

INDIANA COURT OF APPEALS

APPELLATE CASE NO. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS)	
OF INDIANA, INC. and)	Marion County Superior Court
LEAGUE OF WOMEN VOTERS)	Civil Division-02
OF INDIANAPOLIS, INC.)	
)	
Appellants)	
)	Trial Court
vs.)	Cause No. 49D02-0806-PL-027627
)	
TODD ROKITA, in his official)	The Honorable S. K. Reid
capacity as Indiana Secretary of State)	
)	
Appellee)	

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SUMMARY OF ARGUMENT

This is an appeal from a motion to dismiss pursuant to T.R. 12(B)(6). “A 12(B)(6) dismissal is improper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief.” *State of Indiana v. American Family Voices, Inc.*, 898 N.E.2d 293, 296 (Ind. 2008). In the present case, the complaint at issue alleges that improper legislatively mandated voter qualification which is imposed upon all in-person voters is contrary to under Art. 2, § 2 and also violates Art. 1, § 23 as the Photo ID Law burdens some classifications of voters more than others.

Rokita’s attempt to distinguish *Morris v. Powell*, 125 Ind. 281, 25 N.E.21 (Ind. 1890), is unpersuasive. In *Morris*, our supreme court declared a registration law unconstitutional under Article 2, §2 of the Indiana Constitution, in part because it imposed a disparate burden on the right to vote. The Photo ID Law, requires voters to expend money, time and energy to secure the required government-issued form of identification, necessary to have a vote counted. The Photo ID Law makes it impossible to avoid imposing a cost on a voter as it fails to provide the simplest of accommodations, e.g., the voter signing while at the polls an affidavit attesting to her identity, as the Law has eliminated the affidavit option that formerly existed.

The Law is not a mere procedural regulation. Rokita’s reliance on *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14 (1922), is misplaced, as the *Simmons* court was seeking to reconcile with Art. 2, § 2, a voter registration law expressly authorized by Article 2, § 14. The *Simmons* court held that a registration law authorized by Art. 2, § 14 was

permissible, but it did not grant a broad license to the Legislature to pass laws that impede voting when the impediment has nothing to do with voter registration. Rokita admits the Photo ID Law was not enacted as part of a voter registration system. Nor does the provide a means of proving a voter's eligibility. The Law does not require the identification to prove the age, citizenship and residency of the voter the primary qualifications set forth in Article 2, § 2. Nor is the Law a time, place or manner regulation. Instead, it is an attempt to impose a new substantive qualification which, if not fully complied with, will prevent a voter from casting a vote that will be counted.

The constitutional flaw with the Photo ID Law is not that it requires voters to identify themselves at the polls, but rather that it unnecessarily impedes and burdens a voter's right to vote by imposing costs on the exercise of that right not expressly authorized by any language of Article 2 of our Constitution and thus adds a voting qualification to the exclusive list set forth in Art. 2, § 2.

Rokita's effort to justify the law as a permissible exercise of the Legislature's authority under Art. 2, § 1 to ensure that elections are "free and equal" is similarly unavailing. That constitutional provision was intended to expand the opportunity to vote and not to justify unnecessary restrictions or impediments on the right to suffrage. If anything, the purpose of Art. 2, § 1 demands that the Photo ID Law be declared unconstitutional.

Rokita made no showing before the trial court "whether the disparate treatment accorded by [the Photo ID Law is] reasonably related to inherent characteristics which

distinguish the unequally treated classes,” the first prong of the two prong analysis applied under an Art. 1, § 23 analysis pursuant to *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). “[L]egislative purposes may be a factor considered in making the reasonable relationship determination.” *Morrison v. Sadler*, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005). In the present case, Rokita claims the legislative purpose is to prevent in-person voter fraud. Given that there have been no documented cases of in-person voter fraud under the current system of voting while there have been prosecuted cases of mail-in absentee voter fraud, the imposition of an additional burden upon in-person voters is not reasonably related to the differences between mail-in absentee and in-person voters. Further, although raised before the trial court, Rokita fails to apply the *Collins* analysis to other classifications raised by the League such as veterans with federal photo identification that lacks an expiration date and persons who cannot vote using their Medicare cards. On this basis, the dismissal by the trial court should be reversed.

Finally, Rokita attempts to argue that as he has nothing to do with the enforcement of the Photo ID Law, he cannot be named as a party. Rokita ignores the fact that the League is seeking only declaratory relief and not injunctive relief and cites only case law relating to the dismissal of parties in instances where injunctive relief is sought. Rokita, Indiana’s chief election officer, acknowledges that he “advises” and “instructs” county election boards and voters regarding the Photo ID Law. A declaration that the Photo ID Law is unconstitutional will require Rokita to advise the local election officials and voters that the Law is unconstitutional.

