
IN THE
Supreme Court of Indiana

No. _____

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

LEAGUE OF WOMEN VOTERS OF INDIANA, INC. and)	Appeal from the
LEAGUE OF WOMEN VOTERS OF INDIANAPOLIS, INC.,)	Marion Superior Court
)	Civil Division, 13
)	
Appellants (Plaintiffs below),)	Trial Court Cause No.
)	49D13-0806-PL-027627
v.)	
)	The Honorable
TODD ROKITA, in his official capacity as)	S.K. Reid, Judge
Indiana Secretary of State,)	
)	
Appellee (Defendant below).)	

RESPONSE TO APPELLANTS' PETITION TO TRANSFER

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STATEMENT OF THE ISSUES

1. Whether the Indiana Rules of Appellate Procedure permit a judgment winner who lost on an alternative theory to file a cross-petition to transfer on that theory.

2. Whether Article 2, Section 2 of the Indiana Constitution allows the General Assembly to require voters to present government-issued photo identification when voting in-person at the polls as a procedure for deterring and detecting voter fraud and for promoting public confidence in the legitimacy of elections.

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BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

On July 28, 2008, the League of Women Voters of Indiana, Inc., and the League of Women Voters of Indianapolis, Inc., (“League”), filed a lawsuit against Secretary of State Todd Rokita challenging the Indiana Voter ID Law, Pub. L. No. 109-2005, under Article 1, Section 23 and Article 2, Section 2 of the Indiana Constitution. The trial court granted the Secretary’s motion to dismiss, holding that the Voter ID Law is a procedural regulation of the voting process rather than a substantive qualification prohibited by Article 2, Section 2 of the Indiana Constitution. Br. of Appellants, Attach. A at 1. It also ruled, under Article 1, Section 23, that any “classes” of voters created by the statute were “not arbitrary or unreasonable but instead reasonably related to self-evident inherent characteristics that distinguish the different classes[,]” and that “[a]ll individuals within the different classes are treated similarly.” *Id.* at 1-2.

The Indiana Court of Appeals agreed that the Voter ID Law does not impose a substantive voting qualification prohibited by Article 2, Section 2. *League of Women Voters of Indiana, Inc. v. Rokita*, 915 N.E.2d 151, 161 (Ind. Ct. App. 2009) (“*LWV*”). It also ruled, however, that exempting absentee voters and voters living in state-licensed care facilities where they can vote in person was unlawful under Article 1, Section 23. *Id.* at 162-65. The court “reverse[d] and remand[ed], with instructions to the trial court that it enter an order declaring the Voter I.D. Law void.” *Id.* at 168.

On October 16, 2009, the Secretary filed a Petition to Transfer urging the Court to affirm the decision of the trial court dismissing the case. The League has

filed its own Petition urging the Court to review whether the Voter ID Law violates Article 2, Section 2 of the Indiana Constitution.

ARGUMENT

I. The Court Should Clarify Whether Cross-Petitions are Permitted

The State's position is that the Court should grant transfer in this matter, a decision that would bring the entire case, including the Article 2, Section 2 issue, before the Court. *See* Ind. Appellate Rule 58A. Because the League prevailed below, however, its petition raises the important question whether cross-petitions to transfer are permitted.

The Indiana Rules of Appellate Procedure do not expressly permit cross-petitions to transfer. Indiana Appellate Rule 57B provides that “[t]ransfer may be sought from adverse decisions issued by the Court of Appeals,” but does not specify whether the decision must be adverse in whole or only in part. Here, the Court of Appeals’ decision was adverse to the Secretary because it declared the Voter ID Law void. However, the court’s ruling on the Article 2, Section 2 claim was adverse to the League. The rules provide no answer whether the League may petition for review under these circumstances, or whether such a petition is to be treated as a free-standing request or merely as conditioned on the Court’s disposition of the State’s petition.

Granting a petition to transfer vacates the entire Court of Appeals judgment and puts the Court in the position of undertaking “jurisdiction over the appeal and *all issues* as if originally filed in the Supreme Court.” Ind. Appellate Rule 58A

(emphasis added). There is seemingly little need for a cross-petition. Practically speaking, however, it is not certain that the Court will address on transfer an issue decided adversely to the party that prevailed below. If the Court vigilantly considers every issue presented in the original appeal, cross-petitions are not necessary. If, however, the Court tends to focus only on those issues presented in the transfer papers, then it should make clear that parties that prevail in the Court of Appeals may present conditional cross-petitions to transfer, akin to U.S. Supreme Court practice. *See* U.S. Supreme Court Rule 12.5, 13.4.

