

In The  
**Supreme Court of the United States**

—◆—  
WILLIAM CRAWFORD, *et al.*,

*Petitioners,*

v.

MARION COUNTY ELECTION BOARD, *et al.*,

*Respondents.*

—◆—  
**On Writ Of *Certiorari* To The  
United States Court Of Appeals  
For The Seventh Circuit**

—◆—  
**BRIEF FOR PETITIONERS**

—◆—  
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## **QUESTION PRESENTED FOR REVIEW**

Whether an Indiana statute mandating that registered voters seeking to cast their ballots in-person produce a particular form of government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

**PARTIES TO THE PROCEEDINGS  
AND RULE 29.6 CORPORATE  
DISCLOSURE STATEMENT**

Petitioners in No. 07-21 are William Crawford, Joseph Simpson, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, and the Indianapolis Branch of the NAACP. The Indiana Coalition on Housing and Homeless Issues was a party below and originally a petitioner before this Court but has withdrawn from this case.

Respondents are the Marion County Election Board and the State of Indiana. The State of Indiana was allowed to intervene in this case by the district court.

The Rule 29.6 disclosure statement contained in the petition for writ of certiorari remains the same. However, the Indiana Coalition on Housing and Homeless Issues is no longer a party.

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Seventh Circuit, dated January 4, 2007, is reported at 472 F.3d 949 (7th Cir. 2007), and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App. 1-15). A timely petition for rehearing, with suggestion for rehearing en banc, was denied, with four judges dissenting, on April 5, 2007, and is reported at 484 F.3d 436 (7th Cir. 2007) (Pet. App. 150-55). The decision of the district court was entered on April 14, 2006, and is reported at 458 F.Supp.2d 775 (S.D. Ind. 2006) (Pet. App. 16-149).

**JURISDICTIONAL STATEMENT**

The opinion of the United States Court of Appeals for the Seventh Circuit is dated January 4, 2007. The Seventh Circuit's Order denying the petition for rehearing with suggestion for rehearing en banc was entered on April 5, 2007. The petition for writ of certiorari was filed on July 2, 2007, and was granted on September 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).



## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

United States Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code § 3-11-8-25.1 provides, in pertinent part:

### **Admission of voter to the polls**

(a) Except as provided in subsection (e), a voter who desires to vote an official ballot at an election shall provide proof of identification.

(b) Except as provided in subsection (e), before the voter proceeds to vote in the election, a member of the precinct election board shall ask the voter to provide proof of identification. The voter shall produce the proof of identification before being permitted to sign the poll list.



(c) If:

- (1) the voter is unable or declines to present the proof of identification; or
- (2) a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification under IC 3-5-2-40.5;

a member of the precinct election board shall challenge the voter as prescribed by this chapter.

(d) If the voter executes a challenged voter's affidavit under section 22.1 of this chapter, the voter may:

- (1) sign the poll list; and
- (2) receive a provisional ballot.

(e) A voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in an election.

Indiana Code § 3-5-2-40.5 provides:

**“Proof of identification”**

“Proof of identification” refers to a document that satisfies all the following:

- (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

(2) The document shows a photograph of the individual to whom the document was issued.

(3) The document includes an expiration date, and the document:

(A) is not expired; or

(B) expired after the date of the most recent general election.

(4) The document was issued by the United States or the state of Indiana.

Indiana Code § 3-11.7-5-2.5 provides:

(a) A voter who:

(1) was challenged under IC 3-10-1, IC 3-11-8, or IC 3-11-10-26 as a result of the voter's inability or declination to provide proof of identification; and

(2) cast a provisional ballot;

may personally appear before the circuit court clerk or the county election board not later than the deadline specified by section 1 of this chapter for the county election board to determine whether to count a provisional ballot. (b) Except as provided in subsection (c) or (e), if the voter:

(1) provides proof of identification to the circuit court clerk or county election board; and

(2) executes an affidavit before the clerk or board, in the form prescribed by the commission, affirming under the penalties of perjury that the voter is the same individual who:

(A) personally appeared before the precinct election board; and

(B) cast the provisional ballot on election day;

the county election board shall find that the voter's provisional ballot is valid and direct that the provisional ballot be opened under section 4 of this chapter and processed in accordance with this chapter.

(c) If the voter executes an affidavit before the circuit court clerk or county election board, in the form prescribed by the commission, affirming under the penalties of perjury that:

(1) the voter is the same individual who:

(A) personally appeared before the precinct election board; and

(B) cast the provisional ballot on election day; and

(2) the voter:

(A) is:

(i) indigent; and

(ii) unable to obtain proof of identification without the payment of a fee; or

(B) has a religious objection to being photographed;

the county election board shall determine whether the voter has been challenged for any reason other than the voter's inability or declination to present proof of identification to the precinct election board.

(d) If the county election board determines that the voter described in subsection (c) has been challenged solely for the inability or declination of the voter to provide proof of identification, the county election board shall:

- (1) find that the voter's provisional ballot is valid; and
- (2) direct that the provisional ballot be:
  - (A) opened under section 4 of this chapter; and
  - (B) processed in accordance with this chapter.

(e) If the county election board determines that a voter described in subsection (b) or (c) has been challenged for a cause other than the voter's inability or declination to provide proof of identification, the board shall:

- (1) note on the envelope containing the provisional ballot that the voter has complied with the proof of identification requirement; and
- (2) proceed to determine the validity of the remaining challenges set forth in the challenge

affidavit before ruling on the validity of the voter's provisional ballot.

(f) If a voter described by subsection (a) fails by the deadline for counting provisional ballots referenced in subsection (a) to:

(1) appear before the county election board; and

(2) execute an affidavit in the manner prescribed by subsection (b) or (c); the county election board shall find that the voter's provisional ballot is invalid.



### **STATEMENT OF THE CASE**

In 2005, Indiana adopted a law that requires registered voters who cast their ballots in person to provide current government-issued photographic identification in order to have their ballot counted. Thousands of persons currently do not have the necessary identification and citizens whose eligibility to vote has never been questioned lack identification that meets these requirements. Furthermore, for many persons, obtaining identification that satisfies Indiana's new requirements is a costly, protracted process. For others, it may be impossible.

The State's ostensible justification for enacting the voter identification law was to prevent vote fraud by ensuring that no one impersonates registered voters and casts ballots in their names. Yet there is no evidence that such a crime has ever occurred in Indiana. Nor was any evidence of otherwise undetected

fraud presented to the State Legislature. While enacting an identification law applicable to in-person voting, the Legislature took no steps to curtail the problem about which it actually had some evidence – absentee voting-related fraud. A divided panel of the Seventh Circuit nonetheless held that the State’s actions satisfied the heavy burden that the Constitution places on state policies that significantly interfere with the right to vote. That decision should be reversed.