ARGUMENT

I. ROKITA IS A PROPER DEFENDANT IN THIS DECLARATORY JUDGMENT ACTION

Rokita contends he is not a proper party defendant in this case because he does not enforce or implement the Photo ID Law and that he cannot offer “meaningful redress” when the League prevails. Rokita’s argument fails because this is a declaratory judgment action and as chief election officer of the state of Indiana, it is Rokita who provides an interpretation of the Law to all local election officials in the state. A declaration that the law is unconstitutional would prohibit Rokita from advising local election boards and voters that they must follow the Law.

The Indiana declaratory judgment act empowers courts “to declare rights, status and other legal relations whether or not further relief is or could be claimed.” Ind. Code § 34-14-1-1. Declaratory judgments, by definition, do not involve executory or coercive relief. *Smith v. Mercer*, 118 Ind. App. 575, 79 N.E.2d 772, 775 (Ind. Ct. App. 1948) (citations omitted). In the present case, the League is not seeking injunctive relief that would prohibit Rokita from enforcing the Law because the League agrees that Rokita cannot enforce the Law. However, a declaratory judgment of unconstitutionality will stop Rokita from advising and encouraging local election officials and voters to follow the Law.

Rokita acknowledges that he is Indiana’s chief election official. <http://www.in.gov/sos/elections/pdfs/2008ElectionAdminManual.pdf>, p. 6 (last visited

April 25, 2009). As Indiana's chief election official, Rokita "[a]dvis[es] and instruct[s] local election officials on election administration" and "may issue advisory opinions regarding election administration issues." *Id.* at pp. 6-7. As part of his "advising and instructing," Rokita provides many online resources to local election officials and voters through his website. *See*, <http://www.in.gov/sos/elections/>. Rokita "instructs" and "advises" local election officials and voters in general on a number of election-related topics, including the Photo ID Law. *See, e.g.*, <http://www.in.gov/sos/photoid/> (Last visited April 28, 2009); http://www.in.gov/sos/elections/pdfs/Photo_ID_Press_Release.pdf (last visited April 25, 2009) (press release for local election officials and directed at voters discussing the Photo ID Law); <http://www.in.gov/sos/elections/pdfs/2008ElectionAdminManual.pdf>, p. 60.

When the chief election officer of the State of Indiana advises and instructs local election officials and voters regarding the Photo ID Law, it is reasonable to assume that local officials and voters are going to act accordingly. It is also reasonable to assume that Rokita's instructions and advice regarding the intricacies of the Photo ID Law are intended to ensure that the Law is enforced uniformly and consistently across Indiana. If Rokita did not expect local election officials to act upon his "advice" and "instructions," then surely he would not be expending taxpayers' resources on his various publications containing his "advice" and "instructions."

Once this Court declares the Photo ID Law unconstitutional, Rokita will not be able to advise voters and local election officials that the Law is to be followed on

Election Day. Rokita would have to advise voters that if their rights as “individual” voters are challenged by a local election officials requiring presentation of photo identification, then the “individual” should consult an attorney. If a local election official foolishly decides not to follow Rokita’s “advice” and “instruction” regarding the unconstitutionality of the Photo ID Law and elects to disregard an opinion of Indiana’s higher court, the local election official will be subject to a variety of remedies. The opinion of this Court will serve as *stare decisis* upon the lower courts who may be asked to interpret the Law.

Rokita mistakenly relies upon *Libertarian Party of Indiana v. Marion County Board of Voter Registration*, 778 F. Supp. 1458 (S.D. Ind. 1991) (where State Election Board lacked power to discipline or remove members of Marion County Voter Registration Board who refused to abide by its directives, injunctive relief sought by the Libertarian Party against the State defendants was not obtainable), and *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019-20 (9th Cir. 2002) (plaintiff’s claimed injury could not be redressed by California Secretary of State because law being challenged was not applicable to the municipality and secretary had not required nor encouraged municipal defendant to follow state election law). Rokita relies upon these cases for the proposition that he is not a proper party to this action. (Rokita Br. 10). Rokita ignores the difference between injunctive relief and declaratory relief. Both of these cases involved plaintiffs seeking injunctive relief which is not the case here. The League is not asking the trial court to order Rokita take action. It is simply asking for a declaration of

unconstitutionality that will in turn effectively prohibit Rokita from providing erroneous advice about the Photo ID Law to voters and local election boards.

