

discouraged from voting by other inconveniences like long lines at the polls or a cold, hard rain. An inconvenience is not, however, a constitutional violation.

The Democratic Party Plaintiffs' reply contains an illuminating irony. The Democrats lament that the Voter ID law was "engineered" on a straight party-line vote over the unanimous opposition of every sitting Democratic State Senator and Representative. (Democrats' Consolidated Response, p.1). That result was possible because the people of Indiana voted in a Republican governor and a Republican legislature in the 2004 elections. As the alleged "champions" of the right to vote, the Democratic Party Plaintiffs seem to take a dim view of the result when that right is freely exercised. Even so, the process by which the law was passed is not being challenged and is not relevant to this discussion.

The Marion County Election Board reasserts its position in this memorandum that the Crawford Plaintiffs do not have standing, that the Democratic Party Plaintiffs have standing to assert associational claims only, and that both the Civil Rights Act claims and Indiana Constitutional claims should be rejected.

ARGUMENT

- I. No One Except the Democrats, Who Have Standing to Assert Their Associational Claims Only, Has Any Standing to Bring This Action.**
 - A. Crawford and Simpson Will Suffer No Cognizable Injury from the Voter ID Law, Nor May They Assert the Injuries and Rights of Hypothetical Voters.**
 - 1. Offense is not injury, so Crawford and Simpson are not injured as voters.**

In their reply, Plaintiffs Crawford and Simpson argue that they are injured as voters because they are "forced to produce photo identification." Crawford Reply at 7. In support of this proposition, they cite *Cramer v. Skinner*, 931 F.2d 1020, 1026 (5th Cir. 1991), which held that a frequent interstate airline traveler had standing to challenge a federal law, prohibiting

airline travel agents from voluntarily disseminating certain information about interstate flights. Even though the plaintiff could have received such information from the airline on request, he had standing because he had come to rely on travel agents volunteering such information and, therefore, the law “makes planning his trips more difficult.” *Id.* at 1027. Here, however, Crawford and Simpson do not allege or argue that the Voter ID Law will make voting more difficult for them. They argue only that they are offended at having to produce at the polls identification that they already possess. Mere offense is not enough to confer Article III standing. *See Books v. Elkhart County*, 401 F.3d 857, 870 (7th Cir. 2005) (holding that offense does not create Article III standing because “otherwise there would be universal standing: anyone could contest or challenge any public policy or action he disliked.”).

While courts have conferred standing for plaintiffs who alter their behavior to avoid unwelcome contact with an “offensive” religious display, such “offense” injury has been limited to Establishment Clause cases. *See, e.g., Books*, 401 F.3d at 861; *see also O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005) (holding that plaintiffs had standing to bring Establishment Clause challenge because they had frequent and unwelcome contact with offensive statue); *Buono v. Norton*, 371 F.3d 543, 547-48 (9th Cir. 2004) (holding that plaintiffs had standing to bring Establishment Clause challenge because plaintiff was offended by religious display on government property such that he could not freely use such property). “Offense” injury arises in such cases only because Establishment Clause violations can occur where a reasonable observer may perceive government “endorsement” of religion and a concomitant message of exclusion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring). Only in this context does it make sense that a person would have standing to sue because he was “offended” by a display, because that “offense” is part and parcel of the

constitutional violation. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (holding that Establishment Clause forbids government endorsement of religion because “it send ancillary message to members of the audience who are nonadherents ‘that they are outsiders’”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

The substantive legal issue in this case has to do with any burdens the Voter ID Law imposes on the right to vote, not with whether having to show photo identification will offend voters or make them feel like outsiders. Therefore, because Plaintiffs Crawford and Simpson both have the photo identification necessary to vote, they cannot claim that their right to vote has been burdened merely because they are offended by the new means of identifying themselves.

2. Plaintiffs Crawford and Simpson are not injured as candidates by the Voter ID Law and, therefore, cannot assert the rights of their voters.

Crawford and Simpson also argue that they have standing as candidates to represent the rights of their voters. *See Crawford Reply* at 6-7. The Marion County Election Board (and the State Defendants by incorporation) addressed this argument in detail in its opening brief. *See MCEB Brief* at 32-33. In sum, Crawford and Simpson confuse their ability to assert *voter rights* when they (Crawford and Simpson) have already suffered their own injuries with the ability to assert *voter injuries* as a substitute for their own.

Crawford and Simpson do not address these arguments head on. Instead, they continue to rely principally on the reasoning in *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 402, 404 (E.D. Mich. 2004). They also rely on *Walgren v. Bd. of Selectmen of the Town of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1975), but there the Court merely observed that “[w]e have in the past indicated that a candidate has standing to raise the constitutional rights of voters.” *See id.* (citing *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973)).

