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

STATE DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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ADDITIONAL STATEMENT CONCERNING FACTUAL ASSERTIONS

As the State Defendants explained in their opening brief, aside from facts relating to standing, there are no material facts necessary to support summary judgment for the Defendants. The Voter ID Law is a reasonable election regulation as a matter of law, and no facts are necessary to demonstrate that. *See Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). Even if some form of heightened scrutiny applies, the State is not required to prove any facts supporting its compelling interests in preventing and detecting voter fraud at the polls and protecting the apparent legitimacy of elections. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Accordingly, there are no material factual disputes that would prevent entry of summary judgment in Defendants' favor.

Nonetheless, on the chance that the Court deems some factual showing necessary, the State Defendants have asserted a number of facts supporting its position that are not disputed, except insofar as the Plaintiffs have filed a motion to strike some of the Defendants' exhibits. These undisputed facts include: (1) reports of voter fraud across the country; (2) evidence that citizens are concerned about voter fraud; (3) evidence that Indiana's voter-registration lists are bloated with ineligible entries; (4) reports showing the prevalence of photo identification among the population; and (5) the Report of the Baker-Carter Commission finding that voter fraud occurs and endorsing photo identification requirements at the polls. These facts confirm that Indiana has compelling interests in combating voter fraud and preserving the legitimacy of elections and that the Voter ID Law is a reasonable, narrowly tailored means of advancing those interests.

On the other hand, the Defendants continue to dispute some facts asserted by the Plaintiffs, but which are not material in any event. For example, it is not legally significant

whether any voters in Marion County currently do not have a valid state-issued photo-identification card. Nonetheless, the State has provided evidence disputing the Plaintiffs' factual assertions in this regard, including their assertions that those without such identification are disproportionately poor or uneducated. *See* State's Brief at 14-16; State's Ex. 79, at 6.

Finally, two facts that had been disputed apparently are no longer in dispute. The State has provided conclusive evidence that Indiana non-license photo-identification cards may be renewed for free and that out-of-state license holders who move to Indiana may obtain Indiana non-license photo-identification cards for free. *See* State's Ex. 72, at ¶¶ 8, 10, 11; Ind. Code § 9-24-16-10. While the Crawford Plaintiffs in particular asserted facts contrary to these in their opening brief, they have not now designated any contrary evidence. In any event, these issues can be settled by reference to law rather than facts. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390-91 (2000).

SUMMARY OF ARGUMENT

While they continue to press for heightened scrutiny, neither the Crawford Plaintiffs nor the Democrats continue with any serious argument that the Voter ID Law can be declared unconstitutional under the balancing test prescribed in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The Voter ID Law is exactly the type of law that the Elections Clause permits States to enact, and incidental burdens that individuals may encounter as a result no more amount to a severe burden or a poll tax than incidental burdens already associated with in-person voting. Regardless, the Voter ID Law is a reasonably narrowly tailored means of advancing compelling state interests in preventing and detecting in-person voting fraud and in preserving the apparent legitimacy of elections.

ARGUMENT[1]

I. Plaintiffs Have Put Forth No New Evidence To Demonstrate That The Secretary Of State And The Co-Directors Of The Indiana Election Division Are Proper Defendants.

The Indiana Secretary of State and the Co-Directors of the Indiana Election Division are not proper defendants in this case because they do not enforce the Voter ID Law. In their Motion to Dismiss, these Defendants argued that while they are involved in educating local election officials concerning the Voter ID Law and in promulgating provisional-ballot affidavits, they have no direct role in enforcing the photo-identification requirements of the Voter ID Law and, therefore, cannot remedy any injuries owing to the Voter ID Law. *See Ind. Democratic Party v. Rokita*, 1:05-cv-00634, Docket Nos. 12, 13, 17 (S.D. Ind. 2005). The Court's July 1, 2005 Entry on Defendants' Motion to Dismiss observed that "Defendants' motion is well-taken in that it does, in fact, appear that Rokita, King, and Robertson, acting in their official capacities, have no direct role in enforcing the photo identification mandates of SEA 483." *See Ind. Democratic Party,* Docket No. 24, at 2-3. However, the Court wanted to have a better opportunity to understand the Voter ID Law before making a final decision. *Id.* at 2.

Plaintiffs have now had ample opportunity to gather evidence demonstrating that the Secretary of State and the Co-Directors of the Indiana Election Division are proper defendants, but they have failed to do so. Defendants Rokita, King, and Robertson have always been candid concerning their involvement in elections and in educating local officials and poll workers concerning the Voter ID Law. The Democrats continue to argue that this educational role is enough to establish standing, pointing to deposition testimony from Defendant King concerning

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[1] The State Defendants hereby incorporate by reference the reply arguments of the Marion County Election Board as they relate to Plaintiffs' lack of standing, the Civil Rights Act, and the Indiana Constitution.

educational efforts undertaken by the Election Division. *See* Dem. Reply at 14. However, this testimony is merely cumulative evidence of what was already known at the time that the Court took the Motion to Dismiss under advisement. *Compare* Dem. Reply at 14 *with Ind. Democratic Party*, Docket No. 13, at 2-3.

In addition, as the Defendants have explained, an injunction against any training efforts would only make inconsistent enforcement more likely. *See Ind. Democratic Party,* Docket No. 17, at 9. Besides, any risk of an equal protection violation arising from inconsistent enforcement cannot be the subject of a facial challenge such as this, for obvious reasons. This challenge seeks an injunction prohibiting the Secretary of State and the Co-Directors of the Indiana Election Division from enforcing the Voter ID Law, a power they do not possess in the first instance. Rokita, King, and Robertson must be dismissed as defendants.

II. The Voter ID Law Is A Valid Elections Clause Regulation And Is Not A "Severe Burden" On Voting Subject To Strict Scrutiny.

Without providing any qualitative analysis, and only the thinnest quantitative analysis, the Democrats argue that the Voter ID Law imposes a "severe burden" on voting that must be subjected to strict scrutiny. *See* Dem. Reply at 19-20. However, even aside from the shortcomings of their quantitative evidence, the Democrats cite no cases for the proposition that an election law can be adjudged a "severe burden" based on estimates of the numbers of voters that will not be able to vote as a result of it. Furthermore, they fail to distinguish the Voter ID Law qualitatively from other fraud-prevention election laws, such as voter-registration requirements and in-person voting requirements, in order to demonstrate that the Voter ID Law imposes a severe burden on voting when those other requirements do not. Indeed, as explained in the State's opening brief, the photo-identification requirement bears no similarities to restrictions that courts have found to impose severe burdens. *See* State's Brief at 23-25; *see also*

Hill v. Stone, 421 U.S. 289 (1975) (property-ownership requirement); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year-residency requirement); *Ayres-Schaffner v. DiStefano*, 37 F.3d 726 (1st Cir. 1994) (prior-participation requirement); *Paul v. Ind. Election Bd.*, 743 F. Supp. 616, 623 (S.D. Ind. 1990) (ban on write-in voting).