Finally, Rokita also relies upon an unpublished opinion from the federal district court for the proposition that Rokita had no “role in *enforcing* the” Photo ID Law.¹ (Rokita Br. 10) (emphasis in original). The unpublished district court opinion cited by Rokita was handed down in conjunction with the federal lawsuit regarding the Photo ID Law which sought both declaratory relief and injunctive relief. *See, Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 779, 782 (S.D. Ind. 2006). And as acknowledged by Rokita, the question in that case was whether “enforcement of [the Photo ID Law] will not implicate at least some of the official statutory responsibilities of Defendant[] Rokita.” *Crawford v. Marion County Election Board*, 378 F. Supp. 2d 788 (D. Ct. Ind. 2005). As previously discussed, the instant action seeks only declaratory relief.

On the basis of the foregoing, Rokita is a proper defendant in this action.

¹ Ind. Appellate Rule 65(D) provides: “Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and **shall not be cited** to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.” (emphasis added). Although this rule applies to Indiana appellate opinions, Rokita did not provide a copy of the opinion to this Court. Further, the opinion has no *res judicata* application as the League was not a party to the federal action.

II DISMISSAL UNDER IND. T.R. 12(B)(6) WAS INAPPROPRIATE

A. UNDER THE STANDARD OF REVIEW, THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT

Rokita acknowledges that the standard of review for a decision rendered under Ind. T.R. 12(B)(6) requires this Court to presume that all the factual allegations in plaintiff's complaint are true and are to be viewed in the light most favorable to the plaintiff. (Rokita Br. 8). Rokita then goes on to argue that challenged legislation is presumed to be valid, citing the same case that the League cited in its brief, *Matter of Tina T.*, 579 N.E.2d 48, 56-57 (Ind. 1991). The League agrees with this statement of law.

However, the League does not agree with the next giant leap in logic that Rokita attempts to make when he cites *Tina T.* for the proposition that “[e]ven in the context of appealing dismissal of its case, the challenger bears the burden of rebutting this presumption based on hypothesized facts, and the Court must resolve all reasonable doubts in favor of the law’s constitutionality.” (Rokita Br. 8-9). Rokita’s reading of *Tina T.* is incorrect in that *Tina T.* makes no reference to dismissal or hypothesized facts. Further, and more importantly, the appeal in *Tina T.* was from a final judgment entered under Ind. Trial Rule 56 and not a motion to dismiss pursuant to Ind. T.R. 12(B)(6). *Tina T.*, 579 N.E.2d at 56, 62, 63 (“The juvenile court held that I.C. 31-6-14-1 *et seq.* is unconstitutional and enjoined its further enforcement, and the State appealed directly to this Court,” finding that trial court should have granted appellant’s motion for summary judgment and reversing trial court’s judgment in two other class actions).

Rokita also claims that “dismissal is appropriate where the law’s constitutionality is apparent as a matter of law and no factual resolution is necessary to decide the case.” (Rokita Br. 9) (citing *Baldwin v. Reagan*, 715 N.E.2d 332, 335 (Ind. 1999)). While this may be true, *Baldwin* was decided under Ind. T.R. 56 and the appeal was taken from the ruling on summary judgment. *Baldwin*, 715 N.E.2d at 335 (“Following arguments on cross-motions for summary judgment, the trial court held that the Seatbelt Enforcement Act violated art. I, § 11, of the Indiana Constitution and permanently enjoined the defendants from enforcing the statute” and “The defendants, represented by the Attorney General, appeal those rulings”).

“A 12(B)(6) dismissal is improper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief.” *State of Indiana v. American Family Voices, Inc.*, 898 N.E.2d 293, 296 (Ind. 2008) (citation omitted). Thus, when a complaint facially challenging the constitutionality of a statute fails to allege that not all persons covered by the statute are negatively impacted, the granting of a motion to dismiss will be upheld. *See, e.g., Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 981 (Ind. 2005) (as challenged legislation is presumed valid and challenger must demonstrate that “there are *no* set of circumstances under which the statute can be constitutionally applied,” where complaint did not allege that all persons covered by statute would have constitutional right infringed, motion to dismiss was affirmed).

Unlike *Brizzi*, there is no certainty on the face of the League’s amended complaint that the League is not entitled to any relief. In the present case, the complaint alleges that

the Photo ID Law “imposes a new substantive qualification on the right to vote, not authorized by the Indiana Constitution, which is the requirement that an otherwise registered and constitutionally qualified voter display at the polls on Election Day, or within 10 days of the election at the circuit court clerk’s office, a specific document—usually an Indiana driver’s license, a U.S. passport, or a photo ID card issued by the BMV--some of which are not possessed by all Indiana registered voters.” (App. 13). While some voters are more burdened than other voters, the requirement of presenting government-issued photo identification containing specific information unrelated to actual qualifications such as age and citizenship is a qualification imposed upon **all** voters and the amended complaint in the present case is unlike the complaint in *Brizzi*. Further, under an Art. 1, § 23 analysis, taking the allegations of the complaint as true, there are various groups more burdened by the Photo ID Law such as the elderly, again making this complaint unlike that presented in *Brizzi*.

