

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.)

**MEMORANDUM IN SUPPORT OF DEMOCRATS' MOTION
FOR SUMMARY JUDGMENT**

Submitted by:

William R. Groth

Geoffrey S. Lohman

Barry A. Macey

*Attorneys for Plaintiffs, Indiana Democratic Party
and Marion County Democratic Central Committee*

STATEMENT OF ISSUES

1. Do Democrats have standing to maintain this action for declaratory and injunctive relief seeking to have the photo ID requirements of Senate Enrolled Act 483 declared unconstitutional and in violation of federal statutes and enjoining Defendants from enforcing them?
2. Are Democrats entitled to bring a private action to enforce 42 U.S.C. §1971(a)(2)(A) and (B) of the Civil Rights Act of 1964 notwithstanding the fact that those provisions may also be enforced by the Attorney General of the United States?
3. Do the photo ID requirements of Senate Enrolled Act 483 on their face violate 42 U.S.C. §1971(a)(2)(A) by imposing on persons who have already been found by State officials to be qualified to vote, standards, practices and procedures not applied to other individuals within the same political unit, to wit, those persons who vote absentee ballot by mail or who live in state- licensed care facilities containing a polling place?
4. Do the photo ID requirements of Senate Enrolled Act 483 on their face violate 42 U.S.C. §1971(a)(2)(B) because they prohibit the counting of an otherwise qualified voter's ballot for a paper omission not material in determining the voter's qualification to vote under Indiana law?
5. Do the photo ID requirements of Senate Enrolled Act 483 on their face, and in the context of the cumulative burdens imposed by other Indiana election laws, constitute severe burdens thus requiring the application of strict judicial scrutiny?
6. Do the photo ID requirements of Senate Enrolled Act 483 severely burden the Democratic Party's fundamental rights as partisan political organizations to choose with whom they wish to associate in connection with the Democratic Party's primary election?
7. Are the photo ID requirements of Senate Enrolled Act 483 narrowly tailored to serve the State's interests?
8. Do the photo ID requirements of Senate Enrolled Act 483 violate the First and Fourteenth Amendments to the United States Constitution?

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**MEMORANDUM IN SUPPORT OF DEMOCRATS’ MOTION
FOR SUMMARY JUDGMENT**

The Indiana Democratic Party and the Marion County Democratic Central Committee (the “Democrats”), by counsel, submit this Memorandum in Support of their Motion for Summary Judgment.¹

¹ Democrats agree with the facts and arguments made by the Crawford Plaintiffs in the consolidated case at *Crawford, et al. v. Marion County Election Board*. Democrats adopt and incorporate by reference the factual and legal arguments made by the Crawford Plaintiffs.

I. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

A. The Enactment and Requirements of SEA 483

On April 27, 2005 the Governor of the State of Indiana signed Senate Enrolled Act No. 483 (hereinafter “SEA No. 483” or the “Photo ID Law”), which became effective by its terms on July 1, 2005. The Photo ID Law is now codified at Ind. Code §§3-11-8-25.1 and 3-5-2-40.5 (2005)². The Indiana General Assembly passed the Photo ID Law along a straight party-line vote. King Dep. at 109. It requires some but not all registered and otherwise qualified voters to provide “proof of identification” at the polling place on Election Day or by appearing personally before the circuit court clerk or county election board “not later than the deadline. . . for the county election board to determine whether to count a provisional ballot”. That deadline, as the result of other election law changes made by the Indiana General Assembly in 2005, is now the second Monday following election day. I.C. §3-11.7-5-1(b) (2005); King Dep. 23.

The “proof of identification” Indiana voters will be required to provide must contain the following and meet the following conditions:

- (1) A photograph of the individual to whom the “proof of identification” was issued;
- (2) The name of the individual to whom the document was issued, which “conforms to the name in the individual’s voter registration record”;
- (3) An expiration date;
- (4) The document must be current or have expired after the date of the most recent general election; and

² The Indiana Statutes referenced in this Memorandum are set forth in the Indiana Statutory Appendix located at the end of this brief.

- (5) The “proof of identification” must have been “issued by the United States or the state of Indiana”.

I.C. §3-5-2-40.5 (2005). If an otherwise qualified and registered voter is unable or unwilling to produce at the polls on Election Day the precise form of photo identification required by the Photo ID Law, or if any member of the precinct election board “determines that the proof of identification presented by the voter does not qualify as proof of identification under IC 3-5-2-40.5”, a member of the precinct election board “*shall* challenge the voter as prescribed by this chapter.” I.C. §3-11-8-25.1(d)(2) (2005) (emphasis added).³ A member of the precinct election board may be subject to criminal prosecution for knowingly failing to comply with this law. King Dep. 58; I.C. §3-14-2-14 (2005).

After this mandatory challenge has been made, the voter may execute a challenged voter affidavit and sign the poll list, but the voter must be given a provisional ballot. I.C. §3-11-8-25.1(e) (2005). However, the provisional ballot may not be opened and counted unless the voter, not later than the second Monday following the election, personally appears before the circuit court clerk or the county election board and either provides the required proof of identification and executes an affidavit affirming that the voter is the same voter that cast the provisional ballot, or executes an affidavit that the voter is either (1) indigent and unable to obtain proof of identification without the payment of a fee, or (2) has a religious objection to being photographed. I.C. §3-11-7-5-2.5 (2005). The indigency affidavits will not be available for voters to sign at the polls; they will be available only at election board offices after Election Day. King Dep. 73. SEA

³ I.C. §3-11-8-25 (2005) describes these voting procedures generally. That section expires on December 31, 2005 and thereafter I.C. §3-11-8-25.1 (2005) applies. For purposes of this motion, Democrats are challenging the voting procedures that shall take effect on January 1, 2006.

483 contains no definition of the term “indigency”. King Dep. 70; Robertson Dep. 37.

The proof of identification requirements of the Photo ID Law do not universally apply to all voters. The Law contains two major exceptions. First, those requirements do not apply to voters who apply for an absentee ballot by mail and who then proceed to vote by absentee ballot (the “Absentee Ballot Exception”). I.C. §3-11-10-1.2 (2005). Second, they do not apply to a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides (the “State Licensed Care Facility Exception”). I.C. §3-11-8-25.1(f) (2005). If a voter falls within either of these exceptions, the voter is not required to provide any proof of identification in order to vote and to have his vote counted. King Dep. 98-99; Robertson Dep. 36.

Although the proponents of SEA 483 asserted that the law was intended to combat voter fraud, no evidence of the existence of such fraud has ever been provided. No voter has been convicted of or even charged with the offense of misrepresenting his identity for purposes of casting a fraudulent ballot in person, King Dep. 95-96; Mahern Aff. ¶¶ 2-3, though there have been documented instances of absentee ballot fraud. King Dep. 120. Indeed, no evidence of in-person, on-site voting fraud was presented to the General Assembly during the legislative process leading up to the enactment of the Photo ID Law. Mahern Aff. ¶¶ 2-3.

B. Protection Against In-Person Voter Fraud Provided by Prior Laws

The changes made by the Photo ID Law represent a substantial departure from practices under prior State law. Under prior Indiana law dating back to at least 1930, any member of precinct election boards (consisting of the inspector and two judges) could challenge a voter suspected of misrepresenting his identity for voting purposes, as could political party challengers.

King Dep. 44, 46, 89. Either political party's clerk could also challenge a voter based on a comparison of the voter's signature to the signature contained in the voter registration records.

King Dep. 44. A voter who misrepresented his identity for purposes of casting a fraudulent ballot is now and has for decades been subject to a felony charge and conviction. *See*, I.C. §3-14-2-16 (2005); King Dep. 32. Provisions of the National Voter Registration Act of 1993 provide procedures for purging inactive or duplicate registrations from the rolls of registered voters, 42 U.S.C. §1973 gg-6, and under the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §15481, each state must have in place by January 1, 2006 a computerized statewide voter registration file, which will aid in further significantly reducing the number of duplicate registrations, and in removing deceased voters from the rolls. King Dep. 37, 42, 44; Robertson Dep. 43-44.

Prior to 2004, Indiana law did not provide for the casting of a "provisional" ballot. Instead, a member of the precinct election board, or the election clerk, who wished to challenge the eligibility of a voter would be required to swear out an affidavit (Top Section of Form PRE-4) under the penalties of perjury. King Dep. 49; Ex. 2. The challenged voter could then swear out a counter-affidavit (Bottom Section of Form PRE-4) which must contain the following information under the penalties of perjury: (1) the voter's name, (2) date of birth, (3) present address, (4) prior address (if applicable), (5) that the voter is a citizen, (6) that the voter has resided in the precinct for at least 30 days, and (7) that the voter has not already voted in any other precinct. King Dep. 50-51; Ex. 2; I.C. §3-11-8-23 (2005). The voter would then be permitted to vote a

regular ballot after signing the poll book.⁴ King Dep. 49. The challenge affidavits were required to be sent to the prosecuting attorney for investigation. King Dep. 49, 56-57; I.C. §3-14-5-2 and 3 (2005)

In 2004 following the passage and implementation of HAVA, provisional voting for the first time became available. Provisional ballots are reviewed by the county election board following election day to determine whether they should be counted. I.C. §3-11.7-5-2 (2005). Provisional ballots have a low probability of being counted. In the 2004 general election, 82% of the provisional ballots cast in Marion County were not counted, the majority of which were due to poll worker error, or errors made by the person challenging the vote. Sadler Dep. 15-17, 20. Statewide, only about 15% of all provisional ballots were counted. Sadler Dep. 44.

Clerk Sadler testified that challenges can take up to one-half (½) hour if lines at the polls are long. Sadler Dep. 19. When asked whether she believed the new requirements imposed on voters and precinct board workers by the Photo ID Law would further slow down the voting process, she said she did not think so “unless there’s a huge challenge effort made by either of the [political] parties, which is typically where those challenges are generated”, such as it was rumored the Marion County Republican Party planned to do in the 2004 general election. Sadler Dep. 48. Sadler also acknowledged that the opportunities for mounting an aggressive effort to challenge voters had increased by virtue of the Photo ID Law, as well as the enactment of a new

⁴ A dispute arose in 2004 between Co-Director King and Marion Circuit Court Clerk Sadler as to the circumstances under which a voter who was challenged would be required to vote by provisional ballot. King took the position that a voter challenged for any reason could not, even after swearing out the counter-affidavit (PRE-4), vote by regular ballot but instead would be required to vote by provisional ballot. King Dep. 53. The opinion was not shared by Clerk Sadler, who believed that a challenged voter who swore out a counter-affidavit should be permitted to vote by a regular (non-provisional) ballot. King Dep. 54; Sadler Dep. 13, 52. That dispute has yet to be resolved. Robertson Dep. 20-22.

Indiana law allowing partisan challengers to be stationed inside the polling area, which will make it “easier for the party challengers to make those challenges”. Sadler Dep. 49-50, 65; I.C. §3-11-8-15(a)(5) (2005). Sadler further acknowledged that she is aware of political challengers challenging voters for “trivial” reasons, such as that the spelling of the voter’s name does not match the spelling of the voter’s name on the pollbook. Sadler Dep. 56.

