UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CITY OF HAMMOND, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. 2:21-cv-00160-PPS-JEM
	)	
vs.	)	
	)	
LAKE COUNTY JUDICIAL NOMINATING COMMISSION, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs, City of Hammond, Thomas McDermott, in his official and personal capacities, Eduardo Fontanez, and Lonnie Randolph, by counsel, under Fed. R. Civ. P. 56 and Local Rule 56-1(a), respectfully move the Court to enter summary judgment in their favor.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

In the vast majority of Indiana judicial circuits, voters elect all state trial court judges. But in three state judicial circuits—with by far the most minority residents—voters have the lesser right to vote on whether to retain superior court judges appointed by the Governor. The resulting racial disparities are stark. While eighty-one percent of white Indiana residents elect all of their judges, sixty-six percent of black residents vote only on whether to retain the vast majority of their judges. As the United States Supreme Court has recently held, the "touchstone" of the Voting Rights Act is that voting "must be 'equally open' to minority and non-minority groups alike." *Brnovich v. Democratic National Comm.*, 141 S. Ct. 2321, 2337 (2021). Yet, Indiana's system of voting on judges is not "equally open" and, thus, violates the VRA. This unequal system of voting also violates Indiana's Constitution's prohibition on special legislation and the Privileges and Immunities Clause. As will be demonstrated, Plaintiffs are entitled to summary judgment.

I. Background.

Under Local Rule 56-1, Plaintiffs are separately filing a Statement of Material Facts, but Plaintiffs also provide this brief background. "Indiana's judiciary is a branch of our state's constitutional system." *Lake Cnty. Bd. of Comm'rs v. State*, 181 N.E.3d 960, 963 (Ind. 2022). Indiana "trial courts are state entities." *Id.* at 967. The Indiana Constitution provides that Indiana shall "be divided into judicial circuits." Ind. Const. Art. 7, § 7. The Indiana Legislature has done so. Ind. Code Art. 33-33. Generally, the geographical boundaries of a county constitute a state judicial circuit, except that Dearborn and Ohio Counties constitute one judicial circuit. *See, e.g.*, Ind. Code §§ 33-33-1-1, 33-33-15-1(a).

Each judicial circuit has at least one circuit court judge, Ind. Code Art. 33-33, but some judicial circuits have far more. Ind. Code § 33-33-53-1(b) ("There are nine (9) judges of the Monroe circuit court."). In total, Indiana has 115 elected circuit court judges. Ind. Code Art. 33-33; Directory of Courts & Clerks in Indiana, *available at* https://www.in.gov/courts/files/court-directory.pdf. Lake County has one elected circuit court judge. Ind. Code § 33-33-45-2(a).

The Indiana Legislature has also created superior courts. Ind. Code Art. 33-33. In several counties, there are no superior court judges. *See, e.g.*, Ind. Code § 33-33-53-1(b) (providing that the tenth judicial circuit has nine circuit court judges and has no superior courts). Other judicial circuits have many superior court judges. *See, e.g.*, Ind. Code § 33-33-49-6(a) (providing that Marion County has thirty-six superior court judges). In all, there are 204 superior court judges in Indiana. Directory of Courts & Clerks in Indiana, *supra*.

Throughout the state, when a vacancy arises "in the office of Judge of any Court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified." Ind. Const. Art. V, § 18. In Lake, St. Joseph, Marion, and Allen Counties, the Legislature has provided that the Governor fills a vacancy on a superior court from a list of nominees compiled by a judicial nominating commission ("JNC"). Ind. Code Art. 33-33. That is, the JNC process constrains the Governor's appointment authority by limiting whom he may appoint.

What happens next is what differs across the state. In all judicial circuits, the Indiana Constitution requires that "a Judge for each circuit shall be elected by the voters thereof." Ind. Const. Art. 7 § 7. In most judicial circuits, voters also elect superior court judges. Ind. Code Art. 33-33. In Allen County, voters elect superior court judges in non-partisan elections. Ind. Code § 33-33-2-9.

But in Lake, Marion, and St. Joseph Counties, voters vote only on whether to retain the appointed superior court judge. Ind. Code §§ 33-33-45-42, 33-33-49-13.2; 33-33-71-43. Voters in these counties cannot vote in primaries for superior court judges. *Id.* If the voters vote not to retain the judge, then the Governor would appoint a new judge to that court. *Id.* In other words, voters in these counties have no voice in electing a superior court judge of their choice.

Despite the differential treatment for the selection of circuit court and superior court judges, there are few, if any, differences between circuit courts and superior courts, as explained on the Indiana judiciary's website:

> In Indiana, there are three different kinds of trial courts: circuit courts, superior courts, and local city or town courts. Though these courts have different names, the trial courts are actually more alike than they are different. Trial courts have different names primarily due to accidents of legislative history and local custom, not true differences in the nature or purpose of the courts.

About the Judicial Branch, https://www.in.gov/courts/about/ (last visited November 28, 2022).