B. THIS IS NOT SIMPLY A FACIAL CHALLENGE THAT CAN NECESSARILY BE RESOLVED ON A MOTION TO DISMISS

Without providing any citation to the record or a legal basis for the argument, Rokita claims that the challenge posed by the League is a facial challenge. (Rokita Br. 7, 8, 12, 34, 36, 37). Contrary to Rokita’s characterization, the League’s action is not simply a facial challenge that can be resolved on a motion to dismiss.

As regards the Art.1, § 23 argument, Rokita claims that “this case does not present an as-applied challenge because . . . there are no plaintiffs here injured by these

applications.” (Rokita Br. 37). Rokita ignores cases such as *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 251 (Ind. 2003) (two physicians and a clinic brought suit asserting the rights of women under Art. 1, § 23 to Medicaid reimbursement for abortions). In making his claim that the League presents a facial argument, Rokita attempts to make an end-run around his waiver of the issue of standing. However, Rokita has waived the issue of standing because he did not present it before the trial court. *See, Mitchell v. Stevenson*, 677 N.E.2d 551, 558 (Ind. Ct. App. 1997).

On this basis, Rokita’s back door attempt to challenge the standing of the League should be stricken.²

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

A. THE PHOTO ID LAW LEGISLATIVELY IMPOSES A NEW VOTER QUALIFICATION

Rokita argues that the League’s reliance upon *Morris v. Powell*, 125 Ind. 281, 25 N.E. 21 (Ind. 1890), is inapposite because “neither provision of the law challenged in *Morris* was struck down simply because producing a document at the polls is itself an improper added qualification to vote.” (Rokita Br. 23). The League agrees that the law

² As is discussed in the amended complaint, the League holds a very unique position regarding elections as its “business” is “dedicated to encouraging its members and fellow Hoosiers to exercise their right to vote as protected by the Indiana Constitution.” (App. 8-9). Given the League’s “business,” it is likely one of the few organizations in the state that can assert standing on behalf of itself and its members but which can also assert public standing. *See, e.g., Cittadine v. Indiana Department of Transportation*, 790 N.E.2d 978, 980 (Ind. 2003) (“[W]hen a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter nor be a public official.”).

in *Morris* was struck down because of the burden imposed upon the voters in getting that piece of paper the law required them to have at the time of voting.

Rokita attempts to skirt the issue of burden by arguing that the Photo ID Law requires identification “relevant to a permissible pre-existing qualification.” However, on the very face of the Law, the form of photographic identification that must be displayed at the polls is not required to contain the voter’s address, a statement as to her citizenship, or her date of birth, the primary qualifications to vote.

The breadth of the Supreme Court’s holding in *Morris* is evident from its observation that:

It matters not whether the provision [requiring certain citizens to register at least 90 days before an election] of the law be termed a registration of voters or a provision requiring certain proof of the class of voters named to entitle them to vote. In either event the effect is the same, for it requires proof of qualifications to vote which the voter under the constitution does not need to possess.

Id. at 226.

Like the required certificate struck down in *Morris*, which Rokita says “presupposed ownership of real property,” the possession of the limited forms of identification required by the Law also presupposes the ownership of property. Ownership of a passport presupposes that the owner had at least \$100 to pay for that passport. (App. 11). Ownership of a driver’s license presupposes that the owner has the financial wherewithal to own, operate, fuel and license a motor vehicle. Even the possession of a “free” photo ID issued by the BMV presupposes that the owner had the

financial means to obtain the documents needed to obtain that photo ID. *Id. See, Weinschenk v. State*, 203 S.W.3d 201, 213-14 (Mo. 2006) (finding that photo ID law similar to Indiana’s violated Missouri constitution because it required voters to produce certain documents that cost money and “all fees that impose financial burdens on eligible citizens’ right to vote, not merely poll taxes” are impermissible). *Cf. In re Request for Advisory Opinion*, 479 Mich. 1, 740 N.W.2d 444, 464-65 (2007) (rejecting claim that Michigan photo ID law was unconstitutional poll tax because affidavit exception meant that any voter without adequate identification “may simply sign an affidavit in the presence of an election inspector” and avoid the costs associated with obtaining it). Unlike the law in Michigan, the Indiana Photo ID Law has no similar affidavit exception for those who, for whatever reason are unable to obtain the required form of identification. In Indiana, unlike Michigan, those claiming indigency must make a second trip after the election to the county clerk’s office just to sign the indigency affidavit so that her vote will be counted.

