

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
JOINT MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

Defendant Todd Rokita, in his official capacity as Indiana Secretary of State, Defendants J. Bradley King and Kristi Robertson, in their official capacities as Co-Directors of the Indiana Election Division, and Intervenor-Defendant the State of Indiana respectfully submit this memorandum in support of their joint motion for summary judgment and in opposition to the motions for summary judgment filed by Plaintiffs William Crawford, *et al.* and Plaintiffs Indiana Democratic Party and Marion County Democratic Central Committee.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. National Instances of In-Person Voter Fraud

~~In-person voter-identity fraud is notoriously difficult to detect and investigate. In his book *Stealing Elections*, John Fund observes that actual in-person voter fraud is nearly undetectable without a voter photo-identification requirement because anybody who provides a name that is on the rolls may vote and then walk away with no record of the person's actual identity. See generally John Fund, *Stealing Elections* (2004). The problem is only exacerbated by the increasingly transient nature of society. Documentation of in-person voter fraud often occurs only when a legitimate voter at the polls hears a fraudulent voter trying to use her name, as happened to a woman in California in 1994. See Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 292 (1996).~~

Regardless of the lack of extensive evidence of in-person voter fraud, the Commission on Federal Election Reform (known as the Baker-Carter Commission) recently concluded that

“there is no doubt that it occurs.” State Ex. 1, p. 18.¹ ~~Legal cases as well as newspaper and other reports confirm that in-person voter-identity fraud, including voter impersonation, double votes, dead votes, and fake addresses, plague federal and state elections. In the 2000 elections in St. Louis, 14 dead people voted. See Fund, *supra*, 64. Since October 2002, the U.S. Department of Justice has launched more than 180 investigations into election fraud, some of which have resulted in charges for multiple voting. State Ex. 2, p. 23.~~

In 2004, there was evidence that elections in Washington and Wisconsin were decided by illegal ballots, some of which might have been prevented if voters had been required to show photo identification. In Washington’s 2004 gubernatorial elections, the margin of victory was 0.5%, or 128 votes out of the 2.8 million votes cast. State Ex. 3, pp. 4-5. The total tally included more than 1,600 fraudulently cast ballots, including 19 ballots cast by dead voters, six double votes, and 77 votes unaccounted for on the registration rolls. *Id.* at 19.

In Wisconsin, an ongoing federal, state, and local investigation of voter fraud among 80,000 same-day registrants in the 2004 elections has documented more than 100 cases where individuals voted twice by using fake names and addresses. State Ex. 4, p. 2. For example, cousins were charged with casting ballots at two different polling places each. State Ex. 5. Also, the task force investigating possible fraud in the 2004 Milwaukee elections found persons who registered and voted with identities and addresses that could not in any way be linked to a real person and identified citizens who told investigators that they did not vote, even though report showed that someone voted in their names. State Ex. 4, pp. 3-4. In addition, 4,609 more ballots,

¹ The State Defendants will cite to the record as follows: for the Democrats’ Exhibits, (Dem. Ex. __); for the Crawford Plaintiffs’ Exhibits, (Crawford Ex. __); for the State Defendants’ Exhibits, (State Ex. __).

nearly 2% of the total, were cast than voters were registered. (*Id.* at 5) In that election, utility bills sufficed for same-day-registrant voter identification. *See* Wis. Stat. Ann. § 6.55 (7)(c)(12).

