

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY,)
and MARION COUNTY)
DEMOCRATIC CENTRAL)
COMMITTEE,)

Plaintiffs,)

vs.)

CAUSE NO: 1:05-CV-0634-SEB-VSS

TODD ROKITA, in his official)
capacity as Indiana Secretary of State;)
J. BRADLEY KING, and KRISTI)
ROBERTSON, each in their official)
capacities as co-directors of the Indiana)
Election Division,)

Defendants.)

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Plaintiffs, Indiana State Democratic Party and Marion County Democratic Central Committee (hereinafter “Plaintiffs” or “Democrats”), by their undersigned counsel, hereby submit their Memorandum in Opposition to Motion to Dismiss and Memorandum in support thereof filed by Defendants Todd Rokita, in his official capacity as Indiana Secretary of State (“Rokita”), and J. Bradley King (“King”) and Kristi Robertson (“Robertson”), each in their official capacities as co-directors of the Indiana Election Division (“the Election Division”). Because Democrats have standing to assert their own rights and the rights of voters who associate with them who will be burdened by the

challenged law, and because Rokita, King and Robertson in their official respective capacities are clearly proper party defendants in a suit seeking prospective injunctive (and declaratory) relief as to this new election law, the Court should deny Defendants' Motion.

STANDARD OF REVIEW

In ruling on a motion to dismiss for want of standing or for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a district court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiffs' favor. *Lee v. City of Chicago*, 330 F.3d 456, 458 (7th Cir. 2003). A district court may also properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine if subject matter jurisdiction exists. *Johnson v. Ghar*, 330 F.3d 999, 1001 (7th Cir. 2003). As the party invoking federal jurisdiction, the plaintiffs bear the burden of establishing the required elements of standing. *Lee v. City of Chicago, supra* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

FACTS WHICH MUST BE TAKEN AS TRUE IN RULING ON DEFENDANTS' RULE 12(b)(1) MOTION

As Defendants acknowledge, this is a constitutional and a statutory challenge to a new Indiana law, Senate Enrolled Act No. 483¹ ("SEA 483"), that requires some, but not all, voters to present specified forms of state or federal-issued photo identification as a

¹ In their Memorandum, Defendants have referred to this law as Public Law 109-2005. Since Democrats have been unable to verify that Public Law 109-2005 and SEA 483 are one and the same, Democrats shall refer herein to the challenged law as SEA 483.

condition to being permitted to vote and to having the voter's ballot counted in the final tally. Defendants acknowledge that Rokita, as Indiana Secretary of State, is the state's chief election official for all purposes except for the coordination of State responsibilities under the National Voter Registration Act ("NVRA"), 42 U.S.C. §1973gg-8. I.C. §3-6-3.7-1. Rokita has other duties concerning elections for federal, state and local offices in Indiana, including serving as the chief state election official under the Help America Vote Act ("HAVA"), 42 U.S.C. §15401, et seq. See I.C. §3-6-3.7-2(5). Rokita is also broadly charged with performing "all ministerial duties related to the administration of elections by the state". I.C. §3-6-4.2-2(a). He also serves as one of the three members of the Indiana State Recount Commission, which is charged with the responsibility of conducting recount proceedings resulting from elections for a federal, state or legislative office. I.C. §3-12-10-2.1(a) and (b) and I.C. §3-12-10-4(a). Rokita also is statutorily required to certify the results of federal elections and prepare and transmit the appropriate certifications of election. I.C. §§3-12-5-7, -10 and -12

The Election Division, of which King and Robertson are the co-directors, operates within the office of the secretary of state. I.C. §3-6-4.2-1. Its duties include assisting Rokita in performing duties related to the administration of elections and in the implementation of HAVA. I.C. §3-6-4.2-2(b) and I.C. §3-6-4.2-2.5. They are the chief state election officials responsible for the coordination of state responsibilities under the NVRA, I.C. §3-7-11-2, and in that capacity are charged with "[p]rotect[ing] the fundamental rights of voters", I.C. §3-7-11-2(3), and developing procedures and forms

required by the NVRA. I.C. §3-7-11-2(10). King and Robertson also are charged with the responsibility of preparing and distributing ballots for all federal and state offices, providing information regarding voter registration procedures and absentee ballot procedures to absent uniformed services voters and overseas voters, implementing the state plan in accordance with the requirements of HAVA, and making polling places accessible to individuals with disabilities in a manner that provides the same opportunity for access and participation as other voters. I.C. §3-6-4.2-12(1), (6) and (8), and I.C. §3-6-4.2-12.5(a)(1).