B. THE PHOTO ID LAW IS NOT SIMPLY A REGULATION OF ELECTION PROCEDURES

The League agrees that the general assembly has the power to enact legislation regulating elections and voting; however, the League also contends that a voting regulation which adds a new voter qualification is unconstitutional.

1. Rokita’s Reliance Upon *Simmons* Is Misplaced

Rokita cites *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14 (1922), for the

proposition that “the Indiana Supreme Court specifically rejected the theory that Article 2, § 2 provides an exhaustive list of possible impediments to voting.” (Rokita Br. 15). This is not true.

The Supreme Court in *Simmons* was required to reconcile a voter registration law authorized by Art. 2, § 14 with Art. 2, § 2, which prohibits legislatively enacted voter qualifications. The Supreme Court recognized that a voter registration law could be enacted under the authority granted by Art. 2, § 14, notwithstanding Art. 2, § 2, provided the law does not violate any other provision of the Indiana Constitution. *Simmons*, 136 N.E. at 17-18. Additionally, the *Simmons* court recognized that all voter registration laws must be uniformly applied and not be so unreasonable as to violate the “free and equal” requirement of Art. 2, § 1. *Simmons*, 136 N.E. at 17 (quoting *People v. Hoffman*, 116 Ill. 587, 5 N.E. 596 (1886)).

Rokita himself admits that the Photo ID Law was not enacted as part of the voter registration system. (Rokita Br. 25, n. 2). Rokita also acknowledges that the legislature cannot enact a voter qualification that is not provided for in Art. 2, § 2. (Rokita Br. 15). However, relying upon *Simmons*, Rokita claims that the Photo ID Law “vindicates” the voter registration system (Rokita Br. 25, n. 2) and that the legislature “*may* regulate the way in which the existing qualifications set forth by Art. 2, § 2 are verified and administered.” (Rokita Br. 15).

Rokita’s argument fails because the Photo ID Law does nothing to verify that a voter satisfies the qualifications imposed by Art. 2, § 2. The voter registration system

itself does not even require a person registering to vote to prove their age, citizenship or residency so it is not as if the Photo ID Law was enacted to confirm the identification of someone who had previously proved those qualifications at the time they registered to vote. The Photo ID Law itself does not require the identification prove address, age or citizenship.

2. The Photo ID Law Is Not A Times, Places, Or Manner Regulation

Rokita claims the Photo ID Law is a procedural regulation comparable to time, place and manner regulations. However, the Photo ID Law on its face has nothing to do with the time or place of holding elections nor is it intended to regulate the “manner” of voting. The “manner” of voting “has reference only to the method or mode” of selecting public officers and “does not include the power to determine qualifications of legal voters.” *Board of Election Comm’rs v. Knight*, 187 Ind. 108, 117 N.E. 565, 568 (Ind. 1917) (the "word 'manner' * * * indicates merely that the legislature may provide by law the usual, ordinary or necessary details required for the holding of the election”).

Rokita attempts to analogize the Photo ID Law to laws governing the hours when the polls are open or the amount of time a voter can spend in the polling booth or the prohibition against divulging a voter’s ballot after the vote has been made but before it is cast. (Rokita Br. 18-19). However, these are examples of procedural regulations that regulate “times, places, and manner.”

The Photo ID Law is no mere procedural rule. It is a substantive rule that requires in-person voters to prove their identity by a prescribed method, unless otherwise expressly excepted by the Law. It is the fact that the voter must present government-issued identification with an expiration date and photograph, and all the steps that the voter must take outside the polling place to procure the required identification, that imposes the burden, all of which was discussed in the League's opening brief.

Whether government-issued identification is "universally" required in our modern society is irrelevant to the constitutional inquiry of whether the burden imposed by the Photo ID Law constitutes an additional voter qualification.³ (*See*, Rokita Br. at 15-16). The question is not what additional qualifications for voting the framers might have enacted had they lived in modern society, but rather it is to determine their original intent based upon the times in which they lived and the "state of things existing" when they drafted the 1851 constitution. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 412 (Ind. 1991). The framers obviously had concerns that the Legislature might impair the right to vote with additional qualifications and hence constitutionally mandated the exclusive

³ Rokita claims that "[p]hoto identification is necessary in order to drive an automobile, board an airplane, enter a federal courthouse, cash a check, rent a movie, or engage in any number of other common daily transactions." (Rokita Br. 15-16). Rokita's assertion that it is "necessary" to show photo identification to board an airplane or enter a federal courthouse is wrong. *See, e.g., Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006) (the federal policy that airline passengers present a photo ID does not prevent the person without such ID from boarding a flight, but merely requires that he be subjected to a more extensive personal search). And, not everyone drives or cashes checks or rents movies. And those who do currently drive but who then stop driving due to age infirmity or choice may ultimately face the problems currently encountered by many senior citizens in securing a photo identification card.

qualifications that can be imposed upon voters. To further buttress the expansion of voting rights, the framers also included the mandate that elections be “free and equal,” discussed *supra*.

