

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT

CAUSE NO. 49D13-0806-PL-027627

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

MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

The Amended Complaint of the League of Women Voters of Indiana, Inc. and the League of Women Voters of Indianapolis, Inc. (collectively, “the League”) 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, and Article 1, § 23 of the Indiana Constitution, which grants equal privileges and immunities. Am. Compl. ¶¶ 11-27. As court after court has recognized, however, the Voter ID Law is a procedural election regulation, not a substantive voter qualification, and the Indiana Supreme Court has already held that Article 2, § 2 does not preclude the legislature from enacting election regulations. Furthermore, any marginal differential treatment of voters under the Voter ID Law is reasonably related to inherent characteristics that distinguish the different classes of voters. 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. Am. Comp. ¶¶ 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) (holding that Article 2 §§ 1 and 14 give the legislature the “power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted”); *see also Morris v. Powell*, 125 Ind. 281,

25 N.E. 221, 222-23 (1890) (Elliott, J., concurring) (“The legislature can enact only such a law concerning the right of suffrage as the constitution authorizes.”). 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.” *Simmons*, 136 N.E. at 18 (quoting *People v. Hoffman*, 5 N.E. 596, 616 (Ill. 1886)); 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 Am. Compl. ¶ 12. It is merely a *procedure* for verifying the *identity* of a registered voter—such identity being the

most fundamental, pre-existing voter-eligibility qualification. 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), both 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 vote in person or identify themselves by name or signature. Surely all would agree that some identification requirement at the polls is necessary, and no principled constitutional 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 identification requirements should be viewed as impermissible “qualifications” as well. Taking the League’s argument to its logical conclusion, a voter should be able to demand a ballot and cast it from home without having to present any identification to poll workers at all—not even the voter’s face.

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 beyond the chute 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, and which also may deter some qualified voters from casting ballots.

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 procedure 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 conflict with 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).

In *Simmons*, the Indiana Supreme Court specifically rejected the theory advanced by the League 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. *Simmons*, 136 N.E. at 17. More fundamental for purposes of this case was the Court's rejection of the argument that Section 2 provides 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.

The Voter ID Law is precisely the sort of regulation contemplated by *Simmons* and is 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, cash a check, rent a movie, or engage in any number of other common daily transactions. *Indiana Democratic Party*, 458 F. Supp. 2d at 838; Ind. Code § 9-24-1-1. *See also 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. *See Indiana Democratic Party*, 458 F. Supp. 2d at 825-26.

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 Crawford*, 472 F.3d 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*, 458 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 photo ID to the polling place may sign an affidavit claiming the 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. The Voter ID Law Does Not Violate Article 1, § 23 of the Indiana Constitution

Statutory classifications are valid under Article 1, § 23 of the Indiana Constitution as long as (1) “the disparate treatment accorded by the legislation [is] reasonably related to inherent characteristics which distinguish the unequally treated classes;” and (2) “the preferential treatment is uniformly applicable and equally available to all persons similarly situated.” *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). This test presumes the validity of statutory classifications and requires courts to give substantial deference to the legislative judgments underlying them. *Id.* The *Collins* test is essentially a rational-basis test, and a classification will be held valid unless it is manifestly unreasonable or arbitrary and the challenger can negate every conceivable rational justification for the classification. *Id.*; *see also W.C.B. v. State*, 855 N.E.2d 1057, 1063 (Ind. Ct. App. 2006), *trans. denied*.

Here, the League claims that the Voter ID Law inequitably differentiates between in-person election day voters and two groups of voters who are exempt from the photo ID requirement: mail-in absentee ballot voters and persons who live and vote in state-licensed residential facilities such as nursing homes. The distinctions between these classes of voters are self-evidently reasonable and internally consistent. In short, it was manifestly reasonable for the legislature to conclude that requiring mail-in voters to submit photo identification would not accomplish the same objectives as requiring in-person voters to show identification to poll workers. It was likewise reasonable for the legislature to exempt from the photo identification requirement nursing home voters whose precincts are located in the facilities where they live since, *as a class*, such voters would be particularly burdened in traveling to obtain identification, yet not similarly so burdened by needing to travel to vote in person. Section 23 does not require the legislature to ignore such obvious and inherent distinctions between these groups of voters and others for the sake of imposing formalistic equality.

A. Disparate treatment of mail-in absentee voters and in-person voters is reasonably related to the inherent differences between them

The first inquiry under *Collins* is whether the disparate treatment is reasonably related to inherent characteristics that distinguish the unequal classes. *Collins*, 644 N.E. 2d at 80. As the League itself recognizes, there are inherent differences between mail-in absentee voters and in-person election day voters. Am. Compl. ¶ 24. The very nature of the act of voting absentee differs from voting in-person on election day. Unlike in-person voters, absentee voters have 30 days prior to election day to cast their ballots. Ind. Code § 3-11-10-26(c). In addition, mail-in absentee voters have no direct contact with election officials at the polls.

Thus, because absentee ballots are received outside the confines of the election day polling place, the type of fraud that may be committed via absentee ballot is self-evidently

different from the type of fraud that may be perpetrated in-person on election day. Specifically, in-person voting is susceptible to voter impersonation fraud, where “a person shows up at the polls claiming to be someone else—someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day.” *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007). Absentee ballot fraud, on the other hand, is more susceptible to coercion of legitimate voters. *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004) (special election necessary after candidate and his supporters engaged in absentee ballot fraud including “unauthorized possession of completed ballots . . . unauthorized possession of unmarked ballots . . . presence [of candidate’s supporters] while voters marked and completed their absentee ballots . . . and the *direct* solicitation of a vote for cash.”).