King and Robertson are also required by Indiana law each year in which a general or municipal election is held to “call a meeting of all the members of the county election boards and the boards of registration to instruct them as to their duties under this title [Indiana’s Election Code] and federal law (including HAVA and NVRA).” I.C. §3-6-4.2-14(a); Complaint ¶6. They approve and transmit forms used by local election officials in the conduct of elections. I.C. §3-5-4-8(b) and (c); Complaint ¶6. They are also empowered to investigate alleged violations of state election laws and the NVRA, I.C. §3-6-4.2-10, and they make the final tabulations of the number of votes cast for United States Senator and United States Representatives. I.C. §3-12-5-9(a)(1).

Rokita describes the role of the Election Division on the official Indiana Secretary of State website as being to “govern the fair, legal and orderly conduct of elections in the State of Indiana by maintaining and improving our direct service relationship with our constituencies: Indiana’s election and voter registration professionals, office holders and

candidates, committee chairs and treasurers, and, of course, Hoosier voters”.

<http://www.in.gov/sos/elections>. As part of those services Rokita, King and Robertson gather and compile a substantial body of information relating to federal, state and local elections. They also publish a campaign finance manual, a candidate guide, a voter registration guidebook, and the Election Administrator’s Manual.

http://www.in.gov/sos/elections/pdfs/2004_Election_Admin_Manual.pdf. The 2004 Election Administrators Manual consists of 76 pages, and includes a section on voter identification and provisional ballots, as well as sections dealing with other election-related issues such as campaign finance, voter registration, ballot information, voting equipment, absentee voting, polling place information, and post-election procedures.

Rokita has also been outspoken and clear about his support for the type of photo identification requirements eventually passed by the Indiana General Assembly in 2005. The Secretary of State’s website, maintained with taxpayer dollars, includes three press releases, the first two urging the passage of strict photo identification requirements and the final one applauding the legislature for enacting SEA 483. See, “Why photo identification is important for elections”, March 10, 2005, www.in.gov/sos/press/2005/03102005.html; “Tackling fraud with voter I.D. and absentee reform”, March 30, 2005, www.in.gov/sos/press/2005/03302005.html; and “Rokita applauds passage of photo identification bill and absentee ballot reform”, April 12, 2005, www.in.gov/sos/press/2005/04122005b.html. Rokita was calling for strict voter photo identification requirements even prior to the 2005 session of the Indiana General

Assembly. In his personal website, http://www.toddrokita.com/election_plan.doc, he advocated “having each person show a piece of photo identification at the polling place when they vote”.

ARGUMENT

I. DEMOCRATS HAVE ASSOCIATIONAL STANDING TO BRING THIS SUIT

An association, including a political organization, has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue on their own behalf; (b) the interests it seeks to protect are germane to the organization’s purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1997); *United Auto Workers v. Brock*, 477 U.S. 274, 289 (1986). Democrats meet all three requirements of *Hunt*.

First, Democrats alleged in their complaint that the implementation of the strict photo identification requirements in SEA 483 will burden and interfere with the constitutional rights of voters who associate with them. **Complaint** ¶¶2, 3, 4, 16, 17, 18, 19, 20, 31. Thus, it is clear that those voters who associate with Democrats would have standing to sue on their own behalf.

Second, Democrats allege, **Complaint**, ¶2, that they are political party organizations dedicated to electing candidates of the Democratic Party to public office in Indiana. In this capacity they are interested in protecting the rights of voters who

normally support and vote for Democratic Party candidates to exercise their constitutional right to vote without undue or discriminatory governmental interference.

Third, neither the claim asserted nor the relief requested requires the participation of individual voters who associate with the Democratic Party in this lawsuit, which seeks only declaratory and prospective injunctive relief. *United Food and Commercial Workers Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (the individual participation of members of an organization is not normally necessary when an association seeks only prospective injunctive relief for its members). Thus, all three requirements for associational standing are clearly present in this case.

