STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D02-0806-PL-027627

LEAGUE OF WOMEN VOTERS OF INDIANA, INC.,	))
	)
Plaintiff,	)
	)
v.	)
	)
TODD ROKITA, in his official capacity as Indiana Secretary of State,	)))
	)
Defendant.	)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

The Complaint of the League of Women Voters of Indiana, Inc. claims that the Indiana Voter Identification Law, Indiana Code § 3-11-8-25.1, contravenes Article 2, § 2 of the Indiana Constitution, which provides substantive qualifications for voting, including citizenship, age, and residency. Complaint ¶¶ 11-20. As court after court has recognized, however, the Voter ID Law is a procedural election regulation, not a substantive voter qualification. Furthermore, the Indiana Supreme Court has already held that Article 2, § 2 does not preclude the legislature from enacting election regulations. For these reasons, and because as a threshold matter the Secretary of State is not a proper defendant to this challenge, this case must be dismissed.

I. The Voter ID Law Does Not Violate Article 2, § 2 of the Indiana Constitution

Article 2, § 2 of the Indiana Constitution provides that every "citizen of the United States who is at least eighteen years of age and who has been a resident of a precinct thirty days immediately preceding such election, shall be entitled to vote in that precinct[.]" The League claims the State's Voter ID Law violates this provision by creating an additional qualification to

vote. Complaint ¶¶ 11-20. The League, of course, must overcome substantial hurdles to invalidate the Voter ID Law; as a legislative enactment, the Law is presumptively constitutional. *State Education Bd. v. Bartolemei*, 434 N.E.2d 74, 76 (Ind. 1982). The League cannot overcome this presumption under any set of facts, and its claim accordingly should be dismissed. In short, the Voter ID Law is a regulation of election procedures designed to protect fair elections, not an alteration of voter qualifications, and Indiana Supreme Court doctrine forecloses this challenge.

A. The Voter ID Law advances the Indiana Constitution's guarantee of "free and equal" elections

The General Assembly's power to regulate elections and voting is grounded in the Indiana Constitution and is implicit in other accepted regulations. The power of the General Assembly to regulate election procedures arises not only from its general police power, but also from Article 2, § 1 of the Constitution, which provides that "All elections shall be free and equal," and Article 2, § 14, which provides that "the General Assembly . . . shall provide for the registration of all persons entitled to vote."

The Indiana Supreme Court has held that these clauses serve as grants of power to the General Assembly to promulgate election laws to regulate and uphold the legitimacy of elections in the state. *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 18 (1922). Inherent in the requirement of holding "free and equal" elections lies the power of the state to protect the rights of citizens to a fair and reliable electoral system in which their individual votes are not diluted by the fraudulently cast votes of others. "When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed." *Id.*; *see also Blue v. State*, 206 Ind. 98, 188 N.E. 583, 589 (1934) (holding that "free and equal" elections are those in which "every voter is allowed to cast his ballot as his own judgment and conscience dictate . . . [and when] the

vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot").

The Voter ID Law directly advances the constitutional guarantee of "free and equal" elections articulated in Article 2, § 1 of the Indiana Constitution. By preventing voter fraud, the identification requirement ensures compliance with the Article 2, § 1 mandate that each vote equally influence the result of an election. Each fraudulently cast vote dilutes the influence that each legitimately cast vote has on the election's outcome. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Voter ID Law prevents fraudulently cast votes and thereby protects each citizen's individual rights under Article 2, § 1 of the Indiana Constitution.

B. The Voter ID Law is not a voter "qualification"

The Voter ID Law is not an "additional qualification" for voting. *See* Complaint ¶ 12. It is merely a method of verifying the identity of a registered voter—the most fundamental, pre-existing voter-eligibility criterion. The framers of the United States Constitution themselves understood a distinction between laws establishing voter qualifications and those that merely regulate election procedure. Alexander Hamilton, discussing Article 1, Section 4 of the Constitution (known as the Elections Clause), distinguished between "[t]he qualifications of the persons who may choose," which are "defined and fixed in the Constitution, and are unalterable by the legislature," and authority over "the manner of elections," where States have primacy. The Federalist No. 60, at 394 (Alexander Hamilton) (Modern Library Coll. ed. 1937).