C. Burdens Imposed by SEA 483 on the Right to Vote

The economic and social burdens imposed by SEA 483 are significant, both in terms of the number of voters affected and the cumulative burdens placed upon each individual. The largest source of qualifying photo IDs will be the Indiana driver’s license or photographic identification cards provided by the Indiana Bureau of Motor Vehicles.⁵ (“BMV”). Many registered voters do not currently possess such identification. Kimball Brace, the President of Election Data Services, Inc., has performed an analysis of the number of registered voters in Marion County who currently possess driver’s licenses or photo IDs issued by the BMV.⁶ Brace Aff. and Report. He has concluded that at least 51,000 registered voters and as many as 141,000 registered voters in Marion County do not currently possess a BMV-issued driver’s license or photo ID. Brace Aff., Report pp. 8-10.

Unsurprisingly, the individuals at risk of disenfranchisement as a result of SEA 483 are

⁵ This is true because of the narrow category of IDs permitted by SEA 483. Many forms of photo ID that one might expect to be sufficient are not. A photo ID issued by the State to the deputy attorney general defending this lawsuit is not sufficient because it lacks an expiration date. King Dep. 78; Ex. 5. Likewise, photo IDs issued by the Indiana University School of Law — Indianapolis and the United States Veterans Administration do not qualify because they lack expiration dates. King Dep. 77, 83; Ex. 4, 6.

⁶ Brace compared records provided by the BMV and the Marion County Board of Voter Registration, which were both compiled and current as of August, 2005. Brace Aff., Report p. 5.

disproportionately poor. By comparing the addresses of the registered voters without BMV-issued IDs to data from the 2000 Census, Brace has determined that registered voters who reside in census block groups with a median household income of less than \$15,000 are more than twice as likely not to possess photo IDs as are registered voters who reside in census block groups with a median household income of more than \$55,000. Brace Aff. and Report, pp. 9-10, Tables F and G. For instance, in his analysis of the “Active” voters without ID, Brace found that 12% of Marion County registered voters residing in census block groups with a median household income of \$55,000 or more lacked a BMV-issued photo ID. Brace Aff. and Report, Table G. In comparison, 28.1% of registered voters residing in census block groups with a median household income of \$15,000 or less lacked such an ID. *Id.* Similarly, 22% of registered voters residing in census block groups with a median household income of more than \$15,000 but less than \$25,000 lacked an ID.⁷ *Id.*

All registered voters without a qualifying ID, both poor and rich, will face individual burdens in order to obtain the ID. Obtaining a photo ID from the BMV is not free, even though the General Assembly purported to require the distribution of photo IDs without a fee. The BMV requires that certain primary documents be presented in order to obtain the ID, one of the most common of which is a certified copy of a birth certificate.⁸ Redmond Dep. 8; Ex. 2. In Indiana,

⁷ Similar results were found when Brace analyzed the total of all voters (both Active and Inactive) without IDs. Brace Aff., Report pp. 8-10, Tables D and F.

⁸ On July 12, 2002 the Indiana Bureau of Motor Vehicles announced that effective July 15, 2002, applicants for Indiana driver licenses and identification cards would have to present certain documents, including at least one “primary” document such as a certified birth certificate, because of recent increases in identity fraud. *Villegas v. Silverman*, 832 N.E.2d 598, 601 (Ind. Ct. App. 2005). Though those requirements were recently struck down by the Indiana Court of Appeals in *Villegas* because they were not promulgated in accordance with Indiana law, the BMV announced that these requirements would remain in

obtaining a certified copy of a birth certificate from a county board of health costs \$10. First Stipulation of the Parties. For individuals born in other states, the cost may be more, assuming they are able to obtain it at all. For instance, the cost of obtaining a certified birth certificate from Boston, Massachusetts is \$28. Clemente Aff. ¶ 5. There may also be costs associated with trips to boards of health or other locations to obtain the required documents.

Indeed, many individuals may be unable to obtain a birth certificate because they do not have the underlying documents needed to obtain a birth certificate. Lafayette Urban Ministries, an organization that provides assistance to needy families, assisted approximately 150 individuals in 2004 in an effort to obtain photo IDs. Anderson Aff. ¶¶ 2-5. About half failed to obtain the ID, primarily because they did not have photo identification to obtain a birth certificate. Anderson Aff. ¶¶ 2-5.

There is an economic cost associated with making a trip to the BMV. These economic costs includes arranging for transportation, and in many instances, time away from work. The inefficiencies of the BMV and the process of obtaining an ID are a burden as well. Theresa Clemente, a 78-year-old woman residing in Fort Wayne but originally from Massachusetts, recently attempted to obtain a photo ID from the BMV so she could vote in Indiana. Clemente Aff. ¶¶ 1-8. After three separate visits to the BMV over a period of many weeks and payment of \$28 for a certified copy of her birth certificate, the BMV has still refused to issue her photographic ID on the grounds that her birth certificate (unsurprisingly) contains only her

effect while the BMV pursued its legal options. “Court rejects BMV ID rules”, The Indianapolis Star, August 13, 2005. The BMV petitioned the Court of Appeals on September 12, 2005 for a rehearing, which was denied October 21. Meanwhile, the BMV has begun the rulemaking process to implement these requirements. “BMV following order to tighten rules for ID’s”, The Indianapolis Star, September 10, 2005.

maiden name. Clemente Aff. ¶¶ 1-8. The BMV has recently closed numerous branches throughout the State, thereby increasing the travel costs for some individuals in order to reach a branch. Redmond Dep. 34. The General Assembly also passed a law in 2005 that prohibits Internet renewal of driver's licenses, which will require all individuals to appear at a license branch to renew their licenses. HEA 1073 (2005), codified at I.C. §29-24-12-5.

For those individuals who do not have the required photo ID on Election Day and who are required to vote a provisional ballot, not only will they be required to navigate the bureaucratic maze of the BMV and/or a board of health within thirteen (13) days, but they will also be required to make a second trip to the county election board or circuit court clerk in order to present the ID. Once again, they will be required to arrange transportation and time off from work, assuming that they are even able to obtain the identification within that time period. A voter who is willing to swear that he is "indigent", and thereby avoid obtaining a photographic ID if election officials agree that he is indigent, must still make this second trip to the election board or clerk's office in order to complete this affidavit. I.C. §3-11.7-5-2.5 (2005).

The requirements of SEA 483 will cause many voters to simply give up. Professor Marjorie Hershey of Indiana University reports that because the Photo ID Law increases the costs of voting by imposing additional requirements and barriers, it is likely to decrease voter turnout, particularly among voters of lower socio-economic status. Hershey Aff., Report pp. 12-17. In particular, Hershey observes that the costs imposed by the law in terms of time, transportation, fees and obtaining all of this information might be most difficult for the disabled, homeless, persons with limited income, those without cars, people of color, those who are part of "language minorities," and the elderly. Hershey Aff., Report p. 17.

II. ARGUMENT

A. Democrats Have Standing to Maintain Their Statutory and Constitutional Challenges to the Photo ID Requirements of SEA 483.

Since the State has questioned Democrats' standing to maintain this action, we will begin with a discussion of the justiciability of Democrats' statutory and constitutional challenges to the photo identification requirements of SEA 483. The issue of standing relates to the right of a party to have a claim decided on the merits and involves three elements. First, the plaintiff must have suffered an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent. Second, the injury must be fairly traceable to the challenged action of the defendant and not the result of the independent action of some party not before the court. Third, it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

With respect to the first *Lujan* requirement, the injury requirement, while the injury must generally affect the plaintiff in a personal and individual way, the particularity requirement does not mean that a plaintiff lacks standing merely because an injury is shared by many others. Thus, an injury that is concrete though widely shared does not deprive the court of standing to address, and redress, that injury, since to deny standing simply because many others are also injured would mean that alleged unconstitutional or illegal governmental actions that impact many persons could be challenged by nobody. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005). Moreover, for purposes of establishing their standing, Democrats need not demonstrate that the injury to their adherents will disenfranchise even a single voter, for it is well established that the "injury in fact" in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier (burden) that makes it more difficult

for members of one group to obtain a benefit than it is for members of another group, not the ultimate inability to obtain that benefit. *Id.* at 497 (citing *Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

Here, Democrats claim harm from the operation of SEA 483's photo identification requirements in several tangible ways. They first claim that those requirements will infringe upon Democrats' associational rights as protected by the First Amendment to determine with whom they will politically associate. Thus, Democrats object to the State disallowing the votes of persons desiring to associate with them by voting in their primary elections solely because, though registered and otherwise fully qualified voters, they are unable to produce the narrow form of state or federal-issued identification required by SEA 483. The harm to a political party's right to determine with whom it will associate politically is a sufficient injury to confer standing.

California Democratic Party v. Jones, 530 U.S. 567 (2000); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) *cert denied* 531 US 114 (2001); *see also American Libertarian Party v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003); and *Lerman v. Bd. of Elections of N.Y.*, 232 F.3d 135, 143 (2nd Cir. 2000). And once it has been shown that Democrats have standing to facially challenge a law because it has been injured by one of its provisions, they have standing to facially challenge the entire law. *Tanner Adver. Group LLC v. Fayette Co.*, 411 F.3d 1272, 1277 (11th Cir. 2005).

Second, the injury Democrats allege to their associational rights and to those voters who choose to associate with them by voting in their primary elections and voting for their candidates in the general election is fairly traceable to the action of both the State and County Defendants, who will be responsible for implementing and enforcing the requirements of the Photo ID Law.

As to the third element of standing, redressability, because this Court has the power to declare the Photo ID Law illegal or unconstitutional, and to enjoin its enforcement, the harm is sufficiently redressable and the Democrats can show that they would benefit in a tangible way from the Court's intervention. *Krislov*, 226 F.3d at 858.

Further, Democrats also have associational standing to assert the interests of those voters whose voting rights will be denied or burdened as a result of the Photo ID Law's operation. An association, including a political organization, has standing to bring suit on behalf of its members or adherents when (a) they would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purposes, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544 (1996); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Each of these requirements establishing Democrats' associational standing is present here. Democrats have standing to assert the voting rights of its members who will vote in the May 2006 primary election and the November 2006 general election without identifying the specific voters whose voting rights will be burdened or denied; it is enough to show that some voters will inevitably be discouraged from voting, prevented from having their votes counted, or severely burdened in the exercise of the franchise due to the new photo identification requirements. *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004); *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1078-79 (N.D. Fla. 2004); *Miller v. Blackwell*, 348 F.Supp.2d 916, 920 (S.D. Oh. 2004); *Bay Co. Democratic Party v. Land*, 347 F.Supp.2d 404, 422 (E.D. Mich. 2004); *Smith v. Boyle*, 959 F.Supp. 982, 986 (C.D. Ill. 1997), *aff'd* 144 F.3d 1060 (7th Cir.

1998). Moreover, the voting rights Democrats seek to protect are undeniably germane to their institutional and organizational purposes, and no individual Democratic Party members are indispensable to the prosecution of this action for declaratory and injunctive relief.

