

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY,)
et al.,)
)
Plaintiffs,)
)
v.)
)
TODD ROKITA, et al.,)
)
Defendants,)
)
_____)
WILLIAM CRAWFORD, et al.,)
)
Plaintiffs,)
)
v.)
)
MARION COUNTY ELECTION BOARD,)
)
Defendant,)
)
and)
)
STATE OF INDIANA,)
)
Intervenor.)

No. 1:05-CV-00634 SEB-VSS

Memorandum in Support of Motion for Summary Judgment by Plaintiffs William Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition of Housing and Homeless Issues, Joseph Simpson

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STATEMENT OF ISSUES

The Indiana General Assembly has passed SEA 483 that requires most, but not all, Hoosiers voting in-person at polling places to produce a driver's license or identification card issued by the Indiana Bureau of Motor Vehicles ("BMV") or other state or federal agency. It does not require those who vote by mail as absentee voters to produce the required identification.

1. Do plaintiffs, consisting of elected officials who are also candidate and voters, and advocacy groups containing members who will be adversely affected by the law, have standing to bring this action?
2. Is SEA 483 unconstitutional because it is in the nature of a poll tax, imposing an economic burden on the right to vote and because, regardless of economic impact, it imposes a severe burden on the right to vote without sufficient justification for doing so?
3. Does SEA 483 violate the Voting Rights Act, 42 U.S.C. § 1971(a)(2) because it subjects voters within Marion County to different voting qualification standards and because it denies the right to vote to those without identification, even though this is obviously not a material requirement inasmuch as the requirement is not imposed on those who vote absentee by mail and it is not imposed on those who vote in-person at nursing homes in which they live?
4. Does SEA 483 violate the Indiana Constitution inasmuch as imposes grossly unreasonable requirements that make voting difficult, if not impossible, for some persons and because the requirements are not explicitly allowed by the Constitution?

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Introduction

Effective July 1, 2005 Indiana law has been changed to require most, but not all, Hoosiers voting in-person at polling places to produce a driver's license or identification card issued by the Indiana Bureau of Motor Vehicles ("BMV"). The new requirement has been promoted as a way of preventing fraud. Yet, there has never been any fraud in Indiana associated with in-person voting. What election fraud has occurred in Indiana has been restricted solely to voting through absentee ballots. However, the new law provides no identification requirements or other safeguards for absentee voting. The new requirement for BMV identification applies only to most, but not all, persons who chose to exercise their right to vote in person. This new requirement has erected an onerous and expensive burden for some voters and an impossible one for others. It violates federal law as well as the United States and Indiana Constitutions. Accordingly, judgment should be entered for the plaintiffs¹ and an injunction should be entered preventing enforcement of this unconstitutional and unlawful requirement.

The summary judgment standard

The standard for the grant of summary judgment is clear.

Under Fed.R.Civ.P. 56(c), summary judgment is warranted only if "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law."

¹ The plaintiffs in this case consist of two individuals, Rep. William Crawford and Joseph Simpson and a number of interested groups: United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis ranch of the NAACP, and Indiana Coalition on Housing and Homeless Issue. For ease of convenience in this memorandum these plaintiffs will be referred to as "Rep. Crawford and the interested groups."

The initial burden of production rests upon the moving party to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 . . . (1986) Once the moving party satisfies this burden, the nonmovant must “set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e). The nonmovant must do more, however, than demonstrate some factual disagreement between the parties; the issue must be “material.” . . . If no genuine issues of material facts exists, the sole question is whether the moving party is entitled to judgment as a matter of law.

Logan v. Commercial Union Insurance Co., 96 F.3d 971, 978 (7th Cir. 1996). There are no contested issues of material fact in this case and judgments should be entered for Rep. Crawford and the interested groups.

Statement of Material Facts Not in Dispute

I. Legal background ²

A. General background as to Indiana election law

1. Registration requirements

The Indiana Constitution, Art. 2, § 2 sets out the basic requirements for voting in Indiana:

(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.

(b) A citizen may not be disenfranchised under subsection (a), if the citizen is entitled to vote in a precinct under subsection (c) or federal law.

(c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before an election may vote in a precinct where the citizen previously resided if, on the date of the election, the citizen’s name appears on the registration rolls for the precinct.

² The facts in this case are intertwined with Indiana’s election law. This law is therefore set out together with the facts.

The Indiana Constitution, Art. 2 § 14 allows the General Assembly to provide for registration of persons otherwise entitled to vote. Indiana law, Indiana Code §§ 3-7-13-1 through 3-7-24-17, and the National Voter Registration Act, 42 U.S.C. § 1973gg, provide for a host of ways to register in-person at various venues and offices as well as registering by mail. There is no requirement that identification be shown when one is registering in-person to vote. (Deposition of Marion County Clerk Doris Ann Sadler, Attachment to Motion for Summary Judgment of Plaintiffs’ Rep. Crawford and the interested groups [“Attachment”], Attachment 1 [“Sadler”] at 8-9). The registration form is signed under penalties of perjury. (*Id.* at 9). There is also no requirement that one registering by mail provide identification. Indiana Code § 3-7-22-1, *et seq.*

2. The role of the County Election Board and local election officials in elections

Indiana law provides for the establishment of the Indiana Election Division, (Indiana Code § 3-6-4.2-1, *et seq.*). The Commission provides advice and instruction to county election officials and publishes information and forms for use in Indiana elections. (*Id.*; Deposition of Co-Director J. Bradley King, Attachment 2 [“King”] at 7). However, the administration of any election and its oversight is the responsibility of the County Election Board. (Indiana Code § 3-6-15-14; Sadler at 6).³

At polling places there are five local election officials: an inspector, appointed by the political party whose candidate for Secretary of State received the most votes in the last election in the county; two clerks, one from each major party, who are in charge of

³ Among other things, each County Election Board is required to “[c]onduct all elections and administer the election laws within the county, except as provided in IC 3-8-5 and IC 3-10-7 for town conventions and municipal elections in certain small towns.” Indiana Code § 3-6-15-14.

the poll book and who check voters in and issue the ballots; and, two judges, also one from each party, who administer the voting machine. (Sadler at 10-11). The County Election Board appoints these officials. (Indiana Code §§ 3-6-6-1, 2). The inspector and the judges together comprise the precinct election or poll board that will vote to resolve disputes that may arise during the polling process. (Indiana Code § 3-6-6-1; Sadler at 11).

3. In-person voting, challenge procedures, and identification prior to July 1, 2005

Prior to the law that is subject to challenge in this case a voter seeking to vote in-person at a polling place would have to present himself or herself to the clerks and sign the poll book. (Sadler at 11; King at 28). At that point there would generally be a photographic copy of the signature that would be compared. (Sadler at 11).⁴ Indiana law provides criminal penalties for those who use a fraudulent identity to vote. See, Indiana Code § 3-14-2-1, *et seq.*

Under the former law, there was no requirement that an individual show any form of identification in order to vote after the prospective voter signed in with the clerk. (Sadler at 11). The only exception to this was added by Congress in the Help America Vote Act of 2002 (“HAVA”), Public Law 107-252. Specifically, Section 303(b) of HAVA, 42 U.S.C. § 15483(b), provides that if a voter registers to vote by mail and votes for the first time in-person thereafter in a federal election the voter must present certain

⁴ Many Indiana counties use a scanned copy of the signature for comparison purposes and others use the voter registration cards themselves. (King at 28-29). It may be that in some counties there was no practical way to compare the signatures to the poll list. (King at 29). However, effective January 1, 2006, federal law requires that the voter registration system general poll lists contain scanned signatures from all registration cards. (King at 30).

identification. Specifically, the voter must present some form of photo identification or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” 42 U.S.C. § 15483(b)(2)(A)(i).

Indiana law allows voters to be challenged. Indiana Code § 3-11-8-20. A clerk could challenge the voter if he or she believed that the voter’s identity was incorrect. (Sadler at 12). The other officials could challenge on other grounds as well as challenging the prospective voter’s identity. (King at 44). A challenge is made by the challenger completing a form affidavit. (Indiana Code § 3-11-8-21; King at 48-49, Ex. 2). The challenged voter could then fill out a form response affidavit attesting to the fact that he or she could lawfully vote in the precinct. (King at 48-49, Ex. 2; Indiana Code §§ 3-11-8-22, 23). The voter would then be allowed to vote. Beginning with HAVA in 2004, most counties would allow the voter to vote through a provisional ballot. (King at 53).⁵ Once the provisional ballot was cast the County Election Board would determine if the ballot should be counted or not. (King at 55-56). The challenged voter would therefore not have to appear before the County Election Board or take any further action to have his or her vote counted. (King at 57, Sadler at 13).

4. Absentee voting prior to July 1, 2005

Indiana law, prior to July 1, 2005, provided that persons may vote absentee ballots via mail if they are going to be absent from the county on election day; if they are absent from their precinct because of working at the polls in another location; if they are

⁵ At least one county, Marion, took the position that if the voter filed a counter-affidavit he or she should be issued a regular, not a provisional, ballot. (King at 54, Sadler at 13).

disabled or confined to a health care facility or hospital because of illness; if they are elderly; if they are caring for someone and may not leave to vote; if they are scheduled to work during the entire time that the polls are open; and if they are eligible to vote in the precinct of their former residence pursuant to Indiana Code § 31-10-11 and 31-10-12. Indiana Code § 3-11-10-24 (amended July 1, 2005).⁶

Additionally, any person who was otherwise entitled to vote via an absentee ballot may vote in-person, prior to the election before an absentee voter board in either the office of the circuit court clerk or a satellite office. Indiana Code § 3-11-10-26. (amended July 1, 2005).

When absentee votes are cast the voter must seal the ballot and sign his or her name on the outside of the envelope containing the ballot and complete a state form. (Sadler at 24). The signature is then examined before the ballot is counted and if it does not match it can be challenged and the precinct election board of the precinct where the voter lives will determine if the ballot will be counted or not. (Sadler at 24-26). The signature, and the ability to compare with the signature on file, is how election officials ensure that there is not fraud and that the election is both safe and secure. (King at 126).