In the same way, the United States Supreme Court has distinguished voter qualification laws, which are suspect and often subjected to strict scrutiny, from fraud-prevention procedures,

which are permissible and subjected to much lighter scrutiny. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (upholding advance voter registration requirement); *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (upholding Arizona's 50-day voter registration and residency requirements and stating that "[s]tates have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect [their] electoral processes from possible frauds"). In *Rosario*, the Court described qualification laws as those laws that "totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Rosario*, 410 U.S. at 757. But with procedural rules, responsibility lies with voters: "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment." *Id.* at 758. The Voter ID Law falls squarely into the latter category.

The two opinions upholding the Voter ID Law in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), each embraced the notion that the Voter ID Law is a procedural election regulation and not a substantive voter qualification. In finding the Voter ID Law valid, Justice Stevens (writing for himself, the Chief Justice, and Justice Kennedy) and Justice Scalia (writing for himself and Justices Thomas and Alito) both describe the Voter ID Law as a "neutral" or "generally applicable nondiscriminatory regulation of voting procedure." *Crawford,* 128 S.Ct. at 1623, 1625. Not even Justices Souter and Breyer, who dissented in *Crawford*, could bring themselves to subject the Voter ID to strict scrutiny—the standard generally applicable to voter qualification laws. *See id.* at 1628, 1643.

The Voter ID Law is no more an "additional qualification" than requiring voters to register, to vote in person, or to identify themselves by any method at all. Surely all would agree

that some identification requirement at the polls is necessary, and no principled distinction separates the Voter ID Law from the identification requirements—including announcing one's name and providing one's signature on the poll book—that existed prior to its enactment. Nonetheless, under the League's theory, these formerly utilized identification requirements should be viewed as impermissible "qualifications," as well. Taking the League's argument to its logical conclusion, therefore, a voter should be able to walk into a polling place, request a ballot and vote without having to identify himself in any way.

Indeed, if the Voter ID Law—or any identification requirement, for that matter—is a "qualification," then any other regulation that may prevent an eligible voter from casting a ballot and having it counted could also be deemed an impermissible "qualification" under the League's theory. For example, Indiana Code § 3-11-8-11 provides that voters must be in the chute when the polls close in order to be able to vote. However, while Article 2, § 14 specifies the day on which elections must be held, it does not limit the hours that polls must be open. Accordingly, if the line to vote extends beyond the chute at the time the polls close on election day, an eligible voter standing in that line may be denied the right to vote by operation of a procedural regulation not specifically authorized by the Indiana Constitution. Yet surely no one would question the validity of regulating the hours that polls are open—or even the validity of requiring voters to cast their ballots in-person at the polls (rather than, say, by mail), which also is not specifically authorized by the State Constitution.

Other procedural regulations that could potentially prevent an eligible voter from casting a ballot—and that would be constitutionally suspect under the League's theory of this case—include limits on the amount of time a voter may spend in the polling booth (Ind. Code §§ 3-11-11-10.5, 3-11-13-32.5, 3-11-14-26 to -28) and the prohibition against divulging one's ballot after

marking it but before casting it (Ind. Code §§ 3-11-11-16, 3-11-13-32.8, 3-11-14-29). Surely, however, these long-accepted, reasonable regulations, which exist to facilitate the administration of free and equal elections, cannot be considered unlawful simply because they are not specifically authorized by Section 2 or any other constitutional provision. Just as these laws place no additional or improper "qualifications" on voters, neither does the Voter ID Law.

C. Courts have already decided that regulations of voting procedure do not violate Article 2, § 2 of the Indiana Constitution.

The Supreme Court of Indiana, the United States District Court for the Southern District of Indiana, and the United States Court of Appeals for the Seventh Circuit have already rejected the notion that election regulations are unconstitutional if not specifically enumerated in Article 2, § 2 of the Indiana Constitution. *See Simmons*, 136 N.E. at 18 (holding that Indiana voter registration requirements do not violate Article 2, § 2); *Blue*, 188 N.E. at 585-86 (holding that lack of registration provision for absentee or sick voters does not constitute a violation of Article 2, § 2); *Ind. Democratic Party v. Rokita*, 458 F. Supp.2d 775, 843 (S.D. Ind. 2006) (holding that the Indiana Voter ID Law does not violate Article 2, § 2 of the Indiana Constitution), *aff'd*, 472 F.3d 949 (7th Cir. 2007).

