

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA DEMOCRATIC PARTY,)
et al.,)

Plaintiffs,)

vs.)

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

TODD ROKITA, *et al.*,)

Defendants.)

WILLIAM CRAWFORD, *et al.*,)

Plaintiffs,)

vs.)

MARION COUNTY ELECTION BOARD,)

Defendant,)

and)

STATE OF INDIANA,)

Intervenor.)

**DEMOCRATS' CONSOLIDATED RESPONSE TO MOTIONS FOR SUMMARY
JUDGMENT OF STATE AND COUNTY DEFENDANTS, AND
REPLY IN SUPPORT OF DEMOCRATS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

The State and County Defendants acknowledge that the right to vote and to have that vote counted is the most precious and fundamental right enjoyed by citizens who meet the age, citizenship and residency qualifications imposed by the Indiana Constitution, and who have registered to vote. Until 2005, the State of Indiana never deemed it necessary to burden the exercise of the right to vote by placing the onus on registered voters, rather than on political party challengers and those who administer elections, to prove their identity through the use of a specified form of photo identification. This landmark change in Indiana election law was engineered by a straight party-line vote, and over the unanimous opposition of every sitting State Senator and Representative who was elected under the banner of the Democratic party. Some legislators and other commentators¹ found this law to be particularly repugnant because it was reminiscent to them of the type of legislation passed in many southern states following the passage of the Fifteenth Amendment, which laws sought indirectly to deny black citizens the right to vote through such devices as literacy tests and poll taxes.²

The State concedes that the Indiana Legislature passed the Photo ID Law without any empirical evidence that one single citizen in the history of the State of Indiana had ever lied about his or her identity to cast a fraudulent ballot. State's Br. at 13 ("the State can cite to no

¹ For example, Ken Bode, Eugene S. Pulliam Distinguished Visiting Professor of Journalism at Depauw University, in The Indianapolis Star on March 25, 2005 accused the sponsors of the Indiana Law of using it as a "voter suppression program". Democrats' SJ Ex. 16. The Rev. Jesse Jackson criticized the Law as the "modern-day equivalent of Jim Crow - era poll taxes". The Indianapolis Star (Aug. 6, 2005). Democrats' SJ Ex.17.

² During the 1960s the literacy test was the chief instrument of black disenfranchisement. Placing form before substance, black applicants for registration were frequently disqualified if the written responses on their voter registration forms were not "letter perfect". Any mistake in filling out the form was cause for disqualification. Parker, Frank J., *Black Votes Count: Political Empowerment in Mississippi after 1965*, Univ. of No. Car. Press (1990), at 27.

confirmed instances of such fraud...it is undisputed that the State has no proof that in-person polling place fraud has occurred in Indiana”). In passing this Law the Legislature exempted from its strict photo identification requirements the one category of voting, mail-in absentee voting, concerning which there are numerous and recent examples of fraud, in one instance fraud so pervasive that the Indiana Supreme Court took the extraordinary measure of setting aside the results of a Democrat Party primary election. *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004). The State also included in this Law a bizarre and irrational exemption for residents of state-certified living facilities, but only if the facilities also house a polling place.

The State claims that the Law “is not a direct or severe impingement of the right to vote, is not a poll tax, and is not an unequally applied voter qualification,” State’s Br. at 17, that it does not impose any new “substantive” voting qualification, and that it is no more than a “time, places and manner” regulation. But regardless of whether it is deemed a procedural or substantive restriction, even time, place and manner restrictions authorized by Art. I, §4, c1.1 of the U.S. Constitution cannot unduly burden or abridge the right to vote. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (“[T]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote”).

Neither the State nor the County dispute Plaintiffs’ contentions that the Photo ID Law will make it very difficult, and in some instances impossible, for some registered voters to vote and to have their vote counted. Neither do they dispute that some voters will be discouraged from taking the measures necessary to obtain the required form of identification, such as obtaining a certified copy of the voter’s birth certificate and other identifying information required by the

Bureau of Motor Vehicles (“BMV”) for the issuance of a photo ID, making at least one trip to a BMV branch, and then if the voter has voted by provisional ballot, making yet another trip to the election board to present identification of the type needed to have the voter’s provisional ballot opened and counted. Equating the fundamental right to vote to financial transactions such as renting a car, cashing a check, or opening a bank account, the State claims that the Photo ID Law is merely a device to “improve fraud prevention”. State’s Br. at 23. The burdens and obstacles imposed by this Law, however, are neither “incidental” nor “marginal”, *id.*, but rather substantial and severe, particularly with respect to those registered voters of limited economic means without driver’s licenses who exist in the margins of society.

It is also surprising the State would refer to the Carter-Baker Commission’s September 19, 2005 Report (“Report”) to support its contention that Indiana’s Photo ID Law does not offend the First and Fourteenth Amendments. That Report recommended a preemptive federalization of voter identification requirements precisely for the reason that some states, such as Georgia and Indiana, were busy enacting voter identification laws that, in the words of the Commission’s Co-chairs, former President Jimmy Carter and former Secretary of State James Baker, were “discriminatory”. “Voting reform in the cards”, New York Times (Sept. 23, 2005), Democrats’ SJ Ex.18. Contemporaneous newspaper accounts report that former President Carter was at first hesitant about the free photo ID proposal, but that laws passed in some states, including Georgia (and by implication Indiana’s), which he referred to as “abominable [and] a disgrace to democracy”, convinced him that a national approach to voter identification was a better idea. “Panel: U.S. should require a free federal ID for voters”, The Indianapolis Star (September 20, 2005). Democrats’ SJ Ex 19.

The Commission’s call for a national voter identification law tied to the “Real ID” Act by

2010 drew harsh criticisms, especially from leaders of the African-American voting rights community, but also from voting rights scholars. Professor Spencer Overton, a member of the Commission and a professor specializing in election law at George Washington University Law School, noted that the Commission's "Real ID" recommendation was more restrictive than the photo ID proposal rejected by the Carter-Ford Commission in 2002³ and so extreme it would prevent eligible voters from proving their identity even with a valid U.S. passport or military photo ID card. Overton also criticized the Commission's voter identification recommendation because it did not and cannot establish that the requirement would exclude even a single fraudulent vote for every one thousand (1,000) eligible voters deterred or prevented from voting by its requirements. Professor Overton also noted that the Commission's "Real ID" recommendation would likely disenfranchise many of the victims of Hurricane Katrina and other natural disasters, whom he called the "forgotten Americans". Overton and many others have also sharply criticized the Commission's proposal that the signatures on the absentee ballot applications of voters be compared to the signature on the voter's registration to establish the identity of absentee voters, while denying Americans who travel to the polls to vote in-person the same opportunity to have their identity confirmed through signature comparison. This double standard is exacerbated by the fact that white voters are about twice as likely to vote absentee as black voters, as well as evidence showing that absentee voting is far more susceptible to fraud than ballots cast in person. *See Dissenting Statement of Commissioner Spencer Overton*, Democrats' SJ Ex. 20. The full text of Professor Overton's and the Brennan Center for Justice at New York University School of Law's scholarly criticisms of the Commission's Report is available at

³ The Carter-Ford Commission had estimated that between eleven million (11,000,000) and nineteen million (19,000,000) potential voters did not have driver's licenses or state-issued photo IDs.

www.carterbakerdissent.com and www.brennancenter.com.⁴

Perhaps the most trenchant of the Brennan Center's criticisms of the photo ID recommendation is set forth below:

And while it might be true that in a close election "a small amount of fraud could make the margin of difference", it is equally true that the rejection of a much larger number of eligible voters could make a much bigger difference in the outcome. In the end, the exclusion of voters through restrictive ID requirements will erroneously determine the outcome of many more elections than any speculative fraud by individual voters at the polls.

See Brennan Center/Overton Response, at 2.

For the reasons set forth both in their original Brief and herein, as well as those arguments contained in the briefs filed by the Crawford Plaintiffs, Plaintiffs should be granted summary judgment, Defendants' motion for summary judgment should be denied, and the Court should conclude that this Law is both unconstitutional and in violation of federal law, and permanently enjoin Defendants from enforcing its voter identification requirements.

