

No.

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In the  
**Supreme Court of Indiana**

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Court of Appeals Cause No. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS OF INDIANA, INC. and  
LEAGUE OF WOMEN VOTERS OF INDIANAPOLIS, INC.,

*Plaintiffs-Appellants,*

v.

TODD ROKITA, in his official capacity  
as Indiana Secretary of State,

*Defendant-Appellee.*

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Appeal from the Marion Superior Court, Civil Division, 13.  
Trial Court Cause No. 49D13-0806-PL-027627.  
The Honorable **S.K. Reid**, Judge Presiding.

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**BRIEF OF LONNA RAE ATKESON, MATT A. BARRETO, LORRAINE  
C. MINNITE, JONATHAN NAGLER, STEPHEN A. NUÑO AND  
GABRIEL RAMON SANCHEZ AS *AMICI CURIAE*  
IN OPPOSITION TO DEFENDANT'S PETITION TO TRANSFER**

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## INTEREST OF *AMICI CURIAE*

*Amici* are six political scientists who study elections, the electoral process, and voting. Many have studied the impact of voter identification laws, including the Indiana law being challenged. *Amici* submit this brief, which consists of social science analysis and research to guide the Court in its analysis here. This Court frequently permits social scientists and academics to participate as *amici*. See, e.g., *City of Carmel v. Certain Southwest Clay Twp. Annexation Terr. Landowners*, 868 N.E.2d 793 (Ind. 2007); *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 986 n.13 (Ind. 2006). Additionally, courts have historically relied upon social science data in evaluating the constitutionality of laws regulating voting and their impact on the electorate. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Court relied upon census data in evaluating voters' challenge to Texas redistricting plan); *Bush v. Vera*, 517 U.S. 952 (1996) (same); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (Court relied on social science data including race and party affiliation in analyzing voters' challenge to Indiana redistricting plan).

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## SUMMARY OF ARGUMENT

As political scientists who study elections, the electoral process, voting, and the impact of voter identification laws, *Amici* unite in their conclusion that Ind. Code § 3-11-8-25.1 (2006) (the “Photo ID Law”) fails to serve either of its purported goals. First, the law is an ineffective tool against voter fraud because it exempts absentee voters from the identification requirement even though the best available research suggests that voter fraud, if it occurs, is more likely to occur through the misuse of absentee ballots. Second, given the disproportionate impact that the implementation of the Photo ID Law has had on Indiana’s voting population, rather than inspiring confidence in the fairness of elections, over time it may have the exact opposite result among significant voting populations. The best available social science research indicates that the classifications created by imposing stringent identification requirements on in-person voters, while not requiring any form of identification from absentee voters, are arbitrary and manifestly unreasonable. Accordingly, the Photo ID Law is unconstitutional.

## ARGUMENT

The right to vote is fundamental and central to the proper functioning of our democratic society. *See, e.g., Gallagher v. State Election Bd.*, 598 N.E.2d 510, 514 (Ind. 1992) (“it is indisputable that the right to vote is fundamental”). The Indiana Supreme Court has explained that the right to vote is “a political privilege of the highest dignity which can emanate only from the people, and is reverently and emphatically enshrined in the sovereign statement of the organic law of the people.” *State ex rel. McGonigle v. Madison Circuit Court*, 193 N.E.2d 242, 249 (Ind. 1963).

In 2005, the Indiana General Assembly passed Senate Enrolled Act No. 483 (“SEA 483”). S. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005). SEA 483 requires the vast majority of Indiana citizens to present certain government-issued identification in order to vote.

The requirement, however, does not apply to absentee voters who submit their ballots by mail<sup>1</sup> or persons living and voting in a state-licensed care facility such as a nursing home.<sup>2</sup> Ind. Code § 3-11-8-25.1(e). A voter who has an accepted identification but is unable to present the identification at the time of voting may file a provisional ballot that will be counted only if she presents her identification to the circuit county clerk within 10 days. *Id.* § 3-11.7-5-2.5(b). In passing the Photo ID Law, the Indiana General Assembly’s purported purpose was twofold: (i) to combat voter fraud, and (ii) to protect the public’s confidence in the integrity of elections. *See Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1618-20 (2008).

