

IN THE INDIANA COURT OF APPEALS

APPELLATE CASE NO. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS)	
OF INDIANA, INC. and)	Marion County Superior Court
LEAGUE OF WOMEN VOTERS)	Civil Division-02
OF INDIANAPOLIS, INC.)	
COUNCIL, INC.,)	
)	
Appellants)	
)	Trial Court
vs.)	Cause No. 49D02-0806-PL-027627
)	
TODD ROKITA, in his official)	The Honorable S. K. Reid
capacity as Indiana Secretary of State)	
)	
Appellee)	

BRIEF OF APPELLANTS

William R. Groth (Atty. No. 7325-49)
Fillenwarth Dennerline Groth & Towe, LLP
429 E. Vermont Street, Ste. 200
Indianapolis, IN 46202
317/353-9363 (Office)
317/351-7232 (Facsimile)

Karen Celestino-Horseman, (Atty. No. 15762-49A), Of Counsel
Thomas N. Austin (Atty. No.
Bruce G. Jones (Atty No.
Austin & Jones, P.C.
One North Pennsylvania
Suite 220
Indianapolis, IN 46204
317/632-5633 (Office)
317/630-1040 (Facsimile)

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUES.....2

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS.....5

SUMMARY OF ARGUMENT.....7

ARGUMENT.....10

CONCLUSION.....46

WORD COUNT CERTIFICATE.....47

CERTIFICATE OF SERVICE.....48

ATTACHMENT A – TRIAL COURT JUDGMENT

TABLE OF AUTHORITIES

Cases

Statutes

Indiana Trial Rules

STATEMENT OF ISSUES

Did the trial court err by granting the motion to dismiss filed by the defendant below, Indiana Secretary of State Todd Rokita, and finding that the Indiana Photo ID Law does not violate Art. II, §2 or Art. I, §23 of the Indiana constitution?

STATEMENT OF THE CASE

On June 20, 2008 the League of Women Voters of Indiana, Inc. and the League of Women Voters of Indianapolis, Inc. (hereinafter jointly referred to as the “League”), filed the instant action seeking a declaration that the Indiana Photo ID Law is unconstitutional in that it violates both Art. II, §2 of the Indiana constitution. On August 5, 2008 the League filed an Amended Complaint (App. ____) alleging that the Law also violated Art. I, §23 of the Indiana constitution. On September 15, 2008 defendant below, Indiana Secretary of State Todd Rokita, filed a motion to dismiss pursuant to Ind. Trial Rule 12(B)(1) and 12(B)(6). On December 17, 2008, the trial court dismissed the action on the merits, finding that the Law did not contravene Art. II, § 2 of the Indiana constitution because that section “permits election regulations even if not specifically mentioned therein,” and further holding that the Law is a “procedural regulation, not an additional qualification on voting”. (App. ____). The trial court also ruled that any classes of voters created by the Law are “reasonably relate[d] to self-evident inherent characteristics that distinguish the different classes” and thus also ruled the Law

did not violate Art. I, § 23 of the Indiana constitution. The League filed a timely notice of appeal on January 15, 2009.

STATEMENT OF FACTS

The Indiana Photo ID Law (hereinafter the “Law” or “Photo ID Law”), adopted by the Indiana General Assembly in 2005, is codified at various places in Title 3 of the Indiana Code. *See*, Ind. Code §§3-5-2-40.5, 3-11-10-1.2, 3-11-8-25.1, 3-11.7-5-2.5 and 3-11.7-5-3. The Law applies to in-person voting at both primary and general elections, but not to absentee ballots submitted by mail. It contains an exception for certain classes of persons; persons living and voting in a state-licensed facility such as a nursing home are not required to present photo identification when voting in-person. *Id.*, §3-11-8-25.1; Amended Complaint, ¶6 (App. ___).

When a voter presents himself or herself at the polls to vote, the first thing the voter must do under Indiana law is provide proof of identification. *See, id.*, § 3-10-1-7.2 (primary elections) and § 3-11-8-25.1 (general elections). “Proof of identification” is defined as follows:

. . . a document that satisfies all the following:

- (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual’s voter registration record.
- (2) The document shows a photograph of the individual to whom the document was issued.
- (3) The document includes an expiration date, and the document:
 - (A) is not expired; or
 - (B) expired after the date of the most recent general election.

- (4) The document was issued by the United States or the state of Indiana.

Id., § 3-5-2-40.5. If a voter fails to present acceptable “proof of identification”, the voter can cast a provisional ballot if the voter executes a challenged voter affidavit.¹ *Id.*, §§ 3-11-8-25.1(e) and 3-10-1-7.2(d).

All provisional ballots are to be counted by noon of the second Monday following the election. *Id.*, § 3-11.7-5-1. If the voter wishes for his or her provisional ballot to be counted, she must personally appear before the circuit court clerk or the county election board before the deadline for counting

¹ The challenged voter affidavit must be sworn and contain the following:

- (1) A statement that the voter is a citizen of the United States.
- (2) The voter's date of birth to the best of the voter's information and belief.
- (3) A statement that the voter has been a resident of the precinct for thirty (30) days immediately before this election or is qualified to vote in the precinct under IC 3-10-10, IC 3-10-11, or IC 3-10-12.
- (4) The voter's name and a statement that the voter is generally known by that name.
- (5) A statement that the voter has not voted and will not vote in any other precinct in this election.
- (6) The voter's occupation.
- (7) The voter's current residential address, including the street or number and if applicable, the voter's residential address thirty (30) days before the election, and the date the voter moved.
- (8) A statement that the voter understands that making a false statement on the affidavit is punishable under the penalties of perjury.

Id., § 3-11-8-23(1)-(8).

provisional ballots. *Id.*, § 3-11.7-5-5(a)(2). At that time, the voter can do one of two things. The first alternative states that if the voter:

- (1) provides proof of identification to the circuit court clerk or county election board; and
- (2) executes an affidavit before the clerk or board, in the form prescribed by the commission, affirming under the penalties of perjury that the voter is the same individual who:
 - (A) personally appeared before the precinct election board; and
 - (B) cast the provisional ballot on election day;

the county election board shall find that the voter's provisional ballot is valid and direct that the provisional ballot be opened under section 4 of this chapter and processed in accordance with this chapter.

Id., § 3-11.7-5-2.5(b)(1)-(2)(A)-(B).

The voter does have another option. She can file an affidavit at the county clerk's office by the deadline for counting provisional ballots, attesting to her religious objection to being photographed, or averring that she is "indigent"² and "unable to obtain proof of identification without the payment of a fee." *Id.*, § 3-11.7-5-2.5(c)(1)-(2)(B). Once a voter takes one of the steps set forth above, the election board is then directed to find that the voter's provisional ballot should be opened and counted. *Id.*, §3-11.7-5-2.5(d)-(f)(2). These affidavits, which are not available at the polls on election day, are valid for only the election for which

² Nowhere does the Photo ID Law define "indigent" thus it is left to each of the 92 county election boards to set that county's standard for whether a voter qualifies as "indigent."

they are filed. New religious objector or indigency affidavits must be filed for each subsequent election in which a voter wishes to avail herself of the indigency or religious objector exemptions.

SUMMARY OF ARGUMENT

ARGUMENT

I STANDARD OF REVIEW

This action was dismissed on the merits by the trial court pursuant to Ind. Trial Rule 12(B)(6). As our supreme court has recognized:

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Hosler ex rel. Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193, 196 (Ind. Ct. App. 1999), *trans. denied*. Thus, our review of a trial court's grant or denial of a motion based on Trial Rule 12(B)(6) is de novo. *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001).