The integrity of other states' elections has likewise been discredited by voter fraud. In Missouri's elections in 2000, an investigation by the Secretary of State of only two of Missouri's 114 counties revealed over 1,000 fraudulent ballots, including at least 68 multiple votes, 14 dead votes, and 79 vacant-lot voters, with another 200 sites requesting further review (eight or more voters registered at the same address that is not a multiple family home, hospital, group home, or nursing home). State Ex. 6, pp. 42-43; State Ex. 7, pp. 3-6. Missouri, Kansas City in particular, has also encountered the problem of voters who lived near the border of two states voting in both states. *See United States v. McIntosh*, No. 04-CR-20142 (W.D. Mo.2004); *United States v. Sherzer*, No. 04-CR-00401 (W.D. Mo. 2004); *United States v. Goodrich*, No. 04-CR-00402 (W.D. Mo. 2004); *United States v. Jones*, No 05-CR-00257 (W.D. Mo. 2005); *United States v. Martin* No. 05-CR-00258 (W.D. Mo. 2005). Records suggest that between 2000 and 2002, 300 voters in Missouri may have voted twice. State Ex. 8, p. 1. In May 2004, a state audit report found that 24,063 persons, or nearly 10% of the Kansas City's registered voters, were either dead, had been convicted of a felony, were registered in another jurisdiction, or were otherwise questionable. State Ex. 9, pg. 14.

In Florida, a Pulitzer Prize-winning series of articles revealed that dozens, possibly hundreds, of people who lived outside the city limits illegally cast votes at the polls in Miami's mayoral elections in 1997. State Ex. 10, pp. 1-2. In a review of just 3% of votes cast, the Miami Herald found 68 votes from ineligible non-city residents. *Id.* at 2.

In Maryland, a Johns Hopkins University study found that over 1,500 names of deceased voters remained registered in Baltimore County in 2005; at least 63 votes were cast in the names

of deceased individuals between the 1980's and 2004. State Ex. 11, p. 1. The Johns Hopkins study showed that at least four votes were cast in the names of confirmed dead people in the 1994 elections, and those names were still listed as active on the 2005 rolls. *Id.* at 2. In fact, cases of the dead voting is a national phenomenon occurring in many jurisdictions, such as Georgia, Illinois, Missouri, Pennsylvania, and Wisconsin. State Exs. 4, 12, 13, 14, and 15.

In New York, a grand-jury investigation into local election fraud concluded that eight underage voters (out of only 4,000 votes cast) registered with false birthdates and voted illegally in the June 2001 local elections. State Ex. 16, p.1. The Times Herald Record found additional evidence of voter fraud, including four double votes, thirteen votes by people also registered to vote in another county, one non-existent voter (records reveal a two-year-old voted), and one voter residing in a neighboring city. State Ex. 17, pp. 1-2.

In Georgia, an investigative report published by the Atlanta Journal Constitution in November 2000 found that since 1980, 5,412 votes had been cast in the name of deceased individuals. State Ex. 18, p. 2. Furthermore, more than 15,000 dead people remained on Georgia's voting rolls. *See id.* Also concerning the 2000 elections, the Republican National Committee cross-analyzed voting records with other data and compiled a database of over 3,200 names of people who apparently voted multiple times. State Ex. 19, p. 1.

As the Baker-Carter Commission recently observed, "[t]he problem . . . is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." State Ex. 1, p. 18; *see also* State Ex. 20, pp. 19-20 (observing that as elections have become closer in recent years, it has become increasingly likely that even small amounts of in-person voter-identity fraud may decide electoral outcomes).

The 2001 National Commission on Electoral Reform (the Ford-Carter Commission) reported that since 1948, elections to select a state's presidential electors have been decided 31 times by less than 1% of the votes cast, and 70 times by less than 2% of votes cast. State Ex. 21. About 4% of Senate seats and 2% of House elections are won within 1% of the vote. The margin of winning is just as close for gubernatorial elections, where 5% of elections are within 1% of the vote. *Id.* In fact, the Task Force stated that “[i]n any given year, the likelihood that there is at least one election within the one-percent technical margin of error is 71 percent for senatorial elections and more than 99 percent for congressional elections.” *Id.* at 4.

II. The Impact of the Perception of Voter Fraud on the Confidence of the Electorate

The Baker-Carter Commission recently concluded that not only actual fraud, but also the perception of fraud, “contributes to low confidence in the system.” State Ex. 1, p. 19. Survey data tends to confirm this observation. Just prior to the 2000 election, a Rasmussen poll showed that 59% of voters believed there was “a lot” or “some” fraud in elections. State Ex. 22, p. 1. Similarly, a Gallup Poll showed that after the 2000 election, 67% of adults nationally had only “some” or “very little” confidence in the way the votes are cast in our country. State Ex. 23, pp. 8-9.

