UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218:

WILLIAM CRAWFORD, et al.,	)	Appeal from the United States
	)	District Court for the Southern
Plaintiffs-Appellants,	)	District of Indiana, Indianapolis
	)	Division
v.	)	
	)	Cause below: No. 1:05-cv-634
MARION COUNTY ELECTION BOARD,	)	
	)	
Defendant-Appellee.	)	Hon. Sarah Evans Barker, Judge

No. 06-2317:

INDIANA DEMOCRATIC PARTY, et al.,	)	Appeal from the United States
	)	District Court for the Southern
	)	District of Indiana, Indianapolis
Plaintiffs-Appellants,	)	
	)	
v.	)	Cause below: No. 1:05-cv-634
	)	
TODD ROKITA, et al.,	)	
	)	
Defendants-Appellees.	)	Hon. Sarah Evans Barker, Judge

REPLY BRIEF OF APPELLANTS CRAWFORD, UNITED SENIOR ACTION OF INDIANA, INDIANAPOLIS RESOURCE CENTER FOR INDEPENDENTLIVING, CONCERNED CLERGY OF INDIANAPOLIS, INDIANAPOLIS BRANCH OF THE NAACP, INDIANA COALITION ON HOUSING AND HOMELESS ISSUES, JOSEPH SIMPSON

Kenneth J. Falk
Counsel of Record
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059 ext. 229
fax: 317/635-4105
e-mail: kfalk@aclu-in.org
Attorney for Appellants in No. 06-2218

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Summary of the Argument

The appellants in No. 06-2218, Representative Crawford, United Senior Action of Indiana ("USA"), Indianapolis Resource Center for Independent Living ("IRCIL"); Concerned Clergy of Indianapolis ("CCI"), Indianapolis Branch of the NAACP ("NAACP"), Indiana Coalition on Housing and Homeless Issues ("ICHHI), and Joseph Simpson (the entire appellant group is referred to as "Rep. Crawford and the interested groups"), have standing to bring this action. Both Rep. Crawford and Joseph Simpson are forced, against their will, to display their identifications as requirements to vote. This affects their freedom of action and is injury. *People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 171 (7th Cir. 1984). Moreover, as candidates who have been told by prospective voters that they will be discouraged from voting because of SEA 483, they have standing as harm to a candidate's supporters establishes standing for the candidate. *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003). The NAACP, CCI, and IRCIL all will have to expend their limited resources in response to SEA 483 and the statute frustrates the purposes for which the organization was formed. This gives them standing. *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982). Additionally, the groups have members who will be injured by the statute and this gives them standing as well. *Bensman v. United States Forest Service*, 408 F.3d 945, 949, n. 2 (7th Cir. 2005).

Any statute imposing a severe burden on the right to vote is subject to strict scrutiny and therefore must be narrowly drawn to advance a compelling state

interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). SEA 483 imposes such a severe burden. It is not narrowly drawn to meet the State's interest in combating fraud and in reassuring the electorate that elections are legitimate.

SEA 483 also violates 42 U.S.C. § 1971(a)(2)(A). The statute prohibits the use of any different voting standards, even those imposed by state statute, regardless of whether the discrimination involves race. Application of the proper analysis to determine if Congress intended a statute to be enforceable by private persons, *see e.g., Blessing v. Freestone*, 520 U.S. 329 (1997), compels a conclusion that the statute is enforceable by the appellants in this case. Given that SEA 483 imposes different standards for registered voters who vote in-person, it violates 42 U.S.C. § 1971(a)(2)(A).

The Voter ID law violates Art. 2, § 2 of the Indiana Constitution. The statute imposes a new specific requirement for persons to vote. However, creating new qualifications for the exercise of suffrage is beyond the constitutional authority of the Indiana legislature.

Argument

I. Introduction

SEA 483 creates one of the most, if not the most, rigorous identification requirements in the United States for most persons seeking to exercise the fundamental right by voting in-person.[1] This, combined with the onerous requirements imposed by the Bureau of Motor Vehicles ("BMV") on persons seeking

[1] *See*, Amicus Brief of Brennan Center for Justice at 19-23.

the most likely forms of voter identification, creates a situation where some Indiana residents will not be able to vote or will be able to vote only with great difficulty.

In response to the law and the burdens it imposes on prospective voters, the Marion County Election Board ("County") and the Intervenor Appellee State of Indiana (along with appellees Rokita, King and Robertson in No. 06-2317) ("State"), argue that Rep. Crawford and the interested groups do not have standing to bring this action despite the fact that all of the appellants are injured in various ways by the challenged voter identification law. The County and State also argue that the law does not impose a severe burden on the right to vote and any severe burden is justified by the required strict scrutiny. The State and County's arguments are erroneous as are their arguments that the law does not violate the Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A) and the Indiana Constitution, Art. 2, § 2.

