IN THE

Indiana Court of Appeals

No. 49A02-0901-CV-00040

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

BRIEF OF APPELLEE TODD ROKITA

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STATEMENT OF THE ISSUES

1. Whether an action seeking declaratory judgment that a statute is invalid is justiciable against a state official who does not enforce the statute.

2. Whether Article 2, § 2 of the Indiana Constitution allows the General Assembly to require voters to present government-issued photo identification when voting in-person at the polls as a means to deter and detect voter fraud and to promote public confidence in the legitimacy of elections.

3. Whether the Equal Privileges Clause of Article 1, § 23 of the Indiana Constitution permits the General Assembly to require in-person voters to show government-issued photo identification to the precinct workers they encounter on election day, while not requiring absentee voters to mail a photocopy of the same to the absentee board along with their ballots.

4. Whether the Equal Privileges Clause permits the General Assembly to exempt residents of state-licensed care facilities who vote where they live from the requirement of showing government-issued photo identification at the polls.

STATEMENT OF THE CASE

The Appellee agrees with the Statement of the Case set forth in the Brief of Appellants. *See* Ind. App. R. 46(B)(1).

STATEMENT OF FACTS

1. In 2005, the Indiana General Assembly enacted the Voter ID Law to prevent voter fraud and to protect public confidence in the legitimacy of elections. The Law requires citizens voting in-person on election day, or casting ballots in-person at a county clerk's office prior to election day, to present election officials with valid photo identification issued by the United States or the State of Indiana. Ind. Code § 3-11-8-25.1. The Law applies to voting in both primary and general elections. Ind. Code §§ 3-10-1-7.2; 3-11-8-25.1. It does not apply, however, to receiving and casting an absentee ballot by mail, or to "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(e), 3-11-10-1.2.

To be acceptable at the polls, government-issued photo identification must show the name of the individual to whom it was issued, which must conform to the name on the citizen's voter-registration record, a photograph of the individual to whom the document was issued, and an expiration date. Ind. Code § 3-5-2-40.5. The expiration date must have either not yet occurred or occurred after the date of the most recent general election. Ind. Code § 3-5-2-40.5(3). The Law also provides that the Bureau of Motor Vehicles may not charge a fee to anyone of voting age for renewal or replacement of non-license photo identification. Ind. Code § 9-24-16-10.

The Voter ID Law is enforced by the precinct and county election boards as follows. In-person voters, whether voting on Election Day or before, are required to produce acceptable photo identification before signing the poll book. Ind. Code § 3-11-8-25.1(b). If the voter shows proper identification, the voter may sign the poll book and be given a ballot to cast.

If a voter does not produce proper identification, a member of the precinct election board, or the county election board if the ballot is cast prior to Election Day at the Clerk's Office, "shall challenge the voter." Ind. Code § 3-11-8-25.1(c)(2). If the voter signs an affidavit attesting to the voter's right to vote in that precinct, the voter may then sign the poll book and cast a provisional ballot. Ind. Code § 3-11-8-25.1(d). A voter who casts a provisional ballot may appear before the circuit court clerk or county election board by noon ten days following the election to prove the voter's identity. Ind. Code §§ 3-11.7-5-1, -2.5. If by that time the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. *Id.* Voters may also validate their provisional ballots by executing an affidavit that the person is the same person who cast the provisional ballot and either (1) the person is indigent and is "unable to obtain proof of identification without payment of a fee;" or (2) has a religious objection to being photographed. Ind. Code § 3-11.7-5-1; 3-11.7-5-2.5(c).

If, notwithstanding a voter's attempt to validate a provisional ballot using one of these methods, the election board determines that the voter's provisional ballot is not valid, the voter may file a petition for judicial review in the local circuit court. Ind. Code § 3-6-5-34. Ultimately, therefore, the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Indiana Supreme Court.

2. In 2005, two separate groups of plaintiffs filed separate lawsuits against 1) the Marion County Election Board and 2) the Secretary of State and members of the Indiana Election Division, challenging the Voter ID Law on various state and federal constitutional grounds. The cases were consolidated in the United States District Court for the Southern District of Indiana. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 7782-83 (S.D. Ind. 2006). The District Court upheld the Law and granted the Defendants' motion for summary judgment. Notably for purposes of this case, the District Court held that the Voter ID Law did not impose a new, substantive qualification on the right to vote and therefore did not violate Article 2, § 2 of the Indiana Constitution. *Id.* at 843. On appeal, the Seventh Circuit Court of Appeals found that the Voter ID Law did not create an impermissible burden on the federal right to vote, and otherwise affirmed the district court on all grounds including with respect to the Article 2, § 2 claim. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007).

On April 28, 2008, the Supreme Court of the United States affirmed the Seventh Circuit and upheld the Voter ID Law. *Crawford v. Marion County Election*

Bd., ---U.S.---, 128 S.Ct. 1610, 1624 (2008). Justice Stevens' controlling opinion held that the Court could not conclude "that the statute imposes 'excessively burdensome requirements' on any class of voters," *id.* at 1623, and that the "application of the statute to the vast majority of Indiana voters is amply justified by the [State's] valid interest in protecting 'the integrity and reliability of the electoral process.'" *Id.* at 1624 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 n.9 (1983)).

SUMMARY OF THE ARGUMENT

The Court should affirm dismissal of this lawsuit on the alternative ground that the case is not justiciable. Secretary of State Rokita, while he undertakes many important election-administration duties, does not enforce the Voter ID Law. Enjoining him from educating independent local officials about the law would not, as a matter of the exercise of judicial power, prevent those local officials from enforcing the law in the future. The injury alleged here is not traceable to the Secretary of State, nor can the Secretary provide the necessary relief. Accordingly, the case is not justiciable.

On the merits, the theories advanced by the League of Women Voters in this case would cripple the power of the legislature to regulate elections and thereby ensure that voting in Indiana is "free and equal." Ind. Const. Art. 2 § 1. In the League's view, any election regulation not mentioned by Article 2 § 2 of the Indiana Constitution that may have a negative impact on a citizen's ability to vote constitutes an unauthorized election "qualification." But under that theory, courts would have to invalidate laws requiring in-person voting, limiting the hours that

polls are open, and limiting the amount of time voters may spend in the booth, among others. Unsurprisingly, the Indiana Supreme Court has never adopted such an extreme standard. Rather, a regulation of election procedures is valid under Article 2 § 2 as long as "what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 18 (1922). Dismissal of this action was proper because the Voter ID Law plainly comports with this standard as a matter of law.

