IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,

v.

TODD ROKITA, et al.,
Defendants,

WILLIAM CRAWFORD, et al.,
Plaintiffs,

v.

MARION COUNTY ELECTION BOARD,
Defendant,

and

STATE OF INDIANA,
Intervenor.

No. 1:05-CV-00634 SEB-VSS

MEMORANDUM OF THE STATE OF INDIANA, THE INDIANA SECRETARY OF STATE, AND THE CO-DIRECTORS OF THE INDIANA ELECTION DIVISION IN SUPPORT OF THEIR JOINT MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT FILED BY BOTH SETS OF PLAINTIFFS

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STATEMENT OF THE ISSUES

In 2005 the Indiana General Assembly enacted laws requiring voters to show government-issued photo identification when voting in person at the polls on election day or in the county clerk's office prior to election day. *See* Senate Enrolled Act No. 483, §§ 1-6, 8-18, Pub. L. No. 109-2005, *codified at* Ind. Code §§ 3-5-2-40.5; 3-10-1-7.2; 3-10-8-25; scattered sections of Ind. Code ch. 3-11-8; several sections of Ind. Code art. 3-11.7; and Ind. Code § 9-24-16-10. Senate Enrolled Act No. 15, §§ 14, 16, and 17, Pub. L. No. 103-2005, *codified at* Ind. Code § 3-11-10-26; House Enrolled Act 1407, §§ 56, 142 and 143, Pub. L. 221-2005, *codified at* Ind. Code §§ 9-16-1-7; 9-16-4-1; and 3-11.7-5-1 (hereinafter "Voter ID Law"). The issues in this facial challenge to the validity of the Voter ID Law are as follows:

I. Whether any of the Plaintiffs, none of whom is a voter injured by the Voter ID Law or has even identified any voters who were injured by the Voter ID Law, has standing under Article III to bring this case.

II. Whether the Secretary of State and the Co-Directors of the Indiana Election Division, who do not enforce the Voter ID Law, may be sued to enjoin enforcement of that law.

III. Whether the Voter ID Law is a permissible exercise of authority under the Elections Clause of the United States Constitution, which charges state legislatures with the responsibility for regulating the times, places, and manners of elections.

IV. Whether the Voter ID Law impinges severely and impermissibly on the constitutional right to vote, the right to free speech, the right to freedom of association, or the right to due process.

V. Whether the Voter ID Law violates the Civil Rights Act of 1964's protections against unequal voting qualifications and immaterial justifications for disenfranchisement.

VI. Whether the Voter ID Law violates provisions of the Indiana Constitution providing for free and equal elections and substantive voter qualifications, and whether, particularly in light of the Elections Clause, this Court should even adjudicate that issue.

MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Defendant Todd Rokita, in his official capacity as Indiana Secretary of State, Defendants J. Bradley King and Kristi Robertson, in their official capacities as Co-Directors of the Indiana Election Division, and Intervenor-Defendant the State of Indiana respectfully submit this memorandum in support of their joint motion for summary judgment and in opposition to the motions for summary judgment filed by Plaintiffs William Crawford, *et al*. and Plaintiffs Indiana Democratic Party and Marion County Democratic Central Committee.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. National Instances of In-Person Voter Fraud

In-person voter-identity fraud is notoriously difficult to detect and investigate. In his book *Stealing Elections*, John Fund observes that actual in-person voter fraud is nearly undetectable without a voter photo-identification requirement because anybody who provides a name that is on the rolls may vote and then walk away with no record of the person's actual identity. *See generally* John Fund, *Stealing Elections* (2004). The problem is only exacerbated by the increasingly transient nature of society. Documentation of in-person voter fraud often occurs only when a legitimate voter at the polls hears a fraudulent voter trying to use her name, as happened to a woman in California in 1994. *See* Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 292 (1996).

Regardless of the lack of extensive evidence of in-person voter fraud, the Commission on Federal Election Reform (known as the Baker-Carter Commission) recently concluded that

"there is no doubt that it occurs." State Ex. 1, p. 18.[1] Legal cases as well as newspaper and other reports confirm that in-person voter-identity fraud, including voter impersonation, double votes, dead votes, and fake addresses, plague federal and state elections. In the 2000 elections in St. Louis, 14 dead people voted. *See* Fund, *supra,* 64. Since October 2002, the U.S. Department of Justice has launched more than 180 investigations into election fraud, some of which have resulted in charges for multiple voting. State Ex. 2, p. 23.

In 2004, there was evidence that elections in Washington and Wisconsin were decided by illegal ballots, some of which might have been prevented if voters had been required to show photo identification. In Washington's 2004 gubernatorial elections, the margin of victory was 0.5%, or 128 votes out of the 2.8 million votes cast. State Ex. 3, pp. 4-5. The total tally included more than 1,600 fraudulently cast ballots, including 19 ballots cast by dead voters, six double votes, and 77 votes unaccounted for on the registration rolls. *Id.* at 19.

In Wisconsin, an ongoing federal, state, and local investigation of voter fraud among 80,000 same-day registrants in the 2004 elections has documented more than 100 cases where individuals voted twice by using fake names and addresses. State Ex. 4, p. 2. For example, cousins were charged with casting ballots at two different polling places each. State Ex. 5. Also, the task force investigating possible fraud in the 2004 Milwaukee elections found persons who registered and voted with identities and addresses that could not in any way be linked to a real person and identified citizens who told investigators that they did not vote, even though report showed that someone voted in their names. State Ex. 4, pp. 3-4. In addition, 4,609 more ballots,

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[1] The State Defendants will cite to the record as follows: for the Democrats' Exhibits, (Dem. Ex. __); for the Crawford Plaintiffs' Exhibits, (Crawford Ex. __); for the State Defendants' Exhibits, (State Ex. __).

nearly 2% of the total, were cast than voters were registered. (*Id.* at 5) In that election, utility bills sufficed for same-day-registrant voter identification. *See* Wis. Stat. Ann. § 6.55 (7)(c)(12).

The integrity of other states' elections has likewise been discredited by voter fraud. In Missouri's elections in 2000, an investigation by the Secretary of State of only two of Missouri's 114 counties revealed over 1,000 fraudulent ballots, including at least 68 multiple votes, 14 dead votes, and 79 vacant-lot voters, with another 200 sites requesting further review (eight or more voters registered at the same address that is not a multiple family home, hospital, group home, or nursing home). State Ex. 6, pp. 42-43; State Ex. 7, pp. 3-6. Missouri, Kansas City in particular, has also encountered the problem of voters who lived near the border of two states voting in both states. *See United States. v. McIntosh,* No. 04-CR-20142 (W.D. Mo.2004); *United States v. Sherzer*, No. 04-CR-00401 (W.D. Mo. 2004); *United States v. Goodrich*, No. 04-CR-00402 (W.D. Mo. 2004); *United States v. Jones*, No 05-CR-00257 (W.D. Mo. 2005); *United States v. Martin* No. 05-CR-00258 (W.D. Mo. 2005). Records suggest that between 2000 and 2002, 300 voters in Missouri may have voted twice. State Ex. 8, p. 1. In May 2004, a state audit report found that 24,063 persons, or nearly 10% of the Kansas City's registered voters, were either dead, had been convicted of a felony, were registered in another jurisdiction, or were otherwise questionable. State Ex. 9, pg. 14.

In Florida, a Pulitzer Prize-winning series of articles revealed that dozens, possibly hundreds, of people who lived outside the city limits illegally cast votes at the polls in Miami's mayoral elections in 1997. State Ex. 10, pp. 1-2. In a review of just 3% of votes cast, the Miami Herald found 68 votes from ineligible non-city residents. *Id.* at 2.

In Maryland, a Johns Hopkins University study found that over 1,500 names of deceased voters remained registered in Baltimore County in 2005; at least 63 votes were cast in the names

of deceased individuals between the 1980's and 2004. State Ex. 11, p. 1. The Johns Hopkins study showed that at least four votes were cast in the names of confirmed dead people in the 1994 elections, and those names were still listed as active on the 2005 rolls. *Id.* at 2. In fact, cases of the dead voting is a national phenomenon occurring in many jurisdictions, such as Georgia, Illinois, Missouri, Pennsylvania, and Wisconsin. State Exs. 4, 12, 13, 14, and 15.

In New York, a grand-jury investigation into local election fraud concluded that eight underage voters (out of only 4,000 votes cast) registered with false birthdates and voted illegally in the June 2001 local elections. State Ex. 16, p.1. The Times Herald Record found additional evidence of voter fraud, including four double votes, thirteen votes by people also registered to vote in another county, one non-existent voter (records reveal a two-year-old voted), and one voter residing in a neighboring city. State Ex. 17, pp. 1-2.

In Georgia, an investigative report published by the Atlanta Journal Constitution in November 2000 found that since 1980, 5,412 votes had been cast in the name of deceased individuals. State Ex. 18, p. 2. Furthermore, more than 15,000 dead people remained on Georgia's voting rolls. *See id.* Also concerning the 2000 elections, the Republican National Committee cross-analyzed voting records with other data and compiled a database of over 3,200 names of people who apparently voted multiple times. State Ex. 19, p. 1.

As the Baker-Carter Commission recently observed, "[t]he problem . . . is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." State Ex. 1, p. 18; *see also* State Ex. 20, pp. 19-20 (observing that as elections have become closer in recent years, it has become increasing likely that even small amounts of in-person voter-identity fraud may decide electoral outcomes).

The 2001 National Commission on Electoral Reform (the Ford-Carter Commission) reported that since 1948, elections to select a state's presidential electors have been decided 31 times by less than 1% of the votes cast, and 70 times by less than 2% of votes cast. State Ex. 21. About 4% of Senate seats and 2% of House elections are won within 1% of the vote. The margin of winning is just as close for gubernatorial elections, where 5% of elections are within 1% of the vote. *Id.* In fact, the Task Force stated that "[i]n any given year, the likelihood that there is at least one election within the one-percent technical margin of error is 71 percent for senatorial elections and more than 99 percent for congressional elections." *Id.* at 4.

II. The Impact of the Perception of Voter Fraud on the Confidence of the Electorate

The Baker-Carter Commission recently concluded that not only actual fraud, but also the *perception* of fraud, "contributes to low confidence in the system." State Ex. 1, p. 19. Survey data tends to confirm this observation. Just prior to the 2000 election, a Rasmussen poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. State Ex. 22, p. 1. Similarly, a Gallup Poll showed that after the 2000 election, 67% of adults nationally had only "some" or "very little" confidence in the way the votes are cast in our country. State Ex. 23, pp. 8-9.

A 2004 Zogby Poll found that 10% of voters believe that their votes are not counted accurately. *See* Fund, *supra,* 2. And according to election-law scholar Richard Hasen, more than 13.6% of Americans worried that the 2004 presidential vote was unfair. State Ex. 24, p. 1. Finally, an even more recent Rasmussen survey of likely voters documents strong support for measures to strengthen electoral integrity. In a 2004 survey of 1000 likely voters, 82% of respondents (including 89% Bush supporters and 75% of Kerry supporters) favored photo identification at the polls. *See* Fund, *supra,* 5.

III. The Impact of "Motor-Voter" Nationally and in Indiana

Though they are largely unable to study verifiable data concerning in-person voter fraud, scholars are well aware of the conditions that foster fraudulent voting. *See* Fund, *supra*; Sabato & Simpson, *supra*, 321. In particular, fraud has become ever more likely as "it has become more difficult to keep the voting rolls clean of 'deadwood' voters who have moved or died" because such an environment makes "fraudulent voting easier and therefore more tempting for those so inclined." Sabato & Simpson*, supra,* 321. "In general, experts believe that one in five names on the rolls in Indiana do not belong there." State Ex. 25.