II. Rep. Crawford and the interested groups have standing to bring this claim

A. Rep. Crawford and Joseph Simpson have standing as both prospective voters and candidates

1. Rep. Crawford and Joseph Simpson have standing as voters because they are forced to display their identification in order to vote

The County argues that the fact that Rep. Crawford and Joseph Simpson are forced to display their identifications in order to vote is not injury, but merely an amorphous objection to the law.[2] However, as the County notes in its brief (at 15), this Court has specifically held that the injury necessary to bestow standing must

[2] The County and State have incorporated each others arguments. Reference will be made to the specific brief in which the argument was made, either State or County.

"affect one's possessions or bodily integrity or freedom of action, however expansively defined . . . and not just one's opinions, aspirations or ideology." *P.O.W.E.R.*, 727 F.2d at 171. A person who lives in California and objects to SEA 483 does not have standing because he has only an opinion, aspirational, or ideological interest. However, Rep. Crawford and Joseph Simpson must have and display identification to vote. Their freedom of action has been circumscribed. This is injury and gives them standing. *Id.*

2. Rep. Crawford and Joseph Simpson have standing as candidates

"The BMV is aware that there are persons who do not currently have a driver's license or identification card and who are, or who will be, eligible to vote at the next election." (Entry at 19, Appendix of Rep. Crawford and the interested groups ("App.") A-21). The BMV, however, does not have an estimate of the precise number. (*Id.*) A 2005 survey released by AARP disclosed that 3% of Indiana registered voters surveyed over the age of 60 do not have either a valid license or identification and 30% of these are not very likely or not likely at all to obtain the required identification, even if it is necessary in order to vote. (Appellants' Joint Appendix at A-146).[3] Rep. Crawford believes that within the economically

[3] The trial court noted, in a reference repeated by the County and State, that the expert employed by the Democrats in this case, whose findings were otherwise rejected by the court, found that only 1% of Indiana's voting age population was without BMV issued identification. (Entry at 51, App. A-53). As the Democrats note in their reply brief, at note 8, the trial court misinterpreted the data. The Task Force Report accompanying the 2001 Report of the National Commission on Election Reform co-chaired by Presidents Gerald R. Ford and Jimmy Carter, estimated that some "6 to 10 percent of the American electorate does not have official state identification." *To Assure Pride and Confidence – Task Force Reports to*

challenged district he has represented since 1972 there are persons who do not have the required identification to vote and he has been told this at town hall and similar meetings. (Crawford Deposition, Attachment 17 to Plaintiffs' Motion for Summary Judgment ["Attachment"] at 10-11, 22, 29-30, R. Doc. 65). Joseph Simpson also has been told by some of his constituents that they object to the law and he is aware that persons will not vote rather than face poll challenges. (Simpson Deposition, Attachment 16 at 17-19, 35, R.Doc. 64).

Rep. Crawford and Joseph Simpson are therefore candidates who represent prospective voters who will be discouraged from voting because of SEA 483. The County argues that this is not sufficient injury to give a candidate standing and that candidates can have standing only if they are suffering a direct injury different than that suffered by prospective voters. Yet, this Court in *Majors, supra,* held to the contrary. There the candidate was faced with an injury different than his supporters, but this Court made it clear that this independent injury was not necessary as it held that the harm to the candidate's supporters established Article III standing for the candidate. 317 F.3d at 722. This is not an evisceration of the requirement of direct injury but merely a recognition of the direct linkage between a supporter and a candidate so that the injury to the voter naturally injures the

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Accompany the Report of the National Commission on Election Reform, Chapter VI-Verification of Identity, p. 4 (2001), http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf (last visited July 25, 2006).

candidate. *See, e.g., Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973). "[C]andidates for public office have been permitted to assert the rights of voters." 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.9 (2nd ed. 1984 and Supp. 2003**)** *citing*, at n. 68, *Majors, Mancuso,* and *Walgren v. Board of Selectmen of the Town of Amherst*, 519 F.2d 1364, 1365, n. 1 (1st Cir. 1975).

B. The interested groups have standing

1. Inasmuch as the NAACP, CCI and IRCIL will have to expend limited resources to respond to SEA 483 and inasmuch as SEA 483 is directly contrary to the mission of these organizations, they have been injured and have standing

Under the rule established by *Havens,* "an organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices," *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 360 (7th Cir. 1999), and this frustrates the purposes for which the organization was formed. *See, e.g., El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991). The County does not disagree with this, but instead argues that SEA 483 does not affect the organizations' basic purposes and that the organizations have not satisfied the requirement that they devote resources to counteract SEA 483. This is erroneous.