In Lake, Marion, and St. Joseph Counties, voters get only a retention vote for most judges. This means a very small percentage of voters in each of those counties get to elect judges of their choice: Lake County 6% (electing only 1 circuit court judge, with 16 appointed superior court judges); St. Joseph County 20% (electing 1 circuit court judge and 1 probate judge, with 8 appointed superior court judges); and Marion County 3% (electing 1 circuit court judge, with 36 appointed superior court judges). And by concentrating appointed judges subject to retention votes in Lake, St. Joseph, and Marion Counties, the result is that 66% of black voting age residents in Indiana do not elect the vast majority of their judges. (Undisputed Statement of Facts ¶ 13; Ind. Code Article 33-33.) They possess only the lesser right of a retention vote. Ind. Code Article 33-33. In contrast, 81% of white voting age residents elect all of their judges. (Undisputed Statement of Material Facts ¶ 37.)

II. Legal standard.

"Summary judgment must be granted when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Hardy v. Chase*, No. 3:19-CV-962-MGG, 2022 WL 2702612, at *1 (N.D. Ind. July 12, 2022) (quoting Fed. R. Civ. P. 56(a)).

III. Analysis

A. Indiana's method of voting for judges violates the VRA.

1. Judicial elections and retention votes are subject to the VRA.

The United States Supreme Court has held that the VRA applies to judicial elections, and the Seventh Circuit has held that the VRA applies to Indiana's judicial retention votes.

Section 2 of the VRA provides the following:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> * * *

52 U.S.C. § 10301.

The United States Supreme Court has held "that state judicial elections are included within the ambit of § 2." *Chisom v. Roemer*, 501 U.S. 380, 402 (1991). The Seventh Circuit has held that the "retention elections stage of the Lake County process satisfies this definition of voting, and thus is governed by § 2 of the Voting Rights Act." *Bradley v. Work*, 154 F.3d 704, 709 (7th Cir.

1998). Consequently, Indiana's system of voting on trial court judges must pass muster under the VRA.

2. The United States Supreme Court's *Brnovich* decision.

The United States Supreme Court recently analyzed Section 2 of the VRA in *Brnovich*. The Court began its analysis by looking at Section 2's language. The "political processes leading to nomination and election . . . must be 'equally open' to minority and non-minority groups alike," meaning "without restrictions as to who may participate." *Brnovich*, 141 S.Ct. at 2337. "Thus, equal openness and equal opportunity are not separate requirements. Instead, equal opportunity helps to explain the meaning of equal openness." *Id.* at 2337-38. Opportunity means "a combination of circumstances, time, and ***place*** suitable or favorable for a particular activity or action." *Id.* at 2338 (internal quotation omitted) (emphasis added). "The statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open. But equal openness remains the touchstone." *Id.* (emphasis in original).

Section 2 "requires consideration of 'the totality of circumstances.' Thus, any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered." *Id.* The Court then looked to five non-exclusive "important circumstances." *Id.*

"First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important." *Id.* Second, "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration." *Id.* Third, the "size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to

consider." *Id.* at 2339. Fourth, "courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." *Id.* Fifth, "the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account." *Id.*

The Court then held that some factors from vote dilution cases "are plainly inapplicable in a case involving a challenge to a facially neutral time, place, or manner voting rule." *Id.* at 2340. The Court concluded that factors such as "racially polarized voting, racially tinged campaign appeals, and the election of minority-group candidates" were not to "be disregarded," "[b]ut their relevance is much less direct." *Id.* The Court also rejected a "disparate-impact model." *Id.* But the majority agreed "that an 'abridgment' of the right to vote under § 2 does not require outright denial of the right; that § 2 does not demand proof of discriminatory purpose; and that a 'facially neutral' law or practice may violate that provision." *Id.* at 2341.

3. Indiana's method for selecting judges violates the VRA.

a) Indiana law violates the VRA's plain language.

Indiana's procedures for voting on judges in Lake County violate the plain language of the VRA. Residents of Lake, Marion, and St. Joseph Counties "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). In other Indiana counties, voters can vote for judges of their choice. *See* Ind. Code Art. 33-33. But in Lake, Marion, and St. Joseph Counties, the governor appoints the superior court judges; and Lake, Marion, and St. Joseph County voters then vote only on whether to retain the appointed judges. *See, e.g.*, Ind. Code § 33-33-45-42. This retention vote provides "less opportunity . . . to participate in the political process and to elect representatives" than voters in other Indiana counties have and violates the VRA. 52 U.S.C. § 10301(b).

b) Indiana law violates the VRA under the *Brnovich* factors.

i. Indiana's voting procedures impose a substantial burden on minority voters.