1. In 2005, Indiana enacted legislation that for the first time requires “proof of identification” in order to vote at the polls. IND. CODE § 3-11-8-25.1(b). Prior to the new law, registered voters needed only to sign in at the polls where their signatures would be compared with those on file with election authorities, and the voters could be challenged if the signatures did not match or if their identities were questioned. (District Court decision [“D.Ct.”], Pet. App. at 28-29).<sup>1</sup>

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<sup>1</sup> Prior to the July 1, 2005 effective date of the identification law, the only time that presenting any sort of identification was required was as mandated by the Help America Vote Act of 2002 (“HAVA”), Pub.L.No. 107-52, 116 Stat. 166 (2002), 42 U.S.C. § 15483. Under HAVA, persons who register to vote must disclose their drivers license number or the last four digits of their social security numbers. 42 U.S.C. § 15483(a)(5)(A). If the applicant has neither a current license nor a social security number, the State will assign a random identification number to the person. If an individual registers by mail and has not previously voted and does not submit with his or her registration a drivers license number or the last four digits of his or her social security number that is matched with existing State records, the first time that he or she votes, either in-person or by

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Indiana law also contained, and continues to contain, detailed criminal provisions addressing various forms of election fraud including Class D felonies such as: voting or applying to vote in false name or voting more than once (IND. CODE § 3-14-2-12); unregistered or unauthorized voting (IND. CODE § 3-14-2-9); voting in other precincts (IND. CODE § 3-14-2-11); fraudulently applying for or completing a ballot fraudulently (IND. CODE § 3-14-2-16); hiring or soliciting a person to vote in a precinct where the person is not a voter (IND. CODE § 3-14-2-13); and, an election official allowing persons to vote who are not entitled to do so or who vote by use of an unauthorized procedure. (IND. CODE § 3-14-2-14).

As noted, the ostensible purpose for the new law is to safeguard against in-person impersonation fraud in voting. (D.Ct., Pet. App. at 106-07). However, the

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absentee ballot, the person must provide some form of identification: a current and valid photo identification of some type or a copy of a current utility bill, bank statement, government check, paycheck, or government document showing the person's name and address. 42 U.S.C. § 15483(b)(3)(A), (b)(2). If the person votes absentee he or she may simply send copies of the identifying information, whether photo identification or the other documentation. 42 U.S.C. § 15483(b)(2).

Before the passage of HAVA, the challenge process required the challenger to complete an affidavit, under the penalties for perjury, which could be countered by a counter-affidavit by the prospective voter. (D.Ct., Pet. App. at 29). Following the passage of HAVA, but prior to the voter identification law, the challenged voters cast provisional ballots and the election authorities would then determine if the ballot should be counted. IND. CODE § 3-11.7-5-2. (D.Ct., Pet. App. at 30).

State is not aware of any incidents of attempted or successful impersonation fraud in in-person voting in the State's lengthy history. (D.Ct., Pet. App. at 39).<sup>2</sup> No voter has ever been charged with any crime relating to impersonation fraud in in-person voting, no evidence of impersonation fraud in Indiana was presented to the Indiana legislature while it was considering the voter identification law and none was presented in this litigation. (D.Ct., Pet. App. at 39).

The absence of in-person voter impersonation within Indiana reflects the national experience. The Election Assistance Commission created by HAVA reported "that impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election." United States Elections Assistance Commission, *Election Crimes: An Initial Review and Recommendations for Future Study* 9 (December 2006), <http://www.votetrustusa.org/pdfs/EAC/ElectionCrimes.pdf>. It further found that many of the allegations of voter

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<sup>2</sup> Petitioners (hereinafter "Crawford, Simpson and the affected groups") sued the Marion County (Indianapolis) Election Board. Indiana intervened to defend the statute. Therefore the respondents will be referred to as "the State."

The county election board in Indiana is required to "[c]onduct all elections and administer the election laws within the county, except as provided in IC 3-8-5 and IC 3-10-7 for town conventions and municipal elections in certain small towns." IND. CODE § 3-6-5-14.



fraud made in the reports and books it analyzed “were not substantiated.” *Id.* at 16. The Commission’s conclusion comports with the experience of the U.S. Department of Justice. The Public Integrity Section of the Criminal Division of the U.S. Department of Justice reported that in the first three years of its “Ballot Access & Voting Integrity Initiative,” nationwide 89 persons in the United States were charged by federal prosecutors for various election related crimes. (District Court Record Document [“R.Doc.”] 79, Ex. 2 at 2). There are no specific examples in the report of in-person impersonation fraud, and a number of the offenses clearly involved other forms of fraud, for example, vote buying, voter harassment, conspiring to submit false voter registration information, and providing false information concerning felony status. (*Id.* at 1-4). “[T]he disenfranchisement of voters through antiquated voting systems, errors, mismanagement of registration bases, and intimidation or harassment is a far bigger problem than traditional forms of election fraud.” Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* 15 (2003). (R.Doc. 82, Att. 3, Ex. 6).

2. The new identification requirement does not allow the voter to choose from various types of photo identification, but requires a specific and limited form of current identification, IND. CODE § 3-5-2-40.5, which the parties agree is most likely to be either a

drivers license or an identification card issued by BMV. (D.Ct., Pet. App. at 31).<sup>3</sup>

***Persons without identification in Indiana:***

There are thousands of persons in Indiana of voting age who do not have a current license or identification card. The BMV does not have an estimate of the exact number of persons, although it acknowledges that these persons are present in Indiana. (D.Ct., Pet. App. at 36). The number appears to be at least 43,000.<sup>4</sup> A survey released in 2005 by AARP Indiana notes that 3% of Indiana registered voters above the age of sixty (60) surveyed do not have either a valid license or an identification card. (Joint Appendix ["J.A."] at 33 n.3). These survey results were corroborated by the director of petitioner United Senior Action who testified, based on her experience and conversation with her members, there are many senior citizens who do not have either valid licenses or identification cards. (D.Ct., Pet. App. at 45).

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<sup>3</sup> The only exception to the requirement that all in-person voters present proof of identification is if the voter "votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." IND. CODE § 3-11-8-25.1(e). This exception applies most notably to nursing homes. (D.Ct., Pet. App. at 25; King Dep. at 121, R.Doc. 57, Att. 2).

<sup>4</sup> The trial court, using methodology that was neither "complete [n]or definitive," opined there were 43,000 persons in Indiana of voting age without BMV identification or licenses. (D.Ct., Pet. App. at 69-70 n.43).

In addition to senior citizens, a number of other groups of citizens are significantly less likely than the citizenry as a whole to possess current drivers licenses or BMV identification cards. The record in this case shows that these groups include:

- persons with disabilities, especially disabilities that prevent them from driving, such as blindness (D.Ct., Pet. App. at 45)
- homeless persons (D.Ct., Pet. App. at 44; Ford Aff., Thompson Aff., J.A. at 10, 15-16; *see also* J.A. at 67 ¶ 5 (describing the situation of Kristjan Kogerma, a homeless man with a birth certificate and social security card, but no BMV identification))
- members of racial minority groups (AARP Survey, J.A. at 33 [referring to drivers license rates])
- persons with low incomes (*Id.*)
- persons who live in urban areas (*Id.*).

The extent of the problem of persons without identification is illustrated by the fact that Lafayette Urban Ministries, an organization providing assistance to needy families, noted it had to help approximately 150 people in 2004 who did not have photo identification. (D.Ct., Pet. App. at 36 n.18). Indiana House of Representative Member Crawford, who represents an Indianapolis district that is one of the most economically challenged in Indiana, has been informed by constituents at community events that they do not have the required identification to vote.

