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,	)	
	)	Honorable Sarah Evans Barker,
Defendant-Appellee.	)	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,	)	Division
	)	
-v-	)	Cause below: No. 1:05-CV-634
	)	
TODD ROKITA, *et al.,*	)	
	)	Honorable Sarah Evans Barker,
Defendants-Appellees.	)	Judge

BRIEF OF APPELLEE MARION COUNTY ELECTION BOARD

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JURISDICTIONAL STATEMENT

The jurisdictional statements of Plaintiffs/Appellants William Crawford *et al.* and the Indiana Democratic Party *et al.* are not complete and correct.

1. In No. 06-2218, Plaintiffs/Appellants William 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, and Joseph Simpson (the "Crawford Plaintiffs") filed their complaint in the Marion Superior Court on April 28, 2005, against the Marion County Election Board ("MCEB"). The complaint claimed that Senate Enrolled Act 483 ("the Voter ID Law") violated the Fourteenth Amendment, the Voting Rights Act (42 U.S.C. § 1971(a)(2)(A) & (B)), and Article 2, section 1 of the Indiana Constitution. Subsequently the Crawford Plaintiffs filed a motion to raise additional legal argument based on Article 2, section 2 of the Indiana Constitution. On May 27, 2005, pursuant to 28 U.S.C. §§ 1441(b), (c), MCEB removed the case to federal court. Because the matter challenged the constitutionality of a state statute, the State of Indiana filed a motion to intervene on June 23, 2005, which was granted the same day. The district court had jurisdiction over the Crawford Plaintiffs' federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the state-constitutional claims pursuant to 28 U.S.C. § 1367.

2. In No. 06-2317, Plaintiffs/Appellants Indiana Democratic Party and Marion County Democratic Central Committee (the "Democrats") filed their

complaint in the district court against Defendants/Appellees Todd Rokita, J. Bradley King, and Kristi Robertson (the "State Defendants") on May 20, 2005. The Democrats alleged that the Voter ID Law violated the First and Fourteenth Amendments, the Voting Rights Act (42 U.S.C. § 1971(a)(2)(A) & (B)), and the Help America Vote Act (42 U.S.C.§ 15483(b)(1) & (2)) . On August 8, 2005, the Democrats amended their Complaint to name MCEB as a defendant. The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and supplemental jurisdiction over the state-constitutional claims pursuant to 28 U.S.C. § 1367.

3. On June 23, 2005, the district court consolidated these two cases into a single cause number (1:05-cv-00634-SEB-VSS). On April 14, 2006, the district court filed an "Entry Granting Defendants' Motions for Summary Judgment, Denying Plaintiffs' Motions for Summary Judgment, and Denying Plaintiffs' Motions to Strike." This was a final and appealable judgment, and no party filed post-judgment motions.

On April 24, 2006, the Crawford Plaintiffs filed a Notice of Appeal, appealing the district court's April 14 order. This appeal was docketed in this Court on May 1, 2006, as Cause No. 06-2218. On May 5, 2006, the Democrats filed a Notice of Appeal, also appealing the district court's April 14 order. This appeal was docketed in this Court on May 8, 2006, as Cause No. 06-2317. On May 11, 2006, this Court issued an order directing that the two appeals be consolidated for purposes of briefing and disposition. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether an individual has proven first-party standing to challenge a voter-identification law where he claims that, when he presents his identification, he will be injured by "unwelcome confrontation" with a law to which he objects.

2. Whether an organization whose purpose is unrelated to voting has proven first-party standing to challenge a voter-identification law where it claims a legally protected interest in *not* having a law requiring voters to present photographic identification and claims that having such a law will, in the future, directly injure the organization by forcing it to spend money on obtaining identification for voters and educating the public about the law.

3. Whether an organization has proven representative standing to challenge a voter-identification law where its "members" have not consented to membership; and it cannot identify a single member who will not be able to vote.

4. Whether political parties, organizations, or politicians have third-party standing to raise the claims of voters against a voter-identification law where the parties cannot demonstrate that anyone will be injured by the law, and without showing why any hypothetical voter who would be injured could not bring suit on his own behalf?

5. Whether the Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A), permits states to exempt residents of nursing-home polling places from presenting photo identification when they vote.

6. Whether Article 2, section 2 of the Indiana Constitution permits a state law requiring registered voters to present poll workers with government-issued photo identification in order to vote in person at a precinct polling place.

STATEMENT OF THE CASE

MCEB incorporates by reference the Statement of the Case in the brief of the Appellees Rokita, King, and Robertson and Intervenor/Appellee the State of Indiana.

STATEMENT OF THE FACTS

MCEB incorporates by reference the Statement of the Facts in the brief of the Appellees Rokita, King, and Robertson and Intervenor/Appellee the State of Indiana and provides the following additional facts:

There are three groups of plaintiffs in this consolidated case. The first consists of the Indiana Democratic Party and the Marion County Democratic Central Committee ("the Democrats"), the second comprises of several grassroots political organizations ("the Organizations") and the third group is comprised of two elected public officials, William Crawford and Joseph Simpson ("the Politicians").

A. The Democrats

The Democrats allege that they are associated with "hundreds of thousands of registered voters who regularly support and vote for candidates who are affiliated with the Democratic Party," whom they count as all those who vote in the Democratic primary, attend meetings, contribute to candidates, or vote for candidates in the general election. (Supp. App. 142). The Marion County Democratic Central Committee (MCDCC) is comprised of four members, all of whom have ID and are unaffected by the law. (*Id.* at 162). The MCDCC has no bylaws or policies acknowledging the existence of other members. (*Id.* at 163).

The Democrats conducted several polls and surveys to find people who it claimed would be unable to comply with the Voter ID law, and eventually provided information on nine living persons: David Harrison, Constance Andrews, Barbara Smith, Imogene Chapman, Ernest Pruden, Helen Wright, Lois Holland, Ronald Yancey, and Thelma Ruth Hunter. (*Id.* at 167). All of them are over 65, and eligible to vote absentee, which does not require ID. David Harrison is 75 years old. (*Id.* at

178). Constance Andrews has a valid driver's license. (App. 32) Barbara Smith is 71 years old, has voted absentee and has a certified birth certificate. (*Id.* at 34). Imogene Chapman is 84-years old, and has an original certified birth certificate. (*Id.* at 32). Ernest Pruden is a 74 years old. (*Id.* at 33) Lois Holland is 69 years old. (*Id.*). Robert Yancey is a poll worker for the Democrats who has a non-license photo-identification card issued by the BMV that expires in 2009. (*Id.* at 34). Helen Wright was not deposed, but was 65 years old as of 2006 (*Id.*). Thelma Ruth Hunter is an 85-year-old woman who resides in Indianapolis who believes that there is no birth certificate that currently exists for her. (*Id.* at 33).

B. The Organizations

Plaintiff United Senior Action (USA) is a senior-citizen public-policy organization with dues-paying members. (Supp. App. 203, 213). USA claims that it has members who will not be able to vote or who will be impeded from voting because of the Voter ID Law. (*Id.* at 215). However, USA has no records identifying its members who have or do not have driver's licenses or non-license photo identification. (*Id.* at 214). Michelle Niemeyer, the Executive Director of USA who served as its organizational deposition representative, testified that she has "not spoken to any individual members [of USA who said that they] will not be able to vote because of this, since it's enacted." (*Id.* at 221). She said USA has conducted no surveys to determine whether any seniors will be affected by the law, and the assertion in Paragraph 38 of the Complaint that many seniors do not have driver's licenses or other photo identification is based only on her "experience with the organization and conversations over the last 16 years or our members." (*Id.*). USA

does not allege that it will have to expend or divert resources in connection with the new law. (Crawford Appellate Brief 36).

The Indianapolis Resource Center for Independent Living (IRCIL) is a non-profit that provides services and advocacy for individuals with disabilities. (Supp. App. 204). According to the IRCIL's bylaws, its members include its board of directors and "the people with disabilities whom we serve." (*Id.* at 223). IRCIL asserts that many of its members "may not have . . . valid photo identification . . . " (*Id.* at 204) and "will be discouraged from voting" by the Voter ID Law. (*Id.*). However, IRCIL could identify no such member, and acknowledged that its assertions were based only on "our in depth understanding and knowledge of the community that we serve." (*Id.* at 224) In fact, Melissa Madill, IRCIL's designated deponent, said that none of the 15 members with whom she had spoken concerning the Voter ID Law since its passage asserted that they would be unable to vote because of the law. (*Id.* at 233). IRCIL argues that assisting people obtain ID will cause a diversion of staffing resources away from its other duties. (*Id.* at 235).