As to the *Brnovich* factors, this Court must first analyze "the size of burden imposed by a challenged voting rule," and the "concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting." 141 S.Ct. at 2338. A court must also "consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." *Id.* at 2339. For the individual named plaintiffs in this case—or any other Lake, Marion, or St. Joseph County resident—to vote in full and open judicial elections for all judgeships would require them to move to a different county at least thirty days before an election. Ind. Code § 3-7-13-1. For named plaintiff Indiana Senator Lonnie Randolph, he could no longer represent the district he was elected to represent. Ind. Code § 2-1-9-9 (providing that "the senator shall represent, after November 7, 2022, the district established under IC 2-1-15 in which the senator's legal residence is located"). Forcing residents to move at least thirty days before an election and give up an elective office to have full voting rights "seriously hinder[s] voting." *Brnovich*, 141 S.Ct. at 2338

And if residents do not move to another county, then their only choice is an up or down retention vote on the Governor's appointee to the superior court. Ind. Code § 33-33-45-42(b). If they were to vote no, it would result only in the Governor appointing someone new. Ind. Code § 33-33-45-42(d). "When an election law reduces or forecloses the opportunity for electoral choice, it restricts a market where a voter might effectively and meaningfully exercise his choice between competing ideas or candidates, and thus severely burdens the right to vote." *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015) (holding

that the system of electing judges in Marion County violated the First Amendment because it did not provide for contested elections).

In other words, Lake County residents face one of two enormous burdens. First, they can move to another county at least thirty days before an election to enjoy full voting rights enjoyed by other Indiana residents, or second, they can chose to vote in a retention vote that provides no meaningful choice. The burden Indiana's voting system imposes on Lake County residents is substantial, supporting that the system violates the VRA. *Brnovich*, 141 S.Ct. at 2338.

ii. Indiana's current method of selecting trial court judges was not widespread in 1982.

Next, the Court must analyze "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982." *Brnovich*, 141 S.Ct. at 2338. The "degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account." *Id.* In *Brnovich*, the Court reasoned that Congress could not have intended the 1982 amendments to the VRA to outlaw in person voting because it was ubiquitous at that time. *Id.*

Until the early 1970s, all Indiana residents elected all judges. *See, e.g.*, Burns Indiana Statute 4-1902 (1968) (providing for elections for Lake County superior court judge) (historic statutes are attached as an exhibit). In the early 1970s, the Legislature implemented retention votes in Lake and St. Joseph Counties. Ind. Code §§ 33-5-29.5-42 (1973); 47 (1973). During the decade preceding this change Lake County "saw an increase in its minority population of 6.4 percent" and St. Joseph County saw a 2.7 percent increase. (Fuentes Report p.6.) From 1972 to 1982, the Legislature implemented the same retention-vote system in Allen County. Ind. Code §§ 33-5-5.1-44 (1973). But in 1982, the Legislature re-enacted elections for superior court judges in Allen County. Ind. Code § 33-5-5.1-29(b). In 1982, superior court judges in Marion County were elected. Ind.

Code § 33-5-35.1-24 (1975). As a result, in 1982, judicial nominating followed by retention votes for superior court judges was in effect **only** in Lake and St. Joseph Counties.

Plaintiffs have located only two other states in 1982 besides Indiana that, in only limited portions of the state, had trial courts with judges selected by judicial nomination. (Fuentes Rep. p.25.) Missouri first implemented its plan in 1940, *African-American Voting Rights v. State of Missouri*, 994 F.Supp. 1105, 1112 (E.D. Mo. 1997), and Arizona first implemented its plan in 1974.[1] Ariz. Const. Art. 6 § 37 (using judicial selection for counties with populations greater than 250,000). A plan that appears to have existed only in three states (two of which for around a decade) was certainly not "standard practice" or "in widespread use" in 1982. *Brnovich*, 141 S.Ct. at 2338.

Two of these uncommon systems have been challenged as violating the VRA. In *African-American Voting Rights*, 994 F.Supp. at 1122-26, the district court analyzed retention votes under factors from *Thornburg v. Gingles*, 478 U.S. 30 (1986), which was a vote dilution case. The district court concluded that "plaintiffs have offered (at best) marginal evidence of vote fragmentation or dilution." *Id.* at 1126. Similarly, in *Bradley v. Work*, 154 F.3d 704, 710 (7th Cir. 1998), the Seventh Circuit analyzed whether retention votes in Lake County constituted "vote dilution," but concluded because of recent changes to the law "that the record was too thin to support declaratory relief against the new system." The Seventh Circuit held out the possibility that "[f]uture litigation may prove that the 'totality of the circumstances' under the revised system shows a violation of the mandates of the Voting Rights Act." *Id.* Both of these courts applied the *Gingles* vote-dilution factors, and neither court addressed whether such system was in widespread use in 1982.

[1] Kansas too has a similar hybrid system for trial courts but counties can opt into the plan. Ks. Const. Art. 3 § 6.

But *Brnovich* held that the *Gingles* vote-dilution factors' "relevance is much less direct" in non-vote dilution cases. 141 S.Ct. at 2340. Retention votes for superior court judges in Lake County do not dilute minority votes. Instead, it abridges the right to vote, giving voters in Lake County "less opportunity than other members of the electorate to participate in the political process," 52 U.S.C. 10301(b), because Lake County residents get only an up or down retention vote on superior court judges they did not choose, while voters in the vast majority of Indiana counties get to vote in general elections for a **specific** judge of their choice. This case would appear to be the first time that a court has been called upon to apply the *Brnovich* factors to the uncommon system of having different voting procedures for state trial court judges in different parts of a state.