(D.Ct., Pet. App. at 52; Crawford Dep. at 10-11, 21-22, 80 and Interrogs. ¶ 1, R.Doc. 65, Att. 17; R.Doc. 86, Ex. 62)

### **The requirements for BMV identification**

There is no cost for the identification card if the applicant does not have a valid license and will be at least eighteen (18) at the time of the next election. IND. CODE § 9-24-16-10(b). The card must be renewed every four years. (D.Ct., Pet. App. at 35). However, obtaining the necessary identification requires more than merely contacting the BMV; the applicant must personally visit a BMV branch and present certain specific documentation to obtain identification. (D.Ct., Pet. App. at 31). The applicant must present a primary document, secondary document, and a proof of residency document or two primary documents and one proof of residency document. IND. ADMIN. CODE tit. 140, r. 7-4-2.<sup>5</sup> A primary document includes an original birth certificate, United States passport, or similar official record. IND. ADMIN. CODE tit. 140, r. 7-4-3(a). (*See* Regulatory Appendix, attached to this

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<sup>5</sup> A person applying for a drivers license must also present proof of possession of a social security number. IND. ADMIN. CODE tit. 140, r. 7-4-2. (D.Ct., Pet. App. at 32 n.16). The regulations governing the documentation necessary for the BMV, which are contained in the Appendix to this brief, were enacted after the trial court's decision but are substantially similar to the non-promulgated BMV requirements in effect at the time of the decision. (*Cf.* IND. ADMIN. CODE tit. 140, r. 7-4-2, 7-4-3, with material cited by the trial court at Pet. App. at 31-35).

brief; D.Ct., Pet. App. at 32-33). Secondary documents include such items as a certified academic transcript, a drivers license issued in another state, a valid banking or charge card, a W-2 or 1099 tax form, a Medicare or Medicaid card, or a certified divorce or marriage decree. IND. ADMIN. CODE tit. 140, r. 7-4-3(d). (Regulatory Appendix). The proof of residency requirement is satisfied by documents that specify the person's name and current, non-post office box, address. IND. ADMIN. CODE tit. 140, r. 7-4-3(e). (Regulatory Appendix).

### **Difficulties in presenting an original birth certificate**

Nationwide, millions of persons lack the primary documents that the BMV requires. As many as 7% of United States citizens do not have ready access to citizenship documents such as passports, naturalization papers or birth certificates. Brennan Center for Justice at NYU School of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification 2*, [http://www.brennancenter.org/stack\\_detail.asp?key=97&subkey=39242&proj\\_key=76](http://www.brennancenter.org/stack_detail.asp?key=97&subkey=39242&proj_key=76) ("*Citizens Without Proof*"). Citizens earning less than \$25,000 a year are more than twice as likely to lack this documentation. *Id.*

Collecting all the information necessary to satisfy the BMV requirements is a daunting process for thousands of potential voters in Indiana. For instance, Therese Clemente does not have a license or

identification card and attempted to obtain one after learning of the voter identification law. (Clemente Aff. ¶¶ 2-3, J.A. at 93). She went to the BMV and brought numerous documents, but when she got there she was told she needed her birth certificate. (*Id.* ¶ 3). She returned home and brought her birth certificate back, but was refused because it was not a certified copy. (*Id.* ¶ 4). She then sent away to Massachusetts, where she was born, to obtain her birth certificate and, after paying \$28, she received her birth certificate fourteen days later. (*Id.* ¶ 5). She returned to the BMV branch only to be told the birth certificate was not acceptable because it contained her maiden name, not the married name she has used for more than five decades. (*Id.* ¶ 6, J.A. at 94). She was turned away and was told she had to bring back, on her fourth trip to the BMV, a certified copy of her marriage certificate. (*Id.* ¶¶ 6-7).

As demonstrated by Ms. Clemente, at times the initial problem in meeting the requirements to receive identification is the obtaining of the birth certificate. A person without a sealed birth certificate will have to pay for one. In Indiana this can cost from \$12-\$20 and can cost more if the person was born in another state. (D.Ct., Pet. App. at 37-38, n.19).<sup>6</sup>

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<sup>6</sup> Indiana Code § 3-11.7-5-2.5(c)(2)(A) allows a voter who voted by provisional ballot to travel to the election authorities and sign an affidavit that he or she is indigent and unable to obtain proof of identification without payment of a fee. The definition of indigency is uncertain. (Sadler Dep. at 37-39, R.Doc. 57, Att. 1). The costs for transportation and parking

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Furthermore, obtaining a birth certificate may be difficult, regardless of costs. Some persons were born at home and do not have a birth certificate. For example, Thelma Hunter was born at home in Tennessee and to her knowledge no certificate exists. (*Id.* at 50). This is not a unique circumstance. (Haith Aff. ¶ 13, R.Doc. 63, Att. 14).<sup>7</sup> If there is an out-of-state birth record and a request is made to retrieve it, it may take months to be delivered. (Thompson Aff. ¶ 9, J.A. at 16).

Worse yet, the requirement that registered voters obtain a birth certificate in order to obtain a BMV identification document may pose a Catch-22, inasmuch as the process for obtaining the birth certificate may itself require the requestor to provide identification. (D.Ct., Pet. App. at 38). For example, a person who goes to the Marion County (Indianapolis) Health Department cannot obtain a birth certificate unless he or she can produce a passport, current student identification, military identification card, or a non-expired drivers license or state identification card.

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imposed on persons who must travel to the BMV and then to the election authorities cannot be waived. (Roberston Dep. at 48-49, R.Doc. 63, Att. 12).

<sup>7</sup> The BMV has created a policy, which it has not announced publicly, that allows persons over the age of sixty-five (65) who do not have birth certificates because their births were not recorded to substitute other documents as a primary document for the purposes of obtaining identification. (Redman Dep. at 9, ex. 3, R.Doc. 57, Att. 3). There is no record that this policy has ever been used. (*Id.* at 11).

(Ullrich Aff. ¶ 6 and attachments, R.Doc. 62, Att. 11).<sup>8</sup> There are also homeless persons who do not have these underlying documents necessary to obtain a birth certificate, regardless of cost concerns. (Ford ¶ 11, J.A. at 12).

### **Difficulties in presenting secondary and proof of residency documentation**

Obtaining the BMV identification is not merely a function of presenting a certified birth certificate. The other documents required by the BMV must be produced as well. Frequently homeless persons, some of whom have voted in the past, do not have the mass of documents necessary. (Ford ¶¶ 13-14, J.A. at 12-13). Kristjan Kogerma, a homeless man, went to the BMV with his birth certificate and social security card, but was denied identification because, being homeless, he did not have proof of an address. (Kogerma Aff. ¶¶ 6, 8 and attachment, J.A. at 66-67).

Similarly, poor people, people who live in nursing homes or persons with disabilities living in congregate

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<sup>8</sup> Failing that, the person will be directed to the Indiana State Board of Health which has an expanded list of documents that can be produced in order to obtain the birth certificate. (*Id.* ¶ 7; D.Ct., Pet. App. at 38). This bureaucratic maze resulted in about one-half of the 150 individuals that Lafayette Urban Ministries attempted to assist in 2004 in obtaining BMV identification not being able to receive identification because the individuals did not have the photo identification needed to obtain a birth certificate. (D.Ct., Pet. App. at 36 n.18).



living situations may not have, or may not be able to access, the information necessary to obtain the identification from the BMV. (Bohannon dep. at 42-43, 91-92, R.Doc. 62, Att. 10; Neimier dep. at 59-62, R.Doc. 62, Attachment 7; Madill dep. at 26-29, R.Doc. 62, Att. 9).

Therefore, given the mass of documents that must be produced, some persons have difficulty in obtaining identification. An employee of the BMV whose job it is to determine if applicants for licenses or state identification cards have with them the appropriate documentation indicated that in a given week she sees fifty potential applicants. (Andrews dep., J.A. at 215, 220-21). Of these, fully 60% must be turned away because they have not brought the appropriate documents with them. (*Id.* at 220-21).