II. ADDITIONAL STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

The Court has before it compelling evidence of the difficulties some voters have already encountered in attempting to comply with the Law's requirements. Theresa Clemente, a non-driving seventy-eight (78) year-old former Bostonian, has described in her Affidavit how after paying \$28.00

⁴ Richard L. Hasen, a professor of election law at Loyola University Law School in Los Angeles, whom the State (Brief at 6) refers to as an "election law scholar", had this to say about the Carter-Baker Commission's voter ID recommendations:

Unfortunately, by taking sides in a fight over voter identification requirements, the [Commission] squandered its political capital, perhaps even setting back the cause for reform...[T]he Commission blew it by taking a strong partisan position requiring voter identification at the polls. The recommendation is aimed at preventing voter fraud, but doesn't properly target that problem [and] will place an onerous burden on the poor and those (especially the elderly) who lack driver's licenses.

"Carter-Baker election reforms imperiled by its partisan voter ID mandate," Christian Science Monitor (Sept. 22, 2005). Democrats' SJ Ex. 21.

to obtain a certified copy of her birth certificate from the State of Massachusetts and three trips to the BMV, she had yet to receive a photo ID. Democrats' SJ Ex. 8. The experiences of Lafayette Urban Ministries in assisting approximately 150 of its constituents in seeking to obtain photo IDs, half of whom were unable to secure IDs, are also documented in the affidavit testimony of Mary Anderson. Democrats' SJ Ex. 9.

Thelma Ruth Hunter, an eighty-five (85) year-old registered voter and longtime supporter of Democratic candidates, who has resided and voted in person in Indianapolis her entire life, will not be able to vote in her local polling place because the state of her birth, Tennessee, despite a tendered payment of \$12.00, will not issue her a "delayed certificate of birth". Hunter was born at home and no current certificate of her birth exists. Democrats' SJ Ex. 22.

Lois Holland, a non-driving sixty-nine (69) year-old registered voter who intends to vote in the May 2006 Democratic primary, was born at home in Livingston, Tennessee, and does not have a certified copy of her birth certificate. State's SJ Ex. 59, ("Holland") at 17, 19. She did not understand at the time the State took her deposition on November 18, 2005 that the uncertified copy of her birth certificate or her voter registration card would not suffice under the Photo ID Law. Holland at 19.

Ernest L. Pruden, a non-driving military veteran and registered voter whose only form of photo identification is an IndyGo bus pass, State's SJ Ex. 58, ("Pruden") at 13, testified that he had never heard of the Photo ID Law and did not understand its requirements. Pruden at 14. He has never voted by absentee ballot. Pruden at 17. He does not have a copy of his birth certificate or his military discharge papers. Pruden at 19, 21. Mr. Pruden was born seventy-four (74) years ago in Elizabeth City, North Carolina, and does not know whether he was born in a hospital or home.

Pruden at 23. He is uncertain as to what he would need to do to obtain a certified copy of his birth certificate from the North Carolina county in which he was born. Pruden at 26-27.

David Harrison, a non-driving seventy-five (75) year-old registered voter and Korean War veteran who once worked on Congresswoman Julia Carson's campaign, State SJ Ex. 54 ("Harrison") at 7-8, possesses only Veterans' Administration and IndyGo photo identification cards, neither of which would be acceptable under the Law because the VA card has no expiration date and the IndyGo card was not issued by the State or federal government. Harrison at 19. He would never want to vote absentee because "I don't trust that system". Harrison at 13. He was born in Indiana but cannot afford the \$10.00 for a certified copy of his birth certificate. Harrison at 15-16. He is acquainted with forty-five (45) to fifty (50) people who live in his assisted living center who also do not drive. Harrison at 17. He is disabled and relies entirely on public transportation, and is charged \$5.00 for every round trip because he uses IndyGo buses that are specially equipped to transport disabled persons. Harrison at 18, 20.

Imogene Chapman is an eighty-five (85) year-old non-driver who lives in Indianapolis. State SJ Ex. 57 ("Chapman") at 7. She is a registered voter who has worked at the polls for the past 15 years. Chapman at 10. She has never had any State or federal-issued form of photo ID. Chapman at 18. She voted absentee once but said "I don't like absentee voting". Chapman at 19. When deposed, she was able to produce a copy of her birth certificate from Cass County, Indiana, but did not have a certified copy of her original certificate. Chapman at 24-25. She would have to rely on someone else for transportation in order to get to the BMV branch nearest her home because it is not on a bus route. Chapman at 30-31.

Barbara J. Smith, a seventy-one (71) year-old retired former federal government employee,

State SJ Ex. 56 (“Smith”) at 9-10, 13, has only a photo ID card issued by the federal government to her as a retiree, but as it is without an expiration date it will not suffice under the Law. She does not want to be forced to vote by absentee because “I think that’s my right to go to the polls and vote”. Smith at 14. She is currently home-bound because she is recovering from a recent knee operation. Smith at 16. She relies on her son and goddaughter for transportation. Smith at 17.

Constance Andrews worked seventeen (17) years for the Marion County Municipal Court. Since March 2003, she has worked at the Midtown Branch of the BMV issuing licenses and photo IDs. State SJ Ex. 55 (“Andrews”) at 7, 19. She is familiar with the primary and secondary documents, as well as the proof of residency requirements, necessary to obtain a photo ID. She described the documents required to prove residency as a “challenging list for a lot of people to obtain”. Andrews at 8. In her experience even the proof of residency requirement is difficult for many people to fulfill, especially those who rent and have recently moved and thus do not have utility bills with their current address. These difficulties are compounded by the fact that a lease is not accepted by the BMV as proof of residency. Andrews at 9. Ms. Andrews also testified that proof of residency is also a problem for persons recently released from incarceration. Andrews at 10-11. She also described the BMV’s list of secondary documents as “problematic” for other people, many of whom do not have bank accounts or statements. Andrews at 11. She testified that a person whose driver’s license is stolen must pay ten dollars (\$10.00) to get a replacement, but the theft victim would have to have a passport or certified birth certificate to obtain a replacement. Andrews at 22-23. However, in order to get a certified birth certificate, the individual would need to have a photo ID. Andrews at 24-25. She receives and processes about fifty (50) applications weekly for photo IDs and driver’s licenses, of which about thirty (30) are turned away because they do not have the

required primary, secondary, and/or proof of residency documents. Andrews at 28-29. She testified that the waiting period is from forty-five (45) minutes to two hours on the busiest days, although it is hard to estimate the time with precision because “they have taken the clocks out of the branches”. Andrews at 31-34.

Edward Treacy, the Chairperson of the Marion County Democratic Central Committee (“MCDCC”), has provided affidavit testimony that the Photo ID Law will require the MCDCC to divert its limited resources away from its primary activities such as “get-out-the-vote” efforts and helping to elect its candidates to public office, and into efforts to inform its voters of the Law’s stringent new photo identification requirements and to ensure that it is not selectively enforced during the 2006 general election. Democrats’ SJ Ex.23.

Former Congressman Lee Hamilton also has provided affidavit testimony that although as a member of the Carter-Baker Commission on Election Reform he supported the Commission’s 87 recommendations, including one to federalize voter identification laws beginning in 2010, he has no opinion concerning whether the Indiana Photo ID Law complies with constitutional standards or statutory requirements. Democrats’ SJ Ex. 24.

III. STATEMENT OF DISPUTED MATERIAL FACTS

With over thirty pages of factual assertions in briefs of the State Defendants and the Marion County Election Board, it is difficult to comply with Local Rule 56.1(b). Nevertheless, the Plaintiffs have filed two separate motions to strike in conjunction with the “factual” assertions set forth in those briefs. First, the Plaintiffs have filed a motion to strike portions of the affidavit of Wendy Orange on the grounds that her opinions are not admissible under either Federal Rule of Evidence 701 or 702. Second, the Plaintiffs have filed a motion to strike large portions of the

State Defendants' appendix and brief on the grounds that the unsworn and/or hearsay materials contained therein are inadmissible. The Plaintiffs dispute all of the factual assertions that are founded upon these inadmissible materials.

The Plaintiffs also re-adopt and incorporate by reference their own Statement of Material Facts Not in Dispute, as well as their Additional Statement of Material Facts Not in Dispute (contained in this memorandum) as setting forth factual matters that preclude entry of summary judgment in favor of the State Defendants.

