

I THE PRACTICALITIES AND REALITIES OF THE PHOTO ID LAW ARE SUCH THAT THE LAW WILL BE DISCOURAGE VOTERS FROM VOTING

A. THE PHOTO ID LAW PROCESS

When a voter presents himself or herself at the polling place to vote, the first thing the voter must do under Indiana is provide proof of identification. *See*, I.C. 3-10-1-7.2 (primary elections) and I.C. 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.

I.C. 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. *See*, I.C. 3-11-8-25.1(e) and I.C. 3-10-1-7.2(d). The challenged voter affidavit “must be sworn and affirmed and must 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.

I.C. 3-11-8-23(1)-(8).

All provisional ballots are to be counted by noon of the second Monday following the election. I.C. 3-11.7-5-1. If the voter wishes for his or her provisional ballot to be counted, the voter must appear before the circuit court clerk or the county election board before the deadline for counting provisional ballots. I.C. 3-11.7-5-5(a)(2). At that time, the voter can do one of two things. The first alternative is 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.

IC 3-11.7-5-2.5(b)(1)-(2)(A)-(B).

If the voter has other grounds for not being able to present proof of identification, other than those previously discussed, the voter does have another option:

- (c) If the voter executes an affidavit before the circuit court clerk or county election board, in the form prescribed by the commission, affirming under the penalties of perjury that:
 - (1) the voter is the same individual who:
 - (A) personally appeared before the precinct election board; and
 - (B) cast the provisional ballot on election day; and
 - (2) the voter:
 - (A) is:
 - (i) indigent; and
 - (ii) unable to obtain proof of identification without the payment of a fee; or
 - (B) has a religious objection to being photographed; the county election board shall determine whether the voter has been challenged for any reason other than the voter's inability or declination to present proof of identification to the precinct election board.

IC 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 to then take the following action:

- (d) If the county election board determines that the voter described in subsection (c) has been challenged solely for the inability or

declination of the voter to provide proof of identification, the county election board shall:

- (1) find that the voter's provisional ballot is valid; and
 - (2) direct that the provisional ballot be:
 - (A) opened under section 4 of this chapter; and
 - (B) processed in accordance with this chapter.
- (e) If the county election board determines that a voter described in subsection (b) or (c) has been challenged for a cause other than the voter's inability or declination to provide proof of identification, the board shall:
- (1) note on the envelope containing the provisional ballot that the voter has complied with the proof of identification requirement; and
 - (2) proceed to determine the validity of the remaining challenges set forth in the challenge affidavit before ruling on the validity of the voter's provisional ballot.
- (f) If a voter described by subsection (a) fails by the deadline for counting provisional ballots referenced in subsection (a) to:
- (1) appear before the county election board; and
 - (2) execute an affidavit in the manner prescribed by subsection (b) or (c);

the county election board shall find that the voter's provisional ballot is invalid.

I.C. 3-11.7-5-2.5(d)-(f)(2).

The extent to which voters will be challenged regarding their photo identification will be determined by the individuals empowered to make the challenge. By statute, a member of the precinct election board can challenge the voter based upon the proof of identification. I.C. 3-10-1-7.2(c); I.C. 3-11-8-25.1(d). The precinct election board consists of one inspector and two judges. I.C. 3-6-6-1(b). The Republican and

Democratic party chairmen for the county each are entitled to select one judge. I.C. 3-6-6-1(c). The inspector is selected by “[t]he county chairman of the major political party whose candidate for the office of secretary of state received the highest vote in the county at the last election.” I.C. 3-6-6-8. It is the inspector who serves as chairman of the precinct election board. I.C. 3-6-6-1(e). Thus two of the three members of the precinct election board are appointees of the same major political party.

Additionally, each political party with a candidate on the ballot in that precinct is entitled to appoint a challenger. I.C. 3-6-7-1. A challenger, like a precinct board member, must present the challenge to a “voter offering to vote” in the form of an affidavit. I.C. 3-11-8-20. In prior elections, the political challenger was not allowed in the polling place; however, in the last Indiana legislative session, the law was changed to allow the political challenger access to inside the polling place which means the political challenger can stand with the precinct election board when the voter is showing proof of identification to the precinct election board. I.C. 3-11-8-15(a)(5).