### **The challenge process and provisional voting**

When a person attempts to vote in-person without identification the prospective voter *must* be challenged by the voting officials at the polls, even if the person is known to the officials. IND. CODE § 3-11-8-25.1(c). (D.Ct., Pet. App. at 25).<sup>9</sup> Once the challenge is made the prospective voter can only execute a provisional ballot and only after the person signs an

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<sup>9</sup> These officials are five persons comprising the precinct election board and party clerks, all appointed by the county election board. (D.Ct., Pet. App. at 22-23).

affidavit attesting to his or her right to vote in the precinct. IND. CODE § 3-11-8-25.1(d).

In order to have the ballot counted, the person must engage in a time-consuming post-election day process. He or she must appear before the circuit court clerk or county election board to prove identity not later than ten days after the election. IND. CODE §§ 3-11.7-5-1, 3-11.7-5-2.5(a). When appearing the voter must either: (1) present the photo identification demanded by Indiana law and execute an affidavit indicating the applicant is the same person who voted provisionally, or (2) execute the affidavit and also swear that the voter: (a) is indigent and unable to obtain the proof of identification without payment of a fee or (b) has a religious objection to being photographed. IND. CODE § 3-11.7-5-2.5(c). If the person succeeds in doing one of these three things, then the vote will be counted, unless there are other grounds for a challenge unrelated to identification. IND. CODE § 3-11.7-5-2.5(c)-(e). If, however, the potential voter fails to meet the deadline or does not produce or execute the required documentation, “the county election board shall find that the voter’s provisional ballot is invalid.” IND. CODE § 3-11.7-5-2.5(f).

In particular, Indiana’s process affects the indigent and religious objectors. The indigency and religious objection affidavits are not available for voters to sign at the polls – they are only available at the election offices after the day of the election. (D.Ct., Pet. App. at 26). And, an indigent voter or religious objector must pursue the post-election day

process of appearing at the polls, signing an affidavit, voting provisionally, then returning on another day to a remote site to execute another affidavit for each election in which he or she wishes to participate; there is no way to establish indigency or religious objections ahead of time for all subsequent elections.

Before the new identification requirements, challenges could take up to thirty minutes to resolve. (D.Ct., Pet. App. at 30). These challenges, which, unlike the new law, did not require the voter to make additional trips to government offices to attempt to have the vote counted, left some prospective voters extremely intimidated, causing voters to leave without voting, even when the challenges were not meritorious. (*Id.*). With the new law, the opportunities to present challenges have increased. (*Id.*).

### **Absentee balloting**

As indicated, there is no evidence of in-person voter impersonation fraud in Indiana.<sup>10</sup> The one area of voting in Indiana where there has been documented fraud is in the area of absentee balloting. (D.Ct., Pet. App. at 39). Despite this, the 2005 Indiana voter identification

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<sup>10</sup> The trial court noted there was anecdotal information about voting fraud in other areas of the country. (D.Ct., Pet. App. at 40-41). However, as indicated above, these anecdotes are effectively countered by formal studies, not mentioned by the trial court. *See also amicus* brief of Brennan Center for Justice at NYU School of Law at 7-14, filed in the United States Court of Appeals in this cause.

law challenged in this case does not require that absentee voters provide any documentary proof of their identity. *See* IND. CODE 3-11-10-1.2.; (D.Ct., Pet. App. at 27 n.10).<sup>11</sup> Instead, it leaves in place the pre-2005 process, under which, when absentee ballots are received, the county election board examines the signatures required on the accompanying affidavit and ballot envelope to see whether they match the registered voter's signature on file. If they do not match, the ballot can be challenged. (D.Ct., Pet. App. at 27 n.10). Otherwise, the ballot is counted.

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<sup>11</sup> The only time a person voting through an absentee ballot by mail is required to produce identification is if the voter falls within the HAVA requirements that are imposed on first-time voters who registered by mail who did not submit with his or her registration a drivers license number or the last four digits of his or her social security number. *See* note 1, *supra*. (D.Ct., Pet. App. at 27 n.10).

In support of its argument that fraud was a possibility in Indiana, the State introduced evidence that Indiana's voter rolls were significantly inflated. (D.Ct., Pet. App. at 39-40). Subsequent to the trial court's decision in this case, the United States brought suit against the State of Indiana and state election officials for failing 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. (Complaint, J.A. at 309). The defendants entered into a consent decree conceding that NVRA imposes the requirement to maintain voter registration lists and that they have been derelict in their duties "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." (Consent Decree, J.A. at 300). The State and its officials are now bound to take continuing steps to insure that the voting lists are well-maintained. (*Id.*, J.A. at 301-05).

Many voters, however, cannot respond to Indiana's voter identification requirement by voting absentee. Unlike many other states, which liberally permit absentee voting, Indiana permits only specified categories of voters to cast absentee ballots. *See* IND. CODE § 3-11-10-24 (permitting individuals to vote absentee if they have a specific expectation of being out of the county during the entire time polls are open; will be engaged in election activity away from their precinct; are confined because of illness; are elderly or disabled; are scheduled to work the entire time polls are open; are precluded from voting during the entire time polls are open due to religious obligations; have confidential addresses pursuant to Indiana law; or are eligible to vote in the precinct of a former residence).

3. The petitioners in this case are two elected officials and candidates, and four groups affected by the law. The candidate-officials, Representative Crawford and Joseph Simpson, have constituents, and prospective voters and supporters, who are adversely affected by the law. (D.Ct., Pet. App. at 52-53; Crawford Dep. at 10-11, 22, 29-30, 80, Ex. B, Interrog. ¶ 1, R.Doc. 65, Att. 17; Simpson Dep. at 12-13, 41-43, 62-64, 71, 79-80, Ex. C, Interrog. ¶ 4, R.Doc. 64, Att. 16 ).<sup>12</sup>

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<sup>12</sup> As indicated, Rep. Crawford has constituents who have specifically informed him that, because of the law, they would not be able to vote. Simpson, who is an elected member of the Washington Township (Indianapolis) Board and an elected

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The Indianapolis Branch of the NAACP (“NAACP”) has members who have indicated they will not be able to vote because of the law and the organization has further indicated it will have to expend its limited time and membership resources to engage in educational and outreach efforts to inform the public about the law. (D.Ct., Pet. App. 56-57; Bohannon Aff. ¶ 5, J.A. at 289). United Senior Action of Indiana (“USA”) is a 15,000-member organization primarily of senior citizens and is designed to advocate for and promote elder issues. (D.Ct., Pet. App. 57). It has members who no longer have licenses or birth certificates. (Neimier Dep. at 25, 69, R.Doc. 62, Att. 7).

The Indianapolis Resource Center for Independent Living (“IRCIL”) is a self-help advocacy center for independent living funded through Title 7 of the Rehabilitation Act (29 U.S.C. § 796f) to assist persons with disabilities who comprise its membership. (D.Ct., Pet. App. at 54-55; Madill Dep. at 6, Doc. 62, Att. 9, 17-18, 75-76). The law will require IRCIL to devote its limited institutional resources to assist persons with disabilities in collecting the documentation necessary to obtain the BMV identification which

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precinct committee-person (not a township trustee as noted by the trial court) has been informed by his constituents that they object to the law and believe it is another mechanism to stop them from voting, and he is personally aware that when voters are challenged some will leave the polls. (D.Ct., Pet. App. at 52-53; Simpson Dep. at 12-13, 41-43, 79-80, Ex. C, Interrog. ¶¶ 2, 4, R.Doc. 64, Att. 16).

will, in turn, preclude IRCIL from using its limited resources in other areas of importance to the community of persons with disabilities. (D.Ct., Pet. App. at 55, Madill Aff. ¶¶ 4-5, J.A. at 283). Similarly, petitioner Concerned Clergy of Indianapolis, a membership civil rights organization, will have to expend its limited resources to assist persons in paying for the cost of birth certificates. (D.Ct., Pet. App. at 54; Oakley Dep. at 8-9, Ex. G, Interrogs. ¶ 8, R.Doc. 63, Att. 13; Oakley Aff. ¶¶ 2-5, J.A. at 287).