Prior to July 1, 2005, there was no requirement on those voting via absentee ballot that they produce identification, except that if a voter registers to vote by mail and votes for the first time thereafter in a federal election, via an absentee ballot, the voter must present certain identification. 42 U.S.C. § 15483(b). This is the same identification that

⁶ As of July 1, 2005, two additional categories of absentee ballot voters were added: persons who are unable to vote because they are adhering to a religious discipline or holiday during the entire time that the polls are open and persons who are address confidentiality program participants as defined by Indiana Code § 5-26.5-1.6. Indiana Code § 3-11-10-24 (effective July 1, 2005).

must be produced if the person votes in-person for the first time after registering by mail: photo identification or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”

42 U.S.C. § 15483(b)(2)(A)(ii).

B. Senate Enrolled Act No. 483 and the other current voting requirements in Indiana

1. Current requirements for identification for those voting in-person at polling places

Senate Enrolled Act No. 483 (“SEA 483), effective July 1, 2005, modified numerous statutes and added additional identification requirements to the signature requirements for most voters attempting to vote in-person. The identification required by the statute is quite specific. It must be a document that satisfies all of the following requirements:

- (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.

Indiana Code § 3-5-2-40.5.

Before any voter can vote in person in a primary or general election the voter must be asked by a member of the precinct election board to show the voter’s identification. (Indiana Code §§ 3-10-1-7.2(b), 3-11-8-25(b) (expires January 1, 2006); 3-

11-8-25.1(b) (applies after December 31, 2005)). If the voter does not present proof of identification or if the member of the precinct board determines that the proof of identification does not qualify as identification as required by the new law, then the member of the election board must file a challenge to the voter. (Indiana Code §§ 3-10-1-7.2(c), 3-11-8-25(c) (expires January 1, 2006); 3-11-8-25.1(c) (applies after December 31, 2005)). The voter may then file a counter-affidavit and if so will be allowed to sign the poll list and will be given a provisional ballot. (Indiana Code §§ 3-10-1-7.2(d), 3-11-8-25(d) (expires January 1, 2006); 3-11-8-25.1(d) (applies after December 31, 2005)).

As indicated above, under the former law, once the voter completes the voter's affidavit, the voter's obligations are done and the County Election Board will determine if the vote is to be counted. Under the new law, however, in order for the vote to be counted the voter must appear before the Circuit Court Clerk of the County Election Board and:

- a. Provide proof of identification and execute an affidavit that the voter is the same person who had voted provisionally
- b. Execute an affidavit that the voter is the same person who had voted provisionally and:
 - i. is indigent and unable to obtain proof of identification without payment of a fee, or
 - ii. has a religious objection to being photographed.

Indiana Code 3-11.7-5-2.5. The voter must appear before the Circuit Court Clerk or the County Election Board no later than noon on the second Monday following the election. (*Id.*, Indiana Code § 3-11.7-5-1). This is the deadline for the counting of provisional ballots. (Indiana Code § 3-11.7-5-1).

Once the voter timely appears and either presents proof of identification or signs the affidavit of inability to obtain the identification without payment of a fee or that he or she has a religious objection to being photographed, the voter's vote will be counted provided that there were no other grounds for challenging the voter's ballot. (Indiana Code § 3-11.7-5-2.5). If the voter fails to appear in a timely fashion, fails to provide the requisite identification or execute the appropriate affidavits, the provisional ballot will be declared to be invalid. (Indiana Code § 3-11.7-5-2.5(f)).

However, not all voters who vote in-person must show the required identification. For, SEA 483 contains an exception for a voter "who votes in person at a precinct polling place that is located at a state licensed facility where the voter resides." (Indiana Code §§ 3-10-1-7.2(e), 3-11-8-25(e) (expires January 1, 2006); 3-11-8-25.1(f) (applies after December 31, 2005)). These persons are "not required to provide proof of identification before voting." (*Id.*). The term "state licensed facility" covers, at least, nursing homes. (King at 121).

2. Current identification requirements for absentee voters

Although SEA 483 imposes rigorous identification requirements for those seeking to vote in-person, except for nursing home residents, the law explicitly indicates that those who vote absentee by mail do not have to provide the identification required by those who vote in-person. (Indiana Code § 3-11-10-1.2).⁷ However, a voter who votes

⁷ Legislative changes effective July 1, 2005, also made it more difficult to vote by an absentee ballot. Previous law allowed a voter to vote absentee if he or she "will be absent from the county on election day." (Indiana Code § 3-11-10-24 (amended July 1, 2005)). The new law allows someone absent to vote only if they specify that they have a "a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open. (Indiana Code § 3-11-10-24 (effective July 1, 2005)).

in-person at the clerk's office or a satellite office before an absentee voter board must show the identification. (*Id.*)⁸

II. Facts

A. The specifics and costs of obtaining a photo identification card in Indiana

As indicated above, in order to vote in-person, Indiana voters who do not reside in State licensed facilities, must present a current photo identification, with an expiration date, issued by the State or federal government. The federal issued identification includes passports as well as military identification. (King at 60).⁹ State identification could include perhaps university issued identification cards if the cards contained an expiration date. (King at 61)¹⁰ The most likely source of identification cards are either licenses or state identification cards issued by the Indiana Bureau of Motor Vehicles

⁸ If an absentee voter board visits a voter who is ill, injured, or disabled, or is caring for a confined person, no identification is required. (Indiana Code §§ 3-11-10-1.2, 3-11-10-25).

⁹ A passport is, of course, a travel document issued by the United States to nationals proceeding abroad. 22 C.F.R. §§ 51.1, 51.2. In order to obtain a passport for the first time the applicant must appear in person before an individual authorized by the United States, must present identification, verify the application, provide two recent photographs and pay the fees. 22 C.F.R. § § 51.21, 51.43. The fee is \$85 for a new passport and \$55 for renewal for adults. 22 C.F.R. §§ 51.61, 22.1. A passport is valid for 15 years. 22 C.F.R. § 51.21. In order to obtain the passport the person must present a certified birth certificate and , if not available, the applicant is to produce the best obtainable other evidence available. 22 C.F.R. § 51.43. Given that passports are restricted to those anticipating foreign travel, and given the cost for obtaining a passport, it can be presumed that most voters, particularly the poor and disabled, will not be likely to have passports.

¹⁰ Although the identification cards issued by Indiana University School of Law in Indianapolis do not contain expiration dates and therefore would not be valid. (King at 82-83)

(“BMV”) and SEA 483 focuses on identification cards issued by the BMV. (*See*, SEA 483, Sections 15-18).

In order to obtain a license or identification card¹¹, the BMV requires that the applicant produce certain forms of identification. BMV rules require that a new issuance requires that the applicant present, among other things, either: one primary document, one secondary document, and one proof of Indiana residency requirement or two primary documents and one proof of Indiana residency. (Deposition of BMV Designee Carol Redman, Attachment 3 [“Redman”] at 5, Ex. 2).¹² A primary document consists of a United States Birth Certificate with a stamp or seal, documents showing that the person was born abroad as an American citizen or is naturalized, or a passport of military photo. (Redman, Ex. 2).¹³ Secondary documents currently are defined as:

- bank statement
- certified academic transcript
- confirmation of registration letter from an educational institution
- court documentation with stamp or seal
- foreign consulate-issued ID card
- government-issued license or ID card
- Hoosier RX plan card w/imprinted name
- Hoosier Works Card w/ imprinted name
- Indiana County Pre-sentence Investigation Report with clerk stamp or seal
- Indiana gun permit (valid)

¹¹ Under Indiana law, an Indiana resident who does not wish to receive a license to drive may receive an identification card. Indiana Code § 9-24-16-1, *et seq.*

¹² In *Villegas v. Silverman*, 832 N.E.2d 598 (Ind.Ct.App. 2005), *petition for rehearing denied*, the Court struck down the BMV identification rules because they had not been promulgated as required by Indiana law. The BMV continues to use these rules and is currently engaging in rule making with only minor changes in the proposed rules. (Redman at 6-7).

¹³ Primary documents also include certain acceptable documentation from federal immigration authorities for non-citizens. (Redman, Ex. 2). This is obviously of no relevance in this case that concerns the rights of citizens to vote.

- Indiana probation photo ID card
- Indiana professional/occupational license (valid)
- Indiana BMV Title Application w/BMV valid stamp
- Indiana BMV Title or Registration (Valid)
- Insurance card
- Letter from probation officer or government caseworker on letterhead stationary, certified with court or government stamp or seal with the applicant's name, and signature of the probation officer or caseworker¹⁴
- Major credit or bank card (MC, VISA AE, and Discover only)(valid)
- Original out-of-state- driving record
- Pay check stub – computer generated
- Prison release documentation/photo id
- School report card (dated within 12 mos.)
- School photo id card
- Selective Service Acknowledgement Card – SSS Form 3A
- U.S. divorce decree certified by court of law with stamp or seal
- U.S. application of marriage/record of marriage (certified copy). Must contain the stamped seal and be signed by clerk
- U.S. District Court Pre-Sentence Investigation Report with clerk stamp or seal
- U.S. Military discharge or DD214 separation papers
- U.S. Veterans Universal Access ID card with photo
- W-2 Form (federal or state) of 1099 federal tax form.

(Redman, Ex. 2).¹⁵

The proof of Indiana residency requirement imposes on the applicant for a license or BMV issued identification the requirement that he or she present some proof of a residential address, although a post office box is not acceptable. (Redman, Ex. 2). What is acceptable includes, but is not limited to:

- child support check from the Family and Social Services Administration with the name and address of the applicant
- change of address confirmation form (CNL 107) from U.S. Postal Service listing old and new address
- current bill or benefit statement (within 60 days of issuance)
- Indiana driver's license, identification card or permit with photograph
- Indiana property deed or tax assessment

¹⁴ The proposed rule that is currently in rule making adds to this subcategory a similar letter from a social worker. (Redman at 6)

¹⁵ The proposed amended rule that is in rule making at the current time adds as a secondary document a Medicaid or Medicare card. (Redman at 6).

- Indiana residency affidavit
- Voter registration card

(Redman, Ex. 2).¹⁶

In order to obtain an identification card or license from the BMV an applicant must personally appear at the branch. (Redman at 8). An identification card costs \$10 and a license costs \$14. (Redman at 13). The identification is valid for four years. (*Id.*) As of January 1, 2006, a license expires after six years. (Indiana Code 9-234-12-1(c)).