The Voter ID Law also does not draw impermissible distinctions prohibited by Article 1, § 23. In this regard, the League's main objections are that voters casting mail-in absentee ballots need not include a copy of their identification with their ballots, and that residents of state-licensed-care-facilities who vote in precincts where they live need not show photo identification. With mail-in voters, there is no reason to require photo identification be included with the ballot since the voter will not be present for the absentee board to compare with the photograph. Imposing a photo identification requirement on mail-in voters would be an empty effort to straightjacket the absentee voting process to achieve formalistic equality. Article 1, § 23 does not require that. With nursing-home-resident voters, the General Assembly provided an exception as an accommodation to a limited, identifiable class of voters who might find it particularly difficult to travel to obtain identification, but who need not travel to vote in person, and who categorically are not likely to be impostors in any event.

Finally, the League attempts to derail the Voter ID Law with a slew of picayune objections to some practical applications. They argue that it is unfair to accept identification cards with an expiration date of "indefinite" but not cards with no expiration date. They argue that it is unfair that Purdue students, whose student ID cards carry no expiration date, may nonetheless use their student IDs because a special database confirms their enrollment to precinct officials. And they argue that voters who have a religious objection to being photographed should not have to cast a provisional ballot in every election.

None of these objections, however, is properly addressed in this facial challenge. First, with respect to a card with an "indefinite" expiration date, the possibility remains that a county election board will not accept such identification and the proper application of the statute will be challenged in a petition for judicial review, at which point the courts will have the opportunity to consider the matter. At this point, notwithstanding the Election Division's advice, it remains to be seen whether that application is legally proper. Furthermore, if the ballot of a veteran whose only identification card is a medical services card bearing no expiration date is rejected, that veteran can bring a claim asserting that, because other cards bearing "indefinite" expiration dates are accepted, the Voter ID law is unconstitutional as to him. But even if such a claim would be valid, that is no basis for invalidating the entire statute, since many perfectly constitutional applications remain. *See Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999). The same goes for students at other state universities or private colleges: If they do not have other

conforming identification, they may bring as-applied challenges to remedy any particular injustices they may incur.

The U.S. Supreme Court rejected a facial Fourteenth Amendment challenge to the Voter ID Law in part because the plaintiffs asked the Court "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity." *Crawford*, 128 S.Ct. at 1622. Furthermore, the plaintiffs in that case had "not demonstrated that the proper remedy-even assuming an unjustified burden on some voters-would be to invalidate the entire statute." *Id.* at 1623. The same is true of the League's hypothesized parade of unfair applications: even if true, and even if unconstitutional in particular application, those scenarios cannot justify invalidating the entire Voter ID Law, which plainly has a vast legitimate sweep.

STANDARD OF REVIEW

Review of a trial court's grant of a motion to dismiss based on Trial Rule 12(B)(6)—a ruling that rejects the legal sufficiency of the complaint but not its factual allegations (which are presumed true and viewed in the light most favorable to the plaintiff)—is de novo. *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind. 2007). That said, legislation that is challenged on constitutional grounds is presumed valid. *Matter of Tina T.*, 579 N.E.2d 48, 56-57 (Ind. 1991). Even 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. *Id.* Thus, 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. *See Baldwin*, 715 N.E.2d at 339.

ARGUMENT

I. This Case is Not Justiciable Because the Secretary of State Does Not Enforce the Voter ID Law

While the trial court was correct in finding that the League's Article 2, § 2 and Article 1, § 23 claims plainly fail as a matter of law, this Court need not even reach those issues because the case suffers from a threshold justiciability problem: the Secretary's inability to provide meaningful redress even if the League had a valid claim (which it does not).

For jurisdiction to exist, not only must the plaintiff have standing, but the plaintiff's alleged injury must be "fairly traceable to the defendant[]" and "likely to be redressed by the requested relief." *See Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003). Under this rule, this case is not justiciable because the injuries alleged by the complaint—a burden on voting caused by enforcement of the Voter ID Law—are not fairly traceable to the Secretary of State.

In short, while the Secretary of State has many important powers and duties related to elections, he does not enforce the Voter ID Law; rather, precinct and county election boards enforce the Voter ID Law. Therefore, the League's injuries (if any) are fairly traceable only to those bodies, none of which are defendants here. *Compare Crawford v. Marion County Elec. Bd.*, No. 1:05-cv-

0804-DFH-WTL, Compl. at 2 (S.D. Ind. May 27, 2005) (suing election board responsible for administering all election laws in Marion County); *see also, e.g., Libertarian Party of Ind. v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458, 1461 (S.D. Ind. 1991) (Indiana State Election Board not a proper defendant because unable to order county boards to redress injuries); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) (California Secretary of State not a proper defendant because unable to order cities to redress injuries in municipal elections).

In the federal challenge to the Indiana Voter ID Law, United States District Court Judge Sarah Evans Barker concluded that neither the Secretary of State nor the Indiana Election Division, which operates within the office of the Secretary of State, had any role in *enforcing* the Voter ID Law. *Ind. Democratic Party v. Rokita*, 458 F. Supp.2d 775, 785-86 (S.D. Ind. 2006) ("The Division has no direct role in enforcing election laws, nor does the Secretary of State . . . [and] the administration of any election and its oversight is the responsibility of the County Election Board.") (citations omitted). Accordingly, the court relieved the Secretary and the Election Division of the duty to participate in the litigation. *Ind. Democratic Party v. Rokita*, No. 1:05-cv-0634-SEB-VSS, Entry on Def's Mot. to Dismiss at 2-3 (S.D. Ind. July 1, 2005). However, since there were other defendants (the Marion County Election Board and the State of Indiana as an intervenor), dismissing the Secretary and the Election Division outright was not crucial. In this case, by contrast, there are no other defendants, so the outright dismissal of the Secretary *is* crucial. It serves no

purpose to permit a case to proceed against an official who has no power to enforce the challenged law.