4. The separate cases brought by Crawford, Simpson, and the affected groups and the Indiana and Marion County Democratic Parties (“Democrats”) were consolidated by the trial court and the consolidated case was submitted on cross-motions for summary judgment. (J.A. at 1-3). Crawford, Simpson, and the affected groups argued that the voter identification law is unconstitutional because it imposes a severe burden on the fundamental right to vote and is not narrowly drawn to meet a compelling state interest. (R.Doc. 66).<sup>13</sup> In granting the respondents’ summary judgment motion, the trial court held the Democrats had standing and petitioners Crawford and Simpson also had standing to assert the rights of voters who “inadvertently” cannot present photo identification. (D.Ct., Pet. App. at 96). The trial court

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<sup>13</sup> The petitioners also claimed the voter identification requirements violated 42 U.S.C. § 1971(a)(2)(A) and the Indiana Constitution. The trial court found against petitioners on these arguments and they are not pursued before this Court.

held that the other petitioners did not have standing. (*Id.*). The trial court further held the statute constitutional in that it did not create a severe burden on the right to vote and the law was reasonable. (*Id.* at 96-117).

5. A divided panel of the Seventh Circuit affirmed the trial court's decision. It concluded that, inasmuch as the Democrats clearly have standing, other standing arguments did not need to be addressed. (Pet. App. at 4). It noted "most people who don't have photo ID are low on the economic ladder." (Pet. App. at 3). It recognized that "even very slight costs in time or bother or out-of-pocket expense deter many people from voting" and the evidence demonstrated "the Indiana law will deter some people from voting." (*Id.*). In analyzing the right to vote, the panel observed that "the benefits of voting to the individual are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote)." (*Id.*) (Court's emphasis). The panel then concluded that the number of persons disfranchised by the voter identification law was small and, the fewer the number of people who would be disfranchised by the law, "the less of a showing the state need make to justify the law." (Pet. App. at 5). Given this deferential standard, the State's asserted interest in preventing fraud was deemed sufficient justification for the law. (Pet. App. at 10).

Judge Evans, in dissent, asserted that Indiana's voter identification law imposed a severe burden on



the right to vote on some portion of eligible voters and therefore should be subject to elevated judicial scrutiny, which it fails. (Pet. App. at 11-15). Judge Wood, writing for the four judges who dissented from the denial of rehearing en banc, argued that this “Court’s voting cases do not support a rule that depends in part for support on the idea that no one vote matters” and that if even one citizen is deprived of the right to vote, a severe burden on the right to vote is still present. (Pet. App. at 154). Accordingly, she argued that the panel had applied the wrong standard of review to a law that potentially imposed a severe burden on affected voters. (*Id.*)



### **SUMMARY OF THE ARGUMENT**

Indiana has enacted the most stringent and restrictive voter identification requirement in the United States. As a result, even the Seventh Circuit recognized “the Indiana law will deter some people from voting.” (Pet. App. at 3). The severe burden imposed by the statute is not, and cannot be, justified. Indiana’s voter identification law is therefore unconstitutional.

The Seventh Circuit made three fundamental errors in concluding that the voter identification law did not impose a severe burden. First, it failed to acknowledge that voting rights are burdened not just by absolute prohibitions that disfranchise the voter, but also by state-imposed hurdles that make it more

difficult to vote. Second, the court of appeals wrongly measured the severity of the burden by focusing on the number of individuals affected, rather than the magnitude of the burden imposed on affected individuals. For, in the court of appeals' estimation "the fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer." (D.Ct., Pet. App. at 5). The right to vote is an intensely personal right, *see, e.g., Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989), and unjustified burdens on that right are unconstitutional regardless of the number of voters affected. Just as the state cannot censor one speaker on the theory that others are allowed to speak, it cannot disfranchise even one voter on the theory that others are allowed to vote. Third, the court of appeals erroneously minimized the number of persons adversely affected by the law. Indiana law imposes a new burden on thousands of individuals because many registered voters currently lack the identification that will satisfy the law, many voters will face substantial difficulties in obtaining that identification, and Indiana's provisional voting process for voters who do not possess the required forms of identification itself erects substantial hurdles in the path of voters having their ballots counted.

This Court has long emphasized that, "as a general matter, 'before [the] right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Dunn v. Blumstein*,

405 U.S. 330, 336 (1972) (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)). The State's purported interest in this case – the prevention of vote fraud – cannot meet that test. While combating voting fraud is certainly a compelling governmental interest, see *Purcell v. Gonzalez*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 5, 7 (2006) (*per curiam*), the law cannot be sustained merely because Indiana has articulated hypothetical fraud as its concern. It is uncontested there is no evidence that there has ever been any in-person impersonation voting fraud in Indiana. Indeed, studies demonstrate that in-person impersonation fraud in voting is an extremely rare phenomenon anywhere. Given that courts have the duty to determine the legitimacy and strength of the State's interest, see *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), the State has an obligation to present some evidence to demonstrate the legitimacy of its fraud concerns. The State has failed in this obligation. The need to make this showing is particularly necessary in the context of voting rights, where our nation's history demonstrates repeated efforts have been made to suppress these rights under the guise of beneficent purposes.

Given this lack of credible evidence, the law is not appropriately tailored. There has been no showing that the previous anti-fraud devices, such as signature requirements, in-person observation with the ability to challenge the voter, and criminal penalties, do not provide satisfactory and less restrictive alternatives. Indiana has abandoned these less-restrictive alternatives, yet the State has seen fit to

continue signature comparison as the sole method for combating absentee voting fraud, notwithstanding the fact there has been documented fraud in this area of voting in Indiana. Moreover, the State's reliance on the existence of bloated voter rolls as a reason to fear fraud and require the new law cannot justify the voter identification law because the State has failed in its responsibilities under federal law to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters" from the registration lists, 42 U.S.C. § 1973gg-6(a)(4), a failure that has been corrected by a consent decree quickly agreed to by the State when sued by the United States. The State is doing more than requiring identification. It is requiring a particular and narrow form of identification, while ignoring many other forms that are well-recognized and accepted in other jurisdictions.



## ARGUMENT

Registered voters in Indiana who seek to vote in-person must satisfy the most demanding and restrictive voter identification requirement in the United States.<sup>14</sup> Indiana has created a new substantive

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<sup>14</sup> Indiana and Georgia are the only two states that require individuals seeking to vote in-person to present photo identification. Like Indiana, Georgia first enacted a photo identification requirement in 2005. Act No. 53, § 59, 2005 Ga. Laws 295. Georgia amended its code and regulations in 2006 to provide

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requirement for persons seeking to vote in-person. The issue is not merely identification, for Indiana has eschewed methods of identification in widespread use in other jurisdictions such as personal affidavits or other forms of identification.<sup>15</sup> Instead, a limited type

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that any registered voter without a photo identification card will be issued one free by his or her county board of registrars based on his or her voter registration application, no further documentation being required. Act No. 432, § 2, 2006 Ga. Laws 3 (codified at GA. CODE ANN. § 21-2-417.1); GA. COMP. R. & REGS. 183-1-20.01(4)(b)2(iii).