Plaintiffs also dismiss the broad authority granted to the States to regulate the manner of conducting of elections by the Elections Clause of the Constitution. *See* U.S. Const. art. I, § 4, cl. 1. However, the Elections Clause gives States have wide latitude in regulating the time, place, and manner of elections. Although the right to vote is indeed fundamental, a regulation falling within Elections Clause authority perforce does not unlawfully burden that right, and relying on that authority "States have enacted comprehensive and sometimes complex election codes." *See Anderson,* 460 U.S. at 788.

Acknowledging that all regulations impact the right to vote, the Supreme Court has held that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* Moreover, the Supreme Court has explicitly rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takuski*, 504 U.S. 428, 432 (1992). The Seventh Circuit itself has very recently recognized the expansive authority of States in this regard: "[B]ecause balancing the competing interests involved in the regulation of elections is difficult and an unregulated election system would be chaos, state legislatures may without transgressing the Constitution impose extensive restrictions on voting." *See Griffin,* 385 F.3d at 1130.

The Democrats essentially argue that simply because some voters may be less likely or unable to vote as a result of the Voter ID Law, that circumstance automatically qualifies the Law as a severe burden on the right to vote that must be subjected to strict scrutiny. *See* Dem. Reply

at 19-20. In *Griffin*, however, the Seventh Circuit, upholding Illinois' restrictions on mail-in voting, explicitly rejected the notion that any law that collaterally burdens legitimate voters is automatically subject to strict scrutiny. *See Griffin,* 335 F.3d at 1130. The Seventh Circuit observed that all voting restrictions "exclude, either de jure or de facto, some people from voting" and ruled that "the striking of the balance between discouraging fraud and other abuses and encouraging voter turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Id.* at 1130-31. Otherwise, no principle would preclude a federal court from decreeing "weekend voting, multi-day voting, all-mail voting, or Internet voting (and would it then have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access?)." *Id.* at 1130.

The Democrats have not provided any basis for this Court to be "strongly convinced that the legislative judgment is grossly awry" with respect to the Voter ID Law. *See id.* at 1131. Indeed, they fully accept the notion that some form of documentary identification may be required at the polls. *See* Dem. Brief at 34. They merely quibble with the form chosen by the General Assembly. On a more quantitative level, they do not dispute that the vast majority of voters already possess acceptable photo identification. They simply argue that because some voters "on the margins" may not already possess photo identification and, therefore, may encounter hurdles that prove difficult or costly to them, the Law imposes a severe burden. *See* Dem. Reply at 20, 29-30. But even assuming for the moment the accuracy of this narrative, the Democrats' theory of the case in no way establishes "grossly awry" legislative judgment. It merely establishes what the Seventh Circuit already assumes to be true in *all* voter-regulation cases—that some people will be unable to vote as a result of the Law. *See Griffin,* 385 F.3d at

1130. That is simply not enough even to trigger strict scrutiny of the Voter ID Law, much less invalidate it.

What is more, the Democrats do not provide any reliable basis for their assumption that the Voter ID Law will impose an insurmountable burden for voters at the margins. They posit that the Law will disenfranchise "thousands." *See* Dem. Reply at 29. Yet, they have not been able to identify even one Democrat who will be unable to vote because of the Law. *See* Dem. Reply at 5-9; State's Exs. 50, 53, 70. They have introduced testimony from Kimball Brace that somewhere in the range of 51,000 to 141,000 registered voters in Marion County do not have an Indiana driver's license or non-license photo-identification card. *See* Dem. Ex. 5, at 10; Dem. Reply at 29 n.14. But Brace provides no confidence interval for his conclusions (even though he fully acknowledges the difficulty of matching voter-registration files with BMV records), and his attempt to correlate unmatched registration records with census block data is scientifically unsound. *See* State's Ex. 79, at 6. For all we know, every person identified by Brace as not having a state-issued photo-identification card could earn in excess of $72,000 per year. *See* State's Ex. 80, at 95. We do know that Brace searched for, but could not find, evidence that the Law may have a disparate racial impact. *See* State's Ex. 80, at 34-35.

What is more, Brace in no way forecloses the possibility that every registered voter who supposedly does not have a state-issued photo-identification card may already have some other form of acceptable photo identification, such as a passport or military identification. He also makes no attempt to account for the number of individuals currently without acceptable photo identification who will obtain it before the next election. Nor do the Democrats otherwise show that any "ID gap" existing in 2006 will persist in future elections. It is far more likely that, as citizens adjust to the new Voter ID Law, any such gap will shrink with each successive election

until every registered voter has acceptable photo identification, at which point the Voter ID Law will be no more controversial than registration itself.

Election regulations such as the Voter ID Law that do not impose qualitatively severe burdens on the right to vote are valid where the State's interest in having the regulation outweighs the burden imposed by the regulation. *See Griffin,* 385 F.3d at 1130-31. In this case, as even the Democrats admit, the State's interest in protecting legitimate voters from fraud, and in protecting public perception of legitimate elections, are no less than compelling. *See* Dem. Brief at 34; Dem. Reply at 18-19. As noted, the Law's burdens are not great in the first instance (particularly given that the vast majority of registered voters already possess acceptable photo identification) and are likely to be utterly inconsequential over time. In fact, the Democrats' reply brief does not argue that the Voter ID Law is unconstitutional under this lower level of scrutiny. This is understandable in light of the Seventh Circuit's ruling that the balance of harms question is "quintessentially a legislative judgment." *Griffin,* 385 F.3d at 1131. The General Assembly is entitled to deference to its judgment that the Voter ID Law will serve its compelling interests in free and fair elections without imposing a severe burden on voters.

III. If Necessary, The Voter ID Law Passes Strict Scrutiny.

A. The State Has a Compelling Interest in Preventing and Detecting Fraud and in Preserving the Apparent Legitimacy of Elections.

Democrats largely concede that the State's interests in protecting legitimate voters from fraud and in protecting public perception of legitimate elections are compelling interests. *See* Dem. Reply at 18 ("Democrats have never suggested that the State could not . . . enact a law which uniformly requires *all* voters . . . to identify themselves with more than their signature, or that one type of such identification could not be a form of photo identification"); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 788-89 (1978) ("Preserving the integrity of the electoral

process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important.") (internal citations omitted).

However, Democrats continue to argue that the State's real motive for enacting the Voter ID Law is not fraud prevention. *See* Dem. Reply at 18. They insist that that there is "not a shred of empirical evidence" to support the State's "goal of attacking imposter voting" and that the exclusion of absentee voters from the requirements of the Voter ID Law "raises an inference that the State's motives are different than those it asserts as justification for the Law, i.e., that they are pretextual." Dem. Reply at 18-19.