*Amici’s* analysis of the best-available social science research, including data tracking the impact of the Photo ID Law during the November 2008 federal elections, leads to the unavoidable conclusion that the Photo ID Law fails on the first count since it exempts absentee voters from having to present identification, notwithstanding that voter fraud can more easily occur through the misuse of absentee ballots, and may well fail on the second count, given the disproportionate impact the implementation of the Photo ID Law has had on Indiana’s voting populace.

## **I. The Photo ID Law Does Not Combat Voter Fraud**

Prosecutorial evidence strongly indicates that the electoral process is more susceptible to fraud through the misuse of absentee ballots than it is through in-person voting. The Photo ID

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<sup>1</sup> As used in this brief, the term “absentee voter” refers only to those voters who submit their ballots by mail and are exempted from the identification requirement of the Photo ID Law. Ind. Code § 3-11-10-1.2(1) (2006). It does not refer to in-person early voters who, like in-person election day voters, are subject to the identification requirement, even though the Photo ID Law classifies such voters as absentee voters as well. *Id.* §§ 3-11-8-25.1(a), 3-11-10-26 .

<sup>2</sup> Furthermore, voters who are indigent or who have a religious objection to being photographed can cast a provisional ballot that is counted if the voter executes a sufficient affidavit before the circuit court clerk within ten days following the election. *Id.* §§ 3-11.7-5-1, 3-11.7-5-2.5(c) (describing requirements for affidavit).

Law, therefore, misses its mark because it statutorily exempts such voters from the identification requirement. Exempting absentee voters from the law confers an unreasonable privilege upon this class of voters, in violation of the Equal Privileges and Immunities Clause.

**A. Because Voter Fraud Is More Likely To Occur Through the Misuse of Absentee Ballots Than By In-Person Voters, Exempting Absentee Voters From the Photo ID Law Fails To Serve the Law’s Purported Purpose**

There is very little documented evidence of voter fraud in the United States. A review of every criminal indictment brought in U.S. Federal courts between September 30, 2004 to October 1, 2005, a period during which the U.S. Department of Justice made the investigation and prosecution of election fraud a top law enforcement priority, “outranked only by crimes involving terrorism and espionage[,]” *see* Craig C. Donsanto, *Corruption of the Election Process under U.S. Federal Law 34 in Election Fraud: Detecting and Deterring Electoral Manipulation* (R. Michael Alvarez et al. eds., 2008) (quoting the director of the Justice Department Election Crimes branch), reveals that per three million registered voters only one defendant was charged with any kind of Federal election law violation. *See* Lorraine Minnite, *The Myth of Voter Fraud* (Cornell University Press, forthcoming Apr. 2010). In Indiana, there is, in fact, no evidence of in-person voter fraud. Both Justice Stevens, who wrote the opinion for the Court in *Crawford*, and Justice Souter, who authored the dissent, agreed that there was not a shred of evidence in the record of in-person voter fraud at any time in Indiana’s history. 128 S. Ct. at 1619 (the “record contains no evidence of any such fraud—[in-person voter impersonation]—actually occurring in Indiana at any time in its history”); *id.* at 1637 (“neither the District Court nor the Indiana General Assembly that passed the Voter I.D. Law was given any evidence whatsoever of in-person voter impersonation fraud in the State”) (Souter, J., dissenting). Defendant-Appellee has conceded this fact. Brief of Appellee-Respondent, *Crawford v. Marion County Election Bd.*,

Nos. 07-21, 07-25, 2007 U.S. Briefs 21, 72, 79-80 (U.S. Dec. 3, 2007) (State conceding that although Indiana has experienced other types of voter fraud it has not encountered in-person voting fraud).

It is a prevalent view among researchers in the area that, in the atypical cases where voter fraud does take place, it is much easier to engage in absentee mail fraud and therefore is more likely to occur through the misuse of absentee ballots than by in-person voters. In a report prepared by the Federal Election Assistance Commission on voting fraud, 27 experts in the area of voting, including academics, attorneys, and public officials, largely agreed “that impersonation of voters is probably the least frequent type of fraud,” while “absentee balloting is subject to the greatest proportion of fraudulent acts.” *See* U.S. Elections Assistance Commission Report, *Election Crimes: An Initial Review and Recommendations for Future Study* 9 (2006), available at [http://www.eac.gov/clearinghousedocs/reports-and-surveys-2006electioncrimes.pdf/attachment\\_download/file](http://www.eac.gov/clearinghousedocs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file).