Again, however, with the exception of *Bay County*, most cases, including *Mancuso*, have only permitted candidates to assert the rights of voters where the candidates have challenged laws that directly regulate the candidates *as candidates*. *Mancuso* itself involved a candidate's challenge to a resign-to-run law on behalf of voters. *See Mancuso*, 476 F.2d at 189-90.

Accordingly, the First Circuit's stray (and doctrinally unremarkable) observation in *Walgren* that "a candidate has standing to raise the constitutional rights of voters" adds no weight to Plaintiffs' argument. In *Walgren*, in fact, the candidate plaintiff suffered cognizable direct injury owing to the challenged conduct because he had quite demonstrably lost an election that had already occurred. *See Walgren*, 519 F.2d at 1365 n.3. Here, Crawford and Simpson merely hypothesize not that they will lose an election, but merely that they will lose votes in the future owing to the law. They have provided no support even for this type of watered-down, speculative injury.

Again, a candidate's ability to assert voters' rights when suffering direct injury *as a candidate* is a species of overbreadth standing. Such standing is thus very different from the standing being asserted here, where candidates who have demonstrated no cognizable injuries of their own are attempting to rely on the (purported) injuries, and not simply the rights, of hypothetical voters. *See MCEB Brief* at 32-33.

B. The Political Groups Have Not Suffered Direct Injury and Cannot Assert Standing on Behalf of Their "Members."

1. The political groups suffer no direct injury and do not have standing.

Initially, the plaintiff political groups (United Senior Action of Indiana, Indianapolis Resource Center for Independent Living (IRCIL), Concerned Clergy of Indianapolis (CCI), Indianapolis Branch of the NAACP, and the Indiana Coalition of Housing and Homeless Issues (ICHHI)) argued that they had standing because the Voter ID Law would disenfranchise some of their members and thereby lessen their political clout. *See Crawford Brief* at 34-36. However,

the Seventh Circuit has instructed that a burden on a group's ability to advocate for its cause "is not the personal injury that is required to establish standing." *See People Org. for Welfare and Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984).

The political groups attempt to explain *POWER* by claiming that it merely held that the state had no affirmative duty to help register voters. *See Crawford Reply* at 14-15. Without further explanation, Plaintiffs claim that this case is "in stark contrast" to *POWER* because the Voter ID Law will directly frustrate their goals and reduce their effectiveness as advocacy organizations. *Id.* Plaintiffs' conclusory statement does not distinguish this case from *POWER*. The Seventh Circuit has clearly stated that reduced ability to advocate is not the concrete injury required for Article III standing. *See People Org. for Welfare and Employment Rights*, 727 F.2d at 172; *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433-34 (D.C. Cir. 1995) (holding that mere frustration of organization's objective does not impart standing).

The political organizations also now argue that they will have to reallocate their resources in order to assist their constituents in complying with the Voter ID Law and, therefore, that they suffer injury. *See Crawford Reply* at 13-14. Any such diversion of resources, however, is no more sufficient to confer Article III standing than decreased political clout. None of the Plaintiffs' cases, moreover, squarely addresses the issue. In *El Rescate Legal Servs. v. Executive Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991), the Ninth Circuit held that the issue of whether the association had suffered direct injury was moot and only in dicta offered that the organization had likely suffered injury. *See id.* at 748. In *Johnson v. Mortham*, 915 F. Supp. 1529, 1540 (N.D. Fla. 1995), the Court found that an organization had standing because the redistricting plan at issue prevented the organization "from effectively organizing itself within the District, giving it standing to sue in its own right." *Id.* But the Court was not specific about

the nature of this injury, and certainly did not state that reallocation of resources caused injury to the organization. At most, the court held that the organization was impeded in its right to associate with others in the district, which is a very different type of injury that is not asserted by the political groups in this case.

Plaintiffs also cite *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1261 (N.D. Miss. 1987), which devoted only one sentence to the issue of standing: “Inasmuch as the plaintiffs have shown that the challenged statutes either impinge upon their protected rights to register to vote or burden their organizational efforts to assist prospective voters in registering, the court finds that all of the plaintiffs have standing to sue.” *Id.* The Court provided no in-depth analysis of this statement. In contrast, the Seventh Circuit has analyzed this issue in detail and concluded that this type of injury is insufficient to confer standing on an association. *See People Org. for Welfare and Employment Rights*, 727 F.2d at 172. Regardless, even in *Allain* there is at least some suggestion that the organizational plaintiffs were directly injured because the challenged statutes and practices actually prevented their voter registration activities (*i.e.*, as enforced, the law prevented them from providing deputy registrars), rather than simply made those efforts more costly. *See Allain*, 674 F. Supp. at 1259 (discussing failed efforts to increase numbers of community volunteers designated as deputy registrars).