As regards the political challenger, the question arises whether a challenge by the political challenger can require a voter to cast a provisional ballot. Indiana Code 3-11-8-20 requires the political challenger to make the challenge in affidavit form. Indiana Code 3-11-8-22 states that a voter challenged under I.C. 3-11-8-20 may vote if the voter completes an affidavit. Indiana Code 3-11-8-25 (d), contained within the Photo ID law, provides that if a voter executes a challenged voter’s affidavit pursuant to I.C. 3-11-8-22, the voter is to be given a provisional ballot. The determination of whether a challenge by a political challenger requires a voter to cast a provisional ballot has not yet been litigated.

Assuming arguendo that a voter challenged by a political challenger must cast a provisional ballot, Indiana law sets forth no limitations upon the types of challenges that can be made by a political challenger. It could well be that voters will be challenged by the political challenger and forced to cast a provisional ballot even if no member of the precinct election board decides to challenge the voter. The possibility of challenges being made for political reasons already exists among the members of the precinct election board who serve at the behest of the county party chairman. Add to that mix an individual who is titled “challenger” and who is there only to represent a political party, and the possibility of extensive challenges exist. As is discussed in the next section, there will be many circumstances under which voters can be challenged.

Further, the system of challenging must also be placed in context. Voters have a twelve hour period within which to cast their ballot. There is no process of appealing a challenge that requires the voter to vote a provisional ballot. Thus even if it is discovered while the polls are open that unreasonable challenges are being made, there is little that can be done.

One example of the type of challenges that could be made was discussed by Brad King, co-director of the Indiana Election Division of the Office of the Secretary of State. Mr. King has testified that the name changes incurred by women as a result of marriage can result in a challenge:

Q But if all she has is a driver's license and her name on the driver's license is now Jane Davis but her name on the polls is Jane Smith, how is she going to prove that she's Jane Smith under the law?

A Indiana law prior to Senate Bill 483 has always permitted -- in recent years has permitted an individual to indicate a change of name on the poll list. So, for example, if the poll list reflected a woman's maiden name and the woman chose to change it upon

marriage, Indiana law permits the voter to indicate that change of name on the poll list itself. It's considered sufficient grounds for the county registration office to then change county registration record to reflect that new name. And in that scenario I would guess that the individual could make that change of name indicated on the poll list and present the identification that otherwise conformed to the definitions in 3-5-2.

Q But if someone, a challenger, decided differently or felt differently, that person could be challenged and be required to vote provisionally?

A Certainly. The individual could be challenged and then it would be up to the county election board to determine if there were good cause and proper grounds for the provisional ballot.

Q But that voter would have to make a personal appearance before the county election board?

A Yes. If the precinct election board determined that the document presented did not conform with the requirements in 3-5-2-40.5.

(Ex. A, Dep. Of Brad King, p.p. 85-86).

Indiana Code 3-7-41-2 provides:

A voter who wishes to indicate that the voter's name has changed may also write the necessary information concerning the name change on the poll list under IC 3-11-8-25 before the person receives a ballot. The person may then vote if otherwise qualified.

However, as Mr. King observed, the precinct election board and/or the political challenger could ignore that handwritten change because the original poll list and the voter's identification do not "conform" and proceed to challenge the woman voter. This means that application of the statute will not be uniform from precinct to precinct let alone county to county. Additionally, for women whose names the BMV has incorrectly produced on their driver's license (an example is provided later), changing the poll list will not assist them. If they produce their identification to the circuit court clerk or the county election board, their driver's license will not match the poll list. If the voters are

challenged, they legally cannot change the poll list on election day so as to incorrectly spell their names because they sign an affidavit attesting to their name under penalties of perjury,

While such challenges may sound trivial, they do occur, as testified to by Doris Ann Sadler, Secretary of the Marion County Election Board:

Q What happens if there is a challenge to a voter who has an I.D. but let's say, for example, the name is spelled wrong and it doesn't match the spelling of the name on the poll book, and there's nothing to prevent somebody from challenging that voter for that kind of what we might call trivial reason. Right?

A And we in fact have had some examples of challenges based on trivial reasons like that, yes.

Q And right now we don't know whether the law requires that person to vote provisionally or whether that person after signing a counteraffidavit saying I am who I said I am, I don't care if you misspelled it on the poll book, whether that person can vote provisionally regularly?