Further, even if there were some reasonable doubt as to Democrats' standing, since they have brought this facial challenge to the Photo ID Law under the First and Fourteenth Amendments, claiming that the law burdens the exercise of the fundamental right to vote and is not narrowly tailored, the courts have made it clear that under such circumstances the standing requirements are not as rigorously enforced. *United States v. Holm*, 326 F.3d 872, 875 (7th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (a plaintiff who mounts a pre-enforcement challenge to a statute under the First Amendment need not wait to file suit until the law is enforced); *Schultz v. City of Cumberland*, 228 F.3d 831, 848 (7th Cir. 2000); *see also Village of Schaumburg v. Citizens for Better Env't*, 444 U. S. 620, 634 (1980) (overbreadth doctrine provides exception to the general principle that a party may assert his own rights and not the claims of third parties not before the court). Accordingly, Democrats' standing to maintain this action is clear under well-established law.

B. Democrats' Statutory Claims

- 1. Democrats are entitled to bring this action to enforce 42 U.S.C. §1971(a)(2)(A) and (B) of the Civil Rights Act of 1964 notwithstanding the fact that those provisions may also be enforced by the Attorney General of the United States.**

Democrats have brought their statutory challenge to the Photo ID Law based in part upon the provisions of the Civil Rights Act of 1964, specifically 42 U.S.C. §1971(a)(2)(A) and (B), enforceable by way of 42 U.S.C. §1983. Those provisions state, in pertinent part, as follows:

- (2) No person acting under color of law shall –

- (A) in determining whether any individual is qualified under state law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by state officials to be qualified to vote;
- (B) deny the right to any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Though Congress had previously included a provision authorizing the Attorney General to bring actions to enforce earlier versions of the Civil Rights Act, 42 U.S.C. §1971(c), Congress also included a provision stating that these subsections may be enforced “without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law”. 42 U.S.C. §1971(d).

The State has challenged Plaintiffs’ right to bring a private action to enforce these subsections. Consequently, Democrats will begin by addressing the issue of whether those subsections create federal rights enforceable against State or local officials under 42 U.S.C. §1983, which provides a cause of action against any person who, acting under color of state law, abridges the rights created by the Constitution or the laws of the United States. *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

It is true that only “unambiguously conferred” rights will support a §1983 action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). However, if it is shown that the statute creates an individual right, the right is presumptively enforceable under §1983. *Gonzaga*, 536 U.S. at 284. Plaintiffs “do not have the burden of showing an intent to create a private remedy because §1983 generally supplies a remedy for the vindication of rights secured by federal

statutes.” *Id.* The State may rebut this presumption by showing that Congress specifically foreclosed a remedy under §1983. *Id.* at 285 n.4. “The State’s burden is to demonstrate that Congress shut the door to private enforcement either expressly, through ‘specific evidence from the statute itself,’ or ‘impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983’”. *Id.* (internal citations omitted).

In *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), the Supreme Court set out the three factors that guide the inquiry into whether Congress intended to create a right enforceable in a §1983 action:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Id. (citations omitted). In determining if an implied right of action exists under a federal statute, a court must consider both the plain meaning of the statute as well as its proper context. “Each part or section of the statute must be construed in connection with every other part or section to produce a harmonious whole.” *Dersch Energy v. Shell Oil*, 314 F.3d 846, 856 (7th Cir. 2002). Courts must focus primarily on the legislative intent to determine if an implied private right of action exists. This necessarily involves an examination of the statute’s language, structure and legislative history. *Mallett v. Wisconsin Div. of Voc. Rehab.*, 130 F.3d 1245, 1249 (7th Cir. 1997).

By analogy, the Supreme Court has found that provisions of the Voting Rights Act of 1965 (“VRA”) can be enforced in a private suit notwithstanding the absence of language

expressly creating a private right of action and the presence of provisions authorizing the Attorney General to sue to enforce the VRA. *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969) (allowing private enforcement of Section 5 of the VRA); *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-235, 240 (1996) (allowing private enforcement of Section 10); *see also Thornburgh v. Gingles*, 478 U.S. 30 (1986) (private enforcement action under Section 2). In *Allen*, the Supreme Court noted that 42 U.S.C. §1971(c) provides that the Attorney General *may* institute an action, and observed that the “achievement of the Act’s laudable goals could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.” 393 U.S. at 556-557; *see also id.* n.21. The Court also observed that when Section 5 of the VRA was enacted, the Court’s jurisprudence allowed private rights of action to enforce laws designed to protect a broad class of persons. *Id.*; *see also Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979) (observing that the Court had previously found implied private causes of action at the time Congress enacted the statute in question).

In the most recent federal appeals court decision to address the issue of whether 42 U.S.C. §1971(a)(2) can be enforced in a private action, the Eleventh Circuit squarely held that private individuals may sue under 42 U.S.C. §1983 to enforce the rights guaranteed by 42 U.S.C. §1971(a)(2). *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). After carefully applying the *Blessing* and *Gonzaga* analytical framework, the Eleventh Circuit determined that the legislative history of the 1957 law giving the Attorney General the right to enforce the provisions of the Civil Rights Act was not intended to substitute one form of protecting the right to vote, a “fundamental and basic right”, for another. *Schwier*, 340 F.3d at 1295. The court also found unpersuasive the

reasoning of the only other circuit court of appeals to touch upon this issue, *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), *cert. denied* 532 U.S. 906 (2001), which a few years earlier held that a *pro se* plaintiff was precluded from maintaining a private action under 42 U.S.C. §1971(a)(2)(B). Noting that the Sixth Circuit had failed to examine the legislative history, seek guidance from, or even cite either *Allen* or *Morse*, the Eleventh Circuit expressly disapproved of the Sixth Circuit's holding in *McKay* that 42 U.S.C. §1971(a)(2) is enforceable only by way of an action instituted by the Attorney General. *Schwier*, 340 F.3d at 1294-95.

Clearly, 42 U.S.C. §1971(a)(2)(A) and (B) each unambiguously creates individual rights not to be discriminated against by State or local election officials in connection with the exercise of the most basic and fundamental right in a democracy - - the right to vote. The rights created by those sections are neither vague nor amorphous. Moreover, they are “couched in mandatory rather than precatory terms” and clearly impose a binding obligation on the State not to deny or abridge the right to vote. *Blessing*, 520 U.S. at 341. Accordingly, these provisions of §1971 may be privately enforced. *Schwier*, 340 F.3d at 1297.

2. **The Photo ID requirements on their face violate 42 U.S.C. §1971(a)(2)(A) because they impose on persons who have already been found by State officials to be qualified to vote standards, practices, and procedures not applied to other individuals within the same political unit, to wit, those persons who vote absentee ballot by mail or who live in state- licensed care facilities.**

The right to vote is a “fundamental political right, preservative of all rights.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Supreme Court has held that all qualified voters not only have a right to cast their vote, but also to have their vote counted. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another”); *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) (“[E]veryone ha[s] the right to vote *and have his vote counted.*”) (emphasis added); *Reynolds*, 377 U.S. at 554-55 (“It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *and to have their vote counted.*”) (emphasis added) (citations omitted). The VRA also defines the word “vote” as “all action to make a vote effective including . . . casting a ballot, *and having such ballot counted* and included in the appropriate totals of votes cast with respect to candidates for public office [.]” 42 U.S.C. §1971(e) (emphasis added).

It is clear from the face of the Photo ID Law that not all voters will be required to produce the required form of photo identification in order to vote and to have their vote counted. The Photo ID Law imposes its new identification requirements only (except for the State Licensed Care Facility Exception) on those voters who appear in person to cast their ballot, but not on those who cast an absentee ballot by mail. This anomaly exists even though the right to vote by

an absentee ballot is not accorded the same constitutional protections as the act of voting generally. *McDonald v. Bd. of Elections*, 394 U.S. 802, 807-08 (1969); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004), *cert. denied* 125 S. Ct. 1669 (2005) (states have no obligation to allow unlimited absentee voting). This disparate treatment of in-person voters as compared to mail-in absentee voters on its face offends 42 U.S.C. §1971(a)(2)(A), irrespective of the absence of contention that the Photo ID Law was enacted for racially discriminatory reasons. *See Auerbach v. Kinley*, 499 F.Supp. 1329, 1340 (N.D.N.Y. 1980); *Ball v. Brown*, 450 F.Supp. 4, 7 (N.D. Oh. 1977); *Frazier v. Callicutt*, 383 F.Supp. 15, 20 (N.D. Miss. 1974); *Brier v. Luger*, 351 F.Supp. 313 (M.D. Pa. 1972); *Sloane v. Smith*, 351 F.Supp. 1299, 1305 (M.D. Pa. 1972); and *Shivelhood v. Davis*, 336 F.Supp. 1111, 1115 (D. Vt. 1971).

Congress enacted 42 U.S.C. §1971(a)(2)(A) to effectuate the proposition that the Equal Protection Clause of the Fourteenth Amendment prohibits States or local election officials from arbitrarily subjecting one group of voters to burdens not placed on other citizens, absent a compelling justification for the disparate treatment. *Frazier v. Callicutt, supra*. Because a voter who requests and then casts an absentee ballot by mail or one who resides in a state-certified residential facility housing a polling place is not required to produce any form of identification, but all other voters who vote in person at the polls must comply with those identification requirements, the Photo ID Law places a special burden on some but not other voters. The State cannot show any compelling justification for subjecting only voters who vote in person to the new requirements of the Photo ID Law, while exempting absentee voters who vote by mail or persons who live in state-certified residential facilities.

On the other hand, absentee ballots are peculiarly vulnerable to coercion and vote

tampering since there is no election official or independent election observer available to ensure that there is no illegal coercion by family members, employers, churches, union officials, nursing home administrators, and others.⁹ Even if one were to accept the factually baseless argument that there is rampant voter fraud among in-person, on-site voters, it is particularly odd that the Photo ID Law expressly exempts the one method of voting that has experienced documented instances of fraud. *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (recounting the instances of rampant fraud in absentee voting in the 2003 East Chicago mayoral primary elections) and *Shoffstall v. Kaperek*, 457 N.E.2d 550 (Ind. 1984) (detailing absentee ballot fraud in Vigo County in the early 1980's).¹⁰

Since it was wholly irrational if not unconstitutional¹¹ for the Indiana General Assembly to have excluded absentee voters (as well as those who reside in state-certified retirement facilities) from the reach of the Photo ID Law, *a fortiori* the State cannot establish any compelling justification for the disparate treatment accorded to in-person voters and absentee voters with respect to the photo identification requirements of the Photo ID Law. There was not even a rational basis for the General Assembly to exclude absentee voters from the mandates of the

⁹ According to Hans A. von Spakovsky, current counsel to the Assistant Attorney General of the Civil Rights Division, “absentee ballots represent the easier way to steal an election.” Memorandum (March 29, 2001) (available at http://www.hss.caltech.edu/~voting/von_spakovsky-1.pdf).

¹⁰ There is also ample evidence of absentee ballot fraud from other states. *See, e.g., In re: The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170 (Fla. App. 1998) (evidence of 140 ballots falsely witnessed and 480 ballots procured or witnessed by “ballot brokers”).