II. Article 2, Section 2 Permits the Voter ID Law as a Regulation of Election Procedures

Article 2, Section 2 of the Indiana Constitution provides that every “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[.]” Ind. Const. art. 2 § 2. The League claims the Voter ID Law violates this provision by imposing “unnecessary and burdensome requirements” that create an additional qualification to vote. League’s Pet. 7. The Voter ID Law, however, is a regulation of election procedures designed to ensure fair elections, not a voter qualification, and the Court’s precedents foreclose the League’s claim.

A. The Voter ID Law protects “free and equal” elections and is not a voter “qualification”

1. The power of the General Assembly to regulate election procedures arises not only from the general police power, but also from Article 2, Section 1 of the Indiana Constitution, which provides that “[a]ll elections shall be free and

equal,” and Article 2, Section 14, which provides that “the General Assembly shall provide for the registration of all persons entitled to vote.” These clauses grant power to the General Assembly to regulate and uphold the legitimacy of elections. *See Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 18 (1922) (holding that Article 2, Sections 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”).

By preventing voter fraud, the Voter ID Law directly advances the constitutional guarantee of “free and equal” elections. Each fraudulently cast vote dilutes the influence of each legitimately cast vote. “[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 notion that elections need protection from fraud is hardly novel or even debatable. *See Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1619 (2008) (“While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.”). Nonetheless, the League dismisses the State’s need to deter voter fraud, stating that “there has never been a single documented case of in-person voting fraud in Indiana.” League’s Pet. 11.

No such proof is necessary to uphold this law. Where a regulation has a plain connection to protecting the integrity of elections and guaranteeing the rights of legitimate voters, the government has no burden to prove any particular level of need. In *Simmons*, this Court confirmed the validity of procedural voting

regulations designed to deter fraud even without any proof of fraud. *Simmons*, 136 N.E. at 17-18. The Court set a very high standard for challenges to voting regulations under the State Constitution, stating that “[t]he legislature has 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 (emphasis added). The argument that the state must prove some level of voter fraud before it can enact laws deterring fraud is not consistent with *Simmons*.¹

Applying the *Simmons* standard, it is self-evident that the Voter ID Law is neither “grossly unreasonable” nor “practically impossible” to comply with. Government-issued photo identification is universally accepted as proof of identification. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (“[I]t is exceedingly difficult to maneuver in today’s America without a photo ID.”). Accordingly, 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 people who have [a driver’s license or passport], as most people do”); *see also Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 807 (S.D. Ind. 2006). Among all

¹ Even if proof of fraud were necessary, the time for bringing it forward has not yet occurred. This case was resolved in the trial court on a motion to dismiss, not summary judgment. At this point, the Secretary has not been confronted with any burden to demonstrate the existence of actual fraud, and he cannot now be forced to concede the absence of fraud. As Justice Stevens noted in *Crawford*, “[i]t remains true . . . that flagrant examples of [] fraud in other parts of the country have been documented throughout this Nation’s history, . . . that occasional examples have surfaced in recent years . . .” *Crawford*, 128 S.Ct. at 1619.

the possible ways to identify individuals, government-issued photo ID has come to embody the best balance of cost, prevalence, and integrity. *See Indiana Democratic Party*, 458 F. Supp. 2d at 825-26.

What is more, 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 who simply forgets to bring a 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, which will be counted if the voter later validates it. *See* Ind. Code §§ 3-11-8-25.1(d), 3-11.7-5-1, 3-11.7-5-2.5.

The bottom line is that there is no case to be made that the Voter ID Law violates the *Simmons* standard, which is why dismissal of the claim was appropriate.

2. The League’s theory of the case is not that the Voter ID Law is a “grossly unreasonable” procedural regulation, but that it imposes a “new substantive qualification” on the right to vote, and that the Law is “absolute” and does not regulate the “manner” of voting. League’s Pet. 5, 7, 12. First, characterizing a procedural regulation as “absolute” does not render it a “qualification.” In-person voting requirements and limited polling hours are more “absolute” than the Voter ID Law—one cannot even cast a provisional ballot after the polls close, much less sign an affidavit that re-opens the precinct on-the-spot—but the League does not claim that they are “qualifications.” And while mail-in

absentee voting permits some exceptions to the in-person requirement, *see* Ind. Code § 3-11-10-24, it is not constitutionally required and it provides an exception to the Voter ID requirement on the same terms. *See Crawford*, 128 S.Ct. at 1627 (“That the State accommodate some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.”).