Undeterred by Judge Barker's findings in the federal case, the League claims that the Secretary is the "highest State official responsible for implementing and/or instructing precinct officials and election administrators throughout Indiana concerning the Indiana Photo ID Law[.]" Appellants' App. at 9. The Secretary does produce, along with the Indiana Election Division, the Election Administrator's Manual, the Election Day Handbook, and Indiana Voter Information Guide, all of which educate voters and local officials who administer elections. *See* Indiana Election Division, *Election Administrator's Manual* (2008), *available at* http://www.in.gov/sos/elections/pdfs/2008ElectionAdminManual.pdf; Indiana Secretary of State & Indiana Election Division, *Indiana Election Day Handbook* (2007), *available at* http://www.in.gov/sos/elections/hava/pdf/EDH_08.pdf; J. Bradley King, Pamela Potesta & Julia Bauler, *Indiana Voter Information Guide* (2008), *available at* http://www.in.gov/sos/elections/pdfs/IVIG_2008.pdf. But this case is not about changing the way the Secretary educates voters and local officials. It is instead about the enforceability of the Voter ID Law, and the Secretary has no control over that.

It may be that, in general, the Secretary performs "all ministerial duties related to the administration of elections by the State," Ind. Code § 3-6-4.2-2, but on the particular subject of the Voter ID Law, the Secretary has no role in determining if identification offered by a potential voter is sufficient, whether to permit a voter

to cast a ballot without showing proper identification, whether to count a provisional ballot, or even in supervising county and precinct election boards' execution of the Voter ID law's requirements. If an election board failed to follow the Secretary of State's guidance on the Voter ID Law, the Secretary would have no power to invalidate or correct the results in that precinct or to discipline the local boards. The Secretary cannot even remedy errors in vote count certifications or refuse to certify election results. Ind. Code §§ 3-12-5-13, -15.

The League seeks a declaration that the Voter ID law is facially invalid. Since the Secretary's role regarding the Voter ID law is purely advisory, he can be enjoined only from educating precinct and county officials about the law, which would not, by the operation of judicial power, prevent election boards from enforcing the law. Thus, a judgment against the Secretary would do nothing to redress formally the League's alleged injuries. The decision below should therefore be affirmed on the alternative grounds that the court never had jurisdiction over the case in the first instance.

II. Article 2, § 2 of the Indiana Constitution Permits Regulation of Election Procedures Such As the Voter ID Law

Article 2, § 2 of the Indiana Constitution provides substantive voting qualifications. It says that every "citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election, may vote in that precinct[.]" Ind. Const. Art. 2 § 2. The League claims the Voter ID Law violates this provision by creating an additional qualification to vote. Br. of Appellants at 6-7. The Voter ID Law,

however, is merely a regulation of election procedures designed to ensure fair elections, not an alteration of voter qualifications, and Indiana Supreme Court doctrine forecloses the League's arguments.

A. The Voter ID Law advances the Indiana Constitution's guarantee of "free and equal" elections, and courts have upheld the ability of the legislature under Article 2, § 2 to impose procedural election regulations, including this one

1. The General Assembly's power to regulate elections and voting is grounded in the Indiana Constitution and is implicit in other accepted regulations. The power of the General Assembly to regulate election procedures arises not only from its general police power, but also from Article 2, § 1 of the Indiana Constitution, which provides that "[a]ll elections shall be free and equal," and Article 2, § 14, which provides that "the General Assembly shall provide for the registration of all persons entitled to vote." The Indiana Supreme Court has held that these clauses serve as grants of power to the General Assembly to promulgate election laws to regulate and uphold the legitimacy of elections in the State. *See Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14, 18 (1922) (holding that Article 2, §§ 1 and 14 give the legislature the "power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted").

Inherent in the requirement of holding "free and equal elections" lies the power of the State to protect the rights of citizens to a fair and reliable electoral system in which their individual votes are not diluted by the fraudulently cast votes of others. "When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed." *Id.* at 18 (quoting *People v.*

Hoffman, 5 N.E. 596, 616 (Ill. 1886)); *see also Blue v. State*, 206 Ind. 98, 188 N.E. 583, 589 (1934) (holding that "free and equal" elections are those in which "every voter is allowed to cast his ballot as his own judgment and conscience dictate . . . [and when] the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot.").

The Voter ID Law directly advances the constitutional guarantee of "free and equal" elections articulated in Article 2, § 1 of the Indiana Constitution. By preventing voter fraud, the identification requirement ensures compliance with the Article 2, § 1 mandate that each vote equally influence the result of an election. Each fraudulently cast vote dilutes the influence that each legitimately cast vote has on the election's outcome. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Voter ID Law prevents fraudulently cast votes and thereby protects each citizen's individual rights under Article 2, § 1 of the Indiana Constitution.

2. The Supreme Court of Indiana, the United States District Court for the Southern District of Indiana, and the United States Court of Appeals for the Seventh Circuit have already rejected the notion that procedural election regulations are unconstitutional if not specifically enumerated in Article 2, § 2 of the Indiana Constitution. *See Simmons*, 136 N.E. at 18 (holding that Indiana voter registration requirements do not conflict with Article 2, § 2); *Blue*, 188 N.E. at 585-

86 (holding that lack of registration provision for absentee or sick voters does not constitute a violation of Article 2, § 2); *Ind. Democratic Party v. Rokita,* 458 F. Supp. 2d 775, 843 (S.D. Ind. 2006) (holding that the Indiana Voter ID Law does not violate Article 2, § 2 of the Indiana Constitution), *aff'd,* 472 F.3d 949 (7th Cir. 2007).

In *Simmons,* the Indiana Supreme Court specifically rejected the theory that Article 2, § 2 provides an exhaustive list of possible impediments to voting. *Simmons,* 136 N.E. at 17-18. In so doing, the Court set a very high standard for challenges to voting regulations under the State Constitution, stating that "[t]he legislature has power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Id.* at 18. In other words, while the legislature may not place additional qualifications on voting, it *may* regulate the way in which the existing qualifications set forth by Article 2, § 2 are verified and administered. The enactment of the Voter ID Law is an entirely appropriate and constitutionally permissible exercise of that discretion. It is well within the power of the General Assembly to require that voters prove their identities before being permitted to vote.

