
**IN THE
SUPREME COURT OF INDIANA**

No. _____

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

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

APPELLANTS' PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

Does Indiana's Voter I.D. Law violate Article 2, Section 2 of the Indiana Constitution because it imposes an additional qualification for voting by requiring that an otherwise registered and qualified voter, who wishes to vote in-person and have her vote count, produce at the polls, or if not within ten (10) days after the election at the office of the county clerk, a specified form of photographic identification that not voters all possess?

TABLE OF CONTENTS

QUESTION PRESENTED ON TRANSFERi

TABLE OF AUTHORITIESiii

BACKGROUND AND PRIOR TREATMENT OF ISSUES
ON TRANSFER1

ARGUMENT1

1. Standard of Review1

2. The Legislature may not add qualifications for voting other than
by constitutional amendment.....2

3. The Voter I.D. Law is an absolute prerequisite to vote because it
lacks an affidavit alternative at the polls5

4. The Voter I.D. Law imposes unnecessary and burdensome
requirements that unconstitutionally qualify the right to vote7

5. The Voter I.D. Law is not a “times, places, and manner” regulation
nor a registration law.....12

CONCLUSION15

WORD COUNT CERTIFICATE17

CERTIFICATE OF SERVICE18

TABLE OF AUTHORITIES

Cases

<i>Ajabu v. State</i> , 693 N.E.2d 921 (Ind. 1998)	2
<i>Attorney General v. City of Detroit</i> , 78 Mich. 545, 44 N.W. 388 (1889).....	7
<i>Bayh v. Sonnenburg</i> , 573 N.E.2d 398 (Ind. 1991)	2
<i>Blue v. State ex rel. Brown</i> , 206 Ind. 96, 188 N.E. 583 (1934), <i>rev'd on other grounds by Harrell v. Sullivan</i> , 220 Ind. 108, 40 N.E.2d 115 (1942)....	4, 7, 13, 15
<i>Board of Election Commissioners of City of Indianapolis v. Knight</i> , 187 Ind. 108, 117 N.E. 565 (1917)	12
<i>Bonner ex rel. Bonner v. Daniels</i> , 907 N.E.2d 516 (Ind. 2009)	2, 10
<i>Crawford v. Marion County Election Board</i> , 128 S. Ct. 1610 (2008)	8-11
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1986)	4
<i>Fritch v. State</i> , 199 Ind. 89, 155 N.E. 257 (1927)	3
<i>Goldsberry v. State</i> , 821 N.E.2d 447 (Ind. Ct. App. 2005)	14
<i>Gougar v. Timberlake</i> , 148 Ind. 38, 46 N.E. 339 (1897).....	3
<i>Harman v. Forssenius</i> , 380 U.S. 528 (1965)	11
<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663 (1966)	5, 11
<i>In re Request for Advisory Opinion</i> , 479 Mich. 1, 740 N.W.2d 444 (2007)	6
<i>Indiana Gaming Comm'n v. Moseley</i> , 643 N.E.2d 296 (Ind. 1994).....	3
<i>Ind. St. Elec. Bd. v. Gallagher</i> , 598 N.E.2d 510 (Ind. 1992)	4
<i>League of Women Voters of Indiana, Inc. v. Rokita</i> , No. 49A02-0901-CV-40, ___ N.E.2d ___, 2009 WL 2973120 (Ind. Ct. App. Sept. 17 2009)	<i>passim</i>

<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	6
<i>Morris v. Powell</i> , 125 Ind. 281, 25 N.E. 221 (1890).....	7, 10, 11, 12, 13
<i>Pabey v. Pastrick</i> , 816 N.E.2d 1138 (Ind. 2004)	11
<i>Perkins v. Lucas</i> , 197 Ky. 1, 246 S.W. 150 (1922).....	5
<i>Price v. State</i> , 622 N.E.2d 954 (Ind. 1993)	2
<i>Simmons v. Byrd</i> , 192 Ind. 274, 136 N.E. 14 (1922)	14
<i>State v. Montfort</i> , 723 N.E.2d 407 (Ind. 2000)	2
<i>State ex rel. Harry v. Ice</i> , 207 Ind. 65, 191 N.E. 155 (1934)	4
<i>State ex rel. McGonigle v. Madison Circuit Court</i> , 244 Ind. 403, 193 N.E.2d 242 (Ind. 1963).....	4-5
<i>U.S Terms Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995).....	12
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	4
<i>Wallace v. State</i> , 905 N.E.2d 371 (Ind. 2009).....	2
<i>Weinschenk v. State</i> , 203 S.W.3d 201 (Mo. 2006)	5-6