More to the point, regulating the manner of voting is *precisely* what the Voter ID Law does. It requires voters to cast ballots in a particular manner—*i.e.*, with photo identification—in order to ensure that voters meet the most fundamental of all voting qualifications: that they are who they say they are. Patently false is the League’s assertion that “[n]one of the provisions of the Voter ID Law connects with the qualifications to vote that the registration system is intended to verify[.]” League’s Pet. 13. The Voter ID Law directly vindicates the identity requirement, *i.e.*, that the person voting is the same person who registered. If registration laws are, as the League claims, “the primary means by which states insure the integrity of elections,” League’s Pet. 4 n.2, then the State must be permitted to vigorously enforce registration laws by ensuring that the person who shows up at the polls is the same person who registered. Thus, the Voter ID Law has everything to do with the “‘method or mode’ of selecting public officers.” League’s Pet. 12 (quoting *Bd. of Election Comm’rs of City of Indianapolis v. Knight*, 187 Ind. 108, 117 N.E. 565, 568 (1917)).

For these reasons, the two opinions upholding the Voter ID Law in *Crawford v. Marion County Election Board* both embraced the notion that the Voter ID Law is a procedural election regulation and not a substantive voter qualification. Both opinions describe the Voter ID Law as a “neutral” or “generally applicable, nondiscriminatory voting regulation.” *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 Law to strict scrutiny—the federal constitutional standard applicable to substantive voter qualification laws. *See id.* at 1628, 1642-43.

It is also worth observing that, while this Court at one time treated voter registration as a substantive qualification, *see Morris v. Powell*, 125 Ind. 281, 288, 25 N.E. 221, 223 (Ind. 1890), since then, as the Court of Appeals explained, this Court “has changed course in its interpretation of whether voter registration is a qualification which requires constitutional provision or merely regulation of otherwise qualified voters.” *LWV*, 915 N.E.2d at 160. *Simmons* and *Blue v. State ex rel. Brown* both demonstrate that this Court has “departed from its conclusion in *Morris* that in the absence of a constitutional provision a voter registration law is [a] qualification of voters which cannot be added by our legislature.” *LWV*, 915 N.E.2d at 161. In *Simmons*, the Court analogized a polling-booth-hours law to voter registration and held that it was not an invalid “qualification” even if it prevented some voters from casting ballots. *Simmons*, 136 N.E. at 14. In *Blue*, the Court held that the possibility that a potential voter could be prevented from registering due to illness or travel did not cause the registration statute to run afoul

of Article 2, Section 2. *Blue v. State ex rel. Brown*, 206 Ind. 98, 188 N.E. 583, 585-86 (Ind. 1934), *overruled on other grounds by Harrell v. Sullivan*, 220 Ind. 108, 40 N.E.2d 115 (1942).

The Voter ID Law is no more a substantive qualification than long-accepted procedural voting rules such as requiring voters to vote in person during specified hours, to identify themselves at the polls by name and signature, to limit the amount of time they spend in the polling booth (Ind. Code §§ 3-11-11-10.5, 3-11-13-32.5, 3-11-14-26 to -28), to avoid divulging their ballots after marking them but before casting them (Ind. Code §§ 3-11-11-16, 3-11-13-32.8, 3-11-14-29), or to register to vote.

3. The League admits that *some* identification requirement is necessary. League's Pet. 14 ("The League's objections to the Photo ID Law are not that it requires voters to identify themselves at the polls."). The League, however, would require voters to submit proof of identity at registration rather than at the polls, stating that registration laws are "the means by which proofs are furnished showing the existence of the voter's qualifications." League's Pet. 4 n.2. The League does not explain, however, why this would be a useful, or even less burdensome, alternative. Verifying identity "well *in advance* of Election Day," *id.*, would require voters to go through the same process as verifying it on Election Day, but would do nothing to deter in-person, Election Day voter fraud.