A 2004 Zogby Poll found that 10% of voters believe that their votes are not counted accurately. *See Fund, supra*, 2. And according to election-law scholar Richard Hasen, more than 13.6% of Americans worried that the 2004 presidential vote was unfair. State Ex. 24, p. 1. Finally, an even more recent Rasmussen survey of likely voters documents strong support for measures to strengthen electoral integrity. In a 2004 survey of 1000 likely voters, 82% of respondents (including 89% Bush supporters and 75% of Kerry supporters) favored photo identification at the polls. *See Fund, supra*, 5.

III. The Impact of "Motor-Voter" Nationally and in Indiana

Though they are largely unable to study verifiable data concerning in-person voter fraud, scholars are well aware of the conditions that foster fraudulent voting. *See* Fund, *supra*; Sabato & Simpson, *supra*, 321. In particular, fraud has become ever more likely as "it has become more difficult to keep the voting rolls clean of 'deadwood' voters who have moved or died" because such an environment makes "fraudulent voting easier and therefore more tempting for those so inclined." Sabato & Simpson, *supra*, 321. "In general, experts believe that one in five names on the rolls in Indiana do not belong there." State Ex. 25.

The National Voter Registration Act, also known as the "Motor-Voter" law, requires each state to make a reasonable effort to remove the names of ineligible voters from the official registration list, but it restricts how states may do so. Except in limited circumstances, states may not remove voters from the registration list, at least for purposes of federal elections, due to the voter's failure to vote. *See* 42 U.S.C. § 1973gg-6(b)(2). Instead, the Motor-Voter law requires states to take active steps to confirm the address of voters before purging them from the official list. *See id.* The Motor-Voter law suggests that states can satisfy their duties under the removal-program requirement by sending notices to individuals who are identified by the U.S. Postal Service as having completed a change-of-address card. *See* 42 U.S.C. § 1973gg-6(c). The notice must instruct the voter to return the card, and that if the registrant does not do so and does not vote in the next two general elections, the voter may be removed from the registration list. *See* 42 U.S.C. § 1973gg-6(d)(2). States may only remove voters from the registration list if (1) the voter confirms in writing that the voter has moved or (2) the voter fails to respond to the required notice *and* has not voted in the two general elections following the notice. *See* 42 U.S.C. § 1973gg-6(d)(1).

This restriction on purging over the last decade has generally resulted in a substantially higher number of illegitimate voter registrations, sometimes called "list inflation." State Ex. 26. In 2004, 86.84% of the nationwide voting-age population was registered to vote, compared with 75.87% in 1992. *See id.* In fact in both 2000 and 2004, numerous states actually recorded registration rates at over 100%. *Id.*

For this case, Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population data, conducted his own examination of Indiana's voter registration lists and concluded that they are among the most highly inflated in the nation. State Ex. 27, p. 9. Benson used four different methods in order to determine the extent of list inflation and found that each method yielded results that indicated high inflation rates (*See id.* at 6-9). Specifically, when he compared actual voter registration with self-reported registration rates, he found that there were 4.3 million registered voters in 2004, while there were only 3 million voters who reported being registered, resulting in estimated list inflation of 41.4%. (*Id.* at 6)

Benson also looked at the registration rates before and after the Motor-Voter law, which became effective on January 1, 1995. (*Id.* at 7) He found that in 1988, the rate of registration in Indiana was 69.71% of the voting age population (VAP) with a voter turnout of 75.67% of VAP, while in 2004 the registration rate was 93.6% of VAP (with 12 counties in which the number of registered voters was over 100% of the voting-age population), with a turnout rate of 58.5% of VAP, indicating that list inflation is high (*Id.*) When he reviewed the number of deceased voters on the list, he found with a high rate of confidence that at least 35,699 Indiana registered voters are now deceased. (*Id.* at 8) Additionally, his research indicated that in 2004 there were 233,519 potential duplicate registrations. (*Id.* at 9)