Finally, Crawford Plaintiffs rely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097 (9th Cir. 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 106 (2004), for the proposition that any organization that reallocates its spending to combat perceived problems created by a government regulation has standing to challenge that regulation. *See Crawford Reply* at 13-14. However, Plaintiffs overstate the holding in these cases. Both cases were decided on the pleadings without the benefit of

discovery. *See Havens Realty*, 455 U.S. at 369; *Smith*, 358 F.3d at 1100. Both courts, therefore, were examining whether plaintiffs allegations could withstand a motion to dismiss, which is a relatively low standard.

In *Havens Realty*, plaintiff HOME alleged that it had been ““frustrated by defendants’ racial steering practices in its efforts to assist equal access to housing through counseling and other referral services”” and that it had ““to devote significant resources to identify and counteract the defendant’s [sic] racially discriminatory steering practices.”” *Havens Realty*, 455 U.S. at 369 (quoting HOME’s complaint). The Court held that for purposes of a motion to dismiss, the plaintiff’s allegations were sufficient. *See id.* “If, as broadly alleged, petitioners’ practices have perceptibly impaired HOME’s ability to provide services for low-and-moderate income homeseekers, there can be no question that the organization has suffered injury in fact.” *Havens Realty*, 455 U.S. at 379 (emphasis added). It is important to observe that these are highly general allegations of injury—they do not themselves require the inference that the injury arose only because of a voluntary decision to divert resources in response to the activities of another.¹ In fact, the Court did not specifically address HOME’s allegation that it had to reallocate resources to combat the effects of defendants’ practices, and the Court’s focus was on “HOME’s ability to provide services.”

With its decision in *Smith*, the Ninth Circuit is apparently the only court that has read *Havens Realty* to create standing based on a group’s voluntary diversion of its own resources in response to a law that it finds offensive. *See Smith*, 358 F.3d at 1105. If taken to its logical conclusion, *Smith* would allow almost universal standing. Any individual organization could allege that it has responded to a law by voluntarily reallocating its budget to address the effects

¹ The same, of course, cannot be said here. This case is well beyond the pleadings stage, and plaintiffs must do more than rest on general assertions of injury.

of a law or to educate others about it. Article III injury relates to burdens that the law itself actually inflicts, not self-imposed, opportunistic adaptation in response to a law's consequences for others.

2. The political groups have identified no members who are injured and, therefore, cannot assert associational standing.

The Crawford Plaintiffs agree that “an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Associational standing is derivative, and by its nature, it does not confer standing upon the association unless the association has *members* who have standing.

The Crawford Plaintiffs attempt to buttress their standing argument in three ways. First, they attempt to expand the definition of “members” to include clients and others to whom the association provides services. Second, they argue that the organizations need not identify any “members” who will be injured by the Voter ID Law. Third, they argue that board members and other representatives of the associations are “offended” by the Voter ID Law and, therefore, the associations may assert associational standing.

a. The political groups' constituents do not possess sufficient “indicia of membership” to confer standing upon the organizations.

Three of the political groups, IRCIL, ICHHI, and CCI exist to provide community services and do not have traditional members. *See* MCEB Brief at 35-36. These circumstances deprive these organizations of any capacity to claim to represent those who simply use their services but in no way have indicated any consent to be represented in this case. Contrary to

Plaintiffs' assertions, in *Hunt*, the Court did not recognize the rights of an entirely private association to claim unilaterally authority to represent hypothetical beneficiaries of its efforts. *See Hunt*, 432 U.S. at 344-45. In that case, rather, the plaintiff association was a trade collective created by Congress specifically to represent the interests of its apple grower constituents. *See id.* As a result, it was clear that the association (1) served a specialized segment of the community, (2) represented individuals who served in the entity, elected the entity's leadership, and financed the entity's activities, and (3) had interests necessarily tied with those of its constituency. *See id.*; *see also Fund Democracy, LLC v. SEC*, 278 F.3d 21, 26 (D.C. Cir. 2002). In other words, the relationship between the organization and the interests it represented was bestowed by Congress, not simply declared by the organization's fiat.

In subsequent cases, courts have respected the limits of *Hunt* when determining whether an association has sufficient "indicia of membership" to have representational standing. In *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999), the Eleventh Circuit held that the Advocacy Center, a protection and advocacy organization established by federal statute, had standing to assert the rights of its "constituents" because Congress specifically authorized them to protect the rights of individuals with mental illnesses. *Id.* Furthermore, the enabling statute required that the board of each organization include constituents and required the organization to have an advisory council, 60% of whose membership, as well as the chair, must be constituents. *Id.* *See also Or. Advocacy Ctr. v. Mink*, 322 F.2d 1101 (9th Cir. 2003) (holding that Oregon Advocacy Center established by the same federal statutory scheme at issue in *Stincer* had standing to assert rights of its constituents, even though they were not "members" in a traditional sense).

