UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN DOE, formerly known as JANE DOE, Plaintiff, v. MICHAEL PENCE, in his official capacity as Governor of the State of Indiana; GREGORY ZOELLER, in his official capacity as Attorney General for the State of Indiana; and MYLA A. ELDRIDGE, in her official capacity as Marion County Clerk of the Court, and Lilia G. Judson, in her official capacity as Executive Director of the Indiana Supreme Court Division of State Court Administration, Defendants.	)	Case No.: 1:16-cv-02431-JMS-DML

MEMORANDUM IN SUPPORT OF DEFENDANTS' MICHAEL PENCE, GREGORY ZOELLER, LILIA JUDSON'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants Michael Pence, Greg Zoeller and Lilia Judson, by counsel, respectfully submit this Memorandum in Support of their Motion to Dismiss Plaintiff's First Amended Complaint.

I. INTRODUCTION

Plaintiffs have brought suit against Governor Michael Pence ("Governor Pence"), Attorney General Gregory Zoeller ("Attorney General Zoeller"), Marion County Clerk Myla Eldridge ("Clerk Eldridge"), and Executive Director of the Indiana Supreme Court Division of State Court Administration Lilia G. Judson ("Director Judson"),[1] for alleged violations of the United States

[1] Each defendant is sued in their official capacity only. (See First Amended Complaint for Declaratory and Injunctive Relief, ¶¶ 9-12).

Constitution due to the operation of Indiana Code § 34-28-2-2.5(a)(5) (the "Statute"), which essentially provides that a petition for a change of name requires proof that the person seeking a change of name is a citizen of the United States. Plaintiff is seeking: (a) a declaration that the Statute violates Plaintiff's rights under the Equal Protection, Due Process, and Free Speech clauses of the United States Constitution, (b) a permanent injunction enjoining the Defendants from enforcing the Statute, (c) an order requiring Eldridge to accept petition for a change of name from non-citizens, and (d) attorney fees and costs pursuant to 42 U.S.C. § 1988.

As to Governor Pence, Attorney General Zoeller and Director Judson, Plaintiffs fail to meet the standing requirements under Article III. Thus, accepting every allegation as true, the First Amended Complaint for Declaratory and Injunctive Relief (the "Complaint") fails to state a claim upon which relief may be granted against Attorney General Zoeller and Director Judson, and as a result, this Court lacks subject matter jurisdiction, and Plaintiff fails to state a viable claim. Therefore, the Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) requires dismissal if the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The court accepts the well-pleaded allegations from the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Estate of Eiteljorg ex rel. Eiteljorg v. Eiteljorg*, 813 F. Supp. 2d 1069, 1073-74 (S.D. Ind. 2011) (citing *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 771 (7th Cir. 2002), for Rule 12(b)(1) standard). "When considering a motion to dismiss under Rule 12(b)(1), the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether

in fact subject matter jurisdiction exists." *Eiteljorg, supra*, 813 F. Supp. 2d at 1074 (quoting *Capitol Leasing Co., v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993)).

B. Federal Rule of Civil Procedure 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defense to a pleading for "failure to state a claim upon which relief can be granted." To state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). "The 'short and plain statement' must be enough "to give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) and noting that the Supreme Court in *Twombly*, 127 S. Ct. at 1969, retired the common formulation that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). "In addition, a plaintiff can plead himself out of court by alleging facts that show there is no viable claim." *Pugh v. Tribune Co.*, 521 F.3d 686, 699 (7th Cir. 2008) (citing *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006)).

For purposes of a motion to dismiss under 12(b)(6), the court accepts the complaint's factual allegations as true and tests the legal sufficiency of the complaint. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d. 672, 675 (7th Cir. 2001). The court views facts as well as any inferences reasonably drawn in the light most favorable to the non-moving party. *Mosley v. Klincar*, 947 F.2d 1338, 1339 (7th Cir. 1991). When dismissing a complaint for failure to state a claim, the court may not look to materials beyond the pleading itself. *Alioto v. Marshall Field's & Co.,* 77 F3d. 934, 936 (7th Cir. 1996). "[T]he factual allegations in the complaint 'must be enough to raise a right to relief above the speculative level.'" *Killingsworth*, 507 F.3d at 618 (quoting

Twombly, 127 S. Ct. at 1965) (other citations omitted). "Although this does 'not require heightened fact pleading of specifics,' it does require the complaint to contain 'enough facts to state a claim to relief that is plausible on its face.'" *Killingsworth*, 507 F.3d at 618 (quoting *Twombly*, 127 S. Ct. at 1974) (other citations omitted).