Plaintiff Concerned Clergy of Indianapolis (CCI) is an organization "dedicated to advancing social justice issues, particularly issues affecting the poor in Indianapolis." (*Id.* at 205). CCI asserts that its members include "poor persons in the City of Indianapolis." (*Id.*). It claims that "poor persons may not have a driver's license or state identification card" and that the Voter ID Law "will discourage poor persons from voting." (*Id.*). However, CCI maintains no records identifying its members with or without driver's licenses or non-license photo identification. (*Id.* at

238, 239). CCI's conclusion that the Voter ID Law would discourage poor persons from voting is based only on its "experience as an Indiana based civil rights organization." (*Id.*). CCI claims that it will have to spend money helping people obtain birth certificates so that they can vote. (*Id.* at 244, 245). Margie Oakley, CCI's designated deponent, conceded that no CCI members have indicated to her that they do not have photo identification, and that no CCI members have told her that the Voter ID Law will prevent them from voting. (*Id.* at 247, 248). One member of CCI, Rev. Leroy Dinkins, has a driver's license but objects to having to show photo ID and would prefer not to show his ID to vote. (*Id.* at 249, 250).

Plaintiff Indianapolis Branch of the NAACP is the local branch of the well-known, national civil-rights organization. (*Id.* at 202). NAACP alleges that the Voter ID Law will "make it more difficult for NAACP members . . . to participate in elections." (*Id.*). However, the NAACP has no records identifying any members who do or do not have driver's licenses or non-license photo identification. (*Id.* at 253, 254). The NAACP further asserts that it will have to divert resources from its other activities to educate voters about the ID requirement. (*Id.* at 264). Roderick Bohannon, the NAACP's designated deponent, testified that he has heard some members say "I don't think I'll be able to vote the way the statute is construed," but he could not identify who had made that assertion. (*Id.* at 262). Bohannon himself has a state-issued BMV identification card, but objects to having to show it in order to vote. (*Id.* at 264).

The Indiana Coalition on Housing and Homeless Issues (ICHHI) is a non-profit committed to combating homelessness. (*Id.* at 207). ICHHI does not "presume to speak for everybody that is homeless." (*Id.* at 266). ICHHI claims to be aware that "many homeless and impoverished persons do not have valid driver's licenses and state identification cards." (*Id.* at 207). It also claims that the Voter ID Law "will prohibit members of ICHHI from voting because they will not be able to timely satisfy the identification requirements." (*Id.*). However, ICHHI is unable to identify any such members. (*Id.* at 269). Also, ICHHI maintains no records identifying members who have no driver's license or other non-license photo identification. (*Id.* at 270). In response to a survey, several of ICHHI's member organizations asserted general awareness that many homeless persons have no photo identification. (*Id.* at 278-281). However, those surveys do not identify any such individuals, nor do they indicate whether such homeless persons are members of ICHHI or one of its member organizations. (*Id.*). And some indicate that they assist the homeless with obtaining photo identification. (*Id.*). ICHHI does not allege that the law will cause them to divert resources from its mission. (Crawford Appellate Brief 36). One affidavit was presented by Kristjan Kogerma, a homeless person, alleging that he could not obtain an ID card because he had no address, but his affidavit did not indicate that he was registered, or intended to register, to vote in Indiana, nor did it suggest that he was not indigent and thus unable to take advantage of the photo ID waiver for indigents. (App. 154).

C. The Politicians

William Crawford is a member of the Indiana House of Representatives, representing House District 98. (Supp. App. 202). Crawford possesses photo identification required by the Voter ID Law, but alleges that he is offended that he has to show identification to vote. (*Id.* at 285). Although he asserts that citizens living in his district do not have photo identification required by the Voter ID Law (*Id.* at 287), he could not name a single such registered voter. (*Id.*).

Plaintiff Joseph Simpson is an elected Washington Township Trustee. (*Id.* at 208). Simpson has a driver's license issued by the BMV. (*Id.* at 298). He objects to having to show his identification to vote. (*Id.* at 305, 306). Like Crawford, Simpson has generally alleged that some citizens who have voted for him in the past do not have the sort of photo identification required by the Voter ID Law, but he could not name any in response to Defendants' interrogatories. (*Id.* at 296, 297).

SUMMARY OF THE ARGUMENT

Plaintiffs' claims fail for lack of standing. Plaintiffs' approach is to raise numerous arguments and apply them indiscriminately to various plaintiffs, without regard for facts or record citations—apparently hoping that the Court will throw its hands up and rule that there must be standing somewhere for someone.

Plaintiffs do not claim, however, that anyone has been denied the right to vote, nor do they claim that anyone has been denied the right to obtain a free, photographic identification.

Plaintiffs are wrong as to standing. *First*, the politicians do not have first-party standing because objection to a law is not an injury. The politicians admit

that they possess qualifying, photo identification, but claim that they strongly object to the law and will be injured by "unwelcome confrontation" with the law when they present their identification to vote. But, unlike the confrontation that arises when one must pass an objectionable religious monument, an individual does not "confront" a law by obeying it. Therefore, the district court properly denied first-party standing to the politicians.

Second, organizations have not identified a concrete and imminent injury directly caused by the Defendants. Although Plaintiffs claim that, if the Law is enforced, they will have to spend money educating the public about the Law or obtaining identification for voters, that claim rings hollow. Under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), an organization has first-party standing only where the plaintiff proves that (1) it has in fact expended resources (2) to counteract a law that is directly and completely at odds with the plaintiff's pre-existing activities. Here, no organization has shown that it has spent any money to counteract the Law, much less that the Law is completely at odds with the organization's pre-existing activities. Therefore, the district court properly denied first-party standing to the organizations.

Third, the organization plaintiffs have not proven representative standing because their "members" have not consented to membership; they cannot identify a single member who will be unable to vote; and their purposes are either unrelated to voting or not explained in the record. To have representative standing, an organization must establish that (1) it is bringing the suit on behalf of its members;

(2) its members have standing to sue in their own right; (3) the interests the organization seeks to protect are germane to its purpose; and (4) the suit does not require the participation of individual members. A limited exception to the first requirement exists for organizations established by statute and thus having no traditional "membership." Those organizations may establish the "substantial equivalency" of membership by showing that the organization (1) serves a specialized segment of the community; (2) represents individuals having all the indicia of membership, including electing the organization's leadership, serving in the organization, and financing the organization; and (3) has its fortunes tied closely to those it represents. Here, the organizations can satisfy neither the general rule nor the exception.

No organization can identify a member without photo identification. Although CCI and NAACP have identified members objecting to the law, that injury is not legally cognizable. Moreover, IRCIL, ICHHI, and the political parties have not shown that their "members" are the substantial equivalent of members because Plaintiffs have not introduced evidence that their "members" elect the organizations' leadership, serve in the organization, or finance the organization. Contrary to the Democrats' argument, no case holds that the act of voting is sufficient to establish one as a member of a political party for purposes of representative standing.

Fourth, none of the parties can establish a right to represent third-party voters not before the court. In order to have third-party standing, a plaintiff must

show that they will be injured in fact by the alleged injury to the third party, that they have a close relationship with the third party, and that the third party faces an obstacle to bringing suit on their own. The last requirement is relaxed in cases involving First Amendment overbreadth challenges, but only those. However, that requirement is not applicable here. First, plaintiffs cannot prove with actual facts that there is any overbreadth—that any voters will have their associational rights chilled—because they cannot identify anyone who cannot vote under the new law. Further, requiring identification is at best a minimal intrusion on associational rights and does not significantly compromise the right. With or without the relaxed third prong, however, the parties could not establish third party standing. The failure of the parties or the candidates to identify anyone who would vote for them, but cannot because of the voter law, means that they cannot establish injury-in-fact. And furthermore, they cannot establish that third-party voters who know they cannot obtain ID have some burden to asserting their own rights.

Finally, the District Court's alternative formulation that the Plaintiffs have standing to represent people with ID who fail to produce it on election day does not establish standing, as such voters are still able to vote by provisional ballot and will have their vote counted on the same terms as all others, upon showing ID.

