

IN THE
SUPREME COURT OF INDIANA

No. _____

Court of Appeals Cause No. 49A02-0901-CV-00040

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

**BRIEF OF THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*
IN OPPOSITION TO DEFENDANT'S PETITION TO TRANSFER**

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INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. Since its founding under Thurgood Marshall in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. LDF has represented parties or participated as *amicus curiae* in numerous voting rights cases before the United States Supreme Court and in Indiana state court. *See, e.g., Nw Austin Mun. Util. Dist. No. One v. Holder* 129 S. Ct. 2504 (2009); *Herring v. Marion County Election Bd.*, No. 49D11-0810-MI-047860 (Marion Co. Sup. Ct. Oct. 24, 2008); *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Thornburg v. Gingles*, 478 U.S. 30 (1986). LDF has an interest in this appeal because it presents important issues concerning minority voters’ ability to meaningfully access the political process.

SUMMARY OF ARGUMENT

The right to vote in a democracy is the bedrock on which all other rights rest. But IND. CODE § 3-11-8.25.1(a) (2006) (the “Photo ID Law”), which requires in-person voters to present photographic identification issued by either the State of Indiana or the U.S. government, denies many of Indiana’s most socio-economically vulnerable citizens access to the one right that is the foundation of all others. In particular, African Americans, who face dramatically higher poverty rates than average, and who are frequently isolated in racially segregated communities in Indiana, bear the

disproportionate brunt of the Photo ID Law, as nearly *thirty percent* of eligible African-American voters in Indiana lack the required photo ID. Further, empirical evidence from the most recent election cycle confirms that the Photo ID Law has a disparate impact on African-American voters. Because regulations on voting rights that result in vote denial are subject to heightened scrutiny under both Indiana and federal law, and given that there has not been a *single* documented case of in-person voter fraud in Indiana, this Court should deny the petition to transfer and sustain the judgment of the court below. Such a ruling would bring an end to the disfranchisement of those Indiana citizens who, by virtue of their poverty and marginalization, can neither afford nor obtain a government-issued photo ID.

ARGUMENT

I. Regulations that Impose a Heavy Burden on the Right to Vote Are Subject to the Highest Levels of Judicial Scrutiny

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). *See also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civic and political rights”). As an express guarantee under the Indiana Constitution, the right to vote is subject to the highest levels of protection in Indiana courts. *See* IND. CONST., ART. 2, SECS. 1, 2; *see also State ex rel. McGonigle v. Madison Circuit Court*, 193 N.E.2d 242, 249 (Ind. 1963) (“The right [to vote] is a political privilege of the highest dignity which can emanate only from the people, and is reverently and emphatically enshrined in the sovereign statement of the organic law of the people”).

Indiana courts have held that regulations that place heavy burdens on the right to vote are subject to heightened scrutiny, and can only be justified by strong governmental interests. *See, e.g., Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 514 (Ind. 1992) (“it is indisputable that the right to vote is fundamental and thus certain encroachments trigger strict scrutiny”); *Miller v. Review Bd. of Ind. Employment Sec. Div.*, 436 N.E.2d 804, 810 (Ind.App. 1982) (“Substantial burdens on the right to vote ... are constitutionally suspect and invalid ... unless essential to serve a compelling state interest”).¹ Here, there are no legitimate interests served by the state’s burdensome Photo ID Law.

II. Indiana’s Photo ID Law Imposes Constitutionally Forbidden Burdens on the Right to Vote that Disproportionately Impact African Americans

A. African Americans in Indiana disproportionately live in poor and segregated communities, and often cannot afford the costs associated with obtaining a government-issued photo ID

Nearly one in five, a total of 17.2 percent, of all people in Indiana lives in poverty. *See* Kaiser Family Foundation, *Indiana: Poverty Rate by Race/Ethnicity, States (2007-2008)*, U.S. (2008), *available at* <http://statehealthfacts.kff.org/profileind.jsp?ind=14&cat=1&rqn=16>. The poor in Indiana are disproportionately African-American, as the

¹ Federal courts have observed that, in particular, election regulations that serve to “fenc[e] out from the franchise,” entire classes of people otherwise eligible to vote threaten the “[e]xercise of rights so vital to the maintenance of democratic institutions.” *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)). Aside from the Fifteenth Amendment’s prohibition on “fencing Negro citizens out” of the ballot box, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), the Fourteenth Amendment demands “strict review of statutes distributing the franchise.” *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972). Thus, heightened scrutiny is particularly appropriate where, as here, election laws have a discriminatory impact or place heavier burdens on protected classes of citizens. *See id.* at 336 (“In decision after decision, this Court has made clear that that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *cf. Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring) (observing that “heightened scrutiny” is appropriate where electoral rules “have discriminatory effects”); *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (“[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status”).

