IN THE

Supreme Court of Indiana

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No.

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

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

BRIEF OF *AMICI CURIAE*

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I. Interest of *Amici Curiae*

The American Civil Liberties Union Foundation, Inc. (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 550,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The ACLU and its 53 affiliates defend the equal right of racial and other minorities to participate in the electoral process. The ACLU has filed lawsuits challenging the constitutionality of voter identification requirements in Georgia, *Common Cause/Georgia v. Billups*, No. 05-201 (N.D. Ga. filed Sept. 19, 2005), Arizona, *Inter Tribal Council of Arizona, Inc. v. Brewer*, No. 06-1362 (D. Ariz. filed May 24, 2006), and Indiana, *Crawford v. Marion County Election Bd.*, No. 05-634 (S.D. Ind. filed May 2, 2005).

The Southern Coalition for Social Justice ("SCSJ") is a non-profit organization incorporated in North Carolina for charitable purposes. SCSJ promotes justice by empowering minority and low-income communities to defend and advance their political, social, and economic rights. In its civic engagement work, SCSJ works to ensure that all people have the right to vote. Organizations that SCSJ represents have an interest in ensuring that state constitutions protect their member's ability to vote and every voter's opportunity to participate in the election process.

II. Summary of Argument

This Court should strike down the Indiana Photo ID law as violative of the state's Equal Privileges and Immunities Clause because it unjustifiably privileges select groups by exempting them from the law's photo identification requirements. Article I, §23 of the Indiana Constitution demands a critical look at legislative classifications that convey an advantage to one group over another. This Court has explicitly adopted a method of review for challenges made under this clause that is different from the method of review applied to federal Equal Protection challenges.

Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994). In states that have developed such distinct jurisprudence, state courts have subjected legislative classifications to heightened scrutiny, carefully examining the justifications offered for such classifications and affording more protections to groups not receiving special privileges. Even in states that have not explicitly discarded the traditional categories of Equal Protection review, courts have used their states' constitution privileges and immunities clauses to strike down laws that unjustifiably favor select groups over others. This Court should reaffirm its commitment to carefully scrutinizing legislative classifications that create classes of privilege and advantage.

III. Argument

The Equal Privileges and Immunities Clause of the Indiana Constitution prohibits the Indiana Photo ID Law because the law unjustifiably conveys advantages to absentee voters over in-person voters and residents of state-licensed care facilities which happen to be polling places over residents of state-licensed care facilities which are not polling places. There is no logical or justifiable reason to advantage absentee voters—a group among which the incidence of voter fraud is dramatically higher—over in-person voters by exempting them from the photo identification requirement. Furthermore, the state can offer only the most flimsy of justifications for why it has decided to convey a significant advantage—the ability to vote in-person without presenting photo identification—to a relatively small group of elderly and disabled individuals simply because their state-licensed care facility happens to be a polling place. The Indiana Supreme Court must do what the Privileges and Immunities Clause commands—examine carefully the justifications offered for the distinctions made by the Indiana Photo ID law, and strike the law down because those justifications are without merit.

As other courts in states with similar equal privileges and immunities clauses have done, this Court must skeptically examine legislative classifications that convey advantages only to a select few, and they must strike down such classifications when they are not sufficiently justified.[1] Indeed, several other state courts have invalidated laws under their privileges and immunities clauses that likely would have survived typical Equal Protection rational basis review. It is very clear that this Court has chosen an approach along these lines. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

Among the state courts taking a harder look at discriminatory legislative classifications, some, like Indiana, have developed an independent mode of analysis, foregoing the traditional categories of review associated with Equal Protection analysis.[2] It is clear that these state courts that are shifting away from standard Equal Protection methodology are doing so in a way that is more probing and critical of legislative classifications that convey some advantage to a particular group. Similarly, this Court should reaffirm its commitment to the mode of review it has already adopted—one that affords more protection to groups not receiving legislatively bestowed advantages.

A. States with Privileges and Immunities Clauses Modeled After the Indiana Privileges and Immunities Clause Have Developed Independent Modes of Review Under Such Clauses, and Using That Review, Have More Critically Reviewed Classifications Conveying Advantages to Some Groups Over Others.