SEA 483 provides that an individual that does not have a valid license and will be at least eighteen (18) years of age at the next general, municipal, or special election must be issued an identification card from the BMV without cost. (Indiana Code 9-24-16-10). The BMV has interpreted this to mean that in order to obtain a free identification card,, the applicant cannot have either a valid license or identification card. (Redman at 13). Moreover, if an applicant has moved to Indiana from another state and still has a valid license from that state, the applicant will have to pay the BMV \$10 to obtain a license because the applicant has a valid license in another state. (Redman at 15-16).

B. There are voters and potential voters who do not currently have the identification necessary to be able to vote

The BMV does not have an estimate as to the number of adults in Indiana who are currently eligible to vote but who do not currently have licenses or identification cards issued by the BMV. (Redman at 21). But, the BMV is aware that there are persons who do not currently have license or identification cards and who are, or who will be, eligible to vote at the next election. (Redman at 21-22).

¹⁶ The proposed amended rule adds as an additional document under proof of Indiana residency a valid Indiana vehicle title or watercraft registration. (Redman at 6).

In a survey done by plaintiff Indiana Coalition on Housing and Homeless Issues to its members, providers of services to homeless and low-income persons indicated that they were personally aware of clients who had neither licenses nor identification cards. (Deposition of Michael Reinke, Attachment 4 [“Reinke”] at 60-67, Ex. I). This is not a rare phenomenon among homeless persons. Case managers at Horizon House, a day center in Indianapolis for homeless persons, note that frequently homeless persons have lost all their possessions, including any identification. (Affidavit of Robert Andrew Ford, Attachment 5 [“Ford”] ¶¶ 1-5; Affidavit of Brenda Thompson, Attachment 6 [“Thompson”] ¶¶ 1-5).

This problem is not restricted only to homeless persons. The director of plaintiff United Senior Action concludes, based on her experience with the organization and the conversations she has had over the last 16 years with her members, that there are many senior citizens who do not have either a valid license or identification card. (Deposition of Michelle Niemier, Attachment 7 [Niemier] at 23-24). A survey released on October 28, 2005 by AARP Indiana reports that 3% of Indiana registered voters over the age of 60 do not have a license or identification card. (Affidavit of June Lyle and AARP survey, Attachment 8.) This conclusion is echoed, albeit for a different population, by plaintiff Indianapolis Resource Center for Independent Living (“IRCIL”), a self-help advocacy organization with and for persons with disabilities. (Deposition of Melissa Madill, Attachment 9 [Madill] at 6.) Its executive director notes that it is very common for persons with disabilities to not have identification. (Madill at 13). Moreover, persons who are blind or visually impaired often do not even know that their identification cards, if they have them, have expired. (Madill at 47). And, plaintiff Indianapolis Chapter of

the NAACP has members who have specified that they will not be able to vote given the current law. (Deposition of Roderick Bohannon, Attachment 10 [“Bohannon”] at 15-18).

C. Obstacles faced when persons must obtain and/or present an identification card or license from the BMV in order to have their vote counted

1. Cost concerns

The path to obtaining the identification card is potentially difficult. First, there is the cost. In Marion County the cost is \$10. (Declaration of Gregory J. Ullrich, Attachment 11 [“Ullrich”] ¶ 4). However, if the person lives out of state the cost can range from \$15 to \$30. (Ford ¶ 9).

SEA 483 does provide that a voter who has voted by provisional ballot may avoid the need to procure identification if the voter executes an affidavit’s at the County Clerk’s office or the office of the County Election Board that he or she is indigent and “unable to obtain proof of identification without the payment of a fee.” (Indiana Code § 3-11.7-5-2.5(c)(2)(A)). At this point it is not certain whether the cost of a birth certificate is a “fee” within the above statute. (Sadler at 37-38). Nor is there any definition of indigency. (Sadler at 38-39). Even if the cost of a birth certificate can be part of the “fee” that can be waived when the person appears at the office of the Clerk or County Election Board, there are other costs, such as the cost of parking and gas that could not be deemed to be part of a “fee,” no matter how expansively the waiver provision of Indiana Code § 3-11.7-5-2.5(c)(2)(A) is interpreted. (Deposition of Co-Director Kristi Robertson, Attachment 12[“Robertson”] p. 48-49).¹⁷

¹⁷ For example, there is no free parking for voters who must go the office of the Clerk or the Election Board in the City County Building in Indianapolis. (Sadler at 39).

Considerations of cost for transportation in order to obtain a BMV identification card or license is of acute concern for persons with disabilities. (Madill at 13). Federal statistics demonstrate that the disabled population has a 70% unemployment rate. (Madill at 13, 16). Transportation is of extreme concern and importance to the disabled community. (Madill at 13). In Indianapolis, there is a para-transit system, INDY Go, which provides curb-to-curb service for disabled persons. (Madill at 14). The service is expensive, \$6.00 for a round-trip. (Madill at 13). In order to utilize the service the disabled person must schedule the trip 3-5 days in advance. (Madill at 15). A single trip may take two hours as other persons are picked up. (*Id.*) And, there is a greater demand for the service than capacity. (*Id.*).

Homeless persons will not be able to afford the cost of birth certificates and have great difficulty accessing transportation to get to the Health Department to obtain a birth certificate and then travel to the Clerk's office. (Thompson ¶¶ 7, 16, 17; Ford ¶¶ 7, 8, 18). This is a problem for the working poor as well. Not only do they have to pay for a birth certificate, they will have to pay the bus fare and take time off of work. (Deposition of Margie Oakley, Attachment 13 ["Oakley"] 15-16).

2. Other issues concerning birth certificates

If a prospective voter does not have a birth certificate for reasons other than inability to pay for it, the person cannot obtain BMV identification and cannot have their vote counted. (Robertson at 49-50). This is not a hypothetical concern.

Persons born in Marion County may obtain a certified copy of their birth certificate from the Health and Hospital Corporation of Marion County. (Ullrich ¶¶ 1-3). There is only one office where the person can receive a birth certificate from the Health

and Hospital Corporation and it is located at 3838 N. Rural Street in Indianapolis. (Ullrich ¶¶ 2, 3). However, in order to obtain a certified copy of the birth certificate the applicant must produce a passport, current student identification, military identification card or either a non-expired drivers license or state identification card. (Ullrich ¶ 6, and attachment). If the person does not have the identification required by the Health and Hospital Corporation, he or she will not be able to receive a birth certificate from the Health and Hospital Corporation and will be referred to the Indiana State Department of Health in downtown Indianapolis. (Ullrich ¶ 7). But, the Indiana State Department of Health requires that an applicant for a birth certificate produce:

one of the following: a drivers license, state identification card, work identification with signature, military identification with signature, school identification with signature, veterans identification, or a passport, or,

two of the following: social security card, credit card with signature, bank card with signature, motor vehicle registration (must be at least 6 months old), housing lease (must be at least 6 months old), military DD-214, valid Indiana professional license, original employment application (must be at least 6 months old), current voters registration.

(First Stipulation of the Parties, Frequently Asked Questions, page 2).

The need to have a license or identification card in order to obtain a birth certificate that is needed to obtain a license or identification card is a circular problem that prevents persons from being able to obtain either. Thus, Robert Ford, a case manager at Horizon House notes that:

In order to obtain a birth certificate the individual must at least have a state identification card or Social Security Card or other items such as a credit card, bank card, or lease and a homeless person might not have any of these. They will then not be able to obtain a birth certificate, even if they have the \$10. I have had clients who did not have sufficient identification to obtain a birth certificate from either the Marion County Board of Health or the State Department of Health.

(Ford ¶ 11).

Of course, some persons are born out of the state of Indiana. In some circumstances African-Americans were born at home in one of the southern states and the forms to register the birth were not completed. (Affidavit of Aaron Haith, Attachment 14 [“Haith”] ¶ 13) As a result, the person will not have a birth certificate. (*Id.*) United Senior Action is well aware of the fact that there are senior citizens without birth certificates. (Niemier at 51-52). The BMV has acknowledged that this problem exists and has issued a letter to its license branches indicating that if individuals who are 65 years or older attest that they have never been issued a birth certificate because their birth was not recorded they may substitute as a primary document: their Medicaid/Medicare card; Social Security benefits statement; property deed; property tax statement; bank statement; U.S. Veteran’s access photo identification card; marriage license or divorce decree, or pension statement. (Redman, Ex. 3). However this policy has not been promulgated, it is not on the BMV’s website that lists the identification requirements and if persons go to branches and ask what identification is necessary to obtain a license they will be given the BMV’s formal policy (Redman, Ex. 2) that contains no mention of this exception for persons over the age of 65. (Redman at 9-11). The BMV representative indicated that she was not aware that the policy had been publicized in any way to senior citizens’ organizations. (Redman 9). Moreover, no records are kept of whether the policy had ever been used. (Redman 11). If someone is under 65 and has never been issued a birth certificate he or she will not be able to take advantage of this; it is only for persons over 65 years of age. (Redman 11-12).

Even if the person born out of state has a birth certificate, it may take many months to receive it. Brenda Thompson, case manager at Horizon House, notes that “depending on the state, it may take months to receive an out-of-state birth certificate, even if the particular identification requirements to obtain the birth certificate are satisfied.” (Thompson ¶ 9, *see also*, Ford ¶ 10; Oakley 40-41).

The BMV is aware of persons who have tried to obtain a license or identification card and have been turned away because they do not have an original birth certificate. (Redman at 18).

3. Other issues concerning the acquisition of an identification card or license

People have also been turned away from the BMV because they do not have the secondary documentation or proof of residency required in order to obtain a license or identification card. (*Id.*). This is a particular problem for homeless persons who do not have a residence. Robert Ford, case manager at Horizon House notes that “I know from working with my clients that some of them do not have this secondary and other information and therefore they are unable to obtain even an identification card.” (Ford ¶ 13). Kristjan Kogerma is a homeless person who went to the BMV in Indianapolis on September 27, 2005 in order to obtain identification. (Affidavit of Kristjan Kogerma, Attachment 15 [“Kogerma”] ¶¶1-5). He presented his birth certificate and his Social Security card, but was turned away because he did not have anything with his address on it. (Kogerma ¶ 6 and attachment). He has no address; he is homeless. (Kogerma ¶ 8).