IV. ARGUMENT

- A. **Democrats have standing to bring this action to assert their own institutional and political interests, as well as the interests of those affiliated with the party.**
 - 1. **Associational standing exists despite the fact that Democrats do not have members in the traditional trade association sense.**

The Marion County Election Board ("MCEB") concedes that the Indiana Democratic Party ("IDP") and the MCDCC have standing to challenge the Photo ID Law, but only insofar as the Law burdens or interferes with their rights as political party organizations to associate with certain registered voters who may not be able to vote in the Democratic primary election due to those voters being unable to comply with the Photo ID Law. MCEB Br. at 24, 28-29. The MCEB asserts that neither the IDP nor the MCDCC has associational standing to represent the interests of their supporters or adherents who may be burdened by the Law's stringent identification requirements because neither has "members" whose rights it may assert under the doctrine of associational standing. While acknowledging the continued vitality of the doctrine of associational standing, the MCEB claims that the IDP and MCDCC may not challenge the Law

under that doctrine on behalf of those registered voters who associate politically with them because Indiana citizens who register to vote do not declare a party affiliation, and because the IDP and MCDCC have no procedures whereby a registered voter becomes or ceases to be a member. MCEB Br. at 25. MCEB cites no legal authority to support its novel contention that only organizations with formal initiation and resignation procedures may invoke the associational standing doctrine. This omission may have something to do with the fact that the law is precisely to the contrary.

In *Hunt v. Washington State Apple Adver. Comm'n.*, 432 U.S. 333 (1977), the Supreme Court held that for an organization to have standing it need not have “members” in the traditional trade association sense; all that is required is that there are sufficient “indicia of membership”, i.e., a functional equivalent of membership, such “that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a ‘personal stake in the outcome of the controversy’”. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003) (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977)); *Group Health Plan, Inc. v. Philip Morris, Inc.*, 86 F.Supp.2d 912, 918 (D. Minn. 2000).

The courts have never held that formal membership in a political party organization is required to assert constitutional protections. In cases involving allegations of job discrimination based on political affiliation, the courts have stated clearly that political affiliation is not restricted to actual “membership” in a political party, but also includes commonality of political purpose and support of political candidacies. *Smith v. Sushka*, 117 F.3d 965, 970 n.6 (6th Cir. 1997); *Bass v. Richards*, 308 F.3d 1081, 1091 (10th Cir. 2002) (“there is no meaningful distinction for First

Amendment purposes between non-partisan political alignment and membership in a political party”).

The law in Indiana and most other states commonly includes provisions requiring membership in a political party for appointments to various boards and commissions. These provisions can generally be satisfied merely by publicly proclaiming a person’s allegiance to that political party. *See, e.g., Tobin for Governor v. Illinois St. Bd. of Elections*, 268 F.3d 517, 525 n.8 (7th Cir. 2001).

Organizational standing also exists where, as here, the organization will suffer a “concrete and demonstrable injury to the organizations’ activities”, such as draining its limited resources away from its primary activities to deal with the law’s new effects. *Association of Disabled Americans v. Claypool Holdings, Inc.*, 2001 WL 1112109, *14 (S.D. Ind. 2001) (citing *Haven Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also*, Treacy Aff’t, Democrats’ SJ Ex. 23.

Furthermore, the standing of political party organizations to challenge election laws deemed to be illegal or unconstitutional has never been seriously disputed. *Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (holding that the Illinois Republican Party and its chairman had standing to challenge on Fourteenth Amendment grounds a provision of the Illinois Constitution providing for the election of judges to the Illinois Supreme Court); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (New Alliance Party found to have standing to challenge Indiana’s untimely certification of major party’s presidential candidates to be on State ballots); *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (political party had standing to assert the rights of its members who would be voting in the upcoming election even though the party did not identify any specific voter who might be harmed); *Patriot Party of Allegheny Co. v.*

Allegheny Co. Dept. of Elections, 95 F.3d 253, 257 (3rd Cir. 1996); *International Ass’n. of Machinists v. Fed’l Election Comm’n*, 678 F.2d 1092, 1098 (D.C. Cir. 1982) (*en banc*) (political actors may bring suit when they are competitively disadvantaged by governmental actions).

Accordingly, the IDP and MCDCC have Article III standing not only to assert their own institutional interests under the First and Fourteenth Amendments, but also to assert the interests of their adherents, candidates, officeholders and supporters who will be adversely impacted by this Law.⁵

2. Democrats have standing to assert the rights and interests of those voters who are allied or affiliated with them and who support their candidates through their votes, time and resources.

Democrats also have standing to assert the rights of those hundreds of thousands of voters, as well as their office holders and candidates, whose rights and interests are or will be impacted by the requirements of the Photo ID Law. They have introduced undisputed evidence that persons claiming themselves to be Democrats have been or will be severely burdened by the Law’s strict new photo identification requirements. They have also introduced the expert testimony of a nationally-renowned political scientist, Professor Marjorie Hershey, who has opined that the Law’s requirements will discourage many registered voters, particularly those who are non-drivers, by increasing the “costs” associated with voting. Among those direct and indirect costs are the additional efforts necessary to obtain the primary, secondary and proof of residency documents needed to obtain a “free” photo identification from the BMV. Hershey Report and Supplemental Report, Democrats’ SJ Exs. 10 and 25. Though Democrats have identified several

⁵ Democrats are compelled to advise the Court that one of the cases cited in their opening brief, *Tanner Adver. Group, L.L.C. v. Fayette Co.*, 411 F.3d 1272 (11th Cir. 2005), was vacated and ordered reheard *en banc* on November 1, 2005. 2005 WL 2850068.

such real persons who will be burdened and/or disenfranchised by the Law's requirements, the only relevant question is whether they have demonstrated that at least one of their members is "suffering immediate or threatened injury". *Warth v. Sedlin*, 422 U.S. 490, 511 (1975).

3. The Secretary of State and Co-Directors of the Indiana Election Division are proper defendants.

Democrats have already addressed this issue extensively in their Memorandum in Opposition to the State Defendants' Motion to Dismiss filed on May 27, 2005. We would, however, further note that it was established in the depositions of Co-directors King and Robertson that each will occupy significant roles in devising forms and the affidavits required by the Photo ID law, and in training local clerks and precinct workers concerning its new requirements.⁶ Indeed, it is imperative that the State actors take an active role in the Law's implementation and administration, as a *laissez faire* approach to the enforcement of this Law or any other state election law could give rise to an equal protection claim, *League of Women Voters of Ohio v. Blackwell*, ___F.Supp.2d___, 2005 WL 3274844, *3-4 (N.D. Oh. 2005) (citing *Bush v. Gore*, 531 U.S. 98, 109 (2004) and *City of Canton v. Harris*, 489 U.S. 378, 387 (1989)), if for example the State's failure to take reasonable measures to ensure that the Photo ID Law is enforced uniformly and equally in all precincts of all 92 counties results in different citizens, due to the vagaries of their residence, being accorded different voting rights.

Rokita, as the State's chief election official, has wide-ranging responsibilities for performing "all ministerial duties related to the administration of elections by the state." I.C. §3-6-4.2-2(a). As such, he is also a proper party defendant, particularly since Democrats are seeking

⁶ Indeed, the State has submitted draft forms prepared by the Election Division to be used in connection with the Photo ID Law. (State's Ex. 44). The State has also submitted affidavits from two employees of Secretary of State Rokita's office describing actions taken by that office to promote the Photo ID Law and to educate voters regarding its requirements. (State's Ex. 46-47).

only declaratory and prospective injunctive relief, which do not implicate Eleventh Amendment immunity. *Steffel v. Thompson*, 415 U.S. 452, 469-70 (1974); *Ameritech Corp. v. McCann*, 297 F.3d 582, 588 (7th Cir. 2003).

4. *Salerno* is inapplicable to Democrats' claims under the First and Fourteenth Amendments.