Researchers have concluded that there are two main reasons why there is a greater likelihood of voter fraud through the misuse of absentee ballots. First, absentee ballots are not “secret,” i.e., those who vote in this manner are assured neither the privacy nor the protections afforded those who vote under the watchful eyes of Election Day judges and officials at the polling place. *See* John C. Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* 53 (2006) (“The main reason absentee ballots are susceptible to fraud is the separation of both ballot and voter from the polling place, with all of its integrity and privacy protections.”); National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* 44 (Miller Center of Public Affairs, University of Virginia & The Century Foundation, 2001) (assessing the threats of early and remote voting, the report stresses the dangers posed by

the lack of secrecy and the remoteness from the supervision of the polling place that are inherent to absentee voting).

The risk of voter fraud is also higher with absentee ballots because absentee balloting rules increase opportunities for corruption due to the ease by which third parties can unlawfully intervene in the voting process. This can occur through the coercion of legitimate voters by, for example, exploiting vulnerable populations or the purchase and sale of absentee ballots.<sup>3</sup> It can also occur—despite the State’s argument to the contrary—through absentee voter impersonation whereby people apply for absentee ballots using, for example, incorrect addresses of registered voters and then complete and send in the ballot without the actual voter’s knowledge.<sup>4</sup>

The State incorrectly argues that, because absentee ballots are cast in secret with “no direct face-to-face contact with election officials,” it is not feasible to impose an identification requirement on absentee voters. *See* Brief of Defendant-Appellee at 28-29, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49A02-0901-CV-00040 (Ind. Ct. App. Apr. 6, 2009). This is not the case. Indeed, pursuant to the Help America Vote Act (“HAVA”), 42 U.S.C. §§ 15301-15545 (2002), first time mail registrants are permitted to verify their identity by supplying, *inter alia*, a copy of a current and valid photo identification, a current utility bill, or a bank statement.

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<sup>3</sup> *See, e.g., United States v. McCraime*, 144 F.3d 56, 56 (11th Cir. 1998) (describing two conspiracies to buy votes by opposing candidates in a local Georgia election where open bidding for sale of absentee ballots took place in the county courthouse); *Marks v. Stinson*, 19 F.3d 873, 875 (3d Cir. 1994) (a candidate’s campaign obtained absentee ballot applications from hundreds of citizens through fraud and guile in a Philadelphia State Senate election); *United States v. Olinger*, 759 F.2d 1293, 1293 (7th Cir. 1985) (finding scheme to exploit nursing home-bound mentally handicapped by casting ballots in their names without their consent); *United States v. Odom*, 736 F.2d 104, 104 (4th Cir. 1984) (same); *Jordan v. State*, 691 N.E.2d 487, 490 (Ind. Ct. App. 1998) (affirming conviction of a defendant for inducing votes by gift or offer to compensate where the evidence established that the defendant offered money to a voter to induce her into voting by absentee for a particular candidate).

<sup>4</sup> *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (ordering special election based on widespread misconduct in absentee ballots including “the use of vacant lots or former residences of voters on applications for absentee ballots”).

*Id.* § 15483(b)(2)(A)(ii)(II). This demonstrates the existence of a system of verification by mail. The State’s argument is therefore not credible.

While the stated purpose behind the stringent requirements that the Photo ID Law imposes on in-person (but not absentee) voters is to combat fraud, the empirical evidence demonstrates that the law misses its mark. In-person voter fraud is close to nonexistent, and the few documented cases of voter fraud in Indiana all involve the misuse of absentee ballots. Simply put, the Photo ID Law imposes onerous requirements for all voting populations *except* the one voting population most susceptible of such fraud.

**B. Research That Voter Fraud Is More Likely to Occur Through the Misuse of Absentee Ballots Further Supports the Court of Appeals Holding that the Photo ID Law Violates the Equal Privileges and Immunities Clause**

By exempting absentee voters from the stringent identification requirements imposed on in-person voters, the Photo ID Law grants such voters a privilege. Under Indiana law, the unequal treatment between absentee and in-person voters must reasonably relate to inherent characteristics that distinguish the two classes in order to pass constitutional muster. *Collins v. Day*, 644 N.E.2d 72, 78 (Ind. 1994) (holding that where a law singles out one class to receive a privilege not equally provided to others, “such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.”). *Amici’s* aforementioned review of available social science data leads them to agree with the Court of Appeals’ decision that the privilege conferred on absentee voters is manifestly unreasonable. *See League of Women Voters of Ind., Inc. v. Rokita*, No. 49A02-0901-CV-40, 2009 WL 2973120, at \*10 (Ind. Ct. App. Sept. 17, 2009).