poverty rate for African Americans in Indiana is an astonishing 38.9%, compared to only 14.1% for whites. *See id.* Given this context, the Photo ID Law imposes an undue burden on the right to vote and has a racially disproportionate impact. Although photo ID in Indiana is purportedly offered free of charge, in order to obtain a photo ID card from the Bureau of Motor Vehicles (BMV), a person must present another form of government-issued identification, such as a birth certificate,² which itself costs \$10. *See* Indiana State Department of Health, Birth and Death Certificates, *available at* <http://www.in.gov/isdh/20444.htm>. The fees for individuals born outside of Indiana can be as high as \$28. *See* Julien Kern, *As Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Bd. of Election*, 42 LOYOLA OF L.A. L. REV. 629, 636 (2009).

For individuals and families living below the federal poverty line, these underlying costs are, as a practical matter, prohibitive. The Missouri Supreme Court recognized as much with respect to its citizens in *Weinschenk v. State*, 203 S.W.2d 201, 214 (Mo. 2006), stating that “the \$15 [that impoverished individuals] must pay in order to obtain their birth certificates and vote is \$15 that they must subtract from their meager ability to feed, shelter and clothe their families.” Indeed, the U.S. Supreme Court has held that even smaller, seemingly *de minimis* monetary impositions can constitute an undue burden on the right to vote. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down poll tax of \$1.50, and holding that “[w]ealth or fee-paying ... has

² Under the Photo ID Law, individuals under the age of 65 must present a birth certificate to obtain a photo ID. *See* Ind. Election Div., *Obtaining a Photo ID*, *available at* <http://www.in.gov/sos/elections/2625.htm>.

no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened”).³

In Indiana, the direct cost of obtaining a photo ID is exacerbated by the additional transportation expenses of traveling to a BMV. Marion County, for instance, has only 12 BMV branches to service voters spread out amongst 900 active precincts. *See Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1629 (2008) (Souter, J. dissenting). Poor African Americans living in Indianapolis, 44,000 of whom have no independent means of transportation to a BMV, can least afford to pay the transportation costs associated with obtaining a photo ID. *See Andrew Hacker, Obama: The Price of Being Black*, N.Y. REV. OF BOOKS, (Sept. 25, 2008).⁴

Moreover, although the Photo ID Law permits indigent voters lacking photo IDs to cast provisional ballots, in order for such ballots to be counted, these voters must appear at a county clerk’s office and attest to their indigence each time they vote. *See* IND. CODE § 3-11.7-5-2.5(b). This step imposes two levels of additional burdens on poor voters. First, it imposes what may well be a significant transportation costs for impoverished individuals.⁵ Second, it unnecessarily demeans poor Indiana citizens who have become the only class of voters whose economic resources must be invoked as a

³ Furthermore, the BMV now requires applicants to demonstrate Indiana residence with additional documents that poor individuals might lack, such as a bank statement, pay stub, or credit card statement. *See BMV Headaches Ahead*, FORT WAYNE J.-GAZETTE, July 15, 2009.

⁴ This conclusion is consistent with the results of the U.S. Department of Transportation’s 2001 National Household Travel Survey revealed that only 57 percent of African-Americans are drivers, as compared to 73 percent of whites. *See* National Household Travel Survey (2001), *available at* <http://nhts.ornl.gov>. African Americans are less likely than whites to own cars, and are much more likely to rely on public transportation. *See* National Urban League, THE STATE OF BLACK AMERICA 2009 27-28 (Stephanie J. Jones, ed., 2009).

⁵ There is only one county clerk’s office per county, and a county in Indiana can be up to several hundred square miles in size. *See* Kern, *supra*, at 630. Moreover, most counties in Indiana either lack public transportation or only offer limited coverage. *See Crawford*, 128 S.Ct. at 1631 (Souter, J., dissenting).

condition of voting. The sum total of these costs amounts to a deterrent in the political process and an undue burden right to vote.