The NAACP advocates for the advancement of minorities and, although non-partisan, is dedicated to assisting persons in exercising their right to vote. (Bohannan Deposition, Attachment 10 at 10, 47, R.Doc. 62). The County argues that SEA 483 does not directly conflict with the NAACP's purposes because the NAACP is concerned only with the rights of African-Americans. Clearly, any law which

impacts on the voting rights of citizens, including minorities, falls directly within the NAACP's purposes. *See e.g., NAACP Philadelphia Branch v. Ridge*, 2000 WL 1146619, *2 (E.D.Pa. 2000) (NAACP had associational standing to challenge a voter registration law that banned some ex-felons from voting for a period of time following release from prison, because, among other things, the law affected African-American as well as others' voting rights and "[t]he NAACP has a long history of protecting African Americans' voting rights.")

The County states that SEA 483 is of no interest to CCI inasmuch as the law does not affect indigent persons and CCI's primary purpose is not to advance the right to vote. CCI is an advocacy organization dedicated to advancing, and advocating for, issues of interest to minorities and the poor and in that capacity it advocates for voting rights and that persons exercise their rights to vote to the greatest extent possible. (State Appendix and Exhibits in Support of Joint Motion For Summary Judgment, Ex 66 , Interrogatories 4, 8, R.Doc. 87; Oakley Affidavit, Supplemental Attachment 3, ¶2, R.Doc. 100). At this point, it is unclear if the cost of a birth certificate necessary for BMV identification will be deemed to be a fee within the portion of SEA 483 that allows an indigent voter to appear at the office of the Clerk or Election Board and have a provisional ballot counted without identification. (*See,* Indiana Code § 3-11.7-5-2.5(c)(2)(A); Sadler Deposition, Attachment 1, R.Doc. 57 at 37-39). Even if it is, an indigent person will still have to vote by provisional ballot and then make the trip to the office of the Clerk of Election Board to vote. SEA 483 affects indigent persons.

IRCIL is a self-help advocacy organization with, and for, persons with disabilities that is charged with representing disabled persons on issues that directly affect them and is dedicated to allowing persons with disabilities to be normalized into all aspects of society, including voting at polling sites (Madill Deposition, Attachment 9 at 6, 24, 76, R.Doc. 62). Even though, as noted by the County, IRCIL is not a voting rights organization, SEA 483, which makes it burdensome for disabled persons to vote at polling places, directly conflicts with IRCIL's explicit purpose.

The County argues that standing is not available under *Havens*, because, regardless of the purpose of the organizations, there is no evidence that they have expended any resources in response to SEA 483. However, the NAACP has indicated that it will now be engaging in the expense of educational and outreach efforts to inform the public about the law. (Bohannan Affidavit, Supplemental Attachment 5, ¶¶ 1, 3, 4, R. Doc. 100). Although this expense had not occurred at the time of the filing of summary judgment papers, it is clear that the NAACP is committing to incurring these expenses and this certainty of future injury is sufficient to demonstrate standing. *See e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) CCI will now be "expend[ing] its limited financial resources to assist persons with paying the costs of birth certificates so they can vote" and, IRCIL will be devoting "more of its staffing resources to working with clients in order to try to collect the information necessary to obtain an identification card which . . . will inevitably mean that staff will be less able to devote their time to other issues of

important to IRCIL's clients." (Entry at 37-38, A-39-A-40). This likelihood of future injury also supports standing. *See e.g., Palmer v. City of Chicago*, 755 F.2d 560, 572 (7th Cir. 1985). Inasmuch as the three organizations will be expending resources to combat the effects of SEA 483, and inasmuch as this statute directly impacts and frustrates the organizations' purposes, they have standing under *Havens*.

2. The groups also have standing because their members have standing

An organization has standing if "its members can sue in their own rights, the interests at stake are germane to the organization's purpose, and neither the claim nor the relief requested require the participation of individual members in the lawsuit." *Bensman*, 408 F.3d at 949, n. 2. The County argues that this standard is not met because the organizations have not shown that they have members who would have standing to sue in their own names. This is erroneous.

As Rep. Crawford and the interested groups demonstrated in their original brief the fact that a member of CCI (Rev. Dinkins) and a member of the NAACP (Rod Bohannan) will vote and object to the physical act of producing their identification creates standing for the organization. Moreover, there are unnamed members of the NAACP who have indicated that the law will prevent them from voting. (Bohannan Deposition, Attachment 10 at 18, R.Doc. 62). USA also has members who will be discouraged from voting because of the new statute. (Niemier Deposition, Attachment 7 at 23-24, 38-39, R.Doc. 62).