A No, because I have not examined that, again. And say "I." I don't mean to sound like I'm the sole decision maker here. So please don't take it that way. The election board.

Q Does the Election Division have no legal authority from your experience or your vantage point of enforcing a uniform statewide interpretation of ambiguous provisions of election law?

A They do not have that authority, in my opinion.

Q And that results in potentially 92 different interpretations of those ambiguous provisions?

A Yes, it does. And it also results in courts working out those differences.

(Ex. B., Dep. Of Doris A. Sadler, p.p. 56-57).

B. AS THERE IS NO STATUTORY GUIDANCE AS TO WHEN THE NAME ON THE GOVERNMENT ISSUED IDENTIFICATION “CONFORMS” TO THE NAME ON THE POLL LIST, THE PHOTO ID LAW ALLOWS ELECTION OFFICIALS UNBRIDLED DISCRETION AND THE ABILITY TO ADMINISTER THE PHOTO ID LAW IN AN ARBITRARY AND CAPRICIOUS MANNER

As previously discussed, there now exist five people on election day who can challenge a voter regarding proof of identification.¹ The next issue is the extent of circumstances that exist under which challenges can be made.

Indiana law now provides that a voter can be challenged and required to vote a provisional ballot if: (1) “the voter is unable or declines to present the proof of identification or (2) a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification under IC 3-5-2-40.5.” I.C. 3-11-8-25.1(d)(1)-(2). *See also*, I.C. 3-10-1-7.2(c)(1)-(2). While “proof of identification” means that the name on the government-issued photo identification shall “conform” to the name on the poll list, there is no definition of “conform” within the statute. *Webster’s II New College Dictionary* defines “conform” to mean “to be similar in form or character” or “to . . . be in compliance.” Because there is no statutory definition of “conform,” each individual with the authority to make a challenge will decide what is required “to be similar in form or character.” Without a statutory definition of “conform,” the precinct election boards can act with unbridled discretion, including applying varying definitions to different individuals.

¹ The two poll clerks working at the precinct can also challenge voters but on a limited basis. A poll clerk can challenge when the signature of the voter does not match the signature on the poll book. I.C. 3-11-8-25.1(j).

While I.C. 3-7-41-2 allows a voter to correct his or her name on the poll list on election day, as observed by the co-director of the Indiana Election Division, even making the handwritten change will not necessarily protect a voter. Further, there are examples of voters whose last names are incorrectly spelled on their state issued identification such that the only way to correct the poll list to make it conform to the identification would be to change their voter registration so that it incorporates an incorrect last name which may or may not allow them to avoid being challenged!

One example of an incorrect name on an Indiana driver's license is that of Tracy Heaton de Martinez. In recognition of the Mexican custom of using as both the bride's maiden name and the name of the groom, upon her marriage to Felipe Martinez, Tracy Heaton de Martinez incorporated her maiden name and the name of her husband. (Ex. C, Aff. Of Tracy Heaton de Martinez, ¶ 4).² While the Social Security Administration has correctly identified Tracy as "Tracy Heaton de Martinez," the Indiana Bureau of Motor Vehicles ("BMV") has identified Tracy as "TRACY HEATON DEMARTINEZ." (Ex. C, Aff. Of Tracy Heaton de Martinez, ¶ ¶ 5 & 7). When informed of its error in spelling her last name, the BMV told her that it was unable to change her license. (Ex. C, Aff. Of Tracy Heaton de Martinez, ¶5). On the polling list, she is identified as "TRACY HEATON DE MARTINEZ." (Ex. C, Aff. Of Tracy Heaton de Martinez, ¶ 7). Her name on her photo identification will not match the poll list which means she may be subject to challenge. Unfortunately for Ms. Heaton de Martinez, if she is challenged under the Photo ID law, her vote may not be counted even if she appears with her driver's license

² See, Ex. D, *LATINO LAST NAMES & SURNAMES.... & PRONOUNCIATION... WHAT'S RIGHT?*, Domingo Ivan Casañas, www.americanchronicle.com/articles/viewArticle.asp?articleID=2706

before the county election board because she does not have identification from the BMV in which her name matches the poll list. If she changes her name on the poll list to reflect her driver's license, it may require her to adopt a misspelling of her last name and even then, she may not be safe from challenge.

