

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.,)	
)	
Appellants (Plaintiffs below),)	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,)	
)	
Appellee (Defendant below).)	

BRIEF OF *AMICUS CURIAE*
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

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I. INTERESTS OF *AMICUS CURIAE*

The League of Women Voters of the United States (“League”) is a non-partisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in more than 850 communities and in every State.

For nearly ninety years, the League has worked to protect every American citizen’s right to vote. The League has been a leader in the effort to remove unnecessary barriers that far too many Americans face in registering to vote and casting a ballot. The League is a grassroots organization directed by its members, who work to provide voters, without regard for political affiliation, with resources and information in support of the League’s objective – to facilitate the exercise of the constitutional right to vote.

The League is deeply concerned that the Indiana Photo ID Law arbitrarily and unjustifiably confers privileges on certain classes of voters and burdens the voting rights of other classes, resulting in the unjustified disenfranchisement of constitutionally eligible voters. This case is of national importance because, like Indiana, at least fourteen other state constitutions contain equal privileges and immunities provisions. Thus, other states may look to Indiana’s interpretation of its Equal Privileges and Immunities Clause to develop their own constitutional jurisprudence regarding the protection of voting rights.

II. SUMMARY OF ARGUMENT

Laws that grant privileges to certain classes of citizens and impose burdens on other classes are subject to careful review by Indiana courts. Not only is the right to vote a fundamental right under Indiana’s Constitution, thus requiring protective oversight from the

courts, but Indiana’s Equal Privileges and Immunities Clause, Article 1, Section 23 of the Constitution (“Section 23”), prohibits legislative classifications that are not justified by the actual inherent characteristics that distinguish the classes created by the legislation or that fail to treat similarly situated persons equally and uniformly. The Indiana Photo ID Law violates the Indiana Constitution because it metes out the fundamental right to vote according to arbitrary and unjustified legislative classifications. Namely, it conditions the right to vote for persons who elect to vote in-person, or who do not live in a state-licensed care facility designated as a polling location, on the satisfaction of an intrusive and burdensome photo-identification requirement, while allowing mail-in absentee voters and voters who reside in state-licensed care facilities with polling locations to exercise their right free of such an encumbrance.

III. ARGUMENT

Indiana courts critically review legislative classifications that limit fundamental rights for some, carefully scrutinizing the classifications and how those limitations balance against the State’s interests. Indiana’s Photo ID Law cannot withstand such scrutiny.

A. The Right to Vote Is Fundamental

Voting is a fundamental right. It is protected and privileged under the Indiana Constitution in two mutually reinforcing ways. First, the Constitution guarantees Indiana citizens the right to vote. Second, the Constitution promises that this right can be exercised freely and equally by all.

1. Indiana’s Constitution Guarantees the Right to Vote

The Indiana Constitution guarantees its citizens the right to vote. *Blue v. State ex rel. Brown*, 188 N.E. 583, 586, 206 Ind. 98 (1934), *overruled on other grounds by Harrell v. Sullivan*, 40 N.E.2d 115, 220 Ind. 108 (1942) (“The elector is invested by the constitution with

the privilege of voting.” (internal quotation omitted)). Beginning with the Preamble recognizing “the right to choose our own form of government,” the right to vote is provided in at least six articles in the Indiana Constitution.¹ Moreover, by prescribing qualifications on those who can vote, the Indiana Constitution confers “a right to vote which can not be abridged by the legislature.” *Blue*, 188 N.E. at 586.

“The right to vote is an inherent right of citizenship,” *Curley v. Lake County Bd. of Elections & Registration*, 896 N.E.2d 24, 39 (Ind. Ct. App. 2008), and each voter has an “important right and duty as a citizen to cast his [or her] vote and have it counted as cast,” *id.* at 40 (quoting *McArtor v. State*, 148 N.E. 477, 479, 196 Ind. 460 (1925)).

This Court has recognized that the right to vote is paramount, privileged among other core values:

The right of franchise 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. The privilege cannot be abridged or denied by any board or agency created by the legislature, or through direct legislative enactment, except as such limitation upon the privilege is authorized by other provisions within the organic law of the state.

State ex rel. McGonigle v. Madison Circuit Court for the Fiftieth Judicial Dist., 193 N.E.2d 242, 249, 244 Ind. 403 (1963). Given the importance of this right, courts must proceed with caution because the law overwhelmingly weighs in favor of the franchise. *See, e.g., Curley*, 896 N.E.2d at 39.

