

IN THE INDIANA COURT OF APPEALS

APPELLATE CASE NO. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS)	
OF INDIANA, INC. and)	Marion County Superior Court
LEAGUE OF WOMEN VOTERS)	Civil Division-02
OF INDIANAPOLIS, INC.)	
)	
Appellants)	
)	Trial Court
vs.)	Cause No. 49D02-0806-PL-027627
)	
TODD ROKITA, in his official)	The Honorable S. K. Reid
capacity as Indiana Secretary of State)	
)	
Appellee)	

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STATEMENT OF ISSUES

1. Whether the trial court erred when it dismissed the amended complaint on the grounds that the Indiana Photo ID Law (hereinafter the “Law” or “Photo ID Law”) does not violate Art. II, §2 of the Indiana Constitution even though the Law prohibits Indiana voters from voting if they lack a particular type of federal or state identification.

2. Whether the trial court erred when it dismissed the amended complaint on the grounds that the Photo ID Law does not violate Art. I, §23 of the Indiana Constitution even though the Law only imposes identification requirements upon in-person voters despite the fact that the Indiana Supreme Court had previously held that mail-in absentee voting requires heightened security.

3. Whether the trial court erred when it dismissed the complaint on the grounds that the Photo ID Law does not violate Art. I, §23 of the Indiana Constitution even though expiration dates and/or photographs are required on the identification of some in-person voters but not others.

STATEMENT OF THE CASE

On June 20, 2008 the League of Women Voters of Indiana, Inc. and the League of Women Voters of Indianapolis, Inc. (hereinafter jointly referred to as the “League”), filed the instant action against Indiana Secretary of State, Todd Rokita (hereinafter “Rokita”), seeking a declaration that the Photo ID Law is unconstitutional in that it violates Art. II, §2 of the Indiana Constitution. On

August 5, 2008 the League filed an Amended Complaint alleging that the Law also violated Art. I, §23 of the Indiana Constitution. (App. 8-17).¹ On September 15, 2008, Rokita filed a motion to dismiss. On December 17, 2008, the trial court dismissed the action on the merits, finding that the Law did not contravene Art. II, § 2 of the Indiana Constitution because that section “permits election regulations even if not specifically mentioned therein” and it further held that the Law is a “procedural regulation, not an additional qualification on voting”. (App. 6). The trial court also ruled that any classes of voters created by the Law are “reasonably relate[d] to self-evident inherent characteristics that distinguish the different classes” and that the Law also did not violate Art. I, §23 of the Indiana Constitution. (App. 6-7). The League filed a timely notice of appeal on January 15, 2009.

STATEMENT OF FACTS

The Photo ID Law, adopted by the Indiana General Assembly in 2005, is codified at various places in Title 3 of the Indiana Code. *See*, Ind. Code §§3-5-2-40.5, 3-11-10-1.2, 3-11-8-25.1, 3-11.7-5-2.5 and 3-11.7-5-3 (all 2008). The Law applies to in-person voting at both primary and general elections, but not to absentee ballots submitted by mail. It contains an exception for certain classes of persons, e.g., persons living and voting in a state-licensed facility such as a nursing home are not required to present photo identification when voting in-person. I.C. §3-11-8-25.1.

¹ References hereinafter to “(App. ___)” are to Appellants’ Appendix.

When a voter presents himself or herself at the polls to vote, the first thing the voter must do under Indiana law is provide proof of identification. *See*, I.C. §3-10-1-7.2 (primary elections) and §3-11-8-25.1 (general elections). “Proof of identification” is defined as follows:

. . . a document that satisfies all the following:

- (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual’s voter registration record.
- (2) The document shows a photograph of the individual to whom the document was issued.
- (3) The document includes an expiration date, and the document:
 - (A) is not expired; or
 - (B) expired after the date of the most recent general election.
- (4) The document was issued by the United States or the state of Indiana.

I.C. §3-5-2-40.5. If a voter fails to present acceptable “proof of identification”, the voter can cast a provisional ballot if the voter executes a challenged voter affidavit. I.C. §§3-11-8-25.1(d) and 3-10-1-7.2(d).²

² The challenged voter affidavit must be sworn and contain the following:

- (1) A statement that the voter is a citizen of the United States.
- (2) The voter's date of birth to the best of the voter's information and belief.
- (3) A statement that the voter has been a resident of the precinct for thirty (30) days immediately before this election or is qualified to vote in the precinct under IC 3-10-10, IC 3-10-11, or IC 3-10-12.
- (4) The voter's name and a statement that the voter is generally known by that name.

All provisional ballots are to be counted by noon ten (10) days following the election. I.C. §3-11.7-5-1. If the voter wishes for his or her provisional ballot to be counted, she must personally appear before the circuit court clerk or the county election board before the deadline for counting provisional ballots. I.C. §3-11.7-5-2.5(a)(2). At that time, the voter can do one of two things. The first alternative states that if the voter:

- (1) provides proof of identification to the circuit court clerk or county election board; and
- (2) executes an affidavit before the clerk or board, in the form prescribed by the commission, affirming under the penalties of perjury that the voter is the same individual who:
 - (A) personally appeared before the precinct election board; and
 - (B) cast the provisional ballot on election day;

the county election board shall find that the voter's provisional ballot is valid and direct that the provisional ballot be opened under section 4 of this chapter and processed in accordance with this chapter.

I.C. §3-11.7-5-2.5(b)(1)-(2)(A)-(B).

-
- (5) A statement that the voter has not voted and will not vote in any other precinct in this election.
 - (6) The voter's occupation.
 - (7) The voter's current residential address, including the street or number and if applicable, the voter's residential address thirty (30) days before the election, and the date the voter moved.
 - (8) A statement that the voter understands that making a false statement on the affidavit is punishable under the penalties of perjury.

I.C., §3-11-8-23(b)(1)-(8).

The voter has other options, depending upon the reason the voter cannot present the required identification. She can file an affidavit at the county clerk's office by the deadline for counting provisional ballots, attesting to her religious objection to being photographed, or averring that she is "indigent"³ and "unable to obtain proof of identification without the payment of a fee." I.C. §3-11.7-5-2.5(c)(1)-(2)(B). Once a voter takes one of the steps set forth above, the election board is then directed to find that the voter's provisional ballot should be opened and counted. I.C. §3-11.7-5-2.5(d). These affidavits, which are not available at the polls on election day, are valid only for the election in which they are filed. New religious objector or indigency affidavits must be filed for each subsequent election in which a voter wishes to avail herself of the indigency or religious objector exemptions.

A voter who meets the constitutional qualifications of age, citizenship and residency who is unable to produce the required form of photographic identification will not have her vote counted, even though the voter, if challenged, is willing to swear out an oath at the polls attesting that she is who she claims to be and the voter is indeed that person.

SUMMARY OF ARGUMENT

Voting is a fundamental constitutional right that cannot be denied or abridged other than as is expressly permitted by our constitution. The right to vote

³ Nowhere does the Photo ID Law define "indigent." The Photo ID Law leaves it to each of the 92 county election boards to set that county's standard for whether a voter qualifies as "indigent."

includes not merely casting a ballot in an election, but it also necessarily encompasses having that ballot counted in the final election tallies. The people of Indiana have specified within their constitution the exclusive qualifications necessary to cast a vote in public elections. Those qualifications deal with age, residency and citizenship. These qualifications cannot be expanded by any means other than an amendment to the constitution. For example, by constitutional amendment, the electorate of Indiana added Art. II, §14 to the constitution, an amendment that provides the additional voter qualification that a voter be registered.