As the State Defendants argued at length in their opening brief, States are not required to wait for a particular problem to arise before they can take steps to address it. *See* State's Brief at 46-52; s*ee also Timmons,* 520 U.S. at 364 (holding that courts do not require "elaborate, empirical verification of the weightiness of the State's asserted justifications"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures, we think, should be permitted to responds 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."). Furthermore, the Indiana General Assembly is entitled to rely on reports of in-person voter fraud from around the country, such as that coming from the Baker-Carter Commission, which concluded that there is no doubt that fraud occurs (and which further endorses requiring voters to present photo identification at the polls). *See* State's Ex. 1,

at 18-19.[2] Reports of in-person fraud have arisen in the wake of recent elections in Florida, Georgia, Missouri, New York, Washington, and Wisconsin, and reports of individuals voting in

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[2] The Democrats feign surprise that the State would rely on the Report of the Baker-Carter Commission, which not only supports the conclusion that fraud exists, but which also squarely endorses the idea of requiring voters to present photo identification at the polls. *See* State's Ex. 1, at 18.

The Democrats mischaracterize this Report as calling for a national law requiring photo identification at the polls in order to preempt discriminatory state laws. Far from doing so, the Baker-Carter Commission Report expressly states that "each state would also decide whether to require voters to present an ID at the polls . . . ." State's Ex. 1, at 19. The Democrats apparently misunderstand the terms of the Real ID Act, which requires states to issue photo identification in accordance with federal requirements by 2008 in order for such identification to be accepted by federal agencies. *See* Pub. L. No. 109-13 § 202(a)(1), 119 Stat. 231, 312 (2005). The Baker-Carter Commission merely suggests use of "REAL ID" cards (*i.e.* cards issued according to the demands of the federal Real ID Act) for voting purposes; it does not suggest that Congress enact a uniform federal requirement. In light of the Elections Clause, such preemption would be of dubious validity in any event.

In connection with their mistakes concerning the Baker-Carter Commission Report, the Democrats inaccurately state that former President Carter and former Secretary of State Baker have characterized Indiana's Voter ID Law as "discriminatory," citing an article from the New York Times. *See* Dem. Ex. 18. That report documents criticism of the Georgia law only, and that criticism does not even specify how Georgia's law differs from the plan endorsed by the Baker-Carter Commission.

The Democrats also inaccurately state that former President Carter implicitly criticized Indiana's Voter ID Law when he criticized Georgia's law. The article submitted by the Democrats shows only that former President Carter criticized Georgia because their state identification cards cost everyone $20.00 every five years. *See* Dem. Ex. 19. Non-license identification cards may be obtained and renewed for free in Indiana, so Carter's criticism of Georgia's law has no implications whatever for Indiana's Voter ID Law.

Ironically, while the Democrats inaccurately claim that the Commission has put forth its recommendation solely to preempt discriminatory state laws, the fact of the matter is that the Baker-Carter plan ultimately would require provisional voters to validate their ballots by presenting acceptable photo identification within 48 hours of an election. *See* State's Ex. 1, at 19. The Indiana Voter ID Law is much less burdensome, permitting provisional voters to validate their ballots by presenting acceptable identification within *13 days* of an election. *See* Ind. Code § 3-11.7-5-2.5(a).

the name of the dead have been published in Georgia, Illinois, Maryland, Missouri, Pennsylvania, and Wisconsin. *See* State's Exs. 3-17.

The Democrats do not contest the State's evidence that Indiana's voter-registration lists are bloated with illegitimate entries, a circumstance that could enable greater opportunities for fraud. Instead, the Democrats now accuse the State of failing "to conduct voter-list maintenance programs as required by the NVRA." *See* Dem. Reply at 27-29. This argument lacks merit for several reasons. First, this case does not include a challenge to the State's implementation of the Motor-Voter law. Second, the Democrats set forth no facts in support of their spurious allegations of negligence. *See* Dem. Reply at 27-29.

Third, the Democrats mischaracterize the Motor-Voter law, which only requires states to undertake "reasonable effort[s]" to remove ineligible names from official voter-registration lists, yet limits the ability of states to do so. *See* State's Brief at 7-8. 42 U.S.C. § 1973gg-6. Before the Motor-Voter law, States could purge from their voter-registration lists the names of individuals for whom there was no record of voting. Now, States may purge their voter-registration lists only by actively seeking to confirm the address of a voter before purging that voter's name from the list. In practice, this has meant that county election boards send notices to all individuals who have completed change-of-address cards with the United States Postal Service. *See* 42 U.S.C. § 1973gg-6(c). The State may only remove voters from the registration list if (1) the voter confirms in writing that he 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). Far from enabling efficient maintenance of voter-registration lists, the Motor-Voter law imposes cumbersome burdens for removing ineligible voters' names.

Fourth, and most fundamentally, the Democrats' argument has no bearing on whether the State's interest in preventing voter fraud is compelling. It is undisputed that the voter-registration rolls are "bloated" in Indiana. *See* State's Ex. 26; State's Brief at 7-9. How the lists became bloated is not relevant. The fact remains that the bloated registration lists provide ample opportunity for fraud. The State, of course, has a compelling interest in preventing and detecting fraud regardless whether the voter-registration lists are bloated, but the advent of bloated lists makes the Voter ID law more urgent.

B. The Voter ID Law is Sufficiently Narrowly Tailored.

1. "Necessity" is not a stand-alone demand of perfection; it is merely a term of art designed to ensure a reasonable fit between means and ends.

The Democrats argue that the Voter ID Law is not "necessary" to the integrity of the State's electoral process. *See* Dem. Reply at 20, 25-29 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 232 (1989)). It is unclear if the Democrats are simply arguing that the Voter ID Law is not narrowly tailored to serve a compelling interest or if the Democrats are inserting a new, impossible-to-reach standard for the review of election regulations.

The Supreme Court has held that "[w]hen 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." *See Timmons,* 520 U.S. at 358 (internal citations omitted). From this, the Democrats argue that the Voter ID Law is not "necessary" because it is unlikely to remedy all instances of in-person voter fraud, including detecting individuals who are registered

in multiple locations. *See* Dem. Reply at 28. It appears that the Democrats insist that the law achieve 100% efficacy in order to be constitutional. *See* Dem. Reply at 26 ("The State does not and could not reasonably contend that the Law will *eliminate* this heretofore undetected imposter voting . . . .") (emphasis added).

Cases invoking this so-called "necessity" requirement, however, show that it does not mean what the Democrats wish it to mean. While *Eu* ultimately concluded that California had not demonstrated that "regulation of internal party governance [was] necessary to the integrity of the electoral process," the Court did not reach this conclusion simply because it deemed California's no-primary-endorsement law to be less than 100% effective. *See Eu,* 489 U.S. at 232. Rather, the Court reached that conclusion because it rejected the State's premise that it had a "compelling interest in the democratic management of the political party's internal affairs." *Id.* (internal quotations omitted). Without that interest, there was no logical way to connect the law with the objective of "ensur[ing] an election that is orderly and fair." *Id.* at 233.

In *Timmons*, the Court explained that in deciding whether election laws impermissibly burden associational rights, courts must balance the State's interest against the burden "and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358. Significantly, the Court acknowledged that a State's "important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." *Id.* (internal quotations omitted). Thus, "necessity" analysis is simply the balancing or tailoring analysis that the Court undertakes with every voting regulation and not, as Democrats suggest, a requirement that government prove that a regulation will "eliminate" a particular problem.