It is certainly true that in 1982 eleven other states (in addition to Indiana, Missouri, and Arizona) had implemented some version of the Missouri Plan (appointment followed by a retention vote), but these systems applied statewide. Alaska Const. Art. 4 § 5 (providing for appointment of all judges by the governor); Colo. Const. Art. 6 § 20; Del. Const. Art. 4 § 3; Haw. Const. Art. 6 § 3; Iowa Const. Art. V § 15; Kan. Const. Art. 3 § 6; *Opinions of the Justs. to the Senate*, 372 Mass. 883, 905, 363 N.E.2d 652, 666 (1977) (providing Legislature "may not create courts the judges of which are not to be appointed by the Governor with the consent of Council"); Md. Const. Part Art. IV § 5a; Neb. Const. Art. V § 21; Utah Const. Art. VIII § 8; Vt. Const. Ch. II § 32; Wyo. Const. Art. 5 § 4. In such circumstances, the system is "equally open" and provides equal "opportunity" for all voters to participate and does not violate the VRA. 52 U.S.C. § 10301. Indiana, for example, selects appellate (as opposed to trial) judges using a statewide system of appointment followed by retention votes. Ind. Const. Art. 7 § 10. Plaintiffs have not challenged this system because it is "equally open" to all Indiana voters, in that no one gets to choose the appellate judge of their choice, and everyone votes on whether to retain the appointed appellate judge.

Because the current system for voting on trial judges in Indiana was not "widespread" or "standard practice" in 1982, it supports that it could violate the VRA. *Brnovich*, 141 S.Ct. at 2338.

iii. Indiana's system has an outsized impact on minority voters.

A court next looks to the "size of any disparities in a rule's impact on members of different racial and ethnic groups." *Brnovich*, 141 S.Ct. at 2339. "The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential." *Id.* The differential voting schemes implemented by the Indiana Legislature have an outsized impact on minority voters.

2020 census data reveals that Lake, Marion, and St. Joseph Counties are the most diverse in population 18 and over:

Geographic Area	Percentage Minority
Indiana	20%
Marion County	44%
Lake County	41.59%
St. Joseph County	24.9%
Allen County	24.58%

(Undisputed Statement of Material Facts ¶¶ 17, 21, 25, 29, 33.) Counties with abridged voting rights "are home to approximately 86.7% of African American residents and 51.4% [of] Latino residents." (Fuentes Rep. p.7.)

The majority of Indiana's black residents live in Marion, Lake, and St. Joseph Counties:

Geographic Area	Number of Black Voting Age Residents
Marion County	193,504
Lake County	89,806
St. Joseph County	25,176

Indiana	467,861

(Undisputed Statement of Material Facts ¶¶ 8-12.)

Sixty-six percent of Indiana's black voting age residents live in a County that only has retention votes for superior court judges:

Voting Age Black Residents Living in Lake, St. Joseph, and Marion Counties	308,486
Total Voting Age Black Residents in Indiana	467,861
Percentage of Voting Age Black Residents Living in a County with only retention votes for superior court Judges	65.94%

(*Id.* ¶¶ 8-13.) In contrast, more than 80% of Indiana's voting age white residents live in judicial circuits where all judges are elected. (*Id.* ¶ 37)

By implementing retention votes for superior court judges in only Lake, Marion, and St. Joseph Counties, Indiana has provided 66% of its black population with lesser retention votes for superior court judges, while over 80% of Indiana's white residents vote for all judges in elections. This disparity demonstrates that Indiana's system violates the VRA. *Brnovich*, 141 S.Ct. at 2339.

iv. State's interests.

"Finally, the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account." *Brnovich*, 141 S.Ct. at 2339. The State may claim that judicial retention votes are needed in the most populace counties. But until 2017, judicial retention votes were only in place in Lake and St. Joseph Counties, which are only the second and fifth most populace counties by voting age population: Marion County (742,442), Lake County (380,651), Allen County (287,203), Hamilton County (253,195), and St. Joseph County (210,201). (Undisputed Material Facts ¶¶ 18, 22, 26, 30, 38.)

Moreover, from 1989 until 2011, some Lake County superior judges were popularly elected. Ind. Code § 33-33-45-43; P.L. 201-2011, Sec. 114. The only county that has consistently

had all superior court judges subject to a retention vote since the 1970s is St. Joseph County. And even in St. Joseph County, the probate judge (along with the circuit judge) is popularly elected. Ind. Code § 33-31-1-3. Population cannot justify the retention vote system, when only the fifth most populace county has consistently selected all of superior court judges through that method.

Further undercutting this rationale, the Indiana Legislature only switched Marion County to judicial nomination followed by a retention vote for superior court judges in 2017, Ind. Code § 33-33-49-13.1, after the Seventh Circuit ruled the previous method of electing judges in Marion County unconstitutional. *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015). Under the previous system, "the Republican and Democratic parties have each nominated candidates for half of the open seats on the Marion Superior Court." *Id.* at 916. Before the Seventh Circuit, the State offered a host of reasons why the State supposedly had an interest in maintaining this system, which the Seventh Circuit rejected, and population was not one of them. *Id.* at 921-27.