In enacting the Photo ID Law in 2005 the General Assembly added a new voting qualification. Although the Legislature is free to regulate the times, places and manner of public elections, the Photo ID Law is more than a mere procedural regulation in that it imposes burdensome and exclusionary conditions on the right to vote of otherwise constitutionally qualified voters. Thus, if a registered voter satisfies the qualifications regarding age, residency and citizenship but is unable to produce the required form of photographic identification at the polls on election day, that voter must vote by provisional ballot, which will be opened and counted *only* if the voter later makes a second trip to a different location (the office of the county clerk) either to produce the required form of identification or to sign a religious objector or indigency affidavit. A voter who fails to do so will not have her provisional vote counted. A “qualification” is a condition which must be satisfied. The Photo ID Law imposes an additional qualification on all otherwise

registered and fully qualified in-person voters which, if not satisfied, will preclude the voter's ballot from being opened and counted.

The Indiana supreme court has held that a statutory enactment (other than a universal registration law authorized by Art. II, §14) which imposes extra burdens and hardships and requires a voter to prove her qualifications to vote cannot be enforced without amending the constitution. The burdens and hardships imposed by this Law are over and beyond the time-tested method of identification done by signature comparison. Unlike the identification procedures in effect prior to 2005, the Photo ID Law requires voters, particularly those who are non-drivers, to navigate a complex maze of rules and regulations in order to obtain the requisite government-issued form of identification. Further, under the prior identification methods, a voter challenged at the polls as not being the person she claimed to be could swear out an affidavit at the polling place, and that voter was then permitted to cast a regular ballot. There were no trips required to the county election board after election day concluded. A voter was not required to pay a fee to obtain documents such as a certified copy of her birth certificate, in order to receive a photo ID from the Bureau of Motor Vehicles. However, under this Law an in-person voter without the form of identification now required will not have that vote count unless and until the voter has navigated certain bureaucratic requirements and made a trip to the county clerk's office either to present the required proof of identification or execute a religious objector or indigency affidavit. The requirements imposed by the Law are not analogous to Indiana's

voter registration requirements, which are expressly authorized by the constitution and designed to insure that voters have the qualifications needed to vote.

In addition to being a qualification enacted by statute rather than constitutional amendment, the Photo ID Law is also constitutionally flawed in that it is not universally applicable to all voters and thereby in violation of Art. I, §23. Despite the fact that it is recognized that the system of mail-in absentee voting requires additional safeguards due to the fact that it is easier to commit voter fraud by casting an in-person ballot, the Photo ID Law exempts from its requirements those voters who vote by mail-in absentee ballot and instead imposes restrictions only upon in-person voters. Mail-in absentee voters are not even required by law to provide an affidavit attesting to the voter's identity. And while the articulated purpose of the Photo ID Law is to prevent in-person voter fraud, there has never been a documented case of voter impersonation in Indiana's history.

Further, the Law allows certain in-person voters to cast their ballots without having to present any identification, i.e., voters who live in a state-licensed facility that by happenstance also contain a polling place. In contrast, voters living in state-licensed facilities in which the county election board decided not to place a polling place cannot vote without the required identification. When the Law is applied to other classifications, the inequality among the treatment of voters is further demonstrated.

For example, United States military veterans with one type of photo identification cards can vote if the expiration date is listed as indefinite on the card

while veterans with another type of military medical benefits cannot vote using their identification card because it has no expiration date due to the fact that the benefits are good for the lifetime of the veteran. Senior citizens with Medicare cards are entitled to receive valuable medical benefits from the state but cannot use their Medicare card to vote. Students attending Purdue University can use their student identification card that lacks an expiration date to vote because Purdue has made a database available for use on election day but others with state or federally issued identification cards lacking an expiration date cannot vote.

As the League's amended complaint was dismissed by the trial court under Indiana Trial Rule 12(B)(6), all of the allegations of its amended complaint must be accepted as true and construed in the light most favorable to the League. The League has alleged that the Law has prevented a number of registered and qualified voters from full participation in the electoral process, such as voters who have reported to the polls on election day without the required form of picture identification, either because theirs was lost, stolen or forgotten, or they were non-drivers who had never applied to the BMV for photographic identification. The Law's application has resulted in the absolute denial of the right to vote, and it has discouraged a number of other Indiana citizens from voting.

ARGUMENT

I STANDARD OF REVIEW

This action was dismissed on the merits by the trial court pursuant to Ind. Trial Rule 12(B)(6). As our supreme court has recognized:

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Hosler ex rel. Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193, 196 (Ind. Ct. App. 1999), *trans. denied*. Thus, our review of a trial court's grant or denial of a motion based on Trial Rule 12(B)(6) is de novo. *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001).

When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. *City of New Haven v. Reichhart*, 748 N.E.2d 374, 377 (Ind. 2001). A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint that the complaining party is not entitled to relief. *Id.* (citing *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*).

Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602, 604-05 (Ind. 2007).

A complaint should not be dismissed unless, viewing the complaint's allegations in the light most favorable to the non-moving party, it fails to state any facts on which the court can grant relief. *Id.* at 605. The facts alleged in the complaint must be taken as true, and dismissal is appropriate only where it appears that the plaintiff cannot be granted relief under any set of facts. *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 980-81 (Ind. 2005).

Legislation under constitutional challenge is clothed with a presumption of constitutionality, and the burden to rebut this presumption is upon the challenger,

with all reasonable doubts resolved in favor of the law's constitutionality. *Matter of Tina T.*, 579 N.E.2d 48, 56-57 (Ind. 1991) (quoting *Miller v. State*, 517 N.E.2d 64, 71 (Ind. 1987)).

II. THE INDIANA PHOTO ID LAW VIOLATES ART. II, §2 OF THE INDIANA CONSTITUTION

A. Voting is a fundamental right guaranteed to all voters who meet the enumerated qualifications in Art. II, § 2, and the legislative branch cannot abridge or deny that right by adding a new voting qualification other than by constitutional amendment.

Voting has long been recognized by both Indiana and the United States supreme courts to be a fundamental right in our republic. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Indiana Gaming Comm'n v. Mosely*, 643 N.E.2d 296, 304 (Ind. 1994). It is also a right protected by the first amendment to the federal constitution. *Murphy v. State*, 837 N.E.2d 591, 595 (Ind. Ct. App. 2005) (“We accordingly decline the State’s invitation to hold First Amendment rights are not implicated in the voting context”). The right to vote is considered one of the most important rights of citizens, which cannot be abridged or denied except as expressly authorized by the constitution:

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. *The privilege cannot be abridged or denied by any board or agency created by the legislature, or through direct legislative enactment, except as such limitation upon the privilege is authorized by other provisions within the organic law of the state.*

State ex rel. McGonigle v. Madison Circuit Court, 193 N.E.2d 242, 249 (Ind. 1963) (emphasis added).

In keeping with the fundamental importance of voting, our supreme court has held that “*any* effort on the part of the General Assembly to establish a public electorate which would differ from that defined in Art. II, §2 of the Constitution must necessarily be in conflict with the manifest purpose of that section to designate the voters entitled to participate in all elections ‘not otherwise provided for by this constitution.’” *Board of Election Commissioners of City of Indianapolis v. Knight*, 187 Ind. 108, 117 N.E. 565, 569 (1917). Because Art. II, §2 designates the class of persons eligible to be electors and confers on them the right of suffrage, in the absence of other provisions contained in the constitution those electors shall be entitled “to vote generally whenever the polls are opened and elections held for anything connected with the general government, or the state or local governments.” *Id.* In other words, “[w]hen the Constitution defines the qualifications of voters such qualifications cannot be changed nor 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)).