The State is incorrect in asserting, State's Br. at 36, that *United States v. Salerno*, 489 U.S. 739 (1987), which prohibits a Court from invalidating a law on its face unless it is incapable of any constitutional applications, prevents facial invalidation of the Photo ID Law. First, *Salerno* does not apply where, as here, plaintiffs are asserting violations of rights protected by the First Amendment. *Lerman v. Board of Elections in City of New York*, 232 F.3d 135, 144 (2nd Cir. 2000). When a litigant challenges a statute on its face as overly broad, the litigant may assert even the rights of individuals whose interests might be affected by the statute but who are not before the Court, so long as the litigant can reasonably be expected to properly frame the issues and present them with the necessary adversarial zeal. *Id.* (citing *Secretary of State of Md. v. Joseph H. Monson Co.*, 467 U.S. 947, 956-57 (1984)). Litigants can thus challenge a statute because of a judicial prediction that the statute's very existence might affect the rights to constitutionally protected speech or expression of those not before the court. *Id.* at 145, n.11 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (holding that challenge is permissible when statute "may cause others not before the court to refrain from constitutionally protected speech or expression")).⁷

⁷ The State does not contend, nor could it reasonably do so, that voting is not protected by the First Amendment. The Indiana Court of Appeals recently re-affirmed the existence of First Amendment protections for voting in *Murphy v. State*, 837 N.E.2d 591, 595 (Ind. Ct. App. 2005) ("We accordingly decline the State's invitation to hold First Amendment rights are not implicated in the voting context," citing *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Wesberry v. Sanders*, 376 U.S. 1 (1964)). See also *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996) (the presumption of constitutionality is lessened and a far more demanding scrutiny is required when

Second, this is not a purely facial challenge. Tens of thousands of registered voters in Marion County alone, *see* Brace Report, Democrats' Ex. 5, may be deterred from or significantly burdened in the exercise of their right to vote. Looking at it in realistic terms as the Court is required to do, the Photo ID Law will inevitably impose, and in many instances has already imposed, material burdens on a significant number of voters, which will inevitably depress voter turnout by discouraging voters and causing them to abjure their right to vote. *See* Report and Supplemental Report of Prof. Marjorie Hershey, Democrats' SJ Exs. 10 and 25. In that respect its chilling effect will be as pernicious and damaging of First Amendment rights as an overbroad restriction on speech. The fact that the law may impose little or no obstacle on the majority of voters who already possess a driver's license or other form of photo identification under the Law does not negate the fact that it will have a chilling effect on the First and Fourteenth Amendment right to vote of other registered voters presently without the required form of identification.

Third, even if *Salerno* were applicable, Defendants have not suggested any way that the Law could be construed to alleviate its myriad constitutional defects.

B. The Photo ID Law violates 42 U.S.C. §1971(a)(2)(A) and (B).

In their initial brief, Plaintiffs demonstrated that they have a private right of action under 42 U.S.C. § 1971 given the history of that statute, the Eleventh Circuit's direct holding in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir.2003), and the Supreme Court's private right of action analysis in *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) and *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). Defendants contend that no private right of action exists because 42 U.S.C. § 1971(c) permits the Attorney General to enforce 42 U.S.C. § 1971. Defendants rely on *McKay*

challenged legislation implicates a fundamental constitutional right, such as the right to vote).

v. Thompson, 226 F.3d 752 (6th Cir.2000).⁸

The holding in *McKay* on which defendants rely is not persuasive and should not be followed because the *McKay* decision does not provide any helpful analysis, most likely because McKay was a *pro se* plaintiff and unable to provide the court with developed legal argument. In *McKay*, the court's entire analysis of the claim that 42 U.S.C. § 1971 gives rise to a private right of action is included in the following single sentence: "Section 1971 is enforceable by the Attorney General, not by private citizens." 226 F.3d at 756.

What is not included in the Sixth Circuit decision but is included in the Eleventh Circuit's more thoughtful and extensive decision in *Schwier v. Cox* is the following: First, Subsection c of § 1971, the subsection which gives the Attorney General the right to enforce the statute, was not added to the statute until 1957. As the Eleventh Circuit noted, "Therefore, from the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of §1971 under §1983." 340 F.3d at 1295. Second, nothing in the legislative history suggests that in "granting the Attorney General authority to bring suit [the Committee intended] to foreclose the continued use of § 1983 by individuals." *Id.* And third, at the same time that it added Subsection c giving the Attorney General the authority to file suit, Congress also added Subsection d which gave the district courts jurisdiction and eliminated procedural roadblocks to suits brought by individuals. 42 U.S.C. § 1971(d) states:

⁸ Defendants also contend that Plaintiffs' argument by analogy with respect to a private right of action under 42 U.S.C. § 1973 is incorrect because § 1973 has a provision that explicitly creates a private right of action. As the Crawford plaintiffs demonstrate in their brief, defendants are simply wrong on this point. The private right of action provision that Defendants quote only creates a private right of action for Subchapter I-H of Chapter 20, the National Voter Registration Act, 42 U.S.C. §§ 1973 gg, *et seq.* It does not create a private right of action for 42 U.S.C. § 1973c or 42 U.S.C. § 1973h, the provisions which the Supreme Court held created private rights of action in *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), respectively, and on which Plaintiffs rely.

(d) Jurisdiction; exhaustion of other remedies. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

The Eleventh Circuit expressly agreed with the appellants in *Schwier* “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.’”

The Eleventh Circuit’s analysis in *Schwier* is clearly more compelling than the Sixth Circuit’s holding in *McKay*. Because Defendants’ argument has no support other than *McKay*, it should be rejected.

C. The Photo ID Law substantially burdens the right to vote and is unconstitutional.

1. Introduction.

Although they strongly disagree that such a law would be necessary or even useful in detecting persons who are lying about their identity in order to cast a fraudulent ballot, Democrats have never suggested that the State could not, consistent with constitutional norms, enact a law which uniformly requires *all* voters, absentee and in-person and irrespective of whether they reside in a state-certified residential facility with or without a polling place, to identify themselves with more than their signature, or that one type of such identification could not be a form of photo identification. The constitutional problems with this Law stem both from the discriminatory burdens it imposes, and the rather obvious fact that it is far from being narrowly tailored to achieve the State’s *purported* goals. We emphasize the word “purported” because an incongruence between its asserted goal of attacking imposter voting, the existence of which the State has offered not a shred of empirical evidence to prove, and the exclusion of a

large category of absentee voters from the Law's requirements, raises an inference that the State's true motives are different than those it asserts as justification for the Law, i.e., that they are pretextual.⁹ Moreover, the State has not and cannot justify why it was necessary that this Law severely restrict the forms of identification that are considered "acceptable", or why it provides no reasonable alternatives for those registered voters who because of their age, place or date of birth, economic status, disability, lack of transportation or other circumstance are unable to comply with the Law or are severely burdened in doing so.¹⁰

2. The Photo ID Law imposes direct, severe and non-uniform restrictions on the right to vote.

Decisions regarding the constitutionality of State election laws involve a consideration of the "facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The constitutionality of a state election law does not depend on whether it is labeled as being procedural or substantive. What matters is whether the law burdens the rights of voters, either indirectly, such as though restrictions on candidates' access to the ballot, see, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio's early filing deadline for independent candidates for President); *Burdick v. Takushi*, 504 U.S. 428 (1992) (holding that it was not unconstitutional for Hawaii to restrict write-in candidacies), or directly, such as by taxing or imposing other burdens directly on voters. *Harper v. Va. State Bd of Election*, 383 U.S. 663

⁹ See, e.g., *Metro Milwaukee Assn. of Commerce v. Milwaukee Co.*, ___ F.3d __ 2005 WL 3275787, *4 (7th Cir. 12/5/05) (observing that mismatch between ordinance's stated objectives and its requirements raised questions concerning the county's true motives in enacting it).

¹⁰ Like the Georgia law recently enjoined in *Common Cause of Georgia v. Billups*, 2005 US Dist. Lexis 26222 (N.D. Ga. 2005), the Indiana Photo ID Law is also "not narrowly drawn to prevent voter fraud", because there are "other, reasonable ways to achieve [the State's] goals with a lesser burden on constitutionally protected activity"; *Billups*, at *103; and because it "does absolutely nothing to preclude or reduce the possibility for the particular types of voting fraud that are indicated by the evidence: voter fraud in absentee voting, and fraudulent voter registrations". *Id.* at *116-117.

(1966) (declaring Virginia’s poll tax unconstitutional); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down Tennessee’s residency requirements for voting); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (striking down property-ownership requirement for voting).

Despite the State’s best efforts to minimize the Law’s strict requirements by characterizing them as neither a “direct or severe impingement on the right to vote”, State’s Br. 17, it is uncontroverted that the Law will impose real and substantial burdens on the right to vote of some registered voters by imposing upon them substantial costs, hardships and inconveniences. These hardships will fall disproportionately on those registered voters currently without a required form of photo identification, many of whom are on the margins of society, such as the poor, the elderly and the disabled. Some of those individuals will be disenfranchised by the Law’s stringent and uncompromising requirements.