¹¹ The General Assembly’s failure to apply the new photo identification requirements uniformly to all voters ostensibly violates the Indiana Constitution, Art. II, §2. *Blue v. State ex rel. Brown*, 188 N.E. 583, 588 (Ind. 1934), overruled in part on other grounds by *Harrell v. Smith*, 40 N.E.2d 115, 119 (Ind. 1942) (“All regulations of the elective franchise, however, must be reasonable, uniform, and impartial”) (emphasis added).

Photo ID Law. The State has not and cannot establish any compelling justification for the disparate burdens placed on in-person voters and those voting absentee. By imposing procedures on some duly-qualified and registered voters but not on other voters within Marion County, the photo identification requirements of SEA 483 violate 42 U.S.C. §1971(a)(2)(A) and should be declared illegal and unenforceable by this Court, and Defendants should be enjoined from implementing or enforcing its provisions.

3. The Photo ID requirements on their face also violate 42 U.S.C. §1971(a)(2)(B) because they prohibit the counting of an otherwise qualified voter's ballot for a paper omission not material in determining the voter's qualification to vote under Indiana law.

The Photo ID Law also violates 42 U.S.C. §1971(a)(2)(B), known as the “materiality section”, because it imposes on some but not all voters who are registered and otherwise qualified to vote a requirement that they produce a tightly circumscribed form of photo identification. The materiality section “forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to determine their eligibility to vote”. *Schwier v. Cox*, 340 F.3d at 1294. It specifically provides protections against denying an otherwise qualified voter the right to vote and to have his vote counted based on errors or omissions on “records or paper” that are immaterial to the determination of the individual’s qualification to vote. *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371-72 (S.D. Fla. 2004).

Under the Photo ID Law, a voter who presents an otherwise valid form of photo or other identification at the polls for the purpose of establishing his or her identity will not have his or her vote counted if, for example, the identification document did not have a photo, an expiration date, or it was not issued by the United States or the State of Indiana. Even if requiring voters to produce a form of photo identification could be justified as a fraud-prevention measure,

conditioning the right to have one's vote counted on the voter's ability to produce a certain type of identification, i.e., a "record" issued by the state or federal government which contains an expiration date and a photo, is conditioning the right to vote on a document which is immaterial under Indiana law to establishing a voter's qualification to vote. Possessing this type of identification is immaterial to a voter's qualification to vote under Art. II, §2 of the Indiana Constitution, which requires only that the voter be at least 18 years of age, a United States citizen, and a resident in the State for at least thirty (30) days prior to the election. Under Indiana case law, the qualifications to vote established by the Indiana Constitution cannot be changed or added to by statute. *Fritch v. State*, 199 Ind. 89, 155 N.E. 257, 258 (1927) (citing *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890)).¹² Thus, the Photo ID requirements of SEA 483, which add a new qualification for voting eligibility, were an ultra vires act of the General Assembly because they are neither a residency requirement nor a condition of registration. Compare *Blue v. State ex rel. Brown*, 188 N.E. at 586 (registration requirements for voters are not unconstitutional because they are a reasonable regulation of voting and authorized by Art. 2, §14 of the Indiana Constitution). It should also be noted that possession of a photo ID cannot be a material requirement to determining eligibility to vote given that the General Assembly has excluded an entire class of voters from this requirement, specifically absentee voters and residents of State-licensed care facilities with polling places.

By imposing paper requirements that are immaterial to determining a voter's eligibility to

¹² In *Morris*, the Indiana Supreme Court held that certain statutory registration requirements were unconstitutional because they added qualifications to vote contrary to those in Art. 2, §2 of the Indiana Constitution and because they singled out a particular class of voters - - those who had been absent from the State for six months - - by requiring only those persons to register to vote.

vote under the Indiana Constitution, much less to conclusively establishing a voter's identity, the Photo ID Law is an example of the very type of disqualifying tactic this section was designed to eliminate. Therefore, the Court should find that the Photo ID Law also violates 42 U.S.C. §1971(a)(2)(B) because it conditions the right to have otherwise fully qualified voters' ballots counted on the immaterial requirement that they have an Indiana or federal government-issued photo ID containing an expiration date, regardless of whether their identity is undisputed or can be established by other means, such as matching signatures on the poll book, personal recognition by poll workers, or swearing under oath on penalty for perjury that they are who they purport to be.

C. Democrats' Constitutional Challenges

1. A brief look at the history of voting in the United States

Prior to the American Revolution, the franchise was thought to be the possession of the most privileged and wealthy in our society. *See* Ralph Ketcham, James Madison: A Biography, 274 (1971) (describing Madison's approval of limiting the franchise to freeholders). The right to vote was limited in virtually every jurisdiction to white, Protestant, male, property-holding individuals. *See* Chilton, Williamson, America Suffrage: From Property To Democracy, 1776-1860 19 (1960). The nation's first president, George Washington, was elected by a mere six percent (6%) of the American population. *See* The Statistical History of the United States 1071 (Ben J. Wattenberg ed., 1976).

By the first half of the nineteenth century most propertyless white males were enfranchised, despite the widespread view that "the propertyless lacked good and independent judgment" and that "voting was not a right but a privilege, one that this state could grant or

curtail in its own interest”. Alexander Keyssar, The Right To Vote: The Contested History Of Democracy In The United States, 9 (2000). By 1855 half of the states that had taxpaying requirements (which often substituted for property ownership requirements) had gotten rid of them. By the beginning of the Civil War such tax provisions were almost completely eliminated. *Id.* at 49-50. However, females were still prohibited from voting because they were thought to be dependent on adult men and because their “delicacy” rendered them unfit for the worldly experiences necessary for engagement in politics. *Id.* at 6.

After the Civil War, the United States Constitution was amended repeatedly for the purpose of removing voting restrictions based on race, sex, place of residence, wealth, and age. *See* U.S. Constitution, amend. XV (forbidding all voting restrictions based on “race, color, or previous condition of servitude,” ratified in 1870); amend. XIX (forbidding voting restrictions based on gender, ratified in 1920); amend. XXIII (granting District of Columbia residents the right to vote in presidential elections, ratified in 1961); amend. XXIV (eliminating poll taxes in federal elections, ratified in 1964); and amend. XXVI (forbidding restrictions based on age for those citizens eighteen years old or older, ratified in 1971). Other restrictions on voting have been eliminated through legislative and judicial means. *See, e.g.*, The Voting Rights Act of 1965, 42 U.S.C. §§1971, 1973-1973bb-1 (forbidding state voting schemes or practices having discriminatory impact); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating state law limiting the right to vote in school board elections to property owners and those with school-aged children); and *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding that state poll tax of \$1.50 violated the Equal Protection Clause). As Alexander Keyssar observes in The Right To Vote:

By 1975, the nation had witnessed a legal revolution [resulting in] not only the reenfranchisement of African Americans but the abolition of nearly all remaining limits on the right to vote. Poll taxes, literacy tests, understanding clauses, pauper exclusions, and good character provisions had been swept away The [Supreme] Court's discovery of the applicability of the equal protection clause to voting rights represented the Court's own embrace of the internal suffrage reform. If discriminating against blacks was wrong . . . so too was discriminating against the very poor, the propertyless and the mobile[.]

Id. at 281-83.

Since 1975 federal and state legislative enactments have taken further steps toward the goal of universal suffrage and encouraging participation by all segments of the electorate. *See, e.g.*, The National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg, *et seq.* (declaring that the right of citizens of the United States to vote is a “fundamental right” and declaring illegal discriminatory and unfair registration laws and procedures which harmed voter participation by various groups, including racial minorities); and I.C. §§ 3-7-37-1 and -2 (2005)(special registration procedures for homeless persons enacted in the Indiana General Assembly in 1995).

The right to vote is now respected as a “fundamental right” protected by both the First and Fourteenth Amendments. *See Kramer v. Union Free School Dist., supra; Reynolds v. Sims, supra; Krislov v. Rednour*, 226 F.3d at 859; *Turner v. Bd. of Elections*, 77 F.Supp.2d 25, 31 (D.D.C. 1999) (“voting is speech”); *Paul v. State of Ind. Election Bd.*, 743 F.Supp. 616, 623 (S.D. Ind. 1990) (“the right to vote for the candidate of one’s choice, far from being a penumbral right, lies at the heart of the First Amendment’s protection”). Protecting the basic right to vote is essential to the fair workings of the democratic process under our republican form of government. *See, e.g.*, John Hart Ely, Democracy and Distrust: A Theory Of Judicial Review 116-125 (1980) (the Fourteenth and many subsequent amendments have extended the franchise, thereby reflecting a strengthening constitutional commitment to the proposition that all qualified citizens should be

permitted to play a role in public decisionmaking); Cass R. Sunstein, The Partial Constitution, 142-144 (1993) (“Governmental interference with the right to vote . . . calls for active judicial protection of the background conditions for political deliberation, political equality, and citizenship”); Alexis de Tocqueville, Democracy In America 57 (Richard D. Heffner, Ed., 1956) (“[T]he further that electoral rights are extended, the greater is the need for extending them; for after each concession the strength of democracy increases, and its demands increase with its strength”).¹³

Indiana is now one of only two (2) states that make a photo ID an absolute precondition of in-person voting. The other is Georgia. *See* O.C.G.A. §21-2-417 (2005). Georgia’s law was preliminarily enjoined and declared unconstitutional on October 18, 2005. *Common Cause v. Billups*, 4:05-CV-0201-HLM (N.D. Ga. 2005). The 11th Circuit denied Georgia’s motion to stay the injunction pending appeal on October 27th.

A majority of states (28) do not require registered voters to present any form of identification. A minority of states (22) require voters to present some form of identification at the polls. *See* www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm. Of the seven (7) states listed on the National Council of State Legislatures’ website as requiring photo identification, only Indiana and Georgia do not provide an alternative means of verification of identity if the voter is unable or unwilling to produce a photo ID.

¹³ The President of the United States through his public statements has reinforced the concept that the right to vote, like other freedoms explicitly protected by the First Amendment, is fundamental. Standing before Congress on September 20, 2001, just after the September 11 terrorist attacks on the World Trade Center, in a speech marked by the solemnity of the moment, President George W Bush declared that the terrorists responsible for that despicable attack “hate our freedoms - - our freedom of religion, freedom of speech, our freedom to vote and assemble and disagree with each other,” accessible at www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

2. Because the Photo ID Law imposes a direct and severe burden on a core constitutional right, strict scrutiny is required.

The Supreme Court has carefully scrutinized state laws that imposed impediments on the right to vote in local, state and federal elections,¹⁴ especially those laws which impose unequal burdens or discriminate against citizens based on their economic status. As the most elemental expression of civic participation, and the most prominent self-correcting feature of our form of government, any governmental activity which impedes or burdens the right to vote can survive only if the challenged law or procedure both promotes a compelling state interest and is narrowly tailored to achieve that compelling interest. Proof of a discriminatory purpose is not required. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. at 670 (striking down a state poll tax because it discriminated against those of lower economic station, and holding “the right to vote is too precious, too fundamental to be so burdened or conditioned”). The Supreme Court has also struck down other qualifications that conditioned voting or other political participation on economic qualifications, whether in the form of property ownership or the payment of fees. *Hill v. Stone*, 421 U.S. 289 (1975) (taxable property requirement for voters in city elections); *Lubin v. Panish*, 415 U.S. 709 (1974) (candidate filing fee); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (property ownership requirement). There is also a narrower scope for operation of the presumption of constitutionality when on its face legislation falls within one of the first ten amendments, as applied to the states by the Fourteenth Amendment, *such as restrictions on the right to vote. United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

¹⁴Indiana’s interest in regulating federal elections is much weaker than its interest in regulating state and local elections. *Anderson v. Celebrezze*, 460 U.S. 780, 804 (1983). SEA 483's photo identification requirements apply to all elections.