Statutes and Codes

Voter I.D. Law of 2005 (Pub. L. No. 109-2005).....	<i>passim</i>
Ind. Code §§3-7-13-1 and -11	3
140 Ind. Admin. Code §7-4-3	8
42 U.S.C. §§15301, <i>et seq.</i>	4

Constitutional provisions

Federal

art. I, sec. 2.....	5
---------------------	---

14th amendment.....	8, 11
24th amendment.....	11

Indiana

Article 1, Section 23.....	1
Article 2, Section 1.....	5
Article 2, Section 2.....	<i>passim</i>
Article 2, Section 14(c).....	3, 5, 14

Indiana Trial and Appellate Rules

Ind. Appellate Rule 4 (A)(1)(b).....	1
Ind. Trial Rule 12 (B)(6).....	1

Other Authorities

Caitlin E. Borgmann, “Rethinking Judicial Deference to Legislative Fact-Finding”, 84 Ind.L.J. 1 (Winter, 2009)	9
Linda Greenhouse, “In a 6-to-3 Vote, Justices Uphold a Voter ID Law”, NY Times, April 29, 2008	15
Michael J. Pitts and Matthew D. Neuman, “Documenting Disenfranchisement: Voter Identification at Indiana’s 2008 General Election”, 25 J.L. & Pol.__(forthcoming, 2010), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1465529	9
Matt A. Barreto, Stephen A. Nuño and Gilber R. Sanchez, “The Disproportionate Impact of Photo Identification Requirements on the Indiana Electorate”, (November, 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf	10

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On July 28, 2008 the League of Women Voters of Indiana, Inc., and the League of Women Voters of Indianapolis, Inc. (hereinafter the “League”), filed an action against Indiana Secretary of State Todd Rokita (hereinafter “Rokita”), seeking a declaration that Pub. L. No. 109-2005, the 2005 Voter I.D. Law, is unconstitutional under Article 2, Section 2 and Article 1, Section 23 of the Indiana Constitution. On December 17, 2008 the trial court dismissed the League’s lawsuit under Ind. Trial Rule 12(B)(6). On September 17, 2009 the Court of Appeals reversed and remanded with instructions that the trial court declare the Law void under Article 1, Section 23. *League of Women Voters of Indiana, Inc. v. Rokita*, No. 49A02-0901-CV-40, ___ N.E.2d ___, 2009 WL 2973120 (Ind. Ct. App. 2009). However, the Court of Appeals also concluded that the Law does not impose any new voting qualification and thus does not violate Article 2, Section 2. *Id.* at **7-8. On October 16, 2009 Rokita filed his petition to transfer, claiming that the jurisdiction of this Court is mandatory and exclusive pursuant to Ind. Appellate Rule 4(A)(1)(b).

ARGUMENT

1. Standard of Review.

A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear from the face of the complaint that the complaining party is not entitled to relief. The pleadings must be construed in the light most favorable to the nonmoving party and the facts alleged must be

accepted as true. *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009).

Legislation under constitutional challenge is clothed with a presumption of constitutionality. The burden to rebut this presumption is upon the challenger, with all reasonable doubts resolved in favor of the law's constitutionality. *Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009).