III. ARGUMENT

Plaintiff's claims against Governor Pence, Attorney General Zoeller and Director Judson fail to meet the Article III standing requirements. For the following reasons, the Complaint against Governor Pence, Attorney General Zoeller and Director Judson should be dismissed.

A. Background Facts.

Plaintiff moved to Indiana from Mexico in 1990 with his family. (First Amended Complaint for Declaratory and Injunctive Relief ("Complaint"), dkt. 24, ¶ 24). The Department of Homeland Security granted the Plaintiff Deferred Action for Early Childhood Arrivals ("DACA") status in December of 2013, and in August of 2015, the United States granted Plaintiff asylum. (Complaint, ¶¶ 26, 28). Plaintiff states that he will apply for permanent residency in September of 2016 and that after that residency is obtained, he must wait three years before applying for naturalization. (Complaint, ¶ 29).[2] Plaintiff alleges he wishes to change his name from Jane Doe to John Doe to accurately reflect his gender. (See generally, Complaint, ¶¶ 33-44). Plaintiff alleges that the Statute violates various provisions of the United States Constitution because it does not allow him, a non-United States citizen, to change his name to match his gender identity. (Complaint, ¶ 2).

B. Plaintiff lacks Article III standing to pursue his claims against Governor Pence, Attorney General Zoeller, and Director Judson.

[2] It appears that the First Amended Complaint may not have been updated when it was filed in October of 2016, as September of 2016 had already obviously passed. It is unclear whether Plaintiff, at the time of the filing of this Memorandum, has in fact applied for permanent residency.

Despite Plaintiff's allegations, Plaintiff does not have Article III standing to raise his issues in federal court, and his claims must therefore be dismissed.

1. Applicable law regarding Article III standing.

Article III standing is a threshold issue that every plaintiff must meet in order to invoke a federal court's subject matter jurisdiction. Therefore, Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Additionally, the Article III analysis also reveals that Plaintiff has not established any constitutional violation that have caused the Plaintiff damages, and his Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for the failure to state a claim upon which relief can be granted.

The United States Supreme Court has articulated two strands of standing jurisprudence. One is Article III standing, which enforces the Constitution's case-or-controversy requirement, as outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992); *Winkler v. Gates*, 481 F.3d 977, 979 (7th Cir. 2007). The second strand is prudential standing, which is a "judicially self-imposed limit[] on the exercise of federal jurisdiction." *Winkler*, 481 F.3d at 979 (citations omitted). Prudential standing is not implicated by Plaintiff's Complaint and will not be addressed here.

Article III standing has three distinct elements: "injury in fact, a causal connection between the injury and the defendant's conduct, and likely redressability through a favorable decision." *Id.* (citation omitted). All three of the elements must be met for a finding of Article III standing. First, Plaintiff must have suffered an injury in fact. Thus, Plaintiff must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotations omitted).

Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (citations and internal alterations omitted). Third, "it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (citation omitted). Plaintiff bears the burden of establishing the foregoing elements as it is the party invoking federal jurisdiction. *Id.* (citations omitted). *Accord, Scanlan v. Eisenberg*, 669 F.3d 838, 841-42 (7th Cir. 2012) (reviewing a 12(b)(1) motion to dismiss for lack of standing and holding that the "burden to establish standing is on the party invoking federal jurisdiction . . . .").

The United States Supreme Court has long held that federal courts cannot issue advisory opinions that address abstract legal questions. *See United Public Workers v. Mitchell,* 330 U.S. 75, 89 (1947). Pursuant to Article III of the United States Constitution, federal courts have jurisdiction to decide only actual cases or controversies. *See Wisconsin's Environmental Decade, Inc. v. State Bar of Wisconsin,* 747 F.2d 407, 410 (7th Cir.1984) (citing *Poe v. Ullman,* 367 U.S. 497, 502 (1961); *Muskrat v. United States,* 219 U.S. 346, 354-57 (1911)). "Under the Declaratory Judgment Act, 28 U.S.C. § 2201, federal courts may issue declaratory judgments only in cases of actual controversy." *Doe v. Prosecutor, Marion County, Ind.*, 566 F. Supp. 2d 862, 869 (S.D. Ind. 2008).