Kate Sweeney Bell cannot get the BMV to remove the hyphenated name on her driver's license. Ms. Bell is identified on her Indiana driver's license as "KATE. E. SWEENEY-BELL." (Ex. E, Aff. Of Kate Sweeney Bell, ¶ 3). Ms. Bell's legal name is not hyphenated and she has asked the BMV on more than one occasion to remove the hyphen; however, the BMV has refused to honor her request. *Id.* Ms. Bell's name on her voter registration card appears as "KATHERINE E. SWEENEY BELL." (Ex. E, Aff. Of Kate Sweeney Bell, ¶ 4). Without the hyphen, her name on the poll list does not match the name on her driver's license and again, as with Ms. Heaton de Martinez, changing Ms. Bell's name on the poll list might solve the problem and help the poll list match with her driver's license but it would require her to intentionally misspell her name.

In addition to female voters such as Ms. Heaton de Martinez and Ms. Bell, there are women such as Cordelia Lewis-Burks who have used a combination of names. Following her marriage in 1999, her name became Cordelia Lewis-Burks, "Lewis" being her last name before marriage. (Ex. F, Aff. Of Cordelia Lewis-Burks, ¶ 4). Ms. Lewis-Burks retired from her job in 2005 and has been known professionally both as Cordelia Lewis and Cordelia Lewis-Burks. (Ex. F, Aff. Of Cordelia Lewis-Burks, ¶ 7). The full name listed on Ms. Burks' driver's license is "CORDELIA LEWIS-BURKS." (Ex. F, Aff. Of Cordelia Lewis-Burks, ¶ 5). The name on her voter registration card is

“CORDELIA LEWIS BURKS.” (Ex. F, Aff. Of Cordelia Lewis-Burks, ¶ 6). Again, as previously discussed, Ms. Lewis-Burks faces possible challenge under the Photo ID law even if she should change her name on the poll book. Further, Ms. Lewis-Burks is an African-American who lives in a precinct that is predominantly African-American. (Ex. F, Aff. Of Cordelia Lewis-Burks, ¶ 8). Should any political party attempt to dilute the voters of a particular ethnic group, it is women such as Ms. Lewis-Burks who will face the greater number of challenges.

Ms. Heaton de Martinez, Ms. Bell and Ms. Lewis-Burks represent but a handful of the types of challenges that can be made under the new Photo ID law and it appears that the persons who will be primarily impacted by these types of challenges will be women. There are thousands of women across Indiana with names on the poll list that do not match the name on their driver’s licenses.

Indiana is preparing to adopt a new statewide voter registration software statewide. (Ex. G, Aff. Of Joel Miller, ¶ 3). While the new software will be able to incorporate a hyphen in the last name and properly alphabetize the name, the current voter registration program in Marion County does not incorporate a hyphen in hyphenated last names because the current computer system awkwardly alphabetizes hyphenated names. (Ex. G, Aff. Of Joel Miller, ¶ 5). As of this date, each Indiana county has its own voter registration program and independently decides how hyphenated names, three part last names, etc. are handled. (Ex. G, Aff. Of Joel Miller, ¶ 7).

Throughout Indiana there are likely hundreds, perhaps thousands, of female registered voters whose last name is hyphenated on their driver’s license, but whose last name is not hyphenated on the voter registration list through no fault of the women.

Once registered to vote, the law does not require these women to reregister to vote because there has been a software change that now allows a hyphenated name to be alphabetized

Overall, it is not speculation to presume there are thousands of women throughout Indiana who will potentially face challenge on election day. Thousands of women are already registered under the current voter registration systems and with the BMV. As this Court has seen for itself in dealing with the many people who have come before it, women often incorporate their maiden name with their married name, sometimes using a hyphen and sometimes not. Some start-off using a hyphen and then later drop it. Others later incorporate the hyphen. Regardless, most of these women will not realize they cannot comply with the Photo ID law until a challenge is actually made on election day. Further, simply because a voter is not challenged in one election does not mean she will not be challenged in a subsequent election, depending upon the whims of the precinct election board and/or the political challengers

Some of the women who will be challenged will never be able to satisfy the criteria required to vote – not because of anything they have done but because of the limitations of the computer systems of the BMV and the new statewide voter registration system. Women such as Ms. Heaton de Martinez and Ms. Bell have been told they cannot receive a driver's license that matches the voter registration list. Yet because of technical problems with the BMV due to the limitations of its computer system and/or its clerks, these women face the dilemma of changing their names on the poll list so that their driver's license can conform with the poll list or forego voting until the BMV can properly enter their names.