1. The standards to be used in interpreting Art. II, §2.

When interpreting provisions of Indiana’s constitution, it is necessary to look to “the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.” *State v. Montfort*, 723 N.E.2d 407, 409

(Ind. 2000).. Because voting is a fundamental right, Art. II, §2 should be interpreted so as to expand rather than restrict voters' rights. "The purpose of [election] law and the efforts of this court are to secure to the electorate an opportunity to freely and fairly cast his ballot, ... *and prevent disenfranchisement.*" *Curley v. Lake County Bd. of Elections*, 896 N.E.2d 24, 39 (Ind. Ct. App. 2008) (emphasis added) (quoting *State ex rel. Harry v. Ice*, 207 Ind. 65, 71, 191 N.E. 155, 157 (1934)).

The Indiana Constitution is a contract between the State and its citizens. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 409 (Ind. 1991). A court charged with the task of interpreting provisions of the Indiana Constitution must consider the common understanding of both those who framed it and those who ratified it, and should look to the history of the times, and examine the state of things existing when the constitution or any part of it was framed and adopted. *Bayh*, 573 N.E.2d at 412. As our supreme court has observed, the Indiana Constitution was framed by delegates who rejected elitism and who wished to "guarantee popular participation" in the electoral process. "...[W]hile the delegates relied heavily on the constitutions of the Ohio Valley and southeastern states, they generally borrowed only those provisions which *promoted political inclusion*, eschewing the elitist provisions favored by territorial federalists, *such as tax requirements for voting, property qualifications for officeholders...and protection of slavery.*" *Price v. State*, 622 N.E.2d 954, 961-62, n. 10 (Ind. 1993) (emphasis added).

The right to vote is more than merely being allowed to cast a “provisional” ballot. It necessarily encompasses the right to have that vote counted in the final tallies. “[E]veryone ha[s] the right to vote *and have his vote counted...*” *Davis v. Bandemer*, 478 U.S. 109, 124 (1986). *See also, Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots *and have their vote counted...*”) (quoting *United States v. Classic*, 313 U.S. 299, 315 (1941) (emphasis added)).

2. The history and evolution of Art. II, § 2.

Art. II, §2(a), as it currently exists, sets forth the qualifications necessary to vote in Indiana elections.

Article II. Suffrage and Elections

* * *

Section 2. Voting Qualifications.

- (a) A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.

Thus to vote in an Indiana election, a voter must only satisfy the requirements of citizenship, age and residency. In addition, the qualification set forth in I.C. §3-7 as authorized by Art. II, §14(c) of the constitution, requires that persons who meet the constitutional qualifications set forth in Art. 2, §2, be registered to vote.

Art. II, §2, as originally enacted in 1851, conferred the general right of suffrage on “every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months” immediately preceding an election. *Knight*, 117 N.E. at 570. Although in its original form it set qualifications based upon race and sex (unfortunately reflective of the times), the 1851 constitution was still intended to equalize rather grant preferences.

Over the years following its enactment, Art. II, §2 has been repeatedly amended to expand the franchise by removing barriers to voting by certain classes of citizens. In 1881, Art. II, §2 was amended to permit the General Assembly to pass legislation to require the registration of qualified voters as a means of preventing fraud. *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 15 (1922). It was amended again in 1921, in response to the nineteenth amendment to the federal constitution, granting women the right to vote. *Wilkinson v. State*, 197 Ind. 642, 151 N.E. 690, 691 (1926). It was again amended in 1976 after a series of federal court decisions invalidated Indiana’s six month residency requirement in the state and its 60 day residency requirement in the township. *Affeldt v. Whitcomb*, 319 F.Supp. 69 (N.D.Ind.1970), *aff’d* 405 U.S. 1034 (1972) (six months in State residency requirement); *Jackson v. Bowen*, 420 F.Supp. 315 (S.D. Ind. 1976) (striking down township residency requirement). A 1976 amendment conformed Art. II, §2 to the twenty-sixth amendment to the federal constitution giving 18

year-olds the right to vote. *Gallagher v. Indiana State Election Board*, 598 N.E.2d 510, 513 (Ind. 1992).

B. The General Assembly cannot add to Art. II, §2's qualifications.

Legislative power, though broad, is limited by constitutional inhibitions, which act as a check on legislative overreaching. These inhibitions may be either express or implied. When the constitution declares how a fundamental right such as voting may be exercised, it impliedly prohibits its exercise in some other way. *State of Indiana v. Dearth*, 201 Ind. 1, 164 N.E. 489, 493 (1929) (citing *Morris v. Powell*, *supra*). Any person who possesses all of the constitutional qualifications prescribed by Art. II, §2 and who is a legally registered voter pursuant to Art. II, §14, is entitled to vote and to have that vote counted, notwithstanding any law passed by the Indiana legislature to the contrary. Where “qualifications” are set forth in the constitution, short of a constitutional amendment no additional qualifications can be imposed. *McGonigle*, 193 N.E.2d at 249; *Morris*, 25 N.E. at 227 (“The legislature can enact only such a law concerning the right of suffrage as the constitution authorizes”) (Elliott, J., concurring). This view is not unique to Indiana. *See, e.g., Wilkinson v. Queen*, 269 S.W. 2d 223, 225 (Ky. Ct. App. 1954) (“It is a generally accepted rule that the enumeration in a state constitution of the classes of citizens who shall be permitted to vote is considered...as a complete and

final test of the voting privilege The Legislature can neither take from, nor add to, the qualifications there set out unless the power to do so is expressly, or by necessary implication, conferred upon it by the constitution itself”). This view is shared by the federal courts. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829-39 (1995) (holding that term limits constituted an unconstitutional additional qualification for federal legislative office). *See also, Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the qualifications clause of Art. I, § 2, cl. 2 of the federal constitution provides an exclusive list of the qualifications to be a member of Congress).

1. The Photo ID Law is not a times, places and manner procedural regulation but instead one that imposes a new property qualification on the right to vote.

The limitations in Indiana’s constitution do not, of course, prohibit Indiana from passing legislation to regulate the conduct of elections to insure that they are fair, efficient and impartial. Under the federal constitution, Art. I, §4, cl. 1, Indiana has a broad power to prescribe the times, places and manner of holding federal elections, which power is matched by state control over the election process for state and local offices, consistent with limitations placed by the first amendment and other provisions of the federal constitution. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 222 (1989).

The question before the trial court, and now before this Court, is whether the Photo ID Law is a procedural regulation merely regulating the means by which

the franchise is exercised or, as the League contends, it is one that adds a new substantive voting qualification not authorized by the Indiana Constitution.

A “qualification” is an attribute which must be met. It is a “condition or circumstance which must be satisfied”. *Webster’s II New Riverside University Dictionary* 961 (1984) (quoted in *Geberding v. Munro*, 134 Wash.2d 188, 949 P.2d 1366, 1371-72 (1998) (holding that term limits imposed by the legislature on officeholders were qualifications for office in the same manner as age, citizenship and residency)). That the Law constitutes a “qualification” is demonstrated by the practical effect upon a voter who cannot produce the required form of identification --her provisional vote will not be counted. It is also demonstrated by Indiana supreme court precedent construing Art. II, §2.