In fact, the Voter ID Law is precisely the sort of regulation contemplated by *Simmons* and is neither "grossly unreasonable" nor "practically impossible" to comply with. Today, government-issued photo identification is universally accepted as proof of identification. Photo 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. *Indiana Democratic Party*, 458 F. Supp. 2d at 838; Ind. Code § 9-24-1-1. *See also Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[I]t is exceedingly difficult to maneuver in today's America without a photo ID."). Among all the possible ways to identify individuals, government-issued photo ID has come to embody the best balance of cost, prevalence, and integrity. *See Indiana Democratic Party*, 458 F. Supp. 2d at 825-26.

Accordingly, rather than create an entirely new system of identification, the legislature, through the Voter ID Law, sought to improve fraud prevention by relying on a system already in place—standard, government-issued photo identification. The vast majority of voters already possesses such identification and thus complies with the Voter ID Law without even trying. *See Crawford*, 472 F.3d at 950 ("The new law's requirement . . . is no problem for people who have [a driver's license or passport], as most people do"); *see also Indiana Democratic Party*, 458 F. Supp. 2d at 807. Those who do not already possess the necessary identification may obtain a *free* non-license photo identification card from the BMV. Ind. Code § 9-24-16-10.

Even then, a voter who is unable to obtain the required identification prior to election day or who simply forgets to bring a photo ID to the polling place may sign an affidavit claiming the right to vote in that precinct, sign the poll book, and cast a provisional ballot. Ind. Code § 3-11-8-25.1(d). A voter who casts a provisional ballot may appear before the circuit court clerk or county election board by noon ten days

following the election and prove the voter's identity. Ind. Code § 3-11.7-5-1. If by that time the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5. Voters may also validate their provisional ballots by executing an affidavit that the person is the same person who cast the provisional ballot and either (1) the person is indigent and is "unable to obtain proof of identification without payment of a fee;" or (2) has a religious objection to being photographed. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).

Thus, the Voter ID Law simply requires voters to produce a form of identification that (1) most of them already possess and (2) is easily obtainable by those who do not. Even those voters who cannot comply with the law on the day of the election are given the opportunity to cast a provisional ballot, which they are then given a generous amount of time to validate. Accordingly, the Voter ID Law is in no way "grossly unreasonable" and compliance with its requirements is certainly not "practically impossible." It is instead a valid and reasonable means of enforcing the requirements for voting set forth by Article 2, § 2 of the Indiana Constitution.

applies to registration laws

B. The Voter ID Law is not a voter "qualification"

The League's theory of the case is that the Voter ID Law imposes a "new property qualification" on the right to vote. Br. of Appellants at 17. Having a government-issued ID card plainly has nothing to do with owning property;

however, it does relate to proving a registered voter's identity, which is itself a pre-existing voter-eligibility qualification—indeed, the most fundamental of all qualifications. The Law is therefore a valid procedural election regulation, not a new substantive voter qualification of any sort.

1. The Voter ID Law is no more an "additional qualification" than requiring voters to vote in person or identify themselves by name and signature. Surely all would agree that *some* identification requirement at the polls is necessary, and no principled constitutional distinction separates the Voter ID Law from the identification requirements—including announcing one's name and providing one's signature on the poll book—that existed prior to its enactment. Under the League's theory, these identification requirements should be viewed as impermissible "qualifications" as well. Taking the League's argument to its logical conclusion, a voter should be able to demand a ballot and cast it from home—or even over the Internet—without having to present any identification to poll workers at all—not even the voter's face.

Indeed, if the Voter ID Law—or any other identification requirement, for that matter—is a "qualification," then any other regulation that may prevent an eligible voter from casting a ballot and having it counted could also be deemed an impermissible "qualification." For example, Indiana Code § 3-11-8-11 provides that voters must be in the chute when the polls close in order to be able to vote. However, while Article 2, § 14 specifies the day on which elections must be held, it does not limit the hours that polls must be open. Accordingly, an otherwise eligible

voter standing in line beyond the chute when the polls close would be denied the right to vote by operation of a procedural regulation not specifically authorized by the Indiana Constitution. Yet, surely no one would question the validity of regulating the hours that polls are open—or even the validity of requiring voters to cast their ballots in-person at the polls (rather than, say, by mail), which also is not specifically authorized by the Indiana Constitution, and which also may deter some qualified voters from casting ballots.

Other procedural regulations that could potentially prevent an eligible voter from casting a ballot—and that would be constitutionally suspect under the League's theory of this case—include limits on the amount of time a voter may spend in the polling booth (Ind. Code §§ 3-11-11-10.5, 3-11-13-32.5, 3-11-14-26 to -28) and the prohibition against divulging one's ballot after making it but before casting it (Ind. Code §§ 3-11-11-16, 3-11-13-32.8, 3-11-14-29). Surely, however, these long-accepted, reasonable regulations, which exist to facilitate the administration of free and equal elections, cannot be considered unlawful simply because they are not specifically authorized by Section 2 or any other constitutional provision. Just as these laws place no additional improper "qualifications" on voters, neither does the Voter ID Law.

2. The framers of the United States Constitution themselves understood a distinction between laws establishing voter *qualifications* and those that merely regulate election *procedure*. Alexander Hamilton, discussing Article I, § 4 of the Constitution (known as the Elections Clause), distinguished between "[t]he

qualifications of the person who may choose," which are "defined and fixed in the Constitution, and are unalterable by the legislature," and authority over "the manner of elections," where States have primacy. The Federalist No. 60, at 394 (Alexander Hamilton) (Modern Library Coll. Ed. 1937).

In the same way, the Supreme Court of the United States has distinguished voter qualification laws, which are suspect and often subjected to strict scrutiny, from fraud-prevention procedures, which are permissible and subjected to much lighter scrutiny. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (upholding advance voter registration requirement); *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (upholding Arizona's 50-day voter registration and residency requirements and stating that "[s]tates have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect [their] electoral processes from possible frauds."). In *Rosario*, the Court described the qualification laws as those laws that "totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Rosario*, 410 U.S. at 757. But with procedural regulations, responsibility lies with the voters: "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment." *Id.* at 758. The Voter ID Law falls squarely into the latter category.