The National Voter Registration Act, also known as the "Motor-Voter" law, requires each state to make a reasonable effort to remove the names of ineligible voters from the official registration list, but it restricts how states may do so. Except in limited circumstances, states may not remove voters from the registration list, at least for purposes of federal elections, due to the voter's failure to vote. *See* 42 U.S.C. § 1973gg-6(b)(2). Instead, the Motor-Voter law requires states to take active steps to confirm the address of voters before purging them from the official list. *See id.* The Motor-Voter law suggests that states can satisfy their duties under the removal-program requirement by sending notices to individuals who are identified by the U.S. Postal Service as having completed a change-of-address card. *See* 42 U.S.C. § 1973gg-6(c). The notice must instruct the voter to return the card, and that if the registrant does not do so and does not vote in the next two general elections, the voter may be removed from the registration list. *See* 42 U.S.C. § 1973gg-6(d)(2). States may only remove voters from the registration list if (1) the voter confirms in writing that the voter has moved or (2) the voter fails to respond to the required notice *and* has not voted in the two general elections following the notice. *See* 42 U.S.C. § 1973gg-6(d)(1).

This restriction on purging over the last decade has generally resulted in a substantially higher number of illegitimate voter registrations, sometimes called "list inflation." State Ex. 26. In 2004, 86.84% of the nationwide voting-age population was registered to vote, compared with 75.87% in 1992. *See id.* In fact in both 2000 and 2004, numerous states actually recorded registration rates at over 100%. *Id.*

For this case, Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population data, conducted his own examination of Indiana's voter registration lists and concluded that they are among the most highly inflated in the nation. State Ex. 27, p. 9. Benson used four different methods in order to determine the extent of list inflation and found that each method yielded results that indicated high inflation rates (*See id.* at 6-9). Specifically, when he compared actual voter registration with self-reported registration rates, he found that there were 4.3 million registered voters in 2004, while there were only 3 million voters who reported being registered, resulting in estimated list inflation of 41.4%. (*Id.* at 6)

Benson also looked at the registration rates before and after the Motor-Voter law, which became effective on January 1, 1995. (*Id.* at 7) He found that in 1988, the rate of registration in Indiana was 69.71% of the voting age population (VAP) with a voter turnout of 75.67% of VAP, while in 2004 the registration rate was 93.6% of VAP (with 12 counties in which the number of registered voters was over 100% of the voting-age population), with a turnout rate of 58.5% of VAP, indicating that list inflation is high (*Id.*) When he reviewed the number of deceased voters on the list, he found with a high rate of confidence that at least 35,699 Indiana registered voters are now deceased. (*Id.* at 8) Additionally, his research indicated that in 2004 there were 233,519 potential duplicate registrations. (*Id.* at 9)

Benson's study confirms what Indiana citizens have known for awhile: In 2000, the Indianapolis Star investigated the accuracy of Indiana's voter rolls and found that more than 300 dead people were registered. State Ex. 25, p. 3. In fact, the Indianapolis Star's study has been the subject of testimony before Congress concerning the need for election-fraud measures. State Ex. 28, p. 3. And in a recent newspaper article explaining the Indiana Supreme Court's decision to use sources other than voter-registration lists to compile jury pools, Justice Theodore Boehm referred to voter registration lists as "overpopulated (because the lists included many who had died or moved)." State Ex. 29, p. 1.

IV. Government-Issued Photo Identification is Common, Reliable, and Helpful in Preventing Identity Fraud Generally

It cannot be doubted that in today's society, photo identification is a prevalent, useful, and often vital component of life. Simply put, photo identification has become an inevitable fact of American life. State Ex. 30, p. 1. In arguing for the creation of a national identification card, Alan Dershowitz has explained that photo identification is already required for many routine activities, "including flying, driving, drinking and check-cashing." State Ex. 31. Dershowitz also has observed that photo identification is already carried by the vast majority of Americans in their wallets and pocketbooks. *See id.* John Fund observed that requiring voters to show photo identification at the polls is no different from what most Americans already must do when they "take an airline flight, buy an Amtrak ticket, cash a check, rent a video or check into a hotel." Fund, *supra,* 136.

A recent argument against Michigan's roadside-license-confiscation law emphasized how "the photo driver's license has become the most widely accepted (and, frequently required) form of identification in our society." Victor M. Norris & Michael F. Smith, *Photo Finished: Calling Into Question Michigan's Roadside Driver's License Confiscation Law*, 74 Mich. B.J. 410, 412

(1995). As the authors explain, "[o]ne deprived of a photo license need only attempt to rent a car or other equipment, cash a check, open a financial account or engage in a plethora of other common transactions in which photo identification is demanded, to understand how vital the photo driver's license is in our modern society." *Id.*

Even some of the Plaintiffs admit that photo identification is a necessary requirement for most everyday activities that we take for granted. (*See* Crawford Ex. 4, p. 88.) ("I think everything that you need to do from getting a job to getting a place to stay, to applying for any benefits to which you may be eligible will oftentimes require – require some sort of ID."); (s*ee also* Crawford Ex. 10, pp. 43-44) (explaining that in order to get food stamps or Social Security, and even to file bankruptcy, photo identification is required).

Some homeless shelters in the Indianapolis area, including the Hancock Hope House in Greenfield and the Salvation Army Social Service Center in Indianapolis, require photo identification for residency. Many other homeless shelters prefer photo identification. *See* State Ex. 32.

Exercise of some fundamental constitutional rights often turns on presentation of photo identification. For example, in order to obtain marriage licenses in many states, couples must present photo identification. *See* State Ex. 33; s*ee also* State Ex. 34. In order to exercise the fundamental right of access to federal courts, litigants must present photo identification to the United States Marshals Service. *See* State Ex. 35; State Exhibit 36; *Cf.*

Attorneys providing incarcerated criminal defendants with their constitutional right to counsel must show photo identification at the jailhouse door. *See* Norris & Smith, 74 Mich. B.J. at 412. And, it is worth noting, the incidence of driver's licenses and non-license identification cards in Indiana is so high that the BMV's list of those with such identification is one of two new

sources (the other is tax rolls) of names for Indiana's jury pools, replacing voter-registration lists based on both comprehensiveness and accuracy. *See* State Ex. 29.

Society has become so dependent upon state-issued photo identification that Congress earlier this year passed a law designed to improve the reliability of such identification. *See* Real ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (2005). Among other things, the Real ID Act provides that within three years, all states must enhance their security guarantees for driver's licenses to provide comprehensive standards for federal use. *See id.* at § 202, 119 Stat. at 312. In debating the Real ID Act, representatives recognized the importance of making driver's licenses more trustworthy because they play such a vital role in contemporary society. *See* 151 Cong. Rec. H2997-02, H3020 (May 5, 2005) ("At home, the Real ID provisions will strengthen our Nation's driver's license laws, providing each citizen with another layer of security."). In 2004, when Congress was debating a similar provision, it recognized not only how the driver's license has become the "foundation of your identity," but also how the "driver's license has come to represent more than authorization to operate a motor vehicle; it imparts a stamp of legitimacy and is often taken as unquestionable proof of identity." *See* 150 Cong. Rec. H8664-02, H8682-83 (Oct. 7, 2004).

Just as government-issued photo identification has become a useful and reliable means for other government agencies and for the private sector to identify individuals, so too it will be a useful tool for identifying individual voters. Current elections security measures include the challenge process and the signature requirement. (State Exhibit 37, ¶ 3) However, the challenge procedure is typically used to verify not so much identity as residency, and the signature comparison requires unrealistic poll-worker expertise, particularly considering the limited time and the significant pressures at the polls, to be effective. *See id.* ¶¶ 6-9. Requiring photo

identification will permit poll workers to quickly check the name on the list against the name on the card and the face on the card with the face of the voter. (*See id.* ¶ 10)

V. The Baker-Carter Commission Supports Photo-Identification at the Polls

Recognizing the connection between obtaining a driver's license and registering to vote, the Baker-Carter Commission recently recommended that states use "REAL ID" cards for purposes of identifying in-person voters. State Ex. 1, p. 18. In recommending that election law should be reformed to require reliable photo identification, the Commission emphasized several times that "there is no doubt that voting fraud occurs" and observed that fraud dilutes the strength of legitimate votes and thereby disenfranchises honest voters. *Id.*

The Commission recognized that requiring reliable photo identification would deter voter fraud and enable better fraud detection. *Id.* at 18. The Commission also recognized that protecting the integrity of elections by requiring voters to present photo identification would advance the independent, but equally compelling, government interest in protecting public confidence in the legitimacy of election outcomes. *Id.* On Wednesday, November 30, 2005, the *Indianapolis Star* reported that Commission member and former U.S. Representative Lee Hamilton (D-Ind.) "says Indiana was right to adopt a voter ID law . . . ." (State's Ex. __)

VI. MCEB's Material Facts Incorporated Herein

The State Defendants hereby incorporate by reference all of the undisputed material facts asserted in the brief of the Marion County Election Board.

<u>STATEMENT OF DISPUTED FACTS</u>

With a limit of 60 pages and facing a combined total of 31 pages of Statements of Material Facts Not in Dispute, compliance with L.R. 56.1(b) is difficult. Without conceding that any facts relied on by the Plaintiffs are either material or undisputed, the Defendants direct the Court's attention to a few

particular factual disputes, none of which is material for purposes of Defendants' Motion for Summary Judgment.

I. The Plaintiffs Have No Support for their Assertion that there is no In-Person Voter Fraud at Indiana Polling Places

The Crawford Plaintiffs cite the concessions by Indiana Election Division Co-Director King and the Intervenor-State that they are unaware of any historical in-person incidence of voter fraud occurring at the polling place (Crawford Brief, p. 23) as conclusive evidence that in-person voter fraud does not exist in Indiana. They also seek to support this conclusion with the testimony of two "veteran poll watchers," Plaintiff Crawford and former president of the Plaintiff NAACP, Indianapolis Chapter, Roderick E. Bohannon, who testified that they had never seen any instances of in-person voter fraud. (*Id.*)

At best, the evidence on this issue is in equipoise. While common sense, the experiences of many other states, and the findings of the Baker-Carter Commission all lead to the reasonable inferences that (a) in-person polling place fraud likely exists, but (b) is nearly impossible to detect without requiring photo identification, the State can cite to no confirmed instances of such fraud. On the other hand, the Plaintiffs have no proof that it does not occur.

At the level of logic, moreover, it is just reasonable to conclude that the lack of confirmed incidents of in-person voting fraud in Indiana is the result of an ineffective identification security system as it is to conclude there is no in-person voting fraud in Indiana. So while it is undisputed that the state has no proof that in-person polling place fraud has occurred in Indiana, there does in fact remain a dispute over the existence *vel non* of in-person polling place fraud.