The State may claim it implemented judicial retention votes in the counties with the most judges because voters cannot reasonably vote for a large number of judges: Marion County (37); Lake County (17); Allen County (10); Hamilton County (8); St. Joseph County (9); Monroe County (9). Allen, Hamilton, and Monroe Counties all have similar numbers of judges to Lake and St. Joseph Counties. Yet residents of those counties vote in elections for all judges. *See, e.g.*, Ind. Code § 33-33-53-1(b).

Moreover, if the problem is that some judicial circuits allegedly have too many judges, nothing in the Indiana Constitution prohibits the Legislature from re-drawing the judicial circuit. Ind. Const. Art. 7, § 7. Nothing in the Indiana Constitution compels that counties be used to draw judicial circuits. *Id.* Indeed, one judicial circuit comprises two counties. Ind. Code § 33-33-15-

1(a). If the Legislature has created judicial circuits with too many judges, the answer is not to take away voting rights in those circuits, but to make smaller circuits.

The State may also claim that a JNC improves the quality of judges and reduces partisanship. It must be remembered that the Governor fills all vacancies for all courts. Ind. Const. Art. V, § 18. But in Lake, St. Joseph, Marion, and Allen Counties the Governor's choice is constrained to a list of nominees prepared by a JNC. If those candidates are better, then they should be able to win an election, as occurs in non-partisan elections in Allen County. Ind. Code § 33-33-2-9. It is unclear to Plaintiffs how a retention vote, as opposed to an election, after gubernatorial appointment improves the quality of a judge, since the Governor *already* appointed the judge. The only thing a retention vote does is relieves that appointee from facing any competition, and reduces voters' ability "to participate in the political process" in violation of the VRA. 52 U.S.C. 10301(b). And if JNCs produce better appointees at the outset, the answer is to use them in other counties, not give voters in Lake County a lesser retention vote.

Because the State's interest in selecting superior court judges in Lake County by appointment followed by a retention vote are either non-existent or weak, it supports that this system violates the VRA. *Brnovich*, 141 S.Ct. at 2339.

In conclusion, under the "totality of circumstances," Indiana providing voters in Lake County the lesser voting right of a retention vote for appointed judges they did not choose (under Ind. Code § 33-33-45-42) violates the VRA. *Id.* This Court should then "afford the jurisdiction an opportunity to remedy the violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 599-600 (7th Cir. 2000). The most straightforward fix for Indiana to remedy the violation of the VRA would be for the Legislature to make all superior court judges elected, but there could potentially be other solutions, and Indiana should be afforded the opportunity to remedy the violations.

B. Indiana's process for selecting judges in Lake County violates the Indiana Constitution because it is unconstitutional special legislation.

Article 4, Section 23 of the Indiana Constitution ("Section 23") provides that "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Ind. Const. art. 4, § 23. In other words, Section 23 prohibits special legislation—that is, laws that apply only to a specific class—if a general law can be made applicable statewide. *City of Hammond v. Herman & Kittle Props.*, 119 N.E.3d 70, 73 (Ind. 2019).

As explained below, the statutorily prescribed method of selecting superior court judges in Lake County is special legislation that violates Section 23. Specifically, this superior court judge selection process—JNC nominations, Governor appointments, and retention votes—is peculiar and applies to only three counties in Indiana: Lake, St. Joseph, and Marion. *See* Ind. Code §§ 33-33-71-37, -40, -43 (St. Joseph County); Ind. Code §§ 33-33-49-13.3, 13.4 (Marion County).

Apart from the three retention vote counties, Allen County also has a JNC, but its role is more limited. In Allen County, the governor fills interim vacancies from a list of candidates submitted by the Allen County JNC. *See* Ind. Code § 33-33-2-39, -40, -41, -43. Otherwise, Allen County superior court judges are elected in nonpartisan elections. *Id.* § 33-33-2-9. Vanderburgh County also has nonpartisan elections for its superior court judges, but it does not have a JNC for any purpose. *See* Ind. Code § 33-33-82-31. Residents of all other Indiana counties—eighty-seven of them—elect their superior court judges in partisan elections. Ind. Code Art. 33-33.

With this context in hand, Plaintiffs explain why the statutory scheme for selecting superior court judges in Lake County is special legislation that is unconstitutional.

1. Lake County's Statutory Scheme for Selecting and Retaining Superior Court Judges is Special Legislation.

As a threshold matter, the Lake County statutory scheme for selecting and retaining superior court Judges is special legislation. That statutory scheme is found in various sections in Indiana

Code Chapter 33-33-45; specifically, section 25 and sections 27 through 42.

There can be no reasonable dispute that this scheme is "special legislation," or laws that "pertain[] to and affect[] a particular case, person, place, or thing, as opposed to the general public," *Mun. City of S. Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (cleaned up). Here, it's clear that the aforementioned statutes "pertain[] to and affect[]" a particular place—Lake County. *Id.* More generally, JNC nominating schemes, in lieu of full elections for superior court judges, affect three of ninety-two counties in Indiana; thus, those schemes do not operate statewide. While Plaintiffs challenge just Lake County statutes, a proper analysis under Section 23—which mandates that we deem whether a "general law can be made applicable" statewide—requires the Court to look at and analyze what superior court selection processes are used throughout Indiana.