2. The Legislature may not add qualifications for voting other than by constitutional amendment.

The Indiana Constitution is a contract between the State and its citizens. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 409 (Ind. 1991). When interpreting its provisions, it is necessary to look to “the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions,” *State v. Montfort*, 723 N.E.2d 407, 409 (Ind. 2000) (quoting *Ajabu v. State*, 693 N.E.2d 921, 929 (Ind. 1998)), and to examine the historical context when our Constitution or any part of it was framed and adopted. *Bayh*, 573 N.E.2d at 412. Our Constitution was framed by delegates who rejected elitism and who wished to “guarantee popular participation” in the electoral process. [The framers] generally borrowed [from other constitutions] only those provisions which promoted political inclusion, eschewing the elitist provisions favored by territorial federalists, such as tax requirements for voting” *Price v. State*, 622 N.E.2d 954, 961-62, n. 10 (Ind. 1993) (emphasis added).

Article 2, Section 2(a) sets forth the exclusive list of qualifications necessary to vote. “When the Constitution defines the qualifications of voters, such qualifications cannot be changed nor added to by statute.” *Fritch v. State*, 199 Ind. 89, 155 N.E. 257, 258 (1927); *see also Gougar v. Timberlake*, 148 Ind. 38, 46 N.E. 339, 340 (1897) (as a political right, “the legislature cannot lay so much as a finger upon [the right of suffrage], except when expressly authorized by the organic law”). A voter thus must satisfy only the requirements of citizenship, age and residency to be qualified to vote. Article 2, Section 14(c) of our Constitution also requires the General Assembly to provide for the registration of qualified persons, which it has done by enacting the voter registration laws codified in Ind. Code §§3-7, *et seq.* (2006), mandating that persons who meet the constitutional qualifications set forth in Article 2, Section 2 register to vote at least 29 days prior to the next election. I.C. §§3-7-13-1 and -11.

Voting in public elections has long been recognized by this Court as a fundamental right, *Indiana Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 304 (Ind. 1994), and one that cannot be abridged or denied except as expressly authorized by the constitution.

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. 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, 244 Ind. 403, 193 N.E.2d 242, 249 (1963) (emphasis added). The right to vote is more than a registered and otherwise qualified voter being allowed to cast a “provisional” ballot.¹ It necessarily encompasses the right to have that vote counted in the final tallies. “[E]veryone ha[s] the right to vote and have his vote counted. . . .” *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) (emphasis added); *see also United States v. Classic*, 313 U.S. 299, 315 (1941) (same).

Because voting is fundamental, Article 2, Section 2 should not be construed narrowly so as to unnecessarily restrict voters’ rights. “The purpose of [election] law and the efforts of this court are to secure to the electorate an opportunity to freely and fairly cast his ballot, . . . and prevent disfranchisement.” *State ex rel. Harry v. Ice*, 207 Ind. 65, 191 N.E. 155, 157 (1934) (emphasis added). Further, as this Court stated in *McGonigle*, Article 2, Section 2 does not permit the franchise to be extended to some registered² voters but not to others “so long as both meet

¹ Provisional voting was a concept implemented in Indiana shortly after Congress passed the Help America Vote Act (“HAVA”) in 2002, 42 U.S.C. §§ 15301, *et seq.*, as a fail-safe form of voting for registered voters whose names were inadvertently left off the official register of voters. The Voter I.D. Law in 2005 greatly expanded its use to include voters who present at the polls without the photographic identification required by the Law.

² Registration laws are the primary means by which states insure the integrity of elections by making fraudulent voting an “impossibility”, *Ind. St. Elec. Bd. v. Gallagher*, 598 N.E.2d 510, 511 (Ind. 1992), and the means by which proofs are furnished showing the existence of the voter’s qualifications. This is accomplished by preparing, well *in advance* of Election Day, an authentic list of those who are qualified to vote at the election. *State ex rel. Blue v. State*, 206 Ind. 96, 188 N.E. 583, 588-89 (1934) (registration is a machinery for ascertaining *prior to the election* who are legal voters).

the constitutional requirements expressly granted to all citizens.” 193 N.E.2d at 249.³

The Indiana Constitution provides greater protection for the right to vote than the federal constitution. While the federal constitution in art. I, sec. 2 protects the right to vote in federal elections, the right to vote in state elections is nowhere expressly mentioned. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966). On the other hand, the Indiana Constitution enshrines the exclusive qualifications for voting in Article 2, Section 2, and in Article 2, Section 1 guarantees that all elections in Indiana shall be “free and equal”, provisions without counterparts in the federal constitution.