The League’s objection to the Photo ID Law is not that it requires voters to identify themselves at the polls. To the contrary, the League agrees that it is reasonable to require a voter to inform poll workers of who she is before she may be given a ballot. The League also does not object to requiring voters to sign affidavits attesting to their identity, if her identity is challenged. The League acknowledges that these are reasonable safeguards for a fair and honest election, as has our Supreme Court. *Blue v. State*, 206 Ind. 98, 188 N.E. 583, 591-92 (Ind. 1934). However, that does not mean, *ipso facto*, that the means by which the State requires voters to identify themselves can never be considered a “qualification.” A voter identification law which unnecessarily impedes and burdens a voter’s fundamental right to vote crosses the constitutional line.

C. THE PHOTO ID LAW DOES NOT COMPORT WITH ART. 2, § 1 OF THE INDIANA CONSTITUTION

Rokita attempts to justify the enactment of the Photo ID Law on the grounds that it is a permissible exercise of the Legislature’s authority under Art. 2 § 1, the “free and equal” elections clause. (Rokita Br. 13-14). In actuality, the inclusion of Art. 2, § 1 in Indiana’s Constitution undercuts Rokita’s argument.

Art. 2, § 1 was intended to *expand* the opportunity to vote and not restrict or impede the right of suffrage. While there is no Indiana constitutional history directly

discussing the intent behind the adoption of Art. 2, § 1, the Oregon constitution contains language adopted verbatim from Indiana's Constitution. Oregon's highest court has defined "free" to mean that "no impediment or restraint of any character shall be imposed upon [any voter], either directly or indirectly, whereby [s]he shall be hindered or prevented from participation at the polls." *Ladd v. Holmes*, 40 Or. 167, 66 P. 714, 718 (1901). Washington's highest court has held that Washington's "free and equal" elections provision, which was adopted from the Oregon constitution which in turn was borrowed from the Indiana constitution, provides even greater protection for the right to vote than does the federal constitution.⁴ *Foster v. Sunnyside Valley Irr. Dist.*, 102 Wash.2d 395, 687 P.2d 841, 846-47 (1984). Illinois has interpreted the "free and equal" elections requirement in its Constitution as meaning the original drafters' desire "to abolish all unnecessary impediments to voting." *Orr v. Edgar*, 283 Ill. App. 3d 1088, 670 N.E.2d 1243, 1252 (1996). Kentucky's highest court has held that the legislature, "cannot so frame [voting] regulations as to deny the voting privilege, either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial." *Queenan v. Russell*, 339 S.W.2d 475, 477 (Ky. 1960).

Rokita claims that Art. 2, § 1 empowers the legislature "to protect the rights of citizens to a fair and reliable electoral system in which their individual votes are not

⁴ The same can be said of the Indiana Constitution. The federal constitution contains no similar expressed recognition of the right to vote similar to that found in § 2 of Art. 2 which expressly confers the right to vote on persons who have satisfied its requirements, and § 1 of Art. 2, which ensures that elections shall be "free and equal." Indiana's Constitution guards against both outright denials of the right to vote as well as

diluted by the fraudulently cast votes of others.” (Rokita Br. 13). This argument might be persuasive if Rokita could point to a case of in-person voter fraud under the current voting system; however, he cannot. The prevention of non-existent vote “dilution” cannot serve as justification for a law that imposes on in-person voters an unnecessary, burdensome and exclusionary voter identification qualification. Indeed, it would truly be ironic if the Supreme Court were to hold that the Legislature, in the absence of any evidence of impersonation voting fraud, could constitutionally enact a strict voter identification law that imposes a new qualification on voters under the guise of making elections in Indiana more “equal” but at the same time less “free”.

The “free and equal” elections provision of the Indiana Constitution is a mandate to expand the franchise rather than a broad invitation to the Legislature to enact new and unnecessary impediments to voting, and on this basis Rokita’s reliance thereon fails.