On the merits, Plaintiffs' argument that the Voter ID Law violates the Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A), because it accommodates residents of nursing-home polling places by exempting them from showing photo identification must fail. First, Section 1971 was not intended to permit facial challenges to state voting laws,

but was instead intended to prohibit discriminatory *application* of otherwise equally applicable state laws. Second, Section 1971 is not enforceable through a private right of action, but is only enforceable by the United States Attorney General. Third, Section 1971 was targeted a voting qualifications and voting practices that targeted race. The Plaintiffs have put forth no evidence that the Voter ID Law has a disparate impact on racial minorities. Finally, the Voter ID Law does not subject voters to different standards in demonstrating that they are qualified to vote.

Plaintiffs also argue that the Voter ID Law violates Article 2, section 2 of the Indiana Constitution because it adds a new "substantive requirement" to voting. This argument is untenable, and logically extended would invalidate virtually all election regulations, replacing them with a system where each voter has the authority to define personalized standards of when, where, and how to vote.

ARGUMENT

I. No Parties Have First-Person Standing

Standing is a "threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In essence, the standing inquiry is "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* The burden of establishing standing rests solely on the plaintiff: Under Article III, a plaintiff invoking the power of the federal courts bears the burden of demonstrating injury-in-fact, causation, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998). Thus, he must prove that he personally has suffered an injury that is "concrete," "distinct and palpable," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149,

155 (1990) (citations and quotation marks omitted). Further, the injury must be one that "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Id.* (quotation marks omitted).

Apart from this "minimum constitutional mandate," a plaintiff must also satisfy prudential limitations on the "class of persons who may invoke the courts' decisional and remedial powers." *Warth*, 422 U.S. at 499. First, a plaintiff must establish that his interest is "within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Second, he must show that his harm is not "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499. Third, he generally "cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* Although self-imposed, these prudential limitations are not discretionary: "Congress may abolish the limitation[s] entirely, or suspend [their] application to a particular statute, but the courts may not override the limitation[s] simply by deciding not to observe [them]." *S. E. Lake View Neighbors v. Dep't of HUD*, 685 F.2d 1027, 1034 (7th Cir. 1982) (internal citations omitted). Here, none of the parties to this action has first-party standing

A. The Politicians Do Not Have First-Party Standing to Bring This Action Because Alleged Objection To A Law Is Not A Legally Cognizable Injury.

Objection to a law is not an injury sufficient to establish Article III standing. *P.O.W.E.R. v. Thompson*, 727 F.2d 167, 171 (7th Cir. 1984). The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a

federal court." *Allen,* 468 U.S. at 754; *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982) ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974) (denying standing where plaintiffs alleged "the abstract injury in nonobservance of the Constitution"). Rather, to satisfy Article III, the injury must "affect one's possessions or bodily integrity or freedom of action." *P.O.W.E.R.*, 727 F.2d at 171.

Here, the politicians have not been, and will not be, denied the right to vote because they have acceptable photo identification, and they do not dispute this fact. Crawford Br. 34-35. Even so, they claim injury from "being forced to display their identification when they vote" and thus "hav[ing] to engage in a physical activity that is unwelcome and objectionable." *Id.* at 34. They argue that "unwelcome confrontation with an objected to object or practice is sufficient injury to bestow standing" *id.*, and "having to produce a photo identification is a sufficient "identifiable trifle" to allow standing," *id.* at 35.

The politicians' argument is nothing more than a claim of injury based on objection to a law. In the district court, after Defendants pointed out that such injury was insufficient as a matter of law, the politicians quickly attempted to salvage their standing by arguing that, under *Books v. City of Elkhart*, 235 F.3d

292, 300 (7th Cir. 2000), they were forced to engage in "unwelcome confrontation" with a law to which they objected. Crawford Br. 34.

In *Books*, this Court held that "[i]n the context of the Establishment Clause," injury is established where the plaintiff "come[s] in[to] direct and unwelcome contact" with an objectionable religious display and "has undertaken a special burden or has altered his behavior to avoid the offensive object." *Id.* at 299-300. No court, including this Court, has extended that rule beyond the unique context of the Establishment Clause. That is because "the standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer"—"intangible injury" to "the spiritual, value-laden beliefs of the plaintiffs," which can be inflicted uniquely, by mere "contact." In short, such alleged injury is sufficient because the Establishment Clause gives individuals a right *not* to have their government display non-neutral religious monuments to them. *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223-24 (10th Cir. 2005).

Unlike Establishment Clause plaintiffs, Right-to-Vote plaintiffs are not likely to suffer an "intangible injury." Rather, the injury alleged is generally the denial of the right to vote. Defendants are aware of no court, state or federal, which has granted standing to a Right-to-Vote plaintiff whose sole injury is "unwelcome contact" with an objectionable law. Moreover, no such contact is physically possible. In Establishment Clause cases, the unwelcome contact arises from government conduct that exists independent of any action by the plaintiff. *Id.* at 1223 (injury

arose from government display of religious monument). But here, the Politicians' injury arises from their display of photo identification. Crawford Br. 34-35. The only government conduct to which Plaintiffs object is the existence of the Law itself. But, even in the Establishment Clause cases, objection to a law is not sufficient to establish injury. *Valley Forge*, 454 U.S. at 482-83; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (implying that "identifiable trifle" is not sufficient for standing because the "*Scrap* opinion . . . has never since been emulated by this Court"). Therefore, because their only "injury" is objection to the Law, the Politicians do not have first-party standing to challenge the Law.

B. The Organizations Do Not Have First-Party Standing Because Their Alleged Injury In Having To Spend Money In Response To The Law Is Legally Insufficient, Not to Mention Speculative and Self-Inflicted.

To establish "the irreducible constitutional minimum of [Article III] standing," a plaintiff must establish that he has "suffered an 'injury in fact'—an invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Raines v. Byrd*, 521 U.S. 811, 819 (1997). "The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 772 (2000). "No legally cognizable injury arises unless an interest is protected by statute or otherwise." *Cox Cable Comm'ns, Inc. v. United States*, 992 F.2d 1178, 1182 (11th Cir. 1993); *Reid L. v. Ill. State Bd. of Educ.*, 358 F.3d 511, 515-16 (7th Cir. 2004); *City of Cleveland v. Nuclear Reg. Comm'n*, 17 F.3d 1515, 1516-17 (D.C. Cir. 1994).

First, of course, the Voter ID Law has no operational impact on either the Democrats or the organizations. It regulates individual voters only. Accordingly,

there is certainly no straightforward, commonly understood means by which the Voter ID Law can be said to invade any "legally protected interest" of these plaintiffs.

Second, however, CCI, IRCIL, and NAACP claim that they are injured by "hav[ing] to expend resources to combat the effects of SEA 483," Crawford Br. 36, which may also imply an interest in having a voting system in which voters do not have to identify themselves with photo identification. But plaintiffs do not cite, nor are defendants aware of, any case in which a court held that an organization has a right to demand any procedural rules in a state or local voting system, much less the right to demand that voters be permitted to identify themselves *without* photo identification.

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), cited by plaintiffs, does not provide plaintiffs with any support. In *Havens*, HOME, an organization whose purpose was "to make equal opportunity in housing a reality" filed a suit for damages under the Fair Housing Act (FHA) against an apartment complex that falsely told a black tester that no housing was available while simultaneously telling a white tester that housing was available. *Id.* at 368-69. HOME sought to recover resources it had expended in combating the defendant's discrimination. *Id.* at 369. The Court held that HOME had standing. *Id.* at 379. Key to the Court's holding, however, was the fact that Congress, by statute, had eliminated all prudential barriers to standing that otherwise would have applied. *Id.* at 372. Specifically, the statute gave "all" persons a right to truthful information about

housing (not just those actually seeking to rent) and granted anyone with actual injury the right to sue regardless of whether the injury arose from conduct that violated someone else's FHA rights. *Id.* at 376 n.16. Applying those principles, the Court held that HOME had alleged standing sufficiently to avoid a motion to dismiss—HOME had alleged that defendant's denial of equal access to housing had frustrated HOME's attempt to further equal access to housing by requiring HOME to expend resources directly to counteract the defendant's actions. *Id.* at 379 & n.21. Even so, at a later stage of the case, the Court noted that HOME would have to demonstrate that this frustration had actually occurred. *Id.*

Courts applying *Havens* have affirmed its limited application. In *Nat'l Treasury Emp. Union v. United States*, the D.C. Circuit held that *Havens* requires the defendant's action to be "at loggerheads with the stated mission of the plaintiff." 101 F.3d 1423, 1429 (D.C. Cir. 1996) (quotation marks omitted). The court reasoned that "[i]f a defendant's conduct does not conflict directly with an organization's state[d] goals, it is entirely speculative whether the defendant's conduct is impeding the organization's activities," and consequently Article III's causation requirement has not been met. *Id.* at 1430. Moreover, in those cases where prudential limitations apply, if the plaintiff is challenging government action that "does not directly conflict with the organization's mission, the alleged injury to the organization likely will be one that is shared by a large class of citizens and thus insufficient to establish injury." *Id.*