The Georgia statute is currently being challenged. *See Common Cause/Georgia v. Billups*, 504 F.Supp.2d 1333 (N.D. Ga. 2007); *appeal pending*, No. 07-14664-CC (11th Cir. Oct. 5, 2007).

Four states have statutes stating photo identification is required, but each have a fail safe provision for voters without photo identification. Louisiana, Michigan, and South Dakota statutes provide if an individual does not possess photo identification he or she may sign an affidavit at the polls and then vote by regular ballot. *See* LA. REV. STAT. ANN. § 18:562(A); MICH. COMP. LAWS § 168.523; S.D. CODIFIED LAWS § 12-18-6.1. Florida voters without acceptable identification are allowed to vote a provisional ballot which is counted if the county canvassing board determines that the signature on the provisional ballot certificate matches the signature on the voter's registration form. *See* FLA. STAT. ANN. §§ 101.043, 101.048(b).

The official website for the State of Hawaii notes voters must have a picture identification. *See* Voting in Hawaii, <http://www.hawaii.gov/elections/voters/votehi.htm> (last visited Oct. 8, 2007). However, the Hawaii statute only states that a voter "shall provide identification if so requested by a precinct official." *See* HAW. REV. STAT. § 11-136.

<sup>15</sup> For example, in Arizona, a voter who does not possess a form of required identification – a list that includes, *inter alia*, a current utility bill or bank statement – may cast a provisional

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of identification is required and the failure to comply results in a complete denial of the right to vote. The Seventh Circuit, although finding the law constitutional, recognized that “the Indiana law will deter some people from voting.” (Pet. App. at 3). Given the burden imposed by the law and its lack of justification, the Indiana law is unconstitutional.

This Court has repeatedly recognized that the right to vote is a “fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also, e.g., Dunn*, 405 U.S. at 336; *Kramer v. Union School District*, 395 U.S. 621, 626 (1969); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). In *Dunn*, this Court struck down a Tennessee durational residency requirement despite the state’s purported anti-fraud rationale. There, the Court explained that the Constitution requires “strict review” of laws that “place[ ] a condition on the exercise of the right to

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ballot. *See* ARIZ. REV. STAT. ANN. § 16-579(B). However, once the voter casts a provisional ballot it is the county recorder who is tasked with the duty of verifying the voter’s eligibility by comparing his or her signature to the signature on the voter rolls, and no further action is therefore required of the voter. *See* ARIZ. REV. STAT. ANN. § 16-584. In Ohio, a voter without the requisite identification is permitted to cast a provisional ballot after signing an affidavit attesting to his or her identity and eligibility to vote; again, though, the burden is on the county election officials to determine the voter’s eligibility, and no further actions are required of the voter. *See* OHIO REV. CODE ANN. § 3505.181. *See also* Petition for Writ of Certiorari at 16-17 n.6-8.

vote,” *Dunn*, 405 U.S. at 337 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)): review that asks “whether the exclusions are *necessary* to promote a *compelling* state interest,” *id.* (quoting *Kramer*, 395 U.S. at 627) (emphasis in *Dunn*). Thus, this Court squarely directed that “before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.” *Dunn*, 405 U.S. at 136 (internal quotation marks omitted).

*Dunn*’s citation of *Bullock v. Carter* for this point clarifies what constitutes a “condition on the exercise of the right to vote,” since *Bullock* in turn defined this phrase by citing *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). See *Bullock*, 405 U.S. at 143 n.20. *Harper* struck down a Virginia statute that, like the law at issue in this case, required an eligible voter to obtain beforehand and present to poll officials on election day a government-issued document (there, a poll tax receipt and here BMV identification) before he or she could vote.

To be sure, this Court has recognized that elections necessarily involve governmental regulation and that “[e]lection laws will invariably impose some burden upon individual voters.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*. Thus, in *Burdick* itself, which involved a challenge to Hawaii’s ban on voting for write-in candidates, the Court held that not every voting regulation should be subject to conventional strict scrutiny. In particular, *Burdick* held that the “mere fact” that Hawaii’s law

“tend[ed] to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.” 504 U.S. at 433 (quoting *Bullock*, 405 U.S. at 143). Thus, *Burdick* directed that “[a] court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule.’” 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). In doing so a court must take into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* But even under the *Burdick* standard, when a challenged regulation subjects the right to vote to “‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

This Court has not held the *Burdick* framework applicable to a restriction that is directly applied to otherwise eligible voters. There is some uncertainty regarding whether the standard articulated in cases involving voter eligibility like *Dunn v. Blumstein*, 405 U.S. 330 (1972), or the standard articulated in ballot access cases like *Burdick* presents the proper standard for reviewing the conditions on the right to vote imposed by the Indiana law now before this Court. But petitioners believe that there is no need for the Court to resolve that question in order to resolve this



case, for the level of scrutiny called for in *Burdick* is sufficiently exacting to invalidate Indiana's photo identification requirement.

**I. Indiana's voter identification law is particularly suspect because it places a severe burden on a significant number of voters**

The Seventh Circuit makes a number of incorrect conclusions and assumptions in its decision. First, it discounts the burdens imposed by Indiana's photo ID law by noting that these burdens can, in theory, be overcome and thus are not absolute disqualifications. (Pet. App. at 5). Second, it holds that even an unjustified burden on the right to vote is not subject to serious judicial scrutiny unless it disenfranchises an unspecified critical mass of voters. (*Id.*). Finally, it ignores the fact that thousands of Indiana residents are affected by this law, and instead concludes, mistakenly, that the number of persons who are severely burdened by the law, although they exist, are "few." (*Id.*).

**A. Proof of a severe burden does not require proof of outright disfranchisement**

This Court has stressed that the right of suffrage can be denied by "hurdles" placed in the path of prospective voters as effectively as an outright prohibition on the right to vote. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 150 (1965) (concluding that the Louisiana Constitution and statutes that

required voters to prove their ability to understand Louisiana and United States Constitution was unconstitutional). In *Anderson* the statute was found to be unconstitutional not because it placed an insurmountable barrier blocking third-party candidates, but because it placed “a particular burden” on Ohio’s independent voters. *Anderson*, 460 U.S. at 792.

The history of our country is replete with examples of barriers that discouraged voting and were deemed to impose severe burdens on basic constitutional rights, even though they were not insurmountable. For example, poll taxes, even though extremely low in amount and imposing only a “slight economical obstacle for any citizen who desires to qualify in order to vote,” nevertheless were successful in depressing voter participation. *Harman v. Forssenius*, 380 U.S. 528, 539 (1965) (quoting H.R. Rep. No. 1821, 87th Cong., 2d Sess., p. 3). In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court invalidated under the Fifteenth Amendment an Oklahoma law requiring those who had not voted in the 1914 general election to register between April 30, 1916 and May 11, 1916. The Court concluded the Constitution “hits onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted.” *Id.* at 275. The question, therefore, is not whether Indiana’s voter identification requirements disfranchise all persons affected by the law, but whether the requirements place such a particular burden or hurdle in the way of potential voters.

**B. The appropriate focus for assessing a challenged law’s burdensomeness necessarily requires looking at the law’s effect on individual voters**

The Seventh Circuit, although acknowledging Indiana’s “law will deter some people from voting,” also noted that any harm to an individual arising from his or her loss of voting rights was “elusive” and “the fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer.” (Pet. App. at 3, 5). The court therefore totally disregarded the weight and significance of burdens on individual voters, so long as a certain unspecified number of voters were not similarly burdened. The rationale for this was that “a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote.” (*Id.* at 3) (emphasis in original).

