

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,)
)
 -vs-)
)
TODD ROKITA, in his official)
capacity as Indiana Secretary of State,)
)
 Defendant.)

**PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS**

Plaintiff, the League of Women Voters of Indiana, Inc. and the League of Women Voters of Indianapolis, Inc.(both hereinafter referred to as the “League”), by counsel, responds as follows to the defendant Secretary of State’s Motion to Dismiss (“Rokita”) filed pursuant to Ind. Trial Rule 12(B)(1) and 12(B)(6).

BACKGROUND

The Indiana Photo ID Law (hereinafter the “Law” or “Photo ID Law”) was adopted by the Indiana legislature in 2005 and is codified at various places in Title 3 of the Indiana Code. *See*, I.C. §§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. As alleged in the League’s Complaint, the Law applies only to in-person voting at both primary and general elections, but not to absentee ballots submitted by mail. The

law also contains an exception for certain classes of persons. For example, persons living and voting in a state-licensed facility such as a nursing home are not required to present photo identification prior to in-person voting. I.C. §3-11-8-25.1; Amended Complaint, ¶6. However, if the polling location is not located within the nursing home in which the voter resides, the voter is then required to present identification, even if the voter lives in a nursing home.

When a voter presents himself or herself at the polling place 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 I.C. § 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. *See*, I.C. § 3-11-8-25.1(e) and I.C. § 3-10-1-7.2(d). The challenged voter affidavit must be sworn and affirmed and must 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.
- (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(1)-(8).

All provisional ballots are to be counted by noon of the second Monday following the election. I.C. § 3-11.7-5-1. If the voter wishes for his or her provisional ballot to be counted, the voter 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-

5(a)(2). At that time, the voter can do one of two things. The first alternative is 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).

If the voter has other grounds for not being able to present proof of identification, other than those previously discussed, the voter does have another option. She can file another affidavit attesting to her religious objection to being photographed or that she is “indigent” (a word nowhere defined in the statute) 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 to then directed to find that the voter’s provisional ballot should be opened and counted. I.C. §3-11.7-5-2.5(d)-(f)(2).

This Court has jurisdiction over this suit for declaratory relief, and the League has presented cognizable and meritorious claims that the Indiana Photo ID Law violates Art.

II, Sec. 2 of the Indiana constitution by imposing an extra-constitutional qualification on citizens' right to vote, and that it violates Art. I., Sec. 23 by granting certain citizens privileges not reasonably related to their inherent characteristics and not available to similarly situated individuals. The State's motion to dismiss must therefore be denied.

I. STANDARD OF REVIEW FOR MOTIONS TO DISMISS

A motion to dismiss under Indiana Trial Rule 12(B)(6) tests the legal sufficiency of a claim, not the facts supporting it. *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602, 604 (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. *In re Custody of G.J.*, 796 N.E.2d 756, 759 (Ind. Ct. App. 2003).

A motion to dismiss filed under TR 12(B)(1) raises the scope of authority conferred by the constitution or statute and presents a threshold question with respect to a court's power to act. *Community Hospital v. Avant*, 790 N.E.2d 585, 586 (Ind. Ct. App. 2003). In ruling on such a motion the court may consider the complaint and affidavits or evidence submitted in support the motion. *GKN Co. v. Magness*, 744 N.E.2d 397, 400 (Ind. 2001).

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

The State's arguments in support of its motion to dismiss the League's Art. II, §2 claims ignores long-standing precedent recognizing that Article II is to be interpreted broadly to expand rather than restrict voters' rights. Moreover, the Photo ID Law is similar to another law also touted as protecting the integrity of Indiana elections that the Indiana Supreme Court struck down in 1890, a decision which has been consistently followed both by Indiana courts and those in other states. The Photo ID Law has fatal defects. Not only does it add a qualification for voting nowhere found in Indiana's constitution, it also is not uniformly applicable to all voters and thus is constitutionally flawed.

The Indiana constitution sets forth the qualifications necessary to vote in Indiana elections. Art. II, §2 of the Indiana constitution provides as follows:

Article 2. 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.
- (b) A citizen may not be disenfranchised under Subsection (a), if this citizen is entitled to vote in a precinct under Subsection (c) or federal law.
- (c) The General Assembly may provide that a citizen who ceases to be a

resident of a precinct before an election may vote in the precinct where the citizen previously resided if, on the date of the election, the citizen's name appears on the registration rolls for the precinct period.