II. There is no reliable or statistically significant proof that the Voter ID Law will have a disparate negative impact on the poor and uneducated

The Democrat Plaintiffs allege that the Voter ID Law creates a significant economic and social burden on Indiana's poor and uneducated. Their principal support is the $40,000 report prepared by Kimball Brace, President of Election Data Services, Inc. (State Ex. 80 at 31)

Brace's report contains two separate analyses. In his first analysis, Brace attempts to determine the number of names that appear on the Marion County registration list that are not accounted for in the Indiana Bureau of Motor Vehicles list of driver's licenses, permits, and non-license ID. As a means of predicting the impact of the Voter ID Law, this analysis has deep methodological flaws. Brace admits his study is restricted to the state's most heavily populated urban county, which, in part because it has a metro bus system, is not representative of registered voters across Indiana. (State Ex. 80 at 69) Dr. Jonathan Katz, a political scientist and statistician at Cal Tech (currently visiting at Stanford) points out that valid statistical claims cannot be premised on an unrepresentative population sample unless sophisticated statistical corrections are made. The Brace Report contains no such corrections. (State Ex. 79 at 6)

Even as a mere snapshot of the incidence of state-issued photo identification among registered voters in Marion County some 8 months before the May 2006 primary, Brace's study has little probative value. Brace estimates that the number of registered voters not appearing on the BMV list ranges from 51,392 voters to 141,000 voters depending on the stringency of the match criteria applied. (State Ex. 80 at 8, 9) An estimate with this wide of variance signals substantial uncertainty in the estimate. Yet Brace has calculated no confidence coefficient for either number.

Furthermore, Brace has made no correction or adjustment for the number of potential absentee voters, deceased voters, moved voters or voters who may have a federal ID that

complies with the new statute. (State Ex. 80 at 71, 72, 85, and 88) Thus, his study has no capacity to predict the likelihood that registered voters currently without state-issued photo identification will be disenfranchised by the law. And while Brace agrees with Clark Bensen that Marion County's 93.1% voting age population registration rate cannot remotely be accurate ("I believe there is some extra there"), he has made no correction for list inflation. (State Ex. 80 at 84) His reason is that he was not asked to undertake such an examination. (State Ex. 80 at 73)

The second part of Brace's report was to apply 2000 census data to his set of unmatched registered voters to determine their median household income level and educational level. Brace's data suggesting differences between income groups in terms of driver's licenses is completely unreliable. First, he assumes that everyone within a census block group (which is usually about 1,000 people (State Ex. 80 at 97)) has the same income level. In such a block group there will be many people with well over the median income. After he found that his block group has a median income of $15,000, Brace made no attempt to determine, and had no way of determining, on which side of that median the non-matches lie or how far they deviate from the median.

In addition, by attempting to make inferences about *individual* behavior from census data that relates only to *groups* of individuals, the Brace Report suffers from what statisticians and quantitative social scientists call aggregation bias. (State Ex. 79 at 6) Thus, even though Mr. Brace finds some correlation between socio-economic status and possession of state-issued identification at the aggregate level, this relationship may be non-existent or reversed at the individual level. (*Id.*)

Even using Brace's application of census data to infer individual behavior, the differences between low and median income people are extraordinarily small, and based on an

extraordinarily small sample size. According to Table D in the Brace Report, there are only 829 (13.1% of the total) low-income registered voters without a driver's license, permit or non-license photo identification in the census block group he studied—829 individuals that form the basis of Brace's assumptions about all low-income people in Indiana. Yet, the difference between this group's unmatched rate and that of the median income bracket is only 3.6% (13.1% to 9.5%). This differential is small on its face, and smaller still considering the actual number differences. That is, while 829 low-income individuals apparently do not have state-issued photo identification, 600 of those in the median income bracket do not. So, if only 228 low-income registered voters obtained compliant photo identification, or if Brace's estimates are off by only 228 voters, there would be no difference between low and median income groups in terms of the incidence of photo identification.

Finally, Brace's analysis shows absolutely no disparate impact on the basis of education. Table D of the Brace Report shows 9% of voters with graduate degrees and 8.9 of voters with bachelor's degrees did not have BMV voter identification, while only 8.5% of those without a high school education and 8.2% of those with a high school degree were without such licenses. Therefore, *better* educated voters were less likely to have a driver's license, permit, or non-license photo identification.

III. Indiana Citizens May Renew Non-License Identity Cards For Free

Indiana law expressly provides that the BMV may not charge anyone of voting age for renewal or replacement of a non-license photo identification. Ind. Code § 9-24-16-10. At her deposition in this case, BMV Director of Driver Services Carol Redman incorrectly stated that it was BMV policy to charge citizens to renew non-license photo identification. (Crawford Ex. 13) According to Stephen Leak, the BMV's Assistant Commissioner for Driver/Vehicle Services and

Ms. Redman's superior, the policy of the BMV is to issue renewals of non-license photo identification for free. (State Ex. 72 ¶¶ 7-8)

IV. New Indiana Residents With Valid Licenses From Other States May In Fact Obtain Free Non-License Identity Cards

Indiana law also expressly provides that the BMV may not charge anyone of voting age for a non-license photo identification unless the applicant already possesses a valid driver's license. Ind. Code § 9-24-16-10. Unfortunately, the BMV originally misunderstood the statute to mean that it could also charge a fee to new Indiana residents seeking non-license photo identification if such applicants already possessed a valid license from another state. (Crawford Ex. 3 at 15-16) Now, however, the BMV has changed that policy to conform to the plain language of the statute and will issue non-license photo identification to new residents who already possess a valid license from another state. (State Ex. 72, ¶¶ 10-11)

SUMMARY OF ARGUMENT

The Voter ID Law is an important, common-sense effort to protect the integrity of elections. It merely requires voters to produce one among several very common forms of photo identification so that poll workers—whose jobs have come under increasing pressure and scrutiny in recent elections—will have an easier time detecting identity fraud at the polls. The Elections Clause of the United States Constitution expressly authorizes state legislatures to regulate the manner of holding federal (and state) elections. The Voter ID Law is nothing more than an exercise of this authority by the General Assembly. It is not a direct or severe impingement of the right to vote, is not a poll tax, and is not an unequally applied voter qualification. Regardless, Indiana has a compelling interest in preserving the integrity of elections—and in preserving the confidence of the public in the integrity of elections—particularly at a time of highly inflated Indiana voter rolls, frequent accounts of in-person voter

identity fraud around the country, and tightly contested elections. The Voter ID Law is a reasonable, well-targeted means of preserving fair elections, protecting the value of legitimate votes, and safeguarding public confidence in the legitimacy of elections.

ARGUMENT

I. This Case is Burdened with Substantial Standing Problems

For the reasons stated in the brief of the Marion County Election Board, whose arguments concerning standing are incorporated herein by reference, the only parties to have any standing whatever in this case are the State Democrats and the MCDCC, and they have standing only to the extent of their associational freedom claims.

II. The Secretary of State and the Directors of the Indiana Election Division Do Not Enforce the Voter ID Law and are Not Proper Defendants.

As argued in their Motion to Dismiss and memorandum in support, neither the Secretary of State nor the co-Directors of the Indiana Election Division decides whether to require voters to present photo identification at the polls on election day pursuant to the Voter ID Law. That is the responsibility of the county election boards and their poll workers, and they are not under the control of the Secretary of State or the Election Division. Accordingly, an injunction against the Secretary of State and the Election Division cannot redress any of the Plaintiffs' alleged injuries. As a result, Plaintiffs have no standing to sue them, by virtue of both Article III and the Eleventh Amendment.

III. As a Regulation of the Manner of Electing Public Officials, the Voter ID Law Is Expressly Authorized by Art. I § 4 cl. 1 of the United States Constitution

Article I, section four of the United States Constitution provides the States with the power to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congressional oversight. U.S. Const., art I, § 4, cl. 1. This authority,

known as the Elections Clause, extends to elections of State offices as well. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). The Elections Clause, in conjunction with Article I, section two, and Article II, section one, is the font of the judicially recognized right to vote, a right later reinforced by Amendments I, XIV, XV, XVII, XIX, XXIV, and XXVI.

The Voter ID Law represents a basic exercise of Elections Clause authority. It is a law that is fundamentally different from voter qualifications laws, such as age and residency requirements. It does not establish any criteria or barrier to voting; it is simply an enforcement method for insuring that the eligibility criteria for voting that do exist (such as age and residency) are honored. Rather than limit the franchise to a certain subset of the population, the Voter ID Law protects the franchise by insuring that those who meet substantive eligibility requirements have their votes counted without being diluted by ineligible voters. Questions on how best to enforce legitimate criteria are quintessential legislative policy questions and are not subject to judicial second-guessing or invalidation.

A. The Voter ID Law does not impose substantive voting criteria; it protects legitimate voters by enforcing substantive criteria that already exist.

It is axiomatic, but no less critical to understand, that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It is equally critical to understand, however, that the right to vote is not simply the right to cast a ballot, but also the right to have one's vote counted. *U.S. v. Saylor*, 322 U.S. 385, 387 (1994). To protect that right, states must undertake reasonable efforts to ensure that those who cast ballots are actually entitled to do so. Without such safeguards, the right to vote, and to have one's vote counted, would become increasingly diluted amidst a pool of fraudulent ballots. *Id.*

To achieve the important and essential function of preserving the orderliness and fairness of elections presupposed by the Elections Clause,

> States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote…. *Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions*.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (emphasis added).

Among the important interests that justify such regulations is the interest in preserving the "integrity and reliability of the electoral process itself." *Id.* 788 n.9. And while "nothing in the language of [Article I, § 4] gives support to a construction that would immunize" state laws that destroy a citizen's right to vote (*see Wesberry*, 376 U.S. at 6), the ability of the States to determine the procedures and mechanisms of elections held within their borders is unquestioned:

> It cannot be doubted that these comprehensive words [of Article I § 4] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, *prevention of fraud and corrupt practices*, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows as necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932)(emphasis added).

For these reasons, the Court has rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). Otherwise, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest…would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.*

In *Storer v. Brown*, 415 U.S. 724, 729-30 (1974), the Court held that because "the States are given the initial task of determining the qualifications of voters who will elect members of Congress," not every substantial restriction on the right to vote is presumptively invalid. The *Storer* Court observed that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Id.* at 730.

In light of these profound state interests, *Anderson* explained the critical process of balancing the government and individual interests when election laws are challenged:

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. When modest, nondiscriminatory restrictions on the right to vote are placed on this scale, the general interests of the electorate in preserving the integrity of free and fair elections are sufficiently weighty to justify the restrictions. *Id.* at 788; *see also Burdick*, 504 U.S. at 434.

Many commonplace election regulations that may exclude some otherwise legitimate voters are permissible under this standard. For example, requiring voters to register in advance of elections helps to prevent fraud, but it also undoubtedly excludes otherwise qualified and willing voters who forget to register or who do not have access to voter registration personnel or materials. Similarly, requiring voters to vote in public at a specified polling place acts is, among other things, a means to prevent fraud. Yet there may well be a class of people who do not qualify to vote absentee but for whom the burden of getting to the polls to vote is simply too

much. For them, requiring ballots to be cast at a specific polling place operates as a disenfranchisement. Even the fundamental requirement that voters identify themselves to clerks at the polling place—another piece of the fraud-prevention puzzle—may offend some legitimate registered voters and drive them away from voting.

Such collateral disenfranchisement notwithstanding, there can be no serious dispute with advance registration, polling-place voting requirements, or self-identification at the polls. Requiring voters to prove identity with commonly possessed documentation is no different. *See League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 828-29 (N.D. Ohio) (upholding requirement that first-time voters who registered by mail provide acceptable proof of identity even though some voters may be disenfranchised); *see also McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (upholding Tennessee statute requiring disclosure of Social Security number as condition for voter registration); *Greidinger v. Davis*, 988 F.2d 1344, 1352-55 (4th Cir. 1993) (holding that state may require voters to reveal their Social Security numbers though it may not publicly disclose such numbers).