As indicated below, the court of appeals erred in ignoring the fact that the burdens of the voter identification law are felt by thousands of persons. But more fundamentally, the court failed to take into account the basic principle that “[t]he right to vote is personal.” *United States v. Bathgate*, 246 U.S. 220, 227 (1918). As this Court has consistently held, “all who participate in the election are to have an equal vote . . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.” *Gray v. Sanders*, 372 U.S.

368, 379-80 (1963). In *Reynolds v. Sims*, 377 U.S. 533, 554, 567 (1964), the Court stressed that “all qualified voters have a constitutionally protected right to vote,” and “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.” That Indiana’s photo identification law may affect few voters is irrelevant if it burdens or debases their right to vote. In *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*), in invalidating recount procedures in the Florida 2000 presidential election, the Court reaffirmed and relied upon the principle of “the equal weight accorded to each vote and the equal dignity owed to each voter.” The lower court clearly violated this principle by refusing to accord equal weight and dignity to voters burdened by the photo identification law.

Moreover, this is not an election contest, nor a case such as *Thornburg v. Gingles*, 478 U.S. 30 (1986), in which plaintiffs contend the votes of those without photo identification are “diluted” such that they affect the outcome of elections. This case involves unconstitutional burdens on the right to vote itself. As the Court explained in *Morris*, 489 U.S. at 698, “[t]he personal right to vote is a value in itself,” and denial of a citizen’s voting rights causes individual harm when it occurs “without more and without mathematically calculating his power to determine the outcome of an election.” In its seminal voting rights cases, such as *Smith v. Allwright*, 321 U.S. 649 (1944) (white primary), *Harman v. Forssenius* (poll tax), and *Dunn v. Blumstein* (durational residency requirement),

this Court has invalidated burdens on the right to vote, not because they would have affected the outcome of elections, but because the burdens themselves violated the Constitution. Under this Court's jurisprudence, the constitutionality of the voter identification law must be assessed without regard to whether a certain minimal number of voters are burdened, or whether they could have affected the outcome of an election.<sup>16</sup>

**C. The voter identification law severely burdens thousands of prospective Indiana voters**

The court of appeals also erred in concluding that the challenged law has little effect on the electorate. Although the precise number is not known, there are thousands of Indiana residents of voting age without the required identification. (*Supra* note 4). Nationwide, studies indicate that from 6 to 11 percent of Americans do not have state-issued identification of the sort Indiana requires here.<sup>17</sup> Although the AARP

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<sup>16</sup> In addition to being legally erroneous, the Seventh Circuit's rationale ignores the fact that elections are frequently decided by a difference of only a few votes. *See* Petition for Writ of Certiorari at 26 n.16.

<sup>17</sup> The Task Force Report accompanying the 2001 Report of the National Commission on Election Reform co-chaired by Presidents Ford and 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 Accompany the Report of the National Commission on Election Reform*,

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Indiana survey of older registered voters indicated that 3% had no BMV identification, surveys of the elderly population in general disclose that a much higher percentage lacks this form of identification.<sup>18</sup>

As acknowledged by the Seventh Circuit, those “low on the economic ladder” (Pet. App. at 3) are especially prone not to have the required identification. This is not just a problem that is limited to the homeless and displaced. Citizens with lower incomes are less likely to possess photo identification, and minority populations disproportionately lack identification.<sup>19</sup>

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Chapter VI-Verification of Identity, p. 4 (2001), [http://webstorage3.mcpa.virginia.edu/commissions/comm\\_2001\\_taskforce.pdf](http://webstorage3.mcpa.virginia.edu/commissions/comm_2001_taskforce.pdf). *Citizens Without Proof* demonstrates that 11% of United States Citizens, more than 21 million people, do not have government-issued identification.

<sup>18</sup> For example, based on Wisconsin Department of Transportation figures, an estimated 23% of persons aged sixty-five (65) and over do not have either a drivers license or a photo identification. John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, UNIVERSITY OF WISCONSIN-MILWAUKEE EMPLOYMENT AND TRAINING INSTITUTE 1 (June 2005), <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf> (“Pawasarat”). The national survey conducted by the Brennan Center discloses that 18% of American citizens age sixty-five (65) or above do not have current government issued photo identification. *Citizens Without Proof* at 3.

<sup>19</sup> *Citizens Without Proof* at 3. In Milwaukee County, Wisconsin, only 47% of African American adults and 43% of Hispanic adults have drivers licenses. Pawasarat at 1.

Persons without valid photo identification must obtain it to vote in-person. As indicated above, obtaining identification may be a difficult process. Persons who do not have birth certificates may obtain them only by expending money and significant time and effort. Some, like Thelma Hunter, do not have official records of their birth at all. Others, like Kristjan Kogerma and other displaced persons, simply do not have the other documentation required by the BMV. The end result, as Ms. Andrews noted, is that 60% of applicants for identification at one BMV license branch are turned away each week because they do not have the underlying documentation necessary to obtain BMV identification. For those who are persistent and attempt to acquire the appropriate documentation and return to the license branch, like Ms. Clemente, there is no guarantee that even repeated trips will reward the determined prospective voter with the elusive prize of identification.<sup>20</sup>

The burdens and hurdles placed in the way of some persons by the voter identification law are therefore significant, involving cost, time, and repeated trips to government agencies. For some the effort and repeated trips may result in the receipt of

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<sup>20</sup> Ms. Clemente's ultimate problem in obtaining identification, that her name on her birth certificate is different than her current name, is also not unique. Only 48% of voting-age women across the United States with ready access to their birth certificates have a birth certificate with their current legal name. *Citizens Without Proof* at 2.

voter identification. For others, identification will continue to be elusive. As Judge Evans, in dissent, noted in the court of appeals, the law “will make it significantly more difficult for some eligible voters . . . to vote. And, this group is mostly comprised of people who are poor, elderly, minorities, disabled or some combination thereof.” (Pet. App. at 13). The law imposes a severe restriction on these persons’ voting rights and, although their precise numbers are not known, the number is significant.<sup>21</sup>

Another group who will be burdened by the law, and whose numbers certainly cannot be assessed until an election, are those who come to the polls and are not allowed to vote by way of a regular ballot because they simply forgot their identification, or present identification that they believe is valid but is not. The latter category would include persons, for example, who no longer drive and assume that their expired license is valid identification because it contains their name, picture, and current address. Or it could include persons who are carrying other documents they mistakenly believe satisfy Indiana’s

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<sup>21</sup> Although the names of all the persons who are burdened by the law are not known, their interests are well-represented by petitioners. The NAACP is advancing the interests of its members who have indicated they are not able to vote because of the new law. The same is true of USA, who has members that do not have birth certificates or current licenses. Representative Crawford is furthering and representing his constituents and potential supporters, a number of whom have indicated that the new law will preclude them from voting.



rigorous requirements. For example, the Washington Post reported that long-time United States Congresswoman Julia Carson of Indianapolis went to her polling place early in the morning on primary day in 2006 to vote and was initially informed by a poll worker that her photo identification card issued by the federal government was not satisfactory because, although it was identified as being issued for the 109th Congress, it had no expiration date. Amy Goldstein, *Democrats Predict Voter ID Problems*, WASHINGTON POST at A1 (Nov. 3, 2006), [www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110201897.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110201897.html). She was allowed to vote only after an off-site supervisor intervened. *Id.*<sup>22</sup>