Thus to vote in an Indiana election, a voter must only satisfy the requirements of citizenship, age and residency.

A. THE HISTORY OF ART. II, §2 SUPPORTS THE ENFRANCHISEMENT AND NOT THE DISENFRANCHISEMENT OF VOTERS

The Indiana constitution is, in a sense, 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. “[I]n placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.” *Id.*

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. *Board of Election Commissioners of City of Indianapolis v.*

Knight, 187 Ind. 108, 117 N.E. 565, 570 (1917). Although Art. II, §2 set qualifications based upon race and sex (unfortunately reflective of the times), the 1851 Constitution was still intended to equalize rather grant preferences.

Indiana Supreme Court Chief Justice Randall Shepard has characterized the Indiana constitution as one dominated by a rejection of elitism. “[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 requirement for voting, property qualifications for officeholders...and protection of slavery.*” *Price v. State*, 653 N.E.2d 954, 961-62 (Ind. 1993)(emphasis added).

Art. II, §2 has been repeatedly amended to remove barriers to voting by certain classes of citizens. In 1881, Art. II, §2 was amended to include registration of qualified voters. *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 15 (Ind. 1922). It was again amended in 1921 to allow women the right to vote in response to the 19th amendment to the federal constitution. *Wilkinson v. State*, 197 Ind. 642, 151 N.E. 690, 691 (Ind. 1926). It was also 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.60 (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) (township residency requirement). The 1976 amendment also conformed

Art. II, §2 to the 26th 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). In 1984, Art. II, §2 was most recently amended regarding residency in precincts. *Id.*

Indiana Courts have long considered the right to vote to be one of the most important rights of Hoosiers. As our Supreme Court has observed:

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).

Through the decades, our supreme court has repeatedly held that “*any effort on the part of the General Assembly to establish a public electorate which would differ from that defined in Article 2, §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*, 117 N.E. at 569 (emphasis added).

Because Article II, §2 designates the class of persons eligible to be electors and confers on them the right of suffrage, in the absence of other restrictive 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, “When 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 (Ind. 1927) (citing *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890)). Supreme courts in states with similar constitutional provisions have held similarly. *See, e.g., Cameron v. Connally*, 117 Tex. 159, 229 S.W. 221, 223 (Tex. Ct. App. 1927) (“... where the right of suffrage is fixed in the constitution of a state, as is the case in most states, it can be restricted or changed by an amendment to the constitution... The Legislature can pass no law directly or indirectly either restricting or extending the right of suffrage as fixed by the constitution.”); *Simkin v. City of Rock Springs*, 33 Wyo. 166, 237 P.245 (1925) (same).

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. For example, when the Constitution declares how a right 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 (citing *Morris v. Powell, supra*). Thus, any person who possesses all of the constitutional qualifications necessary to vote as prescribed by Art. II, §2 and who is a legally registered voter by way of legislation enacted pursuant to Art. II, §14, is entitled to vote, notwithstanding any law passed by the Indiana Legislature to the contrary. Short of a constitutional amendment, no additional qualifications can be

imposed by the Legislature.

B. THE PHOTO ID LAW AS ADOPTED BY THE LEGISLATURE VIOLATES ART. II, §2 BECAUSE IT IMPOSES A NEW VOTING REQUIREMENT NOT UNIFORMLY APPLIED TO ALL VOTERS AND IMPOSES A UNIQUE BURDNE ON A CLASS OF VOTERS, NAMELY THOSE WHO VOTE IN PERSON

Our Supreme Court has held that the right to vote cannot be made dependent upon the voter producing a special document, such as a certificate that the voter was a taxpayer of county. *Morris*, 25 N.E. at 223. In *Morris*, the law at issue excluded from voting any 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 which certified that the voter was on the tax rolls and that the voter was still a taxpayer in the county. *Id.* at 221-222. Our supreme court struck down that law under Article II, §2 as an additional, and unconstitutional, voting qualification.

The *Morris* court found that this legislative enactment was unconstitutional because the law added a “property qualification to a certain class of voters.” *Morris*, 25 N.E. at 223.