The Indiana Supreme Court specifically rejected in *Simmons* the League's theory in this case. There, the Court upheld the voter registration requirement against a challenge under Article 2, § 2, holding that Article 2, § 14 and Article 2, § 2 were not in conflict and rejecting the argument that § 2 provided an exhaustive list of possible impediments to voting. *Simmons*, 136 N.E. at 17-18. In so doing, the Court set a very high standard for challenges to voting regulations brought on State Constitution grounds: "The legislature has the power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is

practically impossible." *Id*. at 18. In other words, while the legislature may not place additional qualifications on voting, it *may* regulate the way in which the existing qualifications set forth by Article 2, § 2 are verified and administered. The enactment of the Voter ID law is an entirely appropriate and constitutionally permissible exercise of that discretion. It is well within the power of the General Assembly to require that voters prove their identities before being permitted to vote.

Indeed, the Voter ID Law is precisely the sort of regulation contemplated by *Simmons* and is certainly neither "grossly unreasonable" nor "practically impossible" to comply with. Today, government-issued photo identification is universally accepted as proof of identification. Photo identification is necessary in order to drive an automobile, board an airplane, enter a federal courthouse, rent a car, cash a check, open a financial account, or engage in any number of other common daily transactions. In short, photo identification is necessary to function in society on a daily basis. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[I]t is exceedingly difficult to maneuver in today's America without a photo ID."). Among all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity.

Accordingly, rather than creating an entirely new system of identification, the legislature, through the Voter ID Law, sought to improve fraud prevention by relying on a system already in place—standard, government-issued photo identification. The vast majority of voters already possess such identification and thus comply with the Voter ID Law without even trying. *See id.* at 950 ("The new law's requirement . . . is no problem for those who have [a driver's license or a passport], as most people do"); *see also Indiana Democratic Party*, F.Supp.2d at 807. Those

who do not already possess the necessary identification may obtain a *free* non-license photo identification card from the BMV. Ind. Code § 9-24-16-10.

Even then, a voter who is unable to obtain the required identification prior to election day or simply forgets to bring his photo ID to the polling place may sign an affidavit attesting to his right to vote in that precinct, sign the poll book, and cast a provisional ballot. Ind. Code § 3-11-8-25.1(d). A voter who casts a provisional ballot may appear before the circuit court clerk or county election board by noon ten days following the election and prove the voter's identity. Ind. Code § 3-11.7-5-1. If by that time the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5. Voters may also validate their provisional ballots by executing an affidavit that the person is the same person who cast the provisional ballot and either (1) the person is indigent and is "unable to obtain proof of identification without payment of a fee;" or (2) has a religious objection to being photographed. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).

Thus, the Voter ID Law simply requires voters to produce a form of identification that (1) most of them already possess and (2) is easily obtainable by those who do not. Even those voters who cannot comply with the law on the day of the election are given the opportunity to cast a provisional ballot, which they are then given a generous amount of time to validate. Accordingly, the Voter ID law is in no way "grossly unreasonable" and compliance with its requirements is certainly not "practically impossible." It is instead a valid and reasonable means of enforcing the requirements for voting set forth by Article 2, § 2.

II. This Case is Not Justiciable Because the Secretary of State Does Not Enforce the Voter ID Law

While the League's Article 2, § 2 claim must plainly fail as a matter of law, the Court should not actually reach that issue because this case suffers from multiple threshold justiciability problems related to the League's lack of standing and the Secretary's inability to provide meaningful redress even if the League had a valid claim (which, again, it does not). Arguments concerning the League's standing, however, would likely require discovery and the submission of evidence, and so are not well-suited for inclusion in this motion. The State intends to raise such objections later, if necessary.

For now, the main justiciability problem relates to redressability and the impropriety of suing the Secretary of State to enjoin enforcement of the Voter ID Law. For this Court to have jurisdiction, not only must the plaintiff have standing, but the plaintiff's alleged injury must be "fairly traceable to the defendant" and "likely to be redressed by the requested relief." *See Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003). Under this rule, this case is not justiciable because the injuries alleged by the complaint—a burden on voting caused by enforcement of the Voter ID Law—are not fairly traceable to the Secretary of State. In short, while the Secretary of State has many important powers and duties related to elections, he does not enforce the Voter ID Law; rather, county election boards enforce the Voter ID Law. Therefore, the League's injuries (if any) are fairly traceable only to county election boards, none of which are defendants here. *Compare Crawford v. Marion County Elec. Bd.*, No. 1:05-cv-0804-DFH-WTL, Compl. at 2 (S.D. Ind. May 27, 2005) (suing election board responsible for administering all election laws in Marion County); *see also, e.g., Libertarian Party of Ind. v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458, 1461 (S.D. Ind. 1991) (Indiana State Election Board not a proper defendant because unable to order county boards to redress

injuries); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) (California Secretary of State not a proper defendant because unable to order cities to redress injuries in municipal elections).