Under these associational standing principles, numerous circuit courts of appeal and district courts have found that national and local political party organizations have standing to assert both their own rights as political organizations and the rights of their candidates and *voters* in suits challenging state election laws or policies on federal constitutional or statutory grounds. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004); *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n. 23 (4th Cir. 1992); *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1078-79 (N.D. Fla. 2004); *Miller v. Blackwell*, 348 F. Supp.2d 916, 920-21 (S.D. Oh. 2004) (finding Ohio Democratic Party had standing to challenge alleged infringement of its members' constitutional right to vote in federal elections); *Smith v. Boyle*, 959 F. Supp. 982, 986 (C.D. Ill. 1997) (finding that Illinois Republican Party had

standing to sue to challenge the constitutionality under the Fourteenth Amendment of two sections of the Illinois constitution relating to judicial elections). Federal courts have consistently held that political parties have standing to make facial challenges to election laws alleged to conflict with federal constitutional or statutory requirements even though it may be impossible to identify the specific voters who may be harmed by the application of the challenged law, *Sandusky County Democratic Party v. Blackwell, supra*; where such challenges raise issues that are neither speculative nor remote, but real and imminent. *Florida Democratic Party v. Hood, supra* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000)).

Accordingly, Democrats have associational standing under Article III of the United States Constitution to bring this facial challenge to SEA 483 on behalf of the voters who associate with them and whose fundamental rights will be severely burdened by the photo identification requirements of SEA 483.

II. ROKITA, KING AND ROBERTSON ARE PROPER PARTY DEFENDANTS IN THEIR RESPECTIVE OFFICIAL CAPACITIES

- A. Because they have not invoked Eleventh Amendment immunity, Defendants have implicitly acknowledged they have a connection with the enforcement of SEA 483.

Defendants claim that the Democrats' facial challenge to SEA 483 must be dismissed for want of subject matter jurisdiction because the harm from SEA 483 to those who associate with them is "not fairly traceable to the conduct of the Defendants".

Defendants' Memorandum, at 5. In support of their argument, Defendants claim they have "no authority to enforce the voter identification requirements" of SEA 483 and thus there is no Article III case or controversy for the Court to adjudicate. *Id.*

Defendants' justiciability argument fails to note that Democrats have brought their Section 1983 claims against Defendants only in their official capacities. An official capacity claim against a State official is effectively a claim against the State itself.

Kentucky v. Graham, 473 U.S. 159, 166 (1985). Official capacity suits against State officials which seek prospective injunctive relief only are permitted by Section 1983.

Will v. Michigan Department of State Police, 491 U.S. 58, 71 n.10 (1989); *Ex parte*

Young, 209 U.S. 123 (1908). "The constitutional privilege of a State to assert its sovereign immunity....does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Alden v. Maine*, 527 U.S. 706, 754-55 (1999);

Bruggeman v. Blagojevich, 324 F.3d 906, 912 (7th Cir. 2003) ("*Ex parte*

Young....authorizes, notwithstanding the Eleventh Amendment, suits for prospective injunctive relief against State officials who as in this case are sued in their official

capacity"); *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 871 (7th Cir. 1999); *Kroll*

v. Bd. of Trustee of Univ. of Ill., 934 F.2d 904, 908 (7th Cir. 1991). Under the *Ex parte*

Young doctrine, "a private party can sue a State officer in his or her official capacity to enjoin prospective action that would violate federal law". *Ameritech Corp. v. McCann*,

297 F.3d 582, 585-86 (7th Cir. 2002) (quoting *Dean Foods Co. v. Brancel*, 187 F.3d 609,

613 (7th Cir. 1999)). However, the named state official must have some “role to play in the enforcement of the challenged statutes”, *Hearne v. Bd. of Ed., City of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999), or some legal responsibility for effectuating the statute at issue in order for an injunctive suit to be “permitted under the doctrine of *Ex parte Young* by the device of the plaintiff’s naming as the defendants the responsible state officials rather than the state itself.” *Takle v. Univ. of Wisconsin Hospital*, 402 F.3d 768, 772 (7th Cir. 2005).

Because they have not invoked or claimed the State’s Eleventh Amendment immunity, Defendants apparently concede they have “some connection” with the enforcement of SEA 483.

B. The harms alleged by Democrats are fairly traceable to Defendants and can be redressed by a favorable ruling from this Court.

A plaintiff who challenges a State statute in federal court on federal statutory constitutional grounds must demonstrate only that there is a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. He or she is not required “to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough.” *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). All that is required in facial challenges to a statute’s constitutionality, particularly a challenge such as this one under the First Amendment, is a well-founded, credible fear that the law will be enforced against it or those who associate with them, *Virginia v. American*

Booksellers Association, 484 U.S. 383, 393 (1988), and that there is a “reasonable probability - - not a certainty - - of suffering tangible harm” unless the relief sought in the suit is granted. *Hoover v. Wagner*, 47 F.3d 845, 847 (7th Cir. 1995). This is especially true where it is alleged that the statute’s very existence may cause others not before the Court to refrain from engaging in constitutionally protected speech or expression.