None of political groups in this case was established by federal statute. Plaintiffs argue that IRCIL is federally funded and thus is the equivalent of the advocacy centers in *Stincer* and

Oregon Advocacy Center. See Crawford Reply at 9-10. However, IRCIL has only asserted that it receives federal funding for its mission and that this funding comes with strings attached; it makes no assertion that Congress created it specifically to represent the interests of all disabled individuals. Consequently, it has not established authority to represent those who use its services other than its unilateral decision to do so.

Plaintiffs IRCIL, ICHHI, and CCI do not possess any indicia of membership to constitute the functional equivalent of traditional membership organizations. None of the plaintiff political groups has demonstrated that their constituents serve in their leadership, elect their leadership, or help to finance the associations' activities. See *Hunt*, 432 U.S. at 344-45. Without evidence that those being represented have some form of control over the association, the association has no standing to represent them. See *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (holding that plaintiff association could not assert associational standing because it did not serve "a discrete, stable group of persons with a definable set of common interests").

In a case very similar to this one, the Seventh Circuit held that a non-profit association, which purported to represent the interests of all low-income and moderate-income individuals for whom it provided services, did not have standing to assert claims on behalf of these individuals. See *Hope, Inc. v. County of Dupage*, 738 F.2d 797, 814 (7th Cir. 1984). The Court noted that "the low and moderate income individuals whom HOPE purports to represent" were not "the substantial equivalent of members." *Id.* at 815. Moreover, the Court noted that if associational standing were stretched to allow associations to "litigate on behalf of individuals that were neither members nor the substantial equivalent of members, a conflict would be created with the prudential limitation that generally a plaintiff 'cannot rest his claim to relief' on the legal rights and interests of third parties.'" *Id.* at 815 n.6 (quoting *Warth v. Seldin*, 422 U.S. 490, 499

(1975)). If the political groups were allowed to litigate on behalf of their constituents, the grounding of associational standing in membership consent (or some acceptable substitute, such as bestowal of responsibility by Congress) would be negated.

b. Even if the political groups have “members,” the political groups have failed to identify any members who have suffered, or who will suffer, injury traceable to the Voter ID Law.

Because associational standing is a derivative right, plaintiff political groups must do more than establish that they have “members” in order to assert claims on behalf of those members. “The right to sue on behalf of its constituents, however, does not relieve [plaintiff] of its obligation to satisfy *Hunt*’s first prong by showing that one of its constituents otherwise had standing to sue.” *Stincer*, 175 F.3d at 886-87; *see also Fund Democracy*, 278 F.3d at 26-27 (holding that even if plaintiff could have demonstrated that it had members, plaintiff had not established that any of these individuals could have sued in their own right); *Hope, Inc.*, 738 F.2d at 814 (“The problem with HOPE’s standing in its representational capacity is that it has not alleged much less proven that any of its members or directors either suffered an injury or was threatened with immediate injury to the extent that the member or director would be able to make out a justiciable case had he brought suit himself . . .”).

Here, none of the political groups has identified even one member who will be injured by the Voter ID Law. *See Crawford Brief* at 35 (“The organizations have not been able to identify specific members who will not be able to vote or who will be deterred from voting because of the burdens imposed by the challenged law.”) Instead, they argue that they need only claim to have such members and need not identify any such members in order to have standing. *See Crawford Reply* at 11-13. Yet, they concede that the “only question is whether or not the organizations in

this case have demonstrated that they have at least one member who is ‘suffering immediate or threaten [sic] injury.’” Crawford Reply at 11 (quoting *Warth*, 422 U.S. at 511).

The political groups claim that their members stand to suffer injury because they “will be subjected to the requirement that they must produce the required photo identification and/or they will not be able to vote or will, because of the need to obtain proper identification prior to being able to vote, have their right to vote burdened.” Crawford Reply at 11. However, Plaintiffs have put forth no evidence of a single person who will be unable to vote—or who will be burdened in voting—as a result of the Voter ID Law. *See* MCEB Brief at 35-36. Instead, the political groups cling to vague allegations that there are some unidentifiable members who will be unable to vote. *See* Crawford Reply at 12-13; Crawford Brief at 35.

At the summary-judgment stage, this is insufficient to establish standing. *See Stincer*, 175 F.3d at 887 (holding that vague allegations that certain unidentified individuals were denied access to their health records were not enough to confer standing on association created to protect individuals because there was no link between those allegedly denied access to their records and membership in association attempting to assert their interests). *Compare Envtl. Conservation Org. v. Dallas*, No. 3:03-CV-2951, 2005 WL 1771289, at *3 (N.D. Tex. 2005) (affidavit from member of association alleging injury was sufficient to demonstrate that at least one member could assert claim in her own right).