In so holding, the Court of Appeals acknowledged that the backward logic of the Photo ID Law cannot be squared with this Court’s reasoning in *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006). *See id.* In *Horseman*, this Court upheld a statute challenged under the Equal Privileges and Immunities Clause that gave preferential treatment to in-person voters over absentee voters. *Horseman*, 841 N.E.2d at 171-73. Specifically, the law at issue permitted a recount of ballots cast in-person that were not counted due to clerical error, but did not permit the recount of absentee ballots uncounted based on clerical error. *Id.* at 171. This Court’s rationale in upholding the law in *Horseman* despite the privilege it conferred on in-person voters was that inherent differences result in absentee ballots being more susceptible to fraud and, thus, “it is reasonable that the legislature believed it in the interests of Indiana voters to more stringently govern absentee balloting.” *Id.* at 173; *see also id.* (“Although the legislature has included numerous provisions in our code meant to protect the integrity of absentee ballots cast, those provisions cannot safeguard the ballots and the intent of the individual voters to the extent that provisions surrounding Election Day procedures can.”) (footnote omitted). The Court of Appeals reasoned that if, based on this Court’s holding in *Horseman*, “it is reasonable to ‘more stringently govern absentee balloting,’ then it follows that a statute that imposes a less stringent requirement for absentee voters than for those voting in person” is not reasonable. *League of Women Voters of Ind., Inc.*, 2009 WL 2973120, at \*10.

Like the legislation upheld in *Horseman*, the Indiana Photo ID Law purports to protect the integrity of the election process from fraud. *See Crawford*, 128 S. Ct. at 1618-20. Unlike the legislation upheld in *Horseman*, however, the Photo ID Law grants a privilege to absentee voters—allowing them to vote without presenting photo identification—in the name of protecting the integrity of the election process. This position runs afoul of this Court’s reasoning

in *Horseman* and the reality of voter fraud as demonstrated by the discussion above. There is no acceptable correlation between the relevant inherent differences between in-person voters and absentee voters—the latter class being susceptible to election fraud while the former class being practically immune to it—and the preferential treatment of absentee voters—privileging absentee voters by exempting them from the obligation to present photo identification. Accordingly, the Photo ID Law violates the Equal Privileges and Immunities Clause.

## **II. Indiana’s Photo ID Law Disenfranchises Voters and Disproportionately Excludes Particular Groups From the Electoral Process, And Should, Therefore, Undermine Public Confidence in the Legitimacy of Elections**

### **A. The Photo ID Law Prohibited a Significant Number of Indiana Voters from Participating in the November 2008 Election**

In the November 2008 election, the Photo ID Law prohibited a significant number of Indiana voters from casting their ballots. While *Amici* are unaware of the total number of registered voters in Indiana who were deterred from even showing up at the polls, the data regarding voters who cast provisional ballots because they lacked the requisite photo identification provides some insight. Out of the total 7,094 provisional ballots cast by in-person voters in Indiana’s 92 counties during the 2008 November general election, 1,039, or 14.6 percent, were cast because a voter lacked the accepted photo identification. Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification at Indiana's 2008 General Election*, J.L. & Pol. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1465529](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465529). Ultimately, only 13.2 percent of those provisional ballots cast because of failure to satisfy the identification requirement were subsequently qualified and counted after the election. *Id.* Thus, 86.8 percent, or 902, identification-related provisional ballots were not counted. *Id.* Moreover, there is no evidence in the public record that the state suspected any of these voters of election fraud.

## **B. The Photo ID Law Disproportionately Excludes Particular Groups From the Electoral Process**

While the demographic breakdown of those 902 voters is unknown to *Amici*, research has established that voters disenfranchised by the Photo ID Law are likely to be distributed unequally throughout Indiana's population. Specifically, a recent study of Indiana voters determined that the likelihood that a registered voter in Indiana has the required identification needed to vote is influenced by the following three characteristics: (i) the person's race, (ii) the person's income, and (iii) the person's level of education. See Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 *Political Science & Politics*, Issue 1, 3-4 (Jan. 2009).