D. THE U.S. DISTRICT COURT’S TWO PARAGRAPH DISCUSSION OF ART. 2, § 2 IS NOT PERSUASIVE

Of the 127 page opinion issued by the federal district court in the *Crawford* litigation, Rokita relies upon the only two paragraphs in the opinion that address the issue of whether the Photo ID Law violated Art. 2, § 2 of the Indiana Constitution. *See, Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 843 (S.D. Ind. 2006), *aff’d* 472 F.3d 949 (7th Cir. 2007). In affirming the district court, neither the Seventh Circuit nor the United States Supreme Court addressed the issue of whether the Law violated Art 2, § 2 of the Indiana Constitution.

more subtle restrictions.

Further, the district court opinion is not binding on this Court. *See, e.g., Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1285 (Ind. 2006) (federal opinions interpreting Indiana laws do not absolve Indiana courts from their ultimate responsibility for determining Indiana law). Not even decisions of the Seventh Circuit interpreting Indiana law, although entitled to “respectful consideration,” are binding on Indiana state-court judges. *Indiana Department of Public Works v. Payne*, 829 N.E.2d 184, 196 (Ind. Ct. App. 2005). This is especially true of federal court decisions interpreting the Indiana Constitution. *Priest v. State*, 270 Ind. 449, 386 N.E.2d 686, 689 (1979) (construction of Indiana constitutional provisions is an “independent judicial act in which federal cases play only a persuasive role”) (citing *Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171, 175 (1977)).

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

A. NO NEW ISSUES HAVE BEEN RAISED IN THIS APPEAL

Rokita claims that “[t]he League [] argues – for the first time in this litigation – that among the in-person voters, the photo identification requirement is not reasonably related to the differences between in-person voters with state or federally issued identification with an expiration date and/or photograph and those without” (Rokita Br. 27) and that “[b]ecause this issue was not raised in the trial court, it is accordingly waived for review.” (Rokita Br. 34). However, Rokita is incorrect.

The League argued the situation of senior citizens with medicare cards lacking photographs and expiration dates and veterans holding the Veterans Universal Access Identification Card which lacks an expiration date, in its brief in opposition to Rokita's motion to dismiss. (Supp. App. 31). Further, the allegations of the complaint are broad enough to support the examples cited by the League. On this basis, Rokita's argument regarding waiver is without merit.

B. THE DISMISSAL SHOULD BE REVERSED BECAUSE THE PHOTO ID LAW FAILS TO SATISFY ART. 1, § 23

Under the analysis provided by *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), the first issue to be answered is “whether the disparate treatment accorded by [the Photo ID Law is] reasonably related to inherent characteristics which distinguish the unequally treated classes.” *See, Collins*, 644 N.E.2d at 80. In the present case, while the League agrees that under this prong of the analysis there are inherent characteristics which distinguish absentee and mail-in voters, the League does not agree that that the Photo ID Law is reasonably related to those distinguishing characteristics.

Collins states:

The distinctions must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situation related to the subject-matter of the legislation which require, necessitate, or make expedient different or exclusive legislation with respect to the members of the class.

Collins, 644 N.E.2d at 78. What was not shown with respect to Rokita's motion to dismiss was what requires, necessitates or makes expedient the Photo ID Law directed

only at in-person voters.

“[L]egislative purposes may be a factor considered in making the reasonable relationship determination.” *Morrison v. Sadler*, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005) (statute allowing only opposite-sex marriage upheld under Art. 1, § 23 following lengthy review of state’s interest in promoting “natural procreation”). As was extensively discussed in the League’s original brief, while there are documented cases of mail-in absentee voter fraud, there have been no adjudicated cases regarding in-person voter impersonation. What Rokita fails to recognize is that under the *Collins* analysis, there must be something about the differences between absentee and mail-in voters that requires or necessitates the different treatment of the two classifications.

The simple fact that a person can stand in front of the Election Day official and present a photograph for comparison while the absentee voter cannot, does not provide a reason why the in-person voter is required to present the photo identification. Rokita’s articulated reason is that the Photo ID Law prevents in-person voter fraud in the first place. Thus the issue regarding the first prong of the analysis, and for purposes of this appeal, is whether the Photo ID Law is reasonably related to Rokita’s claim that the distinguishing characteristics between mail-in absentee voters and in-person requires or necessitates voters to show specific types of photo identification so as to prevent in-person voter fraud. The League contends that the Law is not reasonably related.

With no recorded cases of in-person voter fraud, Rokita’s claim of preventing in-person voter fraud, i.e., addressing a need that does not exist, fails to demonstrate that the

law is reasonably related to the distinguishing characteristics of in-person and mail-in absentee voters.

On this basis, the Law fails to satisfy the first prong of *Collins*.