There is no constitutional test requiring the government to prove that a statute will be 100% effective at achieving the asserted state interest, which is obviously an impossible

standard. In fact, very recently this Court applied similar "narrowly tailored" scrutiny when it upheld Indiana's Telephone Privacy Law based on evidence showing that while that law is highly effective at reducing unwanted telephone sales calls, it nonetheless was not 100% effective. *See Nat'l Coalition of Prayer, Inc. v. Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at *3 (S.D. Ind. Sept. 2, 2005) (showing that implementation of do-not-call law resulted in an 84% decrease in telemarketing calls). In general, all that is required for purposes of determining whether a law is narrowly tailored is that the law bears a "reasonable fit" with the ends it is designed to achieve. *See Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476, 480 (1989) (holding that the test for commercial speech restrictions, which permits regulations that are "not more extensive than is necessary," requires only a "fit that is not necessarily perfect, but reasonable"). The Voter ID Law plainly bears a "reasonable fit" to the goal of preventing and detecting identity fraud at the polls.

The Democrats also argue that the Voter ID Law is not "necessary" to achieve the State's interest in preserving public confidence in the integrity of elections. However, the only reason advanced by the Democrats in support of this argument is that "lack of public confidence in elections is more likely, in light of the 2000 presidential election . . . the result of concerns that the election process is designed to exclude legitimate voters, and not from any fear that illegitimate voters will be permitted to cast a ballot." Dem. Reply at 28-29. This unsupported assertion is merely an attempt by the Democrats to substitute their judgment for the General Assembly's judgment. Survey evidence demonstrates overwhelming public support for requiring photo identification at the polls. *See* State's Brief at 6; State's Ex. 22; John Fund, *Stealing Elections* 5 (2004). The Supreme Court has expressly observed that support of this magnitude for an election law demonstrates the extent to which a law assuages deep public

concern over the legitimacy of elections. *See Nixon*, 528 U.S. at 394-95. Plaintiffs do not deny that preserving public confidence in elections is a compelling interest or that voter fraud undermines public confidence, and they offer no substantial explanation why the Voter ID Law would not advance this interest.

2. The Voter ID Law is narrowly tailored to achieve a compelling interest.

a. The Democrats argue that the Voter ID Law is not narrowly tailored because it lacks a "safety valve" or "reasonable alternative" for those who will be unable to vote at the polls on election day. Dem. Reply at 31. It is curious that the Democrats would even attempt this argument in view of all the accommodations available for voters who do not currently have acceptable photo identification. For example, the elderly and disabled (and others) may vote absentee without providing photo identification. *See* Ind. Code § 3-11-10-24. For those who must obtain photo identification, the BMV cannot charge a fee for non-license photo-identification cards to anyone who does not have a valid driver's license. *See* Ind. Code § 9-24-16-10. Those individuals who do not possess the required photo-identification on election days may vote provisionally and then have their ballots counted by showing appropriate identification to the County Election Board or Clerk or signing an affidavit of indigency or religious objection within 13 days of the election. *See* Ind. Code § 3-11.7-5-2.5.

The Democrats, however, insist on more. They insist that individuals without proper photo identification should be able to sign at the polls on election day an affidavit of identity, or at least be able to vote if a poll worker recognizes them. *See* Dem. Reply at 32. Because the Democrats make this argument in the face of the numerous accommodations in the Voter ID Law, they once again appear to be advancing the argument that if an election regulation leaves any legitimate voter unable to vote, then it is automatically invalid. Not only has the Supreme

Court rejected this argument as a basis for applying strict scrutiny, but also this does not prove that a law is insufficiently narrowly tailored. *See* Part II, *supra.*

The ballot-access cases do not, as the Democrats themselves seem to suspect, make this argument any more supportable. *See* Dem. Reply at 31-32. The Supreme Court invalidated California's ballot-access fee because "[t]he absence of *any* alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants." *See Lubin v. Panish*, 415 U.S. 709, 718 (1974) (emphasis added). Such a system, the Court ruled, "is not *reasonably necessary* to the accomplishment of the State's *legitimate* election interests." *Id.* (emphasis added). Here, unlike in *Lubin*, those who do not have proper identification at the polls on election day have several available options, depending on their qualifications, including voting absentee, signing an affidavit of indigency, signing an affidavit of religious objection, or obtaining proper photo-identification (free from the BMV) and presenting it to the County Clerk within 13 days. And while the ballot access fee could not logically advance California's interest in avoiding frivolous candidates in *Lubin,* the ability *vel non* to confirm one's identity with highly prevalent, readily available, and consistently reliable photo identification self-evidently corresponds to the State's compelling interests in preventing and detecting fraud and promoting public confidence in the integrity of the electoral process.

b. The Democrats also argue that the Voter ID Law is not narrowly tailored because the exception for indigent voters—who must cast a provisional ballot and then swear an affidavit of indigency within 13 days at the County Clerk's office—is not reasonable and adds "further burdens" to those who are indigent and wish to vote. *See* Dem. Reply at 32-33. They complain that, under the former election law, all challenged voters could sign an affidavit attesting to their right to vote and then would be permitted to vote without returning. *See* Dem. Reply at 33.

As a threshold matter, this argument amounts to a dispute about challenge procedures, not the Voter ID Law. Regardless, the 13-day provisional-balloting process provided by the Voter ID Law provides a generous opportunity for legitimate voters—indigent and otherwise—to overcome any unexpected problems at the polls and in a hallmark of narrow taking. *See* Ind. Code § 3-11.7-5-2.5. It far exceeds the 48-hour provisional-ballot process used in Georgia and recommended by the Baker-Carter Commission. *See* State's Ex. 1, at 19. It is clear that the Democrats would do things differently, but that does not mean that their policy preferences are constitutionally mandated. The General Assembly made the reasonable judgment that permitting voters to sign affidavits of indigency or identity at the polls, or merely to be recognized by a poll worker at the polls, is an insufficient means to protect electoral integrity. The Democrats do not explain why the provisional-ballot accommodation that the General Assembly provided in light of its balancing of these concerns—which also happens to be the accommodation required by the Help America Vote Act, *see* 42 U.S.C. § 15482—is *constitutionally* insufficient.

The Democrats attempt to avoid the reasonableness of this system by focusing on issues unrelated to these accommodations. They note that "a voter may simply be unaware of the Law's stringent new requirements" or a voter may have "forgot[ten] to bring her identifying documents to the polls" or, perhaps, "her driver's license may have been stolen . . . ." Dem. Reply at 34. These are hardly objections to systematic burdens imposed by the Law. Indeed, far from demonstrating that the Voter ID Law is insufficiently narrowly tailored, these concerns demonstrate just how well crafted the Law really is. The Voter ID Law provides all of these individuals a way to cast a ballot and have their votes counted. By attempting to minimize any

unintended ill effects of the Voter ID Law, while continuing to pursue its goal of detecting and preventing in-person voter fraud, the General Assembly has crafted a narrowly tailored law.[3]

c. Next, the Democrats argue that "[t]he availability of absentee voting is not a reasonable alternative for voters who are unable to comply with the law." Dem. Reply at 35-36. The Democrats complain that absentee-voting allowances are not broad enough to accommodate all individuals who will be unable to obtain acceptable photo identification; yet, they also insist that the State is not truly interested in preventing voter fraud precisely because the Voter ID Law does not apply to mail-in absentee ballots. *See id.* at 23-25, 35-36.