B. The Voter ID Law wins in the balance.

Nor is the Voter ID Law in some way disproportionate to the goal of detecting and deterring identity fraud at the polls. Today, government-issued photo identification is universally accepted as proof of identification. First, of course, the vast majority of the voting-age population wishes to be able to drive an automobile and therefore have driver's licenses. Beyond that basic function, the Transportation Security Administration demands to see government-issued photo identification before travelers can even pass through security checkpoints at airports, *see* State Ex. 77. The United States Marshal's Service similarly demands to see government-issued photo identification before allowing anyone to enter United States

Courthouses. *See United States v. Smith*, 426 F.3d 567, 571-72 (2d Cir. 2005). Photo identification is needed to rent a car, cash a check, open a financial account, or engage in many other common transactions. Norris & Smith, 74 Mich. B.J. at 412. Among all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity.

As with many private-sector and public-sector services, programs, and operations, the Voter ID Law, rather than create an entirely new system of individual identification, seeks to improve fraud prevention by relying on a system already in place—standard, government-issued photo identification. Like other safeguards, the Voter ID Law promotes state interests of the most profound order. Any incidental, marginal deterrence of legitimate voters, while unfortunate, is more than outweighed by the protection afforded to legitimate voters as a whole. *See Summit County Democratic Cent. and Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (rejecting a preliminary injunction against a new polling-place voter-challenge process because the public interest in "permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote" outweighs the interest in permitting "every registered voter to vote freely").

IV. The Voter ID Law Imposes No Unconstitutional Burdens on the Right to Vote or Any Other Constitutional Right.

A. The Voter ID Law does not impose severe burdens on the right to vote.

Voting regulations may be subjected to strict judicial scrutiny only if they impose "severe" burdens on the right to vote. *See Burdick*, 504 U.S. at 434. Requiring voters to show poll workers their driver's licenses hardly rises to the level of, for example, a one-year residency

requirement (*see Dunn v. Blumstein*, 405 U.S. 330 (1972)), a property-ownership requirement (*see Hill v. Stone*, 421 U.S. 289 (1975)), a prior-participation requirement (*see Ayres-Schaffner v. DiStefano*, 37 F.3d 726 (1st Cir. 1994)), or even a ban on write-in voting (*see Paul v. Indiana Election Bd.*, 743 F.Supp. 616, 623 (S.D. Ind. 1990)). And it imposes nothing like the vote dilution at issue in legislative-apportionment cases. *See Wesberry,* 376 U.S. at 17-18. To the contrary, the main purpose underlying the Voter ID Law is to protect legitimate voters from having their votes diluted by fraudulent ballots. *Cf. DiStefano*, 373 F.3d at 729 n.8 (distinguishing between the substantive disqualification of a prior-participation requirement and "structural" regulations, such as registration requirements).

The Plaintiffs acknowledge that laws regulating the "mechanics" of the election process are subject to "lesser" scrutiny because they burden the right to vote only "indirectly." (Democrats' Br. at 30) Yet they insist, without providing any explanation, that requiring voters to present photo identification somehow constitutes a non-mechanical "direct[] burden [on] the core right to vote." (Democrats' Br. at 29) The only theory they offer for distinguishing the Voter ID Law from registration, in-person voting, and signature requirements is that the Voter ID Law is new.

For example, the Democrats cite *Mescall v. Burrus*, 603 F.2d 1266, 1269 (7th Cir. 1979), a special-purpose-electorate case, for the proposition that "any restrictions on voting other than residence, age, and citizenship" must satisfy strict scrutiny. They ignore, however, that (1) requiring photo identification is merely a device for verifying identity (which presumes things like residence, age, and citizenship); and (2) that common procedures such as registration, self-identification, and poll-book signature requirements would also be subject to strict scrutiny under their theory. What *Mescall* was talking about, of course, are *substantive* requirements (such as

whether voters may be restricted to a special-purpose electorate) as opposed to *procedural* requirements used to ensure the integrity of the election. *See id.*

The Voter ID Law imposes no substantive qualifications for voting. It is nothing more than a method, in an era of highly inflated voter rolls, for detecting and deterring fraud and preserving the public confidence. It supplements (and does not supplant, as the Democrats suggest) existing fraud-prevention measures.[2] Accordingly, the Voter ID Law should not be subjected to strict scrutiny.

B. The Voter ID Law does not treat similarly situated citizens unequally.

The Plaintiffs also complain that the Voter ID Law does not apply equally to all voters. In particular, they object that absentee voters who mail their ballots are not required to include photo identification with their ballots, and they also object that residents of state-licensed residential care facilities (*i.e.*, nursing homes) are not required to show photo identification if they vote in person at a precinct polling place located inside their care facilities. Ind. Code §§ 3-11-10-1.2; 3-11-8-25.1(f). Based on these supposed inequalities, Plaintiffs argue that the Voter ID Law violates the Equal Protection Clause and the Civil Rights Act and that, in any event, it cannot be justified by reference to the compelling state interest in preventing voter fraud. Thus, at bottom, the Plaintiffs are making the extraordinarily odd argument that the allegedly "harsh"

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[2] The Democrats underscore their confusion in this regard when they dismiss out-of-hand the notion that voters could be required to verify their identities through DNA samples or fingerprints. (Democrats' Br. at 34) While these measures might theoretically implicate Fourth Amendment protections, it is hard to contend that they would amount to substantive election qualifications subject (on that basis) to strict scrutiny. In fact, because fingerprints and DNA are universal, one would think the Democrats would embrace such tools as better alternatives to government-issued photo identification, which Plaintiffs contend to be excessively difficult to obtain. Indeed, the Baker-Carter Commission has endorsed the notion that future national policy linking biometric data to identity should include voting as one use. State Ex. 1, p. 21.

and “disenfranchising” Voter ID Law should be *expanded* into areas where it serves no valuable purpose or has particularly harsh results.

1. Photo identification would not address absentee-ballot fraud and might actually compromise absentee-ballot secrecy.

Unlike with in-person voting, the Voter ID Law would not detect or prevent mail-in absentee-ballot fraud. The type of fraud addressed by the Voter ID Law occurs when an individual who is not entitled to vote arrives at a precinct polling place and claims the identity of someone whose name is on the voter-registration list for that precinct. The asserted identity may be of someone who is deceased, who has moved, or who has simply not voted in that election. Requiring voters to present photo identification provides election officials with the opportunity to (1) check the name on the identification card against the information in the poll book; and (2) simultaneously check the photograph on the identification card (which, owing to the expiration date requirement, will be relatively recent) against the face of the person who will cast the ballot. The photo identification thus becomes a link between the voter and the registration. State Ex. 37.

Absentee-ballot fraud, by contrast, typically occurs in a very different way and is not readily detectable by checking photo identification. As the Democrats themselves acknowledge, the chief vehicle for absentee-ballot fraud is coercion of legitimate voters, not simply voting in the name of another. (Democrats Br. at 20-21) In fact, the absentee-ballot fraud documented in cases cited by the Democrats was largely accomplished through such coercion and tampering. *See Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004); *Schoffstal v. Kaperek*, 457 N.E.2d

550, 552-54 (Ind. 1984).[3] Requiring voters to enclose a photocopy of photo identification plainly would not detect this sort of fraud.

Even where absentee-ballot fraud is accomplished by way of voter impersonation, a photo-identification requirement would be of little use. While requiring absentee voters to enclose a copy of photo identification with their ballots would provide election officials with a trustworthy source to establish a link with the name of a registered voter, the absence of a live body standing before those same officials precludes linking the enclosed identification with the person actually casting the ballot. State Ex. 37, ¶ 22. A critical link in the chain of identity verification is thereby lost, meaning that the photo identification is of little practical significance in detecting absentee ballot fraud. *Id.*

Furthermore, the poll-book signature requirement yields little benefit at the polling place, where officials are both untrained in signature analysis and under pressure to keep lines moving. State Ex. 37, ¶ 9. However, signature comparison is a very meaningful security device with respect to absentee ballots. With absentee ballots, officials have much more time to compare the signature on the ballot envelope with the voter-registration signature. State Ex. 37, ¶¶ 15-19. Also, unlike poll-site workers, absentee-ballot workers may compare the signature on the ballot envelope with any other signature exemplars available, including, but not limited to, the absentee-ballot application submitted in the name of the voter. State Ex. 37, ¶ 18. The difference in outcomes is enormous. Of the Plaintiffs with experience working at polling sites on election day—who have a combined 60 years of experience—none is aware of any instance where a clerk has even questioned the genuineness of a signature. *See* State Exs. 54-60; State Ex. 37, ¶ 9. In contrast, according to former Marion County election administrator Wendy

[3] So, too, in the cases from other states cited by the Democrats was the absentee-ballot fraud

Orange, rejecting absentee ballots on suspicion of forgery is a routine practice. State Ex. 37, ¶ 20.

In addition, requiring absentee voters to include a copy of photo identification in the ballot with their envelopes poses risks that presenting photo identification at the polls does not. With respect to absentee ballots if election workers rely on photo identification inserted with a marked ballot, they will be able to verify identity only by unsealing the ballot envelope. Officials would then have before them exposed, marked ballots along with the photo identification of the voters. This obviously poses a grave threat to ballot secrecy.

Finally, it is worth noting that some of the Plaintiffs acknowledge the material differences between absentee voting and in-person voting for Voter ID Law purposes. For example, when asked how photo identification would be effective in detecting absentee-ballot fraud, Melissa Madill of Plaintiff IRCIL responded "I guess I'm not saying it would be effective. I'm just saying nothing happened to address that, and that seemed to be where the issue was." Crawford Ex. 9, p. 67. Similarly, asked whether photo identification would be just as effective for absentee ballots as for in-person voting, Roderick Bohannon of the NAACP answered "No," but nonetheless asserted that the law manifests "discrimination" even though "practicality really is what we're not dealing with." Crawford Ex. 10, p. 85. Plaintiff Crawford acknowledged that a photo-identification requirement would not have prevented the absentee-ballot fraud that occurred in East Chicago and Anderson in recent years. Crawford Ex. 17, p 88.

2. The nursing home exemption is a reasonable accommodation, not illegal discrimination that undermines the goals of the Voter ID Law.

Plaintiffs also object that residents of state licensed-care facilities who vote in-person at polling sites located in the facilities where they live are not required to show photo identification.

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accomplished by coercing legitimate voters or tampering with their ballots.

As it happens, each of the state-licensed facilities that serve as polling places are nursing homes, which is to say that they house the aged. There are only thirty-two such facilities in fifteen counties. (*Id.*)

By exempting nursing-home residents who vote at their own facilities from the Voter ID Law, the General Assembly was simply acknowledging a few basic self-evident realities: (1) those over 65 can vote absentee and need not provide photo identification in doing so; (2) seniors living in nursing homes that are not polling places are likely to vote absentee; (3) seniors who live in nursing homes that are polling places will be more likely to vote in person because they will not have to travel to do so; (4) seniors who live in nursing homes would likely have particular difficulty traveling to obtain photo identification; and (5) seniors who vote in person in the nursing homes where they live are both likely to be identifiable as residents by election officials and unlikely to commit fraud by misidentifying themselves in the name of someone on the poll book.

Many of the Plaintiffs worry about the impact of the Voter ID Law on the elderly. Neither they nor the Court should fault the General Assembly for trying to accommodate seniors who are so infirm that they can no longer care for themselves. The licensed-care-facility exemption represents a reasonable accommodation by the General Assembly and in no way violates equal protection principles or undercuts the state's compelling interests in deterring and detecting in-person voter fraud and preserving public confidence in elections.