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.

Morris, 25 N.E. at 223 (emphasis added). *Morris* is more than merely instructive, it is controlling authority.

Morris was decided after the 1881 amendments to the Indiana Constitution when Art. II, §14 was added to the constitution. This new provision granted the legislature the authority to enact a system of registering voters, authority previously not held by the general assembly.¹ Additionally, Art. II, §2 was amended so as also to reference the requirement of being a “duly registered voter.”²

The law challenged in *Morris* was designated as a registration law, and thus seemingly authorized under Article II, §2 and §14 of the Indiana constitution. In his brief in support of his motion to dismiss, Rokita claims that the Photo ID Law requirements do not constitute a “qualification.” However, the *Morris* court recognized that “registration will be as much a qualification as age or residence”:

Courts differ as to the effect of a law requiring the registration of voters in States wherein the constitution defines the qualifications of voters, and is silent upon the question of registration; some courts holding registration to be a mere regulation as to the mode of exercising the right of suffrage, while other courts, and, we think, the better reasoned opinions, hold it to be adding a qualification; but whatever may be the true rule where the Constitution is silent, *we think there can be no doubt that under the Constitution of this State, registration under a proper law constitutes a*

¹ In 1881, Art. II, §14 provided in part: “. . . the General Assembly . . . shall also provide for the registration of all persons entitled to vote.” Art. II, §14(c) now provides: “The General Assembly shall provide for the registration of all persons entitled to vote.”

² “. . .the General Assembly may provide by law...for the registration of all persons entitled to vote”. Burns’ 1914, R.S. 1881, Sec. 95.

qualification.

Further, the Court made clear that any qualification must be uniform and may not be selectively applied to an arbitrary class of voter:

The Constitution, in defining the qualification of voters, makes one of the qualifications to be "if he shall have been duly registered according to law." When a valid law for the registration of all voters shall have been enacted, as required by the Constitution, then registration will be as much a qualification as age or residence. *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).³ The court declared this particular registration law void because the law, rather than regulating the manner, time or place of voting, disenfranchised every person too ill to attend the board of registration, and "unreasonably and unnecessarily requires persons... to return home to register, as well as to vote, *making two trips, when only one ought to be required.*" *Id.* at 225 (emphasis added); *see also, Attorney General v. City of Detroit*, 78 Mich. 545, 44 N.W. 388, 392 (1889) (striking down Michigan registration law imposing a two-trip requirement on voters).

Our supreme court thus held that this particular registration law was unconstitutional, both because it was not uniformly applied to all voters and thus imposed

³ As to this point, other state supreme courts have commented that the holding in *Morris* was "undoubtedly correct." *State ex rel. Read v. Christ*, 25 N.M. 175, 179 P. 629, 635 (1919).

“extra burdens and hardships on these classes of voters [those required to comply with its terms],” and was thus an additional voting qualification not authorized by Article II, §2. *Morris v. Powell*, 25 N.E. at 225. The *Morris* court went on to state that it was irrelevant to the constitutional analysis whether this provision of the law be termed a registration provision or not, “for it requires proof of qualifications to vote, *which the voter under the constitution does not have to possess*. . . and it changes and abridges the rights of the classes of voters designated.” *Id.* at 226 (emphasis added). While the supreme court expressed “regret to declare void any law having for its object the purity of the elections,” the court unanimously 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.* Thus, the supreme court declared the law void.⁴ *See also*,

⁴ 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).

Coggeshill v. City of Des Moines, 138 Iowa 730, 117 N.W. 309 (1908) (arbitrary classification of voters not tolerated under Iowa constitution).

The constitutional principles enunciated by our Supreme Court in *Morris* over 118 years ago are equally applicable to the Photo ID Law of 2005. As in *Morris*, the Law is not uniformly applicable to all voters in that it does not apply to mail-in absentee votes or certain residents in state-certified residential facilities. But what makes the Law rise to the level of a “qualification” under Art. II, Sec. 2 is that, like the tax document required in *Morris*, the requirement of government identification with an expiration date and photograph can and does impose a costly burden upon some voters.