Over a century ago, our supreme court first ruled that a qualification on the right to vote can include even a well-intentioned law which requires some but not all voters to produce at the polls a particular tangible document to establish their entitlement to vote. In *Morris v. Powell*, the 1888 law under challenge excluded from voting any otherwise qualified voters who had been out of the state on business for six months or more prior to an election, unless they produced at the polling place a certificate from the county auditor certifying that the voter was on the tax rolls and was still a taxpayer in the county. *Morris*, 25 N.E. at 221-22. Our supreme court struck down that law, finding that the law added a “property qualification to a certain class of voters”, in violation of Art. II, §2. *Id.* at 223. In so doing our supreme court observed that:

That, when the people by the adoption of the constitution, have fixed and defined in the constitution itself what qualifications a voter shall possess to entitle him to vote the legislature cannot add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. *The principle is elementary that when the constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment.* That our constitution does define the qualification of voters, and that the part of section 13, *supra*, providing that certain persons shall make proof of the fact that they are taxpayers of the county, is an *attempt to add an additional qualification... and it is therefore unconstitutional and void.*

Id. (emphasis added). *Morris* was decided after the 1881 amendment adding Art. II, §14 to the constitution. This provision granted the legislature the authority to enact a system of registering voters, authority previously not held by the general assembly.⁴

Our supreme court declared void the election law at issue in *Morris* because the law disenfranchised every person too ill to attend the board of registration, and burdened some voters by “unreasonably and unnecessarily requir[ing] persons.... to return home to register, as well as to vote, *making two trips, when only one ought to be required.*” *Id.* at 225 (quoting *Dagget v. Hudson*, 43 Ohio 548, 3 N.E. 538)(emphasis added)). The court also held that the 1888 law was unconstitutional because it “require[d] proof of qualifications to vote, which the voter under the constitution does not have to possess” and in so requiring imposed “extra burdens and hardships on these classes of voters [those required to comply

⁴ Art. 2, §14(c) now provides: “The General Assembly shall provide for the registration of all persons entitled to vote.”

with its terms].” *Morris*, 25 N.E. at 225-26. While our supreme court expressed “regret to declare void any law having for its object the purity of the elections,” it determined that it could not “so far forget our duty as to uphold the laws so plainly in conflict with the fundamental law of the state as the section of the law under consideration.” *Id.*⁵

In the present case, the trial court declared the Photo ID Law to be a mere “procedural regulation.” (App. 6). It erred in so holding, as the Law imposes a new property “qualification” on voting. It is not a mere “times, places and manner” procedural regulation, such as a law setting the hours for holding elections or a law specifying that voting shall take place by paper ballot or electronic machine, or a law establishing the locations of polling places. The Law

⁵ Concurring in *Morris*, Justice Elliott used even more forceful language:

The legislature can enact only such a law concerning the right of suffrage as the constitution authorizes....The question is one of power. If the constitution such enactments as those contained in section 13, the power exists, and the section must stand; if the constitution does not authorize such a law the power does not exist, and the section must fall...The power which the general assembly assumed to exercise is not an ordinary legislative power, for, in assuming to legislate upon the subject of the qualifications of voters, that body entered into the domain of those in whom original power resides, and from whom all legislative powers are derived. *The people control the subject of the right of suffrage, and legislative assemblies have only such power over that subject as the people have granted them by the organic law. That the legislature cannot add to the qualifications of voters is a proposition upon which there is no diversity of opinion.*

Morris, 25 N.E. at 227 (emphasis added).

is a substantive qualification because it imposes burdensome and exclusionary conditions on the right to vote of constitutionally eligible registered voters.

If a voter is unable to produce and display the narrow form of photographic identification at the polls on election day or, within ten (10) days thereafter at the office of the county clerk, she will not have her vote counted in the final tallies. Thus, just as not being at least 18 years of age, a resident of the precinct for at least thirty (30) days, or a citizen would disqualify a person from participation in the electoral process, so too does the failure of an otherwise constitutionally qualified voter to display the prescribed form of photographic identification. Unlike requiring voters to register, the Law does not merely seek to insure that only qualified voters vote; rather, it disqualifies with a broad brush any registered voter, including one who meets each of the constitutional qualifications for voting, solely because that voter does not possess or is unable to display a certain document at the polls, and even though the voter is willing to swear out an affidavit that she is who she claims to be. In short, it requires that certain in-person voters provide a certain kind of “proof” of who they are, and thus is an attempt to add an additional qualification to the right to vote.

Like the tax document required to vote challenged in *Morris v. Powell*, the requirement of government identification with an expiration date and photograph is a “qualification” because it imposes an unnecessary and arbitrary burden on

some voters, particularly non-drivers but also students⁶, and it disqualifies those otherwise eligible voters who are unable for any reason to comply with its requirements from having their provisional votes counted.

In assessing whether a requirement for voting is procedural or substantive, and thus subject to the strictures of Art. II, § 2, our supreme court has also examined whether the challenged election law unnecessarily burdens the voter's exercise of her right to vote. For example, the supreme court in *Morris v. Powell* made reference to the "two trips" requirement and the other burdens imposed by the law struck down in that case. In *Blue v. State ex rel. Brown*, 206 Ind. 96, 188 N.E. 583, 591 (1934), *rev'd in part on other grounds*, *Harrell v. Sullivan*, 220 Ind. 108, 40 N.E.2d 115 (1942), the supreme court observed that the practice of requiring a voter to verbally identify herself and sign her name on the pollbook to enable a signature comparison was not an unconstitutional additional qualification because it was uniformly applied, imposed "no burden upon the one challenged" and a challenged voter was allowed to "take the oath as other challenged voters, and he is then permitted to vote."

The burdens and hardships imposed by the Law on some Indiana voters subject to its requirements are self-evident. To secure an Indiana photographic identification card, a would-be voter must present the original or certified copy of

⁶ The Law arbitrarily imposes those burdens on college students depending on where they are matriculating. For example, voting officials in Tippecanoe County have agreed to accept Purdue student ID cards notwithstanding the lack of an expiration date, while other student ID cards are not acceptable due to the lack of an expiration date. See <http://www.wsbt.com/news/election/2008/17855654.html>.

her birth certificate, a certificate of naturalization, a U.S. Veteran's photo identification, a U.S. military photo identification, or a U.S. passport. 140 Ind. Admin. Code §7-4-3. (App. 11). Indiana counties charge between \$3-\$12 for a birth certificate, and in some states the cost is much higher. The total fees for a U.S. passport are approximately \$100. (App. 11). Persons born at home and of a certain age, particularly those in another state, cannot simply go down to the Health Department and get a copy of their birth certificate. A woman who marries and fails to change her name with social security must make an additional trip to the social security office in order to secure an Indiana identification card or license.

A person who fails to or cannot present the required form of ID either at the polls or later at the office of the county clerk will be prevented from having his vote counted in the final tally, thus requiring trips to the county clerk's office and/or the Indiana Bureau of Motor Vehicles and/or the social security office to comply with the Law's requirements and to have one's vote counted. The Law is burdensome, exclusionary and disqualifying as to some voters. By imposing a new qualification on the right to vote, and disqualifying the provisional votes of those who are unable to comply with its requirements, the Law transgresses Art. II, §2.

Both the plurality and dissenting opinions in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008)(holding that the Law on its face did not offend the federal constitution), although disagreeing as to the severity of those

burdens, acknowledged that the Photo ID Law selectively imposes some burdens on the right to vote. In his plurality opinion upholding the Law's facial constitutionality under the first and fourteenth amendments to the federal constitution, speaking for two of his colleagues (Chief Justice Roberts and Justice Kennedy) Justice Stevens observed that the Law "imposes some burdens on voters that other methods of identification do not share." *Crawford*, 128 S. Ct. at 1620. In dissent, Justice Souter (joined by Justice Ginsburg) opined that the burden imposed on voters by the Law "translates into an obvious economic cost (whether in work time lost, or getting and paying for transportation) that an Indiana voter must bear to obtain ID" and that those costs "are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile." *Id.* at 1630. Justice Souter thus concluded that there was no reason to doubt that "a significant number of state residents will be discouraged or disabled from voting" by the Law's requirements. *Id.* at 1634.