Apparently, no Voter ID Law could ever be constitutional, according to the Democrats. If the Law applied to mail-in absentee ballots, there would be no way around the requirement for anyone, which would frustrate their demands for a safety valve. On the other hand, if the Law did not apply to mail-in absentee ballots, but everyone was permitted to vote in this manner, then, in their view, there would be no valid purpose underlying the Law. The Democrats cannot have it both ways.

By any reasonable understanding, its inapplicability to mail-in absentee voting demonstrates that the Voter ID Law is narrowly tailored. Seniors and the disabled—two groups who Plaintiffs suggest would be most adversely affected by the Law—automatically have a safety valve for coping with the Law that the Democrats advocate. *See* Ind. Code § 3-11-10-24; Dem. Reply at 29-30. Yet this distinction between absentee voting and in-person voting does not negate the value of the Law in preventing and detecting fraud. Because Indiana law limits absentee voting to certain classes of individuals—those who are truly "absent" in addition to the

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[3] Besides, if these possibilities were enough to sink the Voter ID Law, then the prospect that a registered voter may be unable to vote because she is unaware of the location of her polling place, or that her car may have been stolen, would be enough to invalidate the general requirement of in-person voting on election day.

elderly and the disabled, *see* Ind. Code § 3-11-10-24—the vast majority of voters will not only be required to show their photo identification at the polls on election day, but they will also continue to be routed away from absentee voting, which for reasons unrelated to photo identification is vulnerable to fraud. Thus, the Voter ID Law is narrowly tailored to serve the State's compelling interest in preventing and detecting fraud without going overboard and burdening mail-in absentee voters for no good reason.

It also bears observing that, with due respect to the Northern District of Georgia, there is no constitutional standard that permits a court to gauge the likelihood that voters will learn about, and develop an effective plan to cope with, a new election regulation. *See Common Cause/Ga. v. Billups*, No. 4:05-cv-0201-HLM, 2005 WL 3556181 (N.D. Ga. 2005). In Indiana, the Secretary of State and the Election Division are working hard to educate voters about the Voter ID Law and to train poll workers to implement it. *See* State's Exs. 45, 46, 47. But it is simply irrelevant to any consideration of constitutional or statutory validity whether Indiana has, for example, "publicized the fact that a Photo ID is not necessary to vote via absentee ballot." *See Common Cause,* 2005 WL 3556181, at *38. Under narrow-tailoring doctrine, the sufficiency of a reasonable alternative does not depend on a court's assessment of whether those needing the alternative are sophisticated enough to "plan sufficiently enough ahead," *id.* at *39 to take advantage of what the law allows. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986) (reasonable alternative avenues of communication sufficient where 520 acres of land was available for adult businesses who "must fend for themselves in the real estate market").

d. Finally, the Democrats argue that the Voter ID Law is not narrowly tailored because it is "both overinclusive and underinclusive." *See* Dem. Reply at 36-37. In a reprise of their absentee-ballot complaints, they assert that the Voter ID Law is *underinclusive* because it

fails to address fraud in absentee voting. *See id.* There is, of course, no requirement that a statute address all potential evils at one time. *See Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others."). The legislature must be free to focus its attention on one problem at a time, and the General Assembly has chosen to focus on fraud at the polls before addressing other problems.

As explained in the State Defendants' opening brief, the benefits provided by the Voter ID Law vis-à-vis in-person voting simply would not arise from applying the Law to mail-in absentee voting. *See* State's Brief at 26-28. Whether the Court looks to the testimony of Wendy Orange or merely recognizes what is self-evident, absentee-ballot fraud poses different problems than in-person fraud, and the General Assembly is entitled to address those problems differently, if at all.[4] It has a compelling interest, in fact, in *not* requiring mail-in absentee voters to comply with the Voter ID Law for no reason other than to equalize abstract burdens of undertaking each method of voting.

This distinction is even more compelling in view of the risk that voter anonymity might routinely be compromised if the Voter ID Law were imposed on mail-in absentee voting. As the State Defendants explained in their opening brief, under the current system of mail-in balloting, requiring absentee voters to include photo identification with their ballots would have the result

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[4] For example, prior to enacting the Voter ID Law, in 2005 the General Assembly addressed some of the problems with absentee-voting fraud by passing Senate Enrolled Act No. 0015, which included changes to absentee voting, such as the creation of the Absentee Voter's Bill of Rights, *see* Ind. Code § 3-5-8-2.5, limiting the ability to vote by mail-in absentee ballot, *see* Ind. Code § 3-11-10-24, and creating new criminal penalties for fraud related to absentee voting, *see* Ind. Code §§ 3-14-2-1, 3-14-2-2.5, 3-14-3-1.1, 3-14-3-21.5.

that election officials would be checking the photo identification at the same time that they unseal and thereby expose the ballot. *See* State's Brief at 27-28. Particularly in close cases that might be reviewed by several election personnel, this might utterly destroy ballot secrecy. *See id.* at 28. Significantly, the Democrats *do not deny* this problem. Instead, they blithely suggest that the State could simply revamp its entire absentee-ballot process to accommodate this requirement. *See* Dem. Reply at 24-25. The State acknowledged as much in its opening brief, but the point is that the legislature is entitled not to undertake this tremendous and costly burden, particularly where the return on the investment—photo identification with no face to match—would be so insignificant.

The Democrats assert that the Voter ID Law is *overinclusive* because it is not drawn with "precision" and because there are less restrictive means to advance the State's goal. *See* Dem. Reply at 36-37. They assert that there is no evidence of in-person voting fraud and essentially take the position that the State may not enact any fraud-prevention regulations without such evidence. *See* Dem. Reply at 18-19; Dem. Brief at 39. Again, the State is not required to prove some quantum of in-person voting fraud to justify a fraud-prevention measure. *See Timmons,* 520 U.S. at 364. And even if it were, the reported incidents of fraud around the country, combined with the State's bloated voter-registration rolls (which the Democrats do not dispute), provides all the evidence necessary to support the General Assembly's compelling interest in adopting the Voter ID Law. Moreover, the Voter ID Law addresses another compelling state interest—promoting public confidence in elections. Regardless of whether the State has proven any instances of in-person voter fraud, the Voter ID law advances the State's compelling interest in protecting the public confidence in elections. *See McConnell v. Fed. Election Comm'n*, 540

U.S. 93, 143 (2003) ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest . . . .").