3. The Voter I.D. Law is an absolute prerequisite to vote, i.e., a “qualification”, because it lacks an affidavit alternative at the polls.

The costs and other burdens associated with state- or federal-issued identification required to vote resulted in a finding that Missouri’s voter identification law, which resembled Indiana’s in most respects, violated that state’s constitution. *Weinschenk v. State*, 203 S.W.3d 201, 213-14 (Mo. 2006) (holding that “all fees that impose financial burdens on eligible citizens’ right to vote, not merely poll taxes” are impermissible). Because the court resolved the

The Legislature’s duty to enact such laws, which it long ago fulfilled, is expressly contained in Article 2, Section 14(c) of our Constitution.

³ The Kentucky supreme court stated this principle thusly: “[T]he terms of the law must not be such as to deprive the elector altogether of the right to vote, provided he has the necessary qualifications when the election time arrives, and has complied with reasonable regulations as to registration.” *Perkins v. Lucas*, 197 Ky. 1, 246 S.W. 150, 154 (1922).

case on state equal protection grounds, it did not address the “qualification” issue under the Missouri constitution. *Id.* at 212, n. 16. Though Michigan’s supreme court rejected claims that its voter identification law was an unconstitutional poll tax, it so held only after observing that any voter without the required form of identification “may simply sign an affidavit in the presence of an election inspector” and avoid the costs associated with obtaining it. *In re Request for Advisory Opinion*, 479 Mich. 1, 740 N.W.2d 444, 464-65 (2007).

Unlike Michigan’s law, the Indiana Voter I.D. Law has no Election Day affidavit fall-back for those voters who are unable to obtain and present at the polls the required form of identification. Those who assert a religious objection or indigence at the polls and wish to have their provisional vote count, or who were required to vote provisionally because they lacked the required form of identification at the polls, must make a second trip within 10 days after the election to the office of the county clerk to sign the indigence or religious objector affidavit or present the form of identification the Law requires. The Law does not permit the signing of those affidavits at the polls. Since the presentation of the specified form of identification is an absolute, not an alternative condition, its application disqualifies otherwise qualified registered voters who lack it. *Cf.*, *Lubin v. Panish*, 415 U.S. 709, 714 (1974)(facially striking down California statute that required candidates pay a filing fee because it lacked an alternative means of ballot access for indigent candidates). If a voter lacking the required identification were allowed to swear out an affidavit at the polls attesting to her

identity, she would be able to avoid the Law's second trip requirement. "[O]nly one [trip] ought to be required" to cast a valid vote. *Morris v. Powell*, 125 Ind. 281, 25 N.E. 221, 225 (1890)(quoting *Attorney General v. City of Detroit*, 78 Mich. 545, 44 N.W. 388, 392 (1889)).

4. The Voter I.D. Law imposes unnecessary and burdensome requirements that unconstitutionally qualify the right to vote.

While the League acknowledges that the State may, and should, regulate elections to assure they are fair, equal and free from corruption, such regulations must be reasonable, uniform, and impartial, and they may not deny or abridge, or unnecessarily impede, otherwise qualified citizens from voting. *Morris v. Powell*, 25 N.E. at 225. In determining whether a voting regulation is merely procedural--one which regulates the times, places or manner of voting--or one constituting a new substantive qualification enacted by the Legislature in violation Article 2, Section 2; this Court has looked to whether the challenged law burdens the act of voting. *In Blue v. State ex rel. Brown*, 206 Ind. 96, 188 N.E. 583, 591 (1934), *rev'd in part on other grounds by Harrell v. Sullivan*, 220 Ind. 108, 40 N.E.2d 115 (1942), the Court observed that the practice of requiring a voter to verbally identify herself and sign her name on the poll book to enable a signature comparison was not an unconstitutional additional qualification because it was uniformly applied, imposed "no burden upon the one challenged," and a challenged voter was allowed to "take the oath as other challenged voters, and he is then permitted to vote." The requirement at the polls of government

identification with an expiration date and photograph is a “qualification” because it imposes an unnecessary, and non-uniform, burden on those who vote in-person, and because it dis-qualifies those otherwise registered and qualified voters who are unable to comply.