2. The Special Legislation—the Statutory Superior Court Judge Selection and Retention Process in Lake County—Is Unconstitutional.

As explained below, the Defendants will be unable to meet their burden to show that the Lake County statutory scheme for selecting and retaining superior court judges is constitutional.

The Indiana Supreme Court recently set forth a comprehensive framework for determining whether special legislation is unconstitutional. *See Herman & Kittle Props.*, 119 N.E.3d at 84. That framework essentially hinges on the uniqueness of the identified class—here, Lake County and its retention vote county counterparts—and the relationship between any uniqueness and the differential treatment provided by the law. *See id.* Specifically, "a special law violates Article 4, Section 23 when there are no unique circumstances of an affected class that warrant the special treatment—meaning that a general law could be made applicable." *Id.* (citing *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty.*, 849 N.E.2d 1131, 1138 (Ind. 2006); 849 N.E.2d at 1138–39; *Mun. City of S. Bend v. Kimsey*, 781 N.E.2d 683, 694 (Ind. 2003)).

For a special-legislation challenge, the parties' respective burdens are as follows:

> [O]nce a special-legislation claim is lodged and the court determines that the law is indeed special, the burden is on the proponent to show that a general law can't be made applicable. This requires the legislation's proponent to clear a low bar by establishing a link between the class's unique characteristics and the legislative fix. If the proponent overcomes its initial hurdle to show a link between the unique characteristics and the special treatment, but the case poses a question of degree—i.e., the characteristics used to justify the special law are common to the specified class and to those outside of the class—then the opponent of the legislation must show why the specified class's characteristics are not defining enough to justify the special legislation. By carrying this burden, the opponent demonstrates that the law's proponent has failed to justify the special treatment.

Id. at 84–85.

Under the above framework, the Lake County special legislation cannot pass constitutional muster for two reasons. First, the Defendants will fail to establish a link between any proffered unique characteristics of Lake County and the statutory scheme's differential treatment. That is, while Lake County (and its other retention vote county counterparts) may prove to be unique in certain ways, it is a "generalized uniqueness" and not one that "justif[ies]" the imposition of a nominating-versus-full-election process upon Lake County. *Herman & Kittle Props.*, 119 N.E.3d at 86. To state it another way—while Lake County could have certain issues affecting its judicial system, the Defendants cannot prove that a retention vote is the way to fix those problems.

Second, even if the Defendants are able to link certain unique characteristics of Lake County to the legislative fix, they cannot show that those characteristics are defining enough to justify the imposition of a nominating process on only Lake County and the other retention vote counties—that is, the Defendants will fail to explain why retention votes cannot be made applicable throughout the State. This is because there is no meaningful explanation as to why the problems Lake County and other nominating counties face are "any different than those faced" by other counties in the State, *Alpha Psi*, 849 N.E.2d at 1138, or why a general law would be "inoperative in portions of the state" or "injurious or unjust" if imposed on all counties, *State v. Buncich*, 51 N.E.3d 136, 141 (Ind. 2016) (cleaned up). In other words, there is no evidence that Lake County

and other nominating counties are facing a particular issue that would justify imposing retention votes on them, and only them; rather a general law can be made applicable statewide.

As explained clearly in *Herman & Kittle*, it is the Defendants' burden to establish the link between Lake County's unique characteristics and the legislative fix. Though the Defendants have not yet had the opportunity to proffer those unique characteristics and link them to the retention vote scheme affecting Lake County, Plaintiffs below explain why any attempt to do so would fail regardless.

3. The Historically Inconsistent Superior Court Judge Selection Process in Lake County Reveals that Retention Votes Are Not Linked to the Locality's Unique Characteristics.

The path to the current retention vote process in Lake County has not been a straight one. Rather, the Legislature has shifted back and forth—imposing a purely nominating system for Lake County superior court judges for a number of years, then instituting a hybrid system where some Lake County superior court judges were elected (while others were nominated), and then back again to a purely nominating system. This back-and-forth—explained below—is critical to the special-legislation analysis, as it will hinder the Defendants' ability meaningfully to link any unique characteristics of Lake County to the "legislative fix" of retention votes.

The Lake County JNC was created in 1973; among its duties were to present three nominees to the Governor when a judicial vacancy on the Lake County superior court occurred. Ind. Code §§ 33-5-29.5-28, 39 (1974). The Governor then would make an appointment from the list. *Id.* § 33-5-29.5-39. In other words, in the early 1970's, all Lake County superior court judges were subject to appointment followed by a retention vote; by the same token, Lake County residents could not elect any of their superior court judges.

This changed in 1989. Then, the Legislature provided that three Lake superior court judges "comprise the county division," Ind. Code § 33-5-29.5-21(b), and that those judges "shall be elected . . . by the electorate of Lake County," Ind. Code § 33-5-29.5-42.5. Election of these Lake superior court judges, however, did not last. In 2011, the Legislature repealed the provision for the election of the Lake superior court judges that made up the county division. Ind. Code § 33-33-45-43; P.L. 201-2011, Sec. 114. Once again, all Lake County superior court judges were appointed followed by a retention vote.