The jurisprudence of the Oregon and Washington state courts lends strong credence to this Court's commitment to interpreting Indiana's Equal Privileges and Immunities Clause in a way

[1] There are at least fourteen other states with equal privileges and immunities clauses in their state constitutions. For a list of these states, see David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 Vt. L. Rev. 221, 223 (1988). Among these states, some state courts apply the standard federal Equal Protection analysis to challenges made under their privileges and immunities clause.

[2] Other state courts are using a mode of review that clearly affords more protection than traditional Equal Protection review, but have declined to, or simply have yet to clarify, the extent to which the analysis they use under their states' privileges and immunities clause differs from federal Equal Protection analysis.

that affords more protection than would the federal Equal Protection Clause would to groups not the beneficiaries of legislatively conveyed advantages. The state constitutions of Oregon and Washington contain privileges and immunities clauses that were modeled on the privileges and immunities clause contained in the Indiana Constitution. *State v. Clark*, 630 P.2d 810, 814 n.7 (Or. 1981), *cert. denied*, 454 U.S. 1084 (1981); *Grant County Fire Prot. Dist. No 5 v. City of Moses Lake*, 42 P.3d 394, 406 n.6 (Wash. 2002). Like Indiana, both states have developed a methodology of review under their clauses that is completely distinct from and more critical than the standard review methodology applied in Equal Protection challenges.

Oregon's Supreme Court was the first to apply an approach different from the basic federal Equal Protection methodology to challenges under its equal privileges and immunities clause. David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 Vt. L. Rev. 221, 225 (1988). In *State v. Clark*, 630 P.2d 810 (Or. 1981), *cert. denied*, 454 U.S. 1084 (1981), the Oregon Supreme Court detailed its equal privileges and immunities clause analysis by describing three possible targets of discrimination—each with its own analysis. *Id*. at 815-16. These targets include individuals, true classes, and legislative classes. *Id*. at 816. The court's distinction between true classes and legislative classes was that true classes are comprised of persons who share certain ethnic or social characteristics unrelated to the law that classifies them, while legislative classes share only traits derived from the challenged law itself. *Id*.

Oregon has found more expansive protection in its equal privileges and immunities clause by expanding the number of "true" classes subject to strict scrutiny beyond that which federal Equal Protection jurisprudence has established. *See Tanner v. Oregon Health Sci. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) (ruling that sexual orientation is a suspect classification);

Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 977 (Ore. 1982) (finding gender to be a suspect classification unless based on real gender differences). In contrast to true class discrimination, the analysis for legislative class discrimination turns on a person's ability to move into and out of these legislatively constructed classes. *Clark*, 630 P.2d at 816. The Oregon Supreme Court has said that it will not invalidate laws establishing legislative classes so long as the law in question does not prohibit movement between the classes—that is, where the classes are, as far as the law is concerned, open. *Id*. However, this analysis still contains grey areas, such as facially neutral laws which in effect close the legislative classes. Schuman, *supra*, at 240. Applying that analysis here, it is clear that Indiana voters cannot move freely into and out of the legislative classes created by the law in question. Election officials determine which state-licensed facilities will serve as polling places—it is beyond the control of the voter. Additionally, not every Indiana voter is statutorily eligible to vote absentee. This Court should take note of the Oregon class discrimination jurisprudence and recognize that the distinctions made in the Indiana Photo ID law are patently unreasonable, restrictive and arbitrary.

Like Oregon, Washington is another state in which the court has found that the state privileges and immunities clause is subject to an analysis different from the standard federal Equal Protection analysis and, indeed, provides more protection than the federal Equal Protection Clause. In *Grant County Fire Prot. Dist. No 5 v. City of Moses Lake*, 42 P.3d 394 (Wash. 2002), the Washington Supreme Court held that the differing annexation methods employed by two municipalities did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, but did violate the equal privileges and immunities clause contained in the Washington Constitution. The two methods in question were the petition method and the election method of annexation. *Id.* at 401. The Washington Supreme Court concluded that the

petition method favored owners of higher-valued property over owners of lower-valued property and non-property owning residents. *Id*. at 397.