This is not a problem unique to homeless persons. Poor persons may simply not have the documentation necessary to obtain the identification or license. (Bohannon 42-

43, 91-92). Persons in nursing homes may not have, or be able to obtain, the requisite information. (Niemier 60-62). It is not uncommon for disabled persons living in some type of congregate living situation run by a private company to have their identification kept by the company so that the individual is not able to obtain his or her identification card even if one has been issued. (Madill at 26-29).¹⁸

4. Voting concerns

A person who does not have appropriate identification will be challenged and will have to vote via a provisional ballot. (*Supra*). The prospective voter can have his or her vote counted only if he or she appears before the Clerk or County Election Board by 12:00 noon on the second Monday following the election and presents appropriate identification or complete the appropriate affidavit. (*Supra*). Therefore, prior to going to the office of the Clerk or County Election Board the prospective voter may have to obtain identification from the BMV. (*Supra*). In the poor and minority community in the past, when a provisional ballot did not require additional efforts on the voters' part (*supra*), prospective voters were extremely intimidated by challenges and frequently did not vote and just left the polls, even when the challenges were not meritorious. (Haith ¶¶ 2-10; Bohannan 50-54; Oakley 20-21; Deposition of Joseph Simpson, Attachment 16 [“Simpson”] at 62-64).

Frequently the potential voters who are being challenged are on their way to work or on their way home to take care of families. They frequently do not wish to take the 15-30 minutes to go through the challenge process in

¹⁸ The co-director of the Indiana Election Division concedes that it is possible that if a person is homeless or living in a congregate living situation either because the person is elderly or is a person with disabilities, the individual will not have either the required secondary documentation or proof of residency to obtain an identification card from the BMV. (King at 118-19).

order to vote. Therefore, it is my personal experience that many of these persons when challenged, will simply leave the polling place without voting rather than take the time to successfully deal with the challenge.

It is my experience that people do not go to extraordinary efforts when they are challenged when trying to vote. They simply will not vote.

(Haith ¶¶ 7, 11).¹⁹ Part of this may just be the time that a challenge takes; sometimes the process can take more than one-half hour. (Sadler 18-19). One homeless person who

¹⁹ As Margie Oakley stated;

When you deal with poor people, and I can explain it, because I'm poor myself. You have a lot that you have to try to do to just survive from day to day. And when you have a fixed or limited income, your money only goes so far. And it's a hassle just to survive. It's the struggle to survive when you're poor.

If you add something to it, like this voter I.D. and all the hassle they would have to go through to try to get an I.D., it becomes another burden, that – one that they would feel like, forget it, it's not worth it. I'm having enough problems trying to pay the rent, trying to feed my children, trying to buy food, trying to keep the lights on, the heat on.

Oakley 18).

And case manager Ford noted that although some homeless persons are registered to vote:

It is extremely stressful to be homeless and homeless persons are conditioned to avoid confrontation and stressful situations. Rather than face these types of situations, it is my experience that most homeless persons will avoid them.

Therefore, I believe it to be quite likely that a homeless person who is faced with a challenge to his or her ability to vote will not pursue his or her right to vote but will leave the poll rather than face a situation of confrontation.

. . . [A]nything which makes voting more difficult will probably deter many, if not most, homeless persons from voting.

(Ford ¶¶ 13, 15, 16, 18). This only makes sense in that the number one priority for homeless persons is finding food and if extraordinary efforts are required to vote, persons will not vote. (Reinke at 79-80).

attempted to vote in November of 2003 was faced with a challenge that took 1½ hours to resolve. (Ford ¶ 15). Part of it may be transportation concerns as indicated above.²⁰

In the 2004 election, a number of Marion County voters, because of a purge of the registration list, were told when they arrived at the polls that they were listed as dead. (Deposition of Representative William Crawford, Attachment 17 [“Crawford”] 90-92, 127-128). In order to resolve this problem the voters had to go to the City-County Building, and a number of the prospective voters just said it was not worth the effort. (Crawford at 127-28).

It is a concern to the Marion County Clerk that voters will just not bother once they are challenged because even if they go through the steps necessary to make their vote count, it will not be counted until almost two weeks after the election is over. (Sadler at 35). There is also a risk that even if the provisional ballot is cast it will not be counted because of technical problems with the ballot. (Sadler at 43-45). In Marion County in 2004, 1,732 provisional ballots were cast and 1,407 were not counted. (Marion County Election Board response to interrogatories, Attachment 18 [“Marion County Interrogatories”] ¶ 4). The fact that only 19% of the provisional ballots were counted in Marion County actually exceeds the State average of 15%. (Sadler 44).

²⁰ As a case manager who works with homeless persons noted:

My homeless clients have difficulty in obtaining transportation moving about Indianapolis. They frequently walk everywhere they go.

This means that even if they present themselves to vote and are challenged under the new identification law and are informed that in order for their ballot to count they must go get identification and then go to the Clerk’s office, or even if they were to be told that they just had to go to the Clerk’s office, homeless persons probably will not do so because of transportation difficulties.

(Thompson ¶¶ 16-17).

D. Justification for SEA 483

The reason that the law requiring a specific type of identification has been enacted is to instill voter confidence in the voting process. (King 91) Yet, “the State of Indiana, is not aware of any incidents or person attempting vote, or voting, at a voting place with fraudulent or otherwise false identification.” (Intervenor-Defendant State’s Answers to interrogatories, Attachment 18 [“State Interrogatories”] ¶ 2). Indeed, in the history of Indiana no voter has ever been formally charged with any sort of crime related to impersonating someone else for purposes of voting. (King 95). The lack of fraud in in-person voting is confirmed by veteran poll watchers who have never seen any instances of attempted fraud. (Haith ¶ 17; Crawford 45 and Ex. B, Interrogatories 10; Bohannon, Ex. H, Interrogatories 12). Indeed, no firm evidence of fraud in in-person voting was presented to the General Assembly when it was considering SEA 483. (Crawford, Ex. B, Interrogatories 8.)²¹

However, as indicated above, voters may, if qualified, vote by mail via absentee ballot. (*Supra*). In 2004 in Marion County 323,673 persons voted and, of this number, 17,877 were absentee ballots by mail. (Marion County Interrogatories ¶¶ 3, 5). And, it is in the area of absentee ballots where there has been clear evidence of fraud, both in

²¹ Representative Crawford stated, in part:

Insuring that elections are fair and that there is not fraud is, of course, consistent with my beliefs and principles. However, it is difficult to take seriously any claim that the challenged statute is designed to further voter security when there was absolutely no evidence presented to the General Assembly as we considered this law that there had been attempts by persons to vote in-person while using false identification. Indeed, I publicly called for the Marion County Prosecutor and the United States Prosecutor to identify any case in Marion County of voter fraud and have yet to be informed of any.”

(*Id.*).

Indiana and the United States. (State Interrogatories ¶ 2.b.). Indeed, pervasive fraud regarding absentee balloting led the Indiana Supreme Court in 2004 to vacate the results of the mayoral election in East Chicago. (*Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004); State Interrogatories ¶ 2.b.)

E. The parties

1. The defendants

The Marion County Election Board is, as indicated above, the entity that is responsible for the oversight of elections in Marion County, Indiana. (Sadler 6). The Election Board consists of the Marion County Clerk and two other persons. (Sadler 6-7). The Clerk acts as election administrator in Marion County. (Sadler 6).

2. The plaintiffs

Representative William Crawford represents District 98 in the Indiana House of Representatives. (Crawford 10). He has served in the Indiana House since 1972. (Crawford 11). His Indianapolis district is probably the most economically challenged in the State. (Crawford 11, 21, 77-78). He has been told by a number of persons that they do not have the required identification to be able to vote. (Crawford 22, 80). The majority of the voters in his district do have the identification necessary to vote, but there is a significant minority that has neither a license nor identification card. (Crawford 29-30). He believes that this will be an obstacle to poor persons voting. (Crawford 130). This concerns him as a politician because he plans to run again in 2006. (Crawford, Ex. B, Interrogatories ¶ 6; Judicial Notice). His experience is that the more people who come out to vote, the better it is for his electoral chances. (Crawford 32, 127). As a civil rights

matter he thinks that it is the basic public policy of Indianapolis, Indiana and the United States to encourage people to exercise the fundamental right to vote and finds this statute, that will restrict voters, to be patently offensive. (Crawford 47-48). And, as a personal matter, he finds it grossly offensive that he will have to produce identification in order to exercise the most basic and fundamental right that he has, the right to vote. (Crawford 31).

United Senior Action of Indiana is a 15,000 member not-for-profit organization that is designed to promote and advocate issues of interest and importance to senior citizens. (Niemier 17 and Ex. D, Request No. 1). It advocates not just for its members, 95% of who are of retirement age, but also for all senior citizens in Indiana. (Niemier 20, 28). The organization received complaints from many members that SEA 483 will discourage persons from voting and the organization is concerned that the statute establishes impediments to vote. (Niemier 24, 38-39). It has members who do not have birth certificates. (Niemier 69). Inasmuch as the purpose of the organization is to promote the recognition of the rights of senior citizens, and given the importance of voting, United Senior Action is concerned about the statute. (Neimier 42-44). United Senior Action is concerned both for its members who will be adversely affected by the law and for itself because the organization's effectiveness as an advocate for the elderly will be diminished as its members' ability to vote is diminished. (Neimier, Ex. D Interrogatories ¶ 7).

IRCIL is an organization that advocates for persons in the Indianapolis area with disabilities. (Madill 6, 74). Its members are those persons with disabilities who receive services from the organization within its fiscal year. (Madill 19). As an organization it is

concerned about voting issues and the ability of disabled persons to access voting areas. (Madill 17-18). It was contacted by members who expressed concern about SEA 483 and the barriers to voting it would create and the organization testified against the proposed legislation because of the negative impact it would have on people with disabilities. (Madill 11, 22-23). It recognizes that its members are frequently dependent on public transportation and will have difficulty in making all the trips necessary to obtain identification in order to have their votes counted. (Madill, Ex. E, Interrogatories ¶ 10). It is concerned that its members will not realize that they have to have current identification cards in order to vote or that they live in congregate living situations and they do not have the information necessary to obtain identification cards from the BMV. (*Id.* and Madill 46-47). It believes that its effectiveness as an advocacy organization will be compromised if persons with disabilities are precluded from voting. (Madill, Ex. E, Interrogatories ¶ 8).