Accordingly, the D.C. Circuit denied standing to an organization seeking to challenge the constitutionality of the Line Item Veto Act where the organization's mission was to "improve[e] the terms of employment for government workers"—"a mission not necessarily inconsistent with the Line Item Veto Act." *Id.* The court reasoned that, without a direct conflict, the court could not determine whether the organization's expenditure was "truly necessary to improve the working conditions of government workers or rather [was] unnecessary alarmism constituting a self-inflicted injury." In addition, the court rejected the organization's claim that, in ruling on a motion to dismiss, a court must accept as true "not only the fact that [an organization] has expended additional funds . . . , but also the speculative conclusion that such expenditures are a necessary link in achieving the organization's ultimate purpose." *Id.*

Other courts agree with the D.C. Circuit's interpretation of *Havens*. In *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999), the Fifth Circuit held that an organization had established standing sufficiently to defeat a summary-judgment motion where the organization "presented evidence" (1) "that it ha[d] expended resources registering voters" in response to Louisiana's allegedly unlawful actions; and (2) that its purpose to "increase the political power of low- and moderate-income people in the political process" was "in direct conflict with Louisiana's alleged failure to facilitate voter registration." *Id.* at 361 (discussing *Nat'l Treasury* favorably). However, the court denied standing for several claims where the organization did not provide evidence

of actual expenditure due to direct conflict. *Id.* at 358-60 (denying standing for litigation costs, monitoring costs, and certain voter-registration costs).

In this case, the organization plaintiffs cannot satisfy *Havens* for several reasons. *First*, unlike in *Havens*, no statute grants them reprieve from the prudential limitations on standing. The Seventh Circuit holds that a plaintiff cannot satisfy prudential standing where the only "alleged basis for standing [is] that [it] will incur expenses" in response to the defendant's action because, "assuming this amounts to injury in fact, it is not within the zone of interests protected by the Fourteenth Amendment." *Calvin v. Conlisk*, 534 F.2d 1251, 1253 (7th Cir. 1976); *id.* at 1253 & n.3 (noting that "organizations' voluntary decision to assume the burden" of the expenditures "arguably breaks the causal chain"). Moreover, "to allow standing on this basis" would "give any organization with a particularized interest the right to bring suit in order to spare itself the expense of continued efforts to further that interest." *Id.* Accordingly, prior precedent dictates that Plaintiffs do not have first-party standing to challenge the Voter ID law.

Second, the law does not directly conflict with the organizations' stated purposes. CCI's purpose is "dedicated to advancing social justice issues, particularly issues affecting the poor in Indianapolis." But this mission does not directly conflict with the Voter ID law; by its terms, it does not apply to indigent people. Further, unlike in *Reform Now*, CCI has not shown that its primary purpose is advancing the right to vote without identification (or even advancing the right to vote generally). As such, any expenditure that CCI expends in reaction to

the law does not flow from the law's existence itself, but from CCI's voluntary *choice* to focus on one claimed burden on the poor as opposed to the numerous other activities, unrelated to voting, that it supports. The same holds true for the NAACP, an organization well understood to be an advocate for all rights of African-Americans. The Voter ID law is not in direct conflict with the rights of African-Americans as a class; as such, any diversion of resources is not an injury flowing from the Voter ID law but rather is "unnecessary alarmism constituting a self-inflicted injury." *Nat'l Treasury Emp. Union*, 101 F.3d at 1429. So too the IRCIL, which "provides services and advocacy for individuals with disabilities" but, again, is not primarily a voting-rights organization whose interests are directly affected.

Third, plaintiffs have not shown that they have actually expended any resources in response to the Voter ID Law. Although all of the organizations speculated that they might expend resources in the future, these self-serving affidavits are insufficient to establish that such expenses will actually occur. *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) (holding a plaintiff's self-serving statements, unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment). Without such evidence before the district court, it was correct to deny the organizations first-party standing. *Nat'l Treasury Empl. Union,* 101 F.3d at 142 (declining plaintiff's invitation to "accept as true not only the fact that it has expended additional funds in an attempt to lobby the President more effectively, but also the speculative conclusion that such

expenditures are a necessary link in achieving the organization's ultimate purpose.").

In light of the organizations' failure to identify an injury to a legally protected interest and the Seventh Circuit's precedent that prudential limitations preclude standing based on the organizations' expenditures, the district court properly denied standing as to the non-profit organizations.

C. The Democrats Have Waived Their Claims to First-Party Standing

The Democrats have waived their claims to first-party standing. The plaintiffs do not dispute the district court's ruling that they waived their right to bring a freedom of association claim; therefore, standing on that claim is irrelevant. Dem. Br. 11. The plaintiffs do state in a footnote that the district court failed to consider their first-party standing claim under *Havens*. Dem. Br. 11 n.2. However, plaintiffs waived this claim by raising it for the first time in their Summary Judgment Reply Brief at 12. *Kelso v. Bayer Corp.,* 398 F.3d 640, 643 (7th Cir. 2005). Moreover, Plaintiffs do not argue that they are entitled to standing; they merely note that the district court did not rule on the issue. Dem. Br. 11 n.2. Accordingly, plaintiffs have waived the issue. *Dieter,* 395 F.3d at 759 ("Perfunctory or undeveloped arguments are waived."). In all events, for the reasons listed in Part I.B., the plaintiffs have not suffered concrete and demonstrable injury.

II. Neither The Democrats Nor the Organizations Have Representative Standing To Challenge A Voter-Identification Law Where Their "Members" Have Not Consented To Membership And/Or Where They Cannot Identify A Single Member Who Will Not Be Able To Vote.

An organization has representative standing where it establishes that (1) it is bringing the suit on behalf of its members; (2) its members have standing to sue in their own right; (3) the interests the organization seeks to protect are germane to its purpose; and (4) the suit does not require the participation of individual members. *Hunt v. Wash. State Apple Adv. Comm'n*, 432 U.S. 333, 343 (1977); *Local 194, Retail Union v. Standard Brands, Inc.*, 540 F.2d 864, 867-68 (7th Cir. 1976) (organization must give members notice of suit). A limited exception to the first requirement of traditional membership exists for organizations established by statute. Those organizations may establish the "substantial equivalency" of membership by showing that the organization (1) serves a specialized segment of the community; (2) represents individuals having all the indicia of membership, including electing the organization's leadership, serving in the organization, and financing the organization; and (3) has its fortunes tied closely to those it represents. *Hunt*, 432 U.S. at 344-45; *Central Delta Water Agency v. United States*, 306 F.3d 938, 950-51 (9th Cir. 2002) (granting standing to state-created water agency); *Gettman v. DEA*, 290 F.3d 430, 435-36 (D.C. Cir. 2002) (standing denied where no evidence that magazine's readers selected magazine's leadership, guided its activities, or financed its activities); *Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 27-28 (D.D.C. 1979) (denying standing where "contributors and supporters have absolutely no direct control over" organization); *cf. Friends of the*

Earth, Inc. v. Chevron Chem. Co., 129 F.3d 826, 829 (5th Cir. 1997) (granting membership to organization whose constituents "voluntarily associated themselves with the organization," "elected [its] governing body," and "financed its activities").

Membership is a central element of representative standing. The Supreme Court created the exception to recognize that the "primary reason people *join* an organization is often to create an effective vehicle for vindicating [shared] interests." *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986). Moreover, the Court has never unmoored the doctrine from its foundation of voluntary association. *Id.* (association is group of individuals who "band together"); *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (association is "medium through which its individual members seek to make more effective the expression of their views"); *Joint Anti-Fascist Ref. Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (association occurs when people pool their capital, interests, or activities under a name and form identifying "collective interests"). For example, in *Warth*, the Court denied standing to an organization alleging discrimination against non-members. 422 U.S. at 514 & n.22 (organization was "attempt[ing] to raise putative rights of third parties" where it did not allege that its members harmed); *Bayaa v. United Airlines*, 249 F.Supp.2d 1198, 1204 (C.D. Calif. 2002) ("[U]se of 'constituents' does not comport with the spirit of representational standing, as its breadth defeats the exclusivity inherent in 'membership.'"). Relying on this precedent, the Seventh Circuit has held that representative standing does not extend to "entities other than associations which actually represent interests of parties whose affiliation with the representational

litigant is that of membership with the representative or substantial equivalent of membership." *Hope, Inc. v. DuPage County*, 738 F.2d 797, 814 (1984).