When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. *City of New Haven v. Reichhart*, 748 N.E.2d 374, 377 (Ind. 2001). A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint that the complaining party is not entitled to relief. *Id.* (citing *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*).

Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602, 604-05 (Ind. 2007).

A complaint should not be dismissed unless, viewing the complaint's allegations in the light most favorable to the non-moving party, it fails to state any

facts on which the court can grant relief. *Id.* at 605. The facts alleged in the complaint must be taken as true, and dismissal is appropriate only where it appears that the plaintiff cannot be granted relief under any set of facts. *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 980-81 (Ind. 2005).

Legislation under constitutional challenge is clothed with a presumption of constitutionality, and the burden to rebut this presumption is upon the challenger, with all reasonable doubts resolved in favor of the law's constitutionality. *Matter of Tina T.*, 579 N.E.2d 48, 56-57 (Ind. 1991).

II. THE INDIANA PHOTO ID LAW VIOLATES ART. II, § 2 OF THE INDIANA CONSTITUTION

- A. Voting is a fundamental right guaranteed to all voters who meet the enumerated qualifications in Art. II, § 2, and the legislative branch cannot abridge or deny that right by adding a new voting qualification other than by constitutional amendment.

Voting has long been recognized by both Indiana and the United States supreme courts to be a fundamental right in our republic, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Indiana Gaming Comm'n v. Mosely*, 643 N.E.2d 296, 304 (Ind. 1994). It is also a right protected by the first amendment to the federal constitution. *Murphy v. State*, 837 N.E.2d 591, 595 (Ind. Ct. App. 2005) (“We accordingly decline the State’s invitation to hold First Amendment rights are not implicated in the voting context.”). The right to vote is considered one of the most important rights of citizens, which cannot be abridged or denied but by constitutional amendment:

The right [to vote] is a political privilege of the highest dignity which can emanate only from the people, and is reverently and emphatically enshrined in the sovereign statement of the organic law of the people. *The privilege cannot be abridged or denied by any board or agency created by the legislature, or through direct legislative enactment, except as such limitation upon the privilege is authorized by other provisions within the organic law of the state.*

State ex rel. McGonigle v. Madison Circuit Court, 193 N.E.2d 242, 249 (Ind. 1963)(emphasis added).

In keeping with the fundamental importance of voting, our supreme court has held that “*any effort on the part of the General Assembly to establish a public electorate which would differ from that defined in Art. II, §2 of the Constitution must necessarily be in conflict with the manifest purpose of that section to designate the voters entitled to participate in all elections ‘not otherwise provided for by this constitution.’” Board of Election Commissioners of City of Indianapolis v. Knight*, 187 N.E. 108, 117 N.E. 567, 569 (1917) (emphasis added). Because Art. II, §2 designates the class of persons eligible to be electors and confers on them the right of suffrage, in the absence of other restrictive provisions contained in the Constitution those electors shall be entitled “to vote generally whenever the polls are opened and elections held for anything connected with the general government, or the state or local governments.” *Id.* In other words, “[w]hen the Constitution defines the qualifications of voters such qualifications cannot be changed nor added to by statute.” *Fritch v. State*, 199 Ind. 89, 155 N.E. 257, 258 (1927) (citing *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890)).

B. The standards to be used in interpreting Art. II, §2.

When interpreting provisions of Indiana's constitution, it is necessary to look to "the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions". *McCullough v. State*, ___N.E.2d ___, 2009 WL 312766, *2 (Ind. Feb. 10, 2009)(citing *State v. Montfort*, 723 N.E.2d 407, 409 (Ind. 2000)). Because voting is a fundamental right, Art. II, § 2 should be interpreted so as to expand rather than restrict voters' rights. "The purpose of [election] law and the efforts of this court are to secure to the electorate an opportunity to freely and fairly cast his ballot, ... *and prevent disenfranchisement.*" *Curley v. Lake County Bd. of Elections*, 896 N.E.2d 24, 39 (Ind. Ct. App. 2008) (emphasis added) (quoting *State ex rel. Harry v. Ice*, 207 Ind. 65, 71, 191 N.E. 155, 157 (1934)).

The Indiana constitution is a contract between the State and its citizens. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 409 (Ind. 1991). A court charged with the task of interpreting provisions of the Indiana constitution must consider the "common understanding of both those who framed it and those who ratified it, and should look to the history of the times, and examine the state of things existing when the constitution or any part of it was framed and adopted." *Bayh*, 573 N.E.2d at 412. Indiana Supreme Court Chief Justice Randall Shepard has characterized the Indiana constitution as one dominated by a rejection of elitism. "...[W]hile the delegates relied heavily on the constitutions of the Ohio Valley and southeastern states, they generally borrowed only those provisions which

promoted political inclusion, eschewing the elitist provisions favored by territorial federalists, such as tax requirement for voting, property qualifications for officeholders...and protection of slavery.” Price v. State, 653 N.E.2d 954, 961-62 (Ind. 1993)(emphasis added).

The right to vote is more than merely being allowed to cast a “provisional” ballot. It also necessarily encompasses the right to have that vote counted in the final tallies. “[E]veryone ha[s] the right to vote *and have his vote counted*”. *Davis v. Bandemer*, 478 U.S. 109, 124 (1986); see also, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots *and have their vote counted...*”)(quoting *United States v. Classic*, 313 U.S. 299, 315 (1941) (emphasis added)).

C. The history and evolution of Art. II, § 2.

Art. II, § 2(a), as it currently exists, sets forth the qualifications necessary to vote in Indiana elections.

Article 2. Suffrage and Elections

* * *

Section 2. Voting Qualifications.

- (a) A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.

Thus to vote in an Indiana election, a voter must only satisfy the requirements of citizenship, age and residency. In addition, I.C. § 3-7, as authorized by Art. II, §14(c) of the constitution, requires that persons who meet the constitutional qualifications as eligible voters be registered to vote.

Art. II, §2, as originally enacted in 1851, conferred the general right of suffrage on “every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months” immediately preceding an election. *Board of Election Commissioners of City of Indianapolis v. Knight*, 117 N.E. at 570. Although in its original form it set qualifications based upon race and sex (unfortunately reflective of the times), the 1851 Constitution was still intended to equalize rather grant preferences.

Over the years following its enactment, Art. II, §2 has been repeatedly amended to expand the franchise by removing barriers to voting by certain classes of citizens. In 1881, Art. II, §2 was amended to permit the General Assembly to pass legislation to require the registration of qualified voters as a means of preventing fraud. *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 15 (Ind. 1922). It was amended again in 1921, in response to the nineteenth amendment to the federal constitution, to allow women the right to vote. *Wilkinson v. State*, 197 Ind. 642, 151 N.E. 690, 691 (1926). It was again amended in 1976 after a series of federal court decisions invalidated Indiana’s six month residency requirement in the state and its 60 day residency requirement in the township. *Affeldt v. Whitcomb*, 319 F.Supp.60 (N.D.Ind. 1970), *aff’d* 405 U.S. 1034 (1972) (six

months in State residency requirement); *Jackson v. Bowen*, 420 F.Supp. 315 (S.D.Ind. 1976) (striking down township residency requirement). A 1976 amendment conformed Art. II, §2 to the twenty-sixth amendment to the federal constitution by giving 18 year-olds the right to vote. *Gallagher v. Indiana State Election Board*, 598 N.E.2d 510, 513 (Ind. 1992).