The two opinions upholding the Voter ID Law in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), both embraced the notion that the Law is a procedural election regulation and not a substantive voter qualification. In finding the Voter ID Law valid, Justice Stevens (writing for himself, the Chief Justice, and Justice Kennedy) and Justice Scalia (writing for himself and Justices Thomas and Alito) both describe the Voter ID Law as a "neutral" or "generally applicable, nondiscriminatory voting regulation." *Crawford*, 128 S.Ct. at 1623, 1625. Not even Justices Souter and Breyer, who dissented in *Crawford*, could bring themselves to subject the Voter ID Law to strict scrutiny—the standard generally applicable to voter qualification laws. *See id.* at 1628, 1643.

3. As it did in the trial court, the League continues to rely on the Indiana Supreme Court's 1890 decision in *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221 (1890), for the proposition that under Article 2, § 2 of the Indiana Constitution, "a qualification on the right to vote can include even a well-intentioned law which requires some but not all voters to produce at the polls a particular tangible document to establish their entitlement to vote." Br. of Appellant at 18. The League's reliance on this case is misguided.

The regulation challenged in *Morris* contained two key provisions: 1) any voter who was absent from the state for a period of six months or more or who had not resided in one county for six months prior to the election was required to register a notice of his intention to vote with the clerk of the courts 90 days before the election and produce a certified copy of that registration at the time of voting;

and 2) any voter who was absent from the state for a period of six months or more prior to the election on the business of the state or of the United States was required at the time of voting to produce a certificate from the county auditor stating that his name had continuously appeared upon the county tax rolls during his absence from the state. *Morris*, 25 N.E. at 221-22.

The Court found that the first provision was intended by the legislature to serve as a type of registration system.[1] *Id.* at 223 (footnote added). However, it was unconstitutional because it placed an additional qualification on the right to vote by essentially "requiring a fixed residence in the precinct 90 days previous to an election." *Id.* at 224. This requirement was in direct contravention of Article 2, § 2, which provided then, as now, that a voter need only reside in a precinct for 30 days immediately preceding an election in order to vote in that precinct. The Court also held that the law was constitutionally deficient because it put in place a registration system that was only applicable to a certain class of voters and "impose[d] a burden upon them which [wa]s not imposed upon other voters, and change[d] their constitutional privileges and rights." *Id.* at 225. Thus, the registration law was invalid not because registration as such was an improper qualification, but because it both contravened an express qualification in the Constitution (the 30-day residency rule) and because it did not meet the basic requirement for a registration law, *i.e.*, that it be uniformly applicable to all voters.

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[1] In 1881, the legislature amended Article 2, § 14 of the Indiana Constitution to allow the General Assembly to "provide for the registration of all voters entitled to vote." Ind. Const. Art. 2, § 14; *Morris v. Powell*, 125 Ind. 221, 25 N.E. 221, 222 (1890). At the time *Morris* was

With respect to the second provision of the challenged law, the Court held that it, too, was unconstitutional because it sought to add "a property qualification to a certain class of voters." *Id.* at 223. At the time *Morris* was decided, the only persons who appeared on the county tax rolls were men between the ages of 21 and 50 years and persons owning taxable property in the county. *Id.* Therefore, a man over the age of 50 absent from the state for a period of six months or more on government business would be required to own property to be able to vote. *Id.*

In short, 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. Rather, both provisions were invalidated because they required documentation of some *other* extra-constitutional qualification to vote, *i.e.*, 90-day residency and property ownership. *Id.* at 226. *Morris* says nothing to suggest that a law requiring voters to produce a document relevant to a permissible pre-existing qualification would be invalid.

And that is all the Voter ID Law does. It requires *all* voters (with a few narrow and rational exceptions discussed in Part II, *infra*) to produce a photo ID before voting in order to ensure that they meet the most fundamental of all voting requirements: that they are who they say they are. Requiring a photo ID to prove one's identity does not, as the League argues, "impose[] a new property 'qualification' on voting." Br. of Appellant at 20. The certificate requirement invalidated in *Morris* imposed a property ownership qualification not because of

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decided in 1890, the legislature had not yet acted under this constitutional provision to adopt a uniform system of registration for all voters.

voters' "ownership" of the required certificate, but because possessing the certificate presupposed ownership of real property (at least for a readily identifiable class of voters). Possession of a U.S. passport or Indiana license or identification card, in contrast, presupposes nothing of the sort, so *Morris* is inapposite.

4. The League also argues here, as it argued below, that the Voter ID Law rises to the level of a qualification under Article 2, § 2 because it imposes a burden upon some voters. *See* Br. of Appellants at 22-26. However, the fact that a regulation imposes burdens on voters *at all* does not, without more, render it an unconstitutional qualification. What *will* render it unconstitutional is if those burdens are unjustifiably imposed only on specific segments of the electorate, which the Voter ID Law does not do.

The League argues that the Law imposes heavier burdens on certain classes of voters, particularly non-drivers and students. Br. of Appellant at 22. Not so. The Voter ID Law imposes exactly the same burden on *all* voters: to vote in-person in Indiana, every voter must present a government-issued photo ID card that can be obtained for free. Ind. Code § 3-11-8-25.1. The Law "draws no classifications, . . . except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors." *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1625 (Scalia, J., concurring); *See* Ind. Code §§ 3-11-10-24; 3-11.7-2-1. Even voters who already possess the required identification are not exempt from the burden, as they are required to keep their identification current. Thus, what the League cites as "burdens" that fall more

heavily on certain segments of the population are in fact "no more than the different *impacts* of the single burden that the law uniformly imposes on all voters." *Crawford,* 128 S.Ct. at 1625 (Scalia, J., concurring).