Here, plaintiffs cannot establish representative standing. None of the organizations has alleged that any of their members will be denied the right to vote. (Supp. App. at 212, 236, 267, 251). CCI and NAACP identify members who "object" to the law, Crawford Br. 38, but, as shown in Section I(A), above, objection is not a legally sufficient injury. Plaintiffs attempt to obviate their inability to produce even a single injured member by arguing that they need not identify anyone, but instead the Court must take them at their word. Crawford Br. 38. However, the only case cited by Plaintiffs for this assertion does not support them. In *Doe v. Stincer*, the Eleventh Circuit held that an organization is not required to "specifically name the individual on whose behalf the suit is brought." 175 F.3d 879, 884 (11th Cir. 1999). The Court did not hold that the organization did not have to identify by other means the member and his injury with sufficient specificity and particularly to satisfy Article III; indeed, the court remanded the case precisely because the organization had *not* made such a showing. *Id.* at 887-88; *Nat'l Alliance for Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) (citing *Doe* for proposition that organization's "failure to identify an injured constituent prevents them from asserting associational standing"); *see also infra* Part III.A.2 (distinguishing *Sandusky County Dem. Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2005)).

In addition, plaintiffs IRCIL, ICHHI, and the political parties have not shown that they have members or the substantial equivalent of members. The plaintiffs have introduced no evidence that any "members" elect the organizations' leadership, serve in the organization, or finance the organization. *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center*, 19 F.3d 241, 244 (5th Cir. 1994) (standing denied to non-state-created organization serving disabled individuals because "members" cannot "participate in and guide the organization's efforts"); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1111-12 (9th Cir. 2003) (granting standing where plaintiff was created by Congress; board was composed of members independently representing plaintiff's constituents; 60% of advisory counsel was comprised of constituents or their family members; and plaintiff had grievance procedure through which constituents could ensure full access to plaintiff's services); *Doe*, 175 F.3d at 885-86;*Chevron*, 129 F.3d at 829.

Moreover, while the membership of the MCDCC is expressly limited to four individuals (each of whom possesses a valid Indiana driver's license),the claimed "membership" of the state Democrats includes far in excess of 50% of voters in the State—hardly a specialized segment of the community. And neither they nor any of the other organizations has made a showing that their fortunes are closely tied to the goodwill of their "members." Accordingly, plaintiffs have failed to establish even the substantial equivalent of traditional members in an association.

Contrary to the Democrats' argument, no case holds that the act of voting is sufficient to establish one as a member of a Democratic organization for purposes of

representative standing. Dem. Br. 13-15. The Democrats confuse the "right to association" with associational, or representative, standing. *Id.* (citing Supreme Court cases, all of which concern the right to association, not the doctrine of representative standing). The Democrats remaining cases are distinguishable and most directly support Defendants, not the Democrats, by holding that standing existed for a specific, political organization to represent its "members"—not its supporters. Dem. Br. 15 (listing cases without parentheticals); *Bay County Dem. Party v. Land*, 347 F.Supp.2d 404, 422 (E.D. Mich. 2004) (no discussion of representative standing; holding that "political parties and candidates have standing to represent the rights of voters" never followed by any federal court); *Northampton County Dem. Party v. Hanover Twp.*, 2004 WL 887386 (S.D. Ohio 2004) (no discussion of representative standing; holding that political party had standing to represent the general electorate followed only be *Bay County* and another district courts); *see also infra* Part III.C. (discussing *Bay County*).

In light of the plaintiffs' failure to identify any member who will be denied the right to vote, the district court properly denied representative standing.

III. No Party Has Third-Party Standing to Represent Voters Not Before the Court.

A. The Democrats Do Not Have Standing to Adjudicate the Rights of Hypothetical Voters Who Cannot Obtain ID Or Who Cannot Produce ID On Election Day.

As a prudential rule, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" not before the court. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

There is a limited exception to this rule; it requires the plaintiff to have "suffered an injury in fact, thus giving [the plaintiff] a sufficiently concrete interest in the outcome of the issue in dispute," that the plaintiff "must have a close relation to the third party" and that "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (internal quotation marks and citations omitted). The requirement that the third party must be hindered in raising its own rights is relaxed in cases involving First Amendment overbreadth challenges. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 957 (1984).

In this case, however, the Democrats' attempt to represent "*all* registered voters associated with the Party who lack qualifying identification" must fail, as must the district court's alternative formulation that the party has standing to raise the rights of voters *with* identification who cannot produce their identification due to forgetfulness, theft, or carelessness. (App. 60). First, the overbreadth exception does not apply, meaning that the Democrats must establish all three prongs in order to assert third party standing. In any event, however, the Democrats cannot show that they will be injured in fact, that they have a special relationship with any actual voters, or that any hypothetical voters could not raise their own rights before the courts.

1. The "Overbreadth" Exception to the Third-Party Standing Requirements Is Not Applicable In This Case.

Although the Democrats repeatedly assert that they need not meet the third requirement of the third-party standing test because of the overbreadth doctrine,

nowhere do they explain why this is so. First, although it is true that "each provision of [a state's election codes], whether it governs the registration and qualifications of voters … or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), it does not necessarily follow that the overbreadth doctrine should be applied to *this* claim.

"Overbreadth" in the First Amendment context has a very specific meaning—it is an attempt to invalidate a law "not because [the plaintiff's] own [First Amendment] rights . . . are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). Thus, it is a method by which a party engaged in proscribable speech may assert the rights of innocent speakers whose speech may be chilled. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977); *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (D.C. Cir. 1999) ("overbreadth" is "a standing exception . . . for parties engaged in unprotected conduct to challenge applications of the statute against third parties not before the court"). The Democrats' claims do not fit into this paradigm.

First, it is not within the mill run of overbreadth challenges: The Democrats are not themselves engaged in proscribable conduct under the Voter ID law and more importantly, it has not demonstrated that the Voter ID law will chill anyone from engaging in First Amendment activities. "The overbreadth claimant bears the burden of demonstrating, from the text of the law and from *actual fact* that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (emphasis supplied) (internal punctuation omitted). The Democrats produced information on nine individuals who they claimed would be affected; however, all nine of them were over 65 and automatically eligible to vote by absentee ballot (which does not require ID), with several holding ID or birth certificates. App. 62. All of them were thus able to vote. The failure of the Party to provide evidence of *any* actual voter who cannot meet the identification requirements under the Voter ID law means that there is "no allegation or hint that anyone's speech would be chilled if [the Democrats] cannot bring the third-party claim, and therefore the Supreme Court's command that prudential standing requirements be relaxed does not apply." *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000).

Second, even if some voters are unable to vote because of the law, this does not constitute the sort of "chill" contemplated by overbreadth doctrine. Overbreadth standing arises only where individuals are likely to avoid regulated but protected conduct, such as publishing literary materials that happen to contain some indecent speech, because they are afraid of punishment. In such cases the doctrine permits those who engage in regulated, but unprotected, conduct (such as purveyors of

obscenity) to assert the rights of the protected. Such standing does not arise where, as here, application of the law may render protected conduct ineffective but otherwise threatens no legal repercussions. In such circumstances, there is no basis for inferring that individuals will be deterred by the law from attempting to engage in the protected conduct, and thus no reason to permit others whose conduct is not protected by the constitution to assert their rights.

Furthermore, the party-neutral requirement that a person identify himself before the physical, in-person act of voting will not "significantly compromise" associational freedoms; *every* regulation of the voting process affects associational rights to some extent, but procedural requirements such as the Voter ID law are only "a minimal intrusion on the associational rights of voters." *Clingman v. Beaver*, 544 U.S. 581, 591 (2005) (holding that a requirement that voters register as a member of a political party before voting in that party's primary is only a minimal intrusion on the associational rights of voters, as "with only nominal effort [i.e., the act of registration] they are free to vote."). And even if the law would significantly compromise someone's associational freedoms, the overbreadth complained of must be "substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Again, other than wild speculation, the Democrats have failed to put forth any evidence that *any* voters will have their associational rights infringed by the Voter ID statute, let alone a substantial number. They are not entitled to the relaxed third-party standing law pertaining to First Amendment

overbreadth challenges, and must demonstrate, among other things, that the voters it seeks to represent are hindered in their ability to bring their own claims.