As alternatives, the Democrats suggest that voters without photo identification should be permitted to vote a regular ballot (*i.e.* not a provisional ballot subject to subsequent validation) if they bring some alternative form of identification, such as a utility bill. *See* Dem. Reply at 32. They even go so far as to argue such individuals should be permitted to vote if a poll worker recognizes them, or if they execute an affidavit of identity. *See id.; see also* Dem. Brief at 34. But the Democrats provide no authority for the proposition that the legislature should somehow be relegated to these measures rather than the one they have chosen. This is unsurprising since the Supreme Court and the Seventh Circuit have held that the opposite is true. *See Anderson,* 460 U.S. at 788; *Griffin*, 385 F.3d at 1131. The Democrats' arguments about overinclusiveness amount to nothing but public-policy disputes. There is no judicially applicable principle supporting the validity of the Democrats' suggested alternatives but not the Voter ID Law as enacted. It is the General Assembly, not Plaintiffs or courts, that gets to decide among reasonable policy alternatives.[5]

3. The Voter ID Law is not vague.

Even more than before, the Democrats and the League of Women Voters now march together inasmuch as the Democrats advance the League's argument that the Voter ID Law is unconstitutionally vague because the meaning of the term "conforms" is not clear. *See* Dem. Reply at 37-39. For the reasons explained in the State Defendants' opening brief, the meaning of

[5] Even supposing that the State adopted one of these alternatives, what would stop the Democrats, or another group of plaintiffs, from claiming that the law is still overinclusive? The notion that the State should permit individuals to vote if they are recognized by poll workers is particularly troubling because it would invite virtually undetectable abuse by poll workers who would recognize their friends but not those whose voting tendencies they might not know or like.

this term is reasonably clear, and any discrepancies in enforcement can reasonably be resolved through challenges to statutory interpretation. *See* State's Brief at 42-43.

The Democrats and the League also worry together about "the potential for selective enforcement or politicization of the challenge process . . . ." Dem. Reply at 37. But they in no way show how the Voter ID Law has any more "potential for selective enforcement" than any other election law, such as the signature requirement. If anything, possession of photo identification conclusively demonstrating one's identity would seem to make spurious challenges less likely. In any event, any problems that arise with respect to selective enforcement can be addressed on a case-by-case basis. The mere hypothesis that such a problem may arise is not enough to justify invalidating a statute on its face. *See Hill*, 530 U.S. at 733.

IV. The Voter ID Law Does Not Impose Unequal Burdens.

Plaintiffs continue to argue that the Voter ID Law violates both the Equal Protection Clause and the Civil Rights Act because it does not apply equally to all voters. *See* Dem. Reply at 23-25. Although the Democrats seem to have abandoned their argument that the indigency exception is unequally applied to voters, they continue to argue that the absentee-ballot exception is not justified by the State's compelling interest in preventing fraud. *See id.* at 24-25. As discussed at length in the State's opening brief and again briefly above, in-person voting and absentee voting present different challenges that need not be addressed the same way. *See* State's Brief at 25-28; Part III.B.2.d, *supra.* In brief, absentee-ballot fraud is generally accomplished through coercion or tampering—problems not necessarily detectable with photo identification. *See Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004); *Schoffstall v. Keperak*, 457 N.E.2d 550, 553-54 (Ind. 1984). Relatedly, election officials would have no way to compare photo identification included with an absentee ballot (again, at risk of spoiling ballot

secrecy) with the face of the person who actually marked the ballot. Requiring voters to include a photocopy of the identification would therefore have little, if any, benefit in terms of fraud prevention and detection.

Significantly, the Democrats do not dispute these differences. They merely argue that Wendy Orange should not be permitted to testify about them. *See* Dem. Reply at 24-25. But, candidly, it does not take an expert in election procedures to understand that absentee-ballot fraud is substantially different from in-person voting fraud for the reasons described. These differences are self-evident and fully justify different treatment by the General Assembly. The Crawford Plaintiffs seem to recognize this, but nonetheless argue that mail-in absentee voting should be equally burdened for the sake of formal equality. *See* Crawford Reply at 18-20. However, treating differently situated classes the same can be just as problematic as treating similarly situated classes differently. The Constitution does not compel the General Assembly to regulate all means of voting the same way just to achieve some abstract notion of equal burdens.

To the extent that the relationship between the right to vote and the First Amendment requires some level of heightened scrutiny for laws that distinguish among groups of voters, the Voter ID Law is a permissible content-neutral regulation of the manner of voting. It is justified by reference to preventing and detecting the types of voter fraud that are detectable with in-person voting, but not mail-in voting, and not by reference to the "content" of the votes themselves. In other words, there is no basis for inferring that the General Assembly drew a line between in-person voting and absentee voting in order to benefit absentee voters as such (*i.e.* because absentee voters are likely to vote a particular way).

Furthermore, for the reasons discussed in Part III, *supra,* and in the State Defendants' opening brief, *see* State's Brief at 52-56, the Voter ID Law directly advances a compelling

government interest and is narrowly tailored to do so. Accordingly, there is no colorable argument that the Voter ID Law's differential treatment of mail-in absentee voting and in-person voting violates the Equal Protection Clause. *See Nat'l Coalition of Prayer, Inc.*, 2005 WL 2253601, at *12 (upholding against First Amendment and equal protection challenges the Telephone Privacy Law's differential treatment of charities' telephone sales calls by their volunteers and employees on one hand and their contracted professional telemarketers on the other).

The Plaintiffs continue to object to the nursing-home exception. *See* Dem. Reply at 25. The State's opening brief discussed several logical reasons for this exemption. *See* State's Brief at 28-29. The Democrats ignore most of these reasons, including the fact that all state licensed-care facilities that serve as polling places are homes for the elderly, who are automatically eligible to vote absentee. The General Assembly's determination that these voters, as a class, are less likely to commit, or have the ability to commit, fraud at the polls is entitled to deference, especially in light of the fact that the exemption is content-neutral and does not show a preference for any class of voters. The exemption merely accommodates a very small set of individuals who would otherwise be accommodated through the absentee-voting exception.

V. The Voter ID Law Does Not Impose A Poll Tax.

Neither the Democrats nor the Crawford Plaintiffs squarely address the State's argument that any fees or costs associated with acquiring proper photo identification are not poll taxes. In the State's opening brief, the State explained at length that poll taxes historically were taxes levied uniformly on all persons and enforced at the polls both as a matter of convenience and as a means to discriminate against black voters. *See* State's Brief at 32-34. The Plaintiffs, in contrast, pursue here the novel theory that *any* burden that falls upon voters as a result of an

election regulation is a poll tax. *See* Dem. Reply at 21-22; Crawford Reply at 23-24. For reasons that should be obvious, this is incorrect. Otherwise, voter registration and in-person voting requirements, which plainly impose collateral burdens on voters, would be poll taxes.

A. Birth Certificate Fees Are Not Poll Taxes.

In *Harper*, the Court struck down Virginia's poll tax because "[w]ealth . . . is not germane to one's ability to participate intelligently in the electoral process." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966). Therefore, the "requirement of fee paying" to obtain a ballot "causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause." *Id.* In short, *Harper* invalidates poll taxes that condition the right to vote upon payment of fee.

The Voter ID Law, in contrast, imposes no fee upon voters. Instead, voters are merely required to present any one among several acceptable forms of identification. Plaintiffs do not dispute that the vast majority of voters already have acceptable photo identification in the form of a driver's license or non-license photo-identification card. Nor do they dispute that any such voters will never have to pay a fee to renew such a card if all they wish to do is use it to vote. *See* Ind. Code § 9-24-16-10. Instead, they focus on some unidentified small percentage of voters who may incidentally incur a fee for a birth certificate as a prerequisite for obtaining acceptable photo identification. *See* Crawford Reply at 22. But they also do not dispute that the fees for birth certificates required by statute are fees for a particular service rather than exactions levied on the population generally. *See* Ind. Code §§ 16-37-1-11, 16-37-1-11.5.