Concerned Clergy of Indianapolis is a civil rights organization that was formed in the 1960s. (Oakley 8-9). Its membership consists of ministers, civic leaders, educators, politicians, entrepreneurs as well as community persons. (*Id.*) It advocates for minorities and poor persons in such areas as politics, economics, education, health and justice areas. (Oakley 9, Ex. G, Interrogatories ¶ 8). The organization is very active in the voting area, doing voter registration and assisting in the efforts of Operation Big Vote to get out the vote. (Oakley 11).²² It advocated against SEA 483 because it believed it would put an undue burden on the ability of poor persons to vote. (Oakley 15-16). Members indicated that they would be discouraged from voting because of the new law. (Oakley 17). To the

²² Operation Big Vote is a non-partisan effort to maximize the voting efforts of particularly poor and minority voters. (Haith ¶ 4).

extent that SEA 483 lessens the political clout of minorities and poor persons, it lessens Concerned Clergy's effectiveness as well. (Oakley, Ex. G, Interrogatories ¶ 8).

The Indianapolis branch of the NAACP is the local affiliate "of the oldest existing civil rights organization in the country." *San Francisco NAACP v. San Francisco Unified School District*, 59 F.Supp.2d 1021, 1031 (N.D.Calif. 1999) (Bohannan 9). The local affiliate was founded in 1924. (*Id.*). It is a civil rights organization that advocates for the advancement, both legislatively and through litigation, of persons of color. (Bohannan 10). The chapter has 1500 members in Marion County. (Bohannan 16). The organization is non-partisan and registers persons to vote and encourages persons to vote. (Bohannan 25, 47). The organization lobbied against SEA 483. (Bohannan 12). Members have indicated that they will not be able to vote because of the new law. (Bohannan 18). Moreover, to the extent that the new law diminishes the political clout of African-Americans it renders the NAACP and its branches less effective in arguing their issues. (Bohannan, Ex. H, Interrogatories ¶ 9).

ICHHI is a statewide coalition of organizations and individuals that advocates for persons who experience homelessness as well as low-income persons and families across Indiana. (Reinke 6). Its members include paid members that are generally organizations such as homeless shelter, day shelters, and mental health centers, among others. (Reinke 10-12). It also considers all homeless persons who receive services to be members as well. (Reinke 11). ICHHI was aware of SEA 483 when it was introduced and believes that it will adversely affect both homeless persons and ICHHI.(Reinke 8-9). The adverse consequences of the law on the homeless population are outlined above. ICHHI will be negatively affected because reducing the political power of homeless persons will make it

more difficult for ICHHI and its member organizations to convince persons of the issues affecting homeless persons. (*Id.*).²³

Joseph Simpson has been an elected member of the Washington Township Board for over 12 years. (Simpson 11-13). He is also an elected precinct committee-person. (Simpson 13). He wants to continue in office. (Simpson 17-18). He has had persons in his district indicate that they objected to SEA 483 and he believes that it will be difficult, time consuming and expensive for applicants to obtain identification so they can vote. (Simpson 79, Ex. C, Interrogatories ¶ 10). He is aware that some people will walk away from the polls once they are challenged and he also believes that SEA 483 will increase the number of challenges. (Simpson 41-42, 62-64, 77). The more people who are able to vote, he believes, the more votes that he will receive. (Simpson 18-19). But it is also important for as many people to vote as possible because that way he, as a politician, knows that people are paying attention. (Simpson 21). As a personal matter he strongly objects to having to show his identification in order to vote. (Simpson 21-23).

Summary of the Argument

Representative Crawford and the interested groups have standing to bring this action. Both Representative Crawford and Joseph Simpson are individual voters who will now be forced to produce their identification. This is threatened injury that gives them standing. *Valley Forge Christian College v. Americans United for Separation of*

²³ The connection between a group voting and persons in the political arena paying attention to the group and its issues is a comment attributed to an Indiana congressman who reportedly said, in reference to homeless persons: “[w]ell those people don’t vote for me, so I don’t care about their issues.” (Reinke 32).

Church and State, 454 U.S. 464, 471 (1982). Moreover, as candidates they have standing and are threatened with injury because the challenged statute will deter and prevent their supporters from voting. The candidate can raise this harm. *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003). And, the law is clear that candidates have standing to represent the rights of voters because of their close relationship. *See e.g., Mancuso v. Taft*, 476 F.2d 187, 189 (1st Cir. 1973); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 422 (E.D.Mich. 2004).

The organizational plaintiffs have standing because their members are facing injury. *See, e.g., Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). Additionally, the organizational plaintiffs can raise the fact that they are being injured in that their ability to advocate for clients and other interested persons will be diminished because of the law. *See, e.g., Johnson v. Mortham*, 915 F.Supp. 1529 (N.D. Fla. 1995). Finally, the organization can raise the claims of non-member voters and potential voters who are within the sphere of each organization's advocacy interests under the doctrine of third-party standing. *Powers v. Ohio*, 499 U.S. 400 (1991).

SEA 483 imposes a clear economic burden on the right to vote. Persons have to pay for at least a BMV identification card every four years in order to vote. Although the law provides for free identification, this is only available for those who do not currently have a license or identification from Indiana or another state. Additionally, there are other costs, such as those for procuring a birth certificate, and transportation costs that will be incurred as a prerequisite to voting. The Supreme Court has subjected economic burdens on the right to vote to the strictest scrutiny and has struck down poll taxes and procedures to avoid poll taxes as unconstitutional. *Harper v. Virginia State Board of*

Elections, 383 U.S. 663 (1966); *Harman v. Forsessenius*, 380 U.S. 528 (1965). SEA 483 creates an economic requirement to vote and represents a poll tax. It is irrelevant that some people may obtain a free identification card and some people may complete an indigency affidavit that may excuse purchasing a birth certificate and other costs incident to complying with the law. Regardless, the law “imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote” without payment of a fee. *Harman*, 380 U.S. at 541. The district court in *Common Cause/Georgia v. Billups*, No. 4:05-CV-0201-HLM (October 18, 2005) (slip opinion attached in four parts), recently issued a preliminary injunction against a similar Georgia law because it is a poll tax. The Indiana statute is a poll tax and there are no grounds to sustain it.

Regardless of economic considerations, SEA 483 imposes a serious burden on the right to vote. Some persons simply will not be able to vote because they do not have the documentation necessary to receive an identification card from the BMV. Others will do so only with great difficulty. The statute will discourage persons from voting. This is a significant burden and is simply not justified. Significant burdens on the right to vote are subject to rigorous scrutiny. *Burdick v. Takushi*, 504 U.S. 428 (1992). The statute fails this scrutiny.

SEA 483 violates both 42 U.S.C. § 1971(a)(2)(A) and (B). Using the applicable test set out by the Supreme Court, *see, e.g., Blessing v. Firestone*, 520 U.S. 329 (1997), it is clear that the statute is enforceable by private individuals under 42 U.S.C. §.1983. Section (2)(A) prohibits voters within the same county from being subjected to different standards as to the qualifications to vote. SEA 483 violates this statute inasmuch as the challenged law sets up different standards for voters depending on whether they are

voting in person, voting in person in the state facilities where they live, or voting absentee. The federal statute, 42 U.S.C. § 1971(a)(2)(B), prohibits voters from being denied the right to vote because of non-material errors or omissions. Obviously, proof of identification is not material inasmuch as it is not necessary for absentee voters or persons living in state licensed facilities where they vote.

Finally, SEA 483 violates both Art. 2, §1 and Art. 2, § 2 of the Indiana Constitutions.²⁴ These provisions are violated by the burdening of the right to vote by technical requirements that make it impossible to vote and by statutory provisions, like SEA 483, that create new requirements to vote not otherwise provide for in the Indiana Constitution.

Argument

I. Introduction

SEA 483 erects a hurdle for persons who wish to vote. The evidence is uncontested that some may not be able to overcome the hurdle and others will be able to do so only at great effort and cost, which may discourage voters from even attempting to take the steps necessary to have their vote counted. Burdening the fundamental right to vote in this way offends the United States Constitution. The statute also violates portions of the Voting Rights Act, 42 U.S.C. § 1971, as well the Indiana Constitution.

II. The plaintiffs have standing to bring this action

²⁴ Representative Crawford and the interested groups did not raise this claim in their Complaint and have filed with this Court a Motion to Raise Additional Legal Argument

Both the Marion County Election Board and the Intervenor State of Indiana have stated in their affirmative defenses that Rep. Crawford and the interested groups do not have standing to bring this action. The standing requirement, of course, emanates from the requirement in Article III of the Constitution that federal courts decide only cases and controversies. *Valley Forge Christian*, 454 U.S. at 471.

[A]t an irreducible minimum, Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" . . .

454 U.S. at 472. (internal citations omitted). The standing inquiry "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As *Valley Forge* indicates, a litigant has standing not just with regard to a claim of present harm, but also where there is "a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 14 (1972) The plaintiffs have standing to maintain this action. They, voters, their members and those for whom they advocate are faced with the specific, future harm of the challenged statute will be applied at the next primary or election in Indiana.

A. Plaintiffs Crawford and Simpson

Plaintiffs Crawford and Simpson are voters as well as current office holders and candidates for reelection. As voters they object to having to display their identification in order to vote. This requirement that they produce their identification in order to vote is an injury in fact. See e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 699, 690 n. 14 (1973) ("As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough

for standing to fight out a question of principle.” [internal citation omitted]. The injury is traceable to the law that will be enforced by the Marion County Election Board and can be redressed through an injunction.

Additionally, as candidates both Rep. Crawford and Mr. Simpson are facing injury because of the fact that the challenged statute will deter their supporters from being able to vote. In *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003), the Court found that a candidate had standing to challenge an Indiana law regulating political advertising. The Court noted that the candidate had standing not only because he had been threatened with prosecution for not complying with the statute, but also because “a candidate can be harmed if his supporters are deterred by loss of *their* anonymity from supporting him by paid advertisements.” 317 F.3d at 722 (Court’s emphasis). Candidates Crawford and Simpson are therefore harmed because of the law’s affect on their supporters.