D. The General Assembly cannot add to Art. II, §2's qualifications.

Legislative power, though broad, is limited by constitutional inhibitions, which act as a check on legislative overreaching. These inhibitions may be either express or implied. When the constitution declares how a fundamental right such as voting may be exercised, it impliedly prohibits its exercise in some other way. *State of Indiana v. Dearth*, 201 Ind. 1, 164 N.E. 489, 493 (1929) (citing *Morris v. Powell, supra*). Any person who possesses all of the constitutional qualifications prescribed by Art. II, §2, and who is a legally registered voter pursuant to legislation expressly authorized by Art. II, §14, is entitled to vote and to have that vote counted, notwithstanding any law passed by the Indiana legislature to the contrary. Where “qualifications” are set forth in the constitution, short of a constitutional amendment no additional qualifications can be imposed by legislative enactment. *State ex rel. McGonigle v. Madison Circuit Court, supra*; *Morris v. Powell, supra*. This view is not unique to Indiana, *see, e.g., Wilkinson v. Queen*, 269 S.W. 2d 223, 225 (Ky. Ct. App. 1954) (“It is a generally accepted rule that the enumeration in a state constitution of the classes of citizens who shall be permitted to vote is considered...as a complete and final test of the voting

privilege. The Legislature can neither take from, nor add to, the qualifications there set out unless the power to do so is expressly, or by necessary implication, conferred upon it by the constitution itself.”), and it is a view shared by the federal courts. *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the qualifications clause of Art. I, § 2, cl. 2 of the federal constitution provides an exclusive list of the qualifications to be a member of Congress); *see also, United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829-39 (1995)(holding that term limits constituted an unconstitutional additional qualification for federal legislative office).

- E. The Photo ID Law is not a times, places and manner procedural regulation but instead one that imposes a new property qualification on the right to vote.

The limitations in Indiana’s constitution do not, of course, prohibit Indiana from passing legislation to regulate the conduct of elections to insure that they are fair, efficient and impartial. Under the federal constitution, Art. I, §4, cl. 1, Indiana has a broad power to prescribe the times, places and manner of holding federal elections, which power is matched by state control over the election process for state and local offices, consistent with limitations placed by the first amendment and other provisions of the federal constitution. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 222 (1989).

The question before the trial court, and now before this Court, which is one of constitutional dimension, is whether the Photo ID Law is a procedural

regulation that merely regulates the means by which the franchise is exercised or, as the League contends, it is one that adds a new substantive qualification, not authorized by the Indiana constitution, to the right to vote.

The trial court declared the Law to be a mere “procedural regulation” (App. __). It erred in so holding, as the Law imposes a new property “qualification” on the right to vote. It is not a mere “times, places and manner” procedural regulation, such as a law setting the hours for holding elections, a law specifying that voting shall take place by paper ballot or electronic machine, or a law establishing the locations of polling places. The Law is a substantive qualification rather than a mere procedural regulation because it imposes burdensome and exclusionary conditions on the right to vote of constitutionally eligible registered voters. If a voter is unable to produce and display the narrow form of photographic identification at the polls or, within ten (10) days thereafter at the office of the county clerk, she will not have her vote counted in the final tallies. Thus, just as not being at least 18 years of age, a resident of the precinct for at least thirty (30) days, or a citizen would disqualify a person from participation in the electoral process, so too does the failure of an otherwise constitutionally qualified voter to display the prescribed form of photographic identification disqualify that individual from having her vote counted.

A “qualification” is an attribute which must be met. It is a “condition or circumstance which must be satisfied”. *Webster’s II New Riverside University Dictionary* 961 (1984)(quoted in *Geberding v. Munro*, 134 Wash.2d 188, 949 P.2d

1366, 1371 (1998) (holding that term limits imposed by the legislature on officeholders were qualifications for office in the same manner as age, citizenship and residency)). That the Law is a “qualification” is demonstrated both by the practical effect of a voter not producing the required form of identification (her provisional vote will not be counted) as well as Indiana supreme court precedent.

Our supreme court over a century ago first ruled that a qualification on the right to vote can include even a well-intentioned law which requires some but not all voters to produce at the polls a particular tangible document. In *Morris v. Powell*, the 1888 law under challenge excluded from voting any otherwise qualified voters who had been out of the state on business for six months or more prior to an election, unless they produced at the polling place a certificate from the county auditor which certified that the voter was on the tax rolls and was still a taxpayer in the county. 25 N.E. at 221-22. Our supreme court struck down that law, finding that the law added a “property qualification to a certain class of voters”, in violation of Art. II, §2. *Id.* at 223. In so doing our supreme court observed that:

[That w]hen the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote the Legislature cannot add an additional qualification is too plain and well recognized for argument, or to need the citation of authorities. *The principle is elementary that when the Constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment.* That our Constitution does define the qualification of voters, and that the part of section 13, *supra*, providing that certain persons shall make proof of the fact that they are

taxpayers of the county, is an *attempt to add an additional qualification... and it is, therefore, unconstitutional and void.*

Id. (emphasis added).

Morris was decided after the 1881 amendment to the Indiana Constitution adding Art. II, §14 to the constitution. This provision granted the legislature the authority to enact a system of registering voters, authority previously not held by the general assembly.³ Additionally, Art. II, §2 was amended so as also to reference the requirement of being a “duly registered voter.”

Our supreme court thus declared this particular election law void because the law disenfranchised every person too ill to attend the board of registration, and burdened some voters by “unreasonably and unnecessarily requir[ing] persons.... to return home to register, as well as to vote, *making two trips, when only one ought to be required.*” *Id.* at 225 (emphasis added). The court also observed that the 1888 law was unconstitutional because it “require[d] proof of qualifications to vote, which the voter under the constitution does not have to possess” and in so requiring imposed “extra burdens and hardships on these classes of voters [those required to comply with its terms].” *Morris*, 25 N.E. at 225-26. While the supreme court expressed “regret to declare void any law having for its object the purity of the elections,” it determined that it could not “so far forget our duty as to uphold the laws so plainly in conflict with the fundamental law of the state as the

³ Art. 2, §14(c) now provides: “The General Assembly shall provide for the registration of all persons entitled to vote.”

section of the law under consideration.” *Id.*⁴

Like the tax document required to vote and fully participate in the electoral process challenged in *Morris v. Powell*, the requirement of government identification with an expiration date and photograph is a “qualification” because it imposes an unnecessary and arbitrary burden on some voters, particularly non-drivers but also students⁵, and it disqualifies those otherwise eligible voters who are unable for any reason to comply with its requirements from having their provisional votes counted. It is thus beyond a mere procedural “time, places a property requirement for full participation in the electoral process, a new qualification imposed on voters who otherwise meet all constitutional

⁴ Concurring in *Morris*, Justice Elliott used even more forceful language.

“The legislature can enact only such a law concerning the right of suffrage as the constitution authorizes....The question is one of power. If the constitution such enactments as those contained in section 13, the power exists, and the section must stand; if the constitution does not authorize such a law the power does not exist, and the section must fall...The power which the general assembly assumed to exercise is not an ordinary legislative power, for, in assuming to legislate upon the subject of the qualifications of voters, that body entered into the domain of those in whom original power resides, and from whom all legislative powers are derived. The people control the subject of the right of suffrage, and legislative assemblies have only such power over that subject as the people have granted them by the organic law. *That the legislature cannot add to the qualifications of voters is a proposition upon which there is no diversity of opinion.*”

Morris, 25 N.E. at 227 (emphasis added).