Moreover, it is not as if Election Day identification rules catch voters off guard—at least no more than requiring verification at registration would (which

might in any event run afoul of the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*). Indiana’s Election Day voter identification rules have been in place for four years now, and voters still without identification can obtain it at any time. Beyond that, a voter surprised on Election Day may cast a provisional ballot, obtain identification within 10 days, and then validate the provisional ballot.

The League also argues that “a voter lacking the required identification [should be] allowed to swear out an affidavit at the polls attesting to her identity,” and thereby “avoid the Law’s second trip requirement.” League’s Pet. 6-7. The League’s suggestion, however, would neuter the Law completely: An affidavit without later validation would be no different from simply requiring voters to sign a poll book, the prior security device that the legislature has deemed insufficient.

On a more fundamental level, there is nothing inherently valid or invalid about the number of “trips” a voter must make to cast a ballot. Even without Voter ID, many voters make multiple “trips” to register to vote and get to the polls on Election Day. If the number of “trips” were important under the Indiana Constitution, the Court would have to mandate that registration boards and poll workers go to voters’ homes, or that voters be permitted to cast ballots electronically from home or work, in order to eliminate voting “trips” altogether. Voting requires effort, and there is nothing special about the “trip” to the polls on Election Day that makes it, but not other voting-related “trips,” permissible under the Indiana Constitution.

4. In its petition, the League cites—for the first time in this case—two studies purportedly demonstrating the “disenfranchising impact” of the Voter ID Law. League’s Pet. 9-10 (citing Michael J. Pitts & Matthew D. Neuman, *Documenting Disenfranchisement: Voter Identification at Indiana’s 2008 General Election*, 25 J.L. & Pol. __ (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465529; Matt A. Barreto, Stephen A. Nuno, and Gilbert R. Sanchez, *The Disproportionate Impact of Photo Identification Requirements on the Indiana Electorate* (Washington Institute for the Study of Ethnicity and Race, Working Paper, 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf). Because they are being used to attack the validity of a presumptively valid statute, because they have never been subjected to adversarial testing (much less made part of the trial court’s findings), and because they are irrelevant, these studies cannot justify final judgment against the Secretary.

The studies do not even justify remand because they suggest nothing about the Voter ID Law that implicates Article 2, Section 2. The Voter ID Law is a procedural law that imposes exactly the same burden on *all* voters: to vote in-person in Indiana, every voter must present a government-issued photo ID card that can be obtained for free. Ind. Code § 3-11-8-25.1. The Law “draws no classifications, . . . except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors.” *Crawford*, 128 S.Ct. at 1625 (Scalia, J., concurring); *see also* Ind. Code §§ 3-11-10-

24, 3-11.7-2-1. Even voters who already possess the required identification are not exempt from the burden, as they are required to keep their identification current.² Thus, what the League cites as “burdens” that supposedly fall more heavily on certain segments of the population are in fact “no more than the different *impacts* of the single burden that the law uniformly imposes on all voters.” *Crawford*, 128 S.Ct. at 1625 (Scalia, J., concurring).

The suggestion that a non-discriminatory procedural voting regulation impacts different voters differently does not render it an unconstitutional voter qualification. In *Simmons* this Court made clear that polling-hour limitations and in-person voting requirements are not unconstitutional “qualifications” or “grossly unreasonable” procedural regulations even though they may cause some individuals to be unable to vote. *Simmons*, 136 N.E. at 17-18. This Court likewise held in *Blue* that the registration law in effect at the time did not run afoul of Article 2, Section 2 even though some otherwise qualified voters may be prohibited from voting due to inability to register caused by illness or travel. *Blue*, 188 N.E. at 586. As the Court of Appeals explained in its decision below, “[t]he *Blue* court concluded that . . . the

² The League inaccurately asserts that “both the plurality and dissenting opinions in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), recognized that the Law selectively imposes burdens on the right to vote [footnote omitted].” League’s Pet. 8. For support, the League says that “Justice Stevens noted that the Law ‘imposes some burdens on voters that other methods of identification do not share.’” *Id.* at 8-9 (quoting *Crawford*, 128 S.Ct. at 1620). Observing that one requirement imposes more burdens than another requirement does not “recognize[]” that the former “selectively imposes burdens.” Justice Stevens in fact stressed the evenhanded *neutrality* of the Voter ID Law. See *Crawford*, 128 S.Ct. at 1623-24.

simple fact that some voters would be disenfranchised by circumstance was not the fault of the law.” *LWV*, 915 N.E.2d at 160.