Indeed, the Law has already prevented or discouraged a number of registered and otherwise eligible voters in Marion County and throughout the state from casting a vote that was counted. For instance, in the 2007 municipal election in Marion County, at least 34 persons arrived at the polls and presented themselves for voting but without the required form of photographic identification. Each of those voters cast a provisional ballot, but of those 34 provisional ballots, 32 of the voters did not produce the required form of photographic identification within the

time period allotted by the Photo ID Law, and thus their votes were not counted. Most of those voters had voted for several years at the same location. (App. 13).

Further, in the 2008 primary election 12 nuns in St. Joseph County were not allowed to cast a regular or provisional ballot because they did not have the required form of photographic identification required by the Law. (App. 13). Additional Indiana citizens have been denied the right to vote, or been discouraged from voting by the Law's requirements, because their driver's license or other form of compliant photographic identification was either lost or stolen, or the voter forgot to bring the required form of identification to the polls on election day. (App. 14).

Like the county auditor certificate found to be an unconstitutional qualification in *Morris v. Powell*, the Photo ID Law's new requirement that voters produce a particular form of tangible identification in order to have the voter's ballot counted in the final tallies adds a qualification to the exercise of the franchise not explicitly or expressly authorized by Art. II, §2 or §14 of the Constitution. Moreover, the burdens associated with obtaining that form of identification fall disproportionately on those voters who are non-drivers, who must gather up the necessary birth certificate and other required documents and then make special trips to the Indiana Bureau of Motor Vehicles in order to obtain the document now required as a qualification to vote and have one's vote

counted.⁷ *Crawford*, 128 S. Ct. at 1643 ((Breyer, J. dissenting) (noting that the Indiana Law “imposes a disproportionate burden upon those eligible voters who lack a driver’s license or other statutorily valid form of ID”).

2. The Law is not a registration law authorized by Art. II, §14(a) of the Indiana Constitution.

Rokita argued below that the Law is no more an additional qualification than requiring voters to register. However, while the people of Indiana in Art. II, §14 (c) gave the Legislature the right to require a system of voter registration, the Photo ID Law has no similar constitutional underpinning. It cannot be claimed that the Photo ID Law is an element of the voter registration system.

Title 3, Article 7 of the Indiana Code sets forth the system of voter registration. I. C. §3-7-10-1 provides: “This article is enacted by the general assembly to implement Article 2, Section 14(c) of the Constitution of the State of Indiana, which requires the general assembly to provide for the registration of all persons entitled to vote.” None of the provisions of the Photo ID Law connects with the qualifications to vote that the registration system is intended to verify. The Law does not provide that the required form of photographic identification

⁷ In his dissent, Justice Souter observed that to strike down this Law would simply return Indiana to “time-tested systems [that] were in place to detect in-person voter impersonation fraud”, such as poll worker familiarity with residents of the neighborhood, signature comparisons, and extant criminal provisions. *Crawford*, 128 S. Ct. at 1639.

contain a birth date, current address or statement regarding citizenship. Pollworkers charged with requiring the voter to present the identification are not even required to verify the address, age or citizenship as might be listed on the identification.

Under the Indiana Constitution, age, citizenship and residency are the exclusive voting qualifications. A qualified voter must also be registered to vote. That is to say, a voter without the requisite age, citizenship or residency qualifications, or one who is not registered, may not fully participate in public elections by casting a vote that will be counted. A voter without the requisite photo ID may cast a provisional vote but that provisional vote will not be counted.

Like the law struck down in *Morris v. Powell*, the Law imposes a property “qualification” on the right to vote. The people of Indiana in their constitution have expressly amended the Indiana Constitution to authorize the General Assembly to provide for voter registration by adding Art. II, §14(c), while the Photo ID Law, which plays no part in establishing a voter’s qualifications, places conditions on the right to vote and lacks any similar authorization in the Indiana Constitution.

3. The Law is also constitutionally flawed because its requirements are not uniformly applicable to all voters.

Our supreme court also has made clear that any voting qualification must be *uniform* and not selectively applied to an arbitrary class of voter:

The qualifications of voters must be uniform. One voter must possess the same as another, and he need possess no more. Where, as under our Constitution, registration is a qualification, one voter can not be required, by a law, to register, while another has the right to vote without registering. Indeed, such a discrepancy would invalidate a law even if the Constitution was silent as to registration.

Morris, 25 N.E. at 224 (emphasis added). “All regulations of the elective franchise, however, must be reasonable, *uniform*, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.” *Blue v. State ex rel. Brown*, 188 N.E. at 588, *rev’d on other grounds by Harrell v. Sullivan*, *supra* (emphasis added). As is discussed *infra*, the Law is not universally applicable to all voters in that it does not apply to voters who mail in an absentee ballot or those who live in a state-certified residential facility housing the voter’s polling place. It thus fails the Indiana Constitution’s requirement under Art. II, §2 that voting laws, particularly those which directly condition the voting privilege, be uniformly applicable to all voters.

4. The Law is unnecessary because Indiana has no history of imposter voting at the polls on election day.

The State seeks to justify the Photo ID Law as being necessary to prevent fraud by in-person voters; however, there have been no cases of in-person voting fraud in Indiana. *Crawford*, 128 S. Ct. at 1618 (Stevens, J., plurality opinion) (“The record contains no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history”). *See also* 128 S. Ct. at 1637 (Souter, J., dissenting) (“[T]he State has not come across a single instance of in-

person voter impersonation fraud in all of Indiana’s history”). Yet in spite of the fact that there have been documented cases regarding fraud involving the casting of absentee ballots by mail, *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004), it irrationally exempts from its reach anyone casting an absentee ballot by mail. Thus, anyone wishing to cast a fraudulent vote need only do it by mail as the Photo ID Law does nothing to prevent fraudulent voting by persons mailing ballots to the election board. The irrationality of this scheme is discussed more fully in the League’s discussion, *infra*, explicating how the Law also violates Art. I, § 23 of Indiana’s constitution.

III. THE PHOTO ID LAW VIOLATES ART. 1, § 23 OF THE INDIANA CONSTITUTION

Art. 1, §23 of the Indiana Constitution provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” The analysis to determine whether a law infringes upon the rights promised by Art. 1, §23 of the Indiana Constitution is a two step process.

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).

The League maintains that the requirement of presenting photo identification is not reasonably related to the inherent characteristics that distinguish in-person and absentee voters. Additionally, among the in-person voters, the photo identification requirement is not reasonably related to the differences between in-person voters with state or federally issued identification with or without an expiration date and/or photograph. Further, for all these classifications, the preferential treatment is not equally available to all voters.