Additionally, case law is clear that:

political parties and candidates have standing to represent the rights of voters. *Penn Psych. Society v. Green Spring Health Servs., Inc*, 280 F.3d 278, 288 n. 10 (3d Cir. 2002) (stating that “candidates for public office may be able to assert the rights of voters”); *Walgren v. Board of Selectmen of Amherst*, 519 F.2d 1364, 1365 n. 1 (1st Cir. 1975) (observing that “[w]e have in the past indicated that a candidate has standing to raise the constitutional rights of voters”); *Mancuso v. Taft*, 476 F.2d 187, 189 (1st Cir. 1973)(same); *see also Northampton County Democratic Party v. Hanover Twp.*, 2004 WL 887386 at *5-9 (holding that the Democratic Party had standing to represent interests of the general electorate.)

Bay County Democratic Party v. Land, 347 F.Supp.2d 404, 422 (E.D.Mich. 2004) (concerning claim that directives issued to election officials violated federal and state law). In *Mancuso*, in allowing a candidate to challenge a rule prohibiting him from continuing to be employed as a police officer while a candidate, the court noted that the officer had standing not only as a candidate, but because he could raise the rights of

voters. “A candidate for public office, such as appellee, is so closely related to and dependent upon those who wish to vote for him and his litigation will so vitally affect their rights that courts will relax the rule of practice (which is designed to assure vibrant representation of the vital interests of non-parties) and will permit a candidate to raise the constitutional rights of voters.” 476 F.2d 187, 190 (1st Cir. 1973). Plaintiffs Crawford and Simpson therefore have standing

B. The organizational plaintiffs

The remaining plaintiffs are organizations that have members who will be affected by the challenged law and who advocate for individuals who will be affected by the challenged law. An organization may have standing to assert the interests of its members if “its members can sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim nor the relief requested require the participation of individual members in the lawsuit.” *Bensman v. United States*, 408 F.3d 945, 949 n. 2 (7th Cir. 2005). *See also, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). It is necessary that only one member be injured. *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that make out a justiciable case had the members themselves brought suit.”)

It is clear that there are homeless, disabled, elderly and poor persons who will not be able to vote, or who will have to assume burdens to vote. These persons are members of the organizations that are plaintiffs. They have been injured or face injury. The political empowerment of its members is germane to each organization and there is no

reason that specific members need participate in the litigation. The organizations have not been able to identify specific members who will not be able to vote or who will be deterred from voting because of the burdens imposed by the challenged law. However, there are members who are facing serious injury. Given that these issues “are not speculative or remote; they are real and imminent,” standing is present. (*Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (allowing political parties and labor organizations to challenge directive concerning provisional ballots as violative of HAVA, despite the fact that specific members who will be affected have not been identified because this will not be known until the voter shows at the poll.)

“There is no question that an association may have standing in it is own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.” *Warth*. Each organizational plaintiff has alleged and demonstrated that its ability to advocate for its clients and interested persons will be diminished if the law is allowed to stand. In *Johnson v. Mortham*, 915 F.Supp. 1529, 1540 (N.D.Fla. 1995), concerning a challenge to a redistricting plan, the trial court found, among other things, that an organization had standing to sue in its own right because the bizarre shape of the district prevented it from organizing within the district. In *Mississippi State Chapter, Operation Push v. Allain*, 674 F.Supp. 1245, 1261 (N.D.Miss. 1987), Operation PUSH was deemed to have standing because the challenged registration requirements burden its organizational efforts to assist prospective voters. Similarly, the challenged law here burdens the organization plaintiffs in their essential advocacy functions. They therefore have standing.

Each organization that is a plaintiff in this case advocates not only for its members but also for all individuals within the organization's sphere of interest. The Supreme Court has made it clear that litigants may bring actions on behalf of third parties, provided three important criteria are satisfied. "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest,' in the outcome of the issue in dispute . . .; the litigant must have a close relation to the third party . . .; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Clearly, in this case, many of the poor, disabled, elderly and homeless persons affected by the challenged statute do not have the ability to protect their interests. The organizations exist to advocate for these persons, thus establishing the requisite close relationship. And, the organizations have standing on their own. Thus, the criteria for third-party standing are established.

III. SEA 483 violates the United States Constitution in that it subjects the right to vote to severe, unwarranted, irrational and inappropriate restrictions

A. An introduction to right to vote and the United States Constitution

The Constitution does not explicitly guarantee a right to vote in all elections. *Griffin v Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004), *cert. denied*, --U.S.--, 125 S.Ct. 1669 (2005). However, on numerous occasions the Supreme Court has noted the fundamental nature of the right to vote.

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to voter must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 562 (1964). *See also, e.g., Harper v. Virginia State Board of Elections, supra; Wesberry v. Sanders*, 376 U.S. 1 (1964). This right is implicit

in various constitutional provisions including equal protection and the First Amendment. *Hall v. Simcox*, 766 F.2d 1171, 1173 (7th Cir. 1985).

However, the Supreme Court has specified that not every restriction on the right to vote is either unconstitutional or subject to strict scrutiny. Instead, the Court has noted that:

[e]lection laws will invariably impose some burden upon individual voters. Each provision of a code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects-at least to some degree- the individual’s right to vote and his right to associate with others for political ends.” . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petition suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . .

Instead, as the full Court agreed in *Anderson . . . [v. Celebrezze*, 460 U.S. 780, at 788-89 (1983)] a more flexible standard applies. A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against the “precise interest put forward by the States as justification for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” . . .

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” . . . But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

Burdick v. Takushi, 504 U.S. at 433-34 (internal citations omitted). The Seventh Circuit noted, somewhat more tersely, that “the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves... No

greater precision in the articulation of the governing standard seems possible.” *Griffin*, 385 F.3d at 1130.

B. SEA 483 imposes an economic burden on the right to vote and fails the rigorous constitutional scrutiny to which it must be subjected

In order to vote, a prospective voter must have an identification card or license.²⁵ Although Indiana law provides a free identification card, only persons who do not currently have a valid license or identification from Indiana or another state are entitled to a free identification card. Otherwise, a prospective voter must pay \$10 for the identification card that will last four years. Moreover, in order to obtain the identification card, free or otherwise, the prospective voter will have to produce, among other things, an original birth certificate, that will cost, at least \$10 for a Marion County birth certificate and perhaps more if the prospective voter was born out of state. There are transportation costs attendant to getting back and forth. The law does provide a procedure for someone who travels to the Clerk’s office to attest that he or she is indigent and unable to obtain identification without payment of a fee, but it is unclear at this time who will be found to be indigent and whether any fee can be waived other than the BMV identification cost of \$10. It is clear, however, that the transportation costs cannot be waived or forgiven. It is also clear that for all those in Marion County who are not deemed to be indigent, a cost has now been imposed on voting.

²⁵ In discussing identification, the remainder of the memorandum will focus on BMV issue identification cards and licenses because it is obvious that this is the most common form of identification, as defined in SEA 483, that a voter will have. However, to the extent that SEA is unconstitutional and unlawful because of the burden imposed by providing this form of identification, the same would be true of passports that cost \$ 85 to obtain and require original birth certificates if available. *See* Note 9, *supra*.

The Supreme Court has noted on a number of occasions that the ability to pay cannot be the determining factor as to who can vote. “The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996). In *Harper v. Virginia State Board of Elections*, *supra*, the Supreme Court addressed the constitutionality of Virginia’s annual \$1.50 poll tax. The Court stated that:

a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth or to paying or not paying this or any other poll tax.

383 U.S. at 668. The Court noted that it was applying the strictest scrutiny, which the poll tax failed. “We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.” 383 U.S. at 670. The Court stressed that imposition of a fee was unconstitutional whether or not the person was indigent.

We say the same whether the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen’s vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

383 U.S. at 668.

This latter point had been established by the Court in the earlier case of *Harman v. Forsessenius*, *supra*, where the Court was faced with a Virginia statute that conditioned the right to vote on the payment of an annual \$1.50 poll tax or the filing of a certificate of residence. In striking down the law the Court relied on the, at the time, relatively new Twenty-fourth Amendment that prohibits poll taxes in federal elections. In analyzing the

constitutionality of the statute the Court did not focus on how the statute would impact on persons, who because of their indigence, could not pay the poll tax. Instead the Court noted that “in order to demonstrate the invalidity . . . [of the challenged law] it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax.” 380 U.S. at 541. The material requirement was not just the payment of the poll tax. The certificate of residence was also a material requirement as well. 380 U.S. at 543.

Since then the Court, and other courts, have imposed rigorous scrutiny on state schemes that impose fees on voters or candidates. *See, e.g., Lubin v. Panish*, 415 U.S. 709 (1974) (concerning fee for candidate); *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (concerning primary election filing fee, indicating the law must be “closely scrutinized”, citing to *Harper*); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 646 (3rd Cir. 2003) (concerning filing fee for state elections, indicating the law must be narrowly drawn to serve a compelling state interest); *Hussey v. City of Portland*, 64 F.3d 1260, 1266 (9th Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) (concerning a city ordinance that required persons to consent to annexation if they wished to receive a subsidy, indicating that it must be narrowly drawn to advance a compelling interest). In all of the above cases the rigorous scrutiny produced a finding of unconstitutionality.

In this case, in order to vote, an individual will have to present a state or federal issued photo identification. Obviously, most persons will not have a passport or military identification to present. Instead, Hoosiers will have to present licenses or identification cards issued by the BMV. At a minimum this is a cost of \$10 every four years, not including the costs of purchasing a birth certificate. It is true that the \$10 will be waived

by the BMV, but only if the person does not currently have a valid identification card or license from Indiana or another State. For all other Indiana residents, there is now a permanent cost to voting.

It is true that the prospective voter may, after being challenged, travel to the Clerk or County Election Board, and fill out an affidavit that he or she is indigent and unable to pay the fee for the identification card. Of course, there are other fees such as birth certificate and travel costs which may not be excused by the affidavit. In any event, however, a poll tax is unconstitutional if it is applied to any voter, not just to indigents. And, now those who are not entitled to free identification from the BMV will have to purchase an identification card every four years or they will not be able to vote. *Harper* is clear, the Constitution “bars a system which excludes those . . . who fail to pay.” 383 U.S. at 668.