The burdens imposed by the Law on Indiana voters subject to its requirements are far from illusory; they are concrete and tangible. To secure an Indiana photographic identification card, a would-be voter must present the original or certified copy of her birth certificate, a certificate of naturalization, a U.S. Veteran’s photo identification, a U.S. military photo identification, or a U.S. passport. 140 Ind. Admin. Code §7-4-3(2007) (see <http://www.in.gov/legislative/iac>). Indiana counties charge between \$3-\$12 for a birth certificate, and in some states the cost is much higher. The total fees for a U.S. passport are approximately \$100. Persons born at home or in another state cannot simply travel to the local Health Department office and obtain a copy of their birth certificate. A woman who marries and fails to change her name with the Social Security Administration must make an additional trip to the Social Security office in order to secure an Indiana identification card or license.

Both the plurality and dissenting opinions in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), recognized that the Law selectively imposes burdens on the right to vote.⁴ Justice Stevens noted that the Law

⁴ *Crawford*, which upheld the Law under the 14th amendment to the federal constitution, has been criticized by many commentators as being overly deferential to legislative

“imposes some burdens on voters that other methods of identification do not share.” *Crawford*, 128 S. Ct. at 1620. In dissent, Justice Souter observed that the burdens imposed on voters by the Law “translates into an obvious economic cost (whether in work time lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID” and that those costs “are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.” *Id.* at 1630. Justice Souter predicted that “a significant number of state residents will be discouraged or disabled from voting” by the Law’s requirements. *Id.* at 1634. Subsequent developments have borne out that prediction. See, Michael J. Pitts & Matthew D. Neuman, “Documenting Disfranchisement: Voter Identification at Indiana’s 2008 General Election”, 25 J.L. & Pol. ___ (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465529.

The Pitts’ study concludes, based on the authors’ empirical research, that “photo identification has a disenfranchising impact on hundreds of persons who want to have their democratic voice heard,” (manuscript at 2); that in the last election “902 persons arrived at a polling place without valid identification, cast a provisional ballot, and then had that ballot go uncounted;” and that this number

actions at the expense of protecting a fundamental right. *See, e.g.*, Caitlin E. Borgmann, “Rethinking Judicial Deference to Legislative Fact-Finding”, 84 Ind.L.J. 1, 53-54 (Winter, 2009) (calling the Indiana Voter I.D. Law a “prime example of a political majority using its influence to intrude on a basic individual right”, and criticizing the plurality opinion in *Crawford* for “shunning its responsibility to protect” voting from legislative overreaching).

“likely understates the impact of photo identification for several reasons.” *Id.* at 10-11 (emphasis in original). Yet another scholarly study concluded that the Indiana Voter I.D. Law significantly reduces the opportunity to vote for minority, low-income, less educated, and the youngest and oldest residents of Indiana. Its authors also observed that their empirical research showed that African-American voters in Indiana are 33% more likely to be prevented from voting as a result of the photo ID requirement. Matt A. Barreto, Stephen A. Nuño, and Gilbert R. Sanchez, “The Disproportionate Impact of Photo Identification Requirements on the Indiana Electorate”, (November 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf. These studies support the League’s allegations, which must in any event at this stage be accepted as true, *Bonner, supra*, 907 N.E.2d at 518, that the Law has prevented and deterred many qualified and registered voters from casting a vote that will be counted, and that it will continue to do so. Amended Complaint, ¶¶16-19.