⁵ The Law arbitrarily imposes those burdens on college students depending on where they are matriculating. For example, voting officials in Tippecanoe County have agreed to accept Purdue student ID cards notwithstanding the lack of an expiration date, while other student ID cards are not acceptable due to the lack of an expiration date. See <http://www.wsbt.com/news/election/2008/17855654.html>.

requirements to cast a vote that will be counted. Although the people of Indiana are free through the constitutional amendatory process to impose this new voting qualification, the Legislature cannot do by mere statutory enactment.

In assessing whether a requirement for voting is procedural or substantive, and thus subject to the strictures of Art. II, § 2, our supreme court has also examined whether the challenged election law unnecessarily burdens the right to vote. For example, in *Blue v. State ex rel. Brown*, 206 Ind. 96, 188 N.E. 583, 591 (1934), *rev'd in part on other grounds, Harrell v. Sullivan*, 220 Ind. 108, 40 N.E.2d 115 (1942), the supreme court observed that the former practice, in place prior to 2005, of requiring a voter to verbally identify herself and sign her name on the pollbook to enable a signature comparison was not an unconstitutional additional qualification because it was uniformly applied, imposed “no burden upon the one challenged” and a challenged voter was allowed to “take the oath as other challenged voters, and he is then permitted to vote.” *Id.*

The burdens and hardships imposed by the Law on some Indiana voters subject to its requirements are self-evident. To secure an Indiana photographic identification card, a would-be voter must present the original or certified copy of their birth certificate, a certificate of naturalization, a U.S. Veteran’s photo identification, a U.S. military photo identification, or a U.S. passport. Ind. Admin. Code tit. 140, §7-4-3; Amended Complaint, ¶9 (App. ___). Indiana counties charge

between \$3-\$12 for a birth certificate, and in some states the cost is much higher. The total fees for a U.S. passport are approximately \$100. Amended Complaint, ¶10 (App. ___). Persons born at home and of a certain age, particularly those in another state, cannot simply go down to the Health Department and get a copy of their birth certificate. A person who fails to or cannot present the required form of ID either at the polls or later at the office of the county clerk will be prevented from having his vote counted in the final tally, thus requiring two trips or more to comply with the Law's requirements and to have one's vote counted. The Law is burdensome, exclusionary and disqualifying as to some voters. By imposing a new property qualification on the right to vote, and disqualifying the provisional votes of those who are unable to comply with its requirements, the Law transgresses Art. II, §2.

Both the plurality and dissenting opinions in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008)(holding that the Law on its face did not offend the federal constitution), although disagreeing as to the severity of those burdens, acknowledged that the Photo ID Law selectively imposes some burdens on the right to vote. In his plurality opinion upholding the Law's facial constitutionality under the first and fourteenth amendments to the federal constitution, speaking for two of his colleagues (Chief Justice Roberts and Justice Kennedy) Justice Stevens observed that the Law "imposes some burdens on voters that other methods of identification do not share." *Crawford*, 128 S. Ct. at 1620. In dissent, Justice Souter (joined by Justice Ginsburg) opined that the burden

imposed on voters by the Law “translates into an obvious economic cost (whether in work time lost, or getting and paying for transportation) that an Indiana voter must bear to obtain ID” and that those costs “are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.” *Id.* at 1630. Justice Souter thus concluded that there was no reason to doubt that “a significant number of state residents will be discouraged or disabled from voting” by the Law’s requirements. *Id.* at 1634.

Indeed, the Law has already prevented or discouraged a number of registered and otherwise eligible voters in Marion County and throughout the state from casting a vote that was counted. Amended Complaint, ¶16 (App. ___). For instance, in the 2007 municipal election in Marion County, at least 34 persons arrived at the polls and presented themselves for voting but without the required form of photographic identification. Each of those voters cast a provisional ballot, but of those 34 provisional ballots, 32 of the voters did not produce the required form of photographic identification within the time period allotted by the Photo ID Law, and thus their votes were not counted. Most of those voters had voted for several years at the same location. Amended Complaint, ¶17 (App. ___). Further, in the 2008 primary election 12 nuns in St. Joseph County were not allowed to cast a regular or provisional ballot because they did not have the required form of photographic identification required by the Law. Amended Complaint, ¶18 (App. ___). Additional Indiana citizens have been denied the right to vote, or been discouraged from voting by the Law’s requirements, because their driver’s license

or other form of compliant photographic identification was either lost or stolen, or the voter forgot to bring the required form of identification to the polls on election day. Amended Complaint, ¶19 (App. ___).

Like the county auditor certificate found to be an unconstitutional qualification in *Morris v. Powell*, the Photo ID Law’s new requirement that voters produce a particular form of tangible identification in order to have the voter’s ballot counted in the final tallies adds a qualification to the exercise of the franchise not explicitly or expressly authorized by Art. II, §2 or §14 of the Constitution. Moreover, the burdens associated with obtaining that form of identification fall disproportionately on those voters who are non-drivers, who must gather up the necessary birth certificate and other required documents and then make special trips to the Indiana Bureau of Motor Vehicles in order to obtain the document now required as a qualification to vote and have one’s vote counted.⁶ *Crawford*, 128 S. Ct. at 1643 ((Breyer, J. dissenting) (noting that the Indiana Law “imposes a disproportionate burden upon those eligible voters who lack a driver’s license or other statutorily valid form of ID”).

F. The Law is not a registration law authorized by Art. II, §14(a) of the Indiana Constitution.

⁶ To strike down this Law would simply return Indiana to “time-tested systems [that] were in place to detect in-person voter impersonation fraud”, such as poll worker familiarity with residents of the neighborhood, signature comparisons, and extant criminal provisions. *Crawford*, 128 S. Ct. at 1639 (Souter, J., dissenting).

Secretary of State Rokita argued below that the Law is no more an additional qualification than requiring voters to register. However, while the people of Indiana in Art. II, §14 gave the Legislature the right to require a system of voter registration to assure that voters possess the constitutional qualifications for voting, *Simmons v. Byrd, supra* (holding that voter registration law did not conflict with Art. II, §1 or §2 because Art. II, §14 granted the General Assembly specific authority to “provide for the registration of all persons entitled to vote”), the Photo ID Law has no similar constitutional underpinning.⁷

Under the Indiana constitution, age, citizenship and residency are the exclusive voting qualifications. That is to say, a voter without the requisite age, citizenship or residency qualifications may not fully participate in public elections by casting a vote that will be counted. A voter without the requisite photo ID may cast a provisional vote but that provisional vote will not be counted. Either way, by failing to possess the requisite qualifications to vote the voter is unable to cast a vote that will be counted and thus to influence an election’s outcome. The Law imposes a property “qualification” no different than the constitutional requisites of age, citizenship, present residency and registration.

⁷ It cannot be claimed that the Photo ID Law is an element of the voter registration system. Title 3, article 7, sets forth the system of voter registration. I. C. § 3-7-10-1 provides: “This article is enacted by the general assembly to implement Article 2, Section 14(c) of the Constitution of the State of Indiana, which requires the general assembly to provide for the registration of all persons entitled to vote.” None of the provisions of the Photo ID Law connect with the qualifications to vote that the registration system is intended to verify. There is no requirement that the required form of photographic identification contain a birth date, current address or statement regarding citizenship.

G. The Law is also constitutionally flawed because its requirements are not uniformly applicable to all voters.

Our supreme court also has made clear that any voting qualification must be *uniform* and not selectively applied to an arbitrary class of voter:

The qualifications of voters must be uniform; one voter must possess the same as another, and he need possess no more. Where, as under our Constitution, registration is a qualification, one voter can not be required, by a law, to register, while another has the right to vote without registering. Indeed, such a discrepancy would invalidate a law even if the Constitution was silent as to registration.