Other procedural voting regulations that are uniformly applicable to all voters likewise impact certain segments of the population differently, and yet surely no one would question their validity or suggest that they impose additional "qualifications" on the right to vote. For example, requiring voters to present themselves in-person at their precinct polling places between 6:00 a.m. and 6:00 p.m. on election day in order to cast a ballot imposes a burden on some voters who, for a variety of reasons, may have a more difficult time getting to their polling places. It may even require voters who work during the day to make special accommodations in their schedule or obtain permission from their employers to take the time off work necessary to go to the polls and cast their ballots. Similarly, the restrictions on the amount of time a voter may spend in the polling booth (Ind. Code §§ 3-11-11-10.5, 3-11-13-32.5, 3-11-14-26 to -28) could impact certain voters differently, particularly voters with learning disabilities or other conditions that make it difficult to read and process quickly the information on the ballot. These procedural regulations[2], while unquestionably valid and reasonable, impact

[2] Neither the Secretary nor the State has ever argued at any stage of this case or the recently-concluded federal challenge that "the Photo ID Law is an element of the voter registration system." Br. of Appellant at 26. Registration is a constitutional requirement and thus stands apart from procedural time, place, and manner regulations like the Voter ID Law and the other procedural regulations discussed herein. That said, the Indiana Supreme Court has acknowledged that Article 2 § 14 constitutes part of the General Assembly's authority to regulate elections. In that vein, the Voter ID Law must be understood as a law that *vindicates* the registration requirement by preventing those who

different voters in different ways and may even deter some qualified voters from casting ballots at all. Yet, they are no more an improper "qualification" on the right to vote than the Voter ID Law.

Nor does the Voter ID Law impose an additional "qualification" because some citizens will be "denied the right to vote, or be[] discouraged from voting by the Law's requirements, because their driver's license of other form of compliant photographic identification was either lost or stolen, or the voter forgot to bring the required form of identification to the polls on election day." Br. of Appellant at 25. As Justice Stevens observed in *Crawford*, "[b]urdens of th[is] sort arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question about the constitutionality of [the Voter ID Law]; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character." *Crawford*, 128 S.Ct. at 1620. Indeed, "[t]hat the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Id.* at 1627 (Scalia, J., concurring). Thus, allowing individuals to cast provisional ballots—even though doing so means that the voter will have to make a second trip to validate the ballot—is more than sufficient accommodation for any burdens imposed by the Voter ID Law.

have not properly registered from voting in another's name, and by protecting the right to vote at full value.

III. The Voter ID Law Does Not Violate Article 1, § 23 of the Indiana Constitution

Statutory classifications are valid under Article 1, § 23 of the Indiana Constitution as long as (1) "the disparate treatment accorded by the legislation [is] reasonably related to inherent characteristics which distinguish the unequally treated classes;" and (2) "the preferential treatment [is] uniformly applicable and equally available to all persons similarly situated." *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). This test presumes the validity of statutory classifications and requires courts to give substantial deference to the legislative judgments underlying them. *Id.* The *Collins* test is essentially a rational-basis test, and a classification will be held valid unless it is manifestly unreasonable or arbitrary and the challenger can negate every conceivable rational justification for the classification. *Id*; *see also W.C.B. v. State*, 855 N.E.2d 1057, 1063 (Ind. Ct. App. 2006), *trans. denied.*

The League claims that the Voter ID Law inequitably differentiates between in-person Election Day voters and two groups of voters who are exempt from the photo ID requirement: (1) mail-in absentee ballot voters; and (2) persons who live and vote in state-licensed residential facilities such as nursing homes. Br. of Appellant at 30, 40-41. The League also 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. Br. of Appellant at 30.

The distinctions between voters who must show photo identification at the polls and these classes of voters are self-evidently reasonable and internally consistent. In short, it was manifestly reasonable for the legislature to conclude that requiring mail-in voters to submit photo identification would not accomplish the same objectives as requiring in-person voters to show identification to poll workers. It was likewise reasonable for the legislature to exempt from the photo identification requirement nursing home voters whose precincts are located in the facilities where they live since, as a class, such voters would be particularly burdened in traveling to obtain identification, yet not so similarly burdened by needing to travel to vote in person. Section 23 of the Indiana Constitution does not require the legislature to ignore such obvious and inherent distinctions between these groups of voters and others for the sake of imposing formalistic equality.

A. Disparate treatment of mail-in absentee voters and in-person voters is reasonably related to the inherent differences between them

The first inquiry under *Collins* is whether the disparate treatment is reasonably related to inherent characteristics that distinguish the unequal classes. *Collins*, 644 N.E.2d at 80. As the League recognizes, there are inherent differences between mail-in absentee voters and in-person Election Day voters. Br. of Appellants at 31. The very nature of the act of voting absentee by mail differs from voting in-person on Election Day. Unlike in-person voters, mail-in absentee voters have no direct face-to-face contact with election officials when casting their ballots; consequently, with mail-in voters there is no opportunity for poll workers to check

the photo on the identification with the face of the person casting the ballot. That difference explains everything.

What is more, absentee voting by mail is subjected to regulations tailored to the vulnerabilities of that particular voting system (regulations that could not coherently be applied to in-person voting). That is, because absentee ballots are received outside the confines of the Election Day polling place, the type of fraud that may be committed via absentee ballot is self-evidently different from the type of fraud that may be perpetrated in-person on Election Day. Specifically, in-person voting is susceptible to voter impersonation fraud, where "a person shows up at the polls claiming to be someone else—someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007). Absentee ballot fraud, on the other hand, is more susceptible to coercion of legitimate voters. *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004) (special election necessary after candidate and his supporters engaged in absentee ballot fraud including "unauthorized possession of completed ballots . . . unauthorized possession of unmarked ballots . . . presence [of candidate's supporters] while voters marked and completed their absentee ballots . . . and the *direct* solicitation of a vote for cash.").

The Indiana Supreme Court, in fact, has recognized that different measures must be taken to safeguard the integrity of mail-in absentee voting than are used to safeguard the integrity of in-person voting. *Horseman v. Keller*, 841 N.E.2d 164,

172 (Ind. 2006) ("The fact that absentee ballots reach the hands of election officials outside of the confines of the Election Day polling place necessitate statutory procedures for receiving, verifying, storing, transporting, and counting these ballots."); *see also Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 831 (S.D. Ind. 2006) ("[I]t is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters.").