The Voter I.D. Law requires registered voters to possess assets, time, financial resources and know-how to gather the documents the State now deems necessary to “prove” one’s identity, and one or more trips to the Bureau of Motor Vehicles—much like the law struck down in *Morris*, which required Indiana voters to possess taxable property and a stable residency. Also, in contravention of the lessons of *Morris*, the Law imposes a burden most severe upon voters who do not drive or own their own motor vehicle; and no burden whatsoever on voters whom Indiana law permits to vote by mailing in an absentee ballot. As the Pitts

and Barreto studies conclude, the Voter I.D. Law has already had a disfranchising impact on hundreds and likely thousands of persons who want to have their democratic voices heard. Like poll taxes or residency certificates, the Law thus imposes requirements that serve, *sub silentio*, as extra-constitutional qualifications for purposes of voting, and it thus exceeds the implied limitations on legislative action contained in Article 2, Section 2. *Cf. Harper v. Virginia Board of Elections, supra* (\$1.50 poll tax found to be unconstitutional voting qualification under 14th amendment to federal constitution); *Harman v. Forssenius*, 380 U.S. 528 (1965) (requirement that citizens file residency certificate in lieu of paying poll tax deemed unlawful prerequisite, i.e., qualification, to voting under 24th amendment to federal constitution).

The Voter I.D. Law is also an unnecessary abridgement of citizens' right to vote. While the Legislature has the right to "reasonably regulate the right of suffrage. . . [it] has no power to. . . unnecessarily impede its free exercise". *Morris v. Powell*, 25 N.E. at 225. Rokita has contended that the Law is needed to deter fraud; but there has never been a single documented case of in-person voting fraud in Indiana. *Crawford*, 128 S. Ct. at 1618-19 ("The record contains no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history."). And despite the fact that there are documented cases of fraud in the casting of absentee ballots by mail, *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004), the Law exempts from its reach those voters casting an absentee ballot by mail, who are permitted to vote without presenting a specified identification

document and without even a requirement that the voter affirm under penalties for perjury that she is the voter identified on the absentee ballot. In contrast, those who choose to vote in person are required to present the form of personal identification the Law now requires; even an oath does not suffice.

5. The Voter I.D. Law is not a “times, places, and manner” regulation nor a registration law.

On its face the Voter I.D. Law has nothing to do with the times or places of holding elections. Neither does it regulate the “manner” of voting, which this Court has defined as referencing “only . . . the method or mode” of selecting public officers which “does not include the power to determine the qualifications of legal voters.” *Board of Election Comm’rs of City of Indianapolis v. Knight*, 187 Ind. 108, 117 N.E. 565, 568 (1917); *Morris v. Powell*, 25 N.E. at 228 (Elliott, J., concurring) (noting the critical distinction between a procedural rule regulating the “mode” of voting and a “condition precedent” which declares “what evidence whose right is challenged shall produce”); *see also, U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995) (observing that the Framers of the federal constitution, during the ratification debates, viewed the power of the states to regulate the “manner” of voting as only enabling a determination of “how those electors shall elect-whether by ballot, or by vote, or by any other way”) (emphasis in original). Accordingly, the Court of Appeals erred by concluding that “[b]ecause of the similarities in voter registration programs and the Voter I.D. Law

. . . [the] Law is not a qualification, but rather a regulation of the time, place, or manner in which otherwise qualified voters must cast their votes.” *Rokita*, at *8

The Voter I.D. Law is a unique and heretofore unprecedented species of election regulation, clearly never contemplated either by the Framers of our 1851 Constitution or those legislators who drafted, and the voters who in 1881 approved, the first general registration amendment to our Constitution. *Morris v. Powell*, 25 N.E. at 222. The Law imposes an additional burdensome and absolute prerequisite for voting on already registered and fully qualified voters who choose to cast their ballot in-person. If it is deemed desirable to mandate such an additional condition precedent to voting, the Legislature may do so only by amending the constitution.⁵

The Voter I.D. Law also cannot be justified as a registration law. Registration laws require, well in advance of Election Day, the preparation of an authentic list of those who have already proved that they possess the qualifications to vote at the election. *Blue v. State*, 188 N.E. at 588-89 (registration is a machinery for ascertaining prior to the election who are legal voters). The Indiana Code sets forth our system of voter registration. None of the provisions of the Voter I.D. Law connects with the qualifications to vote that the registration system is intended to verify, and the Law’s placement in the Code also militates against a