C. **The Voter ID Law is not a poll tax, and the rationales underlying the poll-tax cases do not speak to this type of law**.

The Plaintiffs contend that the Voter ID Law is invalid under the Equal Protection Clause because it imposes a fee or a series of economic burdens as a condition of exercising the right to

vote.[4] It is certainly the case that the Supreme Court invalidated payment of a poll tax as a condition of voting in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), and that in *Harman v. Forssenius*, 380 U.S. 528 (1965), it ruled that the Twenty-Fourth Amendment prohibits requiring voters to file a certificate of residence or pay a poll tax six months before an election. But those cases and the doctrines they represent in no way preclude states from requiring voters to present photo identification that the BMV issues without charge.

1. Non-license photo identification is available for free from the BMV.

Indiana law concerning free photo identification in this regard provides as follows:

> Sec. 10. (a) The bureau may adopt rules under IC 4-22-2 and prescribe all forms necessary to implement this chapter. However, **the bureau may not impose a fee for the issuance of:**
> (1) an original;
> (2) **a renewal of an**; or
> (3) a duplicate;
> **identification card to an individual described in subsection** (b).
> (b) **An identification card must be issued without the payment of a fee or charge to an individual who:**
> (1) does not have a valid **Indiana** driver's license; and
> (2) will be at least eighteen (18) years of age at the next general, municipal, or special election.

Ind. Code § 9-24-16-10 (emphasis added).

As the emphasized text plainly shows, the BMV must provide an initial *or* renewal non-license identification card for free if the applicant does not have a valid *Indiana* driver's license. Unfortunately, Carol Redman of the BMV misstated in her Rule 30(b)(6) deposition that a person with a valid non-license identification card would be charged a fee upon renewal of that card. Crawford Ex. 3, p. 13. That statement, while

[4] They also contend that, to the extent that the Voter ID Law is invalid as to state elections under the Equal Protection Clause because it imposes a fee, it is also an invalid poll tax under the Twenty-Fourth Amendment as to federal elections.

perhaps understandable as a response to a compound question concerning the impact of having *either* a valid license *or* a valid non-license identification card, is contrary to the plain text of the statute. Stephen Leak, Redman's boss and the Ass't Commissioner of Driver/Vehicle Services of the BMV has declared that the BMV's policy is to enforce the plain text of the statute and to issue free renewals of non-license identification cards to those without valid driver's licenses. State Ex. 72, ¶¶ 8-11.

Moreover, a registered voter who is a relatively new Indiana resident and still has a valid foreign-state license is eligible for a free non-license photo-identification card because that person does not have a valid *Indiana* license. While prior BMV policy had been to the contrary, the BMV has now modified its policy to conform to the plain text in the statute. State Ex. 72. It is simply not true to say that voters who need non-license identification cards to vote will have to pay to renew that identification every four years.

2. Incidental inconveniences and travel costs are not poll taxes.

Next, it is utterly implausible to assert, as the Plaintiffs seem to claim, that burdens incidental to exercising the right to vote can be labeled "poll taxes." For example, the Plaintiffs insinuate that trips to the BMV or to the state or county departments of health in pursuit of photo identification, as well as a post-election trip to the clerk's office to validate a provisional ballot, constitute "poll taxes." Whatever else may be said about such collateral costs, they can in no way be described as fees collected by the state as a condition of voting. *See Harper*, 383 U.S. at 668 (holding that a poll tax is conditioning the "obtaining of a ballot" on the "requirement" of paying a fee). Otherwise, merely requiring citizens to undertake effort to register to vote (such as by traveling to the BMV), or to register to vote absentee, or to travel to the polling place on election day would also constitute poll taxes.

3. **Incidental birth-certificate costs are not poll taxes.**

Plaintiffs also assert that the Voter ID Law amounts to a poll tax because, even if the BMV identification card is free, the BMV requires applicants to provide a birth certificate, which is not free at either the Indiana Department of Health or the Marion County Department of Health. Any such incidental costs, however, are analytically indistinguishable from other costs incidental to voting, such as getting to the polling place on election day, and cannot be understood as poll taxes.

The historical context of the poll-tax cases demonstrates why birth-certificate fees are not poll taxes. The term "poll tax," of course, refers to any tax assessed per capita, not simply taxes assessed on voting. *See Breedlove v. Suttles,* 302 U.S. 277, 282 (1937), *overruled by Harper*, 338 U.S at 668 ("Poll taxes are laid upon persons . . . ."). Historically, poll taxes became affiliated with voting for several reasons. One reason is that states opportunistically used elections, where individuals check in with government officials anyway, to ensure that citizens paid the tax. *Id.* But another more nefarious reason was that states conditioned the franchise on payment of poll taxes as a tool to enforce racial discrimination in voting because blacks were disproportionately less able than whites to pay the tax.

When the Supreme Court invalidated poll taxes as a condition of voting in state elections, it did so because "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Harper*, 383 U.S. at 666. Poll taxes are invalid as invidious discrimination because they are as irrelevant to voting as is military service or professional occupation. *Id.* (comparing wealth to such previously invalidated voting qualifications). With respect to federal elections, in *Harman* the Court construed the Twenty-Fourth Amendment to protect a "right to vote in federal elections without paying a poll tax" and invalidated a Virginia

law requiring voters, as a condition for voting in federal elections, either to pay the state's customary poll taxes or to certify their Virginia residence. *Harman,* 380 U.S. at 541. The Court ruled the law invalid because only those who wished to exercise their Twenty-Fourth Amendment rights (*i.e.* to vote without paying poll taxes) were required to file a certificate of residence. Critically, payment of a per capita tax lay at the root of the problem. *Id.*

Here, however, there is no per capita tax associated with the Voter ID Law. At the most basic level, Indiana assesses no per capita taxes whatever. Conforming identification cards are themselves free, and the fee requirement for birth certificates is merely a fee-for-service that has existed since 1907. *See* State Exs. 48 and 49. Birth-certificate fees in no way represent either an attempt to extract a levy from the citizens to finance elections or general expenditures, or an attempt to discriminate on the basis of socioeconomic or other status. It is simply a reflection of the fact that processing birth certificates costs money. Dem. Ex. 5. And while poll taxes have been invalidated because they were targeted at disenfranchising blacks, here the Democrats' demographics expert, Kimball Brace, could not show that any deterrent impact the Voter ID Law might have on legitimate voters would disproportionately affect blacks. Dem. Ex. 5.

As a functional matter, voters are not suddenly required to pay a fee to the state for the privilege of voting. *See Harper*, 383 U.S. at 666-68. The vast majority of voters will not even need to obtain photo identification to vote in the next election because they already have conforming photo identification in the form of a driver's license or non-license identification card. There is no cost to voters to use these forms of photo identification already in their possession at the polls. And many who do not already have some acceptable form of

identification will be able to vote absentee and, therefore, will not need to obtain it. Such groups include anyone over 65-years old and anyone with a disability. *See* Ind. Code § 3-11-10-24. And while exceptions for indigence do not resuscitate what is otherwise an invalid poll tax, the indigence exception, which on its face applies even if the only fee incurred is for a birth certificate, further underscores that the Voter ID Law is not, *a priori*, a poll tax.

It is true that driver's licenses will continue to cost money to obtain and to renew, but that is a fee for the privilege of driving that already exists and is in no way associated with using driver's licenses for identification at the polls. Those who already have non-license identification cards will now be able to renew them for free as long as they do not have driver's licenses. And those with driver's licenses who do not wish to pay to renew them will be able to obtain free non-license photo identification—they will not even need a birth certificate to obtain it. *See* Ind. Code § 9-24-16-10; *see also* Crawford Exs. 2-3. Thus, the state, through the Voter ID Law, in no way imposes any fee on the vast majority of voters.

Furthermore, voters who do not already have conforming state-issued photo identification may instead use photo identification issued by a federal agency, such as U.S. Military identification or a U.S. passport. Any fees that voters incur in obtaining these documents cannot plausibly be described as state poll taxes because those fees are imposed by the federal government. This is true even with respect to state charges for birth certificates that are necessary for obtaining passports—it is the federal government, not the state, which has decided birth certificates are necessary for passports. For purposes of analyzing whether the Voter ID Law imposes a state poll tax as a condition for voting, all costs attendant to obtaining acceptable federal identification are the responsibility of the federal government, not Indiana.

Similarly, the state cannot be held responsible for costs voters may incur obtaining birth certificates from other states, none of which remit birth certificate revenue to Indiana. It is not as if Indiana is attempting to coerce citizens to purchase birth certificates generally for the benefit of a multi-state birth certificate revenue-sharing compact.

That leaves only a limited sector of voters—those born in Indiana who do not already have state-issued photo identification, who are not eligible to vote absentee, who are not indigent and who do not have a religious objection to being photographed—who might actually pay a fee charged by an Indiana agency in order to be able to vote. In contrast, the Virginia poll taxes invalidated in *Harper* and *Harman* were formal taxes assessed against *all voters*. *See Harper*, 383 U.S. at 668; *Harman*, 380 U.S. at 541. If the Voter ID Law is meant to condition the right to vote on the payment of a fee, it is a highly incompetent piece of legislation.

The truth is that this law in no way even remotely resembles a poll tax. It simply enforces the entirely legitimate (nay-compelling) state interest in securing the integrity of elections and public confidence in election results. Costs incidental to these interests cannot reasonably be described as poll taxes. Requiring photo identification at the polls no more conditions the right to vote on payment of a poll tax than requiring photo identification to enter a federal courthouse so conditions the right of access to courts.[5]

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[5] In making their poll tax argument, Plaintiffs also attempt to draw an analogy between the Voter ID Law and candidate filing fees that have been declared invalid. (Crawford Br. at 40) They do not explain, however, how a $10.00 general birth-certificate fee that might at most actually be paid by a minute portion of the electorate is in any way like a multi-thousand-dollar fee assessed on *all* candidates, and *only* on candidates, for public office. Plaintiffs cite to *Bullock v. Carter*, 405 U.S. 134 (1972), which invalidated excessively high candidate filing fees, and comment that *Bullock* cites *Harper*. (Crawford Br. at 40) However, *Bullock* cites *Harper* precisely to make the point that candidate filing fees are *not* like poll taxes. *Bullock*, 405 U.S. at

4. *Salerno* prohibits facial invalidation.

In light of all the circumstances described above where voters will not need to pay any fees to Indiana in order to obtain conforming identification, the Voter ID Law cannot be invalidated on its face as an illegal poll tax. Under *United States v. Salerno*, 481 U.S. 739, 745 (1987), a statute may not be invalidated on its face unless it is incapable of any constitutional applications. Again, the only voters that may ultimately pay a fee for an Indiana birth certificate are those (1) born in Indiana who (2) do not already have state-issued photo identification, who (3) are not eligible to vote absentee, who (4) are not indigent, and who (5) do not already have a birth certificate.

Under *Salerno*, the Voter ID Law may not be invalidated on its face. *See also Hill v. Colorado*, 530 U.S. 703, 733 ("[S]peculation about possible vagueness in hypothetical situations . . . will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications."); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n.21 (1995) (commenting that FECA was constitutional on its face even though it might be deemed unconstitutional in some applications). At most, actual voters who must pay for birth certificates in order to obtain acceptable identification could bring as-applied challenges to invalidate the birth certificate fees (and not the Voter ID Law) as de facto poll taxes.

