purposes of summary judgment. Most of these documents are inadmissible for the additional reason that they are hearsay, or irrelevant if not offered for the truth of the matter, so whether they are compliant with the ordinary requirements of Fed. R. Civ. P. 56 is of little significance. *See Scott v. Edinburg*, 346 F.3d 752, 759-60 n.7 (7th Cir. 2003) (quoting Charles Alan Wright, *Federal Practice & Procedure* § 2722, 379-80 & 382-84 (1998) (“To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.”)); *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985) (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.”).

Nevertheless, several of the exhibits do not fit within the categories of official publications and newspaper articles set forth in Federal Rule of Evidence 902 as self-authenticating, specifically, Exhibits 6, 26, 33-34, and 76. Each of these exhibits are inadmissible for this reason alone. Most notably, Exhibit 76 purports to provide a listing of the polling places that were also state-licensed health care facilities in 2004, which the State used in connection with its justification for the exception within the Photo ID Law for persons residing in such facilities. Because it is unsworn and provides no indication regarding its source it is inadmissible.

Finally, the State Defendants have suggested that the Plaintiffs filed a motion to strike as a

substitute for disputing the documents submitted by the State. Given that the State is claiming this material is offered only to prove that such material is available and could have been considered by the General Assembly, there is quite simply nothing to dispute. The Plaintiffs do not question the existence of such materials. Moreover, as a factual matter, the State has provided no evidence that the General Assembly considered it. That the General Assembly could have hypothetically considered it is not relevant under strict scrutiny. Perhaps because the documents were not part of the legislative record, and certainly because the Plaintiffs were not notified of the State Defendants' intent to use these documents as part of their defense as required by Fed. R. Civ. P. 26(a)(1)(B), there was never anything for the Plaintiffs to dispute. The documents should be stricken because they are inadmissible and because the State Defendants have not complied with Fed. R. Civ. P. 56.

WHEREFORE, 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 23rd day of January, 2006, 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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