Morris, 25 N.E. at 224 (emphasis added). “All regulations of the elective franchise, however, must be reasonable, *uniform*, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.” *Blue v. State ex rel. Brown*, 188 N.E. at 588, *rev’d on other grounds by Harrell v. Sullivan*, *supra* (emphasis added). The Law is not universally applicable to all voters in that it does not apply to voters who mail in an absentee ballot or those who live in a state-certified residential facility housing the voter’s polling place. It thus fails the Indiana constitutional requirement that voting laws, particularly those which directly condition the voting privilege, be uniformly applicable to all voters.

H. The Law is unnecessary because Indiana has no history of imposter voting at the polls on election day.

The State seeks to justify the Photo ID Law as being necessary to prevent fraud by in-person voters; however, there have been no cases of in-person voting

fraud in Indiana. *Crawford*, 128 S. Ct. at 1618 (Stevens, J., plurality opinion)(“The record contains no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history”); *see also* 128 S. Ct. at 1637 (Souter, J., dissenting) (“...The State has not come across a single instance of in-person voter impersonation fraud in all of Indiana’s history”). Yet in spite of the fact that there have been documented cases regarding fraud involving the casting of absentee ballots by mail, *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004), it irrationally exempts from its reach anyone casting an absentee ballot by mail. Thus, anyone wishing to cast a fraudulent vote need only do it by mail as the Photo ID Law does nothing to prevent fraudulent voting by persons mailing ballots to the election board. The irrationality of this scheme is explicated more fully in the League’s discussion, *infra*, explicating how the Law also violates Art. I, § 23 of Indiana’s constitution.

I. Federal district court opinions are not binding on this Court.

The federal district court in the *Crawford* litigation, in less than two short paragraphs of its lengthy opinion, held that the Law did not violate Art. II, §2 of Indiana’s constitution. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 843 (S.D. Ind. 2006).⁸ However, a decision of a federal court interpreting Indiana law is not binding on Indiana state court judges. *See, e.g., Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1285 (Ind. 2006) (federal opinions interpreting Indiana

⁸ A different federal judge recently expressed his agreement with that opinion, again without performing any independent analysis. *Stewart v. Marion County Election Board*, ____ F.Supp.2d ____, 2008 WL 4690984 (S.D. Ind. 2008).

laws do not absolve Indiana courts from their ultimate responsibility for determining Indiana law). Not even decisions of the Seventh Circuit interpreting Indiana law, though entitled to “respectful consideration,” are binding on Indiana state-court judges. *Indiana Department of Public Works v. Payne*, 829 N.E.2d 184, 196 (Ind. Ct. App. 2005). This is especially true of federal decisions interpreting the Indiana constitution. *Priest v. State*, 270 Ind. 449, 386 N.E.2d 686, 689 (1979)(construction of Indiana constitutional provisions is an “independent judicial act in which federal cases play only a persuasive role”) (citing *Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171, 175 (1977)). Thus, this Court has an independent duty to evaluate the Law under Indiana’s constitution, applying Indiana supreme court precedents and looking to the history of the drafting and ratification of the 1851 Indiana constitution in performing that task.

III. THE PHOTO ID LAW VIOLATES ART. 1, § 23 OF THE INDIANA CONSTITUTION

Art. 1, § 23 of the Indiana Constitution provides: “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.” The analysis to determine whether a law infringes upon the rights promised by Art. 1, § 23 of the Indiana Constitution is a two step process.

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly

situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).

The League maintains that the requirement of presenting photo identification is not reasonably related to the inherent characteristics that distinguish in-person and absentee voters. Additionally, among the in-person voters, the photo identification requirement is not reasonably related to the differences between in-person voters with state or federally issued identification with or without an expiration date and/or photograph. Further, for all these classifications, the preferential treatment is not equally available to all voters.

A. The disparate treatment is not reasonably related to the claimed inherent characteristics.

The first prong of the analysis consists of two steps. To determine whether the disparate treatment is reasonably related to the inherent differences of the classifications at issue, the Indiana supreme court has held “such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and [whether] the disparate treatment accorded by the legislation is reasonably related to such distinguishing characteristics.” *Collins*, 644 N.E.2d at 78-79. “We believe that this requirement incorporates and satisfies the often expressed concerns that such legislative classifications be ‘just,’ ‘natural,’ ‘reasonable,’ ‘substantial,’ ‘not artificial,’ ‘not capricious,’ and ‘not arbitrary.’” *Id.*

As Chief Justice Shepard has observed:

The first step in Indiana's two-part analysis begins with the same question as federal equal protection doctrine: what is the claimant's classification *vis a vis* the challenged governmental act? The similarity does not run deep, however, because we do not strain to pigeonhole the claimant into a suspect or semi-suspect class. Instead, by utilizing just one test under the Equal Privileges and Immunities Clause, and thus a single standard of review, we intend merely to determine whether or not there is disparate treatment under the governmental act. If there is not, then the claimant cannot prevail and one need not continue the analysis....

Thus, Indiana's classification analysis looks not to who claims disparate treatment, but first to what disparate treatment is claimed. Where disparate treatment is found, an inquiry into the reasonableness of the classification to the legislative purpose will be undertaken before moving to the second part of the test. Additionally, significant to this discussion, this analytical process has its source within our distinctive constitutional jurisprudence.

A New Generation: The Mature Nature of State Constitution Jurisprudence, 30 Val. U.L. Rev. 421, 453-454 (1996).

As discussed *supra*, the only voters required to present photo identification are those voters who vote in-person. *See, e.g.*, I.C. 3-11-8-25.1. While the League and Rokita agree there are inherent differences between the casting of a ballot in-person and voting by mail-in absentee, *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006), the League maintains that these differences do not reasonably relate to the requirement that in-person voters, but not mail-in absentee voters, present a specific form of identification. Furthermore, the League also contends that there are no real inherent differences between classes of persons voting in-person who have a state or federal identification with or without an expiration date and/or a

photograph. The League also contends that any differences that might distinguish the various classes, do not reasonably relate to the claimed distinctions that allow some persons to vote and others to not vote.

- 1. The requirement that in-person voters verify their identity using specific identification and that mail-in absentee voters are not required by law to affirm their identity under penalty of perjury does not present distinctive, inherent characteristics that rationally distinguish the unequally treated class.**

The first issue raised is whether the differences between casting an absentee mail-in ballot and voting in person serve as a rational distinction requiring the in-person voter to provide proof of identification while the absentee mail-in voter need only execute an affidavit affirming that he/she is eligible to vote in the precinct but which by law does not require the voter to affirm under penalty of perjury that the voter is who he/she claims to be.