Contrary to the County's argument, ICCHI does have members. Its members include both providers of services to homeless persons and homeless persons

themselves. (Entry at 38, App. A-40). *See e.g., Capital Area Immigrant's Rights Coalition v. United States Department of Justice*, 264 F.Supp.2d 14, 20-22 (D.D.C. 2003) (finding standing for immigrants rights group that included as members advocates, community organizations, and immigrants, including those represented in legal proceedings). The evidence is clear that homeless persons, some of whom are members of ICCHI by virtue of the fact that they receive services from provider agencies of ICCHI, have extreme difficulty in obtaining photo identification. (Brief of Rep. Crawford and the interested groups at 23-24).

The County concedes that there is no requirement that actual members be named, *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999), but argues that *Stincer* supports its argument that the NAACP and the other groups do not have standing. In *Stincer* there was no evidence that the interested group had clients who were affected by the issue in the case. 175 F.3d at 887. Here, there is evidence that the groups have members who will be injured. The interests at stake are certainly germane to the organizations and there is no reason that the participation of individual members is required. Standing is present.

III. SEA 483 is unconstitutional because it imposes a severe burden on the right to vote without the necessary justification

A. SEA imposes a severe burden on persons seeking to vote in-person and the law is subject to strict scrutiny

The State argues that exacting scrutiny should not be leveled at a law like SEA 483 that it characterizes as a procedural device, and not one creating substantive voter qualifications. However, this substantive/procedural distinction is illusory and in the eye of the beholder and finds no support in the case law. For

example, an argument could certainly be made that a poll tax is a procedural device, not modifying voter qualifications. But, a poll tax is certainly subject to the most rigorous scrutiny. *See e.g., Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

The test set out in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) and in *Burdick,*, 504 U.S. at 434, does not ask whether the burden on the right to vote can be deemed to be substantive or procedural, but instead focuses on the extent of the burden. Thus, if voting rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434. (internal citation omitted). The restrictions imposed by SEA 483 are severe and the law does not pass the required strict scrutiny.

The State argues that SEA 483 does not impose a severe burden on voting rights, repeating the erroneous claim that 99% of registered voters have identification (see note 3, *supra*) and arguing that any claim of injury is speculation. However, it is not conjectural or speculative that it is extremely difficult, if not impossible, for some persons to obtain the identification or license that is necessary to vote in-person. It is not conjectural that:

- The BMV is aware that there are persons in Indiana of voting age who do not have licenses or identification cards.
- In order to vote in-person those persons will have to produce documents within the multiple categories of documents demanded as identification by the BMV before a license or identification card can be issued.
- This documentation demand by the BMV is onerous. Fully 60% of the persons that one BMV employee sees each week who are attempting to obtain license

or identifications cannot because they do not have the required documentation.

- Homeless persons frequently have no identification at all and therefore do not have the underlying information necessary to procure a birth certificate, regardless of cost.

- Elderly and disabled voters may also not have valid BMV issued identification.[4]

- It may take months to receive birth certificates if the prospective voter was born out of state.

- Even if the cost of a birth certificate is deemed to be a fee that can be waived under Indiana Code § 3-11.7-5-2.5(c)(2)(A), there are other, non-waivable, fees attendant to trying to obtain identification and secure the right to vote.

(Brief of Rep. Crawford and the interested groups at 14-20). It is also not speculative that the reaction of many voters to being challenged is to leave the polls rather than face the hassle of the challenge process, let alone the burden of making the multiple trips necessary to obtain supporting documentation, obtain BMV issued identification, and then travel to the office of the Clerk or Election Board to fill out the necessary papers to have the provisional vote counted, days after the election. (Brief of Rep. Crawford and the interested groups at 20-21).

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[4] It is true that elderly and disabled voters may avoid the burden of the identification requirements by voting absentee by mail, an option that is not automatically available to other potential voters. Indiana Code § 3-11-10-24. And, it is true that this Court noted in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), *cert. denied*, 544 U.S. 923(2005), that a particular voter has no right to a specific method of voting. On the other hand, "because absentee voters vote before election day, often weeks before . . . they are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign." 385 F.3d at 1131. There is therefore good reason for a person otherwise eligible to vote absentee to want to vote in-person.

The burden imposed on some voters by SEA 483 is not minor. Instead, the law erects significant, if not impenetrable, obstacles for persons hoping to vote in-person.

B. SEA 483 is not narrowly drawn to meet compelling state interests

The State argues that it has a compelling interest in combating fraud and in reassuring voters that election results are legitimate and that SEA 483 is narrowly tailored to addressing those compelling interests. Conceding the compelling nature of the interests articulated by the State, SEA 483 fails because it is not narrowly tailored to meet those interests.