Virginia v. American Booksellers, 484 U.S. at 392-93; **Complaint**, ¶18. Thus, a facial challenge to a statute alleged to burden the exercise of a First Amendment right ordinarily raises no standing or case or controversy issues. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003); *see also Alleghany Corp. v. Haase*, 896 F.2d 1046, 1049 (7th Cir. 1990); *Andree v. Ashland County*, 818 F.2d 1306, 1313 (7th Cir. 1987) (a declaration that a statute violates the constitution in a Section 1983 suit is another method of challenging the constitutionality of the statute even if its enforcement is not imminent); and *People of State of Illinois v. General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982) (same).

Defendant Rokita’s frequent public expressions of support for the new photo identification requirements of SEA 483, together with his position and duties as the chief election official for the State of Indiana, allow this Court to find there is a realistic potential that he and co-directors King and Robertson will take all measures at their disposal to effectuate those requirements. Enforcing a law is not done exclusively by filing criminal or civil enforcement proceedings, particularly when such measures are not

expressly authorized by the statute in question.² The word “enforce” has been defined as “to put in to execution, to cause to take effect; to make effective”, *IBM Corp. v. United States*, 201 F.3d 1367, 1372 (Fed. Cir. 2000) (quoting **Black’s Law Dictionary**); or “to effectuate”, *Winstead v. J.C. Penney Co., Inc.*, 933 F.2d 576, 579 (7th Cir. 1991) (“To enforce is to effectuate”). That Defendants can reasonably be expected to use their power to insure the consistent, state-wide implementation of SEA 483 is rendered even more likely by the Supreme Court’s decision in *Bush v. Gore*, 531 U.S. 98 (2000), which puts a premium upon uniform administration of State election laws and practices so as to protect against equal protection claims. Defendants have in the past and can reasonably be expected again to seek to achieve such uniformity through pronouncements made in the Election Administrator’s Manual, in statutorily-mandated instructional meetings for members of county election boards and boards of registration they are required to hold by virtue of I.C. §3-6-4.2-14(a), and by preparing and issuing the necessary forms and affidavits SEA 483 will require on a statewide basis (such as the various forms of affidavits mentioned throughout SEA 483). Moreover, Democrats have also raised claims under the NVRA and HAVA, Complaint ¶¶ 35, 36, and Defendants clearly have specific enforcement authority with respect to those federal statutes. I.C. §§3-7-11-1 and -2 and

² *In Allied Artistic Pictures Corp. v. Rhodes*, 473 F.Supp. 560 (S.D. Ohio 1979), aff’d 679 F.2d 656 (6th Cir. 1982), the court noted that challenges to state election laws filed against state officials are more likely to survive an 11th Amendment challenge because the public interest is not as easily protected in litigation between private parties. *Id.* at 568. Thus, a lesser showing of the connection with the enforcement of the State election laws will be necessary in these cases.

3-6-4.2-2.5.

Defendants have made no assertion that they will *not* begin taking measures pursuant to their statutory responsibilities under Indiana law to inform the public concerning the requirements of SEA 483 after it takes effect on July 1, 2005, or that they will *not* take other appropriate measures to instruct county election boards and voter registration boards throughout the State of Indiana as to the photo identification requirements of SEA 483 in order to prepare them for the elections scheduled in 2006. This is a real dispute between Plaintiffs and Defendants, and this Court has federal subject matter jurisdiction to adjudicate Plaintiffs' facial challenge to SEA 483 under the federal statutory and constitutional grounds asserted in their complaint.³

Other Section 1983 challenges to election laws having state-wide applicability have named secretaries of state or other responsible state election officials as defendants. *See, e.g., Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999) (suit under the Americans with Disabilities Act on behalf of all blind registered voters in the State of Michigan

³ Even if this Court were to be convinced that Defendants have no connection whatsoever to the enforcement of SEA 483 for purposes of the issuance of injunctive relief, "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other." *Roe v. Wade*, 410 U.S. 113, 166 (1973). In determining whether a plaintiff has standing to bring a claim pursuant to the Declaratory Judgment Act the basic inquiry is whether there exists, under the facts alleged, "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Clearly the parties herein have adverse legal interests and their controversy with respect to SEA 483 is definite, concrete, real and substantial. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). There is thus no danger that this is a collusive suit or that the Court's opinion will be "advisory". *See also, Steffel v. Thompson*, 415 U.S. 452, 469-70 (1974); *Ameritech Corp. v. McCann*, 297 F.3d 582 (7th Cir. 2002) (declaratory judgment actions that do not seek monetary relief against the state are not barred by the Eleventh Amendment); *National Audubon Society v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (same).