A. The disparate treatment is not reasonably related to the claimed inherent characteristics.

The first prong of the analysis consists of two steps. To determine whether the disparate treatment is reasonably related to the inherent differences of the classifications at issue, the Indiana supreme court has held “such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and [whether] the disparate treatment accorded by the legislation is reasonably related to such distinguishing characteristics.” *Collins*, 644 N.E.2d at 78-79. “We believe that this requirement incorporates and satisfies the often expressed concerns that such legislative classifications be ‘just,’ ‘natural,’ ‘reasonable,’ ‘substantial,’ ‘not artificial,’ ‘not capricious,’ and ‘not arbitrary.’” *Id.*

As Chief Justice Shepard has observed:

The first step in Indiana's two-part analysis begins with the same question as federal equal protection doctrine: what is the claimant's classification *vis a vis* the challenged governmental act? The similarity does not run deep, however, because we do not strain to

pigeonhole the claimant into a suspect or semi-suspect class. Instead, by utilizing just one test under the Equal Privileges and Immunities Clause, and thus a single standard of review, we intend merely to determine whether or not there is disparate treatment under the governmental act. If there is not, then the claimant cannot prevail and one need not continue the analysis....

Thus, Indiana's classification analysis looks not to who claims disparate treatment, but first to what disparate treatment is claimed. Where disparate treatment is found, an inquiry into the reasonableness of the classification to the legislative purpose will be undertaken before moving to the second part of the test. Additionally, significant to this discussion, this analytical process has its source within our distinctive constitutional jurisprudence.

A New Generation: The Mature Nature of State Constitution Jurisprudence, 30 Val. U.L. Rev. 421, 453-454 (1996).

As discussed *supra*, the only voters required to present photo identification are those voters who vote in-person. *See, e.g.*, I.C. §3-11-8-25.1. While the League and Rokita agree there are inherent differences between the casting of a ballot in-person and voting by mail-in absentee, *See, e.g., Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006), the League maintains that these differences do not reasonably relate to the requirement that in-person voters, but not mail-in absentee voters, present a specific form of identification. Furthermore, the League also contends that there are no real inherent differences between classes of persons voting in-person who have a state or federal identification with or without an expiration date and/or a photograph. The League also contends that any differences that might distinguish the various classes, do not reasonably relate to the claimed distinctions that allow some persons to vote and others to not vote.

1. **The requirement that in-person voters verify their identity using specific identification and that mail-in absentee voters are not even required by law to affirm their identity under penalty of perjury, does not present distinctive, inherent characteristics that rationally distinguish the unequally treated class.**

The first issue raised is whether the differences between casting an absentee mail-in ballot and voting in person serve as a rational distinction requiring the in-person voter to provide proof of identification while the absentee mail-in voter need only execute an affidavit affirming that he/she is eligible to vote in the precinct but which by law does not require the voter to affirm under penalty of perjury that the voter is who he/she claims to be.

- a. **The claimed distinctions between mail-in absentee voting and in-person voting do not support the claimed purpose of the Photo ID Law.**

A voter who votes mail-in absentee is not required to provide proof of identification. To vote an absentee ballot by mail, the voter must meet certain criteria such as serving as a poll worker on election day, being out of the county on election day, or being an elderly or disabled voter. *See*, I.C. 3-11-10-24(a)(1)-(10).⁸

⁸ Indiana Code 3-11-10-24(a)(1)-(10) provides a voter may vote mail-in absentee if:

- (1) The voter 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.
- (2) The voter will be absent from the precinct of the voter's residence on election day because of service as:
 - (A) a precinct election officer under IC 3-6-6;
 - (B) a watcher under IC 3-6-8, IC 3-6-9, or IC 3-6-10;
 - (C) a challenger or pollbook holder under IC 3-6-7; or

Where there are differences between absentee voters and in-person voters due the process employed in casting the ballot, these differences are not reasonably related to the purpose of the Law. The differences between mail-in absentee ballots and in-person ballots were discussed in *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006). In *Horseman*, the trial court declared that I.C. §3-12-1-13 was unconstitutional under Art. 1, §23 of the Indiana Constitution because it did not allow absentee ballots lacking two sets of clerks' initials to be counted in a recount while in-person ballots lacking two sets of clerks' initials could be counted in a recount. The Indiana supreme court found that I.C. §3-12-1-13 was reasonably related to the inherent differences between absentee mail-in ballots and in-person ballots because the mail-in ballots required additional security, noting as follows:

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- (D) a person employed by an election board to administer the election for which the absentee ballot is requested.
 - (3) The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during the entire twelve (12) hours that the polls are open.
 - (4) The voter is a voter with disabilities.
 - (5) The voter is an elderly voter.
 - (6) The voter is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury during the entire twelve (12) hours that the polls are open.
 - (7) The voter is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open.
 - (8) The voter is eligible to vote under IC 3-10-11 or IC 3-10-12.
 - (9) The voter is prevented from voting due to observance of a religious discipline or religious holiday during the entire twelve (12) hours that the polls are open.
 - (10) The voter is an address confidentiality program participant (as defined in IC 5-26.5-1-6).

First, we find that there are indeed inherent differences between all absentee voters and Election Day voters. By their very nature absentee ballots differ from Election Day ballots. See *Ind. Code* § 3-11-4-1. ... Because the absentee voter is not present at the Election Day polling site, the absentee voter is not exposed to the extensive precautions followed by Election Day officials to guard the integrity of the ballots.[] The fact that absentee ballots reach the hands of election officials outside of the confines of the Election Day polling place necessitate statutory procedures for receiving, verifying, storing, transporting, and counting these ballots. See, e.g., *Ind. Code* §§ 3-11-10-1, 3-11-10-3 to -22.

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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. For example, Election Day polling sites operate as closed environments. *Only* precinct elections officers (including the election sheriff, inspector, two judges, poll clerks, and assistant poll clerks), deputy election commissioners, authorized watchers, and precinct pollbook holders are permitted in the Election Day polling place except for voters casting ballots and their underage children. *Ind. Code* § 3-11-8-15; *Ind. Election Day Handbook* at 4. If a ballot originates from a particular precinct polling place, every election worker present is easily discerned. It is also known that each of those election workers (with the possible exception of the election sheriff) was present at the site for the entirety of Election Day. *Ind. Code* § 3-11-8-12; *Ind. Election Day Handbook* at 3. But absentee voters might encounter many other individuals while casting their ballots at home or in the clerk's office, thus allowing greater opportunity for outside influences to impact their votes. And absentee voting may take place over a period of up to ninety days, creating situations in which completed ballots in a precinct are received by different county employees in the presence of a variety of individuals. *Ind. Code* §§ 3-11-4-4, 3-11-4-18. *Thus it is reasonable that the legislature believed it in the interests of Indiana voters to more stringently govern absentee balloting.*

Horseman, 841 N.E.2d at 172-173 (emphasis added).

Thus the recognized difference between mail-in absentee ballots and in-person ballots is that the nature of absentee ballots requires a heightened security. These differences do not rationally support imposing additional identification requirements upon Hoosiers who vote in-person at the polling place while imposing no identification requirements upon mail-in absentee voters, who are not even required to execute an affidavit regarding their identification.

b. The disparate treatment accorded in-person voters and the preferential treatment accorded absentee mail-in voters under the Photo ID Law is not reasonably related to the distinctions between the classifications

The next issue raised is whether “the difference in legislative treatment [of in-person voters and mail-in absentee voters] is reasonably related to the difference between the classes.” *See, Humphreys v. Clinic for Women*, 796 N.E.2d 247, 253 (Ind. 2003). In other words, the relevant inquiry is whether the disparate treatment accorded by the Photo ID Law is reasonably related to the characteristics which distinguish mail-in absentee voters and in-person voters.

Under Indiana law, after an absentee mail-in voter receives his/her ballot and before returning it to be counted, the voter must execute an affidavit, affirming under penalties of perjury, such information as “[t]he name of the precinct and township (or ward and city or town) in which the voter is [] a resident of” or in which the voter is entitled to vote; the voter’s address; the date; and, the voter’s signature. *See*, I.C. §3-11-4-21(a)(1)-(6). Nowhere does Indiana law expressly require the affiant voter to affirm his/her identity.