This is also the conclusion reached by the Northern District of Georgia that recently issued a preliminary injunction against a similar Georgia statute in *Common Cause/Georgia v. Billups, supra*. The Georgia statute required that a person voting in person present a driver’s license, identification card issued by a State or federal agency, passport, military or tribal identification card, or a government employee identification card. Slip opinion at 18-19. The law further provided that a person who swears they are indigent and that he or she is registered to vote and has no other form of acceptable identification would be issued a free identification card. *Id.* at 20. Everyone who filled out an affidavit would be issued a free card without any attempted verification of the applicant’s allegations. *Id.* at 25-26. In order to obtain an identification card, a birth certificate or similar documentation had to be presented. *Id.* at 28. Those who voted

absentee did not have to provide identification unless they had registered to vote by mail without providing identification and were voting absentee for the first time. *Id.* at 61-62. In issuing a preliminary injunction, the Court concluded that the statute imposed an unconstitutional poll tax. (*Id.* at 104). The Court first noted that it was unclear how many persons would take advantage of the waiver provision for a free identification card but, “[I]n any event, as Plaintiffs’ counsel correctly observes, the fact that some individuals avoid paying the cost for the Photo ID card does not mean that the Photo ID card is not a poll tax.” *Id.* at 103. Moreover, even if the fee waiver was deemed to be a realistic option, the Court found that the statute was still unconstitutional. “As the Supreme Court noted in *Harman*, any material requirement imposed upon a voter solely because of the voter’s refusal to pay a poll tax violates the Twenty-fourth Amendment. *Harman*, 380 U.S. at 542. A voter who does not have another acceptable form of Photo ID and who wishes to vote must, as a practical matter, obtain a Photo ID card.” *Id.* at 103-04. The cost or the option of signing the fee waiver affidavit were both deemed to be material requirements in order to vote as prohibited by the Constitution. *Id.* at 104. The Court therefore concluded that the statute was unconstitutional.²⁶

There are no modern cases upholding a poll tax. Theoretically, even under strict scrutiny a poll tax could be upheld if it was narrowly tailored to serve a compelling state interest. *Belitskus*, 343 F.3d at 646. The interest here is to protect fraud, undoubtedly a legitimate and strong interest. However, it is clear that under the former system, which

²⁶ The Court specifically concluded that the photo identification requirement violated Equal Protection with respect to State and municipal elections and the Twenty-fourth Amendment with respect to federal elections. *Id.* at 104. Rep. Crawford and the interested groups did not explicitly make a Twenty-fourth Amendment claim. However, if the statute is a poll tax it violates both equal protection and the Twenty-fourth Amendment if applied to federal elections. *Id.*

did not involve a poll tax, there was no in-person voting fraud. And, it is clear that the election fraud that has occurred in Indiana has occurred with regard to absentee balloting. And, this form of voting is exempted from the requirements of SEA 483. This is clearly not narrowly tailored to meet the interests of the State to prevent fraud. The Court in *Common Cause/Georgia* so found.

Rather than drawing the Photo ID law narrowly to attempt to prevent the most prevalent type of voter fraud, the State drafted its Photo ID requirement to apply only to in-person voters and to apply only to absentee voters who had registered to vote by mail without providing identification who were voting absentee for the first time. By doing so, the State, in theory, left the field wide open for voter fraud by absentee voting. Under these circumstances, the Photo ID requirement simply is not narrowly tailored to serve its stated purposes – preventing voter fraud. . . . Further, the State has a number of significantly less burdensome alternatives available to prevent in-person voting fraud, such as the voter identification requirements it previously used and numerous criminal statutes penalizing voter fraud, to discourage voters from fraudulently casting ballots or impersonating other voters.

Id. at 84-85. The Help America Vote Act was “initiated in the wake of allegations of irregularity and fraud in the 2000 presidential election.” *James v. Bartlett*, 607 S.E.2d 638, 642 (N.C. 2005). Yet, HAVA, , 42 U.S.C. § 15483(b), allows an individual who has registered by mail, and has therefore never been seen by any election official, to prove his or her identity with some form of current photo identification or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” 42 U.S.C. § 15483(b)(2)(A)(i). SEA 483 is not narrowly tailored to meet the State’s interest. SEA 483 is an unconstitutional poll tax.

C. Even without considering the economic requirement imposed by SEA 483, the statute is unconstitutional inasmuch as it imposes a severe burden on the right to vote without sufficient justification

As indicated above, in considering burdens on the right to vote, the Supreme Court has stressed that the magnitude of the burden must be balanced against the State's interests justifying the burden. *Burdick*, 504 U.S. at 433-34. Given the significance of the burden here and the inadequacy of the State's justification, the statute is clearly unconstitutional.

The burden imposed by this statute on some voters is enormous. First, the evidence is clear that there are some people who are not going to be able to obtain an identification card because of inability to obtain a birth certificate or the secondary documentation or proof of residency required by the BMV. Some persons do not have a birth certificate or are unable to obtain one because in order to do so they must produce a BMV issued identification. Others, such as the homeless or those living in congregate living will not have the secondary documentation or proof of Indiana residency. Some of these persons may not be "indigent" and therefore, under the law, there is no way that they can vote in-person. Even those who are indigent will be able to vote only after making yet another trip, this time to the office of the Clerk or County Election Board to execute the requisite affidavit. In order for others to obtain identification they will have to incur the expense and inconvenience of traveling to the Health and Hospital Corporation and possibly the Indiana Department of Health and then to the BMV. If these voters do not learn of the identification requirement until the first time they try to vote they will possibly have to travel to obtain a birth certificate, then to the BMV, and then to the office of the Clerk or County Election Board.

These are all significant burdens. Additionally, it is clear that a not infrequent response to a challenge to the right to vote, is for the prospective voter to forego voting altogether. Thus, the statute will severely burden some voters' ability to vote. The Court also noted this in *Common Cause/Georgia*.

The right to vote is a delicate franchise. Indeed, the Court notes that Plaintiff Watkins declined to pursue his claim when he was informed that Defendants planned to depose him. Given the fragile nature of the right to vote, and the restrictions discussed above, the Court finds that the Photo ID requirement imposes "severe" restrictions on the right to vote. In particular, the Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship.

Slip opinion at 94. (Footnote omitted).

Against this significant burden is the State's interest in voter integrity; curbing fraud. However, as indicated above, the fact is that the area of voting that is historically prone to fraud, absentee balloting, was ignored by SEA 483 and only in-person voting, where there has not been fraud, is covered by the identification requirements. This demonstrates that the State's interests are not sufficient to overcome the significant burden imposed by SEA 483. Moreover, the State's asserted interest is undercut, not only because absentee voters are exempted from the identification requirement, but also because the statute exempts from the identification requirements those who vote in-person at state licensed facilities, such as nursing homes, where they reside. Given that the poll workers, who are charged with insuring voter identity, are not likely to be residents of the nursing home, and are therefore may not know the voter, (*see, e.g.*,

Madill at 69), exempting these persons from the identification requirement makes no sense and exemplifies the insufficiency of the State's interest.²⁷

IV. SEA 483 violates the Voting Rights Act, 42 U.S.C. § 1971(a)(2)

A. An introduction to the statute

Federal law, 42 U.S.C. § 1971 (a)(2) states that:

No person acting under color of state law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Section 1971(a)(1) asserts that persons are allowed to vote “without distinction of race, color, or previous condition of servitude.” However, numerous courts have found that Section 1971 may be applied to actions that are not racially motivated. *See Ball v. Brown*, 450 F.Supp. 4, 7 (N.D. Ohio 1977) (“the prevalent trend permits § 1971 actions to redress non-racial discrimination); *Frazier v. Callicutt*, 383 F.Supp.15, 20 (N.D. Miss. 1974) (“in a proper case, 42 U.S.C. § 1971(a)(2)(A) may be applied to prohibit discrimination in non-racial as well as racial grounds.); *Sloane v. Smith*, 351 F.Supp. 1299, 1305 (1972) (finding that the use of a voting registration procedure in a particular

²⁷ Of course, if the State is asserting that its interests are served in the nursing home context because it is likely that the residents will be known to the voting officials, and therefore identification is not necessary, then why should someone like Rep. Crawford, who is obviously known to poll workers, be required to show identification.

county that discriminated against college students violated rights established by 42 U.S.C. § 1971, among other statutes); *Brier v. Luger*, 351 F.Supp. 313, 316 (M.D.Pa. 1972) (claim that Democrats were purged from voter registration list at a much greater rate than Republicans was “properly brought under 42 U.S.C. § 1971(a)(2)(A) which prohibits the utilization under color of state law of any practices in the determination of voter eligibility which differ from those applied to other individuals within the same county.”); *Shivelhood v. Davis*, 336 F.Supp. 1111 (D.Vt. 1971) (finding in granting a preliminary injunction that defendants violated 42 U.S.C. § 1971(a) by making college students complete an additional questionnaire when registering to vote.)

B. Section 1971 can be enforced by private individuals

Federal statute provides that the Attorney General of the United States may enforce § 1971 through a civil action “for preventive relief.” 42 U.S.C. § 1971(c). A number of cases have held that because § 1971 is enforceable by the Attorney General, individual citizens may not privately enforce the statute. *See e.g., McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), *cert. denied*, 532 U.S. 906 (2001); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998); *Willing v. Lake Orion Community Schools Board of Trustees*, 924 F.Supp. 815, 820 (E.D.Mich. 1996). These cases contain no analysis except to say that the statute provides enforcement by the Attorney General.

This is problematic for two reasons. First, the Supreme Court has specifically held that other statutes subsumed within the Voting Rights Act are in fact enforceable, despite the fact that those sections provided for enforcement by the Attorney General of the United States. Thus, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court explicitly found that the private parties were entitled to seek declaratory relief that

the state election laws and regulations violated 42 U.S.C. § 1973c that provides that certain states covered by the Act can not adopt voting procedures different than that in effect on November 1, 1964 absent a declaratory judgment issued by the United States District Court in Washington, D.C., approving the standard or approval by the Attorney General. 393 U.S. at 549. The Court allowed the private cause of action despite the fact that the only statutory authority for filing litigation was given to the Attorney General. 42 U.S.C. § 1973j(d). The Court found that “achievement of the Act’s laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.” 393 U.S. at 556. Similarly, in *Morse v. Republican Part of Virginia*, 517 U.S. 186 (1996) (plurality decision), the plurality found that 42 U.S.C. § 1973h, prohibiting poll taxes, could be privately enforced, despite the fact that the statute only gave authority to the Attorney General to initiate actions to enforce the statute. 42 U.S.C. § 1973h(b). 517 U.S. at 230-235.