2. The Democrats Do Not Have Third-Party Standing to Represent Voters Who Cannot Obtain ID, Nor Voters Who Lose or Forget Their ID on Election Day.

With or without the relaxed overbreadth third-party standing requirements, the Democratic Party can represent neither the classes of voters it seeks to represent, nor the class that the district court found viable. The Democrats seek to "represent *all* registered voters associated with the Party who lack qualifying identification." Dem. Br. 17. However, as the district court held, the Democrats "have not presented any substantiation that any such voters actually exist." App. 60. As such, the Democrats have not proven that the existence of this law, and its consequent effect on "registered voters associated with the Party who lack qualifying identification," would cause them to lose any votes. Thus, they have failed to demonstrate injury-in-fact and may not assert third-party standing. *Powers*, 499 U.S. at 411; *Indemnified Capital Investments v. R.J. O'Brien & Assoc., Inc.*, 12 F.3d 1406, 1409 (7th Cir. 1993) (holding that for "third party standing . . . the plaintiff must still be able to allege a personal injury.")

Furthermore, even assuming such voters do exist, the District Court correctly held that "such voters' injuries resulting from enforcement of the [Voter ID law] are sufficiently identifiable and concrete as to allow them to assert their own individual claims as voters." App. 60. The Democrats offer no relevant explanation why this is not so. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), is inapposite; that case merely explains why the Court relaxes the third-party standing requirements in First

Amendment overbreadth challenges. But the Supreme Court has noted that outside of the overbreadth context—such as here—political parties do not generally have third-party standing to raise the rights of its candidates as "no obvious barrier exists that would prevent a candidate from asserting his or her own rights." *Renne v. Geary*, 501 U.S. 312, 320 (1991).

There is no principled reason why the same would not hold true for a hypothetical voter. The Democrats' argument that such a voter faces a burden because of time-sensitivity issues and the lack of a "prompt, final judicial decision" is patently absurd; a hypothetical voter who knows he cannot obtain identification will know this in advance, and would have as much time to litigate his own claim as the Democrats would—if not more so, given that an individual likely could move faster than a large organization. Because the Democrats have offered no lucid reason why a voter who cannot obtain identification—if one exists—could not assert his own rights, they may not assert third-party standing here.

Finally, the district court's alternative hypothesis that the Democrats have standing to represent "voters who have secured or could secure the necessary photo identification but, for some reason, will be unable to present such identification at the polls at the time of voting" is incorrect. The district court's holding relied on *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004), which held that a political party could assert the rights of voters who "cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to human error by an election

worker who mistakenly believes the voter is at the wrong polling place." This case is inapposite, however. In *Sandusky*, the plaintiffs sought to challenge an interpretation of the Help America Vote Act ("HAVA") that would allowed poll workers to deny provisional ballots based on an on-the-spot assessment of the putative voter's residency, and have rendered provisional ballots cast by an eligible voter, though in the wrong precinct, invalid. *Id.* These hypothetical voters in *Sandusky* would have had an injury-in-fact from the requirement: either they would not be given the right to cast a provisional ballot or their provisional ballots would be disregarded.

In this case, by contrast, no voter who has ID but fails to produce it while at a polling station will be denied the right to vote; either he can retrieve the ID and return to the polls, or instead be provided a provisional ballot, which will be counted on precisely the same terms as everyone else once he shows his identification. App. 9-10. The fact that he must return home or cast a provisional ballot and show his ID later in order for his vote to count is not a cognizable injury flowing from the Voter ID law, as there is no constitutional right to vote in person at the polling place. *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). Because someone who satisfies the law's ID requirements but does not present the ID at the time of polling is not, by that act, injured, the Democrats cannot establish that *they* are injured by such a voter's inadvertent failure to produce identification, and thus cannot meet the requirements for third-party standing.

B. The Organizations Have Failed to Argue On Appeal That They May Raise Third-Party Standing Claims, Which In Any Event Could Not Succeed.

Although the Organizations argued before the district court that they have standing to raise the issues of third parties who are not their members, they do not do so in this Court.

In any event, the Organizations, like the Democrats, have not established or presented evidence of any third parties who cannot present conforming photo identification at the polls, nor have the Organizations established that any such persons face obstacles to bringing suits challenging the Voter ID law in their own right. Any such standing argument hereto asserted by the Organizations on such grounds must fail for the same reasons as did the Democrats' standing arguments. *See* Section III(A), above.

C. The Politicians Do Not Have Third-Party Standing

Representative Crawford and Candidate Simpson both assert that they have standing to represent the assert the rights of hypothetical, otherwise-qualified voters who would vote for them but for the Voter ID Law. Plaintiffs rely principally on *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003), and *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 422 (E.D. Mich. 2004), and cases cited therein, for the proposition that candidates have standing to represent the rights of voters. These cases, however, do not represent some rule of standing applicable to politicians, but rather is merely a subset of third-party standing doctrine. 13 Wright, Miller, et al., *Federal Practice and Procedure* § 3531.9, n. 68 & accompanying text. For instance, in *Majors*, the candidate could show injury-in-fact as the campaign-disclosure law at

issue already had an operational impact on the candidate *qua* candidate, forcing him to disclose the source of financing on his own literature. *Majors*, 317 F.3d at 722. Permitting the candidate to assert others' rights of anonymity was merely a function of ordinary overbreadth doctrine. *Id.* (citing *Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-93 (1988); *Joseph H. Munson Co.,* 467 U.S. at 954-58; *Shimer v. Washington,* 100 F.3d 506, 508-09 (7th Cir. 1996)).

Bay County, cited by in contrast, permitted candidates to assert the rights of voters in challenging implementation of HAVA, which did *not* regulate the candidates as candidates. But the court in that case relied uncritically on a line of cases tracing back to the same proposition at work in *Majors*: that when candidates challenge laws that directly regulate them as candidates and cause First Amendment injury, they may assert the rights of their supporters. *Mancuso v. Taft*, 476 F.2d 187 (6th Cir. 1973) (permitting candidate to assert rights of voters in challenging a resign-to-run law). In short, *Bay County* mistook the ability of an *injured* candidate to assert voter associational rights to mean that an *uninjured* candidate could assert voter injury. Such an application of third-party-rights doctrine would eviscerate the direct-injury requirement, which the Supreme Court has never intended. *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (stating that direct injury was necessary but not sufficient to assert third-party rights).

Here, the Voter ID Law governs Simpson and Crawford not as candidates but as voters, and does not directly cause them injury. In order to establish third-party standing, like everyone else they must establish injury-in-fact, a special

relationship with the party whose rights they seek to assert, and, as this does not qualify as an overbreadth challenge, see Section III(A)(1), above, they must show that the third-parties they seek to represent have obstacles to raising their own claims. So stated, the politicians present precisely the same standing arguments as the Democrats, and for the same reasons the arguments must fail. *See* Section III(A)(2), above.

First, the politicians cannot establish that the persons who they claim would vote for them, but for the failure to obtain identification, even exist. As such, the politicians have not established that they are losing the potential votes of *anyone* and thus cannot show injury-in-fact. Furthermore, such hypothetical persons who cannot obtain identification have no obstacles to bringing suit in their own right. Finally, the district court held that, as with the Democrats, the politicians had standing to assert the rights of persons who have ID, but inadvertently cannot produce it at the polls. As already argued, however, a person who meets the Law's requirements is not injured by the failure to present ID because he is still allowed to vote, albeit by provisional ballot, and will have his vote counted through the presentation of his identification: the same condition that would have allowed him to vote in person. The lack of injury from such a lapse means that the politicians cannot assert that *they* will be injured by this failure to present already-existing identification, and thus they cannot meet the requirements for third-party standing. *See* Section III(A), above.

IV. The Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A), permits states to exempt residents of nursing-home polling places from having to show photo identification when they vote

A. Section 1971 merely prohibits discriminatory *applications* of state voting laws

By its terms, the language of Section 1971(a)(2)(A) prohibits only the wrongful *application* of state election laws. More to the point, the statute does not create a means to challenge state laws on their face, which is what plaintiffs attempt to do here.

The statute prohibits "persons" from using a "different …standard, practice, or procedure" in determining who is "qualified under State law or laws to vote" than the procedures used for others "within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 42 U.S.C. § 1971(a)(2)(A).

This language is clearly directed toward the actions at the county level and county officials' application of state law. If a state law were challenged on its face, there would be no application of uneven standards or determination of who was qualified to vote yet. Again, the law prohibits applying different standards to those who have already been "found by State officials to be qualified to vote." Thus, once the state sets voting requirements, they cannot be applied unevenly, but these requirements could not be subject to a facial challenge.