B. The Photo ID Law creates arbitrary classifications in violation of the Indiana State Constitution's Equal Privileges and Immunities Clause, which exacerbate the Law's disparate racial impact

The Court of Appeals determined that the Photo ID Law was unconstitutional under the Equal Privileges or Immunities Clause of the State Constitution, Art. 1, Sec. 23, because it creates arbitrary distinctions between: (1) in-person and absentee voters; and (2) elderly individuals living in state-licensed nursing care facilities and those living outside of such facilities. *See League of Women Voters of Ind., Inc. v. Rokita*, 2009 WL 2973120, at **9-12 (Ind.App. Sept. 17, 2009). These arbitrary and unconstitutional distinctions further magnify the racially disproportionate impact of the Photo ID Law. For instance, the more stringent treatment of in-person, as opposed to absentee, voters under the Photo ID Law falls disproportionately on African-Americans, who are more likely than whites to vote in-person. *See R. Michael Alvarez, et al., 2008 Survey of the Performance of American Elections: Final Report* 41 (March 1, 2009), available at <http://www.pewcenteronthestates.org/uploadedFiles/Final%20report20090218.pdf>.⁶

Similarly, the Photo ID Law also has a uniquely burdensome impact on elderly African-American voters, many of whom, because they were born when *de jure* segregation prevented equal access to hospitals, *see* DAVID BARTON SMITH, HEALTH CARE DIVIDED: RACE AND HEALING A NATION 14 (1999), lack the requisite birth certificates necessary to obtain a government-issued photo ID. *See* Brief of *Amicus Curiae* the AARP in Opp. to Pet. to Transfer at 8-9 (citing sources showing that, during

⁶ Moreover, as African-Americans voters in 2008 reported long waits for in-person voting more than twice as often as white voters, *see Alvarez, supra*, at 42, the photo ID requirement only serves to further burden the right to vote of African Americans in Indiana.

de jure segregation, three out of four African-American and other minority infants were born at home, nearly 23 percent of whom went unregistered). As a state-issued photo ID generally cannot be obtained without a birth certificate, many elderly African Americans in Indiana are, by virtue of their race, *incapable* of satisfying the law's requirements.⁷

C. All available data indicate that African Americans in Indiana have less access to photo ID than do members of other races

Given the forgoing, it is not surprising that nearly *three in ten* African Americans in Indiana who are eligible to vote lack a government-issued photo ID. *See* Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 113 (2009) (indicating that among eligible Indiana voters, 83.2 percent of whites, but only 71.7 percent of African Americans hold valid government issued photo identification). These statistics are consistent with data from throughout the country. *See, e.g., Crawford*, 128 S.Ct. at 1634 (Souter, J., dissenting) (observing that “[s]tudies ... suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities”), *citing* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 659 (2007).⁸ The Photo

⁷ Although Indiana law permits eligible voters aged 65 and older to obtain an ID card without a birth certificate, *see* Ind. Bureau of Motor Vehicles, Getting A License, Permit, Or ID Card Without A Birth Certificate, *available at* <http://www.in.gov/bmv/4783.htm>, this exception provides no relief to older voters who, although younger than 65, were nevertheless born before the dismantling of segregation in Indiana during the 1960's.

⁸ Nationally, 25 percent of African-American voting age citizens have no current government-issued photo ID, compared to 8 percent of white voting-age citizens. *See* Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), at 3, *available at* <http://www.vote.caltech.edu/VoterID/CitizensWithoutProof.pdf>. Data from other states also confirms the existence of racial disparities in access to photo ID. In Georgia, for example, African-American registered voters are nearly twice as likely to be without driver's licenses as white registered voters. M.V. Hood, III & Charles S. Bullock, III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 15 (Apr. 2007), [http://www.vote.caltech.edu/VoterID/GAVoterID\(BullockHood\).pdf](http://www.vote.caltech.edu/VoterID/GAVoterID(BullockHood).pdf). Similarly, a study of California, New Mexico and Washington voters found that minority voters are less likely to have various forms of identification, such as driver's licenses, birth certificates, or bank statements. Matt A. Barreto, et al., *Voter ID Requirements and the*

ID Law, therefore, has a clear and immediate disfranchising effect, which disproportionately falls on *qualified* and otherwise eligible African-American voters.

III. Empirical Evidence from the 2008 Election Confirms that Indiana's Photo ID Law Disproportionately Burdens African Americans

Empirical evidence from the most recent election cycle shows that the Photo ID Law has prevented hundreds of qualified voters in Indiana from exercising their constitutionally-protected right to vote. *See* Br. of *Amici Curiae* Lonna Rae Atkeson, *et al.* in Opp. to Pet. to Transfer at 10; Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through An Examination of Provisional Balloting*, 24 J. OF L. AND POL. 475, 480 (2008). But the effects of the Photo ID Law were not limited only to those voters lacking photographic identification; rather, they were felt disproportionately by *qualified* African-American voters as a whole. Nationally, 70% of all African-American voters were asked to show photo identification at the polls, as opposed to only 51% of white voters. *See* Alvarez, *et al.*, *supra*, at 43; Charles Stewart III, CalTech/MIT Voting Technology Project, Working Paper #82, *Racial Differences in Election Administration* 29 (July 2009), *available at* http://www.vote.caltech.edu/drupal/files/working_paper/WP_82.pdf. Due to the uneven enforcement of photo ID laws, these African-American voters were forced to cast provisional ballots at a rate four times higher than were white voters. *See* Stewart at 31.