The State ultimately misconstrues the requirement of narrow tailoring. It is simply not enough to claim fraud. "The Court must examine the extent to which the State's interest in preventing voter fraud makes it necessary to burden the right to vote." *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D.Ga. 2005). The same applies to the State's rationale of reassuring voters as to the legitimacy of elections. As a plurality of the Supreme Court noted recently in striking down Vermont's Act 64's contribution limits as violating the First Amendment, "[w]e consequently must examine the record independently and carefully to determine whether Act 64's contribution limits are 'closely drawn' to match the State's interests." *Randall v. Sorrell*, --U.S.--, 126 S.Ct. 2479, 2494 (2006) (plurality opinion). SEA 483 is not closely drawn to match the State's articulated interests.

The State and the *amicus* American Center for Voting Rights Legislative Fund cite to articles and other materials indicating that there has been in-person

fraud in other states and the *amicus* Brennan Center counters the significance and accuracy of these materials. Yet, it remains undisputed that there is no evidence of in-person voter fraud in Indiana. And, to the extent that Indiana's inflated voter rolls are fertile grounds for in-person fraud, that problem has been resolved by the settlement of a lawsuit brought by the United States against the State of Indiana and the Co-directors of the Indiana Election Division, requiring the defendants to comply with their duties under the National Voter Registration Act of 1993 ("NVRA"),42 U.S.C. § 1973gg-6 to purge ineligible voters from the list. *See,* Consent Decree and Order in *United States of America v. State of Indiana, et al.* , No. 1:06-cv-1000 RLY-TAB (S.D.In. 2006) (Joint Supplemental Appendix of Appellees at 1-8).[5]

The State concedes in its brief (at 40) that maintaining voter lists effectively is an effective fraud prevention device. SEA 483 cannot be deemed to be narrowly drawn where the legislature opted to ignore purging voter lists as required by NVRA and instead chose a solution that imposed a severe burden on the right to vote. "[R]estrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th

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[5] The State argues in its Brief (at 8) that it has no authority to remove voter registrations from the rolls. However, in the Consent Decree it concedes that the NVRA imposes requirements to maintain voter registration lists and that it has failed in its duty to "conduct an adequate general program of list maintenance . . . As a result, the State has violated the registration list maintenance obligations under Section 8 of the NVRA, 42 U.S.C. § 1973gg-6." (*Id.*) (Joint Supplemental Appendix of Appellees at 2).

Cir. 1991) (finding door-to-door solicitation ordinance to be unconstitutional). To this extent the law is overinclusive and not narrowly tailored in that "a narrowly tailored regulation . . . does not sweep too broadly." *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir. 2005), *cert. denied*, -- U.S.--, 126 S.Ct. 1165 (2006).

The State does not explain how the existing anti-fraud mechanisms that are in place, Indiana's criminal law and signature comparison system, are inadequate to address whatever fraud concerns Indiana still has after its agreement to comply with NVRA and purge the voter rolls. Nor does Indiana answer the question of how the onerous requirements of SEA 483 can be deemed to be necessary given that the identification requirements imposed go so much further than the identity requirements imposed under the Help America Vote Act, 42 U.S.C. § 15483(b), which recognize that other forms of identification, other than state or federally issued voter ids, can be used to prove identity.

The State argues that the fact that SEA 483 regulates in-person voting, leaving mail-in absentee balloting unregulated, is not relevant. It is. Even if absentee balloting and in-person voting are deemed to be different so that there could constitutionally be different safeguards, the fact remains that there is no evidence of in-person fraud in Indiana and there is ample evidence of absentee balloting fraud. Moreover, the fraud potential of absentee voting obviously outweighs that of in-person voting. *See e.g., Griffin,* 385 F.3d at 1130-31. ("Voting fraud is a serious problem in U.S. elections generally and one with a particularly

gamey history in Illinois . . . and is facilitated by absentee voting. . . In this respect absentee voting is to voting in person as a take-home exam is to a proctored one.") Given that the Indiana legislature, in the name of fraud prevention and voter security, chose only to burden in-person voting, leaving absentee voting unfettered and unprotected, SEA 483 cannot be deemed to be narrowly tailored to protect against fraud. *See e.g., Republican Party of Minnesota v. White*, 416 F.3d at 751. ("A narrowly tailored regulation . . . does not leave significant influences bearing on the [State's] interest unregulated (is not underinclusive).")