3. As a direct, discriminatory and severe burden on the right to vote, strict scrutiny is required.

Because the burdens imposed by this Law directly burden the right to vote, and are discriminatory in the sense that they are not imposed upon all voters uniformly, this Court’s scrutiny must be strict.¹¹ This requires the State to prove not just that the Law may be desirable to some, but that it is “*necessary* to the integrity of the electoral process”, *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 232 (1989)(emphasis added), and that it is narrowly tailored

¹¹ Because the Law imposes a direct condition or requirement other than age, citizenship, residency and registration on core voting rights in a general interest election, it is subject to strict scrutiny, *see Hill v. Stone*, 421 U.S. 289, 298 (1975), rather than the more flexible standard of *Burdick v. Takushi*, 504 U.S. 428 (1992) applicable to indirect restrictions on the franchise, such as restrictions on candidacy imposed by state ballot access laws. Just as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) defined a new standard of judicial review (“undue burden”) for laws that do not *directly* burden abortion rights, ballot access cases such as *Burdick* “replaced strict scrutiny with a less stringent standard of review for reasonable laws regulating ballot access *rather than infringing the core voting right*”. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004) (emphasis added). However, the Law cannot pass constitutional muster under either strict scrutiny or the *Burdick* approach.

to serve that interest. *Dunn v. Blumstein*, 405 U.S. at 343. Though there is no “litmus-paper test” that courts can use to distinguish between valid and invalid restrictions, *Anderson v. Celebrezze*, 460 U.S. at 789 (striking down ballot access provisions), it is imperative that the lower federal courts evaluate any challenged election law in light of “the realities of the electoral process” and of its practical operation. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 n. 45 (1995) (quoting *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974), and *United States v. Classic*, 313 U.S. 299, 313 (1941)).

The State rejects any notion that the Photo ID Law is a poll tax, because even though it acknowledges some citizens may be required to pay money to obtain certified copies of birth certificates required in order to obtain photo identification to vote in Indiana, “[Indiana] cannot be held responsible for costs voters may incur obtaining birth certificates from other states”. Besides, the State lamely contends, such an “incidental” cost is unlike the Virginia poll tax struck down in *Harper* because “it is assessed against some but not all voters”. State’s Br. at 35. The State of course says nothing about the other incidental but nonetheless real and substantial costs of obtaining the required form of identification, such as the cost in time and of transportation, especially to those without driver’s licenses, who will have to either use public transportation (for a fee) to travel to the BMV location, quite possibly after a trip to the health department to obtain (for a fee) a certified copy of a birth certificate, not to mention the additional costs in time and money for voters who were born in other states. The State minimizes the hardships that some voters will be required to endure because they will have to make multiple trips to the election board if they do not have the required form of photo identification on election day, or the type or authenticity of their form of identification is challenged at the polls, so that their provisional vote can be “validate[d] with the same photo or other identification at the clerk’s office followed by

judicial review if necessary”. State’s Br. at 39.

4. This Court should evaluate the Photo ID Law’s burdens in the context of Indiana’s several other restrictive election laws.

The State incorrectly says, State’s Br. at 43-44, that Democrats have no authority for their assertion that the Photo ID Law must be evaluated in symbiosis with other State election laws, and in a pragmatic and realistic light, to properly assess the severity of the burdens it imposes. It also incorrectly characterizes Justice O’Connor’s concurring opinion in *Clingman v. Beaver*, ___ U.S. ___, 125 S. Ct. 2029 (2005), as not representing the majority view of the Court.

Prior to *Clingman*, the Supreme Court had squarely held that when considering a First and Fourteenth Amendment challenge to a discrete restrictive election law, courts must analyze that law in the context of the State’s other election laws. For example, in *Williams v. Rhodes*, 393 U.S. at 34, the Supreme Court found that Ohio’s restrictive election laws “*taken as a whole* impose[d] a burden on voting and associational rights” (emphasis added) and thus violated the First and Fourteenth Amendments. Other courts have read *Williams v. Rhodes* as requiring federal courts to consider a state’s election laws, taken as a whole, in determining whether a challenged law imposes a significant impediment on voting rights protected by the First and Fourteenth Amendments. *See, e.g., Burdick v. Takushi*, 504 U.S. at 441 (concluding that “Hawaii’s prohibition on write-in voting, *considered as part of an electoral scheme that provides constitutionally sufficient ballot access*, does not impose an unconstitutional burden upon the First and Fourteenth Amendments of the State’s voters.”) (majority opinion), and 494 (“Hawaii ballot access laws, *taken as a whole*, impose a significant impediment on third-party or independent candidacies”) (Kennedy, J., dissenting) (emphasis added)); *Storer v. Brown*, 415 U.S. at 737 (noting that “a number of facially valid election laws may operate *in tandem* to

produce impermissible barriers to constitutional rights”); *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1223 (4th Cir. 1995) (noting that the Court in *Jeness v. Fortson*, 403 U.S. 431, 442 (1971), and *Burdick* had upheld challenged election laws because other aspects of the state’s election laws served to ameliorate the burdens imposed by the challenged laws); *Republican Party of Ark. v. Faulkner Co.*, 49 F.3d 1299, 1301 n.6 (8th Cir. 1995) (observing that the Supreme Court “has clearly endorsed and arguably required the practice of holding election laws unconstitutional *in combination* without considering the constitutionality of particular provisions in isolation”, citing *Williams v. Rhodes*); and *Green v. Northam*, 989 F.Supp. 1451, 1456 (N.D. Fla. 1998) (holding that the Supreme Court has instructed the lower courts to “consider ballot access schemes *in their entirety* when passing on their constitutionality”)(emphasis added).

To be sure, most of the cases involve candidates’ rights to ballot access. But as we noted in our opening Brief, at 29-30, voting (but not candidacy) is a fundamental right. Thus, there are even more compelling reasons for reviewing the Photo ID Law, which directly impinges upon the right to vote, in tandem with the other of Indiana’s restrictive election laws identified in Democrats’ opening brief (at 45-48) to determine whether the cumulative effects of Indiana’s overall scheme of election laws substantially burdens the exercise of the right to vote.

5. The Photo ID Law’s burdens are discriminatory because they are not shared equally by all registered voters.

The State concedes, Br. at 26-29, the disparate treatment of different categories of voters under the Photo ID Law, but claims that discrimination is justified because of unique characteristics of the classifications exempted from compliance with the Law and is therefore not a violation of Equal Protection. It unconvincingly says that the Law contains no photo or other

identification requirements for mail-in absentee voting because such a requirement would have no impact on the detection or prevention of absentee-ballot fraud¹² and would potentially compromise ballot secrecy concerns. In support of these claims, the State places complete reliance on the opinions of Wendy Orange, a former Marion County Election Administrator, whose opinions Plaintiffs on December 5, 2005 moved to strike.

Orange opines that signature comparison is not useful for identification purposes when done by poll workers on election day, but is when done by the absentee ballot board, because the additional signature on the absentee ballot application assists in detecting fraud. This is nonsensical when one pauses to consider that an individual attempting to fraudulently vote absentee could also be expected to sign both the application and the envelope containing the ballot. It is also important to remember that the voter's facsimile signature in the pollbook is also available for comparison purposes with respect to absentee ballot applications, the same as with in-person voters.

The State also claims, via Orange, the ineffectiveness of signature comparison as a fraud-fighting tool in the precincts due to the untrained nature of pollworkers, yet under the Photo ID Law these same pollworkers, whose experience the State makes light of, will be charged with the responsibility for determining both the authenticity and validity of government-issued identification cards on election day.

The State also argues, Br. at 28, that the inclusion of a copy of photo identification with absentee ballots would negatively impact ballot secrecy. This argument is premised on the current absence of any procedure to accommodate this additional documentation while at the same time

¹² This is a surprising claim in light of the Seventh Circuit's recent observation that absentee voting actually facilitates the perpetration of election fraud. *Griffin v. Roupas*, 385 F.3d 1128, 1130-31(7th Cir. 2004).

protecting ballot security and secrecy. But procedures could easily be developed without compromising ballot secrecy, such as providing a separate envelope for the voter's photo identification.