It is highly significant that birth-certificate fees are relevant to the Voter ID Law for only a limited category of voters—those born in Indiana who do not already have proper identification, who are not eligible to vote absentee, who are not indigent, who do not have a

religious objection to being photographed, and who do not already have a birth certificate.[6] *See* Ind. Code §§ 3-11-10-24, 3-11.7-5-2.5. Yet the Crawford Plaintiffs analogize the birth-certificate fee to a tax imposed on *all* persons under the age of 25, the payment of which is a condition for voting. *See* Crawford Reply at 23-24. But in that hypothetical, the government has levied a general exaction on a readily identifiable segment of the population and has directly conditioned the franchise on payment of the tax. Here, the segment of the population that may incur fees charged for birth certificates is not a discrete, readily identifiable class, and voting is not directly conditioned on the payment of the fees. The birth-certificate fees preceded the Voter ID Law, are entirely incidental to its enforcement, and apply regardless of the voter's purpose in obtaining the birth certificate.

The impossibly broad underlying principle of the Plaintiffs' poll-tax argument may be stated as follows: If in the course of doing all that one needs to do in order to vote, a person must pay a government-imposed fee at any time, the voting regulation that proximately led to the incursion of that fee must be a poll tax. If, under this irreducible theory, the Voter ID Law is a poll tax because some voters will incur birth-certificate fees in order to vote, then, by analogy,

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[6] The Crawford Plaintiffs also argue that, just as one must have a birth certificate to obtain acceptable photo identification, one must have photo identification to obtain a birth certificate, thus preventing acquisition of either. *See* Crawford Brief at 17. However, an Indiana resident may use, *inter alia*, a social-security card, credit card, bank card, lease, employment application, work or school-identification card, *and even a voter-registration card* to procure a birth certificate. *See* Dem. Ex. 7, at 6. Furthermore, individuals need not physically travel in order to acquire a birth certificate. The Indiana Department of Health accepts requests for birth certificates over the telephone, by fax, and via the internet. *See* Vital Check Network, Inc., *at* http://www.vitalchek.com/orderforms/generic_Birth.asp?provider_id= 20294 &product_id=16741. (last visited Jan. 11, 2006). This service requires only a short survey and a valid credit card. Additionally, the company providing this service operates in conjunction with 45 other state departments of health, making it just as easy to procure a birth certificate from almost anywhere in the country. *See* Vital Check Network Inc., *at* http://www.vitalchek.com (last visited Jan. 10, 2006).

in-person voting requirements must also be poll taxes because some voters will need to pay for public transportation—a fee imposed by government—to travel to the polls in order to vote. According to the Plaintiffs' theory, it is irrelevant that the fare exists regardless of the user's purpose—the fare must be a poll tax because it is imposed on those voters who must take public transportation to the polls in order to exercise their right to vote. The preposterousness of this analogy demonstrates the invalidity of the entire theory that incidental birth-certificate fees render the Voter ID Law a poll tax.

B. Incidental Costs of Obtaining Photo Identification and Voting Are Not Poll Taxes.

To the Democrats, however, the theory that public-transportation costs are poll taxes is not preposterous at all. In the midst of their poll-tax argument, the Democrats briefly accuse the State Defendants of failing to take account of other incidental costs, including public transportation costs, caused by the Voter ID Law. *See* Dem. Reply at 21 ("The State of course says nothing about the other incidental but nonetheless real and substantial costs of obtaining the required form of identification, such as the cost in time and of transportation, especially to those without driver's licenses, *who will have to either use public transportation (for a fee)* to travel to the BMV location, quite possibly after a trip to the health department to obtain (for a fee) a certified copy of a birth certificate, not to mention the additional costs in time and money for voters who were born in other states.") (emphasis added). Thus, it is indeed the case that the Democrats believe that every incidental opportunity cost experienced by voters as a result of some voting regulation—measured in both time and money—amounts to a poll tax.

Contrary to the Democrats' assertion, the State conclusively debunked this frivolous argument in its opening brief. *See* State's Brief at 32-35. Again, States have broad authority to regulate elections. Their regulatory choices will inevitably impose some burdens involving

opportunity costs on voters. Such costs are not and cannot be poll taxes as understood in *Harper*, 383 U.S. at 668, and *Harman v. Forssenius*, 380 U.S. 528 (1965), otherwise the State would be required constantly to deregulate voting so that the incidental costs of casting a ballot would approach ever closer to zero (a point that could never be achieved).

The Seventh Circuit envisioned and rejected exactly this scenario in *Griffin*. There Judge Posner, writing for the Court, scoffed at the notion that States must make it ever easier on citizens to vote, such as by permitting everyone to vote by mail, or over the Internet, or even using a wireless device. *See Griffin,* 385 F.3d at 1130. The Court recognized exactly the consequences of the Plaintiffs' argument: once courts start forbidding incidental costs imposed by voting regulations, there will be no end to the regulations States must avoid and the affirmative accommodations they must undertake to satisfy the demands of the right to vote.

States are not required to enable such chaos—nor could representative government long endure if they were. Election regulations are not enacted simply for the sake of imposing burdens on voters. They are enacted to protect the rights of legitimate voters to elect the government they choose. An election with no rules would be no election at all, but merely a ruse to justify the reign of the most powerful. There is no principled distinction—with respect to the poll-tax argument or otherwise—between the Voter ID Law and other election rules, such as voter registration and in–person voting, that everyone agrees are appropriate for protecting legitimate elections.

C. *Salerno* precludes facial invalidation because any conceivable poll tax *applies* only to a subclass of all registered voters.

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. *See also Hill,* 530 U.S. at 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.'"). While the Democrats argue that *Salerno* does not apply to First Amendment cases, the poll-tax argument is, strictly speaking, an argument under the Equal Protection Clause, not the First Amendment. Therefore, *Salerno* applies to Plaintiffs' poll-tax argument.

Lest this distinction seem excessively formalistic, however, it is important to consider precisely *when* and *why* the First Amendment permits facial invalidations notwithstanding *Salerno*. In short, *Salerno*'s inapplicability to First Amendment cases is entirely a function of overbreadth-standing doctrine. This doctrine permits parties whose expression may hypothetically be regulated consistent with the First Amendment to mount facial challenges to laws that are worded so broadly as to at least chill (if not outright forbid) protected expression. *See Reno v. ACLU*, 521 U.S. 844 (1997) (striking down a provision of Communications Decency Act as facially overbroad). As a concrete example, overbreadth standing permits a purveyor of obscenity whose speech may be prohibited to bring a facial challenge to a law forbidding "offensive speech":

> We have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity. The notion is that the values protected by the First Amendment are so important that the plaintiff in such a case may assert the rights of hypothetical speakers not before the Court, so long as the challenged law would apply to a substantial amount of protected speech.