- a. The claimed distinctions between mail-in absentee voting and in-person voting does not support the claimed purpose of the Photo ID Law.**

A voter who votes mail-in absentee is not required to provide proof of identification. To vote an absentee ballot by mail, the voter must meet certain criteria such as serving as a poll worker on election day, being out of the county on election day, or being an elderly or disabled voter. *See*, I.C. 3-11-10-24(a)(1)-(10).⁹

⁹ Indiana Code 3-11-10-24(a)(1)-(10) provides a voter may vote mail-in absentee if:

Where there are differences between absentee voters and in-person voters due to the process employed in casting the ballot, these differences are not reasonably related to the purpose of the Law. The differences between mail-in absentee ballots and in-person ballots were discussed in *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006). In *Horseman*, the trial court declared that I.C. § 3-12-1-13 was unconstitutional under Art. 1, §23 of the Indiana Constitution because it did not allow absentee ballots lacking two sets of clerks' initials to be counted in a recount while in-person ballots lacking two sets of clerks' initials could be counted in a recount. The Indiana supreme court found that I.C. §3-12-1-13 was

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- (1) The voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.
 - (2) The voter will be absent from the precinct of the voter's residence on election day because of service as:
 - (A) a precinct election officer under IC 3-6-6;
 - (B) a watcher under IC 3-6-8, IC 3-6-9, or IC 3-6-10;
 - (C) a challenger or pollbook holder under IC 3-6-7; or
 - (D) a person employed by an election board to administer the election for which the absentee ballot is requested.
 - (3) The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during the entire twelve (12) hours that the polls are open.
 - (4) The voter is a voter with disabilities.
 - (5) The voter is an elderly voter.
 - (6) The voter is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury during the entire twelve (12) hours that the polls are open.
 - (7) The voter is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open.
 - (8) The voter is eligible to vote under IC 3-10-11 or IC 3-10-12.
 - (9) The voter is prevented from voting due to observance of a religious discipline or religious holiday during the entire twelve (12) hours that the polls are open.
 - (10) The voter is an address confidentiality program participant (as defined in IC 5-26.5-1-6).

reasonably related to the inherent differences between absentee mail-in ballots and in-person ballots because the mail-in ballots required additional security, noting as follows:

First, we find that there are indeed inherent differences between all absentee voters and Election Day voters. By their very nature absentee ballots differ from Election Day ballots. See *Ind. Code § 3-11-4-1*. ... Because the absentee voter is not present at the Election Day polling site, the absentee voter is not exposed to the extensive precautions followed by Election Day officials to guard the integrity of the ballots.[] The fact that absentee ballots reach the hands of election officials outside of the confines of the Election Day polling place necessitate statutory procedures for receiving, verifying, storing, transporting, and counting these ballots. See, e.g., *Ind. Code §§ 3-11-10-1, 3-11-10-3 to -22*.

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Although the legislature has included numerous provisions in our code meant to protect the integrity of absentee ballots cast,[] those provisions cannot safeguard the ballots and the intent of the individual voters to the extent that provisions surrounding Election Day procedures can. For example, Election Day polling sites operate as closed environments. *Only* precinct elections officers (including the election sheriff, inspector, two judges, poll clerks, and assistant poll clerks), deputy election commissioners, authorized watchers, and precinct pollbook holders are permitted in the Election Day polling place except for voters casting ballots and their underage children. *Ind. Code § 3-11-8-15*; *Ind. Election Day Handbook* at 4. If a ballot originates from a particular precinct polling place, every election worker present is easily discerned. It is also known that each of those election workers (with the possible exception of the election sheriff) was present at the site for the entirety of Election Day. *Ind. Code § 3-11-8-12*; *Ind. Election Day Handbook* at 3. But absentee voters might encounter many other individuals while casting their ballots at home or in the clerk's office, thus allowing greater opportunity for outside influences to impact their votes. And absentee voting may take place over a period of up to ninety days, creating situations in which completed ballots in a precinct are received by different county employees in the presence of a variety of individuals. *Ind. Code §§ 3-11-4-4, 3-11-4-18*. **Thus it is**

reasonable that the legislature believed it in the interests of Indiana voters to more stringently govern absentee balloting.

Horseman, 841 N.E.2d at 172-173 (emphasis added).

Thus the recognized differences between mail-in absentee ballots and in-person ballots is that the nature of absentee ballots requires a heightened security. These differences do not rationally support imposing additional identification requirements upon Hoosiers who vote in-person at the polling place while imposing no identification requirements upon mail-in absentee voters, who are not even required to execute an affidavit regarding their identification.

b. The disparate treatment accorded in-person voters and the preferential treatment accorded absentee mail-in voters under the Photo ID Law is not reasonably related to the distinctions between the classifications

The next issue raised is whether “the difference in legislative treatment [of in-person voters and mail-in absentee voters] is reasonably related to the difference between the classes.” *See, Humphreys v. Clinic for Women*, 796 N.E.2d 247, 253 (Ind. 2003). In other words, the relevant inquiry is whether the disparate treatment accorded by the Photo ID Law is reasonably related to the characteristics which distinguish mail-in absentee voters and in-person voters.

Under Indiana law, after an absentee mail-in voter receives his/her ballot, before returning it to be counted, the voter must execute an affidavit, affirming under penalties of perjury, such information as “[t]he name of the precinct and township (or ward and city or town)” in which the voter is [] a resident of” or in

which the voter is entitled to vote; the voter's address; the date; and, the voter's signature. *See*, I.C. §3-11-4-21(a)(1)-(6). Nowhere does Indiana law expressly require the affiant voter to affirm his/her identity.

In contrast, an in-person voter must produce current or recently expired Indiana or federal identification containing their name, photograph and an expiration date. To secure the identification, the voter must navigate and comply with the various requirements set forth *supra*, which, as previously discussed, can prove to be an onerous burden upon certain voters, particularly those without private modes of transportation.

Under the Photo ID Law, the class receiving preferential treatment is mail-in absentee voters. The Photo ID Law expressly exempts mail-in absentee voters. I.C. §3-11-10-1.2. Yet the very characteristics that distinguish mail-in absentee voting are the same characteristics that present the greater opportunity for voter fraud. In *Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004), the Indiana supreme court "was compelled" to order a special election in light of a deliberate series of actions that made it impossible to determine the winner and which constituted the most "egregious circumstances." Those "deliberate actions" involved absentee ballots and included false statements made under oath such as:

d) the use of vacant lots or former residences of voters on applications for absentee ballots;

* * * * *

h) the routine use of false representations-usually the indication that the applicant "expected" to be absent from Lake County on May 6, 2003-by those Pastrick supporters who filled out the substantive

portions of applications and by votes solicited by Pastrick supporters to vote absentee to complete absentee ballot applications; [and]

* * * *

i) votes cast by employees of the City of East Chicago who simply did not reside in East Chicago . . .

Id. at 1145.

Citing *Pabey*, Rokita claimed below that absentee ballot fraud typically involves coercion of legitimate voters, not impersonation. It is startling that the Secretary of State charged with overseeing Indiana’s elections would assume that the only fraud involved with absentee ballots deals with the coercion of “legitimate” voters. That aside, the Indiana supreme court in *Pabey* recognized instances involving misrepresentations made by the alleged voter seeking to vote absentee. Reading *Pabey* and *Horseman* together shows that where there is no security system to prove the identity of a voter casting a mail-in absentee ballot, the opportunity for fraud is even greater.

Additionally, Rokita claimed below that the disparate treatment accorded by the Photo ID Law to in-person voters is reasonably related to the inherent differences between mail-in absentee voters and in-person voters because the Photo ID Law most directly addresses the threat of voter impersonation presented by in-person voting. However, in reality, if a person wants to vote under a name that is not his or her own, then all that person has to do is cast a mail-in absentee ballot. It is much easier to vote fraudulently by mail-in absentee ballot than run the risk of being recognized as an imposter at the polling place.

It is undisputed that there has been no prosecution for in-person voting fraud. As the *Horseman* court recognized, in-person voting is more secure than mail-in absentee voting due to the presence of bipartisan election day precinct officials. Yet the Photo ID Law grants preferential treatment to mail-in absentee voters and not to in-person voters.