In contrast, an in-person voter must produce current or recently expired Indiana or federal identification containing their name, photograph and an expiration date. To secure the identification, the voter must navigate and comply with the various requirements discussed *supra*, which can prove to be an onerous burden upon certain voters, particularly those without private modes of transportation and who live in rural areas. In some of these rural areas, the Indiana Bureau of Motor Vehicles (“BMV”) has closed local offices so in some counties there is no BMV.

Under the Photo ID Law, the class receiving preferential treatment is mail-in absentee voters. The Photo ID Law expressly exempts mail-in absentee voters. I.C. §3-11-10-1.2. Yet the very characteristics that distinguish mail-in absentee voting are the same characteristics that present the greater opportunity for voter fraud. In *Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004), the Indiana supreme court “was compelled” to order a special election in light of a deliberate series of actions that made it impossible to determine the winner and which constituted the most “egregious circumstances.” Those “deliberate actions” involved absentee ballots and included false statements made under oath such as:

d) the use of vacant lots or former residences of voters on applications for absentee ballots;

* * * * *

h) the routine use of false representations-usually the indication that the applicant "expected" to be absent from Lake County on [election day]; [and]

* * * * *

i) votes cast by employees of the City of East Chicago who simply did not reside in East Chicago . . .

Id. at 1145. Reading *Pabey* and *Horseman* together shows that where there is no security system to prove the identity of a voter casting a mail-in absentee ballot, the opportunity for fraud is even greater.

Nor can it be claimed that the disparate treatment accorded by the Photo ID Law to in-person voters is reasonably related to the inherent differences between mail-in absentee voters and in-person voters because the Photo ID Law most directly addresses the threat of voter impersonation presented by in-person voting. As discussed *supra*, there have been no cases of in-person voter fraud or impersonation in Indiana. However, if a person wants to vote under a name that is not his or her own, then all that person has to do is cast a mail-in absentee ballot. It is much easier to vote fraudulently by mail-in absentee ballot than run the risk of being recognized as an imposter at the polling place. Yet the Photo ID Law grants preferential treatment to mail-in absentee voters and not to in-person voters.

The distinguishing characteristics between mail-in absentee and in-person voting are premised upon the recognition that mail-in absentee voting creates the greater opportunity for fraud and thereby requires more security. The Photo ID Law requirement that in-person voters must present a specified form of identification to vote while mail-in absentee voters are not even legally required to execute an affidavit regarding their identity, is not a requirement that is reasonably

related to the characteristics that distinguish mail-in absentee from in-person voting.

2. The requirement that in-person voters verify their identity using specific identification and that other in-person voters holding state or federal identification that lacks an expiration date and/or a photograph does not present distinctive, inherent characteristics that reasonably distinguish the unequally treated class.

The requirement of an expiration date on state or federal identification, or the lack of a photograph on identification of persons who have established their identity with the state of Indiana or federal government, are not reasonably related to the differences between voters who have identification with an expiration date or photograph.

The Photo ID Law requires that the identification be issued by the Indiana or federal government and contain a photograph of the identification holder, the holder's name and a date upon which the identification expires. I.C. §3-5-2-40.5. The proof of identification is not required to show the residency, age or citizenship of the bearer. Foreclosed from voting are persons who hold Indiana or federal identification that lacks an expiration date and/or photograph.

As this case was dismissed pursuant to T.R. 12 (B)(6), the opportunity to present evidence was not available the League. But there are many examples of the type of in-person voter classifications for which there are no inherent differences but yet receive disparate treatment.

One example is the Veterans Universal Access Identification Card which is issued to veterans entitled to benefits offered by the Veterans Administration. The card contains the veteran's name and photograph along with other information. *See, e.g.,* <http://www.va.gov/oirm/CIO/visninter/decoste.htm> (last visited Feb. 26, 2009). What the card does not contain is an expiration date. *Id.* Hundreds of millions of dollars of benefits are disbursed using the Veterans Universal Access Identification Card yet the holders of these cards cannot use the card to vote. At the same time, military identification cards with expiration dates of "INDEF" can be used to vote. *See, http://www.in.gov/sos/elections/hava/pdf/EDH_08.pdf*, p. 10 of the publication. There is no difference between a military photo identification bearing an expiration date of "indefinite" and a military photo identification for indefinite veterans' benefits but which does not bear an expiration date of "indefinite." By their very nature, once earned, veteran's benefits last until the death of the veteran. Yet these veterans, who earned these benefits by serving their country, cannot vote in-person in Indiana elections using the Veterans Universal Access Identification Card. The Photo ID Law's requirement of an expiration date is not reasonably related to the differences between state and federal identification with and without an expiration date.

Elderly voters cannot use their Medicare identification cards to vote because the cards lack a photograph and expiration date, despite the fact that the card secures millions of dollars in benefits for qualifying Indiana voters. The difference between a senior citizen with an Indiana identification card and a senior

citizen with a Medicare card is not a real difference. Both classifications of voters were required to prove to the State of Indiana their identification yet the Indiana Photo ID Law effectively presumes that the voter presenting the Medicare card is not necessarily who he or she claims to be.⁹

Exempted from the requirements of the Photo ID Law are residents of a state licensed facility where a polling place is located.

Further, the distinctions between in-person senior citizen voters are not reasonably related to the different treatment accorded by the Law. Senior citizens who reside in state licensed facilities in which a polling place happens to be located can vote without presenting identification but senior citizens who reside in state licensed facilities in which a polling place is not located, cannot vote unless he/she presents the requisite identification. In both of these classifications, these senior citizens have not only had to prove their identification to receive their Medicare benefits but they presumably also had to present identification to be able to check into the state-licensed facility. Through happenstance, a polling place happens to be located in one facility but not another and yet this happenstance dictates who must present identification and who must not. Further, a senior citizen who receives state benefits such as Medicare but who is fortunate enough

⁹ Students enrolled at Purdue University in Tippecanoe County, Indiana are allowed to vote despite the fact that their photo student identification card lacks an expiration date. See, http://www.purdueexponent.org/?module=article&story_id=13235. Tippecanoe County has chosen to interpret the Law to mean that confirmation of a student's current enrollment on a Purdue database is the equivalent of an expiration date. At the same time, no such database or accommodation is made for senior citizens with Medicare cards or veterans with Universal Access Cards.

to be able to continue living in the community at large and not in a state licensed facility cannot vote without the requisite identification even though, like the state licensed facility residents, the senior citizen had to prove his/her identity to receive Medicare benefits.

The requirement of a photograph on the federal or state issued identification is also not reasonably related to preventing in-person voting fraud. Indiana provides for the issuance of photo-exempt identification cards and driver's licenses for those whose religion prohibits them from being photographed. After each and every election, voters holding such identification must again prove to the county election board their religious basis for not being photographed, *see* I.C. §3-11.7-5-2.5(c)(2)(B). As even Justice Stevens noted in his opinion affirming the lower court:

It is . . . difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballots subject to later verification in every election when the BMV is able to issue these citizens special licenses that enable them to drive without any photo identification. *See Ind. Code Ann. 9-24-11-5(c) (West Supp. 2007).*

Crawford, 128 S. Ct. at 1621, n. 19. The Photo ID Law requirement of a photograph for persons who, for religious reasons, are exempted from having a photograph on their identification card is not reasonably related to the differences from those identification cards with a photograph.