Thus, the Indiana Supreme Court has recognized that different measures must be taken to safeguard the integrity of *absentee* voting than are utilized to safeguard the integrity of *in-person* voting. *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006); *see also Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 831 (S.D. Ind. 2006) (“[I]t is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters.”). The absentee balloting process is therefore subject to “statutory procedures for receiving, verifying, storing, transporting, and counting” ballots. *Id*; *see also, e.g., Ind. Code §§ 3-11-10-1, 3-11-10-3 to -22.*

While the League acknowledges the inherent differences between in-person voters and absentee voters, it maintains that those differences are not reasonably related to the disparate treatment of these two classes of voters. The League claims that bestowing a “privilege” on absentee voters—*i.e.*, not imposing a photo identification requirement on them—does not

reasonably relate to the history of voter fraud in Indiana, where there is “no history of Election Day voter impersonation” but a “substantial and documented history of voter fraud by those who mail in absentee ballots.” Am. Compl. ¶ 24.

The history of absentee ballot fraud, however, does not justify imposing, for the sake of formalistic equality, an election regulation not reasonably tailored to address that type of fraud. That is, the Voter ID Law relates to one type of fraud: in-person voter impersonation fraud. It allows poll workers to compare identification photographs with the faces of voters. It does not, however, relate to mail-in absentee ballot fraud. There would be no way for an election official to match photo identification (presumably mailed with a ballot) to the absentee voter’s face. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (“[T]here would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter since he wouldn’t be presenting his face at the polling place for comparison with the photo.”). The absence of a live person standing before an election official precludes linking enclosed identification with the person casting the ballot. And, once again, absentee ballot fraud typically involves coercion of legitimate voters, not impersonation. *See, e.g., Pabey*, 816 N.E.2d at 1145-46.

Thus, the security measures used to prevent in-person and absentee ballot fraud directly relate to the unique challenges the two different types of voting present. The history of absentee ballot fraud in Indiana is best addressed through other statutory provisions that are in place to regulate the receipt, handling, transport, storage and counting of absentee ballots, many of which were adopted at the same time as the Voter ID Law. *See, e.g., Ind. Code §§ 3-11-10-1, 3-11-10-3 to -22; see also Ind. Code § 3-11-8-25.1.* The Voter ID Law, on the other hand, most directly addresses the threat of voter impersonation presented by in-person voting. Accordingly, the

differing treatment of these two classes of voters is reasonably related to their inherent differences.

B. The state-licensed care facility precinct exception is reasonably related to the inherent characteristics of care facility residents who vote where they live

Residents of state-licensed care facilities who vote in-person where they reside are also inherently different from other individuals who vote in-person on election day. By exempting this group of voters from the Voter ID Law, the General Assembly was simply acknowledging and accommodating a few basic self-evident realities: (1) regardless of where they live, all seniors and disabled voters can vote absentee and need not provide photo identification in doing so; (2) seniors and the disabled living in licensed care facilities that are *not* polling places may be likely to vote absentee in order to avoid the travel required for voting; (3) seniors and the disabled who live in care facilities that *are* polling places may be more likely to vote in person because they will not have to travel to do so; (4) seniors and the disabled who live in care facilities would likely have particular difficulty traveling to obtain photo identification; and (5) seniors and the disabled who vote in person in the facilities where they live are likely to be identifiable as residents by election officials *and* unlikely to commit fraud by intentionally misidentifying themselves.

The Court should not fault the General Assembly for trying to accommodate those who are so infirm that they can no longer care for themselves. The licensed-care-facility exemption represents a reasonable accommodation by the General Assembly and in no way violates equal privileges principles or undercuts the state's compelling interests in deterring and detecting in-person voter fraud and preserving public confidence in elections. As district judge Barker held: "Nursing home residents represent a discrete and readily identifiable category of voters whose ability to obtain photo identification is particularly disadvantaged, whose qualification for the

exception (residing in a nursing home) is not readily susceptible to fraud, and for whom there otherwise exist sufficiently reliable methods of verifying identification.” *Id.* These inherent characteristics reasonably relate to the Voter ID Law’s differential treatment of care-facility residents.

C. The Voter ID Law satisfies both *Collins* inquiries

The differential treatment between in-person voters on the one hand and mail-in absentee ballot voters and licensed-care-facility-resident voters on the other hand is based on the inherent difference that distinguishes them: the manner in which voters cast, and officials receive, election ballots. Thus, the Voter ID Law satisfies the first *Collins* inquiry. Likewise, satisfying the second requirement of *Collins*, no mail-in absentee voters or licensed-care-facility-resident voters must present photo identification when they cast their ballots, so the voters within each category are treated the same. Since absentee ballot voters, licensed-care-facility-resident voters, and in-person Election Day voters are not members of the same groups and are not similarly situated, their differential treatment does not violate Article 1, § 23 of the Indiana Constitution.

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

While the League’s Article 2, § 2 and Article 1, § 23 claims must plainly fail as a matter of law, the Court should not actually reach those issues because this case suffers from a threshold justiciability problem: the Secretary’s inability to provide meaningful redress even if the League had a valid claim (which, again, it does not).

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, by the operation of judicial power, prevent election boards from enforcing the law. Thus, an injunction against the Secretary would do nothing to redress formally 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,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 15th day of September, 2008, I caused the foregoing to be served by First-Class United States Mail, postage prepaid, on the following:

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