The ripeness doctrine involves the timing of judicial review and the principle that courts should conserve their power and resources for issues that are present or imminent – not squandered on problems that are a future possibility.

> No precise test exists to distinguish between an abstract question and a justiciable case or controversy, but well-established principles provide guidance. *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 297-98, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *J.N.S., Inc. v. Indiana,* 712 F.2d 303, 305 (7th Cir.1983). The

> case or controversy requirement prevents federal courts from rendering judgments that are unnecessary to resolve a real dispute or in cases in which a court would have difficulty reaching a competent decision. *Illinois v. General Electric Co.*, 683 F.2d 206, 210 (7th Cir.1982). **The lack of an immediate conflict could make it difficult for a court to make factual findings and could also reduce the parties' incentives to argue the case vigorously.** *Id.* The basic question the court must ask is whether the contentions of the parties present "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301 (quoting *Railway Mail Association v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945)). **It is insufficient that the controversy may arise in the future; the controversy must be immediate.** *Wisconsin's Environmental Decade, Inc.*, 747 F.2d at 411; *J.N.S., Inc.*, 712 F.2d at 305.

Id. at 869-870 (emphasis added).

Plaintiff alleges that the Statute violates various provisions of the United States Constitution because he believes any submission of a change of name form will be summarily declined. However, Plaintiff does not allege any facts to establish any of the elements of Article III standing: injury in fact, causation, or redressability.

2. Plaintiff has sustained no injury in fact as a result of any conduct of Governor Pence, Attorney General Zoeller, or Director Judson.

Plaintiff alleges that he had a conversation with employees of the Marion County Clerk's office in December of 2013 wherein those employees told him that citizenship was a requirement for a legal name change. (Complaint, ¶ 59). Consequently, he contends that he was "dissuaded" from filing his petition with the Marion County Clerk's Office because of this representation made by employees of the Marion County Clerk. (Complaint, ¶ 62). Notably absent from the allegations set forth by the Plaintiff is one where he alleges that he (1) filed a petition for a change of name, and (2) it was denied. (See generally, Complaint).

Under Article III, it is fundamental that the Plaintiff has a concrete and particularized injury that is either actual or imminent. Plaintiff cannot demonstrate such a concrete and particularized injury that is either actual or imminent, and he has not presented any immediate conflict for this

Court to adjudicate that satisfies the first prong of Article III standing analysis. Instead, he speculates that any such attempt at changing his name would be "futile," so he has not taken that step. (Complaint, ¶ 63). Such speculation is not sufficient to meet the first factor under the Article III standard. What's more, the only allegations of "[dissuasion]" from filing his petition are against the Marion County Clerk – not Governor Pence, Attorney General Zoeller, or Director Judson.

3. Any alleged injury in fact, if established, was not caused by any conduct of Governor Pence, Attorney General Zoeller, or Director Judson.

Even if the Court finds that Plaintiff has suffered an injury in fact, such an injury cannot be attributable to Governor Pence, Attorney General Zoeller, or Director Judson. In fact, Plaintiff makes no allegations directly against Governor Pence or Attorney General Zoeller other than to state that they both have a duty to "ensure that the laws of the State" are "enforced." (Complaint, ¶¶ 9, 10). First and foremost, the duties of the Governor and the Attorney General are established by the Indiana Constitution and the Indiana Code. Notably absent from both the Indiana Constitution and the Indiana Code are any duties imposed on Governor Pence or Attorney General Zoeller to "enforce" the laws with respect to petitions for a change of name in the State of Indiana. *See generally,* IND. CONST., Art. 5, §§ 1, 11, 12, 14; IND. CODE § 4-6-2-1, et seq. Notwithstanding this erroneous allegation regarding the duties of Governor Pence and Attorney General Zoeller with respect to laws involving one's change of name, there are absolutely no allegations in the Complaint that Governor Pence or Attorney General Zoeller have taken any adverse action against the Plaintiff. (See generally, Complaint). Even if Governor Pence or Attorney General Zoeller's duties included enforcing the laws of the State of Indiana, Plaintiff's submission of a change of name form, even if it would allegedly lack the necessary requirements as provided by the Statute, would certainly not expose the Plaintiff to any type of liability through enforcement, whether civil, criminal, or otherwise.

