

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN DOE, formerly known as)
JANE DOE,)
)
Plaintiff,)

v.)

Case No.: 1:16-cv-02431-JMS-DML

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.)

**REPLY 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 Reply 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”), for alleged violations of the United States Constitution due to the operation of Indiana Code § 34-28-2-2.5(a)(5) (the “Statute”), which states

that a petition for a change of name requires proof that a person seeking a change of name is a United States citizen. Governor Pence, Attorney General Zoeller, and Director Judson have moved to dismiss Plaintiff's Amended Complaint because Plaintiff cannot establish Article III standing. (Dkts. 40, 41).

II. ANALYSIS

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 First Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. 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." *Winkler v. Gates*, 481 F.3d 977, 979 (7th Cir. 2007). 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 v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (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 . . .”). Governor Pence, Attorney General Zoeller, and Director Judson address each of the Plaintiff’s arguments set forth in his Response in Opposition below.

A. Plaintiff cannot establish the necessary element of injury in fact as to Governor Pence, Attorney General Zoeller, or Director Judson.

Plaintiff contends that he cannot change the name on his “formal identification documents,” and therefore, he is compelled to identify himself as “Jane” each time he is required to provide formal identification. (Plaintiff’s Response, dkt. 50, p. 4). Plaintiff argues that this has caused him harm in the past because individuals other than Governor Pence, Attorney General Zoeller, or Director Judson have derided him due to the discrepancy between the traditionally female name, “Jane,” and Plaintiff’s identification as a male. (Id. at pp. 5-6). However, the key factor that Plaintiff overlooks is that he has not even attempted to change his name.

The basic question that this Court must address is whether the Plaintiff’s allegations present “a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.” *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, (quoting *Railway Mail Association v. Corsi*, 326 U.S. 88, 93 (1945)). It is insufficient that the controversy may arise in the future; the controversy must be immediate. *J.N.S., Inc. v. Indiana*, 712 F.2d 303, 305 (7th Cir. 1983).

Plaintiff concedes that he has not submitted a name change application, stating that such an effort would be futile in light of the Statute’s language and the alleged commentary provided to him by an employee at the Marion County Clerk’s office. (Amended Complaint, ¶ 62). As such, Governor Pence, Attorney General Zoeller, and Director Judson have not “directly and personally... [prevented Plaintiff]” from changing his name as he argues. (See Response Brief, p. 4). Alleging such a speculative and pre-mature injury does not meet the standards set forth in

Babbitt and *J.N.S., Inc.*. Plaintiff simply argues that he *thinks* that any application for a change of name will be denied, and *if* it is denied, then he *may* continue to face the same threats, mocking, and humiliation that he has experienced in the past subsequent to those instances when he is required to provide formal identification.¹ (See Response Brief, pp. 4-5). An alleged injury that the Plaintiff opines will be incurred does not establish the actual or imminent invasion of a concrete and particularized interest to establish an injury in fact for the purposes of Article III standing. *Lac Du Flambeau Band of Lake Superior Chippewa Indiana v. Norton*, 422 F.3d 490, 495-96 (7th Cir. 2005).

B. Plaintiff cannot establish the second element for Article III standing of causation.

For the second element to be satisfied, there must be a causal connection between the alleged injury and the alleged conduct of Governor Pence, Attorney General Zoeller, and Director Judson. The alleged injury has to be fairly traceable to the challenged action of these defendants, and not the result of the independent action of some third party. *Lujan*, 504 U.S. at 560.

Plaintiff begins his analysis of the second element for Article III standing by stating that “Governor Pence and Attorney General Zoeller have a duty to enforce the law.” (Response Brief, p. 6). Instead of citing a statute or case which supports such a contention, the Plaintiff instead cites his own Amended Complaint. (*Id.*). The duties of the Governor and the Attorney General are established by the Indiana Constitution and the Indiana Code. Completely absent from both the Indiana Constitution and the Indiana Code are any duties imposed on Governor Pence or Attorney General Zoeller to “enforce” the Statute at issue in this matter. *See generally*, IND. CONST., Art. 5, §§ 1, 11, 12, 14; IND. CODE § 4-6-2-1, et seq. Plaintiff offers nothing but his blanket allegation that

¹ As further provided in subsection B, Plaintiff does not allege that these threats, instances of mocking, and humiliating episodes were committed by Governor Pence, Attorney General Zoeller, or Director Judson but rather by individuals who are not parties to this lawsuit.

they have such a duty without any support in law for such an allegation. Governor Pence and Attorney General Zoeller are not the state officials who review change of name applications and then determine which applicants receive the name change they seek. Plaintiff argues that his alleged injury “is attributable at least in part” to Governor Pence and Attorney General Zoeller due to their “state duties, in enforcing the statute;” unfortunately for the Plaintiff, his unsupported contention that Governor Pence and Attorney General Zoeller have a duty to enforce the Statute is incorrect.

As to Director Judson, it defies reason as to how the Plaintiff has been harmed by the creation of a form, purportedly at the direction of Director Judson. The form that the Plaintiff fills out to apply for a name change has no connection with the derision he has received in the past from individuals after Plaintiff had to produce his formal identification. Such harassment, whether past or anticipated, is also in no way attributable to Governor Pence and Attorney General Zoeller.

C. Plaintiff cannot meet his burden of establishing redressability.

Plaintiff saves his weakest argument for last, contending that the third element of redressability is met because an “injunction prohibiting each of the State Defendants from enforcing the Statute...will remedy Plaintiff’s injury....” (Response Brief, p. 7). This argument is nothing more than a concession that Plaintiff does not really know against whom to file suit. Plaintiff could file suit against a multitude of officials in the State of Indiana to increase his chances of meeting the Article III standing requirement of redressability against one of the defendants, but that does not mean that that he has Article III redressability as to each of them.

In this matter, Governor Pence, Attorney General Zoeller and Director Judson have no authority to amend or repeal the laws of the State of Indiana. These are not the individuals who evaluate change of name forms when they are submitted, and 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.

III. CONCLUSION

Because of the foregoing, and the arguments set forth in Defendants' Memorandum in Support of Motion to Dismiss First Amended Complaint, the First Amended Complaint should be dismissed in its entirety.

Respectfully submitted,

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Date: December 13, 2016

By: /s/ Matthew K. Phillips
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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2016, a copy of the foregoing 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

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