In any event, the studies cited by the League do little to support its theory of vast disenfranchisement. The League emphasizes the Pitts study’s finding that in the 2008 general election “902 persons arrived at a polling place without valid identification, cast a provisional ballot, and then had that ballot go uncounted[.]” League’s Pet. 9 (quoting Pitts, *supra*, at 9). Even without testing the accuracy of Pitts’s representations, or considering *why* those votes went uncounted (perhaps they were fraudulently cast), the minuscule impact Pitts has supposedly documented confirms the reasonableness of the Voter ID Law. Those 902 uncounted votes were out of a total of 2,805,982 ballots cast in that election. Pitts, *supra*, at 9 n.42. Thus, uncounted provisional ballots supposedly caused by the Voter ID Law amounted to only 0.032% of the total ballots cast. *Id.* at 9. If anything, this demonstrates that the vast majority of the voting population has no problem complying with the Voter ID Law and that the law is in no way “grossly unreasonable.”

Voter registration, while expressly permitted by the Indiana Constitution, remains a useful barometer for measuring the impact of procedural burdens on voting. As of 2008, only 66.3% of Indiana’s voting age population reported being registered to vote, and only 58.8% reported voting. See U.S. Census Bureau, Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2008 (2009), available at <http://www.census.gov/hhes/www/socdemo/>

voting/publications/p20/2008/Table%2004a.xls. Under the League’s view of the world, Indiana’s voter-registration law prevented 33.7% of the State’s 2008 voting age population from voting—a far greater impact than even Pitts claims for the Voter ID Law. Yet, regardless of Article 2, Section 14’s provision for voter registration, presumably no one would argue that voter-registration laws impose a “grossly unreasonable” burden on voting. In fact, the Court of Appeals rejected this Article 2, Section 2 challenge because the Voter ID Law is akin to voter registration, which would be a permissible procedural regulation even apart from Article 2, Section 14. *See LWV*, 915 N.E.2d at 161.

B. The Voter ID Law does not impose a property ownership requirement or poll tax on voters

The League relies heavily on this Court’s 1890 decision in *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890). The statute challenged in *Morris* required, among other things, that a voter who was absent from Indiana for a period of six months or more on government business produce a certificate from the county auditor stating that his name had continuously been on the tax rolls of the county during his absence from the State. *Id.* at 223. This Court held that, because of the manner in which the tax rolls were kept, this requirement added a property ownership qualification for some voters who would otherwise be eligible to vote under Article 2, Section 2. *Id.* at 223.

The League has argued that the Voter ID Law also imposes a property qualification on the right to vote. *See* Br. of Appellants 10. However, the requirement invalidated in *Morris* imposed a property ownership qualification not

because of voters' "ownership" of the required certificate, but because possessing the certificate presupposed ownership of real property (at least for a readily identifiable class of voters). Possession of government-issued photo identification, in contrast, presupposes nothing of the sort.

The League also implausibly likens the Voter ID Law to a poll tax. *See* League's Pet. 5-6, 11. Poll taxes were invalidated because of the racially discriminatory history behind them and because "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966). In contrast, proper identification plainly bears a legitimate relationship to voting, and the Voter ID Law imposes no tax and carries no history suggesting racial discrimination. Non-license identification is free to voters, *see* Ind. Code § 9-24-16-10, and fees for birth certificates (which have existed since 1907) are merely for the service, not a general exaction. *See* Ind. Code § 16-37-1-11. Indigents needing to pay a fee for a birth certificate to get identification are exempt from having to provide identification. Ind. Code § 3-11.7-5-2.5(c).

As a functional matter, moreover, the vast majority of voters—99% according to the district court in the federal case—are not suddenly required to pay a fee to the State for the privilege of voting. *See Indiana Democratic Party*, 458 F. Supp. 2d at 807. Many of the remaining 1% who wish to vote will be able to vote absentee without photo identification, or else procure identification from the federal government or a birth certificate from another State, and in all events need pay any

fee only once. *Contrast Harper*, 383 U.S. at 666-68. Invoking the poll tax analogy only underscores the overall weakness of the League's case.

CONCLUSION

The Court should affirm the decision of the trial court dismissing the case.

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Petition to Transfer contains no more than 4,200 words, not including the Statement of the Issues.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2009, a copy of the foregoing was served via First Class United States mail, postage pre-paid to the following:

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