Indianapolis Star investigated the accuracy of Indiana's voter rolls and found that more than 300 dead people were registered. State Ex. 25, p. 3. In fact, the Indianapolis Star's study has been the subject of testimony before Congress concerning the need for election-fraud measures. State Ex. 28, p. 3. And in a recent newspaper article explaining the Indiana Supreme Court's decision to use sources other than voter-registration lists to compile jury pools, Justice Theodore Boehm referred to voter registration lists as "overpopulated (because the lists included many who had died or moved)." State Ex. 29, p. 1.

IV. Government-Issued Photo Identification is Common, Reliable, and Helpful in Preventing Identity Fraud Generally

It cannot be doubted that in today's society, photo identification is a prevalent, useful, and often vital component of life. Simply put, photo identification has become an inevitable fact of American life. State Ex. 30, p. 1. In arguing for the creation of a national identification card, Alan Dershowitz has explained that photo identification is already required for many routine activities, "including flying, driving, drinking and check-cashing." State Ex. 31. Dershowitz also has observed that photo identification is already carried by the vast majority of Americans in their wallets and pocketbooks. *See id.* John Fund observed that requiring voters to show photo identification at the polls is no different from what most Americans already must do when they "take an airline flight, buy an Amtrak ticket, cash a check, rent a video or check into a hotel." Fund, *supra*, 136.

A recent argument against Michigan's roadside-license-confiscation law emphasized how "the photo driver's license has become the most widely accepted (and, frequently required) form of identification in our society." Victor M. Norris & Michael F. Smith, *Photo Finished: Calling Into Question Michigan's Roadside Driver's License Confiscation Law*, 74 Mich. B.J. 410, 412

(1995). As the authors explain, “[o]ne deprived of a photo license need only attempt to rent a car or other equipment, cash a check, open a financial account or engage in a plethora of other common transactions in which photo identification is demanded, to understand how vital the photo driver’s license is in our modern society.” *Id.*

Even some of the Plaintiffs admit that photo identification is a necessary requirement for most everyday activities that we take for granted. (*See* Crawford Ex. 4, p. 88.) (“I think everything that you need to do from getting a job to getting a place to stay, to applying for any benefits to which you may be eligible will oftentimes require – require some sort of ID.”); (*see also* Crawford Ex. 10, pp. 43-44) (explaining that in order to get food stamps or Social Security, and even to file bankruptcy, photo identification is required).

Some homeless shelters in the Indianapolis area, including the Hancock Hope House in Greenfield and the Salvation Army Social Service Center in Indianapolis, require photo identification for residency. Many other homeless shelters prefer photo identification. *See* State Ex. 32.

Exercise of some fundamental constitutional rights often turns on presentation of photo identification. For example, in order to obtain marriage licenses in many states, couples must present photo identification. *See* State Ex. 33; *see also* State Ex. 34. In order to exercise the fundamental right of access to federal courts, litigants must present photo identification to the United States Marshals Service. *See* State Ex. 35; State Exhibit 36; *Cf.*

Attorneys providing incarcerated criminal defendants with their constitutional right to counsel must show photo identification at the jailhouse door. *See* Norris & Smith, 74 Mich. B.J. at 412. And, it is worth noting, the incidence of driver’s licenses and non-license identification cards in Indiana is so high that the BMW’s list of those with such identification is one of two new

~~sources (the other is tax rolls) of names for Indiana's jury pools, replacing voter-registration lists based on both comprehensiveness and accuracy. See State Ex. 29.~~