To secure the Indiana identification card, the would-be voter must present the original or certified copy of their birth certificate, a certificate of naturalization, a U.S. Veteran’s photo identification, a U.S. military photo identification, or a U.S. passport. Ind. Admin. Code tit. 140, §7-4-3; Complaint, ¶9. 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. Complaint, ¶10. 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. Most importantly however, for purpose of the constitutional analysis is the fact that a person who fails to 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. The Law is thus exclusionary

for some voters, just as was the law struck down in *Morris*.

Further, elderly persons not living in a state licensed nursing home that is also a polling place and who hold a Medicare card establishing that the state has verified their age, citizenship and residency, cannot vote without showing a photo identification, nor can they use their Medicaid card to vote because the card does not contain a photo or an expiration date. But the elderly are not the only ones facing disenfranchisement by the Law.

Indiana provides for the issuance of photo-exempt identification cards and driver's licenses for those whose religion prohibits them from being photographed. See Indiana Bureau of Motor Vehicles, *Request for Photo Exempt License/Request for Photo Exempt Identification Card for Religious Reason*, available at <http://www.in.gov/icpr/webfile/formsdiv/45811.pdf>. However, because this type of ID lacks a photograph, a voter with a photo-exempt identification card or license fails to satisfy the Photo ID Law, from which she is not exempt. Such a voter must cast a provisional ballot and then, if the voter wants her vote counted, she must appear before the county election board and complete another affidavit stating that the voter objects to being photographed for religious reasons. See Ind. Code § 3-11.7-5-2.5(c)(2)(B) (2007). All of this must be done by the voter during and after every election, despite having presented this same type of evidence to the BMV to satisfy the requirement to secure the photo-exempt identification or license in the first place. The plurality opinion of the United States Supreme Court in *Crawford v. Marion*

County Election Board, 128 S. Ct. 1610 (2008), expressed grave doubts concerning the cumbersome religious objector procedures: “It is, however, difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballot 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.” *Crawford*, 128 S. Ct. at 1621, n. 19 (citing Ind. Code Ann. §9-24-11-5(c) (West Supp. 2007)).

Both the plurality and dissenting opinions in *Crawford* acknowledged that the Photo ID Law imposes selective burdens on the right to vote. In his plurality opinion, 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 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. He 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 citizens in Marion County and throughout the state from casting a vote that counts. Amended

Complaint, ¶16. 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 form of photographic identification required by I.C. §3-11.7-5-2.5. 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. Amended Complaint, ¶17. 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. Amended Complaint, ¶18.

Additional Indiana citizens have been denied the right to vote because their driver's license or other form of compliant photographic identification were either lost or stolen, or the voter forgot to bring the required form of identification to the polls on election day. Amended Complaint, ¶19. Other Indiana citizens have been discouraged or dissuaded from voting by the Law's requirements. *Id.*

C. THE PHOTO ID LAW IMPOSES AN UNCONSTITUTIONAL QUALIFICATION ON THE RIGHT TO VOTE

Like the county auditor certificate found to be an unconstitutional qualification in *Morris*, 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

Article II, §2 or Article II, §14 of the Constitution, not to mention the burdens, discussed *infra*, associated with obtaining that form of identification, burdens which fall disproportionately on those voters who are non-drivers, who are required to 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.⁵ *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”).

Rokita claims that the Law is no more an additional qualification than requiring voters to register, citing *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (Rokita Brief, at 4). However, as discussed previously, our supreme court has held that laws requiring the registration of all voters are “as much a qualification as age or residence.” *Morris*, 25

⁵ Our supreme court held in *Blue v. State*, 206 Ind. 96, 188 N.E. 583, 591 (1934), that the previous means of safeguarding against fraudulent voting--requiring a voter to sign his name on the pollbook and allow challenges to the voter by a poll worker or challenger who questions whether the signature is that of the voter-- creates “no burden upon the one challenged” and thus does not add a new voting qualification in violation of Article II, §2 of the Constitution. Nor, as Rokita claims (at 5), is requiring voters to vote in person or identify themselves by name and signature remotely equivalent to requiring a voter to produce a specific form of governmental-issued identification as a voting prerequisite. For this Court 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 (Souter, J., dissenting).