In *Munro v. Socialist Workers Party,* 479 U.S. 189, 195-96 (1986), the Court, in upholding a statute denying ballot access to minority-party candidates receiving less than 1% of the primary vote, noted that "[l]egislatures, we think, should be able to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights of voters." Indiana's response to the perceived potential problem of fraud and the need for voter reassurance was to enact a law that is neither reasonable nor avoids significantly impinging upon the constitutionally protected rights of voters. The law is unconstitutional.[6]

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[6] The State argues that proof of the narrow tailoring of the law is that nursing home residents are excepted from its identification requirements if they vote in the nursing homes, indigent voters can cast provisional ballots and sign affidavits to that effect in the offices of the Clerk or Election Board. However, removing identification requirements for nursing home residents whose polling places are within the nursing homes merely emphasizes the fact that the focus of a narrowly tailored identification law should be on whether the individual can be identified, not on whether the individual possesses a particular form of identification to the exclusion of all else. And, providing a provisional ballot procedure does not remove

IV. The challenged statute violates 42 U.S.C. § 1971(a)(2)(a)

The County raises a number of arguments in opposition to the claim that SEA 483 violates 42 U.S.C. § 1971(a)(2)(a). The argument are not well-taken and inasmuch as SEA 483 imposes different standards on in-person voters as to their qualifications to vote, the state law is unlawful.

A. Section 1971 prohibits the application of different voting standards, regardless of whether the discrimination is based on race

The County argues that Section 1971 can not be used to strike down a statute that applies different voting standards, but can only be used to challenge racially discriminatory application of otherwise neutral state voting laws. This is incorrect.

There is nothing in the text of Section 1971 that supports the County's argument that it does not apply to facial challenges to state statutes. Section 1971 was added in the Civil Rights Act of 1964, Public L. 88-352, Sec. 101, 78 Stat. 241 (1964). Congress was well aware that equality in voting rights had been frustrated not just by local practices but by discriminatory devices employed by states themselves. *See e.g., State of South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (referring to Voting Rights Act of 1965, 42 U.S.C. § 1973). The language of § 1971 should be construed "liberally to fulfill the protective aspect of American Federalism," *United States v. McLeod*, 385 F.2d 734, 748 (5th Cir. 1967), and

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the unwarranted burden on the voter, particularly when the voter must not only deal with the challenge procedure and delay and vote provisionally, but must then do whatever is necessary to obtain identification and go to the office of the Clerk or Election Board within the prescribed time. The availability of an indigency exception does not assist with narrow tailoring because the voter will still have to undergo the burden of the challenge and going to the Clerk or Election Board. These aspects of the law do not modify its underinclusiveness and overinclusiveness.

§1971(a)(2)(A) must be construed to apply to discriminatory state laws as well as local practices that place those registered to vote on unequal footing.

The discrimination outlawed by § 1971(a)(2)(A) is not just racial discrimination. Section 1971(a)(1) specifically notes that it applies to denial of voting rights based on race. However, 42 U.S.C. § 1971(a)(2) contains no such limitation and, as previously cited in the original brief filed by Rep. Crawford and the interested groups (at 48-49), numerous cases have found that the statute applies to more than racial discrimination. A cardinal rule of statutory construction is that courts have the "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker,* 533 U.S. 167, 174 (2001). If § 1971(a)(2) is deemed to apply only to discrimination based on race, the entire section would be surplusage inasmuch as it would prohibit no more conduct than prohibited by § 1971(a)(1). The statute cannot be read this way. Congress did not make racial discrimination a requirement to invoke § 1971(a)(2).

B. The statute is enforceable through private persons

The statute provides that the Attorney General of the United States may enforce it through a civil action "for preventive relief." 42 U.S.C. § 1971(c). As the County notes (at 41-42), a number of cases have held that because § 1971 is enforceable by the Attorney General, individual citizens may not privately enforce the statute. *See e.g., McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), *cert. denied*, 532 U.S. 906 (2001); *Spivey v. Ohio*, 999 F. Supp.987, 996 (N.D. Ohio 1998); *Willing v. Lake Orion Community Schools Board of Trustees*, 924 F.Supp. 815, 820

(E.D.Mich. 1996); *McKay v. Altobello*, 1996 WL 635987, *1 (E.D.La. 1996). These cases contain no analysis except to say that the statute provides enforcement by the Attorney General and therefore precludes private enforcement.