Society has become so dependent upon state-issued photo identification that Congress earlier this year passed a law designed to improve the reliability of such identification. *See* Real ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (2005). Among other things, the Real ID Act provides that within three years, all states must enhance their security guarantees for driver's licenses to provide comprehensive standards for federal use. *See id.* at § 202, 119 Stat. at 312. In debating the Real ID Act, representatives recognized the importance of making driver's licenses more trustworthy because they play such a vital role in contemporary society. *See* 151 Cong. Rec. H2997-02, H3020 (May 5, 2005) ("At home, the Real ID provisions will strengthen our Nation's driver's license laws, providing each citizen with another layer of security."). In 2004, when Congress was debating a similar provision, it recognized not only how the driver's license has become the "foundation of your identity," but also how the "driver's license has come to represent more than authorization to operate a motor vehicle; it imparts a stamp of legitimacy and is often taken as unquestionable proof of identity." *See* 150 Cong. Rec. H8664-02, H8682-83 (Oct. 7, 2004).

Just as government-issued photo identification has become a useful and reliable means for other government agencies and for the private sector to identify individuals, so too it will be a useful tool for identifying individual voters. Current elections security measures include the challenge process and the signature requirement. (State Exhibit 37, ¶ 3) However, the challenge procedure is typically used to verify not so much identity as residency, and the signature comparison requires unrealistic poll-worker expertise, particularly considering the limited time and the significant pressures at the polls, to be effective. *See id.* ¶¶ 6-9. Requiring photo

identification will permit poll workers to quickly check the name on the list against the name on the card and the face on the card with the face of the voter. (*See id.* ¶ 10)

V. The Baker-Carter Commission Supports Photo-Identification at the Polls

Recognizing the connection between obtaining a driver's license and registering to vote, the Baker-Carter Commission recently recommended that states use "REAL ID" cards for purposes of identifying in-person voters. State Ex. 1, p. 18. In recommending that election law should be reformed to require reliable photo identification, the Commission emphasized several times that "there is no doubt that voting fraud occurs" and observed that fraud dilutes the strength of legitimate votes and thereby disenfranchises honest voters. *Id.*

The Commission recognized that requiring reliable photo identification would deter voter fraud and enable better fraud detection. *Id.* at 18. The Commission also recognized that protecting the integrity of elections by requiring voters to present photo identification would advance the independent, but equally compelling, government interest in protecting public confidence in the legitimacy of election outcomes. *Id.* On Wednesday, November 30, 2005, the *Indianapolis Star* reported that Commission member and former U.S. Representative Lee Hamilton (D-Ind.) "says Indiana was right to adopt a voter ID law" (State's Ex. __)

VI. MCEB's Material Facts Incorporated Herein

The State Defendants hereby incorporate by reference all of the undisputed material facts asserted in the brief of the Marion County Election Board.

STATEMENT OF DISPUTED FACTS

With a limit of 60 pages and facing a combined total of 31 pages of Statements of Material Facts Not in Dispute, compliance with L.R. 56.1(b) is difficult. Without conceding that any facts relied on by the Plaintiffs are either material or undisputed, the Defendants direct the Court's attention to a few

b. In-person voter fraud is very difficult to detect

It is also important to understand that the nature of in-person election fraud is such that it is nearly impossible to detect or investigate. Unless a voter stumbles across someone else trying to use her identity, *see* Sabato & Simpson, *supra*, 292, or unless the over-taxed poll worker happens to notice that the voter's signature is different from her registration signature State Ex. 37, ¶ 9, the chances of detecting such in-person voter fraud are extremely small. Yet, inflated voter-registration rolls provide ample opportunity for those who wish to commit in-person voter fraud. *See* Fund, *supra*, 24, 65, 69, 138; Sabato & Simpson, *supra*, 321. And there is concrete evidence that the names of dead people have been used to cast fraudulent ballots. *See* Fund, *supra*, 64. Particularly in light of Indiana's highly inflated voter rolls State Ex. 27, p. 9, Plaintiffs' repeated claims that there has never been any in-person voter fraud in Indiana can hardly be plausible, even if the state is unable to prove that such fraud has in fact occurred.

c. Voter fraud exists and needs to be prevented.