Because the political groups have not demonstrated that “at least one of [their] constituents would have had ‘standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association,’” the political groups do not have standing to pursue the interests of their constituents. *Or. Advocacy Ctr.*, 322 F.3d at 1112 (quoting *United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996)).

c. Members' offense at new means of identifying themselves at the polls is not a cognizable injury.

Perhaps realizing that they cannot demonstrate that any of their constituents have suffered injury, Plaintiff political groups attempt to achieve standing by incorporating new facts.

Plaintiffs now allege that the political groups have actual members, including their directors and officers, and that these members have suffered injury in the form of offense at the Voter ID Law and its requirement to produce photo identification at the polls. *See Crawford Reply* at 4-5, 11-13.

CCI now alleges that it has elected officers and members that join the organization after being voted into membership. *See Crawford Reply* at 4. Reverend Leroy Dinkins, an officer and member of CCI, now claims that even though he possesses proper identification, he is offended by having to show his photo identification at the polls. *See Crawford Supp. Ex. 3*. Roderick Bohannon, a member of the NAACP, also claims that he is offended by the photo-identification requirement. *See Crawford Supp. Ex. 5*. Likewise, Michael Reinke, a member of IRCIL, now claims that he is offended by the Voter ID Law's photo-identification requirement. *See Crawford Supp. Ex. 7*. However, as explained in detail in section IA1, *supra*, merely being offended by the requirements of a law is not enough to create Article III standing.

C. The Indiana Democratic Party and the Marion County Democratic Central Committee lack standing to assert all but their freedom-of-association claims.

1. Neither the Indiana Democratic Party nor the MCDCC has "members" in any meaningful sense.

It is not a novel theory that organizations may only assert claims on behalf of their members or the substantial equivalent of members. *See Hope, Inc.*, 738 F.2d at 914-15. This has been a bedrock principle of associational standing since the Supreme Court articulated the concept in *Hunt*. Since that time, courts have grappled with situations where an association

attempts to assert the interest of non-member clients or others whose interests the association claims to represent. In doing so, the courts have explained that associational standing is premised on the notion that the members have a stake in the outcome of the litigation and some form of control over the association. *See Hunt*, 432 U.S. at 344-45 (focusing on whether asserted members possessed appropriate “indicia of membership,” including service in the entity, election of the entity’s leadership, and financing the entity’s activities).

In its opening brief, the Marion County Election Board argued that neither the Indiana Democratic Party nor the MCDCC possess the requisite “indicia of membership” to assert standing on behalf of anyone who has ever voted for a Democratic candidate, who has volunteered time on behalf of the Democratic Party, or who has donated money to the Democratic Party. *See MCEB Brief* at 25-27, 29-30. Due to the expansive definitions of membership set forth by the Indiana Democratic Party and the MCDCC, there is really no way to determine who has associated with the Democratic Party in such a way that the Party could assert claims on their behalf. Moreover, *Hunt* and its progeny stand for the proposition that courts allow associations to assert standing when the members have a stake in the outcome and control over the organization. These requirements safeguard the consent of those represented and limit the ability of organizations to assert representative status unilaterally.

Formal association rules and ability to exit are the clearest and most pure form of control. If a person wishes to associate, then he can follow the formal steps for doing so, and if he no longer agrees with the association’s mission, then he can exercise his right to leave. Neither the Indiana Democratic Party nor the MCDCC has formal steps for association or disassociation of those they claim as members. Thus, the purported members lack the ultimate means of control. Moreover, the Democrats bear the burden of proving that they have standing, and they have not

set forth any evidence demonstrating that the persons they claim to represent have any other means of controlling the associations' activities.

Democrats argue that the courts have never held that formal membership in a political organization is required to assert constitutional protection. *See* Democrats' Reply at 11. It is not clear what this assertion has to do with a party's representational capacity, and the Democrats cite cases that have nothing to do with associational standing. Instead, their cases simply address whether a public employee's First Amendment rights are violated when he is dismissed due to his political affiliation. *See Bass v. Richards*, 308 F.3d 1081, 1091 (10th Cir. 2002); *Smith v. Sushka*, 117 F.3d 965, 970 n.6 (6th Cir. 1997). Those cases turn on an individual's claim of affiliation with a political party, not on a party's claim of affiliation with one or more hypothetical individuals whose interests it seeks to represent. And it is equally unremarkable that state officials sometimes must staff multi-party boards and commissions: Doing so requires the mutual recognition of the individual who will serve and the party she represents. Such mutual consent is lacking here, where the Democrats are attempting to assert the rights of everyone who has ever expressed a thought favorable to them. The issue is not whether some hypothetical voters may identify themselves with the Democratic Party, but whether there is any evidence that any such voters (a) consent to representation by the Democrats in a challenge to the Voter ID Law; and (b) stand to suffer injury from the Voter ID Law.