The State claims, Br. at 29, that the nursing home exemption, I.C. §§3-11-8-25.1(f), is reasonably based on the acknowledgment of certain "self-evident realities". The State also incredulously argues that residents of a state-certified facility are more likely to be recognized by the "election officials" as residents and therefore less likely to perpetrate a fraud. *Id.* This argument is wholly unpersuasive as well as inconsistent with the Law's stated purposes. First, it assumes that residents of such facilities, who may reside there for relatively short periods of time, are more honest and trustworthy than other citizen voters. But that argument would seem to apply with equal force to residents of state-certified residential facilities without a polling place, whom the law does *not* exempt. Second, the State claims that residents of state-certified residential facilities with a polling place are "both likely to be identifiable as residents by election officials and unlikely to commit fraud by misidentifying themselves." State's Br. at 29. But again, the same could be said about many if not most voters in most neighborhoods, apartment complexes, high-rise condominiums, and living facilities, the residents of which may be equally readily identifiable yet are not exempted from the Law's strict photo identification requirements.

6. The Photo ID Law is not "necessary" to the integrity of the State's electoral process.

When a state defends a regulation of speech, "it must do more than simply 'posit the existence of the disease to be cured.'" Rather, "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a real and material way." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Legislative determinations about the scope of a particular harm and benefits of a potential solution must be accorded substantial deference, but they are not insulated from meaningful review, as a court must ensure that the legislature “drew reasonable inferences based on substantial evidence.” *Id.* at 666.

The State concedes that in enacting the Photo ID Law, the Legislature had no “confirmed instances” before it or any history or record of imposter voting of the type the Law is designed to address and which was purportedly the sole premise upon which it was enacted. State’s Br. at 13, 49. The State does not and could not reasonably contend that the Law will eliminate this heretofore undetected imposter voting, and makes only the modest (but completely unsupported) claim that it will allow poll workers and challengers to “have an easier time detecting identity fraud at the polls”, and “lessen the opportunity for fraud”. State’s Br. at 17, 48. The State also grudgingly acknowledges or impliedly concedes that the Law “may exclude some otherwise legitimate eligible voters”, a phenomenon it euphemistically refers to as “collateral disenfranchisement”. It also admits that under the Law there will be a “limited sector of voters...who might actually pay a fee charged...in order to be able to vote”. State’s Br. at 35. However, the State never directly asserts that the Law is so important or necessary that it can be said to justify this “collateral disenfranchisement”, and the State implicitly concedes that it was not “necessary” to the integrity of its electoral process by exempting large categories of voters from its requirements.

The State Defendants make frequent allusions to “bloated” voter registration lists as justification for the Photo ID Law. State’s Br. 7, 8, 25, 49, 51-52, 53. Under the National Voter Registration Act of 1993, 42 U.S.C. §1973(gg-1), *et seq.*(“NVRA”), States are required every two (2) years prior to every federal election to “conduct a general program that makes a

reasonable effort to remove the names of ineligible voters from the official lists of registered voters” because of either death or a change in residence. A State begins this process by mailing a notice to all persons believed to have moved using a mass mailing or the United States Postal Service’s National Change of Address (“NCOA”) program. Such a program must include a process for removing the names of all persons who have moved. 42 U.S.C. §1973gg-6(a)(4). *See generally Dobrovolny v. Nebraska*, 100 F.Supp.2d 1012, 1020-21 (D.Neb. 2000).

In a memo dated June 7, 2004, Co-directors King and Robertson acknowledged that prior to March 16, 2004, when a new State law took effect allowing counties to conduct voter list maintenance programs, “State law only allowed the State to perform those voter list maintenance programs”. Democrats’ SJ Ex. 27. However, rather than conducting the required general program to identify and remove voters who have moved, it is now apparent that the State, relying on Indiana statutes they say were “more narrowly focused”, failed to conduct voter list maintenance programs as required by the NVRA. Rather, the co-directors contracted with a vendor to “remove the names of voters registered to vote in one county” who “have indicated a current address in another county” as provided by Indiana law. I.C. §3-7-38.1-4(a)(5)(B)(ii) and (iii). When asked to identify precisely what the State has done to conduct the voter list maintenance programs required by the NVRA in the past ten (10) years, King and Robertson responded that they “do not recall State participation in the voter list maintenance program initially adopted in 1995...to implement the [NVRA].” Answers to Interrogatory No. 1, Democrats’ SJ Ex. 26. They also acknowledged that under Indiana’s “current system” co-Directors King and Robertson play no role in monitoring the efforts of counties to conduct voter

lists maintenance programs. State Defendants' Response to Interrogatory Nos. 3 and 4.¹³

Indiana cannot abdicate its responsibilities under the NVRA by passing legislation that conflicts with or is "more narrowly focused" than federal law. *Sandusky Co. Democratic Party v. Blackwell*, 339 F.Supp. 2d 975, 989 (N.D. Oh. 2004), *aff'd in part, rev'd in part on other grounds* 386 F.3d 815 (6th Cir. 2004) (federal requirements of HAVA cannot be undone either by express state statute or state inactivity). The essential point is that since 1993 the NVRA has given the State Defendants all the legal tools they need to conduct nondiscriminatory, periodic general programs to remove the names of ineligible voters from the official lists of registered voters, but the State has failed to conduct such programs. Had the State not abdicated these responsibilities, there would be no "bloated rolls" and hence no excuse for the enactment of the draconian voter identification requirements being challenged in this case.

Moreover, any potential for fraud that might exist as a result of the state of the voter registration rolls is unlikely to be remedied by the Photo ID Law. For instance, the Photo ID Law would accomplish nothing with respect to double voting, where an individual is registered in more than one location and votes at each location, given that an individual inclined to double vote could show his ID at multiple locations. The Photo ID Law is simply not an appropriate substitute for the State's failure to comply with its responsibilities under the NVRA.

The State claims that public confidence in the integrity of elections is a justification for the Photo ID Law. But lack of public confidence in elections is more likely, in light of the 2000 presidential election and as supported by the State's own evidence, *see* State Ex. 23, the result of

¹³ To the extent the State has attempted to delegate this responsibility to the counties, see I.C. §3-7-38.2-1, without effective monitoring, it is unlawfully abdicating its responsibilities under federal law and consequently treating citizens differently due to the happenstance of the county in which they reside, thus denying them equal protection. *Bush v. Gore*, 531 U.S. 98 (2000).

concerns that the election process is designed to exclude legitimate voters, and not from any fear that illegitimate voters will be permitted to cast a ballot. In that respect, laws like the Photo ID Law only serve to fuel the public perception that the election process is unfair and discriminates against certain classes of voters.

7. The Photo ID Law affects large numbers of registered voters, many of whom are of lesser economic means.

The State Defendants argue that the Photo ID law is justified by the pervasiveness of photographic identification in the everyday lives of most voters. In so arguing, it chooses to ignore or minimize the significant segments of society that do not possess qualifying identification, suggesting that any disenfranchisement of such voters is “collateral” to the goal of preventing fraud that has not been shown to exist in Indiana. Even if the majority of voters possess such identification, there are still significant numbers of voters who do not possess the qualifying identification.

Kimball Brace determined, based upon matching Marion County’s voter registration file with the Bureau of Motor Vehicle’s driver’s license and photo identification files (the most current available data at the time), that a minimum of 51,000 and as many as 141,000 registered voters¹⁴ in Marion County alone lacked qualifying identification from the BMV. (Democrats Ex. 5, pp. 8-10). The State complains that some of these registrations may be for voters who have moved or died and whose registration has not been removed. Once again, it is the State’s failure

¹⁴ The State suggests that this wide-range suggests uncertainty regarding the numbers. But as Brace noted in his report, there is nothing uncertain about it. Brace is certain that there are at least 50,000, but that the number is likely to be closer to the 140,000 number. (Brace Report, Democrats’ Ex. 5, p. 10). The State also complains that the study was limited to Marion County, but the study is not intended to be a statistical predictor of the circumstances in the remainder of the State. Nor is the study a statistical sample. Rather, it tells us exactly what the circumstances are in Marion County, by reviewing every registered voter file in Marion County and every Bureau of Motor Vehicle file for the County.

to comply with its obligations under the NVRA that has resulted in any additional registrations, and the State is unable to identify the number of such registrations that might actually be the result of inflated rolls. In any event, the precise number of voters is unimportant. The significant point is that there are a large number of potential voters in Marion County alone, who are properly registered, but who do not currently possess a qualifying, BMV-issued identification card in order to cast a regular ballot.