Secondly, the analysis of whether a federal statute is enforceable under § 1983 requires a determination of Congressional intent and this is decided by determining whether the statute creates enforceable rights; whether the right is not too vague or amorphous to enforce; and whether the statute unambiguously impose a binding obligation. *Blessing v. Firestone*, 520 U.S. 329 (1997). Following this analysis, the Court in *Schwier v. Cox*, 340 F.3d 1284, 1294 –1298 (11th Cir. 2003), found that § 1971(a)(2)(B) was enforceable through a § 1983 action by private parties. The Court first concluded that the history of § 1971 did not evince an intent by Congress to preclude a § 1983 claim. 340 F.3d at 1294-1296. Specifically, the provision for Attorney General

enforcement was added in 1957. *Id.* However, the text of § 1971(a) predates the recodification in 1957 and this earlier version, 8 U.S.C. § 31, was enforceable by private parties. *See, e.g., Smith v. Allwright*, 321 U.S. 649, 651 (1944). 340 F.3d at 1295. Moreover, the legislative history surrounding the 1957 recodification supports the fact that Congress did not intend to foreclose enforcement through § 1983. 340 F.3d at 1296.²⁸ The Court further noted that Congress' intent could be discerned from the language of § 1971(d) that allows district court's to have jurisdiction of actions under the statute "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies." "Appellants argue that this language could not have applied to the Attorney General and thus was meant to 'remove[] roadblocks for the previously authorized private rights of action under § 1971.' We agree." 340 F.3d at 1296.

Having found that Congress did not intend to foreclose enforcement by private individuals through § 1983, the Court in *Schwier* analyzed the language of § 1971(a)(2)(B) and found that it clearly created rights, which were specific, and were mandatory. *Id.* The same is true here. The statute clearly "creates person-specific rights." *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005). Both § 1971(a)(2)(A) and (B) specifically create rights in individuals in explicit language. Under subsection (A) the individual voter is guaranteed the right not to have different voting procedures applied and in subsection (B) the voter is guaranteed the right not to be denied the right to

²⁸ The Court noted that in the 1957 House Report concerning the change in the law to allow the Attorney General to bring suit the Committee noted that the purpose of this addition was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States H.R.Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1966." 340 F.3d at 1295. (Court's emphasis).

vote because of non-material requirements. The statute is written as a prohibition against a person acting under color of state law, “but the focus of the text is nonetheless the protection of each individual’s right to vote.” *Schwier*, 340 F.3d at 1297. The right is specific. In § 1971(a)(2)(A) it is the right not to be subjected to different voting procedures and in (B) it is the right to vote. Finally, the language is clearly mandatory as § 1971(a)(2) states plainly, “No persons acting under color of state law shall . . .” Therefore § 1971(a)(2)(A) and (B) both create rights enforceable by Rep. Crawford and the interested groups through 42 U.S.C. § 1983.

C. SEA 483 violates 42 U.S.C. § 1971(a)(2)(A) because it subjects potential voters in Marion County to different standards as to their qualification to vote

The statute, 42 U.S.C. § 1971(a)(2)(A), prohibits different standards within a county to be applied to determine whether voters are qualified to vote. Thus, as indicated above, the statute is implicated if voters were to be purged from voter lists based on their party affiliation, *Brier*, 351 F.Supp. at 316, or if students in a college are subject to separate registration requirements, *Shivelhood*, 336 F.Supp. at 1115. SEA 483 certainly provides for different standards for voter qualification. A nursing home resident whose polling place is in the nursing home need not produce identification. However, if she votes at the fire station next door, she must show identification. If a person votes absentee no identification must be shown, other than the person’s signature. But, if the person votes in-person the signature is no longer sufficient and the identification card must be produce. This violates § 1971 (a)(2)(A).

D. SEA 483 violates 42 U.S.C. §1971(a)(2)(B) because it denies persons the right to vote because of failure to have identification which is not material to whether the individual is qualified to vote under State law

In *Schwier* the challenge under § 1971(a)(2)(B) was to a requirement that all voters provide their social security numbers in order to register to vote. The Court did not answer the question of whether or not disclosure of the voter's social security number was a material qualification as to whether the voter could vote and remanded the question back to the district court that had not previously considered the issue. 340 F.3d at 1297.

Here, however, SEA 483 tells us that the identification requirement in the law is not material. There is no requirement of identification cards when one registers to vote. Those who vote absentee, where fraud has historically occurred are excused from the identification requirements. However, those who vote in-person, where there has been no documented fraud, must produce identification. Those who live in a nursing home that is also a polling place, but vote before poll workers who are strangers need show no identification. However, someone who votes outside of a nursing home and votes before poll workers she has known for 40 years must show identification. Given this, it is clear that the State of Indiana does not consider the proof of identification required in SEA 483 to be material "in determining whether such individual is qualified under State law to vote." The statute violates § 1971(a)(2)(B).

V. SEA 483 violates the Indiana Constitution

A. SEA 483 violates Art. 2, § 1 of the Indiana Constitution²⁹

Article 2, § 1 of the Indiana Constitution states that “[a]ll elections shall be free and equal.”

It is said elections are free when the voters are subject to no intimidation or improper influence, and when every voter is allowed to cast his ballot as his own judgment and conscience dictate. That they are equal when the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot.

Blue v. State, 188 N.E. 583 , 589 (Ind. 1934), *overruled in part on other grounds*, *Harrell v. Sullivan*, 40 N.E.2d 115 (Ind. 1942). This provision, combined with the constitutional obligation of the General Assembly to provide for voter registration, Art, 2, § 14, means that:

the Legislature has power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible.

Simmons v. Byrd, 136 N.E. 14, 18 (Ind. 1922). Article 2, § 1 represents “[t]he core principle of elections in Indiana.” *Gaddis v. McCullough*, 827 N.E.2d 66, 74 (Ind.Ct.App. 2005). And, it is “the intent of our Constitution, . . . to encourage exercise

²⁹ The County Election Board has claimed in one of its affirmative defenses that the Eleventh Amendment bars this claim from being heard in this Court. However, the Eleventh Amendment does not bar a federal court from hearing a state claim against a county office since county offices are not protected by sovereign immunity. *See, e.g., Will v. Michigan Department of State Police*, 491 U.S. 58, 70 n. 10 (1989); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (Eleventh Amendment does not protect county from suit in federal court). In any event, removal of a case from state court to federal court, even by a State entity, effects a waiver of the Eleventh Amendment regarding otherwise appropriate state law claims which could have been brought in state court. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002).

of the franchise . . . ‘We should at all times have before us the fundamental principle that no voter should be deprived of his franchise for the infringement of any technical requirements in casting his ballot.’ *Dobbyn v. Rogers*, 225 Ind. 525, 544-45, 76 N.E.2d 570, 582 (1948).” *Gaddis* 827 N.E.2d at 74.

A grossly unreasonable voting requirement that makes compliance for some voters virtually impossible therefore violates Art 2, §1 because it creates a technical requirement that prevents exercise of the right to vote. It is uncontested that SEA 483 imposes an impossible burden on some voters and a difficult burden on others. It imposes a requirement that is not necessary for voter security and it runs counter to, and violates, Art. 2, § 1.

B. SEA 483 also violates Art. 2, § 2 of the Indiana Constitution

Article 2, § 2 of the Indiana Constitution, states:

- (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.
- (b) A citizen may not be disenfranchised under subsection (a), if the citizen is entitled to vote in a precinct under subsection (c) or federal law.
- (c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before the election may vote in a precinct where the citizen previously resided if, on the date of the election, the citizen’s name appears on the registration rolls for the precinct.

Indiana courts have explicitly noted that Article 2, § 2 “is mandatory to the extent that it precludes the Legislature from modifying its requirements or from imposing on persons therein designated any additional qualifications which shall be prerequisite to their exercise of the right of suffrage.” *Board of Elections Commissioners of City of*

Indianapolis v. Knight, 117 N.E. 565, 567 (Ind. 1917). Of course, the constitutional requirements of Art. 2, § 2 can be limited if authorized by another constitutional provision. *State ex rel. McGonigle v. Madison Circuit Court*, 193 N.E.2d 242, 249 (Ind. 1963). And, as indicated above, Art. 2, §14 does allow the General Assembly to impose registration requirements. But, “any effort on the part of the General Assembly to establish a public electorate which would differ from that defined in article 2, § 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 . . .” *Knight*, 117 N.E. at 569.

SEA 483 has added a new requirement to vote, a specific form of identification. This is not a registration requirement, inasmuch as there is no specific form of identification necessary for voter registration in Indiana. *Supra*. Nor can it be deemed a minor requirement implicit in the ability of the State to determine that the voter is the person to whom the right to vote has been extended by Article 2, § 2. Because it is not enough if the voter is recognized; it is not enough if the voter attests in an affidavit, under the penalty of perjury, that he or she is who he or she claims to be; it is not enough if the voter produces other forms of identification, even the forms of identification that satisfies HAVA requirements. The voter must produce a particular form of identification; that required by SEA 483. And if the voter cannot, the voter cannot vote. Thus, SEA 483 imposes a new requirement for voters in Indiana. It is therefore unconstitutional as violative of Art. 2, § 2.

Conclusion

Voting should not be a marathon obstacle course, with some, because of the course’s design, not being able to make it through, some, able to succeed only with great

efforts, and others discouraged from even trying to complete it. SEA 483 erects such an obstacle course in violation of the requirements of the United States and Indiana Constitutions, as well as federal law. There are no contested issues of material fact. The law is with Representative Crawford and the interested groups and summary judgment should therefore be issued accordingly.

/s/Kenneth J. Falk
Kenneth J. Falk
No. 6777-49
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059 ext. 229
Fax: 317/635-4105
E-mail: ken.falk@iclu.org

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2005, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

Doug Webber
Deputy Attorney General
dwebber@atg.state.in.us

Thomas Fisher
Solicitor General – State of Indiana
tfisher@atg.state.in.us

Geoffrey S. Lohman
Fillenwarth, Dennerline, Groth and Towe
glohman@fdglaborlaw.com

William R. Groth

Fillenwarth, Dennerline, Groth and Towe
wgroth@fdglaborlaw.com

Barry Macey
Macey, Swanson and Allman
bmacey@maceylaw.com

James B. Osborn
Office of Corporation Counsel
josborn@indvgov.org

Karen Celestino Horseman
khorseman@sbcglobal.net

/s/ Kenneth J. Falk _____
Kenneth J. Falk