First, Indiana's photo identification requirement falls more heavily on black voters, as they are less likely to have the demanded form of identification. See *id.* at 3-4. Specifically, among adults eligible to vote, 83.2 percent of whites have the accepted identification, whereas only 71.7 percent of blacks possess the required credentials. *Id.* at 3. A similar disparity is found by examining registered voters, with 84.2 percent of whites having the accepted identification compared to only 78.2 percent of blacks. *Id.* Finally, focusing only on likely voters, blacks are still disproportionately impacted by the stringent identifications requirements of the Photo ID Law, as about 15 percent of likely white voters could be turned away from the polls compared to over 20 percent of likely black voters. *Id.* Thus, of the total group of Indiana voters prevented from voting by the identification requirement, black voters are disproportionately disenfranchised. *Id.* at 4.

Additionally, social science data reveals that both higher educated and higher income Indianans are more likely to have the required identification. *Id.* For example, 88.5 percent of

college-educated voters possess the required identification compared to 79 percent of those with only a high school degree. *Id.*

Considering the combined effect of the Photo ID Law based on race, income, and level of education, it is clear that substantial segments of the Indiana population are disproportionately affected by the law. Rather than protect public confidence in elections, by disproportionately prohibiting particular groups of Indiana citizens from exercising their fundamental right to vote, it is likely that over time the Photo ID Law will act to erode confidence in the legitimacy of elections in significant voting populations.

Moreover, the impact of the Photo ID Law is also likely to have partisan implications. Even a relatively small disparity between Republicans and Democrats in the rate of required identification possession can lead to substantial differences in partisanship between the set of eligible voters with accepted identification and the set of eligible voters who do not have the required identification. In the study cited above, 86.2 percent of voters who self-identify as Republican had the required identification compared to only 81.7 percent of self-identified Democrats. *Id.*, tbl. 3. Yet, this resulted in 42 percent of self-identified Republicans versus only 33 percent self-identified Democrats among those with the required identification, compared to 35 percent of self-identified Republicans versus 38 percent of self-identified Democrats among otherwise eligible voters without the required identification. *Id.*, fig. 1.

The partisan implications of the Photo ID Law are also exacerbated by exempting absentee voters from the identification requirement. In Indiana, absentee voters are substantially older than in-person voters. Jonathan Nagler, *Analysis of Mode of Voting in Indiana Calculated Using Current Population Survey, Voter Supplement File* (Oct. 23, 2009) (on file with author). In particular, whereas only 2.9 percent of voters in Indiana under the age of 50 voted absentee

rather than in-person, 8.7 percent of voters age 50 or over voted absentee and this number increases to 11.4 percent for persons over the age of 60. *Id.* The partisan implications of older people being more likely to vote absentee are exemplified by the November 2008 election results where Barack Obama, the Democratic candidate, received 53 percent of the vote of people under the age of 50, but only 44.5 percent of the vote of those aged 50 and over. 2008 National Exit Polls, conducted by Edison Media Research, <http://www.cnn.com/ELECTION/2008/results/polls/#INP00p1>. Thus, the disproportionate impact the photo identification requirement has on in-person Democratic voters is exacerbated by exempting absentee voters. In particular, because absentee voters tend to be older and Republican, the Photo ID Law effectively makes it easier for Republicans to vote than Democrats.

**C. These Disparate Results Should Shake the Public's Confidence in the Photo ID Law**

The support that exists from some segments of the general population for Photo ID Laws depends on the public believing that such laws promote fair elections that are free from fraud. But since the Photo ID Law has such a clear disparate impact on different groups of voters, while not addressing fraud, the confidence in it may well be shaken in significant voting populations.

**CONCLUSION**

Review of social science data leads to one unavoidable conclusion, Indiana's Photo ID Law fails to serve its purported purposes. By exempting absentee voters from the identification requirements, it does not serve as an effective counter to voter fraud since all indications suggest that such fraud is most likely to occur through the misuse of absentee ballots. Moreover, the Photo ID Law disproportionately prohibits black voters, low-income voters, the less educated and Democrats from exercising their fundamental right to vote; such a disparate impact may well

erode public confidence in the integrity of elections. Accordingly, *Amici* respectfully request that this Court hold that the Photo ID Law violates the Indiana Constitution.

Respectfully submitted,

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Dated: November 9, 2009

**WORD COUNT CERTIFICATE**

As required by Indiana Appellate Rule 44, I verify that this Brief of *Amici Curiae* contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served via United States First Class Mail, postage prepaid, on the \_\_\_\_ day of November 2009, addressed to:

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