¹ *See* Article 1, Section 1 (“the People have, at all times, an indefeasible right to alter and reform their government”); Article 2 (entitled “Suffrage and Election”); Article 4, Section 2 (legislature selected by voters); Article 5, Section 3 (Governor and Lieutenant Governor elected at same time as legislature); Article 6, Sections 1 & 2 (voters elect three state officials: Secretary of State, Auditor, and Treasurer; and several county officials: Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner, and Surveyor); and Article 7, Sections 7 & 16 (voters elect circuit court judges and county prosecutors).

2. **Indiana’s Election Laws Must Protect the Virtues of Freedom and Equality in the Electoral Process**

The Indiana Constitution requires that “[a]ll elections shall be free and equal.” Article 1, Section 1. In *Blue*, this Court explained that,

[E]lections are free when the voters are subject to no intimidation or improper influence, and when every voter is allowed to cast his ballot as his own judgment and conscience dictate. That they are equal 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.

188 N.E. at 589. And in its unanimous decision in *Horseman v. Keller*, this Court stated that “Indiana’s election laws strive to uphold the Indiana Constitution by protecting the virtues of freedom and equality in the electoral process.” 841 N.E.2d 164, 169 (Ind. 2006) (citing *Hathcoat v. Town of Pendleton Election Bd.*, 622 N.E.2d 1352, 1354 (Ind. Ct. App. 1993)).

Laws that limit those virtues are unacceptable unless such restrictions are necessary, uniform, and reasonable. *Blue*, 188 N.E. at 588 (“All regulations of the legislative franchise must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.” (internal quotation omitted)); *see also Hathcoat*, 622 N.E.2d at 1354 (requiring voting laws to “guard against fraud, undue influence, or oppression and serve to preserve the integrity of the electoral process without unreasonably restricting access to the ballot box”).

The Indiana Photo ID Law unnecessarily impedes the fundamental right to vote of those citizens who it legislatively classifies as having to present a specific type of photo identification before being able to cast a ballot that will count. The following section examines the acceptability of that limitation, and concludes, as did the Court of Appeals, that the legislative

classifications set forth by the Photo ID Law are not necessary, uniform, or reasonable, and, therefore, violate the Equal Privileges and Immunities Clause of the Indiana Constitution.

B. The Equal Privileges and Immunities Clause Requires a Strong Relationship Between the Creation of the Privileged Class and the Burdens Imposed on the Non-Privileged Class

Indiana courts apply an exacting analysis to legislation that accords different classes of citizens disparate treatment. This Court, in *Collins v. Day*, set forth the analysis that is required under Section 23:

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.

644 N.E.2d 72, 80 (Ind. 1994). Where a court finds disparate treatment, it then must inquire into the reasonableness of the classification in keeping with the legislative goal. *Id.* at 78.

Under the first prong of the *Collins* test, legislative classifications may not be “arbitrary or manifestly unreasonable.” *Id.* at 80. In particular, any legislative classification must be “based upon substantial distinctions germane to the subject matter and the object to be attained.” *Id.* at 78 (internal quotation omitted). Although courts are to accord deference to the legislature in reviewing classifications, such deference does not preclude a highly skeptical review of any regulation that impacts or limits a fundamental right such as voting.

The second prong of the *Collins* analysis examines whether a statute is unconstitutional as applied and whether the special treatment created under the statute is equally available to all who share the inherent characteristics that distinguish and justify the classification. *Id.* at 79. Any preferential treatment given to some groups must be uniformly and equally available to all persons similarly situated. *Id.*; *Martin v. Richie*, 711 N.E.2d 1273, 1281 (Ind. 1999). Thus, any

privileges granted by legislation must be available to all those who share the characteristics of the class. *Collins*, 644 N.E.2d at 79.

The *Collins* Court anticipated that “our independent state privileges and immunities jurisprudence will evolve in future cases . . . to assure and extend protection to all Indiana citizens.” *Id.* at 81. For the reasons set forth below, the instant case provides the Court with the opportunity to affirm the equal right to vote for all eligible Indiana citizens and declare the Photo ID Law unconstitutional.

1. The Photo ID Law Imposes Unconstitutional Restrictions on the Right to Vote for Election Day Voters

The League believes that any additional burdens placed upon any of the State’s voters – whether absentee or Election Day – might unreasonably interfere with the fundamental right to vote. In the instant case, the Indiana Photo ID Law unconstitutionally burdens the rights of Election Day voters.

a. The Equal Privileges and Immunities Clause Forbids Additional Scrutiny Being Applied to Election Day Voters

By requiring the presentation of photo identification as a prerequisite to vote, the Photo ID Law applies more scrutiny to Election Day voters than it does to mail-in absentee voters. Such disparate treatment is forbidden under the Indiana Constitution.