The shift from a nominating system to a hybrid one (where some, but not all, Lake County superior court judges were elected) back to a nominating system is more than notable. It undercuts any argument that unique characteristics of Lake County justified the imposition of a purely nominating system for Lake County superior court judges. After all, if such a system was the "legislative fix" for whatever unique issues Lake County was allegedly facing, then that purely nominating system would not have been partially scrapped for a number of years. In other words, if Lake County faced unique issues **and** the Legislature put in place a purely nominating system that addressed those unique problems, then why the change to electing some superior court judges for over two decades? Presumably it is because, while Lake County possesses some unique characteristics, those unique characteristics cannot justify the current differential treatment—a purely nominating system—imposed on the locality. That is, the necessary link for this Court to deem the special legislation constitutional is missing.

This conclusion is bolstered by a similar shift in superior court judge selection in another locale. In the early 1970's, as with Lake County, the Legislature imposed a nominating-and-retention-vote scheme on Allen County. Ind. Code §§ 33-5-5.1-38, 39. However, that selection scheme is no longer in place. Currently, the Allen County Judicial Nominating Commission's role is more

limited—it selects nominees for only interim vacancies, e.g., due to a death or resignation, on the Allen County superior court. Ind. Code § 33-33-2-39. Allen County residents are otherwise able to elect their superior court judges in nonpartisan elections. *Id.* § 33-33-2-9.

Given the Legislature's early 1970's imposition of retention votes only upon select counties—that is, Lake, St. Joseph, and Allen—it would appear that those localities were singled out because they allegedly shared unique issues that could be targeted by appointment of their superior court judges followed by a retention vote. Yet, now, Allen County's Judicial Nominating Commission has a restricted role; and county residents elect superior court judges. If a purely nominating system was appropriate for Allen County in the early 1970's because of whatever unique characteristics it allegedly possessed (and which were likewise possessed by Lake and St. Joseph Counties), then what changed to prompt a shift to nonpartisan elections? In other words, if there was a link to Allen County's allegedly unique characteristics and a purely nominating system to justify differential treatment in the early 1970's, then either those characteristics must have changed or the purely nominating system did not cure whatever issues Allen County faced. If the former, then there must be data to explain what unique characteristics Lake County possesses—but that Allen County once had but no longer does—to justify a purely nominating system in one locale but not the other. And, if the latter—that the purely nominating system did not work to address Allen County's unique issues (shared by Lake and St. Joseph Counties)—then that system never shared the proper link to the unique characteristics in the first place and was an unconstitutional special law from the get go.

Ultimately, the significant changes in Lake County's superior court judge selection processes over time reveal that a purely nominating system has never been linked to whatever unique characteristics Lake County allegedly possesses. In other words, Defendants will be unable to meet

their burden to show that appointment followed by retention votes was the "legislative fix" to any special issues Lake County was facing. But the history of retention votes in Lake County is not the only reason why.

4. There Will Be No Evidence that the Constitutionally Mandated Elections of Circuit Court Judges Have Caused Issues.

To further understand why the Defendants will be unable to carry their burden to show the Lake County special legislation is constitutional, it's necessary to look at how trial court judges are selected across the State and analyze the differences between those trial courts.

Under the Indiana Constitution, all circuit court judges are elected. Ind. Const. art. 7, § 7. There are 115 circuit court judges across Indiana, including one in Lake County. *See* Ind. Code Art. 33-33. There are also 144 superior court judges in Indiana that are elected. *Id.* There are few, if any, differences between circuit courts and superior courts. *About the Judicial Branch*, *supra*.

This means that the vast majority of general-jurisdiction trial court judges in the vast majority of Indiana counties are elected. One of the rare exceptions are superior court judges in Lake County. The Defendants must be able to proffer some unique characteristics, then, of Lake County to justify retention votes, versus election, of its superior court judges. In other words, what necessitates retention votes for Lake County superior court judges when the vast majority of general-jurisdiction trial court judges—who share very similar functions—are elected? That is—what unique Lake County ills does retention votes seek to cure **and** would those unique ills remain incurable if superior court judge elections were in place?

Defendants will not be able to answer these questions, and, thus, will fail to overcome their burden. There is no evidence that, over numerous decades, elections of circuit court judges in Lake County have caused issues. And if circuit court judge elections in Lake County have so far not posed problems, there is no reason to justify imposing retention votes for superior court judges in

that locale. In other words, the necessary link is missing between the unique characteristics of Lake County and the "legislative fix" of a purely nominating system for one type of trial court judge in the county—all while the vast majority of other Indiana county residents enjoy full elections for all of their general-jurisdiction trial court judges.

5. **Appointment Followed by Retention Votes for All Indiana Judges Has Been Recommended to the Legislature.**

Even if the Defendants proffer certain unique characteristics of Lake County (and of other retention vote counties) and link them to the legislative fix of retention votes for the counties' superior court judges, the special legislation is still unconstitutional. This is because Defendants cannot show that any unique characteristics are defining enough to justify the imposition of a nominating process on only Lake County and the other retention vote counties.