2. Even if the Indiana Democratic Party and the MCDCC have members, they have failed to prove that any of these members are injured.

While the Democrats have hypothesized that thousands of their members will be disenfranchised by the Voter ID Law, they have been able to identify fewer than a dozen specific individuals who purport to be injured by the Voter ID Law. *See* MCEB Brief at 27-28; State's Ex. 50, at ¶ 8. However, none of these individuals stands to suffer any cognizable injury, and the

Democrats cannot claim to represent injured members without identifying any who could sue on their own.

As explained in the Marion County Election Board's opening brief, the individuals identified in the Democrats' responses to interrogatories have suffered no injury. *See* MCEB Brief at 28, 30. All of these individuals either possessed the required photo identification or were over age 65 and eligible to vote absentee. *Id.* Since that time, the Democrats have identified additional individuals who have allegedly suffered injury. *See* State's Ex. _____. In their Additional Statement of Material Facts Not in Dispute, the Democrats put forth evidence regarding only one of these individuals—Thelma Ruth Hunter. *See* Democrats' Reply at 6; Dem. Ex. 22. Even though Hunter has been unable to obtain a birth certificate, she is 85-years old and, therefore, is automatically eligible to vote absentee. *See id.*; *see also* Ind. Code § 3-11-10-24(a)(5). Thus, all of the individuals identified by the Democrats will be able to vote regardless of the validity of the Voter ID Law. The Democrats also have submitted an affidavit from Theresa Clemente, but that affidavit in no way identifies her as a Democrat. *See* Dem. Ex. 8. In any event, she too is older than sixty-five and is automatically eligible to vote absentee. *See id.*

The Democrats argue that the right to vote means the right to vote in-person because absentee voting is not a reasonable alternative. *See* Democrats' Reply at 35-36. However, there is no authority for the proposition that the right to vote necessarily means the right to vote in-person. In the State of Oregon, in fact, all voting is by mail-in ballot. *See* Or. Rev. Stat. § 254.465. If the Democrats were correct that there is a constitutional right to vote in person, all Oregon voters' rights would be impinged.

In any case, the Seventh Circuit has made it clear that there is no constitutional right to vote in whatever manner one pleases. In *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), cited by the Democrats themselves, the Court upheld an Illinois statute requiring in-person voting except in certain enumerated circumstances. *Id.* at 1129. The court rejected the notion that voters have a right to vote absentee, stating that plaintiffs' argument "ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution." *Id.* *Griffin* does not, as the Democrats argue, stand for the proposition that absentee voting is a constitutionally inadequate substitute for in-person voting. Rather, it demonstrates there is no particular right to vote at a certain location or in a certain manner.

Because there is no constitutional right to vote in-person, Democrats have not shown that any of their members have been injured, which, as explained in section I.B.2, *supra*, they must do to establish standing. As a derivative right, the association can only assert standing if it can demonstrate that one of its members is actually injured.

3. Democrats can only claim direct injury insofar as its right to associate for political purposes has been burdened, but cannot claim direct injury because of diversion of resources.

As explained in the Marion County Election Board's opening brief, the Democrats may assert standing only insofar as their right to associate for political purposes is burdened by the Voter ID Law. The Democrats now claim that they suffer direct injury because the Voter ID Law requires them to reallocate their resources to helping voters comply with the Voter ID Law, which takes away from their primary purpose of getting Democrats elected. *See* Democrats' Reply at 12; Dem. Ex. 23, at ¶¶ 1-3. As explained in section I.B.1, *supra*, voluntary reallocation of resources to combat a perceived problem does not constitute cognizable Article III injury.

II. The Court Should Reject the Civil Rights Act and Indiana Constitutional Claims.

A. The Civil Rights Act is no Barrier to the Voter ID Law.

1. 42 U.S.C. § 1971 is not enforceable through a private right of action.

Congress' intent is clear from the face of Section 1971—there is no private right of action. Congress clearly and unambiguously authorized the Attorney General, but not individuals, to enforce Section 1971. *See* 42 U.S.C. § 1971(c). When Congress amended Section 1971 in the Civil Rights Act of 1957, it could have included a similar private right of action as an enforcement mechanism. Congress' decision not to add such a provision speaks to its intent to preclude individual enforcement under Section 1983. The Crawford Plaintiffs fault the County for not undertaking further analysis of the statute to determine if Section 1971 confers a federal right. *See* Crawford Reply at 16. However, whether the statute confers a federal right is immaterial if Congress specifically foreclosed a private right of action based upon the statutorily conferred right.