⁵ As the Court of Appeals held, even if the Voter I.D. Law were deemed not to be a new voting qualification, it nevertheless also fails to pass constitutional muster because, by excluding from its requirements those citizens who choose to vote by mail-in absentee ballot and certain residents of state-certified residential facilities, it is not *uniform* in its application. *Rokita*, at **13-15(citing *Morris*, 25 N.E. at 225).

judicial determination that the Law has a non-tenuous relationship to Indiana's voter registration requirements. See *Goldsberry v. State*, 821 N.E.2d 447, 465 (Ind. Ct. App. 2005) (location in the Code used as an aid in determining legislative intent).

In *Simmons v. Byrd*, 192 Ind. 274, 136 N.E. 14 (1922), this Court considered a single question: whether laws “requiring voters to register before taking part in elections, were made unconstitutional and void by the amendment of article 2, § 2, of the Constitution of Indiana on September 6, 1921.” *Simmons* held that a voter registration law, which is “merely a mode of ascertaining and determining the existence of those qualifications [in Article 2, Section 2],” could be enacted under the authority granted the General Assembly by Article 2, Section 14 notwithstanding the limitations of Article 2, Section 2. *Id.* at 17-18. *Simmons*, however, does not stand for the broader proposition that the General Assembly has the unfettered right to enact any other type of burdensome and exclusionary election law that abridges or denies the franchise to otherwise qualified voters.

The League's objections to the Photo ID Law are not that it requires voters to identify themselves at the polls. No burden on voting is imposed by requiring a voter to inform poll workers who she is and to sign the poll book to enable a signature comparison before she may be given a ballot. The League also does not object to requiring a voter, if her identity or qualifications are challenged, to sign an affidavit attesting to her identity. The League acknowledges that these are reasonable, non-burdensome safeguards for a fair and honest election, as has this

Court. *Blue*, 188 N.E. at 591-92. However, the burdensome voter identification requirements of this Law that apply only to those registered voters who must or choose to vote in-person, including the requirement each election of a second trip to a different location, go well beyond the boundary between mere procedural rules and substantive qualifications. Voiding the Law as a constitutionally unauthorized qualification would not prevent the General Assembly from enacting further laws to assure the integrity of elections. It would only forbid it from requiring voters to bear the costs associated with complying with such laws.

Indiana's restrictive voter identification requirements, enacted in 2005 without a shred of bipartisan support⁶ and in the absence of any evidence of imposter in-person voting, are exclusionary for many voters. The Voter I.D. Law unnecessarily impedes, burdens, and excludes otherwise registered and qualified voters in the exercise of the franchise, and it thereby imposes a new, and constitutionally unauthorized, qualification on the fundamental right to vote.

CONCLUSION

The issue presented by the League's petition is one of great public importance and of first impression which should be decided by this Court. Accordingly, the League respectfully requests that this Court grant its petition to transfer, assume jurisdiction over this appeal, reverse the decision of the trial court

⁶ Linda Greenhouse, "In a 6-to-3 Vote, Justices Uphold a Voter ID Law", *NY Times*, April 29, 2008 (observing that the Law was "adopted by the Republican-controlled legislature in 2005 without a single Democratic vote").

and hold that the Indiana Voter I.D. Law establishes a new qualification for voting not authorized by any provision of Indiana's Constitution and is thus void.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Petition to Transfer contains no more than 4,200 words, not including the Statement of the Issue.

William R. Groth

CERTIFICATE OF SERVICE

I certify that on October 19, 2009, a copy of the forgoing Petition was mailed, and transmitted via email, to Christopher Francis Zoeller, Thomas Molnar Fisher, Heather Lynn Hagan, and Ashley E. Tatman, Office of Indiana Attorney General, 219 Statehouse, Indianapolis, IN 46204.

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