against Secretary of State for failing to implement procedures required by the ADA); *Los Angeles County Bar Association v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (finding no Eleventh Amendment bar to action against California Secretary of State in challenge to California election law seeking only prospective declaratory and injunctive relief, and finding that the lack of any enforcement proceeding by the Secretary of State did not preclude the suit because the statute being challenged was not the type of statute “that gives rise to enforcement proceedings”); *Dann v. Blackwell*, 83 F.Supp.2d 906 (S.D. Oh. 2000) (suit challenging constitutionality of Ohio election law allowed to proceed against Ohio Secretary of State in his capacity as the chief election officer of the State of Ohio.); *see also Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986) (holding that since the Mississippi Secretary of State was, by state statute, responsible for the “general supervision” of the administration by local school officials of the challenged law, his actions could be enjoined under *Ex parte Young*); *Stevenson v. State Board of Elections*, 794 F.2d 1176, 1177 (7th Cir. 1986) (holding that proper parties defendant in suit challenging constitutionality of Illinois election statute were the individual commissioners of the State Board of Elections); and *Waste Management Holdings v. Gilmore*, 64 F.Supp.2d 537, 543 n.6 (E.D. Va. 1999) (holding that the Governor of Virginia was a proper party defendant because he had actively and publicly defended the challenged law).

Defendants also suggest that county election boards are the only proper defendants

because they will make decisions whether voters will be permitted to cast a regular ballot or whether voters' provisional ballots will be counted. Although there is little doubt that such election boards would be proper defendants, they are not the *only* election officials who will play a role in the implementation of this new law. Indeed, the *first* election officials to take active steps toward effectuation of the new law will be Rokita and co-directors King and Robertson. Many local election officials, particularly in less-populated counties that have no full-time election staff, will take their lead from them, just as they have in the past concerning other election issues. The next statewide election will be held in May, 2006. By statute, the co-directors must meet with local election officials, whereupon they will discuss new developments in the election laws. It is reasonable to expect that a law of this significance and novelty will be an important topic of discussion in these required instructional meetings.

Indeed, the co-directors of the Election Division will be required to take an early position and will thus be in the vanguard regarding the proper interpretation of one particular aspect of the new law. The Defendants assert in their Memorandum in support of motion to dismiss, at 4, that an absentee voter who wishes to vote in the Circuit Court Clerk's Office before an absentee voter board must provide proof of identification. In support of this contention they cite Indiana Code §3-11-10-26, which is part of Senate Enrolled Act No. 15. SEA 15 was signed into law by the Governor on April 27, 2005, the same date as SEA 483. It is not at all clear that I.C. §3-11-10-26 requires that the proof of identification be in the form of a photographic identification in order to vote in

front of an absentee voter board. Moreover, this provision is in conflict with SEA 483, which expressly exempts from its identification requirements all absentee voters. I.C. §3-11-10-1.2 is added to the Indiana Code by SEA 483, and it specifically provides that an absentee voter voting before an absentee board is *not* required to provide proof of identification. The co-directors of the Election Division will be the first election officials in the State to take an official position regarding how to reconcile this apparent conflict between SEA 15 and SEA 483 regarding absentee voters and the need for them to present photo identification as a condition to having their votes counted.

The two cases principally relied upon by Defendants, Memorandum in Support at 8, for the proposition that the Court lacks subject matter jurisdiction over this case because Plaintiffs' asserted injuries cannot be fairly traceable to the conduct of the Defendants are each easily distinguishable. For example, in *Rubin v. Santa Monica*, 308 F.3d 1008 (9th Cir. 2002), the court dismissed the California Secretary of State Jones as a defendant, but did so because he had neither required nor encouraged the municipal defendant in that case to follow state election guidelines, and because the California state election regulation being challenged in that case was expressly inapplicable to the municipal election in which Plaintiff Rubin desired to run. *Id.* at 1019-20.