Plaintiffs continue to rely on cases holding that there is a private right of action under Section 1973. However, this reliance is misplaced. Although Section 1973 does not contain an enforcement mechanism for individuals, Plaintiffs continue to ignore a crucial fact relied upon by the courts that have found a private right of action exists. In *Allen v. Williams*, 393 U.S. 544, 557 n.23 (1969), the Supreme Court held that “[i]t is significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits.” Likewise, in *Morse v. Republican Party of Va.*, 517 U.S. 186, 232-33 (1996), the Court again noted the importance of the fact that the “Attorney General had urged us to find that private litigants may enforce the Act.” As far as the Defendants are aware, the United States has never encouraged the courts to find that Section 1971 is enforceable by private litigants.

2. 42 U.S.C. § 1971(a)(2)(A) has no relevance here

The Crawford Plaintiffs argue that the Voter ID Law imposes “a new qualification to vote on those voting in-person.” Crawford Reply at 18. In their view, the Voter ID Law represents more than verification of identity. Because those voting absentee or in a nursing home where they reside are exempt from the photo-identification provisions, the Crawford Plaintiffs conclude that the Voter ID Law imposes different standards on voters and, therefore, violates Section 1971(a)(2)(A).

As explained in the Marion County Election Board’s opening brief, the Voter ID Law requires those who vote in-person to produce proper photo identification simply as a way of verifying that the voter’s identity and registration. *See* MCEB at 43. Even before the Voter ID Law was enacted, there were certain procedures for verifying the identity of individuals voting in-person that did not apply to mail-in absentee voters, including the opportunity for poll workers to see the face of the individual who would be casting the ballot and to watch that person sign the poll book. No election official ever needs to see the faces of absentee voters or to witness them signing the application or the ballot envelope. *See* Ind. Code §§ 3-7-22-4; 3-11-4-4, 3-11-4-8. Requiring photo identification is simply a different method of accomplishing the same goal—a method that the General Assembly quite reasonably believes will be more effective at detecting and preventing fraud.

The Crawford Plaintiffs dispute the argument that Section 1971 applies to discrimination among similarly situated voters. But were the statute understood to require the absolute formal equality that they seek to impose, Section 1971 would mean that States could impose only one method of voting upon all voters, no exceptions. For instance, under the Crawford Plaintiffs’ theory, absentee voting accommodations for the disabled and the elderly would violate Section

1971 because they draw distinctions between groups of voters and the State is simply not permitted to distinguish between those who wish to vote absentee because of a disability and those who wish to vote absentee for simple convenience. The facial absurdity of this argument should be sufficient to rebut itself.

The State has compelling reasons for distinguishing between absentee voters and in-person voters. Most importantly, the photo-identification requirement would not be effective in detecting the types of fraud germane to absentee voting. As discussed in section II.A.2, *supra*, the State has a compelling interest in not burdening voters with ineffective regulations simply to achieve formal equality. Moreover, the General Assembly could reasonably infer that because nursing homes are heavily regulated with respect to identifying residents, and because nursing home residents are unlikely to commit vote fraud and, *as a category*, are relatively easy to identify as residents of the building or likely to be well known by others on the premises, they do not pose the same need to apply the Voter ID Law as other voters. *See Nat'l Coalition of Prayer*, 2005 WL 2253601, at *12-13 (holding that the General Assembly could reasonably infer that charities' volunteers and employees, *as a category*, are less likely to undertake abusive telemarketing practices, they could be regulated differently from paid professional telemarketers).

Section 1971(a)(1)(A) was originally geared toward eliminating racial discrimination in voting regulations. The Democrats have searched for, but not found, any evidence of racially disparate effect (much less disparate treatment) in this case. And while the statute can be applied to classifications other than race, its very existence rests on the assumption that those being treated differently ought in fairness to be treated alike. That is simply not the case here. In essence, the Voter ID Law's exemptions do not treat similarly situated individuals differently. It

is only because of inherent differences between absentee voting and in-person voting, and between resident nursing home voters and other in-person voters—and not because of any arbitrary discrimination or favoritism—that the process by which voters identify themselves is different.

3. There are no grounds for applying 42 U.S.C. § 1971 (a)(2)(B)

42 U.S.C. § 1971 prohibits the denial of the right to vote “because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 42 U.S.C. § 1971(a)(2)(B). First, this statute was enacted to prevent states from creating long, complicated voter-registration forms and then disqualifying voters who made even the slightest error on the form. Plaintiffs attempt to take the word “omission” and stretch that into a voter’s failure to present photo identification, but the statute speaks only of an “omission on any record or paper.” Not having photo identification is an “omission on any record or paper,” so the statute on its face does not apply here, which makes sense in light of its underlying rationale.