In the recently-concluded federal challenge to the Indiana Voter ID Law, United States District Court Judge Sarah Evans Barker concluded that neither the Secretary of State nor the Indiana Election Division, which operates within the office of the Secretary of State, had any role in *enforcing* the Voter ID Law. *Ind. Democratic Party v. Rokita*, 458 F. Supp.2d 775, 785-86 (S.D. Ind. 2006) ("The Division has no direct role in enforcing election laws, nor does the Secretary of State . . . the administration of any election and its oversight is the responsibility of the County Election Board.") (citations omitted). Accordingly, the court relieved the Secretary and the Election Division of the duty to participate in the litigation. *Ind. Democratic Party v. Rokita*, No. 1:05-cv-0634-SEB-VSS, Entry on Def's Mot. to Dismiss at 2-3 (S.D. Ind. July 1, 2005). However, since there were other defendants (the Marion County Election Board and the State of Indiana as an intervenor), dismissing the Secretary and the Election Division outright was not crucial. In this case, by contrast, there are no other defendants, so the outright dismissal of the Secretary *is* crucial. It serves no purpose to permit a case to proceed against an official who has no power to enforce the challenged law.

Undeterred by Judge Barker's findings in the federal case, the League claims that the Secretary is the "highest State official responsible for implementing and instructing precinct officials and election administrators throughout Indiana concerning the Indiana Photo ID Law[.]" Complaint ¶ 2. The Secretary does produce, along with the Indiana Election Division, the Election Administrator's Manual, the Election Day Handbook, and Indiana Voter Information Guide, all of which educate voters and local officials who administer elections. *See* Indiana

Election Division, *Election Administrator's Manual* (2008), *available at* http://www.in.gov/sos/elections/pdfs/2008ElectionAdminManual.pdf; Indiana Secretary of State & Indiana Election Division, *Indiana Election Day Handbook* (2007), *available at* http://www.in.gov/sos/elections/hava/pdf/EDH_08.pdf; J. Bradley King, Pamela Potesta & Julia Bauler, *Indiana Voter Information Guide* (2008), *available at* http://www.in.gov/sos/elections/pdfs/IVIG_2008.pdf. But this case is not about changing the way the Secretary educates voters and local officials. It is instead about whether enforcement of the Voter ID Law should be enjoined, and the Secretary has no control over that.

It may be that, in general, the Secretary performs "all ministerial duties related to the administration of elections by the State," Ind. Code § 3-6-4.2-2, but on the particular subject of the Voter ID Law, the Secretary has no role in determining if identification offered by a potential voter is sufficient, whether to permit a voter to cast a ballot without showing proper identification, whether to count a provisional ballot, or even in supervising county and precinct election boards' execution of the Voter ID law's requirements. If an election board failed to follow the Secretary of State's guidance on the Voter ID Law, the Secretary would have no power to invalidate or correct the results in that precinct or to discipline the local boards. The Secretary cannot even remedy errors in vote count certifications or refuse to certify election results. Ind. Code §§ 3-12-5-13, -15.

The League seeks a declaration that the Voter ID law is facially invalid. Since the Secretary's role regarding the Voter ID law is purely advisory, he can be enjoined only from educating precinct and county officials about the law, which would not prevent election boards from enforcing the law. Thus, an injunction against the Secretary would do nothing to redress the League's alleged injuries, so the case should be dismissed as nonjusticiable.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendant's Motion to Dismiss.

Respectfully submitted,

STEVE CARTER
Attorney General of Indiana
Atty. No. 4150-64

By: ______________________________
Thomas M. Fisher
Solicitor General
Atty. No. 17949-49

Heather L. Hagan
Deputy Attorney General
Atty. No. 24919-49

Benjamin J. Keele
Tarrah M. Beavin
Adrienne A. Dewitt
Law Clerks

CERTIFICATE OF SERVICE

I do hereby certify that on the 14th day of July, 2008, I caused the foregoing to be served by First-Class United States Mail, postage prepaid, on the following:

William R. Groth
Fillenwarth Dennerline Groth & Towe, LLP
1213 N. Arlington Ave.
Suite 204
Indianapolis, IN 46219

Karen Celestino-Horseman
Austin & Jones, P.C.
One North Pennsylvania Street
Suite 220
Indianapolis, IN 46204

____

Thomas M. Fisher
Solicitor General

Office of Attorney General
Indiana Government Center South, Fifth Floor
Indianapolis, IN 46204
Telephone (317) 232-6255