The other case defendants rely on, *Libertarian Party of Indiana v. Marion County Board of Voter Registrations*, 778 F.Supp. 1458 (S.D. Ind. 1991), is also distinguishable. In that case the Libertarian Party sued both the Indiana State Election

Board and the Marion County Board of Voter Registration seeking a declaratory judgment and injunctive relief requiring the Marion County Voter Registration Board to provide the Libertarian Party with a copy of the Voter Registration List routinely made available to both the major political parties but not to the Libertarians. The Libertarians also sought injunctive relief against the State Election Board seeking to compel it to exercise its “supervisory powers” over the county defendants to prevent them from practicing such discrimination in the future. *Id.* at 1460. Since nothing in Indiana election law gave the State Election Board the power to discipline or remove members of the Marion County Voter Registration Board for refusing to abide by its directives, this Court concluded that none of the relief sought by the Libertarian Party was likely to be redressed by the State defendants, and thus dismissed them from the case. *Id.* at 1461.

By contrast, Democrats have demonstrated that Rokita, King and Robertson have specific statutory roles to play in effectuating the photo identification requirements of SEA 483 far beyond exercising vague or non-existent “supervisory powers” over county election or voter registration boards. They play specific statutory roles in implementing and carrying out the requirements of HAVA and the NVRA, I.C. §§3-6-3.7-1, 3-6-4.2-2(b) and -2.5, and 3-7-11-2, two of the federal enactments Democrats claim will be violated by the photo identification requirements of SEA 483. Rokita in his official capacity as Secretary of State is specifically charged with performing all “ministerial duties related to the administration of elections by the State”. I.C. §3-6-4.2-2(a). King and Robertson in their respective official capacities will also be required to approve all

forms, such as the various affidavits called for by SEA 483, to be used in implementing its photo identification provisions. They are also statutorily mandated to explain those requirements to local election officials and instruct them as to their duties under Indiana election laws, which now include their new responsibilities under SEA 483. The Indiana election code also gives them, in conjunction with the state police, the duty of “enforcement of the election laws,” including the use of state police radio and telephone service on election day. I.C. §3-6-4.2-13(a). Thus, unlike the members of the State Election Board in *Libertarian Party*, each of the State Defendants herein will have defined roles in effectuating SEA 483's photo identification provisions, and they can be expected to have critical functions laying the groundwork for the execution and uniform enforcement of what is now the nation's strictest voter identification law. Indeed, without such close oversight by them, the danger suggested by the Defendants, **Complaint ¶8**, of selective enforcement of these new and stringent requirements would be greatly increased.⁴

CONCLUSION

For each of the foregoing reasons, Plaintiffs' facial challenge on federal statutory and constitutional grounds to the photo identification requirements of SEA 483 presents a

⁴ In the event the Court were to disagree with Democrats' contention that Rokita, King and Robertson are proper defendants in this case, they will immediately move for leave to amend pursuant to Rule 15(a) for the sole purpose of adding appropriate non-State defendants. *See, T.W. & M.W. by Eck v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997) (dismissal under Rule 12(b)(1) is without prejudice); *Moore v. State of Indiana*, 999 F.2d 1125, 1128) (7th Cir. 1993) (amendments to add defendants should ordinarily be granted unless the new defendant would not cure the jurisdictional defect).

justiciable case or controversy within the meaning of Article III of the United States Constitution. Moreover, because both the Indiana and Marion County Democratic Parties have associational standing to represent the interests of the registered and otherwise qualified voters who, because they do not presently possess the requisite forms of photo identification, will be burdened or deterred from exercising their constitutional right to vote, their complaint for declaratory and prospective injunctive relief against Defendants in their official capacities may be maintained against Rokita, King and Robertson, each of whom has a direct and statutorily-mandated connection with the effectuation and enforcement of SEA 483 throughout all of Indiana. Accordingly, Defendants' Motion to Dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure should and must be denied.

Respectfully submitted,

s/ William R. Groth

William R. Groth

s/ Geoffrey S. Lohman

Geoffrey S. Lohman

FILLENWARTH DENNERLINE GROTH & TOWE

1213 North Arlington Avenue, Suite 204

Indianapolis, IN 46219

Telephone: (317) 353-9363

Telecopier: (317) 351-7232

E-mail: wgroth@fdgtlaborlaw.com

s/ Barry A. Macey

Barry A. Macey

MACEY, SWANSON & ALLMAN

445 N. Pennsylvania Street, #401

Indianapolis, IN 46204-1800

Telephone: (317) 637-2345

Facsimile: (317) 637-2369

E-mail: bmacey@maceylaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2005, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Thomas M. Fisher, Esq. E-mail: tfisher@atg.state.in.us
Douglas J. Webber, Esq. E-mail: dwebber@atg.state.in.us
Office of the Attorney General
Indiana Government Center South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204

James Bopp, Jr., Esq. E-mail: jboppjr@aol.com
Bopp Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510

s/ William R. Groth
William R. Groth

p/584/jc