Prior Washington cases held that a legislative classification does not violate the privileges and immunities clause if it applies to all persons in a designated class and if there are reasonable grounds for distinguishing between class members and nonmembers. *United Parcel Serv., Inc. v. Dep't of Revenue*, 687 P.2d 186, 193 (Wash. 1984) and *State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1104 (Wash. 1936), *rev'd on other grounds, Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819 (Wash. 1979). However, the Washington Supreme Court has said that the issues involved determine the level of scrutiny to be applied in deciding whether "reasonable grounds" exist. *Grant County*, 42 P.3d at 731-32. For example, the Washington court has found that statutes that provide an economic benefit require the distinctions made by legislative classifications to rest on "real and substantial differences bearing a natural, reasonable and just relation to the subject matter of the act." *Huse*, 59 P.2d at 1105. In contrast, the court has ruled that statutes with classifications made for taxation purposes will not be invalidated if "any state of facts can reasonably be conceived that would sustain the classification." *United Parcel*, 687 P.2d. at 194. The Supreme Court of Washington has not yet named these differing levels of scrutiny or designated precisely when each would apply, but these differing levels do exist, allowing the court flexibility in its equal privileges and immunities analysis.

Building on the Equal Privileges and Immunities Clause in the Indiana Constitution, Oregon and Washington have taken a broad and critical approach to analyzing challenges under their respective privileges and immunities clauses. It would be discordant were Indiana not to continue to do so. While there are no Oregon cases directly on point, and Washington's jurisprudence in this matter has not yet been fully fleshed out, it is clear that both states have

adopted methods of review distinct from federal Equal Protection review that will allow the courts to provide more protections to groups not receiving of legislative advantages or privileges.

B. Other State Courts Strike Down Laws Granting Advantages to One Group Over Another, Using Their State Constitutional Privileges and Immunities Clauses to Do So.

Nationwide, a number of other states with state constitutional privileges and immunities clauses—ones not modeled after Indiana's Clause—have aggressively used those clauses to protect disadvantaged groups by invalidating legislative classifications that afford privileges to some groups and not to others. North Dakota[3] and Arizona[4] are two such states.

In North Dakota, as under federal Equal Protection analysis, strict scrutiny is triggered in cases involving "inherently suspect" or "fundamental interest," classifications, and rational basis review exists at the other end of that spectrum. *Hanson v. Williams County*, 389 N.W.2d 319, 323 (N.D. 1986). However, the North Dakota Supreme Court left open a much wider range of cases than its federal counterpart in which intermediate review—that is, requiring a "close correspondence between statutory classification and legislative goals"—might be applied. *Id*. The North Dakota court has never established a bright line test for when the intermediate standard should apply, but has noted that it most often applies rational basis review in economic and social matters, and the intermediate standard of review is usually applied when "an important substantive right" is involved. *Id* at 325. In *Johnson v. Hasset*, 217 N.W.2d 771, 775 (N.D. 1974), the court applied intermediate review and held unconstitutional a state automobile

[3] The North Dakota Supreme Court calls Art. I, §21, the equal protection provision in the state constitution, and describes analysis done for challenges under this provision as equal protection analysis, but the language in the provision is that of a privileges and immunities clause and the methodology used by the Court is significantly different than federal Equal Protection analysis. *Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986).

[4] The Arizona Supreme Court has, for the most part, viewed Article II, § 13 as the state counterpart to the Equal Protection Clause of the Fourteenth Amendment, *Standhardt v. Superior Court*, 77 P.3d 451, 464 n.19 (Ariz. 2004), but the court, in at least once notable instance, has departed from typical Equal Protection analysis in order to invalidate a classification scheme that would have survived under Equal Protection rational basis review.

guest statute because it created an arbitrary distinction between paying and nonpaying guests—a distinction not justified by the purposes of the statute. *Id*. *See also Hanson*, N.W.2d at 328; *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978). The court found that in these cases, the right to recover for personal injuries is an "important substantive right." *Hanson*, N.W.2d at 325. Applying this logic to this case, the right to vote could easily be considered an "important substantive right," and classifications that restrict that right could rightfully be subject to more exacting scrutiny than mere rational basis.