The absentee balloting process is therefore subject to special "statutory procedures for receiving, verifying, storing, transporting, and counting" ballots. *Horseman*, 841 N.E.2d at 172; *see also, e.g.*, Ind. Code § 3-11-10-1; 3-11-10-3 to -23. And just as the photo identification requirement cannot usefully be applied to mail-in voters, so too some absentee ballot rules, such as the rule that an absentee ballot from a voter who subsequently dies before election day is to be returned with other defective ballots (Ind. Code § 3-11-10-23), could not usefully be applied to in-person voting. It is a function of inherent characteristics unique to mail-in absentee voting that absentee ballot rules recognize the possibility that a voter may die after submitting a ballot but before it is counted, and then take advantage of inherent circumstances (time to find the ballot before it is opened on election day), to address that problem. Similarly, it a function of inherent characteristics unique to in-person voting that the rules recognize the possibility that a voter may be an impostor, and then take advantage of inherent circumstances (the voter's physical presence at the polling place) to address that problem.

While the League acknowledges inherent some differences between in-person voters and absentee voters, it curiously does not address the differences identified above and instead insists that other, largely empirical, differences, are the only ones that count. In particular, the League claims that bestowing "preferential treatment" on absentee voters does not reasonably relate to the history of voter fraud in Indiana, where there "there have been no cases of in-person voting fraud" but "documented cases regarding fraud involving the casting of absentee ballots." Br. of Appellant at 28-29. The supposedly greater occurence of absentee ballot fraud, however, has nothing to do with this case. The more frequent occurrence of absentee ballot fraud, as distinguished from how such fraud occurs, has never been offered by the state as the explanation for differential treatment of mail-in voting as far as Voter ID is concerned. And it certainly does not justify imposing, for the sake of formalistic equality, an election regulation not reasonably tailored to address that type of fraud.

That is, the Voter ID Law relates to one type of fraud: in-person voter impersonation fraud. It allows poll workers to compare identification photographs with the faces of voters. It does not, however, relate to mail-in absentee ballot fraud. There would be no way for an election official to match photo identification (presumably mailed with a ballot) to the absentee voter's face. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) ("[T]here would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for

comparison with the photo."). The absence of a live person standing before an election official precludes linking enclosed identification with the person casting the ballot. And, once again, absentee ballot fraud typically involves coercion of legitimate voters, not impersonation. *See, e.g., Pabey*, 816 N.E.2d at 1145-46.

Thus, the security measures used to prevent in-person and absentee ballot fraud directly relate to the unique challenges the two different types of voting present. The history of absentee ballot fraud in Indiana is best addressed through other statutory provisions that are in place to regulate the receipt, handling, transport, storage and counting of absentee ballots, many of which were adopted at the same time as the Voter ID Law. *See, e.g.*, Ind. Code §§ 3-11-10-1, 3-11-10-3 to -23; *see also* Ind. Code § 3-11-8-25.1. The Voter ID Law, on the other hand, most directly addresses the threat of voter impersonation presented by in-person voting. Accordingly, the differing treatment of these two classes of voters is reasonably related to their inherent differences.

B. The state-licensed care facility precinct exception is reasonably related to the inherent characteristics of residents who vote where they live

Residents of state-licensed care facilities who vote in-person where they reside are also inherently different from other individuals who vote in-person on election day. By exempting this group of voters from the Voter ID Law, the General Assembly was simply acknowledging and accommodating a few basic self-evident realities: (1) regardless of where they live, all seniors and disabled voters can vote absentee and need not provide photo identification in doing so; (2) seniors and the

disabled living in licensed care facilities that are *not* polling places may be likely to vote absentee in order to avoid the travel required for voting; (3) seniors and the disabled who live in care facilities that *are* polling places may be more likely to vote in person because they will not have to travel to do so; (4) seniors and the disabled who live in care facilities would likely have particular difficulty traveling to obtain photo identification; and (5) seniors and the disabled who vote in person in the facilities where they live are likely to be identifiable as residents by election officials *and* unlikely to commit fraud by intentionally misidentifying themselves.

These realities make the state-licensed care facility precinct exemption a reasonable accommodation for this particular class of voters. However, the League argues that it offers a privilege to nursing home residents that is not available to elderly individuals who do not live in nursing homes, but who may have the same difficulties in procuring the necessary identification. The League states: "In rural communities around Indiana there are the elderly persons who have voted for decades in the same polling place but who are now prohibited from voting in-person because they do not have the requisite identification." Br. of Appellants at 44. While the League insists that "[w]e cannot be dismissive of the desire by elderly voters to participate in the traditional American civic event of voting in-person," Br. of Appellant at 44, the fact remains that voting in-person (like voting absentee) is *not* a constitutional right. Voters over the age of 65 who lack the requisite identification are permitted to vote by mail-in absentee ballot, a perfectly reasonable accommodation. *See* Ind. Code § 3-11-10-24(a)(5).

The Court should not fault the General Assembly for trying to accommodate those who are so infirm that they can no longer care for themselves. The licensed-care-facility exemption represents a reasonable accommodation by the General Assembly and in no way violates equal privileges principles or undercuts the state's compelling interests in deterring and detecting in-person voter fraud and preserving public confidence in elections. As district judge Barker held: "Nursing home residents represent a discrete and readily identifiable category of voters whose ability to obtain photo identification is particularly disadvantaged, whose qualification for the exception (residing in a nursing home) is not readily susceptible to fraud, and for whom there otherwise exist sufficiently reliable methods of verifying identification." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 834 (S.D. Ind. 2006). These inherent characteristics reasonably relate to the Voter ID Law's differential treatment of care-facility residents.

C. Any differential treatment among in-person voters with respect to identification expiration dates or photographs must be addressed through as-applied litigation brought by an aggrieved voter, not through a facial attack

For the first time in this litigation, the League argues that "the photo identification requirement is not reasonably related to the differences between in-person voters with state or federally issued identification with or without an expiration date and/or photograph." Br. of Appellant at 30. Because this issue was not raised in the trial court, it is accordingly waived for review. *Mitchell v. Stevenson*, 677 N.E.2d 551, 558 (Ind. Ct. App. 1997) ("A party may not raise an issue on appeal which was not first presented to the trial court.").