Likewise, there are no allegations that Director Judson caused any harm to the Plaintiff. (See generally, Complaint). Curiously, Plaintiff alleges that he has been harmed because the forms of name change allegedly produced by Director Judson's office have a section with respect to citizenship which "prevent[s] or discourage[s] non-citizens" from changing their name. (Complaint, ¶ 12). It is incomprehensible how a form has harmed the Plaintiff. Regardless, the Plaintiff has never even submitted one of these forms. (See generally, Complaint).

In addition, there is a process for the Plaintiff to change his name, and as he lays out in his Complaint, this process is to establish permanent resident, become naturalized, and then change his name. (Complaint, ¶¶ 29). The alleged harm that Plaintiff asserts is, essentially, that this process will take too long. Plaintiff opines that during the period that he is waiting to apply for naturalization, he will face further harassment due to his identification documents identifying him as "Jane Doe" while his gender is actually male. (Complaint, ¶¶ 43-49). While it is deplorable that Plaintiff is harassed due to his gender, such harassment, whether past or anticipated, is in no way attributable to Governor Pence, Attorney General Zoeller, or Director Judson. Further, while Plaintiff has alleged incidents of harassment in the past, Plaintiff cannot foresee the future. As such, his anticipation that he will face further harassment in the alleged three year period it will take for him to apply for naturalization is speculative and without a basis in fact. As such, the Plaintiff has not pleaded facts sufficient to establish Article III standing, and his Complaint must be dismissed.

4. Plaintiff cannot meet his burden of establishing redressability as to Attorney General Zoeller and Director Judson.

Plaintiff also cannot meet the third prong to establish Article III standing, which is likely redressability through a favorable decision. It is unclear what a favorable decision for the Plaintiff obtains them against Attorney General Zoeller or Director Judson. Attorney General Zoeller and

Director Judson have no authority to amend or repeal the laws of the State of Indiana. Moreover, these are not the individuals who evaluate change of name forms when they are submitted by an individual. Any declaratory or injunctive relief against them would not effectuate any change. Therefore, Plaintiff cannot demonstrate that it is likely that any alleged potential injury will be redressed by a favorable decision.

IV. CONCLUSION

As such, Plaintiff has not met his burden of alleging sufficient facts to establish Article III standing, which is a constitutional prerequisite to invoke federal court jurisdiction. Therefore, the Court should dismiss the Complaint for lack of standing as there is no case or controversy before the Court. *See MainStreet Organization of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 747 (7th Cir. 2007) (noting that "if there is no Article III standing, the court is obliged to dismiss the suit even if the standing issue has not been raised . . . ."). Accordingly, taking every allegation in the Complaint as true, it fails to state a claim for relief and this Court lacks subject matter jurisdiction and therefore, this Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12 (b)(1) and Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

GREGORY F. ZOELLER
Indiana Attorney General
Attorney No. 1958-98

Date: November 18, 2016

By: */s/ Matthew K. Phillips*
Matthew K. Phillips
Deputy Attorney General
Attorney No. 28724-49

OFFICE OF THE INDIANA ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 W. Washington St.
Indianapolis, IN 46204-2770
Phone: (317) 234-2415
Fax: (317) 232-7979
Email: Matthew.Phillips@atg.in.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, a copy of the foregoing *Memorandum In Support Of Defendants' Michael Pence, Gregory Zoeller, Lilia Judson's Motion to Dismiss First Amended Complaint* was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Matthew K. Phillips
Matthew K. Phillips
Deputy Attorney General

OFFICE OF THE INDIANA ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 W. Washington St.
Indianapolis, IN 46204-2770
Phone: (317) 234-2415
Fax: (317) 232-7979
Email: Matthew.Phillips@atg.in.gov