D. There is no unconstitutional burden on freedom of association.

The Democrats argue that the Voter ID Law severely burdens their right to associate with voters who are registered to vote but unable to vote due to lack of photo identification. While the First Amendment protects the right of citizens "to band together in promoting among the

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143 n.20. Just about the only way in which the Voter ID Law and candidate filing fees are alike is that neither even remotely resembles a poll tax.

electorate candidates who espouse their political views," *see California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), the Voter ID Law in no way abridges this right.

To begin, Indiana's open-primary system permits any voter, regardless of political affiliation or associational intentions, to vote the ballot of whichever party he chooses. Any number of individuals voting a Democratic ballot may have no intention of associating with the Democratic Party and may not consider themselves members of that, or any other, party. For example, people who consider themselves Republicans may cast a Democratic Party ballot on primary day (and vice-versa) simply to distort the results of the primary. Though such voters are formally on record as having cast a Democratic Party ballot, in their own minds they have not undertaken to associate themselves with the Democratic Party. And beyond choosing the party's ballot, the act of voting in a primary does not in itself communicate association with anyone—it is, in fact, secret.

Even if primary voting somehow equals an associational act in some way, the Voter ID Law impacts associational rights only in very slight, and entirely neutral, ways. Just a few months ago, in upholding Oklahoma's semi-closed-primary system (which prohibits parties from inviting members of other parties to vote in their primaries), the Court said that laws that burden associational rights only slightly do not receive exacting scrutiny. *See Clingman v. Beaver,* ___ U.S. ___, 125 S.Ct. 2029, 2038 (2005) ("[M]inor barriers between voter and party do not compel strict scrutiny. To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.") (internal citations omitted). In fact, the Court observed that it has invalidated regulations based on associational rights only where states seek to discover the names of an organization's members,

to restrict activities central to an organization's purpose, to disqualify an organization from public benefits or privileges, or to compel the organization to associate with unwanted members or voters. *Id.* at 2035-36.

Beyond those types of burdens on organizations, states have wide regulatory latitude. *See id.* at 2035. ("The Constitution grants States broad power to prescribe the Time, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. [internal citations and quotations omitted])(quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). Generally, "'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

The Voter ID Law is a reasonable and content-neutral regulation of election mechanics, not an attack on political organizing. For all the reasons stated in Part IV.G., *infra*, the Voter ID Law is a narrowly tailored effort to vindicate compelling state interests in preventing in-person voter fraud and engendering confidence as to the legitimacy of elections. The Voter ID Law is in no way targeted at the Democratic Party or at disrupting any relationships between the Democratic Party and those that wish to associate with it. It applies every bit as much to the Republican Party and potentially to the Libertarian, Green, and any other parties that hold primaries. It is no more an impingement on any right to associate than the registration requirement or the in-person voting requirement.

The Democrats and voters who wish to cast ballots in their primaries still have the same opportunities to associate with one another as they did before. In fact, the Voter ID Law arguably strengthens party associations insofar as it prevents illegitimate interlopers from

diluting the Democrats' primary ballot pool. Regardless, the Democrats had trouble even identifying any supporters who will be unable to vote because of the Voter ID Law.

E. The Voter ID Law is not unconstitutionally vague.

Relying principally on invalidations of vague criminal laws as violative of due process and on First Amendment cases that invalidate vague licensing schemes as prior restraints on speech, the Democrats (and the League of Women Voters) challenge that the Voter ID Law as unconstitutionally vague. In particular, they argue that permitting "indigent" voters to have their provisional ballots counted without photo identification is impermissibly vague. They also argue that the Voter ID Law gives precinct workers "unbridled discretion" to decide whether a voter's photo identification "conforms" to what the law requires and whether the voter is the person depicted in the photo.

Unlike the laws invalidated in *City of Chicago v. Morales,* 527 U.S. 41 (1999), *Kolender v. Lawson,* 461 U.S. 352 (1983), and *Papachristou v. City of Jacksonville,*405 U.S. 156 (1972), the Voter ID Law threatens no risk that individuals will be chilled from engaging in protected conduct, namely voting, because they fear treading too close to an uncertain line between lawful behavior and criminal conduct. Moreover, unlike the licensing schemes invalidated in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969), and *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2003), *cert. denied,* 540 U.S. 817 (2003), there is no risk of content-based censorship resulting from the unbridled, unreviewable subjective judgments of government bureaucrats. Even if there is a legitimate dispute about the validity of the photo identification, the voter may cast a provisional ballot and then validate it with the same photo or other identification at the clerk's office followed by judicial review if necessary.

In the criminal due process cases, by contrast, the right to move about freely is destroyed when an arrest is made, regardless of judicial review. Furthermore, even if the charges are dismissed, police may exercise the same subjective judgment repeatedly to arrest those who look subjectively suspicious but who have committed no real crime. *See Kolender*, 461 U.S. at 358; *Papachristou*, 405 U.S. at 168-69. In those circumstances it is understandable that individuals would be chilled from exercising their rights to move about freely. Here, it is inconceivable that voters who have acceptable photo identification would be chilled from voting because of the Voter ID Law.

For a law to be vulnerable to a facial First Amendment challenge, it must confer on the government "substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *City of Lakewood,* 486 U.S. at 759. The Voter ID Law plainly does no such thing. Invalid licensing schemes typically require speakers to reveal something about the nature and content of their speech, or permit officials to deny licenses on any grounds they see fit. *See Weinberg,* 310 F.3d at 1046. Here there is no requirement here for any voters, at any stage of the process, to give officials any indication of how that person wishes to vote, and officials are not permitted to reject ballots based simply on any reason they see fit.

Even if this case passes the threshold test for a facial vagueness challenge, *see National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (holding that terms of statute were not constitutionally suspect even though "opaque" because they did not appear "in a criminal statute or regulatory scheme" and did not compel applicants "to steer far clear of any 'forbidden area' ").

The term "indigent," while undefined by statute, is commonly understood and susceptible of an objectively applicable definition. In fact, the statutory context suggests that it means something like "incapable of paying for the required documentation."

What is more, an affidavit of indigency, just like an affidavit of religious objection, is not subject to challenge by the terms of the Voter ID Law. According to the statute, if a voter claims indigency, the voter's provisional ballot must be counted as long as no other objections to the voter's eligibility exist. *See* Ind. Code § 3-10-8-25.1. And even if there were an unauthorized challenge, and even if Indiana's county election boards do not completely agree on the meaning of "indigent," once Indiana's appellate courts are given the opportunity to interpret and apply that term (assuming they do not simply dismiss the challenge completely), they will be able to set forth a straightforward definition that can objectively be applied to all cases. In any event, swearing that one is "indigent" for purposes of being exempt from the Voter ID Law is no more vague a standard—and no more subject to challenge—than swearing that one has a "disability" for purposes of being exempt from the in-person voting requirement. *See* Ind. Code § 3-11-10-24.

The term "conforms" is even less troublesome. Again, the Democrats argue that permitting poll workers to determine whether a particular photo identification "conforms" to the law confers far too much discretion on them. The statute's requirements for conformity, however, are neatly spelled out. The photo identification must have been issued by the State of Indiana or the Federal government; it must have an expiration date; it must contain a photograph of the person to whom it was issued; and the name on it must match a name on the voter registration list. *See* Ind. Code § 3-5-2-40.5. The vast majority of voters will provide a driver's license, a non-license identification card, or a passport. There is no dispute that these conform to

the law. And if there is some question at the margins as to whether an otherwise-compliant identification card issued by a state college or university was actually issued by the State of Indiana, that is a question easily and uniformly resolved through the provisional-ballot process, culminating (if necessary) with judicial review.

The Democrats also complain that poll workers have too much discretion in deciding whether the person in the photograph is the person standing before them. It is unclear whether the Democrats think that human beings are completely incapable of matching photos to faces, or whether, instead, they think the statute should more precisely provide that hair color, complexion, nose shape, mouth shape, and chin strength all have to match, or that only some percentage of those (or other) points of comparison need to match. Regardless, the Democrats champion the abilities of poll workers to compare a voter's signature with a computer image of a signature on the poll book, so it is hard to take seriously their worries over photo judgments. Many businesses and government agencies alike demand photo identification before rendering services or permitting access. In doing so, they readily assume the ability of average individuals without special training to match photographs and faces.

Finally, the League of Women Voters suggests that requiring photo identification to bear a name that "conforms" to the name on the voter registration list is too vague because names that contain hyphens or spaces are often improperly spelled on identification documents. First, requiring that a name on the identification "conform" to the name on the registration list is actually better for voters than defining with precision how close the match must be. This requirement essentially permits poll workers to forgive obvious typographical errors. Second, Indiana law takes account of the possibility that, for an infinite variety of reasons, a person's name may not appear properly on the voter registration list. Under Indiana law, voters are

permitted to indicate a "change of name" on the poll list, which would seem to cover any situation where the registration list contains a spelling inaccuracy. *See* Ind. Code § 3-11-8-25.

Third, it is entirely legitimate for the law to place some responsibility on citizens to take care to register their names properly and to insist on accurate photo identification cards. Assuming the voter has taken care to check the accuracy of photo identification, the name-change process noted above should resolve any risk of minor discrepancies. *See* Ind. Code § 3-11-8-25. Any remaining risk of illegitimate disqualification can be addressed through the provisional-balloting.

F. The Voter ID Law is not the tipping point for an unconstitutionally restrictive election-law matrix.

The Democrats assert that even if the Voter ID Law is permissible when considered alone, it must be deemed overly restrictive when considered alongside other Indiana election regulations. In particular, they claim that, when combined with laws and practices that (1) open polls for only twelve hours; (2) do not mandate employee time off to vote; (3) impose a deadline of thirty days before the election to register; (4) permit partisan challengers in the polling place; (5) restrict absentee voting; (6) close BMV offices; (7) provide for an election system administered by partisan officials, and (8) have led to an allegedly "abysmal record" of counting provisional ballots, the Voter ID Law must be invalidated.

This argument flies in the face of the cardinal principal that, particularly in the context of facial challenges, statutes must be considered on their own merits and not in connection with other laws that may have some tangential relationship to the same subject matter. Indeed, the Democrats cite no Supreme Court doctrine, or even lower court precedent, for this "tipping point" argument. They rely solely on Justice O'Connor's *concurring* opinion in *Clingman* suggesting that an otherwise valid election law may nonetheless be invalidated if other laws

make regulatory compliance impossible. *See Clingman*, 125 S.Ct. at 2047 (O'Connor, J. concurring). In particular, Justice O'Connor asserted that "Oklahoma's requirement that a voter register as an Independent or a Libertarian in order to participate in the LPO's primary is not itself unduly onerous; but that is true only to the extent that the State provides reasonable avenues through which a voter can change her registration status." *Id.* at 2045.

Even if Justice O'Connor's concurrence were a majority opinion, it in no way outlined the unlimited tipping-point argument that the Democrats are urging, which does not stop with an examination of the means available for complying with the Voter ID Law. Justice O'Connor's point was not that courts may conclude that the collective burden of complying with all the laws is simply too much to ask of the citizenry. Instead, she was suggesting the far more modest, and even unremarkable, proposition that a minor restriction on association can be too much if there is no remaining realistic means of associating. The Democrats already exhausted this line of reasoning with their unsubstantiated argument that the law makes it too hard to get state-issued photo identification.