This reading is consistent with Congress' original intent that Section 1971 would be a tool for fighting the uneven application of state voting requirements, like literacy tests, to black voters. *Ramey v. Rockefeller*, 348 F.Supp. 780, 786 (E.D.N.Y.

1972) (Section 1971 "was intended to deal with the discriminatory use of literacy tests and other devices") (internal citation omitted). Voting requirements like literacy tests were created by state law, but were applied unevenly at the local level by individual election officials. *U.S. v. Mississippi*, 339 F.2d 679, 682 (5th Cir. 1964) (examining the uneven application of state registration laws by local registrars such as giving whites easy sections of the Mississippi constitution to copy and giving blacks more difficult ones).

According to *Ramey*, Section 1971 "was enacted as part of Title I of the Civil Rights Act of 1964, which was designed to meet problems encountered in the *operation and enforcement* of the Civil Rights Act of 1957 and 1960, by which the Congress took steps to guarantee to all citizens the right to vote without discrimination as to race or color." *Ramey,* 348 F.Supp. at 786 (internal citation omitted) (emphasis added). Section 1971 was meant to deal with uneven *application* at the local level of state or federal laws.

Here, the Voter ID Law requires application of the same standard to all voters. One may vote in person with the required identification or in person as a resident of a nursing home whose polling place is at the nursing home. The same requirement for in-person voting—identification or nursing home resident—is applied to every voter at the county level by election officials. But there is no allegation that this state law is being applied differently to different groups. There is no showing, for example, that a particular county official requires some voters to present two forms of identification instead of one.

Plaintiffs cite *Brier v. Luger,* 351 F.Supp. 313, 316 (M.D. Pa. 1972), where the district court observed that a claim that Democrats were improperly purged from the voter registration list was proper under 42 U.S.C. § 1971 (a)(2)(A). On the merits, however, the court held that the plaintiff had completely failed to state a claim because he did not show any evidence of discrimination in application of the statute. Likewise, in this case, the Democrats have failed to show that the Voter ID Law is applied in a discriminatory fashion. Instead, they merely speculate that it will have a disparate impact. Absent evidence of actual discriminatory application of the Voter ID Law, Section 1971 does not apply.

B. Section 1971 is not enforceable through a private action

Plaintiffs assert that the Voter ID Law violates 42 U.S.C. § 1971, but that statute provides for enforcement only by the United States:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.

Because Section 1971 is enforceable by the Attorney General, individual citizens may not privately enforce the statute. *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F.Supp.2d 271, 279 (E.D.N.Y. 2004) ("1971 does not provide for a private right of action by individuals. Its provisions are only enforceable by the United States of America in an action brought by the Attorney General and may not be enforced by private citizens."); *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 Cmty. Sch. Bd. of Tr.,* 924 F.Supp. 815, 819 (E.D. Mich.1996); *McKay v. Altobello,* No. 96-3458, 1996 WL 635987, *3-4 (E.D. La. Oct. 31, 1996).

It is long-settled that if a statute is clear and unambiguous, that is the end of the matter, for the court must give effect to the unambiguously expressed intent of Congress. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Congress clearly and unambiguously authorized the Attorney General, but not individuals, to enforce Section 1971. 42 U.S.C. § 1971(c). Congress clearly and unambiguously makes no provision for the enforcement of violations of Section 1971 by private action.

The Plaintiffs also argue that Section 1971 provides individual rights enforceable in an action brought pursuant to 42 U.S.C. § 1983. A federal statute is unenforceable under Section 1983 where (1) the statute was not intended to create enforceable rights, or (2) the statutory scheme reflects a congressional intent to preclude its enforcement under Section 1983. *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Section 1971 fits at least the second of these criteria because the statute provides for enforcement only by the Attorney General, which demonstrates that Congress intended to preclude individual enforcement. Several courts have reached this very conclusion. *Thompson,* 226 F.3d at 756; *Spivey,* 999 F.Supp. at 996; *Willing*, 924 F.Supp. at 819; *Altobello*, 1996 WL 635987, at *3-4.

While the Eleventh Circuit has held that Section 1971 rights are enforceable through Section 1983, *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), its analysis

ignores the holdings of *McKay, Spivey, Gilmore,* and *Willing.* Moreover, *Schwier* relies on cases that found a private right of action under 42 U.S.C. § 1973, not 42 U.S.C. § 1971. *Schwier*, 340 F.3d at 1294 (*citing Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996)). Moreover, in *Allen*, the court held that it was "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits." *Allen,* 517 U.S. at 557 n.23. Likewise, in *Morse*, the court observed that it was important that the "Attorney General has urged us to find that private litigants may enforce the Act." *Morse*, 517 U.S. at 232-33. As far as the Defendants are aware, the United States has never encouraged courts to find that Section 1971 is enforceable by private litigants.

C. Section 1971 is targeted at voting qualifications predicated on race, not residence vel non in a nursing home polling place

The Crawford Plaintiffs argue that the Voter ID Law "imposes different standards depending on whether a person is a nursing home resident or some other type of in-person voter" and, therefore, violates 42 U.S.C. § 1971(a)(2)(A). Crawford Br. 48. 42 U.S.C. § 1971(a)(2)(A) states:

> No person acting under color of law shall
>
> > (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.

As the district court ruled, App. 114-15, n. 106, the history of this statute shows that it was intended only to provide protection against racial discrimination in voting. In fact, the Supreme Court has consistently held that Section 1971(a)(2)(A) is valid only as an exercise of the power granted Congress under section 2 of the Fifteenth Amendment, which protects against the abridgement of voting rights based on race. *United States v. Mississippi*, 380 U.S. 128, 136-37 (1965); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). In other words, Section 1971 cannot extend to non-race claims without falling outside Congress' Section 2 power. Accordingly, the district court ruled that Section 1971 was inapplicable here because the "Plaintiffs have not alleged, much less proven, any discrimination based on race." App. 114-15.

The Section 1971 prohibition of unequal treatment within a county is targeted at practices that discriminate based on race or specific classifications. *Frazier v. Callicutt*, 383 F.Supp. 15 (N.D. Miss. 1974). It is not intended to prevent states from making common-sense exceptions where rules would either be less effective or potentially lead to particularly harsh results. If this was the intent, the Illinois law permitting both in-person and absentee voting which was upheld in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), would itself be vulnerable to attack under Section 1971.

Because there have been no allegations or proof of racial discrimination or racially disparate impact, this section of the Voting Rights Act simply was not meant to apply to a statute such as the Voter ID Law. Besides, as with the right to

vote absentee, citizens within each Indiana county are treated the same with respect to the need for photo identification, with different options being available for reasons that are rationally related to important government objectives, such as indigency, religious accommodation, and residence in a nursing home polling place.

D. The Voter ID Law does not subject potential voters to different standards as to their qualifications to vote in violation of 42 U.S.C. § 1971(a)(2)(A)

The Section 1971 (a)(2)(A) cases relied on by plaintiffs implicate policies and practices that distinguished classes of individuals from the remaining citizens in the county without a valid reason. For example, *Frazier v. Callicutt*, 383 F.Supp. 15 (N.D. Miss. 1974), applied a separate set of standards for students of particular colleges, with the ultimate effect of discriminating primarily against African-American students. In *Shivelhood v. Davis*, 336 F.Supp. 1111, 1113 (D. Vt. 1971), students were required to complete supplemental questionnaires as a condition precedent to registering to vote. In *Ball v. Brown*, 450 F. Supp 4 (N.D. Ohio 1977), the court determined that automatically cancelling a woman's voter registration because of a change in her marital status rather than her name violated 42 U.S.C. § 1971(a)(2)(A). In none of these cases did the differential treatment relate to a legitimate government interest in election administration. They were instead designed to burden a particular class of disfavored voters, including blacks, students and married women. There is no plausible narrative in this case that Indiana has chosen to discourage voting among citizens who do not reside in nursing home polling places.

The Plaintiffs also cite *Brier v. Luger,* 351 F.Supp. 313, 316 (M.D. Pa. 1972), where the district court with very little analysis observed that a claim that Democrats were improperly purged from the voter-registration list was proper under 42 U.S.C. § 1971(a)(2)(A). On the merits, however, the court held that the plaintiff had completely failed to state a claim because he did not show any evidence of discrimination in application of the statute. Likewise, in this case, the Democrats have failed to show that the Voter ID Law is applied in a discriminatory fashion. Instead, they merely speculate that it will have a disparate impact.