N.E. at 224. And while Indiana’s voter registration requirements are authorized by Art. II, §14, the Photo ID Law, which is imposed on voters *who are already registered pursuant to law*, is not. The Constitution is silent with respect to requiring already registered voters to produce a specific, tangible form of identification at the polls on election day as a precondition to having one’s vote count. Thus, Rokita’s analogy to voter registration requirements is inapt. *Simmons v. Byrd, supra* (holding that voter registration law did not conflict with Art. II, §1 or §2 because Art. II, §14 granted the General Assembly specific authority to “provide for the registration of all persons entitled to vote”).⁶

Indeed, even Justice Stevens’ plurality opinion in *Crawford* refers to Indiana’s Photo ID requirement as a “qualification.” 128 S.Ct. at 1618 (noting that Congress, in enacting HAVA, showed that it believed photo ID was an “effective method of establishing a voter’s *qualifications* to vote”) (emphasis added). A “qualification” is a

⁶ It cannot be claimed that the Photo ID Law is an element of the voter registration system. Title 3 of the Indiana Code governs elections. Article 7 of Title 3 sets forth the system of voter registration. Ind. Code § 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 governing voter registration are contained within Article 7.

Nor do any of the provisions of the Photo ID Law connect with the qualifications to vote that the registration system is intended to verify. There is no requirement that the photo identification contain a birth date, current address or statement regarding citizenship. Instead, the Photo ID Law expressly requires an expiration date which means that persons with government identification containing a photograph, such as that issued by the VA Hospital, cannot vote using their identification card if it does not contain an expiration date.

thing or characteristic a voter must possess, without which he will not be permitted to cast a vote, at least one that will be counted. Under the Indiana constitution, age, citizenship and residency are explicitly voting qualifications. That is to say, a voter without the requisite age, citizenship or relevancy qualifications may not participate in public elections. Similarly, a voter without the requisite photo ID may cast a provisional vote but that provisional vote will not be counted. Either way, by failing to possess the requisite qualifications to vote the voter is influence an election's outcome. Thus, the Law imposes a "qualification" not substantively different than the constitutional requisites of age, citizenship, residence and registration, but nowhere authorized in Art. II of Indiana's constitution.

Rokita may contend that the Law does not impose a new qualification for voting but is instead merely device by which a voter is required to prove her qualifications to vote. But the Law does not require that the requisite ID contain any information regarding age, citizenship or residency, and it therefore does nothing to further compliance with or proof of those constitutional requirements.

It is also noteworthy that Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, prohibits enforcement by any covered jurisdiction of voting *qualifications* that differ from those in effect on November 1, 1964 unless they have been pre-cleared by the Attorney General or by the district court in the District of Colombia. *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-550 (1969). This is undoubtedly the reason Georgia

submitted its 2005 voter ID law to the DOJ for preclearance. *See*, “Criticism of Voting Law Was Overruled”, The Washington Post, Nov. 17, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html> A law such as Indiana’s that requires a voter to verify her identity by way of a document is as surely a voting “qualification” as age, citizenship, residency or registration requirements.

Rokita also claims that the Photo ID Law is necessary to prevent fraud by in-person voters (Rokita Brief, at 8); however, as was recognized by the U.S. Supreme Court, 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) (“...The 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), the Law 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 explicated more fully in the discussion, *infra*, at , in support of the League’s argument that the Law also violates Art. I, Sec. 23 of Indiana’s constitution.

D. A FEDERAL DISTRICT COURT’S OPINION IS NOT BINDING UPON THIS COURT

Rokita argues that the courts have “already decided” that the Indiana Photo ID Law does not violate Art. II, §2 of the Indiana Constitution and that, therefore, this Court should simply defer to those decisions (Rokita Brief, at 6-9). First, that statement is untrue. No Indiana state court has ever decided the Law’s constitutionality under the Indiana constitution. While one federal district court judge, without anything more than a superficial one page analysis, did so opine in *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d at 843, *aff’d*, 472 F.3d 979, 484 F.3d 949 (*en banc*), *cert. granted on other grounds sub nom. Crawford v. Marion County Election Board*, 128 S. Ct. 33 (2007), it is well settled that a decision of a federal court is not binding on Indiana state court judges, particularly as to interpretations of the Indiana constitution. *See, e.g., Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1285 (Ind. 2006) (federal opinions interpreting Indiana laws do not absolve Indiana courts from their ultimate responsibility for determining Indiana law).