The Democrats' analytically distinct tipping-point argument, logically extended, amounts to the sweeping assertion that an infinite variety of forces, no matter how far removed from voting (or even the law), could create an unconstitutional burden on fundamental rights. In their view, lack of cheap and efficient public transportation to the polls, or lack of sufficient government-funded education, would unconstitutionally burden voting and associational rights if proven to cause some citizens not to vote. This argument has no grounding whatever in constitutional law, and it certainly is not supported by Justice O'Connor's concurrence in *Clingman*.

G. **The Voter ID Law passes even strict scrutiny**.

While there is no basis for applying strict scrutiny in this case, the Voter ID Law vindicates a sufficiently compelling state interest in a sufficiently narrowly tailored way to pass even that standard. *See Timmons,* 520 U.S. at 358 ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.") (internal quotations and citations omitted).

1. The Voter ID Law vindicates the compelling state interest in deterring and detecting in-person voter identity fraud.

The Plaintiffs largely concede that election fraud prevention is, generally speaking, a compelling government interest that may override fundamental constitutional rights. They would be hard pressed to argue otherwise in light of well-settled Supreme Court doctrine. *See Federal Election Comm'n v. National Conservative Political Action Comm.,* 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns"); *Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 208 (1982) (noting that Government interests in preventing corruption or the appearance of corruption "directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'") (quoting *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957)); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n.26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted."). What's more, the Plaintiffs implicitly

acknowledge that fraud detection and prevention is a compelling government interest when they argue that Indiana should simply permit a wider range of identification, not simply photo identification, to achieve its fraud detection and prevention objectives.

a. Proving fraud is not required before preventing fraud.

The well-established status of the state's compelling interest in detecting and deterring fraud notwithstanding, the Democrats argue that the state may only adopt a voter photo-identification requirement if it can prove that in-person voter fraud is "intolerably high." (Democrats' Br. at 51) Likewise, the Crawford Plaintiffs assume that the state is required to prove that in-person voter fraud is a problem before it can enforce a photo identification requirement. *See* Crawford Br. at 45. But neither of the Plaintiffs' briefs cites any cases for the proposition that a state must wait until it has proof of rampant voter fraud before enacting measures to shore up weak points in whatever fraud-prevention scheme already exists.

The Supreme Court has been quite clear that, at least with respect to highly plausible justifications such as the existence of election fraud, the opposite is true. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390-91 (2000). In *Nixon*, which upheld Missouri's campaign-contribution limits, the plaintiffs and the court of appeals "[took] the State to task . . . for failing to justify the invocation of those interests with empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence." *Id.* The law was valid regardless of empirical evidence demonstrating a problem, the Court concluded, because "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391.

The notion that elections need protection from fraud, whether at the hands of corrupt campaign donors or identity thieves, is hardly novel. Pretty much every election regulation that exists, including registration, in-person voting, and the signature requirement, not to mention the proof of identity already required in many states and by HAVA, is targeted at preventing election fraud.

The Democrats rely on cases invalidating substantive speech limits for the proposition that the State is required to prove the existence of rampant fraud before using that as a justification for a fraud prevention law. (Democrats' Br. at 51) (citing *McIntyre,* 514 U.S. at 334; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1566 (7th Cir. 1986)). But if the interest in fraud prevention can justify voter-identification laws only to the extent it can justify political-advocacy and solicitation restrictions, states could not require voters to disclose their names at all. *See Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (invalidating requirement that paid petition circulators where badges disclosing their names).

Even on their own terms, moreover, those cases turn not on the state's failure to prove the existence of fraud, but on the lack of fit between the laws and fraud prevention. In *McIntyre*, the Court simply concluded that, even assuming the validity of fraud prevention as a compelling interest, a law against anonymous leafleting was insufficiently narrowly tailored. *See McIntyre,* 514 U.S. at 349 ("We agree with Ohio's submission that this [fraud and libel prevention] interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.").[6] In *Village of Schaumburg*, the Court

[6] It is also worth observing that *McIntyre*, which invalidated Ohio's ban on anonymous leafleting in political campaigns, distinguished cases such as *Storer* and *Anderson* because the leafleting law was not a speech-neutral control of the mechanics of the election process and was

held that a city could not limit charitable solicitations to those who spent 75% of donations on charitable works because such a percentage was unrelated to the existence of fraud. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980). And in *Watseka*, similarly, the Seventh Circuit concluded that there was no reason to believe that limiting solicitations to daylight or early evening hours would have any bearing on the occurrence of fraud. *See City of Watseka*, 796 F.2d at 1556.

Here, in contrast, there can hardly be a dispute that requiring voters to present valid photo identification will lessen the opportunity for fraud. And where a new election regulation has a plain connection to protecting the integrity of elections, the government does not need to prove any level of need. *See National Right to Work Comm.,* 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). The Constitution does not "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party,* 479 U.S. 189, 195-96 (1986).[7] The Voter ID Law is a reasonable fraud prevention measure that does not significantly impinge the right to vote. Indiana does not need to supply evidence of actual in-person voter identity fraud to justify it.

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therefore subject to much more rigorous scrutiny. *McIntyre*, 514 U.S. at 345-46. This distinction applies equally here.

b. In-person voter fraud is very difficult to detect

It is also important to understand that the nature of in-person election fraud is such that it is nearly impossible to detect or investigate. Unless a voter stumbles across someone else trying to use her identity, *see* Sabato & Simpson, *supra,* 292, or unless the over-taxed poll worker happens to notice that the voter's signature is different from her registration signature State Ext. 37, ¶ 9, the chances of detecting such in-person voter fraud are extremely small. Yet, inflated voter-registration rolls provide ample opportunity for those who wish to commit in-person voter fraud. *See* Fund, *supra,* 24, 65, 69, 138; Sabato & Simpson, *supra,* 321. And there is concrete evidence that the names of dead people have been used to cast fraudulent ballots. *See* Fund, *supra,* 64. Particularly in light of Indiana's highly inflated voter rolls State Ex. 27, p. 9, Plaintiffs' repeated claims that there has never been any in-person voter fraud in Indiana can hardly be plausible, even if the state is unable to prove that such fraud has in fact occurred.

c. Voter fraud exists and needs to be prevented.

According to the Baker-Carter Commission, there is "no doubt" that voter fraud sufficient to justify photo identification at the polls occurs. *See* State Ex. 1, p. 18. Ample evidence from across the nation confirms that understanding. Instances of dead votes, double votes, and voters using fake names and addresses are all too common in American elections. *See* State Ex. 3, pp. 18-24; State Ex. 4, p. 2-7. In some cases, the number of fraudulent votes is staggering. Take, for example, Missouri, where an analysis of only two of the states' 114 counties revealed over 1,000 fraudulent ballots, including numerous multiple votes, dead votes, and voters "residing" at vacant lots. State Ex. 6.

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[7] It would be utterly implausible, for example, to require a same-day voter-registration state (such as Wisconsin) to prove some minimal level of fraud under its current system before switching to advance registration.

Occasions of in-person voter fraud are not confined to a small number of jurisdictions. Florida has encountered fraud by citizens living outside city boundaries voting in city elections. State Ex. 10. Maryland frequently sees dead people vote in its elections. State Ex. 11. New York has also seen children as young as two voting in local elections. State Ex. 17.

Contrary to the Democrats' misunderstanding of the law, while enforcement outcomes in other states are irrelevant in challenging Indiana's laws, the State is entitled to rely on the experiences of other jurisdictions when deciding issues of public policy. *See Munro*, 479 U.S. at 195-96; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, (holding that speech regulations may be justified by occurrence secondary effects in other states or cities).

The Democrats mistakenly rely on *A Woman's Choice East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2003), for the proposition that the state may not rely on proof of fraud elsewhere. That case stands for no such principle. Instead, the court, observing that "constitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges," ruled that challenges to a state law based on its collateral consequences cannot rely on consequences proven elsewhere. *Id.* at 689. "Indiana is entitled to an opportunity to have its law evaluated in light of experience *in Indiana* . . . What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana . . . is entitled to put its law into effect and have that law judged by its own consequences." *Id.* at 693.

The reason for this high threshold for plaintiffs is that legislative enactments are entitled to deference. The notion of analyzing a law based on "legislative fact" means that a legislature can decide whether prophylactic measures are necessary based on problems that have occurred

elsewhere. *Id.* An operational challenge, however, cannot proceed based on enforcement that has occurred elsewhere. *Id.*

d. Dramatic voter-list inflation makes Indiana ripe for fraud.

The voter-list inflation that has occurred since the Motor-Voter law became effective in 1995 has increased the opportunities for fraud and independently justifies additional fraud-prevention measures. National statistics identify a dramatic rise in the number of registered voters in the states in the past few years, with some states reporting 100% registration rates or more, indicating illegitimate registrations that are ripe for abuse. State Ex. 26.

In addition, Clark Benson has determined that in Indiana leads the country in list inflation, with possibly 41.4% of registered names being illegitimate. Benson reports a considerable increase in registration rates after the passage of the Motor-Voter law (with some counties reporting 100% registration rates or more), tens of thousands of deceased voters on the rolls, and hundreds of thousands potential duplicate registrations. State Ex. 27, pp. 6-9. *See also* State Ex. 25, pp. 1, 3, 6-8 *supra* (reporting that more than 300 dead people remain on voter registration lists). Voter registration list inflation in Indiana is so obvious that the Indiana Supreme Court has decided not to use them any longer to compile jury pools and has decided instead to use tax rolls and BMV lists. *See* State Ex. 29.

Benson observes that list inflation only increases the opportunity for fraud. State Ex. 27, p. 2. He reports two ways to combat the resulting greater potential for fraud: purge the lists more effectively, or require voters to identify themselves in some reliable way. State Ex. 27, p.2. In light of the limits the Motor-Voter law places on the ability of states to purge their voter registration lists, *see* 42 U.S.C. § 1973gg-6, the required centralization of lists under HAVA will not effectively address list inflation, according to Benson. State Ex. 27, p. 9. Accordingly, he

says, states are left to require voters to identify themselves in order to combat the increased risk of fraud that has arisen in the wake of the Motor-Voter law. State Ex. 27, p. 9.

2. The Voter ID Law vindicates the compelling state interest in reassuring voters that elections results are legitimate.

One of the most significant and abiding election-law doctrines developed over the past thirty years has been the government's compelling interest in protecting public confidence in the integrity and legitimacy of representative government. The government is entitled to wide latitude in enacting measures that are reasonably geared toward preventing the perception of corrupt elections.

The Hatch Act's ban on politicking by some federal-government employees, for example, is valid, in part, because "it is also critical that [Government and its employees] appear to the public to be avoiding [political favoritism] if confidence in the system of representative Government is not to be eroded to a disastrous extent." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973). Similarly, FECA's campaign-contribution limits are permissible based in part on "the impact of the appearance of corruption stemming from public awareness *of the opportunities for abuse* inherent in a regime of large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (emphasis added); *see also National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (observing "the importance of preventing . . . the eroding of public confidence in the electoral process through the appearance of corruption"). The need to preserve public confidence in the legitimacy of representative government also was critical to the validity of the Bipartisan Campaign Reform Act's soft-money ban. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 143-145 (2003).