Ultimately, there is no reason a retention vote process cannot be made applicable throughout the State. Indeed, the Legislature has faced numerous calls to impose retention votes statewide. "The bar, as well as business and legislative study groups, have consistently advocated eradicating . . . the politicalization of judge selection." John G. Baker, *The History of the Indiana Trial Court System & Attempts at Renovation*, 30 Ind. L. Rev. 233, 258 (1997) (detailing failed attempts of various groups advocating for merit selection statewide). It is unclear how Defendants can explain why Lake, St. Joseph, and Marion counties are so unique that retention votes—which many have touted as an important potential statewide reform—should be imposed on only those counties and not throughout Indiana.

As explained above, nearly all counties have superior court judges. Thus, retention votes for superior court judges could be operative in those counties; and there is no reason it would "injurious or unjust" to impose retention votes statewide. *Buncich*, 51 N.E.3d at 1138 (quoting *Kimsey*, 781 N.E.2d at 692). To be sure, it's unclear what issues the purely nominating counties

face that are "any different than those faced" by other counties in the State. *Alpha Psi*, 849 N.E.2d at 1138. Rather, historically, those who favor appointment followed by retention votes advocate for imposition of that system statewide. *See Baker*, supra, at 254–58. Defendants ultimately will not have an adequate "factual basis upon which to rest their assertion that a general statute could not apply" and that the current piecemeal approach to retention votes for certain superior court judges is constitutional. *Herman & Kittle*, 119 N.E.3d at 83 (quoting *Kimsey*, 781 N.E.2d at 694).

6. **The Only Appropriate Remedy Is to Have Statewide Elections or Statewide Merit Selection for Superior Court Judges.**

Because the imposition of a purely nominating scheme for Lake County superior court judges is unconstitutional special legislation, the scheme is invalid. Unlike in other special legislation cases, there is nothing to sever from the applicable statutes. *See Herman & Kittle*, 119 N.E.3d at 87–89. Rather, the entirety of the merit selection process must scrapped in favor of statewide elections or the merit selection process must be imposed statewide. No other remedies can cure the constitutional infirmity.

C. Indiana's process for selecting judges in Lake County also violates the Privileges and Immunities Clause of the Indiana Constitution.

Article 1, Section 23 of the Indiana Constitution states, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. art. 1, § 23. Here, Indiana Code article 33-33-45 implicates the Privileges and Immunities Clause because Lake County citizens do not enjoy the privilege of electing their judges, while citizens in eighty-nine counties in Indiana do enjoy that privilege. *See Martin v. Richey*, 711 N.E.2d 1273 ("[A] statute which either grants unequal privileges or imposes unequal burdens may be the subject of a claim under Section 23.").

When legislation is challenged under the Privileges and Immunities Clause, the legislation must meet two requirements—or it is constitutionally infirm. "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes." *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1273 (Ind. 2004). And, second, "the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Id.* As explained below, Indiana Code article 33-33-45 cannot meet these requirements.

Notably, considerations presented by a Privilege and Immunities Clause challenge are "closely related" to considerations presented by a special legislation challenge. *Kimsey*, 781 N.E.2d at 692. For similar reasons as outlined in the above special legislation section, the State will be unable to show how disallowing Lake County voters to elect their superior court judges is reasonably related to any inherent characteristics of those voters. That is, there are no "inherent differences in situation" of Lake County residents "related to the subject-matter of the legislation"—a purely nominating scheme for superior court judges—that "require, necessitate, or make expedient different or exclusive legislation with respect to the members of the class." *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 200 (Ind. 2016) (internal quotations omitted). First, as explained in more detail above, the significant changes in Lake County's Superior Court judge selection process over time reveal that a purely nominating system is not linked to any allegedly inherent characteristics of Lake County voters. Second, also explained in detail above, if Lake County voters possess inherent characteristics that are reasonably related to the legislature's choice to eliminate superior court judge elections in Lake County, then data should show that those same inherent characteristics have proven problematic in regards to the circuit court judge elections that have taken place, and continue to take place, in Lake County.

But even if the State comes up with a reasonable rationale as to why Lake County voters, given their characteristics, are subject to a purely nominating scheme, the State will be unable to meet the second requirement and show that the preferential treatment afforded to the vast majority of Indiana voters is uniformly applicable and equally available to all persons similarly situated. This is because the privilege of electing superior court judges is also not afforded to voters in Marion and St. Joseph Counties, and there can be no plausible argument that these voters are not similarly situated to the all the other Hoosier voters able to elect their superior court judges. In sum, Indiana Code article 33-33-45 violates the Privileges and Immunities Clause.

CONCLUSION

Indiana's method of electing and voting on judges violates the VRA. It also violates Indiana's Constitution's prohibition on special legislation and the Privileges and Immunities Clause. This Court should grant Plaintiffs summary judgment, invalidate Ind. Code §§ 33-33-45-27 to 42, which provide for appointment of superior court judges in Lake County and for retention votes, and provide the Indiana Legislature the opportunity to remedy the violations in a way that complies with the VRA and Indiana Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2023, a copy of the foregoing document 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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