Not even decisions of the Seventh Circuit interpreting Indiana law, though entitled to “respectful consideration,” are binding upon Indiana state-court judges. *Indiana Department of Public Works v. Payne*, 829 N.E.2d 184, 196 (Ind. Ct. App. 2005). This is especially true of federal decisions interpreting the Indiana Constitution. *Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171, 175 (1977). Thus, the Indiana courts have an independent duty to evaluate the Law under the Indiana constitution, applying

historic Indiana supreme court precedents and looking to the historical backdrop of the drafting and ratification of the Indiana constitution in performing that task.

While the people of Indiana are free to amend Article II, §2 to require, as a condition to having one's vote count, that the voter produce a certain 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; *Morris v. Powell*, *supra*.

Irrespective of the wisdom or efficacy of this Law, it is a qualification applicable to some but not all voters, which creates unnecessary burdens on some voters and which causes some to make multiple trips in order to exercise the fundamental right to vote. Such a new qualification to vote and have that vote counted may be accomplished only by amending the constitution and not by statutory amendment.

II THE PHOTO ID LAW VIOLATES ART. I, § 23 OF THE INDIANA CONSTITUTION

Art. I, § 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 comports with Art. I, § 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 these classes. Further, the preferential treatment is not equally available to all voters similarly situated.

A. THE DISPARATE TREATMENT IS NOT REASONABLY RELATED TO THE INHERENT CHARACTERISTICS OF ABSENTEE AND IN-PERSON VOTING

The first prong of the analysis consists of two steps. To determine whether the disparate treatment is reasonably related to the inherent differences BETWEEN in-person and mail-in voting, the Supreme Court has held THAT this Court must determine whether “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 Indiana Supreme Court 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.

Hon. Randall T. Shepard, Chief Justice, *Supreme Court of Indiana, 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, *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 only (and not mail-in absentee voters) present a specific form of identification and mail-in absentee voters are not required to provide any proof of identification.

1. The Requirement That In-Person Voters Verify Their Identity Using Specific Identification And That Mail-In Absentee Voters Are Not Required By Law To Affirm Their Identification Under Penalty of Perjury Is Not Reasonably Related To The Differences Between The Two Classes

The first issue raised is whether the inherent 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 that the voter is who he/she claims to be.

a. There Are Inherent Distinctions Between Mail-In Absentee Voting And In-Person Voting

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 or 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).⁷

⁷ 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
 - (D) a person employed by an election board to administer the election for which the absentee ballot is requested.

The inherent differences between mail-in absentee ballots and in-person ballots were recognized 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. I, §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, noting as follows:

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

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- (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).

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).

The League acknowledges there are inherent differences between casting an absentee mail-in ballot and voting in-person at the polling place; however, the requirement of photo identification imposed only upon in-person voters while mail-in

absentee voters do not even have to execute an affidavit regarding their identification is not rationally related to those inherent differences.

b. The Disparate Treatment Accorded In-Person Voters And The Preferential Treatment Accorded Absentee Mail-In Voters Is Not Reasonably Related To The Photo ID Law

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 (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, 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 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 set forth *supra*, which, as previously discussed, can prove to be an onerous burden upon some voters.⁸

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 (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

⁸ 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 an expiration date. 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. For example, elderly voters cannot use their Medicare identification cards to vote because the cards lack a photograph and expiration date, *See*, [http://en.wikipedia.org/wiki/Medicare_\(United_States\)](http://en.wikipedia.org/wiki/Medicare_(United_States)), http://www.michigan.gov/images/edicareCard_96834_7.gif, http://dpaweb.hss.state.ak.us/manuals/adltc/506/506_medicarebuy_in.htm, despite the fact that the card can secure the voter hundreds of thousands of dollars of Medicare benefits.

Another 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 Oct. 4, 2008). What the card does not contain is an expiration date. *Id.* Like the Medicare card, 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.