The distinguishing characteristics between mail-in absentee and in-person voting are premised upon the recognition that mail-in absentee voting creates the greater opportunity for fraud and thereby requires more security. The Photo ID Law requirement that in-person voters must present a specified form of identification to vote while mail-in absentee voters are not legally required to execute an affidavit regarding their identity, is not a requirement that is reasonably related to the characteristics that distinguish mail-in absentee from in-person voting.

On this basis, the distinctions between mail-in voters and in-person voters are not reasonably related to the different treatment accorded mail-in voters and in-person voters.

- 2. The requirement that in-person voters verify their identity using specific identification and that other in-person voters holding state or federal identification that lacks an expiration date and/or a photograph does not present distinctive, inherent characteristics that rationally distinguish the unequally treated class.**

The purpose of the Indiana Photo ID Law is to verify that the person presenting themselves to vote is the voter that he or she is claiming to be. The

requirement of an expiration date on state or federal identification, or the lack of a photograph on identification of persons who have established their identity with the state of Indiana or federal government, are not reasonably related to the differences between voters who have identification with an expiration date or photograph.

a. The claimed distinctions between the acceptable state and federal identification and the unacceptable state and federal identification

The Photo ID Law requires that the identification be issued by the Indiana or federal government and contain a photograph of the identification holder, the holder's name and a date upon which the identification expires. I.C. §3-5-2-40.5. The proof of identification is not required to show the residency, age or citizenship of the bearer. Foreclosed from voting are persons who hold Indiana or federal identification that lacks an expiration date and/or photograph.

As this case was dismissed pursuant to T.R. 12 (B)(6), the opportunity to present evidence was not available the League. But there are many examples of the type of in-person voter classifications for which there are no inherent differences but yet receive disparate treatment.

One example is the Veterans Universal Access Identification Card which is issued to veterans entitled to benefits offered by the Veterans Administration. The card contains the veteran's name and photograph along with other information. *See., e.g.,* <http://www.va.gov/oirm/CIO/visninter/decoste.htm> (last visited Oct. 4, 2008). What the card does not contain is an expiration date. *Id.* Hundreds of

millions of dollars of benefits are disbursed using the Veterans Universal Access Identification Card yet the holders of these cards cannot use the card to vote. At the same time, military identification cards with expiration dates of “INDEF” can vote. *See*, http://www.in.gov/sos/elections/hava/pdf/EDH_08.pdf, p. 10 of the publication. There is no difference between a military photo identification bearing an expiration date of “indefinite” and a military photo identification for veterans’ benefits not bearing an expiration date of “indefinite.” By their very nature, once earned, veteran’s benefits last until the death of the veteran. Yet these veterans, who earned these benefits by serving their country, cannot vote in-person in Indiana elections using the Veterans Universal Access Identification Card.

Elderly voters cannot use their Medicare identification cards to vote because the cards lack a photograph and expiration date, *See*, [http://en.wikipedia.org/wiki/Medicare_\(United_States\)](http://en.wikipedia.org/wiki/Medicare_(United_States)), http://www.michigan.gov/images/edicareCard_96834_7.gif, http://dpaweb.hss.state.ak.us/manuals/adltc/506/506_medicarebuy_in.htm, despite the fact that the card can secure millions of dollars in benefits for qualifying Indiana voters. The difference between a senior citizen with an Indiana identification card and a senior citizen with a Medicare card is not a real difference. Both classifications of voters were required to prove to the State of Indiana their identification yet the Indiana Photo ID Law effectively presumes that

the voter presenting the Medicare card is not necessarily who he or she claims to be.¹⁰

Indiana provides for the issuance of photo-exempt identification cards and driver's licenses for those whose religion prohibits them from being photographed. After each and every election, voters holding such identification must prove to the county election board their religious basis for not being photographed, *see* I.C. § 3-11.7-5-2.5(c)(2)(B), a case made to the State in order to get the identification or license in the first place. There is no difference between a voter with Indiana identification with a photograph and a voter with Indiana identification that lacks a photograph as each class of voters was required to prove his/her identification to the State of Indiana at the time the identification card was issued.

As discussed *supra*, exempted from the requirements of the Photo ID Law are residents of a state licensed facility where a polling place is located. Such residents are allowed to vote in-person without presenting identification. Residents who live in a state-licensed facility that does not contain a polling place and who wish to vote in-person are required to show the requisite photo identification, even though such persons are burdened in obtaining the identification and likely do not need the identification for anything but voting.

¹⁰ Students enrolled at Purdue University in Tippecanoe County, Indiana are allowed to vote despite the fact that their photo student identification card lacks an expiration date. *See*, http://www.purdueexponent.org/?module=article&story_id=13235. Tippecanoe County has chosen to interpret the law to mean that confirmation of a student's current enrollment on a Purdue database is the equivalent of an expiration date. At the same time, no such database or accommodation is made for senior citizens with Medicare cards or veterans with Universal Access Cards.

- b. The disparate treatment accorded in-person voters with state or federal identification that has a photograph and/or expiration date and those in-person voters with state or federal identification that lacks a photograph and/or expiration date is not reasonably related to the Photo ID Law.**

Rokita claimed in the trial court that the purpose of the Photo ID Law is to prevent in-person voter impersonation. Requiring identification that is not readily available to all voters and which must contain a photograph and an expiration date is not reasonably related to the non-existing differences between the classes of in-person voters previously discussed.

Presenting state and federal identification cards that contain a photograph but no expiration date because the purpose the identification serves is indefinite, does absolutely nothing to further the claimed purpose of the Photo ID Law. As previously discussed, the Veterans Universal Benefits Access card lacks an expiration date because once benefits are earned, the benefits run until death. Yet the Photo ID Law prohibits veterans with this form of federally issued identification from casting a regular (i.e. non-provisional) in-person ballot.

Further, the distinctions between in-person senior citizen voters are not reasonably related to the different treatment accorded by the Law. Senior citizens who reside in state licensed facilities in which a polling place happens to be located can vote without presenting identification but senior citizens who reside in state licensed facilities in which a polling place is not located, cannot vote unless he/she presents the requisite identification. In both of these classifications, these

senior citizens have not only had to prove their identification to receive their Medicare benefits but they presumably also had to present identification to be able to check into the state-licensed facility. Through happenstance, a polling place happens to be located in one facility but not another and yet this happenstance dictates who must present identification and who must not. Further, a senior citizen who receives state benefits such as Medicare but who is fortunate enough to be able to live in the community at large and not in a state licensed facility for care cannot vote without the requisite identification even though, like the state licensed facility residents, the senior citizen had to prove his/her identity to receive Medicare benefits.

The requirement of a photograph on the federal or state issued identification is also not reasonably related to preventing in-person voting fraud. For example, if someone wants to impersonate a voter over the age of 65 or an Amish voter or Mennonite voter, the chances of that impersonator being able to secure the Medicare card of another legally registered voter is very marginal. In the cases of state and federal identification that contains a photograph but no expiration date because the purpose the identification serves is indefinite, the requirement of an expiration date does absolutely nothing to further the claimed purpose of the Law.

Rather than going to the trouble of stealing the identification card of another, if someone wants to vote fraudulently, as previously discussed, then all he or she need do is simply make application for an absentee ballot and not worry about having to present any identification.

On the basis of the foregoing, as the disparate treatment accorded in-person voters is not reasonably related to the Law, it is unconstitutional under Art. I, § 23.

B. The preferential treatment accorded some classes of in-person voters is not uniformly applicable and equally available to all persons similarly situated.