Furthermore, it is significant that the Crawford Plaintiffs do not dispute that *identity is material* to a voter’s *qualifications*. Yet, they argue that *photo identification is immaterial* to a voter’s *identity*. In other words, Plaintiffs dispute the materiality of the process used to determine a voter’s identity. This argument misses the mark. For all the reasons explained repeatedly above, the General Assembly’s decision not to apply the Voter ID Law to mail-in absentee voting or to in-person voting by nursing home residents in their facilities is based on reasonable differences between those situations that relate to the underlying rationale for the

Voter ID Law. Those exceptions in no way undermine the materiality of the Law, which provides a much more reliable means of preventing and detecting voter fraud than existed before.

B. The Court Should Not Invalidate the Law under the Indiana Constitution

1. The Voter ID Law is not grossly unreasonable and is, therefore, valid under Article II, Section 1 of the Indiana Constitution.

In their reply, the Crawford Plaintiffs raise no new arguments, but instead continue to insist that the Voter ID Law is “grossly unreasonable” because it will “impose an absolute barrier on voting for those persons who are unable to satisfy the BMV’s requirements to obtain identification and it will impose onerous requirements on others.” Crawford Reply at 30.

Plaintiffs seem to suggest that the Voter ID Law is not an “equal” application of the law. However, the Indiana Supreme Court has expressly ruled that election laws may draw reasonable classifications. *See Blue v. State ex rel. Brown*, 188 N.E. 583, 586 (Ind. 1934); *see also Brown v. State ex rel. Stack*, 84 N.E.2d 883 (Ind. 1949) (holding that special privileges accorded absentee voters were permissible because the law takes into account the special needs of some voters and thereby contributes to free and equal elections). The Voter ID Law also affords certain accommodations, such as the indigency exception and the absentee exception.

Plaintiffs have failed to show how their conclusory assertions overcome the high burden of showing that an election regulation violates Article II, section 1. *See State Election Bd. v. Bartolomei*, 434 N.E.2d 74 (Ind. 1982) (holding that an election regulation “comes before the courts clothed with the presumption of validity. It is presumptively rational and constitutional. The burden is upon those who challenge its validity to make any constitutional defect apparent.”). Courts have recognized that all voting regulations inconvenience some voters and may ultimately cause some voters to be unable to vote, but that does not make all those

regulations invalid under Article II, section 1. *See Simmons v. Byrd*, 136 N.E. 14, 17-18 (Ind. 1922).

2. The Voter ID Law does not add a substantive voting requirement under Article II, section 2 of the Indiana Constitution.

Plaintiffs also argue that the Voter ID Law violates Article II, section 2 of the Indiana Constitution, which sets the age and residency requirements. *See Ind. Const. art. II, § 2*. Their argument is that the Voter ID Law adds a new substantive requirement for voters. Significantly, they agree that it is implicit in Article II, section 2 that “the person voting is in fact that person.” Crawford Reply at 32. However, Plaintiffs’ argument falls apart when they suggest that the signature requirement, which also is not mentioned in the constitution, is permissible, but the photo-identification requirement is not. The constitution provides no means for verifying the identity of voters, and the Plaintiffs provide no principled distinction between the methods they deem permissible and the photo-identification requirement.

Plaintiffs’ theory would also disqualify a host of well-accepted election regulations, including in-person voting and proof of residency for purposes of registration. None of these requirements are listed in Article II, and Plaintiffs do not suggest that they are invalid. Plaintiffs only reason for asserting that the Voter ID Law imposes a substantive voting qualification is because they prefer another method. However, these and other choices are choices to be made by the General Assembly. The Constitution only forbids the General Assembly from adding new *substantive* requirements.

CONCLUSION

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

Respectfully submitted,

OFFICE OF CORPORATION COUNSEL

/s/James B. Osborn
James B. Osborn, Atty. # 17162-49
Special Assistant Corporation Counsel

*Attorney for Defendant
Marion County Election Board*

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:

William R. Groth
Fillenwarth Dennerline Groth & Towe
wgroth@fdgtlaborlaw.com

Geoffrey S. Lohman
Fillenwarth Dennerline Groth & Towe
glohman@fdgtlaborlaw.com

Barry A. Macey
Macey Swanson & Allman
bmacey@maceylaw.com

Thomas M. Fisher
Office of Attorney General
Tom.Fisher@atg.in.gov

Kenneth Falk
ACLU of Indiana
KFalk@aclu-in.org

/s/ James B. Osborn
James B. Osborn
Special Assistant Corporation Counsel

OFFICE OF CORPORATION COUNSEL
200 E. Washington Street, Suite 1601
Indianapolis, Indiana 46204
Telephone: (317) 327-4055
josborn@indygov.org