In *Horseman*, this Court carefully analyzed the inherent differences between Election Day voters and mail-in absentee voters and unanimously concluded, in the context of Section 23, that if any type of ballots must be subject to greater scrutiny, *it is those of absentee voters, not Election Day voters.* 841 N.E.2d at 171-73. Therefore, as interpreted by the *Horseman* Court,

the Equal Privileges and Immunities Clause forbids imposing any greater scrutiny on Election Day voters than absentee voters.²

b. The Additional Burdens Imposed on and Unequal Treatment of Election Day Voters Violates the Equal Privileges and Immunities Clause

The requirement that Election Day voters present government-issued photo identification at the polls bears no relationship – let alone a strong relationship – to the inherent characteristics that distinguish Election Day voters from absentee voters. Under *Collins*, the disparate treatment accorded by the legislation at issue must be reasonably related to the inherent characteristics that rationally distinguish the unequally treated class. *Collins*, 644 N.E.2d at 80; *see also Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 258 (Ind. 2003) (“Art. I, § 23 . . . prohibits a statute from providing disparate treatment to different classes of persons if the disparate treatment is not reasonably related to inherent characteristics that distinguish the unequally treated classes.”).

Where fundamental rights such as voting are at stake, legislative classifications should be reviewed with extreme care to ensure that individual rights are adequately protected. Simply put, the Photo ID Law unfairly and inappropriately distinguishes between Election Day voters and absentee voters, and, thus, imposes an unconstitutional burden on Election Day voters.

2. The Photo ID Law Unfairly Burdens Residents of State-Licensed Care Facilities Who Do Not Live at a Polling Place

The Photo ID Law improperly distinguishes among residents of state-licensed care facilities by granting an exemption from the photo identification requirement to persons who reside in facilities that also happen to be polling places, while burdening residents of facilities that are not polling places with the photo-identification requirement.

² The League believes that the photo-identification requirement of the Photo ID Law may also be unconstitutional if applied to absentee voters. But that issue is not before the Court.

A legislative classification “must be based on some justifiable distinction when considered in the light of the purposes and the objects of the acts involved.” *Sperry & Hutchinson, Co. v. State*, 122 N.E. 584, 587, 188 Ind. 173 (1919); *see also Collins*, 644 N.E.2d at 78 (“There must be inherent differences in situation related to the subject-matter of the legislation which require, necessitate, or make expedient different or exclusive legislation with respect to the member of the class.” (internal quotation omitted)).

In *Humphreys*, this Court held there was no such justifiable distinction between two classes of Medicaid-eligible pregnant women. 796 N.E.2d at 258. Specifically, the Indiana statute denying Medicaid funding for abortions, except in the cases of pregnancies caused by rape, incest, or where abortion was necessary to preserve the mother’s life, was unconstitutional as applied to Medicaid-eligible women whose pregnancies created a risk of substantial and irreversible impairment of a major bodily function. *Id.* Both classes of women were equally meritorious under the Constitution.

Similarly, no justifiable distinction exists under the Photo ID Law among residents of state-licensed care facilities. The law arbitrarily grants an exemption from the photo-identification requirement based on whether there happens to be a polling place at the resident’s state-licensed care facility. This amounts to unconstitutionally disparate treatment under *Collins* because the Photo ID law fails to apply “fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges and immunities.” *Collins*, 644 N.E.2d at 80. The Photo ID Law should be held unconstitutional.

IV. CONCLUSION

The Indiana Photo ID Law grants privileges to certain classes of citizens and imposes burdens on other classes with respect to the fundamental right to vote. Classifications of this kind are subject to robust review by Indiana courts. Such a review will reveal that the legislative classifications are not justified by the actual inherent characteristics that distinguish the classes and fail to treat similarly situated persons equally and uniformly. This disparate treatment, which is all the more problematic because the right to vote is a fundamental one, violates the Equal Privileges and Immunities Clause of the Indiana Constitution. For the foregoing reasons, this Court should deny the Appellee-Defendant's Petition for Transfer and affirm the judgment of the Court of Appeals.

November 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 9, 2009, a copy of the foregoing Brief of *Amicus Curiae*,
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