New York v. Ferber, 458 U.S. 747, 769 (1982).

A critical component of overbreadth standing is that the law has the same operational impact on all speech, regardless of First Amendment protection. That is, it must impact the unprotected speech of the plaintiff the same as the protected speech of some hypothetical non-party. *See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518, 519-20 (1972) (holding that a law prohibiting

"opprobrious words or abusive language, tending to cause a breach of the peace" was unconstitutionally overbroad because the law could have been applied to constitutionally protected speech just as it was applied to the proscribed speech involved). Going back to the "no offensive speech" hypothetical, such a law would have the same operational impact on everyone—both those who wish to speak with obscenity and those who wish to speak with fully protected speech—meaning that it would prohibit at least some of both.

This critical notion of universal impact is missing in this case. Here, the only conceivable poll tax identified by the Plaintiffs would be the fees associated with acquiring an Indiana birth certificate. But these fees, and the Voter ID Law to the extent it implicates them, do not have the same operational impact on the entire universe of speakers, which in this case is all voters. *See* Part V.A, *supra; see also* State's Brief at 36. A few voters may indeed incur the cost of an Indiana birth certificate as a prerequisite for obtaining acceptable photo identification for the sole reason of voting. For the vast majority of registered voters, however, the Law will never have this operational effect, whether because voters already have photo identification that may be renewed for free, because they will vote absentee, because they already have certified birth certificates, or because the birth certificate they need must be obtained from another state. In other words, if this is a poll tax, it is not a poll tax for everyone. A ban on "offensive" speech, however, *is* a ban for everyone.

Put another way, any attributes of a poll tax found within the Voter ID Law will in no way chill the votes of those who will not incur the tax, such chill being the *sine qua non* of overbreadth doctrine. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First

Amendment rights of other parties not before the court."). Indeed, to the extent the Voter ID Law and the birth-certificate-fee law work together to impose a poll tax on a limited set of voters, the proper remedy is not to enjoin the Voter ID Law, but instead to invalidate the birth-certificate-fee law as applied to those individuals who need a birth certificate to vote. It might even be conceivable for a person who wishes to obtain a birth certificate for reasons other than voting to bring a facial challenge to the birth-certificate-fee law on the grounds that the law not only burdens his ability to obtain a birth certificate, but also that it is so broad as to burden the protected rights of voters who may need to obtain birth certificates to vote. The birth-certificate-fee law is not relevant to all voters, but it is relevant to all who apply for a birth certificate, and it could conceivably chill those who would otherwise request a certificate in order to vote from doing so.

Regardless, the First Amendment's relationship to voting is not a talismanic barrier to the application of *Salerno*. The poll-tax argument is not an overbreadth challenge to the Voter ID Law. It is instead, if anything, a misdirected complaint about the birth-certificate-fee law. Consequently, *Salerno* applies.

VI. The Voter ID Law Does Not Burden Any Right To Free Association.

In their opening brief, the Democrats argued that the Voter ID Law "interferes with and severely burdens the fundamental rights of association which belong to Democrats" because it prohibits them from associating with voters who are registered but unable to vote due to lack of proper photo identification. *See* Dem. Brief at 47-50. In their reply, Democrats have not continued to pursue this argument. Nonetheless, as explained in the State's opening brief, the Voter ID Law does not burden the Democrats' right to associate with voters. *See* State's Brief at 36-39.

In Indiana, voting in primary elections is not necessarily an expression of association. Indiana's open-primary system allows any voter, for any reason, to vote the ballot of the party he chooses. *See* Ind. Code § 3-10-1 *et seq.* The voter need not intend to associate with the party.

Regardless, the Supreme Court has generally invalidated regulations for impermissibly burdening associational rights only where the regulation seeks to control the internal operations of the organization or is somehow discriminatory towards the organization. *See Clingman v. Beaver,* ____ U.S. ____, 125 S.Ct. 2029, 2038 (2005). At most, the Voter ID Law impacts any associational rights of the Democrats only slightly. It is a reasonable regulation of election procedure and is not targeted at controlling the Democratic Party or disrupting the relationships of those wishing to associate with the Democratic Party. Finally, the Voter ID Law applies equally to all voters regardless of the party with which they choose to associate.

VII. The Democrats' Tipping-Point Argument Is Specious.

Democrats argue that the Court should examine the Voter ID Law "in the context of Indiana's several other restrictive laws," including polling hours, lack of statute mandating leave for employees wishing to vote, voter-registration deadlines, presence of partisan challengers in the polling place, restrictions on absentee voting, closing of BMV offices, election system administered by partisan officials, and State's allegedly "abysmal record" of counting provisional ballots. *See* Dem. Brief at 44-47; Dem. Reply at 22. The Democrats' broad-sweeping approach invites review based on an infinite variety of external forces, no matter how far removed from voting.

The Democrats now cite ballot-access cases to support their argument, but those cases are not nearly as expansive in their review of state election laws as the Democrats represent. *Williams v. Rhodes*, 393 U.S. 23, 34 (1968), says that voting laws must be viewed in their

"totality" and "as a whole." However, far from being a challenge to one requirement based on the total weight of all conceivable burdens that voters might encounter, that case involved a challenge to each of a few laws that operated together to impose ballot-access burdens on minor parties, but not the Republican and Democratic parties. *See id.* at 25. In fact, the defendant acknowledged that the laws imposed unequal burdens, but defended them as a unit on the theory that states have a compelling interest in limiting ballot access to the two major parties. *Id.* at 30-34. *See also Republican Party of Ark. v. Faulker County*, 49 F.3d 1289 (8th Cir. 1995) (reviewing laws that operated as a unit to require political parties to *fund* and *conduct* a primary election as a condition of access to the ballot for the general election). Here, the Democrats seek to invalidate the Voter ID Law only, not all of the other laws and practices they identify as combining to impose a burden on voters that they deem to be unacceptable.

Furthermore, the Democrats present no plausible theory that all the laws and practices they mention (such as counting provisional ballots and closing some BMV branches) are part of a unified scheme, or that the Voter ID Law changes character when combined with other election laws. Instead, their theory is simply that, as the last in a line of highly discrete voting regulations and practices that supposedly impose a total quantum of burdens on voters that the Democrats deem excessive, the Voter ID Law must go. This tipping-point theory is unsupported in the law and would require the Court to undertake a purely *quantitative* analysis of the total burden imposed on voting by a wide variety of discrete factors. Accordingly, it has nothing in common with the *qualitative* analysis courts have applied to ballot-access and write-in voting statutes to ensure they do not, alone or in connection with other statutes, facially foreclose all means for voters to cast ballots for minor parties and candidates. *See, e.g., Storer v. Brown*, 415 U.S. 724, 737 (1974) (rejecting a "totality" challenge because the law at issue did not "change its character

when combined with other provisions of the election code"). The "totality" evaluation that the Democrats advocate is, once again, policy analysis, not legal analysis. It is, respectfully, a job for the General Assembly, not the Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the State Defendants' opening memorandum, 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 January 11, 2006, 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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