C. CHALLENGES ON THE BASIS OF PHYSICAL DIFFERENCES BETWEEN THE INDIVIDUAL AND THE PHOTO ON THE IDENTIFICATION ALSO PROVIDE THE OPPORTUNITY FOR UNBRIDLED DISCRETION AND ADMINISTRATION OF THE PHOTO ID LAW IN AN ARBITRARY AND CAPRICIOUS MANNER

While the Photo ID law states that a voter must cast a provisional ballot when the name on the government issued identification does not “conform” to the name on the voter registration list, the Photo ID law is silent about the criteria that are to be used to determine if an individual physically matches the photo on the government issued identification. Under the Indiana law, the photo identification must “show[] a photograph of the individual to whom the document was issued.” I.C. 3-5-2-40.5(2).

Again, people, particularly women often change their appearance. There are many women whose hair color and/or hair styles at the time they present themselves to vote will not match the color and/or style of their hair in their driver’s license or state-issued identification card. Women and men change their eye color with contact lenses and also utilize the services of plastic surgeons.

When it comes to appearance, men also change their appearance but to a lesser extent. For example, Mr. James E. Lingenfelter, Jr. is shown in the photo on his Indiana Driver’s license without any facial hair but now currently sports a goatee and moustache. (Ex. H, Aff. Of James E. Lingenfelter, ¶ 3).

Indianapolis voter Mary Ann Nowlin is wearing glasses in her driver’s license photo but now nearly always wears contact lenses. (Ex. I, Aff. Of Mary Ann Nowlin, ¶ 4). If Ms. Nowlin walks in the polling place wearing contact lenses, she could be subject to challenge.

In addition to the comparison of the photograph to the individual, there is also other data on a state identification card or driver's license that may not match the individual. Ms. Cordelia Lewis-Burks is shown in her driver's license photo with red hair. (Ex. F, Aff. Of Cordelia Lewis-Burks, ¶ 9). Her hair color is identified on her driver's license as brown. *Id.* Ms. Nowlin's driver's license states that she is a brunette but in the photo on her license and in person, her hair is streaked with blonde. (Ex. I, Aff. Of Mary Ann Nowlin, ¶ 6). When Ms. Nowlin and Ms. Lewis-Burks appear to vote, both women could be subject to challenge.

There are many men and women whose actual weight is not reflected on their driver's license. For example, the recorded weight on Ms. Nowlin's driver's license is approximately 50 pounds less than what Ms. Nowlin actually weighs. (Ex. I, Aff. Of Mary Ann Nowlin, ¶ 5). For many people, being challenged on their actual weight or physical appearance could be so embarrassing and humiliating that it could cause some voters never to return to vote. Challengers could discourage voters from voting and require them to cast a provisional ballot on the grounds that the weight or hair color or eye color of the individual presenting the identification does not match the weight or hair color or eye color of the individual described in the identification. After January 1, 2006, the driver's licenses of most individuals are to be renewed every six years. During a six year period an individual can have an extraordinary change in their physical appearance.

As there are no guidelines whatsoever as to what types of things can be challenged regarding the differences between the photo and the descriptions contained on the identification, it will be left to each of the members of the precinct election board and the political challengers to set their own parameters on what they might challenge.

D. THE PROCESS TO HAVE A PROVISIONAL BALLOT COUNTED IS ARBITRARY AND CAPRICIOUS AND UNDULY BURDENSOME

Once a voter is challenged and casts a provisional ballot, the voter must then appear before the election board. Although the challenged voter was required to complete a challenged voter affidavit at the polling place before casting the provisional ballot, *See*, I.C. 3-11-8-22, upon presenting herself or himself to the county election board or clerk of the circuit court and execute yet again another affidavit attesting she/he was the voter who cast the provisional ballot and also present her/his proof of identification.

In the case of names not conforming or physical appearance or physical descriptors not matching the voter who presents herself/himself, the voter has the choice of trying to get a corrected driver's license or identification card or, trying to explain to the county election board why the name is run together or has a hyphen or why the name has changed. Under I.C. 3-11.7-5-2.5, there is no provision that allows the election board to examine anything other than the "proof of identification." Thus, for example, there is no provision for a recently married woman to provide a copy of her marriage license to document her change in name.