Some rights, such as the right to vote, are indispensable to self-rule, and courts legitimately must protect those rights against incursions by legislative bodies. Deference to legislative choices is not warranted on core questions of whether the State's interests are truly compelling enough, in a constitutional sense, to justify a particular election law or whether such a law places an undue burden on First Amendment rights. *Landell v. Sorrell*, 382 F.3d 91, 113 (2nd Cir. 2004) *cert. granted* 73 U.S.L.W. 3686, 3170, 3199 (U.S., Sept. 27, 2005)(No.04-1528). If self-rule is really the lodestar of our republic, then unqualified judicial deference to legislatures with respect to laws affecting the right to vote is utterly senseless. Where legislative restrictions on the right to vote are under review, court intervention is necessary not in spite of democracy but in its very name.

A voter's right to vote and to have his or her vote counted, i.e., to cast an effective vote, enjoys an even higher measure of importance than indirect restrictions such as restrictive candidate ballot access laws. Thus, reasonable laws which limit candidates' right to ballot access are subject to less exacting scrutiny than laws, such as the Photo ID Law, which directly burden the core right to vote. *See, Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 543-44 (9th Cir. 2004) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (requiring use of a balancing test to evaluate state statutes restricting candidates' access to the ballot); and *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (holding that a state law prohibiting write-in candidates did not impose a "severe" burden on voter's right to vote for the candidates of their choice, thereby not automatically requiring strict scrutiny). *Burdick* and its progeny hold there is no absolute right to vote for a particular candidate. Candidacy is also not a fundamental right. *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995), *cert. denied* 516 U.S. 869 (1995); *Medina v. City of Osawatomie*, 992 F.Supp. 1269, 1275-76 (D. Kan. 1998). However, it is indisputable that voting

is a fundamental right. *Bush v. Gore*, 531 U.S. at 104-105; *Torres-Torres v. Commonwealth of Puerto Rico*, 353 F.3d 79, 83 (1st Cir. 2003) (“The right to vote generally compels much stricter scrutiny as a fundamental right than does the right to offer one’s self as a candidate for public office.”); *Paul v. Indiana Election Board*, 743 F.Supp. at 623 (“This court...places more importance on a voter’s right to vote for the candidate of his choice than on a candidate’s right to run for office”).

If a challenged election law directly or indirectly¹⁵ “burdens the right of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest”. *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (citations omitted); *Dunn v. Blumstein*, 405 U.S. at 343; *see also Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 207 (1996) (Thomas, J., concurring) (“When a State’s election law directly regulates core political speech, we have also subjected the challenged restrictions to strict scrutiny”); and *Republican Party of Ark. v. Faulkner Co.*, 49 F.3d 1289, 1297 (8th Cir. 1995) (observing that the Supreme Court in *Eu* suggested that a law which imposes *any* appreciable burden on voting demands strict scrutiny). Thus, the Supreme Court has applied the substantial/lesser burden sliding scale analysis to ballot access and other laws regulating “the mechanics of the electoral process”, which only indirectly burden the right to vote, as opposed to strict scrutiny where the challenged law directly burdens core political speech or the right to vote. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 345

¹⁵ “Constitutional rights would be of little value if they could be . . . indirectly denied.” *Harman v. Forssenius*, 380 U.S. 528, 540 (1965).

(1995); *Harper v. Virginia Bd. of Elections, supra*. The Seventh Circuit has described the judicial approach to reviewing state election laws challenged under the First and Fourteenth Amendments similarly:

[*Reynolds v. Sims* and *Kramer v. Union Free School Dist.*] stand for the proposition that in an election of general interest any restrictions on voting other than residence, age and citizenship must promote a compelling state interest to be considered constitutional . . . mere reasonableness will not suffice.

Mescall v. Burrus, 603 F.2d 1266, 1269 (7th Cir. 1979).

The Supreme Court has recognized that “as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany this democratic process.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). But where voters have already satisfied the state’s minimum voting requirements, *any* restrictions which go to the heart of the right to vote require proof of a compelling interest and narrow tailoring. *Dunn v. Blumstein*, 405 U.S. at 336 (“[B]efore that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny”); *Hill v. Stone*, 421 U.S. at 297 (any restriction other than residence, age and citizenship must promote compelling state interests); *Storer v. Brown*, 415 U.S. 724, 729 (1974) (“substantial burdens on the right to vote . . . are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest”); *see also Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729-730 (1st Cir. 1994) (an election law which is not structural but goes instead to the heart of the voting privilege and denies or burdens the rights of persons who have already satisfied the state’s standard voting requirements must be strictly

scrutinized). This is particularly so where the burden is imposed, as this one is, “the instant before the vote is cast”, which is “the most crucial stage in the election process”. *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964)).

Because States do not enjoy unlimited regulatory authority over the electoral process, federal courts have frequently been called upon to strike the appropriate balance between the constitutional right of voters and the legitimate state interests in insuring that elections are conducted fairly. In doing so, courts must examine the challenged law in a realistic light to determine its extent and the nature of the law’s impact on voters, taking into account the “precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson v. Celebrezze*, 460 U.S. at 786, 789. Courts must also examine the challenged law in light of the cumulative burdens imposed by a State’s overall scheme of electoral regulations upon the rights of voters. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *Green Party of N.Y. v. N.Y. Bd. of Elections*, 389 F.3d 411, 419 (2nd Cir. 2004).

Justice O’Connor recently explained why federal courts must carefully scrutinize state election laws in constitutional challenges brought under the First and Fourteenth Amendments:

[Federal courts play a] limited but important role . . . in reviewing electoral regulation. Although the State has a legitimate - - and indeed critical - - role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, *the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit*¹⁶ . . . As such restrictions become more

¹⁶ Justice O’Connor’s observation is particularly apt with respect to the case before this Court. Co-director King testified that two of the legislators involved in the legislative process leading to the enactment of SEA 483, State Reps. Luke Messer and Mike Murphy, also serve, respectively, as the Executive Director of the Indiana Republican Party and Chairperson of the Marion County Republican Central Committee. King Dep. 22-23. Every Democratic state representative and senator opposed and voted against SEA 483 on final passage. King Dep. at 109.

severe, however, and particularly where they have discriminatory effects, there is an increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions.

Clingman v. Beaver, 125 S. Ct. 2029, 2044-45 (2005) (O'Connor, J., with Breyer, J., concurring) (emphasis added). Election laws which go beyond merely regulating the mechanics of the electoral process and which burden core rights, such as the right to vote and to have that vote counted, must be carefully analyzed to insure that "the statute does [not] burden any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)." *Nixon v. Shrink Mo. Governmental PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). To do so, the State must show that the type of harm the statute is meant to address is a real and not merely a conjectural problem, *Buckley*, 525 U.S. at 210 (Thomas, J., concurring); *Krislov*, 226 F.3d at 865 (when "the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured") (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)), and that the legitimacy and strength of the State's interest make it not just desirable but "*necessary*" to burden constitutional rights. *Anderson*, 460 U.S. at 789.

To be sure, Indiana has important interests in insuring the integrity of public elections and may enact reasonable time, place and manner regulations designed to further those interests. However, those interests do not necessarily justify every burden on the right to vote solely because it is packaged as a fraud-detection device. The "power to regulate the time, place and manner of elections does not justify, without more, the abridgement of rights, such as the right to

vote [.]” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). The State’s interest in combatting fraud does not justify choosing means that “unnecessarily burden or restrict constitutionally protected activity”, and it must draw statutes impacting upon the right to vote with “precision”. *Dunn v. Blumstein*, 405 U.S. at 343. Though everyone clearly desires to have elections conducted fairly, that would not justify performing DNA samples on voters or requiring them to be fingerprinted to validate their identity or subjecting them to other forms of severe burdens far out of proportion to the goal of holding fraud-free elections, particularly when the State has other, far less restrictive and burdensome ways of meeting this objective.¹⁷ If voter fraud protection were indeed a justification for denying the right to vote, it would require a finely-tuned, narrowly-tailored structure designed to minimize the harm to and burden on the right to vote. The Photo ID requirements of Indiana’s Law are anything but narrowly tailored, as they rule out all of the time-honored means of confirming a voter’s identity, such as the affidavit and signature comparisons, as well as all other forms of identification such as utility bills, social security cards, credit cards, employment IDs, etc. *See Harman v. Forsenius*, 380 US 528, 543 (1965) (noting the availability of other devices such as registration, criminal sanctions, purging of registration lists, challengers and affidavits, and public scrutiny of elections by candidates and other interested parties - - demonstrated the lack of necessity for the Virginia \$1.50 poll tax). Indiana’s law now renders all other manners of confirming identity irrelevant.

¹⁷ The fact that the Photo ID Law is a totally novel and unprecedented election law is itself a sufficient ground for applying strict scrutiny. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (the fact that a law is “unprecedented in [the Supreme Court’s] jurisprudence” or is a “discrimination [of] an unusual character” may itself trigger the need for strict judicial scrutiny when fundamental rights are at issue) (citing *Louisville Gas & Elect. Co. v. Coleman*, 277 U.S. 32, 37-38 (1922)). Penalizing otherwise registered and qualified voters by not counting their ballot because of their failure to possess at the polls or later display a limited form of photo identification is a restriction of the most severe kind.

Instead of placing the burden on a challenger to disprove a voter's identity, as has been the law in Indiana for decades, the Photo ID requirements of SEA 483 now impose a presumption that the voter is *not* the person he or she claims to be.

In order to require the application of strict scrutiny, Democrats need not demonstrate that even a single voter will lose his or her right to have their vote counted, though it is inarguable this will be the effect on many registered voters.¹⁸ They only need show that their members' exercise of their right to vote will be substantially burdened, *Storer v. Brown*, 415 U.S. at 729 (“substantial burdens on the right to vote . . . are constitutionally suspect and invalid . . . unless essential to serve a compelling state interest”); *Greidinger v. Davis*, 988 F.2d 1344, 1350 (4th Cir. 1993) (striking down under the First and Fourteenth Amendments a Virginia law permitting public inspection of registered voters' Social Security numbers on request of political parties as an impermissible burden on the right to vote), or that exercise of the franchise will be chilled by conditioning the exercise of the right of every qualified and registered voter to vote and to have that vote counted on the voter's ability to produce a severely limited form of identification for the purpose of “proving” his or her identity. Once the right to vote is established, *any* restriction on the franchise on grounds other than age, citizenship and residence must be strictly scrutinized.