Here, every bit as much as in the campaign-finance and public-employee contexts, government is right to worry that confidence in the legitimacy of elections may erode based

solely on "public awareness of the opportunities for abuse," *see Buckley*, 424 U.S. at 27, inherent in polling-place voting unaccompanied by identification checks. This is particularly true in light of the extent of voter list inflation that has occurred over the past decade or so in the wake of the Motor-Voter law. Regardless whether particular instances of fraud are well documented, "common sense," *see McConnell*, 540 U.S. at 145, tells us that the General Assembly is entitled to be concerned that the combination of inflated voter rolls, lax security, and closely contested elections may, over time, erode voter confidence in election results. And, as the Supreme Court has made crystal clear, states are not required to wait until public confidence in the legitimacy of representative government suffers a direct hit before taking steps to protect electoral integrity. *See Munro,* 479 U.S. at 195-96.

Public opinion data supports the General Assembly's decision to strengthen election security in order to reassure the public concerning the legitimacy of elections. In 2000, a Rasmussen poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. State Ex. 22, p. 1. A short time later, a Gallup Poll showed that 67% of adults nationally had only "some" or "very little" confidence in the way the votes are cast in our country. State Ex. 23, pp. 8-9. A 2004 Zogby Poll found that 12% of voters believe that their vote was counted inaccurately in the 2004 elections. Fund, *supra.* And scholar Richard Hasen has testified that more than 25% of Americans worried that the 2004 presidential vote was unfair. State Ex. 24, p.2. Recent surveys document even stronger support for measures to protect electoral integrity. In a 2004 survey of 1000 likely voters, 82% of respondents, including 89% of Bush supporters and 75% of Kerry supporters, favored photo identification at the polls. *See generally* Fund, *supra.*

Such overwhelming public support for requiring voters to present photo identification at

the polls shows just how much the public seeks reassurance of electoral integrity. In *Nixon*, the Supreme Court observed that overwhelming public support for an election reform law can establish the existence of a constitutionally sufficient justification for the law: "[A]lthough majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: An overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." *Nixon*, 528 U.S. at 395 (internal quotations and citations omitted).

In short, the data concerning the public demand for voter photo identification laws attests to an extraordinary consensus concerning the insufficiency of election security. A reasonable inference is that the legitimacy of elections—particularly close elections—may ultimately be called into question if election officials do not act. Accordingly, the General Assembly had all the "compelling interest" it needed to enact the Voter ID Law.

3. The Voter ID Law is narrowly tailored because it requires readily available proof of identity while minimizing the possibility of disenfranchising legitimate voters.

Requiring voters to present photo identification at the polls directly advances both compelling interests. The vast majority of the electorate already has some form of acceptable government-issued photo identification. Also, government-issued photo identification is highly reliable and, as a consequence, widely relied upon. And, as the Real ID Act's provisions become enforceable, state-issued photo identification will only become more reliable.

With enforcement of the Voter ID Law, poll workers who currently must rely on their highly limited signature-comparison abilities will now be able to check each voter's identification against both the registration list and the voter's face. The requirement that the identification card carry an expiration date ensures that the photograph will be relatively recent.

This will make the poll workers' job of detecting fraudulent voters much easier and thereby deter fraud. In fact, bad faith challenges will likely be discouraged by the fact that all voters must now possess photo identification. As a result, the electorate will know that practical and reliable security checks are in place and therefore have less reason to question the legitimacy of electoral outcomes, particularly in close elections.

Yet the Voter ID Law also is limited in sensible ways in order to minimize the risk of disenfranchising legitimate voters. First, it does not apply to voting absentee by mail, which means that those who are automatically entitled to vote absentee, including the disabled and seniors over age 65, *see* Ind. Code § 3-11-10-24, face no ill effects from this law even if they do not have, and cannot obtain, acceptable photo identification. Therefore, the risk the Voter ID Law will disenfranchise, for example, a voter born in a poor, rural, pre-War southern county that did not record at-home births, is non-existent.

Similarly, residents of state licensed-care facilities who vote at polling places within those facilities need not present photo identification. *See* Ind. Code § 3-10-1-7.2. As it happens, all state licensed-care facilities that are polling places are homes for the elderly, so their residents would be eligible to vote absentee anyway. This exception accommodates the very small set of the elderly who cannot travel to obtain photo identification, but also who do not need to travel to vote at the polls, and who are likely known to poll workers and unlikely to be fraudsters. Accordingly this exception helps with narrow tailoring.

Furthermore, while it is possible that, particularly in the first few elections where the Voter ID Law is enforced, some voters will not arrive at the polls without acceptable photo identification, the law permits such voters to cast provisional ballots. *See* Ind. Code § 3-11-8-25.2. Provisional ballot voters then have almost two weeks to obtain acceptable photo

identification and present it in-person to the county clerk or county election board, at which point the provisional ballot will be counted. *See* Ind. Code § 3-11.7-5-2.5. Alternatively, if the voter is indigent and cannot obtain acceptable photo identification without paying a fee, or if the voter has religious objections to being photographed, the Voter ID Law permits the voter to cast a provisional ballot and then sign an affidavit of indigence or religious objection within 13 days at the clerk's office or before the county election board. *See id.* This 13-day provisional-ballot process provides a generous opportunity for legitimate voters to overcome any unexpected problems at the polls and is a hallmark of narrow tailoring. Indeed, it is far more generous than the 48-hour provisional ballot process recommended by the Baker-Carter Commission and enacted by Georgia.

4. The theoretical possibility that some legitimate voters will be unable to vote cannot justify invalidating the law.

All Plaintiffs argue that the Voter ID Law will result in the disenfranchisement of some legitimate voters. Notably, neither the Democrats nor any of the political organizations that are Plaintiffs in this matter have been able to identify any actual prospective voters who may not be able to vote in the next election because they do not have photo identification. All they have in this regard are unconfirmed anecdotes, impressions, hypotheses, and a deeply flawed statistical projection of the law's operational impact. This theory cannot succeed.

a. There is no "collateral impact" doctrine for election regulations

First, none of the Plaintiffs cites any authority for the proposition that an election regulation may be invalidated because of collateral impact, *i.e.* simply because some legitimately qualified citizens will not vote because they think the law is too burdensome. Poll taxes, for example, are invalid because they impose a burden on voting for no good reason, not because a certain percentage of the population will not be able to comply with them. *See Harman*, 380

U.S. at 541. At the same time, voter registration requirements are undoubtedly permissible even though they disenfranchise an unknown number of otherwise eligible citizens for whom registration is an excessive burden.

The only area of constitutional law where the operational impact of collateral burdens is relevant is in the area of abortion regulations. In *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), the Court ruled that abortions regulations could be invalidated only if they imposed an "undue burden" on women seeking to have an abortion. *See id.* 876-78. While *Casey* did not precisely define "undue burden," it did say that an abortion regulation might be invalid if, by virtue of the compliance burden alone and not vindication of legitimate state interests (such as persuading women not to have abortions), it prevents a "large fraction" of women seeking abortions from having them. *See id.* at 894-95; *see also A Woman's Choice*, 205 F.3d at 698-99. The Court has not announced that a similar test applies to voting regulations, or to any other regulations affecting fundamental rights, such as speech. Accordingly, while the Voter ID Law may be evaluated in terms of its qualitative fit with the objectives the government seeks to advance, it may not be invalidated based on the notion that it might theoretically prevent some legitimate voters from voting.

b. Any "collateral impact" test could be applied only after the law is given a fair chance to go into effect.

Moreover, even if a *Casey*-like "undue burden" test were applicable here, the Seventh Circuit has squarely foreclosed the possibility of invalidating a law based on theoretical operational impact before the law ever goes into effect. *See A Woman's Choice,* 305 F.3d at 687-88. In *A Woman's Choice*, the plaintiffs attempted to prove that Indiana's in-person abortion counseling law would impose an undue burden by using statistics concerning the impact of similar laws in other states. *See id.* The Court ruled that because the law had never been

enforced in Indiana, it could not be invalidated based on the enforcement experience of other states unless it was also proven that this was also "bound to be" the experience in Indiana. *See id.* at 691.

Here, similarly, the Plaintiffs attempt to prove the likely operational effect of a law that has yet to be enforced in any significant way. They do this not by reference to the experience in other states, but by reference to data with equal irrelevance to their theory. The Democrats' expert, Brace, attempted to compare the Marion County voter-registration list with the BMV's list of Marion County residents who possess drivers' licenses and non-license photo-identification cards. Setting aside for a moment some rather grave methodological flaws, even taken at face value Brace's study says nothing about the extent to which legitimate voters will be unable to vote because of the Voter ID Law. Neither Brace's report nor any other evidence attempts to establish that the incidence of BMV-issued photo identification among registered voters in Marion County is representative of the state as a whole. This gap has obvious parallels to the foreign-state study rejected as irrelevant in *A Woman's Choice*. *See id.* at 688-89.

More fundamentally, however, the Brace study presents no basis for the implicit supposition that voting rates will have anything to do with the incidence of BMV-issued photo identification among registered voters in Marion County. The study does not take into account registered voters who may not have a BMV-issued card, but may have a passport or acceptable military photo identification, for example. It also does not attempt to take into account registered voters without acceptable photo identification who will now obtain such identification precisely so they may vote. State Ex. 79, p. 4. Studies such as this may not validly assume static individual behavior in the wake of law that provides obvious incentives for individuals to change their behavior. *Id.*, p. 5.

c. The Brace study has deep methodological flaws, and the only significant data of the AARP study show the extremely high prevalence of state-issued photo identification

As for methodology, Brace posits that his data analysis supports the conclusion that the Voter ID Law will likely have a disproportionate impact on the poor. However, Dr. Jonathan Katz points out that it was invalid for Brace to infer individual behavior from data only about groups of individuals like census block data concerning income and educational levels. State Ex. 79, p. 6. In addition to suffering from "aggregation bias," the Brace Report is by the author's own admission not a representative sample of Indiana voters. State Ex. 80, p. 69.

The Crawford Plaintiffs cite a recent survey by the AARP concerning the incidence of photo identification among those individuals aged 60 and older. First, the study as provided by the Plaintiffs provides no record of the survey methodology or the representativeness of the sample, so it is impossible to draw any conclusions concerning the reliability of the survey. Second, even taking the AARP survey at face value, it shows that an astonishing 97% of seniors have a state-issued photo-identification card. Such data hardly constitutes evidence of likely systematic disenfranchisement of the elderly owing to the Voter ID Law. Beyond that, the study does not show the percentage of the remaining 3% without photo identification that are likely voters or that voted in the last election. It may well be that those without driver's licenses and photo identification will have no interest in voting anyway. Finally, the AARP study does not show the percentage of that remaining 3% without photo identification that is over 65. Again, seniors over 65 (as well as those under 65 who are disabled) are entitled to vote absentee under Indiana law and, therefore, will not need photo identification to vote. *See* Ind. Code § 3-11-10-24. It may be that 100% of those surveyed by the AARP that were under age 65 had a valid driver's license or a non-license photo-identification card from the BMV.

V. The Voter ID Law Does Not Violate the Civil Rights Act

For the reasons set forth in the brief of the Marion County Election Board, which arguments are incorporated herein by reference, the Court should rule that the plaintiffs may not bring a private right of action under the Civil Rights Act In the alternative, and again for the reasons stated in the arguments presented by the Marion County Election Board, the Court should rule that, on the merits, the Voter ID Law does not violate the Civil Rights Act.

VI. The Court Should Reject the Claims Brought Under the Indiana Constitution

If the Court addresses the Indiana Constitutional claims, it should reject those claims for the reasons stated in the Brief of the Marion County Election Board which arguments are incorporated herein by reference.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' and Intervenor's Joint Motion for Summary Judgment and should deny the motions for summary judgment filed by both groups of Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2005, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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