This is problematic for two reasons. First, the Supreme Court has specifically held that other statutes subsumed within the Voting Rights Act are in fact enforceable, despite the fact that those sections provided for enforcement by the Attorney General of the United States. Thus, in *Allen v. State Board of Elections,* 393 U.S. 544, 549 (1969), the Court explicitly found that the private parties were entitled to seek declaratory relief that the state election laws and regulations violated 42 U.S.C. § 1973c which required pre-clearance for certain states seeking to change voting procedures. The Court allowed the private cause of action despite the fact that the only statutory authority for filing litigation was given to the Attorney General. 42 U.S.C. § 1973j(d). The Court found that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556. Similarly, in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality decision), the plurality found that 42 U.S.C. § 1973h, prohibiting poll taxes, could be privately enforced, despite the fact that the statute only gave authority to the Attorney General to initiate actions to enforce the statute. 42 U.S.C. § 1973h(b). 517 U.S. at 230-235. The fact that, as noted by the County, the Attorney General agreed that these statutes could be privately enforced, does not alter the fact that the Supreme Court has held that merely because a voting rights

statute provides only for enforcement by the Attorney General, does not preclude a finding that the statute could be privately enforced.

Secondly, the analysis of whether a federal statute is enforceable by private persons through 42 U.S.C. § 1983 requires a determination of Congressional intent and this is decided by determining whether the statute creates enforceable rights; whether the right is not too vague or amorphous to enforce; and whether the statute unambiguously imposes a binding obligation. *Blessing v. Freestone*, 520 U.S. 329 (1997); *Gonzaga University v. Doe*, 536 U.S. 273 (2002).[7] Merely because enforcement by the Attorney General is allowed by the statute does not excuse a court from utilizing the proper analysis to determine Congressional intent.

Following this analysis, the court in *Schwier v. Cox,* 340 F.3d 1284, 1294 – 1298 (11th Cir. 2003), found that § 1971(a)(2)(B) was enforceable by private parties through a § 1983 action. The court first concluded that the history of § 1971 did not evince an intent by Congress to preclude a § 1983 claim. 340 F.3d at 1294-1296. Specifically, the provision for Attorney General enforcement was added in 1957. *Id.* However, the text of § 1971(a) predates the recodification in 1957 and this earlier version, 8 U.S.C. § 31, was enforceable by private parties. *See, e.g., Smith v. Allwright*, 321 U.S. 649, 651 (1944). *Schwier*, 340 F.3d at 1295. Moreover, the

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[7] A statute will also be deemed not to be enforceable under 42 U.S.C. § 1983 if it creates "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. This principle cannot apply here because the statute does not provide a comprehensive scheme of enforcement.

legislative history surrounding the 1957 recodification supports the fact that Congress did not intend to foreclose enforcement through § 1983. 340 F.3d at 1296.[8] The court further noted that Congress' intent could be discerned from the § 1971(d)'s language that allows district court's to have jurisdiction of actions under the statute "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies." "Appellants argue that this language could not have applied to the Attorney General and thus was meant to 'remove[ ] roadblocks for the previously authorized private rights of action under § 1971.' We agree." 340 F.3d at 1296.

Having found that Congress did not intend to foreclose enforcement by private individuals through § 1983, the *Schwier* court analyzed the language of § 1971(a)(2)(B) and found that it created specific and mandatory rights. *Id.* The same is true here. Section 1971(a)(2)(A) explicitly "creates person-specific rights." *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005). The individual voter is guaranteed the right not to have different voting procedures applied. The statute is written as a prohibition against a person acting under color of state law, "but the focus of the text is nonetheless the protection of each individual's right to vote." *Schwier*, 340 F.3d at 1297. The right is specific; the right not to be subjected to different voting procedures. Finally, the language is clearly mandatory as §

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[8] The *Schwier* court noted that in the 1957 House Report concerning the change in the law to allow the Attorney General to bring suit the Committee noted that the purpose of this addition was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States H.R.Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1966." 340 F.3d at 1295. (Court's emphasis).

1971(a)(2) states plainly, "No persons acting under color of state law shall . . ." Therefore § 1971(a)(2)(A) creates rights enforceable by Rep. Crawford and the interested groups through 42 U.S.C. § 1983.

C. SEA 483 violates 42 U.S.C. § 1971(a)(2)(A)

The County does not deny that SEA 483 imposes different standards for registered voters who are voting in-person, depending on whether they are voting in a nursing home where they reside or if they are voting elsewhere. However, it erroneously argues that there is no statutory violation because the nursing home exception is reasonable and legitimate.

The language of § 1971(a)(2)(A) does not allow for "reasonable" and "legitimate" application of different standards for voting for persons found to be otherwise qualified to vote. It prohibits all such different standards. Moreover, the nursing home exception simply is not reasonable. The County argues that because nursing homes are extensively regulated persons working the polls will know the identity of those voting. However, the poll workers will not be nursing home employees and there is no reason to believe that nursing home employees will be camped out at the polls for the entire day so that nursing home residents can be identified when, and if, they show up to vote.