Mescall v. Burrus, supra; Hayward v. Clay, 573 F.3d 187, 190 (4th Cir. 1978), *cert. denied* 439

¹⁸ The State has questioned the standing of Democrats to bring this action, suggesting that is unknowable how many voters will be deterred by the Photo ID Law from voting. However, it is by now well settled that the “injury in fact” in an equal protection case is the denial of equal treatment resulting from the imposition of a barrier, not necessarily the ultimate inability to obtain that benefit. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *FEC v. Akins*, 524 U.S. 11, 24 (1998) (a sufficient interest for purposes of conferring standing under Article III exists “where large numbers of voters suffer interference with voting rights conferred by law” (citing *Shaw v. Hunt*, 517 U.S. 899, 905 (1996))); *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (political party has standing to assert the rights of its members whose rights to vote will inevitably be interfered with by application of State law or policy).

U.S. 959 (1978) (citing *Hill v. Stone*, 421 U.S. at 297); *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994).

Voters' right to vote and to have their vote counted will also be burdened by requiring voters who do not possess the required form of photo identification to make multiple trips to state agencies' offices, either to obtain the required form of photo identification prior to Election Day or to attempt to obtain it after the election. Further burdens on this fundamental right take the form of requiring them to pay fees to retrieve primary documents, such as birth certificates, needed to gain possession of the requisite form of photo identification. Voters without the form of photo identification required by the Photo ID Law will be required to travel, sometimes long distances, to the increasingly diminishing number of Bureau of Motor Vehicle branches to obtain such identification. Many of those voters will lack the license necessary to drive themselves to these agency offices and will have to rely on the generosity of others or public transportation. A voter voting provisionally on Election Day who does not have an original copy of his birth certificate, one of the primary documents necessary to obtain a photo identification card, will also be required to obtain a certified copy of his birth certificate and then make yet another trip to the courthouse to present that identification to the county clerk or election board in order to have his or her provisional vote counted, long after vote totals have been announced and winners and losers declared.¹⁹

¹⁹ Even as to rights of lesser magnitude than the right to vote, such as the right to a first-trimester abortion, which unlike the right to vote a State has a countervailing right to minimize through regulation, *Casey v. Planned Parenthood*, 505 U.S. 833, 886 (1992), courts have recognized that a two-visit requirement can create a substantial obstacle. *A Woman's Choice East Side Women's Clinic v. Newman*, 305 F.3d 684, 691 (7th Cir. 2002), *cert. denied* 537 U.S. 1192 (2003) ("This is not to say that a two-visit requirement could not create a burden comparable to a spousal-notice requirement.") (Easterbrook, J.).

3. The Photo ID Law imposes unequal burdens on voters and thus violates the Equal Protection Clause.

The Photo ID Law contains four (4) categories of exceptions from its otherwise mandatory requirements. The first exception applies to voters who cast an absentee ballot by mail. The second exception applies to voter who live in state-certified residential facilities that also house a polling place. I.C. §3-11-8-25.1(f) (2005). The third exception applies to voters who are willing to swear out an affidavit on the penalty of perjury that they have a religious objection to being photographed. I.C. §3-11.7-5-2.5(c)(2)(B) (2005). The fourth exception applies to voters who are willing to swear out an affidavit on the penalty of perjury that they are “indigent” and cannot obtain the required form of photo identification without the payment of a fee. I.C. §3-11.7-5-2.5(c)(2)(A) (2005). Three (3) of these exceptions violate the Equal Protection Clause by discriminating against voters who do not or cannot cast an absentee ballot by mail, who live in a state-certified residential care facility which does not contain a polling place, and those to whom the Law gives no standards for determining whether they are “indigent” and who will thus be unwilling to risk criminal prosecution for perjury in order to have their vote counted.

Not only are the burdens imposed on voters by the Photo ID Law “severe”, they are not applied to all voters equally. To avoid strict scrutiny, the restrictions imposed by an election law must be both reasonable and non-discriminatory. *Timmons v. Twin Cities Area New Party*, 520 U.S. at 358-59 (quoting *Burdick v. Takushi*, 504 U.S. at 434). The government may not enact barriers making it more difficult for members of one group to obtain a benefit (or exercise a fundamental right) than for members of other groups. *Northeast Fla. Chapter of AGC v. City of Jacksonville*, 508 U.S. at 666. Where a challenged state election law imposes a discriminatory

burden on the exercise of fundamental rights, strict scrutiny is necessary to make certain that the disparate treatment has a plausible justification and that the state's asserted interests are both "sufficiently weighty" and "important", and that they are served by the unequal burdens imposed. *Reform Party of Allegheny Co. v. Allegheny Co. Dept. of Elections*, 174 F.3d 305, 315-18 (3rd Cir. 1999) (*en banc*) (applying intermediate scrutiny); *see also Rockefeller v. Powers*, 74 F.3d 1367, 1377 n.16 (2nd Cir. 1995), *cert. denied* 517 U.S. 1203 (1996) (suggesting that if ballot access rules impose different appreciable burdens on the fundamental right to vote, those different burdens must be strictly scrutinized); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1223 (4th Cir. 1995), *cert. denied* 517 U.S. 1104 (1996) (where laws place unequal burdens on the right to vote, First Amendment claims substantially overlap Fourteenth Amendment claims, as does the analysis of each).

The State will presumably seek to justify the absentee ballot exception on the basis that a voter who casts an absentee ballot by mail cannot have his identity validated by a poll worker in the same way as when the voter appears personally at the polls. But this argument assumes that matching a face to a photograph (which may have been taken years earlier when the voter had a different appearance) is an exact science that will be performed with the utmost care by partisan and overworked poll workers during a busy election day without causing long lines at the polls. It also assumes that requiring an absentee voter to submit a copy of a form of his or her photo identification card or driver's license with his absentee ballot would not serve a similar function in discouraging imposters from voting. In this regard, it should be noted that under Section 303(b)(2)(A)(ii) of HAVA, a first-time voter who has registered by mail and casts an absentee ballot by mail is required to mail in a copy of a photo ID or other form of identification, such as a

utility bill, bank statement, paycheck or other document permitted by HAVA, 42 U.S.C.

§15483(b)(2)(A)(ii)(II). If the avowed purpose of the Photo ID Law is to ensure the integrity of elections, why is the one form of balloting with the only documented instances of fraud totally exempted from the law's identification requirements?

The justification for exempting voters residing in state-certified residential care facilities with polling places but not those who live in such facilities without a polling place is even more mystifying. Democrats can conceive of no rational purpose for this disparate treatment, much less any compelling state interest. This exception violates the Equal Protection Clause and further demonstrates the unfairness and irrationality of the Photo ID Law. *ACLU of Minn. v. Kiffmeyer*, WL 2428690 (D. Minn. 2004) (holding that plaintiffs were likely to succeed on their claim that state statute allowing photographic tribal cards of persons living on their tribal reservations to be used to register to vote Election Day, but could not be used by those American Indians living off their tribal reservations, violated Equal Protection Clause).

The justification for the indigency exception appears to have been borne purely of expediency – by including such an exception, the State sought to avoid a claim that the Law discriminates against voters based on their economic status and that it is thus akin to a poll tax as struck down in *Harper*. However, a similar indigency provision did not prevent the Virginia poll tax from being declared unconstitutional in *Harman v. Forssenius, supra*. The Photo ID Law contains no definition of what it means to be “indigent”, nor any review procedure for determining a voter's “indigent” status. Because “indigency” is nowhere defined in the Law, voters who have been unable to obtain the required form of photo identification cannot be certain whether they will be committing perjury if they sign an affidavit stating that their indigency prevented them from

obtaining a photo ID. Thus, a voter unable to obtain the required form of identification must choose between foregoing this fundamental right or risking prosecution for perjury in the event an election official determines that the voter's alleged indigency somehow did not prevent that voter from obtaining the required identification.

The fact that indigency affidavits will not be available at the polls but can only be obtained by a voter who is willing and able to make a special trip to the election board office within thirteen (13) days after the election is yet a further example of the Law's utter irrationality and of the severe burdens it imposes on those who are least able to withstand them, i.e., voters of limited economic means.

4. The Constitutional Implications of the Law's Ambiguities and the Degree of Discretion Conferred by It on Partisan Election Officials.

Because voting is protected by the First Amendment and the Law contains no definition of the term "indigent", the Court may determine in a facial challenge that such vagueness will encourage arbitrary and erratic enforcement by public officials and is therefore constitutionally infirm. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (to avoid discriminatory enforcement, "laws must provide explicit standards for those who apply them"); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (void-for-vagueness rule applies to laws regulating conduct protected by the First Amendment); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (vague laws encourage arbitrary and selective enforcement); *Louisiana v. United States*, 380 U.S. 145 (1965) (striking down Louisiana law that delegated to local election officials the power to determine whether an applicant was sufficiently literate to vote).

There are significant constitutional implications arising from other of the Photo ID Law's

ambiguities, as came to light in the deposition testimony of Defendants King and Robertson. To give just one example, the Law gives virtually unbridled discretion to partisan precinct workers and challengers to make subjective determinations such as (a) whether a form of photo identification produced by a voter conforms to what is required by the Law, and (b) whether the voter presenting himself or herself at the polls is in fact the voter depicted in the photo.

Robertson Dep. 29-34, 45; King Dep. 86, 89. This is significant because any voter who is challenged under this Law will be required to vote by provisional ballot and to make a special trip to the election board's office in order to have his vote counted. Robertson Dep. 37; King Dep. 58. Because the Indiana Election Division has no legal authority to enforce a uniform standard of interpreting ambiguous provisions of Indiana election law, there may be 92 different interpretations of the Photo ID Law in Indiana's 92 counties. Sadler Dep. 57.

Facial challenges are permitted to an allegedly overbroad law where (1) the law gives a governmental official or agency "substantial power to discriminate based on the content or viewpoint of speech . . . or . . . speakers," and (2) the law has a "close enough nexus to expression . . . to pose a real and substantial threat of the identified censorship risks," such as laws regulating leafletting, assembly or voting. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1044 (7th Cir. 2002). As noted, the act of voting is a fundamental right and expressive activity protected by the First Amendment. The Supreme Court has long expressed concern about laws which arm public officials with discretion to deny expressive activity, lest that discretion be used to suppress unpopular speech. *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 757 (1988); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981). While some degree of discretion is an unavoidable feature of law enforcement activities, *Ward v. Rock*

Against Racism, 491 U.S. 781, 794 (1989), the Photo ID Law confers substantial discretion, not on law enforcement officials, but on partisan precinct poll workers and challengers appointed by partisan political officials, to determine both whether a voter has presented a form of identification which “conforms” to that required by the Law and whether the person presenting the identification is the person depicted on it. Conferring this degree of discretion upon partisan precinct officials and members of election boards to enforce the facially neutral requirements of the Law “has the potential for becoming a means of suppressing a particular point of view,” *Heffron*, 452 U.S. at 649; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

A law which gives to election officials appointed by partisan political officials a kind of standardless discretion to determine what constitutes compliance has the real potential for becoming a means of suppressing a particular point of view, especially in the context of bitterly-contested partisan elections, where not only in presidential but also in ferocious dogfights at the state and local level, “the sanctity of the ballot box has been violated by intimidation, kidnapping, bloodshed, bribery, embezzlement, intoxication, under-the-table bargaining, stuffed voter polls, creative vote-counting, and, above all, grotesque bureaucratic incompetence and corruption.”