Even had it been properly presented and preserved, this argument is a non-starter. The League's objection, it appears, is to the way in which the Voter ID Law's requirements with respect to photographs and expiration dates have been *applied*. Specifically, the League complains that the Veterans Universal Access Identification Card and Medicare identification cards may not be used to vote because they have no expiration date, yet military identification cards with expiration dates of "INDEF" (short for "indefinite") *can* be used. Br. of Appellant at 39. However, this objection has nothing to do with the face of the statute itself. With respect to expiration dates, the Voter ID Law says only that acceptable photo identification must "include an expiration date" and must not be expired or must expire after the date of the most recent general election. Ind. Code § 3-5-2-40.5. This provision is uniformly applicable to all voters and the non-acceptance of Veterans Universal Access Identification Cards and Medicare identification cards is fully consistent with that provision.

The Election Division has interpreted the law to allow the use of military identification cards with expiration dates that are listed as "INDEF." *See* Indiana Secretary of State & Indiana Election Division, *Indiana Election Day Handbook* at 10 (2007), *available at* http://www.in.gov/sos/elections/hava/pdf/EDH_08.pdf. This interpretation is just that—an *interpretation*. It does not have the force of law. If a particular voter who possesses a Veterans Universal Access Identification Card but no other photo identification is injured by such an application of the Voter ID Law, that voter may bring an as-applied challenge to the Law. However, such alleged

differential treatment is certainly not enough to warrant facial invalidation of the entire Voter ID statutory scheme. *See Baldwin v. Reagan,* 715 N.E.2d 332, 337 (Ind. 1999) ("When a party claims that a statute is unconstitutional on its face, the claimant assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied.").

The same goes for the League's complaint that students enrolled at Purdue University are treated differently because they can use their student identification cards to vote despite the fact that those cards lack expiration dates. Br. of Appellant at 40 n.9. As the League admits, "Tippecanoe county *has chosen to interpret the Law* to mean that confirmation of a student's enrollment on a Purdue database is the equivalent of an expiration date" on the student's identification card. Br. of Appellant at 40 n.9 (emphasis added). Again, this is an interpretation of the Law by the County; it is not stated expressly in the Voter ID Law itself and therefore cannot be the basis for a facial attack on the Law. That interpretation is subject to judicial review, and any student-voter at another college whose non-expiring identification is not accepted, and who feels aggrieved by this treatment, may bring an as-applied challenge.

With respect to the photograph requirement, the League contends that it, too, is unrelated to preventing in-person voter fraud because Indiana provides for the issuance of photo-exempt identification cards and driver's licenses for those whose religion prohibits them from being photographed. Br. of Appellant at 41. Again, however, as Justice Stevens suggested in *Crawford,* the proper vehicle for resolving

this religious accommodation issue is an as-applied challenge, not a facial attack. *See Crawford*, 128 S.Ct. at 1621 & n.19 (stating that even assuming the burden of making a trip to the clerk's office to execute an affidavit after voting provisionally "may not be justified as to a few voters"—including those with religious objections to having their photo taken—that conclusion is by no means sufficient to warrant facial invalidation of the Voter ID Law).

The League states in its brief that because "this case was dismissed pursuant to T.R. 12(B)(6), the opportunity to present evidence was not available. . . . But there are many examples of the type of in-person voter classifications for which there are no inherent difference but yet receive disparate treatment." Br. of Appellant at 38. If this is so, then the proper vehicle for addressing and resolving each objections is an as-applied challenge. The League contends that "the question presented by the second prong of *Collins* is whether the statute is unconstitutional *as applied*." Br. of Appellant at 42 (quoting *Martin v. Richey*, 711 N.E.2d 1273, 1281 (Ind. 1999)). If that is true, this case does not present an as-applied challenge because, unlike in *Martin*, there are no plaintiffs here injured by these applications. Where a law's legitimate sweep is vast, the possibility of one or more as-applied problems cannot justify invalidating it. *See Baldwin*, 715 N.E.2d at 337.

D. The Voter ID Law satisfies both *Collins* inquiries

The differential treatment between in-person voters on the one hand and mail-in absentee ballot voters and licensed-care-facility-resident voters on the other hand is based on the inherent differences that distinguish them: the manner in

which voters cast, and officials receive, election ballots. Thus, the Voter ID Law satisfies the first *Collins* inquiry. Likewise, satisfying the second requirement of *Collins*, no mail-in absentee voters or licensed-care-facility-resident voters must present photo identification when they cast their ballots, so the voters within each category are treated the same. Since absentee ballot voters, licensed-care-facility-resident voters, and in-person Election Day voters are not members of the same groups and are not similarly situated, their differential treatment does not violate Article 1, § 23 of the Indiana Constitution.

Furthermore, whatever the proper understanding of the second *Collins* inquiry, it plainly does not demand that statutes be drawn with "such mathematical nicety as to include all within the reason of the classification and to exclude all others." *Collins*, 644 N.E.2d at 80 (quotation omitted). The General Assembly may draw general classifications that are relevant to legitimate legislative ends, even if some individuals whose conduct does not threaten those ends are burdened thereby. *See id.* The League's strategy here is to convince the Court that the Voter ID Law is not perfectly written or perfectly applied. If that were the constitutional standard, no statute would ever survive judicial review. Courts must defer to legislative judgment when it comes to the details of legislation, *id.* at 79-80, which means that the Voter ID Law cannot be invalidated simply because others might have written it differently.

CONCLUSION

This Court should affirm the trial court's dismissal of the League's complaint.

Respectfully submitted,

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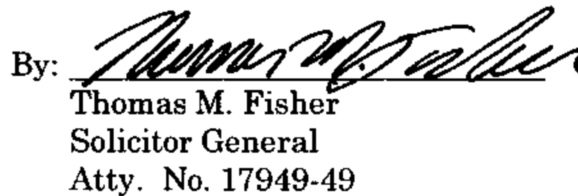
By: 
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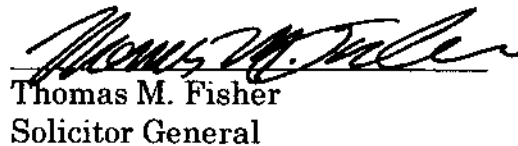
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