The BMV does issue photo-exempt driver's licenses and identification cards. Women who wear a veil for religious reasons often seek a photo-exempt license or identification card. (*See, e.g., Ex. J, Religious Accommodation in Driver's License Photographs: A review of codes, policies and practices in the 50 states*, Council on American-Islamic Relations Research Center). These women can apply to be exempted from the requirement of having a photograph on their driver's license or identification

card but accompanying the application for photo exemption must be an additional document:

You must attach a letter certifying your religious belief from your Minister, Bishop, Elder or other leader of the religious sect of which you are a member explaining why you qualify for a photo-exempt driver license or ID card. The letter of certification MUST be on original letterhead and signed as stated above. Failure to provide such letter will result in denial of this application.

(Ex. K, Request for Photo Exempt License/Request for Photo Exempt Identification Card for Religious Reason).

A woman who presents her photo exempt identification as proof of identification on election day will be challenged because she fails to present the statutorily defined government-issued form of identification with a photograph. She can cast a provisional ballot after completing a challenged voter affidavit. However, if she wants her vote counted, she must appear before the election board and complete another affidavit stating that she objects to being photographed for religious reasons. IC 3-11.7-5-2.5(c)(2)(B). The woman has already provided evidence to the state of Indiana regarding her religious objections to being photographed and now must again execute an affidavit attesting to her religious objection to being photographed. For these women, this will be the process they must follow after each and every election.

The Photo ID law also allows a challenged voter to appear before the election board and attest that he or she is indigent and therefore unable to procure proof of identification. Nowhere does the Photo ID law define what constitutes indigency. Doris Ann Sadler, secretary of the Marion County Election Board and Clerk of the Marion County Superior and Circuit Courts, has acknowledged that Marion County has yet to determine what constitutes "indigency" for purposes of proof of identification:

Q: Next door is a homeless shelter where there are people who have zero money. There are other people out there who may be getting five hundred or six hundred dollars a month in Social Security and there's a whole range in between. So who in those are indigent for purposes of getting a free I.D. once we define what free I.D. means?

A: I don't know.

Q: How are we going to determine that?

A: Well, again, I think that's probably going to be a situation where the Marion County Election Board is going to have to set up some sort of decision-making process to apply under those circumstances. I'm well aware because I'm the clerk that courts and judges make those decisions all the time based on a number of issues. And sometimes, you know, a person getting three hundred dollars is described as being indigent.

Q: Yeah, but sometimes they're not.

A: And sometimes they're not, that's right. The point being that is nothing that I'm aware of that is set in stone that says that applies. So I think we're going to have to make some decisions.

(Ex. L, Dep. Of Doris A. Salder, p.p. 38-39).

As every county will be allowed to determine its own standard as to what qualifies as indigency, the standard will vary from county to county and while some challenged voters may be held to be indigent in some counties and therefore their votes will be counted, there will be voters in the same economic circumstances who will be found not to be indigent in other counties and therefore their vote will not be counted.

If the voter is on the voter registration list but does not have any kind of proof of identification then she or he must secure "proof of identification" which in most cases will be an Indiana driver's license or identification card. However, for some such as Harry Adamson, the father of Harriett Wilkins, securing proof of identification is easier said than done.

Harry Adamson, age 93, is a registered voter who resides in Indianapolis, Indiana with his daughter, Harriet Wilkins. (Ex. M, Aff. Of Harriet Wilkins, ¶ 3). Mr. Adamson moved to Indiana to live with his daughter in 2002. *Id.* As his daughter, the task is now upon Ms. Wilkins to assist her father in securing proof of identification. (Ex. M, Aff. Of Harriet Wilkins, ¶ 6). Born in 1912 in Kansas, Mr. Adamson was not born in a hospital but rather was born in his parents' home. (Ex. M, Aff. Of Harriet Wilkins, ¶ 4). Ms. Wilkins does not know if her father has a birth certificate and in her quest will have to determine what, if anything, she can secure to satisfy the State of Indiana regarding the certified birth records necessary to secure proof of identification for her father. (Ex. M, Aff. Of Harriet Wilkins, ¶ 5). Compounding the situation is the fact that the agencies with whom Ms. Wilkins must deal are located in Kansas. *Id.* As a member of the League of Women Voters, Ms. Wilkins is familiar with the Photo ID law and the problems that it may cause for her father; however, if Ms. Wilkins were to wait to deal with the situation until after Mr. Adamson's ballot was counted, she would only have eight and a half business days to acquire the documentation necessary to have her father's vote counted.