According to the Baker-Carter Commission, there is "no doubt" that voter fraud sufficient to justify photo identification at the polls occurs. *See* State Ex. 1, p. 18. Ample evidence from across the nation confirms that understanding. Instances of dead votes, double votes, and voters using fake names and addresses are all too common in American elections. *See* State Ex. 3, pp. 18-24; State Ex. 4, p. 2-7. In some cases, the number of fraudulent votes is staggering. Take, for example, Missouri, where an analysis of only two of the states' 114 counties revealed over 1,000 fraudulent ballots, including numerous multiple votes, dead votes, and voters "residing" at vacant lots. State Ex. 6.

⁷ It would be utterly implausible, for example, to require a same-day voter-registration state (such as Wisconsin) to prove some minimal level of fraud under its current system before switching to advance registration.

~~Occasions of in-person voter fraud are not confined to a small number of jurisdictions. Florida has encountered fraud by citizens living outside city boundaries voting in city elections. State Ex. 10. Maryland frequently sees dead people vote in its elections. State Ex. 11. New York has also seen children as young as two voting in local elections. State Ex. 17.~~

Contrary to the Democrats' misunderstanding of the law, while enforcement outcomes in other states are irrelevant in challenging Indiana's laws, the State is entitled to rely on the experiences of other jurisdictions when deciding issues of public policy. *See Munro*, 479 U.S. at 195-96; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, (holding that speech regulations may be justified by occurrence secondary effects in other states or cities).

The Democrats mistakenly rely on *A Woman's Choice East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2003), for the proposition that the state may not rely on proof of fraud elsewhere. That case stands for no such principle. Instead, the court, observing that "constitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges," ruled that challenges to a state law based on its collateral consequences cannot rely on consequences proven elsewhere. *Id.* at 689. "Indiana is entitled to an opportunity to have its law evaluated in light of experience *in Indiana* . . . What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana . . . is entitled to put its law into effect and have that law judged by its own consequences." *Id.* at 693.

The reason for this high threshold for plaintiffs is that legislative enactments are entitled to deference. The notion of analyzing a law based on "legislative fact" means that a legislature can decide whether prophylactic measures are necessary based on problems that have occurred

solely on “public awareness of the opportunities for abuse,” *see Buckley*, 424 U.S. at 27, inherent in polling-place voting unaccompanied by identification checks. This is particularly true in light of the extent of voter list inflation that has occurred over the past decade or so in the wake of the Motor-Voter law. Regardless whether particular instances of fraud are well documented, “common sense,” *see McConnell*, 540 U.S. at 145, tells us that the General Assembly is entitled to be concerned that the combination of inflated voter rolls, lax security, and closely contested elections may, over time, erode voter confidence in election results. And, as the Supreme Court has made crystal clear, states are not required to wait until public confidence in the legitimacy of representative government suffers a direct hit before taking steps to protect electoral integrity. *See Munro*, 479 U.S. at 195-96.

~~Public opinion data supports the General Assembly’s decision to strengthen election security in order to reassure the public concerning the legitimacy of elections. In 2000, a Rasmussen poll showed that 59% of voters believed there was “a lot” or “some” fraud in elections. State Ex. 22, p. 1. A short time later, a Gallup Poll showed that 67% of adults nationally had only “some” or “very little” confidence in the way the votes are cast in our country. State Ex. 23, pp. 8-9. A 2004 Zogby Poll found that 12% of voters believe that their vote was counted inaccurately in the 2004 elections. Fund, *supra*. And scholar Richard Hasen has testified that more than 25% of Americans worried that the 2004 presidential vote was unfair. State Ex. 24, p.2. Recent surveys document even stronger support for measures to protect electoral integrity. In a 2004 survey of 1000 likely voters, 82% of respondents, including 89% of Bush supporters and 75% of Kerry supporters, favored photo identification at the polls. *See generally* Fund, *supra*.~~

Such overwhelming public support for requiring voters to present photo identification at