If someone wants to impersonate a voter over the age of 65 or an Amish voter or Mennonite voter, the chance of that impersonator being able to secure the

Medicare card or the state identification card without a photograph of another legally registered voter is very marginal. Rather than going to the trouble of stealing the identification card of another, if someone wants to vote fraudulently, as previously discussed, then all he or she need do is simply make application for an absentee ballot and not worry about having to present any identification.

On the basis of the foregoing, as the disparate treatment accorded in-person voters is not reasonably related to the Law, it is unconstitutional under Art. I, §23.

B. The preferential treatment accorded some classes of in-person voters is not uniformly applicable and equally available to all persons similarly situated.

The second prong of the analysis “embraces concerns, frequently expressed in Section 23 cases, regarding the need for uniformity and equal availability of the preferential treatment for all persons similarly situated.” *Collins*, 644 N.E.2d at 79. “The second prong of the *Collins* test is not a test that goes only to the facial validity of the statute . . . when . . . the language of the relevant statutory provisions creates the primary classifications . . . but does not by its terms expressly create the assertedly unfair or disadvantaged subclassification . . . the question presented by the second prong of *Collins* is whether the statute is unconstitutional *as applied*.” *Martin v. Richey*, 711 N.E.2d 1273, 1281 (Ind. 1999). Like the first prong of the analysis under Art. 1, §23, “the second prong is described as comprising two elements: “[a] any privileged classification must be open to any and all persons who share the inherent characteristics [that] distinguish and justify the classification . . ., [and] [b] the special treatment

accorded to any particular classification [must be] extended equally to all such persons." *Ledbetter v. Hunter*, 842 N.E.2d 810, 813 (Ind. 2006). The League maintains that the classifications of persons subjected to the Photo ID Law are unconstitutionally treated.

As discussed *supra*, the identification required to vote is not equally available to all voters. The truth of the matter is that in this post-9/11 world, the requirements which must be met to secure even a simple Indiana identification card have heightened. The difficulty in securing an identification card is dependent upon many factors, i.e., whether a married or divorced woman has changed her name with the Social Security Administration, whether a person was born at home or in a hospital, and whether a person was born in-state or out-of-state, etc. If an individual can live in Indiana without the very specific identification required by the Photo ID Law, e.g., an Indiana identification card, then in order to vote, the person must secure the identification for the sole purpose of voting and not necessarily with the same degree of ease as another individual. Not all voters are eligible to vote by a mail-in absentee ballot. Thus the Photo ID Law, for purposes of this motion to dismiss, is unconstitutional as applied.

Not all in-person voters are offered the same privilege. For example, in granting preferential treatment to persons residing in state-licensed facilities with polling places, the Law does not grant similar relief to the elderly who are able to remain out in the community but who would have the same difficulties in procuring the requisite identification. In rural communities around Indiana there

are the elderly persons who have voted for decades in the same polling place but who are now prohibited from voting in-person because they do not have the requisite identification. There are the elderly whose families are providing them with care but who, again, cannot vote in-person because they lack the governmental identification that contains a photograph and/or expiration date.

We cannot be dismissive of the desire by elderly voters to participate in the traditional American civic event of voting in-person¹⁰ As Justice Souter recognized in his dissenting opinion in *Crawford*:

[T]here are crucial differences between the absentee and regular ballot. Brief for AARP et al. as *Amici Curiae* 12–16. Voting by absentee ballot leaves an individual without the possibility of receiving assistance from poll workers, and thus increases the likelihood of confusion and error. More seriously, as the Supreme Court of Indiana has recognized, Indiana law “treats absentee voters differently from the way it treats Election Day voters,” in the important sense that “an absentee ballot may not be recounted in situations where clerical error by an election officer rendered it invalid.” *Horseman v. Keller*, 841 N. E. 2d 164, 171 (2006). The State itself notes that “election officials routinely reject absentee ballots on suspicion of forgery.” Brief for Respondents in No. 07–25, p. 62. The record indicates that voters in Indiana are not unaware of these risks. One elderly affiant in the District Court testified: “I don’t trust [the absentee] system. . . . Because a lot of soldiers vote like that and their votes wasn’t counted in the last election according to what I read, absentee.” App. 209 (deposition of David Harrison).

It is one thing (and a commendable thing) for the State to make absentee voting available to the elderly and disabled; but it is quite another to suggest that, because the more convenient but less reliable

¹⁰ Persons age 65 and older constitute “elderly voters.” I.C. §3-5-2-16.5. “Elderly voters” can choose to vote in-person or to vote mail-in absentee. *See*, I.C. §3-11-10-24(a)(5). However, the Photo ID Law means that many of these elderly voters cannot choose whether to vote in-person or by mail. An example are the twelve elderly nuns discussed *supra*.

absentee ballot is available, the State may freely deprive the elderly and disabled of the option of voting in person.

Crawford v. Marion County Election Board, 128 S. Ct. at 1629, n.4.

As discussed *supra*, Purdue students, whose photo identification lacks an expiration date can vote in Tippecanoe County because the Photo ID Law has been interpreted to allow students using the Purdue identification card to vote if their name appears in a database made accessible on election day. Yet students at other state universities are not afforded the same opportunity. And, students at private universities have absolutely no opportunity to use their student identification cards to vote, regardless of whether the card contains an expiration date.

As alleged in the amended complaint, the twelve nuns in South Bend who reside in a private nursing home were not allowed to vote because they lacked the requisite identification. (App.13). Yet if the nuns had resided in a state licensed facility in which a polling place was located, they could have voted without any identification. Other elderly persons who live in state-licensed facilities but in which there is no polling place, cannot vote without the requisite identification card unlike their counterparts who live in a state-licensed facility where the county happens to locate a polling place.

Upon the basis of the foregoing, the Photo ID Law is unconstitutional as applied under Art. I, §23.

CONCLUSION

While the people of Indiana are free to amend Article II, §2 to require, as a condition to having one's vote count, that a voter produce a certain limited type of photographic identification, that qualification cannot be enacted by the legislature because it is nowhere authorized by the "organic law of the state." *State ex rel. McGonigle v. Madison Circuit Court*, 193 N.E.2d at 249. Irrespective of the wisdom or efficacy of this Law, or the severity of the burdens it imposes on the exercise of the franchise, it is a "qualification" applicable to some but not all voters, which requires some to make needless multiple trips in order to exercise the fundamental right to vote. Such a new voting qualification may be accomplished only by amending the constitution and not by statutory enactment. The Law violates Art. II, §2 of the Indiana Constitution. It also violates Art. I, §23 of the Indiana Constitution.

The Photo ID Law also violates Art. I, §23 of the Indiana Constitution. The disparate treatment accorded in-person voters and the various classifications of in-persons voters are not reasonably related to the characteristics which distinguishes these classes. The ultimate problem lies in the fact that there is no single, uniform piece of photo identification with an expiration date that is obtainable with the same degree of ease by all voters. The disparate treatment accorded by the Photo ID Law is not reasonably related to inherent characteristics which distinguish the unequally treated classes and the preferential treatment accorded some voters is not uniformly applicable and equally available to all persons similarly situated.

The League respectfully requests that this Court reverse the decision of the trial court and remand for further proceedings not inconsistent with this Court's opinion.

Respectfully Submitted,



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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

I certify that on March 2, 2009, a copy of the forgoing brief was hand-delivered to Christopher Francis Zoeller, Thomas Molnar Fisher and Heather Lynn Hagan, Office of Indiana Attorney General, 219 Statehouse, Indianapolis, IN 46204.

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ATTACHMENT A