Section 1971(a)(2)(A) is explicit. In determining whether a voter is qualified to vote, different standards are not to be applied to those otherwise eligible to vote. SEA 483 applies such different standards and is therefore unlawful.[9]

[9] The County argues that if SEA 483 is deemed to violate § 1971(a)(2)(A), allowing disabled or elderly voters to vote absentee would therefore be unlawful.

V. SEA 483 violates Art. 2, § 2 of the Indiana Constitution

The County does not disagree with the argument that Article 2, § 2 precludes the State from adding new substantive requirements for voters. Nor could it so argue. "The principle is elementary that when the constitution defines the qualification of voters, that qualification cannot be added to or changed by legislative enactment." *Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890). The County argues that SEA 483 merely regulates elections, imposing no substantive requirements, and therefore does not offend Art. 2, § 2. It argues further that even if the law prevents persons from voting because they are unable to obtain the BMV issued identification, this regulatory "inconvenience" is not sufficient to create a constitutional violation. Again, the County errs.

The County views SEA 483 merely as an identification requirement that facilitates the right to vote, arguing it is no different than any other procedural requirement. But, SEA 483 is clearly much more than an identification requirement. Absent the prescribed form of identification, the fact that the voter is actually identified is legally irrelevant. It is difficult to argue that a new voting requirement, that is concerned with more than mere identification, has not been created when a mother whose children are working the polls where she is voting, but who does not have the identification required by the new law, is denied the

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The trial court concluded that in-person and absentee balloting was sufficiently different that the State could properly have "different standards, practices or procedures" for these inherently different types of voting. (Entry at 115-116, App. A-117-A-118). Heeding the district court, Rep. Crawford and the interested groups are limiting their argument to only the different standards that SEA 483 imposes on in-person voting.

right to cast a regular ballot. "There are no provisions within our constitution which expressly authorize this limitation upon the right of franchise as guaranteed by Article 2, § 2 of the Indiana Constitution." *State ex. rel. McGonigle v. Madison Circuit Court*, 193 N.E.2d 242, 249 (Ind. 1963).

Art. 2, § 2 does not allow an assessment of the reasonableness of a new substantive requirement. The provision simply means that the legislature may not create new substantive voting requirements. *Board of Election Commissioners of City of Indianapolis v. Knight,* 117 N.E. 565, 567 (Ind. 1917). SEA imposes new substantive requirements and is unconstitutional.

The reasonableness of a regulatory change concerning the right to vote that does not impose new substantive requirements is measured by Art. 2, § 1 that requires that "elections shall be free and equal" and allows reasonable regulation "so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Simmons v. Byrd*, 136 N.E. 14, 18 (Ind. 1922). Rep. Crawford and the interested groups have not seen the need to argue before this Court that SEA 483 violates Art. 2, § 1, because the statute so clearly imposes a substantive requirement that violates Art. 2, § 2. However, SEA 483 surely makes it extremely difficult, if not impossible, for certain Hoosiers to be able to vote. The many persons turned away from the BMV because they do not possess the information required to obtain BMV issued identification will not be able to vote. The homeless persons who have lost their birth certificates and other identifying information will not be able to vote. The persons who told Rep. Crawford at town

meetings that they do not have appropriate identification, will not be able to vote. Therefore, even if deemed to be a regulation, the law would be unconstitutional inasmuch as it is far from reasonable.

Conclusion

The trial court's judgment is therefore erroneous and must be reversed. SEA 483 is unconstitutional and unlawful and summary judgment to that effect must be entered for Rep. Crawford and the interested groups.

Kenneth J. Falk
Counsel of Record
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059 ext. 229
Fax: 317/635-4105
E-mail: kfalk@aclu-in.org

Attorney for Appellants Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition on Housing and Homeless Issues, Joseph Simpson

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Kenneth J. Falk
Counsel of Record for
Appellants in No. 06-2218

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I hereby certify that a copy of the foregoing was served on the below named person(s) by first class U.S. postage, pre-paid, on this 2nd day of August, 2006.

Thomas M. Fisher
Doug Webber
Office of the Attorney General
IGCS-5th Floor
302 W. Washington St.
Indianapolis, IN 46204

William R. Groth
Geoffrey S. Lohman
Fillenworth, Dennerline, Groth, Towe
1213 N. Arlington Ave.
Suite 204
Indianapolis, IN 46219

Barry A. Macey
Macey, Swanson and Allman
445 N. Pennsylvania St.
Suite 401
Indianapolis, IN 46204

James B. Osborn
Chief Litigation Counsel
Office of the Corporation Counsel

200 E. Washington St.
Suite 1601
Indianapolis, IN 46204

_____

Kenneth J. Falk
Attorney at Law