Andrew Gumbel, Steal This Vote: Dirty Elections and the Rotten History of Democracy in America (Nation Books, 2005).²⁰

²⁰As one noted election law expert has observed, whatever the faults of the Supreme Court’s decision in *Bush v. Gore*, the Court was correct to recognize that vesting broad discretion in election officials may lead to inequalities. Indeed, *Bush v. Gore* exhibits a profound distrust of election officials making decisions in the absence of clear rules prescribed in advance. 531 U.S. at 106 (holding that the problem with Florida’s recount process was the absence of “specific rules designed to ensure uniform treatment” for all voters). In this regard, the real progenitors of *Bush v. Gore* are First Amendment cases such as *City of Lakewood* and *Shuttlesworth*. See Daniel P. Tokaji, “*First Amendment Equal Protection: On Discretion, Inequality and Participation*”, 101 MICH. L. REV. 2409, 2409-13, 2522-23 (2003) (comparing

The Photo ID Law, which gives a single precinct official the unfettered right to determine whether a particular form of identification conforms to the law's requirements or whether the voter is the person depicted in that document (thereby in either case requiring the voter to cast a provisional ballot), which may never be counted without a burdensome second trip to the election board's offices, has the real potential for being used as a "backdoor means of imposing impermissible content discrimination." *National Coal. of Prayer, Inc. v. Carter*, 2005 WL 22536001, *13 (S.D. Ind. 2005). This Law is imbued with the kind of standardless discretion which the Supreme Court has condemned in cases such as *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). It may be facially challenged, and it must be subjected to the highest level of scrutiny.

5. The Cumulative Burdens Imposed by other Indiana Election Laws Further Compel the Application of Strict Scrutiny to the Photo ID Law.

In evaluating the burdens imposed by a challenged election law under the First and Fourteenth Amendments, courts must examine the cumulative burdens imposed by the overall scheme of electoral regulations upon the rights of voters and political parties to associate by voting in primary and general elections. *Williams v. Rhodes*, 393 U.S. at 34 (finding that the "totality of the Ohio restrictive laws taken as a whole impose a burden on voting and associational rights"). As Justice O'Connor recently observed, "A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation." *Clingman v. Beaver*, 125 S. Ct. at 2047.

Bush v. Gore to First Amendment cases in which the Supreme Court has looked unfavorably on schemes that delegate overly broad discretion to official decisionmakers, and emphasizing the danger of "governmental decisionmakers. . . suppressing disfavored viewpoints and disfavored speakers behind a veil of discretion").

Indiana has a number of such restrictive election laws which, when combined with the substantial new burdens and restrictions imposed by the Photo ID Law, can be expected as a practical matter to have an onerous effect on the ability of otherwise registered and qualified voters to participate fully in elections by voting and having their vote counted. *Krislov v. Rednour*, 226 F.3d at 859-60 (assessing the character and extent of burdens imposed by state laws requires consideration of practical realities).

a. Polling hours/statutes giving employees time off to vote

Indiana's polls open at 6:00 a.m. and are required to close at 6:00 p.m. I.C. §3-11-8-8 (2005). According to the United States Election Assistance Commission, only two other states, Hawaii and Kentucky, mandate the closing of polls at 6:00 p.m. All other states require that the polls remain open until various times between 7:00 p.m. and 9:00 p.m. *See* Exhibit 11, State Polling Hours, Election Holding Status and School Closings, accessible at www.eac.gov/docs/poll/%20hours%20survey.pdf. Closing polls at 6:00 p.m. imposes a significant hardship on the voters who work until 5:00 p.m. or beyond, particularly since Indiana, unlike 30 other states, has no statute allowing voters to take time off work to vote. *See* Exhibit 12, available at www.whad.com/labor_library/Voting_Time_Off_Laws.htm.

b. Registration Deadlines

According to the United States Election Assistance Commission, Indiana's voter registration deadline, 29 days before an election, I.C. §3-7-13-11 (2005), is among the earliest in the nation. Only 20 other states and the District of Columbia have an earlier or the same registration deadline. *See* Exhibit 13, State Voter Registration Deadlines, available at

www.eac.gov/register_vote_deadlines.asp.

c. Partisan Challengers in the Polling Place

Only twenty (20) states, including Indiana, statutorily authorize the use of partisan challengers at the polls. Prior to 2005 challengers were required to remain outside the polling place at the end of the chute. King Dep. 47. However, as a result of an enactment by the General Assembly in 2005, SEA 341, challengers will now for the first time be permitted inside the polling area. King Dep. at 46. *Compare* I.C. §3-11-8-15(a)(5) (2005) with I.C. §3-11-8-15(a)(5) (2003). This will increase both the opportunity and the likely number of challenges to voters questioning their right to vote, thereby increasing the number of provisional ballots cast and slowing down the voting process.

d. Absentee balloting restrictions

Again as a result of a 2005 enactment by the General Assembly, SEA 15, Indiana voters desiring to vote absentee are now required for the first time to swear under oath that he or she “has a specific reasonable expectation of being absent from the county on election day *during the entire twelve (12) hours that the polls are open.*” I.C. §3-11-10-24(a)(1) (2005) (emphasis added). Robertson Dep. 16-17. Twenty-four (24) states have no restrictions on absentee voting and require no reason be given for voting by absentee ballot. See Exhibit 14, available at www.electionline.org/Default.aspx?tabid=474. The tightening by the General Assembly in 2005 of circumstances under which a voter may vote by mailing in an absentee ballot and thus avoiding the new photo identification requirements is yet another example of how the cumulative effect of other Indiana laws, coupled with the new requirements of the Photo ID Law, will substantially burden those voters who do not presently possess the type of photo identification that will

henceforth be required for in-person voting.

e. Burdens resulting from the closing of BMV offices.

The BMV has closed 22 branches, including the only branch in the City of Gary, and has scheduled hearings to close several others. “Protestors left happy, but mood didn’t last”, The Indianapolis Star, September 13, 2005. Clearly, the greater the distance a registered voter without a photo ID must travel to obtain one, the greater will be the burden and expense in terms of time and money to that voter.

f. The fact that Indiana’s election system is administered by partisan officials.

Indiana’s elections are administered by partisan election officials with minimal oversight. Defendant Rokita, the State’s chief election official, was a vocal proponent of the Photo ID Law and is expected to be a candidate for re-election in 2006. Members of county election boards are partisan political appointees, as are members of precinct election boards. This increases the prospects for inconsistent and unequal enforcement of the Photo ID Law, as well as partisan abuse. *Louisiana v. United States, supra; Kay v. Mills*, 490 F.Supp. 844, 852-853 (E.D. Ky. 1980) (noting that the partisan nature of election boards may affect the neutrality of their decisions).

g. Indiana’s abysmal record of not counting provisional ballots.

According to Clerk Sadler, only about 15% of all provisional ballots cast state-wide were counted in the 2004 general election. Sadler Dep. 44.²¹ In Marion County, there were 1,732

²¹ According to a national survey conducted by a nonpartisan organization, Electionline.org, “Solutions or Problems? Provisional Ballots in 2004”, Indiana counted only 598 of 4,029 provisional ballots cast, accessible at: www.electionline.org/Portals/1/Publications/ERIP10Apr05.pdf.

provisional ballots cast, but 1,407 of those (over 81%) were not counted. Marion County Election Board's Response to Interrogatories Propounded by Crawford Plaintiffs, Exhibit 15. Indiana compared poorly with national statistics. In 2004, more than 1.6 million provisional ballots were cast, and nearly 1.1 million (68%) were counted. See "Balancing Access and Integrity," The Century Foundation (2004), at 31, available at www.tcf.org/Publications/ElectionReform/baicomplete.pdf.

6. The Photo ID Law Severely Burdens Democrats' Fundamental Rights as Partisan Political Organizations to Choose With Whom They Wish to Associate

In addition to burdening the fundamental rights of those voters who choose to associate with Democrats through the act of voting for its candidates in the general election, the Photo ID Law also interferes with and severely burdens the fundamental rights of association which belong to Democrats as partisan political organizations. Specifically, the Photo ID Law prohibits Democrats from inviting voters who are registered to vote and meet the constitutional criteria to vote from having their votes counted unless they are both willing and able to display at the polls, or later by making a special trip to the election board or county clerk, a state or federal-issued identification card containing both a photograph and an expiration date. Democrats have no desire to exclude from voting in Democratic Party primary elections those voters who regularly associate with them, or independent voters who may wish to do so in the future, who are unable or unwilling to comply with these stringent, and in their view unconstitutionally burdensome, requirements when they cast an in-person, on-site vote.

The constitutionally-protected right to vote includes the right to vote in a primary election, so long as the State has made the primary election an "integral part of the procedure of choice".

United States v. Classic, 313 U.S. 299, 318 (1941); *see also Terry v. Adams*, 345 U.S. 461 (1953). The Indiana Supreme Court long ago declared primary elections to be an integral part of Indiana's election system. *State ex rel. Gramelspacher v. Martin Cir. Ct.*, 231 Ind. 114, 107 N.E.2d 666, 668 (1952). The essential function of a political party organization is to select candidates for public office to be offered to the voters at the general election. *Clingman v. Beaver*, 125 S.Ct. at 2042 (O'Connor, J., concurring) (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). The Supreme Court has repeatedly reaffirmed that the First and Fourteenth Amendments protect both the rights of voters and political parties to associate through primary elections. *California Democratic Party v. Jones*, 530 U.S. at 575; *Eu v. San Francisco Democratic Party*, 489 U.S. at 222; *Tashjian v. Republican Party of Connecticut*, 479 U.S. at 214-15; *Brazil-Breashears v. Bilandic*, 53 F.3d at 792 (the associational rights of political parties are "fundamental"); *Osburn v. Cox*, 369 F.3d 1283, 1287-88 (11th Cir. 2004), *cert. denied* 125 S. Ct. 352 (2004) (states may not limit which voters a political party may invite to participate in its primary election).

In *Tashjian*, the Supreme Court held that States could not prohibit the Republican Party from seeking to broaden its base by inviting independents to vote in the Republican Party's primary and thereby associate with that political party. 479 U.S. at 217. That right was deemed to be protected by the First Amendment against State interference. While the Constitution grants States broad power to proscribe the time, places and manner of holding elections, *Timmons v. Twin Cities Area New Party*, 520 U.S. at 358, this regulatory power is limited to the mechanics of the voting process and does not give the States *carte blanche* to impose regulations which directly burden the core political speech of otherwise qualified voters and which are not narrowly

tailored to serve a compelling state interest. “The power to regulate the time, places and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote.” *Tashjian v. Republican Party of Conn.*, 479 U.S. at 217. Thus, a State may not through statutory law, regulation or initiative, compel a political party to allow persons who do not share their ideology to vote in their primary election and thus participate in the selection of that political parties’ nominees as candidates in the general election. *California Democratic Party v. Jones, supra; Democratic Party of Wash. v. Reed*, 343 F.3d 1198 (9th Cir. 2003) *cert. denied* 540 U.S. 1213 (2004) (striking down on a facial constitutional challenge the State of Washington’s open primary). These rulings establish strict constitutional limits on the ability of the States to regulate political party’s internal processes, and they reaffirm the fundamental rights of political parties to determine which otherwise registered and qualified voters should or should not be allowed to vote in their primary elections.