The second prong of the analysis “embraces concerns, frequently expressed in Section 23 cases, regarding the need for uniformity and equal availability of the preferential treatment for all persons similarly situated.” *Collins*, 644 N.E.2d at 79. “The second prong of the *Collins* test is not a test that goes only to the facial validity of the statute . . . when . . . the language of the relevant statutory provisions creates the primary classifications . . . but does not by its terms expressly create the assertedly unfair or disadvantaged subclassification . . . the question presented by the second prong of *Collins* is whether the statute is unconstitutional *as applied*.” *Martin v. Richey*, 711 N.E.2d 1273, 1281 (Ind. 1999). Like the first prong of the analysis under Art. 1, §23, “the second prong is described as comprising two elements: “[a] any privileged classification must be open to any and all persons who share the inherent characteristics [that] distinguish and justify the classification . . ., [and] [b] the special treatment accorded to any particular classification [must be] extended equally to all such persons.” *Ledbetter v. Hunter*, 842 N.E.2d 810, 813 (Ind. 2006). The League maintains that the classifications of persons subjected to the Photo ID Law are unconstitutionally treated.

1. The Law, as applied, is unconstitutional in that it does not offer the same privilege to mail-in absentee voters and in-person voters.

The privileged class of voters who are not required to present identification is closed to some voters and the classification is not extended equally. As discussed *supra*, the identification required to vote is not equally available to all voters. The truth of the matter is that in this post-9/11 world, the requirements which must be met to secure even a simple Indiana identification card has heightened. As discussed *supra*, the difficulty is securing an identification card is dependent upon many factors, i.e., if a woman is married has her name been changed with social security, whether a person was born at home or in a hospital, whether a person was born in-state or out-of-state, etc. If an individual can live in Indiana without the identification required by the Photo ID Law then in order to vote, the person must secure the identification for the single purpose of voting and not necessarily with the same degree of difficulty as another individual.

2. The Law, as applied, is unconstitutional in that it does not offer the same privilege to all in-person voters.

Finally, the League maintains that not all in-person voters are offered the same privilege. For example, in granting preferential treatment to persons residing in state-licensed facilities with polling places, the Law does not grant similar relief to the elderly who are able to remain out in the community but who would have the same difficulties in procuring the requisite identification. In rural communities around Indiana there are the elderly persons who have voted for decades in the

same polling place but who are now prohibited from voting in-person because they do not have the requisite identification. There are the elderly whose families are providing them care but who, again, cannot vote in-person because they lack the governmental identification that contains a photograph and/or expiration date.

Rokita in his arguments below dismissed the desire by elderly voters to participate in the traditional American civic event of voting in-person.¹¹ He claimed that regardless of where they live, all seniors and disabled voters can vote absentee and need not provide photo identification to vote absentee. However, as Justice Souter recognized:

[T]here are crucial differences between the absentee and regular ballot. Brief for AARP et al. as *Amici Curiae* 12–16. Voting by absentee ballot leaves an individual without the possibility of receiving assistance from poll workers, and thus increases the likelihood of confusion and error. More seriously, as the Supreme Court of Indiana has recognized, Indiana law “treats absentee voters differently from the way it treats Election Day voters,” in the important sense that “an absentee ballot may not be recounted in situations where clerical error by an election officer rendered it invalid.” *Horseman v. Keller*, 841 N. E. 2d 164, 171 (2006). The State itself notes that “election officials routinely reject absentee ballots on suspicion of forgery.” Brief for Respondents in No. 07–25, p. 62. The record indicates that voters in Indiana are not unaware of these risks. One elderly affiant in the District Court testified: “I don’t trust [the absentee] system. . . . Because a lot of soldiers vote like that and their votes wasn’t counted in the last election according to what I read, absentee.” App. 209 (deposition of David Harrison).

¹¹ Persons age 65 and older constitute “elderly voters.” I.C. §3-5-2-16.5. “Elderly voters” can choose to vote in-person or to vote mail-in absentee. *See*, I.C. § 3-11-10-24(a)(5). However, the Photo ID Law means that many of these elderly voters cannot choose whether to vote in-person or by mail. An example are the twelve elderly nuns discussed *supra*.

It is one thing (and a commendable thing) for the State to make absentee voting available to the elderly and disabled; but it is quite another to suggest that, because the more convenient but less reliable absentee ballot is available, the State may freely deprive the elderly and disabled of the option of voting in person.

CITATION

As discussed *supra*, Purdue students, whose photo identification lacks an expiration date can vote in Tippecanoe County because the Photo ID Law has been interpreted to allow students using the Purdue identification card to vote if their name appears in a database made accessible on election day. Yet students at other state universities are not afforded the same opportunity. And, students at private universities have absolutely no opportunity to use their student identification cards to vote, regardless of whether the card contains an expiration date.

The twelve nuns who reside in a private nursing home were not allowed to vote because they lacked the requisite identification. Amended Complaint, ¶18 (App. ___). Yet if the nuns had resided in a state licensed facility in which a polling place was located, they could have voted without any identification. Other elderly persons who live in state-licensed facilities but in which there is no polling place, cannot vote without the requisite identification card unlike their counterparts who live in a state-licensed facility where the county happens to locate a polling place.

Upon the basis of the foregoing, the Photo ID Law is unconstitutional as applied under Art. 1, § 23.

CONCLUSION

While the people of Indiana are free to amend Article II, §2 to require, as a condition to having one's vote count, that a voter produce a certain limited type of photographic identification, that qualification cannot be enacted by the legislature because it is nowhere authorized by the "organic law of the state." Irrespective of the wisdom or efficacy of the Photo ID Law, or the severity of the burdens it imposes on the exercise of the franchise, it is a "qualification" applicable to some but not all voters, which requires some to make needless multiple trips in order to exercise the fundamental right to vote. Such a new voting qualification may be accomplished only by amending the constitution and not by statutory enactment of the Photo ID Law which violates Art. II, §2 of the Indiana Constitution.

The Photo ID Law also violates Art. I, §23 of the Indiana Constitution. The disparate treatment accorded in-person voters and the subclassifications of in-persons voters is not reasonably related to the characteristics which distinguishes these classes. The problem lies in the fact that there is no single, uniform piece of photo identification with an expiration date that is obtainable with the same degree of ease by all voters. The the disparate treatment accorded by the Photo ID Law is not reasonably related to inherent characteristics which distinguish the unequally treated classes and the preferential treatment accorded some voters is not uniformly applicable and equally available to all persons similarly situated.

The League respectfully requests that this Court reverse the decision of the trial court and remand for further proceedings not inconsistent with this Court's opinion.

Respectfully Submitted,

Karen Celestino-Horseman

Karen Celestino-Horseman (Atty. No. 15762-49A)
One North Pennsylvania
Suite 220
Indianapolis, IN 46204
317/632-5633 (Office)
317/630-1040 (Facsimile)
Attorney for Appellant

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

Karen Celestino-Horseman

Karen Celestino-Horseman

CERTIFICATE OF SERVICE

I certify that on February 16, 2006, a copy of the foregoing brief was served via first class mail, postage prepaid, upon the following:

Douglas R. Brown
Stewart & Irwin
251 E. Ohio St.
Suite 1100
Indianapolis, IN 46204

Jon Laramore
Baker & Daniels
300 N. Meridian St.
Suite 2700
Indianapolis, IN 46204

Ian L. Stewart
Assistant Corporation Counsel
1601 City-County Building
200 E. Washington St.
Indianapolis, IN 46204



Karen Celestino-Horseman