Moreover, provisional ballots did not provide a failsafe from the disfranchisement of qualified voters, for two reasons. First, the vast majority of provisional ballots were discarded. *See* Pitts, *supra*, at 480 (estimating that only 20 percent of photo identification-related provisional ballots ultimately were counted in the 2008 primary in

Disenfranchisements of Latino, Black and Asian Voters, Am. Pol. Sci. Ass'n Presentation (Sept. 1, 2007), *available at* http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf.

Indiana). Second, many voters in Indiana who were turned away from the polls for lack of photo ID were not even informed of their right to cast a provisional ballot. *See Protecting the Constitutional Right to Vote for All Americans: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2008) (statement of John Payton, President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc.) at 6, *available at* http://judiciary.senate.gov/pdf/08-05-20John_Payton_Testimony.pdf (“LDF attorneys were informed by poll workers that voters who did not possess qualifying identification were not always informed of their right to cast a provisional ballot. Instead, some of these voters were simply turned away from the polls”). These facts should give this Court pause given that a voter’s ability to cast provisional ballot was deemed a saving feature of the Photo ID Law under federal law. *See Crawford*, 128 S.Ct. at 1621 (“[t]he severity of that burden ... is mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted”) (Stevens, J.) (plurality op.). The Photo ID Law thus erects a series of barriers each of which poor, and disproportionately African-American voters, must overcome before their votes are counted. In this sense it is a trap that, paradoxically, fences out *eligible* voters, rather than the ineligible individuals that it purports to target.

IV. The Burdens Imposed by the Photo ID Law Are Not Justified by the Governmental Interest that it Purportedly Serves, Rendering the Photo ID Law Unconstitutional

Under the Equal Privileges and Immunities Clause of the Indiana Constitution, “disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). But there are no “inherent characteristics” that justify the

Photo ID Law’s differential treatment of *qualified* voters who lack photographic identification. The characteristics differentiating voters who have access to photo ID from those who lack it are race and wealth. The former is clearly an impermissible ground on which to deny the right to vote, and with respect to the latter, “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.” *Harper*, 383 U.S. at 668.

Moreover, the real-world burdens imposed by the Photo ID Law clearly outweigh its insubstantial benefits. As demonstrated above, the Photo ID Law disfranchised hundreds of *qualified* voters in the most recent election cycle, and thus demands close judicial scrutiny. Where, as here, a voting restriction falls heavily on an identifiable group, the State should face a particularly high standard of justification.

Indiana has not met its burden. Although its purported rationale for the Photo ID Law is to prevent fraud, *see* Def.’s Pet. to Transfer at 11-12, there is absolutely no record of voter fraud with respect to in-person voting in Indiana. *See Crawford*, 128 S. Ct. at 1618-19 (“The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history”) (Stevens, J.) (plurality op.). In balancing the hypothetical harm of in-person vote fraud against the measurable and identifiable record of actual disfranchisement of qualified voters, this Court should err on the side of permitting qualified voters access to the polls. *Cf. Marshall City Tax Awareness Comm. v. Quivey*, 780 N.E.2d 380, 385 (Ind. 2002) (“To be sure, procedures are often necessary to the conduct of an orderly election or petition. But in a democracy we strongly favor permitting citizens to exercise their franchise”).⁹

⁹ Should this Court look to federal law for guidance in interpreting the Indiana Constitution, this case, because of the recent record of disfranchisement of hundreds of qualified voters, can be distinguished from

CONCLUSION

The Photo ID Law places undue burdens on poor voters in Indiana, and disproportionately disfranchises qualified African-American voters, nearly one-third of whom lack government-issued photo ID. By denying large segments of marginalized communities an opportunity to participate in the political process, the Photo ID Law undermines core principles that lie at the heart of our participatory democracy. Indiana's constitution places special value on the vote and thus requires more. For the forgoing reasons, the defendant-appellee's petition to transfer should be denied.

Respectfully submitted,

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* application for admission by motion pending.

Crawford, where the Court found that “it [wa]s not possible to quantify ... the magnitude of the burden” on voters. 128 S.Ct. at 1622. *See Purcell v. Gonzalez*, 126 S. Ct. 5, 7 (2006) (*per curiam*) (“[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges”).

WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Brief in Opposition to Defendant's Petition to Transfer contains no more than 4,200 words.

Cherry Malichi

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2009, a copy of the forgoing was served via First Class United States mail, postage pre-paid to the following:

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