Further, Mr Adamson is lucky to have his daughter available to assist him. Many elderly find themselves alone and although living in assisted living center or nursing homes, there is no one to assist them with personal matters such as obtaining proof of identification.

E. THE PROCESS OF MAKING A PROVISIONAL BALLOT COUNT WILL DISCOURAGE VOTERS

Political scientists have long recognized that voting carries a cost and when that cost increases, fewer voters vote because they believe the benefit, i.e., having one's vote make a difference in the outcome, is outweighed by the cost.

The fundamental axiom of economic theory as it applies to voting is that citizens act rationally as they make their decisions about whether or not to vote (Downs, 1957). Just like any consumer purchase, people are hypothesized to consider both the costs and the benefits. If the benefits outweigh the costs, then the rational choice is to vote. Thus, if turnout is declining it must be because the benefits no longer outweigh the costs for many people.

Although this theory is simple and straightforward, in practice every voter probably weighs the various costs and benefits somewhat differently. A benefit for which one person might trudge through a blizzard in order to vote may not be considered a significant benefit by another person. Similarly, a cost that might seem incredibly burdensome to one individual might be only a minor annoyance to another.

(Ex. N, *Turnout Decline in the U.S. and other Advanced Industrial Democracies*, Wattenberg, Martin P., Center for the Study of Democracy, University of California Irvine, p. 2 (1998)). Even a small cost can lead voters not to participate in the process.

Downs basic argument is that the benefits of voting are so low that even relatively small costs will preclude rational citizens from casting a ballot: "when voting is costly, its costs may outweigh its returns, so abstention can be rational even for citizens with party preferences. In fact, the returns from voting are usually so low that even small costs may cause many voters to abstain," (1957: 274). * * * If the citizen concludes that there are benefits to voting, they then confront the costs of registering to vote, traveling to the polling place, and casting the ballot. Faced with these costs and recognizing that they are unlikely to cast the deciding ballot, most citizens ultimately decide that voting is not worth their time.

(Ex. O, *Precinct Quality and Voter Turnout: Race, Income and Civic Participation*, Barreto, Matt A., The Center for the Study of Los Angeles, Loyola Marymount University, p. 2 (2004)).

An “important cost that must be considered is the time it takes to get to the polls and go through the physical process of voting.” (Ex. N, *Turnout Decline in the U.S. and other Advanced Industrial Democracies*, Wattenberg, Martin P., Center for the Study of Democracy, University of California Irvine, p. 3 (1998)). In the present case, the additional cost imposed by the Photo ID law upon those casting provisional ballots will discourage voters from voting in subsequent elections and from taking the steps necessary to have their ballot counted.

The first group of voters to be discouraged will be the provisional ballot voters who are required to take additional steps to have their ballot counted by appearing before the county election board and, if necessary, gathering additional documentation. For example, working women with families already have family obligations competing for the time they can take away from work. The woman who is required to cast a provisional ballot will now have to take additional time away from work to gather documentation and/or appear before the county election board – time she may or may not have available to her. Finding transportation to and from various locations will not only impose an additional hardship upon some of these women but also upon elderly persons, poor persons and others without vehicles.

On February 9, 2005, before the Indiana legislature adopted the Photo ID law, Indiana Secretary of State Todd Rokita testified before the Committee on House Administration of the United States Congress regarding Indiana’s implementation of the requirements set forth in the Helping America Vote Act (“HAVA”). (Ex. P, Press Release). Secretary Rokita’s testimony acknowledged the difficulties at the polling place

when a voter is required to cast a provisional ballot and how, when implementing HAVA, the state had taken steps to ensure a provisional ballot would be a case of last resort:

In Indiana, we firmly believe that the provisional voting process is one of last resort—to be used only when all other methods of proceeding directly to the voting booth have been exhausted. So far, we have seen its use limited to the rare exception and not used as “normal” way of voting. Based on reports of large numbers of provisional votes cast in various states, it seems to me that provisional voting is either not being used as a last resort or is being abused. I believe the way we address this in Indiana [to satisfy HAVA requirements is], by making sure all other avenues are exhausted before the casting of a provisional ballot, best serves the voters.