Further, as discussed *supra*, 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 prove to the county election board their religious basis for not being photographed, *See* Ind. Code § 3-11.7-5-2.5(c)(2)(B), a case made to the State in order to get the identification or license in the first place.

determine the winner and which constituted the most “egregious circumstances.” *Pabey*, 816 N.E.2d at 1151. 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 May 6, 2003-by those Pastrick supporters who filled out the substantive portions of applications and by votes solicited by Pastrick supporters to vote absentee to complete absentee ballot applications; [and]

* * * *

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

Pabey, 816 N.E.2d at 1145.

Citing *Pabey*, Defendant Rokita claims that “absentee ballot fraud typically involves coercion of legitimate voters, not impersonation.” (Rokita’s Brief, p. 12). First, it is rather amazing that the Secretary of State charged with overseeing Indiana’s elections would assume that the only fraud involved with absentee ballots deals with the coercion of “legitimate” voters. That aside, even the Indiana Supreme Court in *Pabey* recognized instances involving misrepresentations made by the alleged voter seeking to vote absentee. 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.

Additionally, defendant Rokita claims that the disparate treatment accorded by the Voter ID Law to in-person voters is reasonably related to the inherent differences between mail-in absentee voters and in-person voters because the Voter ID Law “most directly addresses the threat of voter impersonation presented by in-person voting.” (Rokita’s Brief, p. 12). However, in reality, 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 fraudulently vote by mail-in absentee ballot than run the risk of being recognized as an imposter at the polling place.

It is undisputed that there has been no prosecution for in-person voting fraud. As the *Horseman* court recognized, in-person voting is more secure than mail-in absentee voting due to the presence of bipartisan election day precinct officials. 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, although not legally required, can simply 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.

If the purpose of the Photo ID Law is to prevent in-person voter impersonation, as is claimed by defendant Rokita, then an in-person voter should not be limited to having to show limited, specific forms of identification not readily available to all voters and which must contain a photograph and an expiration date. For example, if someone wants to impersonate a voter over the age of 65, the chances of that impersonator being able to secure the Medicare card of another legally registered voter is very marginal. In contrast, if the impersonator wants to claim to be someone else, he or she can 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 Photo ID Law, the law is unconstitutional.

B. THE PREFERENTIAL TREATMENT 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 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: “[1] any privileged classification must be open to any and all persons who share the inherent characteristics [that] distinguish and justify the classification . . ., [and] [2] 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 subclassifications of persons subjected to the Photo ID Law are unconstitutionally treated.

As discussed *supra*, exempted from the requirements of the Photo ID Law are residents of a state licensed facility where a polling place is located. Rokita claims: “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.” (Rokita’s Brief, p. 10). However, residents who live in a state-licensed facility that does not contain a polling place and who wish to vote in-person, are required to show the requisite photo identification, even though, as recognized by Rokita, such persons are burdened in obtaining the identification. *See*, Rokita Brief, p. 13 (“[S]eniors and the disabled who live in care facilities would likely have particular difficulty traveling to

obtain photo identification”). If volunteers are willing to take these residents to vote and the residents exercise their right to vote in-person, the Photo ID Law prohibits them from voting in-person unless they have the requisite forms of identification.

In granting preferential treatment to persons residing in state-licensed facilities with polling places, the Photo ID 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. For example, 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 care but who, again, cannot vote in-person because they lack the governmental identification that contains a photograph and/or expiration date.

Defendant Rokita dismisses the desire by elderly voters to participate in the traditional American civic event of voting in-person.⁹ He claims that “regardless of where they live, all seniors and disabled voters can vote absentee and need not provide photo identification in doing so.” (Rokita Brief, p. 13). However, as United States Supreme Court Justice Souter has recognized:

[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

⁹ 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).

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

Slip Op. p.p. 4-5, n. 4.

Upon the basis of the foregoing, the Photo ID Law is unconstitutional as applied under Article II, Sec. 23.