Common experience tells us that the persons without such identification are likely to come from segments of the society that do not drive, including those without the financial ability to afford vehicles. The Brace study confirms what common sense tells us. The Brace study reveals that those registered voters without BMV-issued identification are almost twice as likely to reside in census block groups with a lower median income. As the median income of each census block increases, the number of registered voters without qualifying identification decreases as a percentage. Brace did not reach these conclusions through a statistical sample; rather, his Report reveals, based upon the data provided by the State Defendants, the Marion County Board of Voter Registration and the United States Census Bureau, the number of registered voters in each census block who do not have BMV-issued identification. The reasonable inference from this evidence is that a larger number of voters with lesser economic means in Marion County, Indiana will be affected by the Photo ID law than those of greater economic means. *See Continental Cas. Co. v. Northwester Nat. Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005) (all reasonable inferences from the evidence must be drawn in favor of the non-moving party).

8. The Law is not narrowly drawn.

- a. **The Photo ID Law lacks a “safety valve” or “reasonable alternative” for voters unable to produce the required form of photo identification at the polls on election day.**

The Photo ID Law suffers from multiple flaws, one of which is the absence of any reasonable alternative to its stringent photo identification requirements such as would permit a voter without one of the narrow forms of identification to exercise his or her right to vote notwithstanding. In an analogous context, the Supreme Court has twice held that restrictive ballot access laws for candidates must contain a reasonable alternative for those candidates who, because of their poverty, cannot afford to pay the costs associated with running for office.

In *Bullock v. Carter*, 405 U.S. 134 (1972), the Supreme Court invalidated, as a denial of equal protection, a Texas scheme under which candidates for local office had to pay fees as high as \$8,900 to get on the ballot. In so ruling the Court noted that Texas provided no alternative procedure by which a candidate who was unable to pay the fee could get on the ballot, though it further noted that Texas did not place any direct condition on the right to vote. *Id.* at 143. While noting that the existence of barriers such as the filing fee did not alone compel strict scrutiny, the Court held that it was essential to examine in a “realistic light the extent and the nature of their impact upon voters”. *Id.* Finding that the candidate filing fee had a “real and appreciable impact on the exercise of the franchise”, the Court struck down the Texas filing fee under the First and Fourteenth Amendments. *Id.* at 144.

Two years later, in *Lubin v. Panish*, 415 U.S. 709 (1974), the Court invalidated a California statute requiring payment of a ballot access fee fixed at a percentage of the salary for the office sought. Again, the Court referred to the “absence of an alternative means” of ballot access, which the Court stated would “inevitably” render the fee “exclusionary to some aspirants”. *Id.* at 718.

The circuit courts of appeal have also struck down restrictive ballot access laws on constitutional grounds because they failed to provide a reasonable alternative means of ballot access to indigent candidates. *Belitzskus v. Pizzigrilli*, 343 F.3d 632 (3rd Cir. 2003) (applying strict scrutiny). The “reasonable alternative” requirement has not been confined to ballot access laws. In *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), the Eleventh Circuit struck down a fee, without an indigency exception, required for protestors to demonstrate in city streets and parks.

Only six (6) other states request photo identification from all voters: Florida, Georgia, Hawaii, Louisiana, South Carolina, and South Dakota.¹⁵ With a preliminary injunction having been issued preventing enforcement of the Georgia Photo ID Law, Indiana is now the **only** state in which voters must present photo identification as a prerequisite for voting, with no fail-safe alternative. All other states allow voters to present a voter registration card or other non-photo identification as proof of identity, sign an affidavit of identity, be recognized by poll workers, or verify their personal information as proof of identity before voting. Further, only Indiana requires a voter who votes a provisional ballot to return to the registrar’s office with ID before such ballot will be counted, thus placing the burden on the voter to bring ID rather than on the registrar to confirm the voter’s registration. Of course, voters may not have a method of transportation to return to the clerk’s office, as they do on election day when rides to the polls are widely provided, or may not have time off from work to do so. These features make Indiana’s Photo ID Law by far the most restrictive in the nation.

b. The indigency provision in the Photo ID Law does not provide an

¹⁵ Fl. Stat. Ann. § 97.0535(3)(a); § 101.043 (pending Section 5 pre-clearance review); Haw. Rev. Stat. § 11-136; La. Rev. Stat. Ann. § 18:562; S.C. Code Ann. § 7-13-830; S.D. Codified Laws § 12-18-6.1 and -6.2.

adequate alternative for impecunious voters but instead adds further burdens for those voters wishing to exercise their right to vote.

The Photo ID Law does contain a woefully-inadequate indigency provision, as well as an exemption of voters living in state-certified residential facilities with a polling place. These exemptions show that the Legislature was aware that the Photo ID Law would impose significant burdens on the exercise of the right to vote and in certain instances would be exclusionary. These exemptions, including the exclusion of mail-in absentee balloting from the Law's photo identification requirements, also demonstrate that the Legislature never did consider the display of the narrow forms of photo identification specified in the Law to be in any way material or necessary to the right to vote in the same manner as is age, citizenship, residency and registration. The constitutional problems with the indigency provision are readily apparent.

First, under that provision voters who wish to claim that they are "indigent and unable to obtain proof of identification without the payment of a fee", I.C. §3-11.7-5-2.5(c)(2)(A),¹⁶ may do so but, perhaps somewhat counter-intuitively, not at the polls on election day. Under previous law, a voter challenged as not being the person he or she purported to be would be permitted to sign an affidavit (PRE-4) at the polls on election day and then be permitted to vote by regular ballot, with no requirement of a second trip. However, under the Photo ID Law that procedure is no longer available. Voters without the required form of photo ID who appear at the polls on election day are now required to make a second trip, either to produce the required form of photo identification or to sign an indigency or religious objection affidavit, in order for the voter's

¹⁶ This provision does not indicate whether the "payment of the fee" refers to the fee charged by the BMV for a driver's license or photo ID card (which for many voters under the law are free), or the fee for obtaining the primary and secondary documents required to obtain that license or ID. Even the co-directors of the Indiana Election Division, Defendants King and Robertson, were unable to agree on the proper interpretation of this provision.

provisional ballot cast on election day to be counted. If weeding out voters who are misrepresenting their identity for purposes of casting a fraudulent ballot is indeed the goal of the Photo ID Law, this unduly burdensome procedure seems “extraordinarily ill-fitted to that goal,” *Bullock v. Carter*, 405 U.S. at 146, and an extremely poor model of the type of “fail safe” procedure required by *Bullock, Lubin* and their progeny.

The Law’s indigency provisions and the required second trip to sign an affidavit of indigency or religious objection are also unavailable to registered voters who were unable to produce the required form of photo identification at the polls for some reason other than indigency. For example, a voter may be unable to produce a required form of photo identification because she has recently been the victim of identity fraud or her driver’s license may have been stolen, or her personal records destroyed in a fire, hurricane, tornado, or other natural disaster. Or the voter may simply be unaware of the Law’s stringent new identification requirements or simply forgot to bring her identifying documents to the polls so near to 6:00 p.m. as to eliminate the possibility of retrieving it before the 6:00 p.m. poll closing. Voters who are poor but not destitute may also be reluctant to swear out an affidavit under penalties of perjury that they are “indigent and unable to obtain proof of identification without the payment of a fee” when the Law contains no definition of the term “indigent” or explanation of whether the “fee” is the fee to obtain the proof of identification (which are free) or the documents required to obtain the proof of identification, and carries with it a risk of felony prosecution.

The law in every other State with photo identification requirements, save Indiana, contains some form of fail-safe provision such as the signing of affidavits of identity or personal recognizance. The voter identification laws in other states also permit a far broader array of acceptable forms of identification. By contrast, Indiana’s Photo ID Law is unduly restrictive in

terms of the forms of identification required, forces even indigent voters to make at least a second or multiple trips to have her provisional ballot counted, and lacks any reasonable fail-safe alternative for voters who are unable to comply with the Law's stringent requirements.

c. The availability of absentee voting is not a reasonable alternative for voters unable to comply with the Law.