C. THE PHOTO ID LAW IMPACTS THE PRIVILEGE OF VOTING OF OTHER CLASSIFICATIONS

Another group of persons whose voting rights are infringed are persons who live in a state-licensed facility in which there is no polling place. The Photo ID Law exempts from its restrictions those voters who live in state-licensed facilities in which a polling place is located. Voters who live in state-licensed facilities in which the county clerk does not locate a polling place are not exempted from the Photo ID Law.

Again, under *Collins*, the issue presented is “whether the disparate treatment accorded by [the Photo ID Law is] reasonably related to inherent characteristics which distinguish the unequally treated classes.” Rokita apparently concedes that there are no “inherent characteristics” which distinguish the two classes of voters as he offers no discussion regarding inherent characteristics which might distinguish the two groups, i.e., persons in state-licensed facilities with polling places and persons in state-facilities without polling places.

Instead of addressing the legal argument, Rokita claims that persons living in a facility without a polling place are “likely” to vote absentee so they do not have to travel and that persons living in state-licensed facilities with polling places are “likely” to be identifiable as residents by election officials. (Rokita Br. 33). First, Rokita’s proffered

reasons fail to recognize that senior citizens and disabled persons are entitled to make their own choice as to whether they vote in person or by mail-in absentee ballot.⁵ Secondly, there is absolutely no reason why Election Day polling place officials would have reason to know the individual residents of a state-licensed facility as there is no requirement that persons working the polls have knowledge of the facility.

Under the second prong of the *Collins* analysis, “the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.” *Collins*, 644 N.E.2d at 80. Rokita’s only argument in this regard is that “licensed-care-facility-resident voters and in-person Election Day voters are not members of the same groups and are not similarly situated [and as such] their differential treatment does not violate Art. 1, § 23.” (Rokita Br. 38). This reasoning fails to acknowledge that the class is persons in state-licensed facilities, some of whom can vote in-person without presenting the required photo identification while others are required to present the photo identification.

Rokita does acknowledge the burden that is imposed upon senior citizens and disabled persons in procuring the required photo identification needed to vote in-person by seniors and disabled persons who live in state-licensed facilities without a polling place. Rokita states: “[S]eniors and the disabled who live in care facilities would-likely [sic] have particular difficulty traveling to obtain photo identification.” (Rokita Br. 33).

⁵ Rokita states “that voting in-person . . . is *not* a constitutional right.” (Rokita Br. 33). As discussed *supra*, an analysis under the privileges and immunities of the Indiana constitution does not require the assertion of infringement of a fundamental right.

On this basis, the trial court's dismissal of the League's complaint should be reversed.

D. ROKITA FAILS TO ADDRESS THE OTHER CLASSES OF PERSONS IMPACTED BY THE PHOTO ID LAW

Rokita does not address the plight of veterans with federally issued identification cards for veterans' benefits but which lack an expiration date for these lifetime benefits. He does not address the difficulties imposed upon persons, who, for religious reasons, cannot have their picture taken and must, after every election in which they vote, make additional trips to the clerk's office to re-prove that which they proved in a prior election and to the state in originally securing the identification. And while acknowledging the difficulty in acquiring the required identification for senior citizens, again, Rokita does not address their predicament under the Photo ID Law.

Rokita claims that the legislature "sought to improve fraud prevention by relying on a system already in place – standard, government issued photo identification." (Rokita Br. 16). The problem with Rokita's position is that there is no standard, government issued photo identification. All of the agencies of government which issue identification cards do it without uniformity. The federal government is unlikely to add an expiration date of indefinite to the Veterans Universal Access card just for the purpose of allowing Hoosier veterans to vet under Indiana law. Medicare cards are issued by the State of Indiana which enacted the Photo ID Law yet Medicare cards do not contain photographs or an expiration date.

Instead, Rokita chooses to characterize the problems of these men and women as “picayune objections to some practical applications.” (Rokita Br. 7). For the men and women who have to endure the obstacles imposed in their path in trying to participate in one of our country’s greatest civic exercises, these problems are not “picayune.”

As Rokita fails to address these classifications under *Collins*, the trial court’s decision should not be affirmed.

CONCLUSION

For all of the foregoing reasons, the League of Women Voters of Indiana and the League of Women Voters of Indianapolis respectfully request that the dismissal by the trial court be reversed.

Respectfully Submitted,



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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words.

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CERTIFICATE OF SERVICE

I certify that on May 1, 2009, a copy of the forgoing brief was hand-delivered to Christopher Francis Zoeller, Thomas Molnar Fisher and Heather Lynn Hagan, Office of Indiana Attorney General, 219 Statehouse, Indianapolis, Indiana 46204.

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