(Ex. Q, Testimony of Indiana Secretary of State, Todd Rokita before the Committee on House Administration, p. 3). Secretary Rokita is correct to observe that casting a provisional ballot should be a case of last resort; however, under the Photo ID law as written and as previously discussed, there are no statutory provisions providing such assurances. The Indiana Photo ID law simply does not provide statutory protection against abuse.

It is not only the voters who cast the provisional ballots who are forced to pay an increased “cost” to vote. As Secretary Rokita observed in his testimony:

The voters in line would have to wait while the poll workers look unsuccessfully for the name on the poll list, while the poll workers process the forms the voter fills out to cast a provisional ballot, while the provisional voter uses a booth to cast her ballot, and while the poll workers provide the provisional voter with the information required by HAVA about the provisional ballot process.

(Ex. Q, Testimony of Indiana Secretary of State, Todd Rokita before the Committee on House Administration, p. 3).³ Thus not only is a challenged voter discouraged from voting but also the voters waiting in line behind the challenged voter:

³ Secretary of State Rokita also discussed how poll workers from the neighborhoods can best police those cases where a voter presents to vote but is not the

We also know that both poll workers and voters are discouraged by long lines and delays at the polls. Discouraged poll workers may decline to work again. Discouraged voters may decide that the lines are too long and may walk away without voting. We need to recognize that while of course voting is important and the integrity of the election process is critical, it is also true that for many non-activist voters outside this room, casting a ballot is only one of several important or critical things that they must get done on Election Day. For example, a parent picking up a child after school, a worker hurrying to her job, or a minister on the way to visit a patient at a hospital also have other important things to do the rest of the day.

(Ex. Q, Testimony of Indiana Secretary of State, Todd Rokita before the Committee on House Administration, p. 3).

The difficulty in all of this is that no one can provide assures that there will be no abuse of the Photo ID law as written. As Ms. Sadler testified:

Q So your answer to my question that this new law won't slow down the process is predicated on the assumption that there will not be a concerted challenge program initiated or undertaken by one of the political parties.

A That would be an accurate statement, yes.

Q But there's no assurance that that will not happen, is there?

A There is no assurance, no.

Q In fact, the opportunities for presenting these type of challenges have now increased by virtue of the relocation of the challenger and the new photo I.D. requirements?

A I would say that's an accurate statement, yes.

(Ex. R, Dep. Of Doris A. Sadler, p.p. 49-50).

person they are claiming to be or who gives a false address. However, as Secretary Rokita also acknowledges, finding poll workers is difficult (*See*, Ex. A, Testimony of Indiana Secretary of State, Todd Rokita before the Committee on House Administration, p. 3). So while the idea of having neighborhood residents available to casts challenges is good in theory, in actuality, where the voters of one party predominate over the voters of another party, the poll workers and/or inspector are recruited from areas outside the precinct.

However, to impact the outcome of an election will not require wide scale challenges. For example, in Marion County there are 914 precincts. (Ex. S, Dep. Of Delores A. Sadler, p. 26). If only five challenges are made throughout the day in each precinct, this would be a total of over 4570 provisional ballots. In 2004, Indiana Superintendent of Education Suellen Reed lost to her opponent in Marion County by only 778 votes. (See, Ex. T, 2004 General Election Summary, Marion County Election Board).

The impact of provisional balloting can be more devastating in local races. In 2003, there were several city-county council races with close margins. In City-County Council District 1, the vote difference between the victor and loser was 82 votes. In City-County Council District 12, the vote difference was 13 votes. In City-County Council District 16, the vote difference was three votes. In many of the races for offices in smaller cities such as Beech Grove the margins are just as tight and the politics even more local. (See, Ex. U, 2003 Municipal Election Results, Marion County Election Board). Thus to have an impact, the challenge of voters does not necessarily have to be widespread or even in great numbers.

CONCLUSION

Given the potential impact of the Photo ID law upon the voters of Indiana and the potential to abuse the process, the League of Women Voters of Indiana and the League of Women Voters of Indianapolis respectfully request that the Indiana Photo ID law be declared unconstitutional and/or in violation of federal law.

Respectfully Submitted,

October 31, 2005

Date

/s Karen C. Horseman

Signature

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October 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.

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