Along the same lines, in *Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002), the Supreme Court of Arizona held unconstitutional a state policy of funding abortions necessary to save the life of the mother, but not funding abortions necessary to save the health of the mother, finding that it violated the equal privileges and immunities clause of the Arizona Constitution. *Id*. at 34. The Arizona Supreme Court began its analysis by explicitly rejecting the precedent set by the United States Supreme Court in *Harris v. McRae*, 448 U.S. 297, 302 (1980). Using only rational basis review, the Court in *McRae* upheld the constitutionality of the Hyde Amendment, which prohibited the use of federal funds through Medicaid to reimburse the cost of an abortion unless the procedure was necessary to save the life of the mother or was for the victims of incest or rape—not allowing reimbursement for abortions necessary to preserve the health of the mother. *Id*. at 310-11. The Arizona court in *Simat* rejected this analysis.

Like this Court did in *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003), Arizona used its Equal Privileges and Immunities Clause to invalidate advantages conveyed only to a select few in the context of abortion. In *Simat*, the Arizona Supreme Court exhibited a more broadly-encompassing understanding of the fundamental right to abortion than did its federal

counterpart under similar factual circumstances. *Simat*, 56 P.3d at 32 n.2. The Arizona court applied strict scrutiny because they found that a fundamental right—the right to choose an abortion—was at stake, both under the Arizona and United States Constitutions. *Id.* at 33. Having decided to apply strict scrutiny, the Arizona Court held that once the state had chosen to fund abortions for one group of indigent, pregnant women, for whom abortions are medically necessary to save their lives, it may not deny the same option to another group of indigent, pregnant women for whom abortion is medically necessary to save their health.[5] *Id*. at 32.

Two aspects of the Arizona approach are informative. First, the Arizona court was willing to identify a fundamental right at stake and require the application of heightened scrutiny where the United States Supreme Court was not willing to do so, and such an approach could easily be applied here. In the context of abortion funding, the Arizona Court found that its state constitution offered more protection than its federal counterpart was interpreted to offer in *McRae*. This Court should find that the Indiana Constitution offers more protection than its federal counterpart was interpreted to offer in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), as it predicted it would in *Collins*, 644 N.E.2d at 81 ("This Court anticipates that our independent state privileges and immunities jurisprudence will evolve in future cases facing Indiana courts to assure and extend protection to all Indiana citizens in addition to that provided by the federal Fourteenth Amendment").

Second, the Arizona Court held that once the state decided to provide medical care for indigent, pregnant women, the state's Equal Privileges and Immunities Clause demanded a tight

[5] This Court came to the same general conclusion as the Arizona Supreme Court, although through a less expansive analysis. This Court held that a statute allowing reimbursement only for abortions to save the mother's life was not facially unconstitutional under Article I, Section 23, but that as applied, the privileges and immunities clause required the state to pay for abortions for women whose pregnancies created a "serious risk of substantial and irreversible impairment of major bodily functions." *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003).

fit between the stated objectives and the means used to achieve those objectives. Distinctions made between indigent, pregnant women whose lives were at risk and indigent, pregnant women whose health was at risk did not meet that threshold. The weakly justified distinctions made in the Arizona case could easily be analogized to the weakly justified distinctions made between groups of voters in this case.

IV. Conclusion

The Equal Privileges and Immunities Clause of the Indiana Constitution provides clear direction for this Court in this case—the legislature cannot grant a select group of citizens privileges that it would not grant to all citizens. Indiana, like other states such as Oregon and Washington, has adopted a mode of review very different from the typical review applied in federal Equal Protection cases. *Collins*, 644 N.E.2d at 80. There is a distinct trend among states that have chosen not to use federal Equal Protection review when analyzing challenges made under the states' privileges and immunities clauses. This trend is one of more critical review and one of intolerance for classifications like the exemptions in the Indiana Photo ID law. The Indiana legislature has concluded that the integrity of the ballot does not depend in all situations on voters producing a photo ID. Having made that judgment, the legislature cannot impose that requirement on some voters but not others. Indiana would be out of step with this trend were it to allow the photo ID law, with its discriminatory and arbitrary classifications and ensuing privileges, to stand. This Court must use more exacting review when evaluating this piece of legislation. This Court must protect the groups disadvantaged by this capricious law and find the law in violation of Indiana's Equal Privileges and Immunities Clause.

Respectfully submitted this 9th day of November, 2009.

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CERTIFICATE OF SERVICE

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