The State says that voters who are over sixty-five (65) years of age will be able to vote absentee by mail, thereby avoiding the impact of these restrictive photo identification requirements. Georgia made a similar argument in defending that State's Photo ID Law.¹⁷ In rejecting that argument, the district court, heeding the Supreme Court's admonition in *Bullock v. Carter* to examine a state's election laws in a "realistic light", 405 U.S. at 143, concluded that the availability of even the liberalized procedures for absentee voting was not a reasonable alternative to Georgia's stringent new voter identification requirements. The *Billups* court explained its reasoning in the following words:

"[M]ost voters, however, likely are unaware that they can vote by absentee ballot without a Photo ID, and the State has not demonstrated that it has publicized the fact that a Photo ID is not necessary to vote via absentee ballot....the Court simply cannot assume that Georgia voters who do not have a Photo ID will make the arrangements necessary to vote via the absentee voting process...the absentee voting process also requires that voters plan sufficiently enough ahead to request an absentee ballot, to have the ballot delivered from the registrar's office via the United States Postal Service, to complete the ballot successfully, and to mail the absentee ballot to the registrar's office sufficiently early to allow the United States Postal Service to deliver the absentee ballot to the registrar by 7:00 p.m. on election day. The majority of voters--particularly those voters who lack Photo ID -- would not plan sufficiently enough ahead to vote by absentee ballot successfully. In fact, most voters likely would not be giving serious consideration to the election or to the candidates until shortly before the election

¹⁷ Georgia liberalized its absentee balloting rules when it enacted its Photo ID Law. By contrast, Indiana contemporaneously enacted new restrictions on absentee voting, such as requiring voters to swear under oath that they will be absent from the county the entire 12 hours the polls are open. I.C. §3-11-10-24(a)(1). Absentee voting in Indiana has also long been considered in the nature of a "special right or privilege". *Brown v. State ex rel. Stack*, 227 Ind. 183, 190, 84 N.E. 2d 883 (1949).

itself. *Under those circumstances it is simply unrealistic to expect that most of the voters who lack Photo IDs will take advantage of the opportunity to vote an absentee ballot [and thus] absentee voting simply is not a realistic alternative to voting in person that is reasonably available for most voters who lack Photo ID.* (emphasis added) **Billups** at *111-112.

See also **Griffin v. Roupas**, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (in which the Court, speaking through Judge Posner, observed that absentee voters are also prone to cast invalid ballots, as opposed to in-person voters who can get assistance from election judges, and that because they vote days and sometimes weeks before election day may be deprived of pertinent information surfacing in the late stages of a campaign).

The Georgia district court's decision in **Billups** is a relevant and timely example of a federal district court heeding the admonition of the Supreme Court to look at the "realities of the electoral process" in passing on the constitutionality of a restrictive election law and the reasonableness of any alternatives provided. **Lubin v. Panish**, 415 U.S. at 719 n.5. This Court must also be cognizant of the realities that many voters, especially elderly voters, who have never voted by absentee ballot are likely to have considerable difficulty navigating the complexities involved in absentee voting. Thus, the availability of absentee balloting for some voters is not an adequate or reasonable alternative to the Law's harsh new requirements.

d. The Photo ID Law is both overinclusive and underinclusive.

The Photo ID Law is under-inclusive because it fails to address the one area of voting fraud that has been documented in Indiana – fraud occurring in connection with mail-in absentee balloting. It is overinclusive because it is not drawn with "precision" and there are "other, reasonable ways to achieve [the State's] goals with a lesser burden on constitutionally protected activity". **Dunn v. Blumstein**, 405 U.S. at 343. Even though fraud prevention is the asserted justification for the restriction, the record is "totally devoid of any evidence that [these

identification] requirements are in fact necessary”, especially where the Law does “absolutely nothing to preclude or reduce the possibility for the particular types of voting fraud that are indicated by the evidence: voter fraud in absentee voting, and fraudulent voter registrations”.

Billups, at *116.

- e. **The Photo ID Law is unconstitutionally vague, thereby giving partisan precinct workers and challengers far too much discretion and increasing the likelihood of selective enforcement.**

The League of Women Voters (“LWV”) raised two major arguments in its *amicus* brief: (1) that there are no express limitations upon the types of challenges that can be made by the politically-appointed challengers, who are now permitted to remain within the polling area as a result of 2005 changes in Indiana law; and (2) that the failure to define the term “conform” means that precinct officials in each precinct and in all 92 Indiana counties will have vast discretion to determine whether an individual’s name on her photo identification matches her name on the poll book, or whether the voter’s face “conforms” to the individual’s photo ID. These concerns are compounded by the fact that in the 2004 election most county election officials took the position that any voter challenged would be required to cast a provisional ballot, of which only 15% were counted state-wide.

In response, the State does not dispute that the changes in Indiana law now allow politically-appointed challengers to challenge voters, thus forcing them to cast a provisional ballot, even though no challenge has been lodged by a member of the precinct election board. Neither does the State dispute the potential for selective enforcement or politicization of the challenge process as a result of the 2005 changes in the Law, especially the new photo ID requirements.

Where a law interferes with the right of free speech, a “more stringent vagueness test

should apply.” *Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). If a law is open to subjective interpretation and enforcement, such as by officials who may apply it in an “arbitrary and discriminatory way”, it is unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). This “selective enforcement” concern is heightened whenever a law vests discretion in election officials and provides no effective way arbitrary and capricious action may be prevented or redressed. *Louisiana v. United States*, 380 U.S. 145 (1965); *see also*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (when the right to vote is at stake, the void-for-vagueness doctrine must be applied with special rigor, particularly if the law “encourages arbitrary and erratic” enforcement by public officials). A citizen’s exercise of an important right should not be made subject to the unreviewable discretion of partisan officials, such as political party challengers. *Delaney v. Bartlett*, 370 F.Supp.2d 373 (M.D. N.C. 2004); *Kay v. Mills*, 490 F.Supp. 844 (E.D. Ky. 1980).

Under the Photo ID Law, the Legislature’s failure to define the word “conform” and the granting to precinct officials of unbridled discretion in making such determinations means that partisan individuals manning the over 900 precincts in Marion County and the thousands more throughout the State will be empowered to make individual decisions whether voters whose driver’s license lacks the complete or accurate spelling of the voter’s last name “conforms” to the name of the voter list. Accordingly, those persons will have the power to force such a voter to cast a provisional ballot, which based on the 2004 election experience in Indiana shows that the voter’s ballot will likely never be counted.

The LWV provided affidavits from women whose last names are incomplete on their driver’s licenses due to errors or BMV limitations. In response, the State claims that it is

legitimate for Indiana to place an additional burden on registered voters “to take care to register their names properly and to insist on accurate photo identification cards.” The State further claims that giving poll workers the discretion to “forgive obvious typographical errors” is “better for voters than defining with precision how close the match must be.” State’s Br. at 43. This argument only serves to highlight Plaintiffs’ selective enforcement concerns. It also raises the legitimate fear that precinct officials will administer the Law differently from precinct to precinct or even voter to voter, thereby raising equal protection issues far more serious than those found unconstitutional in *Bush v. Gore, supra*.

9. The Photo ID Law violates the Indiana Constitution.

Democrats incorporate and adopt the arguments made by the Crawford plaintiffs that the Photo ID Law, by imposing a new, non-uniform qualification upon voters in addition to those set forth by Art. 2, §2 of the Indiana Constitution, also violates both that article and Art. 2, §1 of the Indiana Constitution. See *Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890).

V. CONCLUSION

Until 1920 women in this country were denied the right to vote. More recently, African-Americans in the South, many of them now senior citizens who relocated to Indiana, were denied the right to vote through “Jim Crow” laws such as literacy tests, poll taxes, and lengthy residency requirements. Some witnessed the beatings and killings of others who tried to register. The Photo ID Law is a painful reminder of that ugly past, and of the fragility of political rights in this nation. Achieving near-universal suffrage was the culmination of a long political struggle, and it is only an independent judiciary that can ensure that these hard-fought gains are not eroded by transient political majorities.

For each of the foregoing reasons, as well as those reasons set forth in Democrats’

opening brief, the Indiana Photo ID Law violates the United States and Indiana Constitutions, as well as 42 U.S.C. §1971(a)(2)(A) and (B). Accordingly, Defendants' motion for summary judgment should be denied, summary judgment should be entered in favor of Democrats as to their requests for declaratory and prospective injunctive relief, and the Law's voter identification requirements should be permanently enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2005, a copy of the foregoing pleading was filed electronically upon the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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