Regardless, the nursing-home exception that the Plaintiffs find objectionable is amply justified by compelling state interests. Nursing homes are severely scrutinized by federal and state governments. The employees of nursing homes are strictly regulated with regard to patient's identities and health information under the standards of the Health Insurance Portability and Accountability Act of 1996 and Medicaid regulations. 42 U.S.C. § 1177. Indiana statutes provide stringent licensing requirements for nursing homes. Ind. Code § 16-28-2-1 *et seq.* Furthermore, nursing-home employees are intensively familiar with the identities of individual residents based on the regular feeding, medication, physical therapy, and cleaning of the residents. Nursing homes, in effect, are places "where everybody knows your name." Such extensive daily scrutiny and interaction only help to discourage identity fraud. App. 102 ("[T]he Indiana General Assembly selected for exemption from the statute's requirements a discrete and identifiable category of voters whose ability to obtain photo identification is particularly

disadvantaged bur for whom sufficiently reliable methods of verifying their identification otherwise exist.).

Thus, forgiving the voter-identification requirement for nursing-home residents who vote at polling places located therein is supported by the compelling need to accommodate particularly intransient seniors. Nursing-home residents are often incapacitated, without means of travel, and unable to easily obtain the identification required of other in-person voters. At the same time, nursing-home residents would experience relatively little difficulty getting from their room to a polling place located in the same facility. App. 102 ("We find convincing evidence of a good faith attempt to facilitate disadvantaged voters without compromising the voter fraud prevention intent which underlies SEA 483.").

Were the statute understood to require the absolute formal equality that the Plaintiffs seek to impose, Section 1971 would mean that states could impose only one method of voting upon all voters, no exceptions. For instance, under the Crawford Plaintiffs' theory, absentee voting accommodations for the disabled and the elderly would violate Section 1971 because they draw distinctions between groups of voters, and the state is simply not permitted to distinguish between those who wish to vote absentee because of a disability and those who wish to vote absentee for simple convenience. The facial absurdity of this argument should be sufficient to rebut itself.

Moreover, the General Assembly could reasonably infer that because nursing homes are heavily regulated with respect to identifying residents, and because

nursing home residents are unlikely to commit vote fraud and, *as a category,* are relatively easy to identify as residents of the building or likely to be well known by others on the premises, they do not pose the same need to apply the Voter ID Law as other voters. *Nat'l Coalition of Prayer* , 2005 WL 2253601, at *12-13 (holding that the General Assembly could reasonably infer that charities' volunteers and employees, *as a category*, are less likely to undertake abusive telemarketing practices, they could be regulated differently from paid professional telemarketers).

It is telling that the Plaintiffs make no references to the differences between in-person and absentee voting as reason for invalidation under 42 U.S.C. § 1971(a)(2)(A). In fact, by referring to only "in-person" voters they implicitly accept that valid distinctions are acceptable between in-person and absentee voters, but do not elaborate why the nursing-home exception is a less valid classification. However, the reasoning that supports differential treatment for absentee voters is equally applicable to the nursing-home exception. App. 115 ("[A]bsentee voting is an *inherently* different procedure from voting in person, requiring a state which allows both in-person and absentee voting to apply different 'standards, practice, or procedures' to these two groups of voters."). That is, it is only because of inherent differences between resident nursing-home voters and other in-person voters—and not because of any arbitrary discrimination or favoritism—that the process by which voters identify themselves is different.

V. Article 2, section 2 of the of the Indiana Constitution permits requiring voters to present government-issued photo identification

Plaintiffs argue that the Voter ID law violates Article 2, section 2 of the Indiana Constitution, which sets age and residency requirements, because it "does not impose a procedural hurdle" but a new "substantive requirement" to voting. Crawford Br. 50. However, their argument is untenable, as it ignores the plain structure of the Indiana Constitution, and taken at face value, it would invalidate all election regulations, replacing them with a system where each voter has the authority to define personalized standards of when, where, and how to vote.

Regardless, the Voter ID Law, which is "cloaked in the presumption of validity," App. 120 (citing *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 76 (Ind. 1982)), is fully consistent with the text and history of the Indiana Constitution. The Indiana Constitution defines the pool of eligible voters as including any "citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election." Ind. Const. art. 2, § 2. Plaintiffs acknowledge that "the Legislature has the power to determine what regulations shall be complied with by a qualified voter in order that his ballot be counted, so long as what it requires is not so *grossly unreasonable* that compliance therewith is practically impossible." Crawford Br. 50 (citing *Simmons v. Byrd*, 136 N.E. 14, 18 (Ind. 1922)) (emphasis added).

Simmons evaluated registration requirements pursuant to Article 2, section 1, the Free and Equal Elections Clause, and Article 2, section 14, governing

registration requirements. Both sections serve as grants of power to the General Assembly to promulgate election laws to regulate and uphold the franchise found in Section 2. Section 1, in particular, gives the state power to regulate elections to ensure fairness and reliability and protect the right to have one 's vote counted: "When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed." *Simmons*, 136 N.E. at 18.

Plaintiffs argued in the district court that the Voter ID law violates not only Section 2, but also that it independently exceeds the General Assembly's Section 1 power. App. 119-21. As they no longer contend that the Voter ID law is unauthorized Section 1 legislation, they implicitly accept its legitimacy in that regard. It follows, then, that the Voter ID Law is a valid regulation of Section 2 rights, since laws authorized by "other provisions within the organic law of the state," *Ex. Rel. McGonigle*, 193 N.E.2d 249 (Ind. 1963), do not offend the right to vote embodied in Article 2, section 2.

Nonetheless, Plaintiffs still claim the law is "grossly unreasonable" and "practically impossible" to comply with. First, of course, saying that acquiring photo identification is "practically impossible" in this day and age does not even pass the straight-face test. The fact is that the overwhelming majority of voters already possess valid identification, App. 83 (99% of Marion County voters possess the necessary identification), and Plaintiffs have not identified a single person who will be unable to vote because of the Voter ID Law.

But even if some citizens are unable to acquire photo identification, that is not enough to violate the Indiana Constitution. In fact, *Simmons* recognized as much when it observed that "[r]equiring voters to appear on election day and to cast their ballots in person involves inconvenience, and some voters find themselves unable to attend at the time fixed. But that fact does not make a statute unconstitutional which provides when the polls shall open and close." *Id.*; *Griffin v. Roupas*, 385 F.3d 1128, 1129-30 (7th Cir. 2004) (recognizing the same principle under the federal Constitution that laws requiring in person voting will inevitably result in the inability of some eligible voters to vote).

Plaintiffs do not assert that the state may not enact laws requiring voters to identify themselves as eligible, Crawford Br. 50, just that the current law is invalid because it is "new," resulting in a substantive requirement. Their theory is that the Voter ID Law violates the Indiana Constitution because the form of identification it requires is too specific and limited. Crawford Br. 50. But they do not explain how requiring photo identification in this regard is different from stating or signing one's name. Each requirement mandates a specific way for voters to be identified, which if not satisfied, results in the inability to vote. Plaintiffs advance no reason why the previous scheme was "regulatory" and thus permissible, while the new process is "substantive," and impermissible. App. 122.

The Plaintiffs' argument, taken to its logical conclusion, leads to the disqualification of most well-accepted election regulations, including, for example, in-person voting, which imposes geographical and temporal limitations on voting,

which no doubt eliminates some potential voters who are unable, for whatever reason, to make it to the polls on election day. The Plaintiffs' rule would require the state to accept personalized election regulations created by each individual voter, a result not contemplated, nor tolerated, by the Indiana Constitution. As the district court observed, "[t]he fact that Plaintiffs prefer alternative procedures to the photo identification does not create a Constitutional violation in requiring the latter." App. 122. Accordingly, the law in no way violates the Indiana Constitution.

The Voter ID Law exists to ensure that legitimate ballots are counted at full strength, and its requirements are eminently reasonable, particularly since nearly 99% of the electorate has already obtained government-issue photo identification. The Voter ID law is hardly "grossly unreasonable," so it easily satisfies the *Simmons* standard and is in harmony with both Sections one and two of Article 2 and their manifest purpose, "to designate the voters entitled to participate in all elections." *Bd. of Elections Comm'rs of City of Indianapolis v. Knight*, 117 N.E. 565, 567 (Ind. 1917).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding tables and certificates, contains 13,979 words according to the word-count function of Microsoft Word, the word processing program used to prepare this brief.

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