III ROKITA IS THE PROPER DEFENDANT AGAINST WHOM DECLARATORY RELIEF CAN BE ENTERED

The Declaratory Judgment Act’s language states that “[c]ourts of record within their respective jurisdictions have the power to declare rights . . . *whether or not further relief is or could be claimed.*” I.C. §34-14-1-1 (emphasis added); *Smith v. Mercer*, 118 Ind. App. 575, 79 N.E.2d 772, 775 (1948). By declaring the parties’ respective rights and duties pursuant to the Indiana Constitution, this Court will terminate the uncertainty

giving rise to this litigation. Moreover, the judiciary's role in interpreting Indiana's Constitution is at the heart of tripartite government. Indeed, as early as 1803 the United State Supreme Court decided in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, that the right to review acts in Congress and actions of the executive in order to determine their constitutionality was a basic and inherent right of the judiciary. In accordance with that role, Indiana courts have been adjudicating constitutional challenges to statutes for almost two centuries. *Parker v. State ex rel. Powell*, 133 Ind. 178, 32 N.E. 836, 839 (1892) (it is the duty of the judiciary "to pass upon the validity of acts of the General Assembly and to declare them void when in conflict with the Constitution of the State.")

The League is seeking a declaratory judgment only. It has not requested injunctive relief. Rokita advises all the county election boards regarding the Photo ID Law and a declaration that the law is invalid would require Rokita to advise the election boards that the law is unconstitutional and therefore should not be followed.

Rokita is the state's chief election official for all purposes except for the coordination of State responsibilities under the National Voter Registration Act. I.C. § 3-6-3.7-1. He is the chief election official under the federal Help America Vote Act. I.C. § 3-6-3.7-2(5). He is also charged with performing "all ministerial duties related to the administration of elections by the state". I. C. § 3-6-4.2-2(a). He was also a named defendant throughout the federal court litigation challenging Indiana's Photo ID Law under the federal constitution. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775

(S.D. 2006). As the declaratory relief sought by the League is effective against Rokita, he is a proper defendant. *Nass*, 718 N.E.2d at 764-65; *Ad-Craft, Inc. v. Area Plan Comm'n of Evansville & Vanderburgh County*, 716 N.E.2d 6, 15-16 (Ind.Ct.App.1999).

Rokita admits that he instructs and educates county election boards regarding the Law and he also encourages the boards to enforce the Law (Rokita Brief, at 16). Should this Court declare the Law unconstitutional, Rokita, as the State's highest ranking election official, will no longer be able to disseminate information about the Law nor encourage county election boards to enforce it. On this basis alone, he is the proper defendant against whom relief can be accorded.

CONCLUSION

The qualifications to be a Hoosier voter as set forth in the Indiana constitution are qualifications that are either inherent in all individuals or equally and/or uniformly available to all. Age, citizenship and residency are qualifications that can be uniformly and fairly applied to ensure free and equal elections. The qualification that voters present a specific form of identification that is not available to all individuals with the same ease, uniformity and cost is an additional qualification. The Photo ID Law imposes an unreasonable, non-uniform and irrelevant burden on some but not all voters, many of whom are poor, elderly and/or disabled, and it does so without any evidence that it is the least bit necessary, allegedly to address a type of election fraud of which no Hoosier voter

has been charged, much less convicted. As such, it unconstitutionally imposes an additional qualification to vote.

The Photo ID Law imposes the requirement for a very specific piece of government identification only upon in-person voters and imposes no such requirement upon mail-in absentee voters, despite the fact that while there have been no cases prosecuted for in-person voter fraud and there have been cases of mail-in absentee voter fraud. The Photo ID Law requirement is not reasonably related to the distinctions between these two classes of voters nor is the preferential treatment granted under the Photo ID Law uniformly applicable and equally available to similarly situated voters, making it unconstitutional under Art. II, §23.

For all of the above reasons, Rokita's motion to dismiss should be overruled and this court should declare that the Photo ID Law violates Art. 2, §2 and §23 of Indiana's constitution and is thus unconstitutional, void and unenforceable.

Respectfully submitted,

William R. Groth, #7325-49
Fillenwarth Dennerline Groth
& Towe, LLP
429 E. Vermont, Suite 200
Indianapolis, IN 46202
Telephone: (317) 353-9363

Karen Celestino-Horseman, #15762-49A
Of Counsel, Austin & Jones, P.C.
One North Pennsylvania St., Ste. 220
Indianapolis, IN 46204
Telephone: (317) 632-5633

*Attorneys for the League of Women Voters of Indiana, Inc. and
the League of Women Voters of Indianapolis, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2008, a copy of the foregoing document has
been served, via first class mail, postage prepaid, upon:

Mr. Thomas M. Fisher
Ms. Heather L. Hagan
Indiana Government Center South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204-2270