The Photo ID Law transgresses these constitutional limits by severely and directly burdening the rights of otherwise qualified voters to participate fully in the Democratic Party’s primary election. It instructs Democratic Party precinct officials that they must require all Democratic Party voters, even those with whom they may be personally acquainted, or whose signature clearly matches that on the poll book, or who are willing to sign an affidavit swearing on penalties of perjury that they are who they claim to be, to produce either at the polls or within thirteen (13) days thereafter one of the forms of photo identification required under the Photo ID Law. If they fail to enforce this law, these precinct workers may be prosecuted for a felony. King Dep. 58; I.C. §3-14-2-14 (2005). These burdens interfere with Democrats’ right to decide which qualified voters they wish to associate with and are both severe and direct, and they must

therefore measure up to the exacting scrutiny of this Court.

7. The State Cannot Meet Its Burden of Demonstrating that the Photo ID Law is Narrowly Tailored to Serve a Compelling State Interest.

As a burden on core political speech, i.e., the right to vote and to have one's vote counted, the Court must apply "exacting scrutiny"²² and uphold the Photo ID Law only if it is "narrowly tailored to serve an overriding State interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 347 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). To be narrowly tailored means that the law should be "no more burdensome than essential" or "no more restrictive than is necessary". *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004). If there are "other, reasonable ways to achieve [the State's] goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means'". *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004) (*en banc*) (quoting *Dunn v. Blumstein*, 405 U.S. at 343)).

Because elections must be regulated to remain free from both fraud as well as coercion,²³ some latitude is allowed for regulations designed to serve those purposes. *Krislov v. Rednour*, 226 F.3d at 859. However, a law such as this one, that imposes a severe and direct burden upon

²² Strict scrutiny is an exacting inquiry, because "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). It is also necessary to rule out the possibility that a particular election law and the State's asserted interests "are not merely a pretext for exclusionary or anti-competitive restrictions". *Clingman v. Beaver*, 125 S.Ct. at 2045 (O'Connor, J., with Breyer, J., concurring).

²³ "There is a strong public interest in allowing every registered voter to vote freely". *Summit Co. Democratic Cent. and Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). *See also* *Burson v. Freeman*, *supra* (finding that allowing vote solicitation near the polls would cause voter intimidation); and *Bay Co. Democratic Party v. Land*, 347 F.Supp 2d at 411 (observing that regulations that guard against fraud are often in tension with the goal of maximizing participation by eligible voters, since such regulations may "raise barriers so high that some eligible voters may not be able to pass").

core political speech -- the act of voting by a registered and otherwise qualified voter -- must be narrowly tailored, *Dunn v. Blumstein, supra; Hodgkins v. Peterson*, 355 F.3d at 1063-64. The mere potential for fraud cannot be used to justify laws which infringe upon activity enjoying First Amendment protections. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 334 (1995) (preventing fraud held not to justify law on anonymous leafletting); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (preventing fraud held insufficient to justify limiting door-to-door solicitations); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1556 (7th Cir. 1986) (potential for fraud held insufficient to justify regulations on hours for door-to-door solicitations).

Democrats do not suggest that the State does not have a valid interest in minimizing the potential for election fraud. However, because this particular Law imposes a severe burden on the rights of otherwise qualified and registered voters to cast their ballots and to have them counted, the State must do more than simply posit the existence of the disease to be cured. It must show those harms are real and not merely conjectural. *Krislov v. Rednour*, 226 F.3d at 865. Moreover, even if the Photo ID Law were not found by this Court to place a substantial burden on First Amendment rights, it would still be subject to exacting scrutiny because it places more than a minimal burden on core political speech. *Id.* at 862, n.6. (citing *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) and *McIntyre*, 514 U.S. at 348). For example, the State arguably might be justified in imposing uniform, narrowly-tailored and not overly-burdensome voter identification requirements if the State were able to show that there is an intolerably high incidence of fraud among voters misidentifying themselves at the polls for the purpose of casting a fraudulent ballot. But here, the State has utterly failed to show that this genre of fraud is rampant or even that it has

ever occurred in the context of on-site, in-person voting (as opposed to absentee voting by mail) so as to justify these extra burdens, which will fall disproportionately on the poor and elderly. Thus, the Photo ID Law is at once too broad and too narrow. It is too narrow because it does not include the category of voters where fraud has been proven, i.e., absentee balloting by mail. It is overbroad because it severely burdens the right to vote of the vast majority of otherwise qualified and properly registered voters who cast their ballots in person who, if their identity were to be challenged, would be willing to swear under oath they are who they claim to be, all in order to prevent a hypothetical minuscule fraction of people from fraudulently casting ballots by misrepresenting their identities to poll workers. It is also overbroad because it rules out all other means of confirming a voter's identity.²⁴

In evaluating the breadth of the law and whether the State has used the least restrictive means for preventing fraud, the Court must take into account the other mechanisms the State currently employs to serve the statute's purported purposes, as well as other, less restrictive means it could reasonably employ. *Krislov*, 226 F.3d at 863. The State of Indiana has made it a felony for a voter to misrepresent his or her identity for purposes of casting a fraudulent ballot.

²⁴ To the extent the State may attempt to justify the burdens the Photo ID Law would impose on Indiana voters by alluding to evidence of voter fraud from other states, any such evidence would be inapposite. *A Woman's Choice East Side Women's Clinic v. Newman*, 305 F.3d at 692-98 (concluding that empirical studies of the effects of abortion informed-consent laws in Mississippi and Utah did not predict the effects of a similar law in Indiana). To the extent the State may nonetheless seek to rely on such exogenous examples of voter fraud, however, it is also significant that in one of the most substantial investigations into voter fraud in recent history, the State of Washington uncovered only six cases of alleged double voting and 19 cases of alleged voting in the name of a deceased person (several by the recently deceased's family members) out of a total of 2.8 million ballots cast, a rate of ineligible voting that would arguably be addressed by identification requirements of 0.0009%. Court's Oral Decision at 18, attached to Final Judgment Dismissing Election Contest, *Borders v. King Co.*, No. 05-2-00027-3 (Chelan Co. Superior Court, Wash., June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/694.pdf>.

I.C. §3-14-2-16 (2005). In *Meyer v. Grant*, 486 U.S. at 426-27, the Court found that the existence of such severe criminal penalties was more than adequate to fulfill the State's interest in insuring the integrity of the solicitation of signatures on a nominating petition. And in *Dunn v. Blumstein*, 405 U.S. at 353, the Court noted the existence of six sections of the Tennessee Code in holding that Tennessee's one-year residency requirements for voting was an unconstitutional infringement on the right to vote because those criminal laws "were more than adequate to detect and deter whatever fraud may be feared," citing *Harman v. Forsenius*, 380 U.S. at 543.

A voter whose identity or other qualifications to vote is challenged at the polling site is required to fill out and sign, under the penalties of perjury, a detailed affidavit revealing a vast amount of personal information about the voter. While there is no denying that the State's interest in eliminating fraud is important, so is the voter's right to vote free of coercion or intimidation. *Burson v. Freeman*, 504 US 191 (1992); *Summit Co. Democratic Cent. and Exec. Comm. v. Blackwell*, 388 F.3d, 547, 551 (6th Cir. 2004) ("There is a strong public interest in allowing every registered voter to vote freely.") (Rogers, J.) & 552 ("When the fundamental right to vote without intimidation or undue burden is pitted against the rights of those seeking to prevent voter fraud, we must err on the side of those exercising the franchise", and observing that the existence of election protocols, such as election officials, are already in place to inhibit fraud in on-site, in-person voting) (Cole, Jr., J., dissenting). And where the State has already provided a mechanism for matching signatures, has made it a crime to misrepresent one's identity for purposes of voting, and requires the swearing out of an affidavit if the voter's identity is challenged, it already has provisions more than adequate to prevent or minimize fraud in the context of in-person voting, particularly in the absence of any evidence that the problem the Law

seeks to address is anything more than the product of hypothesis, speculation and fantasy.

It would thus be reasonable for the Court to conclude that the benefits of any incremental increase in the State's ability to detect, prosecute and deter voter fraud will be more than negated by the substantially larger number of registered and otherwise qualified voters who will not have their votes counted, or will be discouraged from voting altogether, because of the burdens involved in obtaining and presenting the narrow category of identification now required by the Photo ID Law. *Harman v. Forsenius*, 380 U.S. at 542-43 (“[C]onstitutional deprivations may not be justified by some remote administrative benefit to the State . . .”); *see also Doe v. Rowe*, 156 F.Supp.2d 35, 51-52 (D. Me. 2001)(strict scrutiny applies to restrictions on voting and requires a “truly necessary correlation between the ends and the means”). Further, the State's interest in deterring fraud could have been accomplished by other, far less restrictive and burdensome means, such as by allowing voters without the required form of photo identification to sign an affidavit at the polls swearing to their identity, or producing an identifying document from a far more comprehensive list of acceptable forms of identification. The Photo ID Law, which will burden tens of thousands of voters, cannot be said to be “narrowly drawn” when less restrictive alternatives can accomplish the same goal of preventing a tiny fraction of the electorate from committing a rare and possibly non-existent form of voting fraud.

III. CONCLUSION

There being no genuine issue of material fact, the Democratic Party plaintiffs respectfully request that the Court grant their motion for summary judgment; declare the photo identification requirements of SEA 483 in violation of the foregoing statutory and constitutional provisions, and therefore, void and unenforceable; and grant them any further relief to which the Court may deem

them entitled, including their reasonable attorneys' fees pursuant to 42 U.S.C. §1988.

Respectfully submitted,

s/ William R. Groth

William R. Groth

s/ Geoffrey S. Lohman

Geoffrey S. Lohman

FILLENWARTH DENNERLINE GROTH & TOWE

1213 North Arlington Avenue, Suite 204

Indianapolis, IN 46219

Telephone: (317) 353-9363

Telecopier: (317) 351-7232

E-mail: wgroth@fdgtlaborlaw.com

E-mail: glohman@fdgtlaborlaw.com

s/ Barry A Macey

Barry A. Macey

MACEY SWANSON & ALLMAN

445 N. Pennsylvania Street, Suite 401

Indianapolis, IN 46204

Telephone: (317) 637-2345

Telecopier: (317) 637-2369

E-mail: bmacey@maceylaw.com

*Attorneys for Plaintiffs, Indiana Democratic Party
and Marion County Democratic Central Committee*

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2005, a copy of the foregoing Memorandum in Support of Democrats' Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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

Jim Osborn, Esq. E-mail: josborn@indygov.org
Office of Corporation Counsel
City-County Building 1601
200 E. Washington Street
Indianapolis, IN 46204

Ken Falk, Esq. E-mail: ken.falk@iclu.org
Indiana Civil Liberties Union
Price Building
1031 E. Washington Street
Indianapolis, IN 46204

Karen Horseman, Esq. E-mail: khorseman@sbcglobal.net
717 South East Street
Indianapolis, IN 46225

s/ William R. Groth
William R. Groth

p/643/je