Furthermore, the challenge process is a hurdle in and of itself. Even when frivolous, some voters will react to a challenge by leaving the polls. Completing the affidavit to vote by way of a provisional ballot can take up to one-half hour and is only the first step in a process that requires the prospective voter to try to get identification and then travel to the appropriate county office to present identification and sign yet

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<sup>22</sup> The trial court recognized there would be these potential voters who “through inadvertence will not be able to present photo identification at the polls the day of election.” (D.Ct., Pet. App. at 96). “Obviously, the exact identity of voters who will utilize provisional ballots because of their inadvertent lack of photo identification cannot be determined in advance. As a result, such affected voters also cannot assert their own rights in advance.” (*Id.* at 79). These voters are burdened because they will be denied the ability to cast a regular ballot.

another affidavit. Persons without identification who cannot afford a birth certificate may fall within the uncertain definition of indigency and must also vote provisionally. The person cannot sign the indigency affidavit at the polls, but must travel to the appropriate public office to sign the affidavit on a later date.<sup>23</sup> Certainly, having to travel to other offices and fill out forms, in a ten-day window, to make one's vote count in an election that is over, represents a hurdle that many registered voters will choose not to attempt.<sup>24</sup>

In assessing the severity of the restriction on the right to vote – “burdens that are not limited to absolute denial of the right – we should focus on the realities of the situation, not on empty formalism.” *Clingman v. Beaver*, 544 U.S. 581, 610 (2005) (Stevens, J., dissenting). The Seventh Circuit assumes that virtually everyone in Indiana and the United States possesses licenses or BMV identification. The reality is, however, that there are residents of Indiana and the United States who do not enter federal

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<sup>23</sup> This assertion of indigency must be done every time the person votes, theoretically two times a year, for both the primary and general election. “This is plainly a cumbersome procedure.” *Harman*, 380 U.S. at 542 (concerning the certificate of residence that could be filed in order to be exempt from a poll tax.)

<sup>24</sup> Numerous studies demonstrate that anything that increases the “cost” of voting will discourage some voters and lead to lower voter turnout. *See, e.g.*, Thomas Holbrook and Brianne Heidbreder, *The Etiology of Class Bias in the American States* 7 (2007), <http://www.unc.edu/depts/polisci/statepol/conferences/2007/papers/Holbrook%20and%20Heidbreder%20paper.pdf> (citing various studies).

buildings or fly in airplanes (Pet. App. at 3), and who do not have all their vital papers with them or easily accessible to them in a safety deposit box. The reality is that the prospect of being challenged and having to make extra trips to government agencies to vote will deter persons from voting. The reality is the voter identification requirements represent a real impediment on the ability to vote for numerous persons in Indiana.

That Indiana's law imposes a "severe" restriction is reinforced by comparing it to other jurisdictions' voter identification requirements. The law at issue in this case is the most draconian in the United States. Only one other state – Georgia, whose recently enacted law is also currently being challenged – imposes an unyielding requirement that all individuals seeking to vote in-person present photo identification.<sup>25</sup> Most other states either require no such proof, provide failsafe alternatives for voters who appear without documentation of their identities, or provide mechanisms for verifying the provisional votes cast by voters lacking the required documents that are far less burdensome than Indiana's.<sup>26</sup>

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<sup>25</sup> See *supra* note 14.

<sup>26</sup> See *supra* notes 14-15; Petition for Certiorari at 16-17. Petitioners do not suggest that these other statutes are necessarily constitutional; they too may well impose severe burdens on the right to vote, and may contain additional requirements that render them just as constitutionally problematic as the Indiana law at issue in this case.

## II. The State's supposed interests do not justify this law

This Court's decisions in *Burdick* and *Anderson* direct courts reviewing challenges to laws that burden the right to vote to consider "the *precise* interests put forward by the State as justifications for the burdens imposed by its rule." *Anderson*, 460 U.S. at 789 (emphasis added). The court must also determine the "legitimacy and strength" of these interests. *Id.* Particularly when, as here, the right to vote has been "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 citations omitted). In any event, it is not enough for the State merely to articulate plausible interests, for a court "must consider the extent to which those interests make it necessary to burden the plaintiff's rights," *Anderson*, 460 U.S. at 79, and "must also have a 'strong basis in evidence.'" *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (internal citations omitted).

The Seventh Circuit noted the purpose for the identification law was to prevent in-person impersonation voting fraud. (Pet. App. at 6-7). Although combating voting fraud is certainly a compelling governmental interest, *Purcell*, 127 S.Ct. at 7, the State has no interest in combating this particular form of fraud in this instance, given the absence of any evidence that it has ever occurred in Indiana and the absence of any reason to believe that it might occur in the future. Indeed, the record is so bereft of

evidence suggesting any fraud problem and the State's response to any purported problem is so wildly excessive as to give rise to the inference that the voter identification law is not really designed to stamp out fraud.

It is undisputed that there is absolutely no evidence in-person impersonation voting fraud has ever occurred in Indiana. The only documented voting fraud in Indiana has involved absentee balloting, an area the State has chosen not to regulate with any new protections. Although the State and the trial court cited to various newspaper articles and anecdotal reports of voting fraud outside of Indiana, most do not specifically concern in-person impersonation fraud<sup>27</sup> and actual studies disclose scant evidence of voting fraud in general, and in-person impersonation fraud in particular. As indicated previously, "the disenfranchisement of voters through antiquated voting systems, errors, mismanagement of registration bases, and intimidation or harassment is a far bigger problem than traditional forms of election fraud." Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* 15 (2003). (R.Doc. 82, Att. 3, Ex. 6).

Cases from other jurisdictions challenging voter identification laws also illustrate that the proponents of voter identification requirements, although claiming fraud as a justification, have been unable to

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<sup>27</sup> See *supra* note 10.

present evidence of in-person impersonation fraud that would be remedied by the challenged laws. *See ACLU of New Mexico v. Santillanes*, 2007 WL 782167 at \*33 (D.N.M. 2007), *appeal pending*, No. 07-02057 (10th Cir.) (Defendant presented “no admissible evidence that the October 2005 City Charter amendment actually serves to combat an existing problem with voter impersonation fraud in municipal elections.”); *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1361 (N.D. Ga. 2006) (“Indeed, Secretary of State Cox pointed out that, to her knowledge, the State had not experienced one complaint of in-person fraudulent voting during her tenure.”); *Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. 2006) (“The Photo-ID Requirement could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri.”)

By contrast, the Seventh Circuit panel’s majority advanced the perverse hypothesis that the very lack of reported evidence in fact proves the existence of a problem: the fact that there were no verified instances of illegal impersonation simply suggested that such lawbreaking was occurring undetected. (*See* Pet. App. at 8-9.) As this Court has observed in a related context, “[t]his ‘heads I win, tails you lose’ approach cannot be correct.” *FEC v. Wisconsin Right To Life*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2652, 2668 (2007). If the *Burdick/Anderson* test is to have any meaning, sheer imaginative speculation cannot take the place of tangible, evidence. Indeed, in a variety of contexts related to regulation of the political process, this

Court has repeatedly demanded more than a blanket assertion of an anti-fraud rationale. Perhaps the most analogous example involves the Tennessee durational residency requirement at issue in *Dunn v. Blumstein*. There, the state argued that its law was necessary to combat potential fraud, but this Court found that claim “unconvincing,” 405 U.S. at 346, in light of the state’s inability to summon any evidence.<sup>28</sup>

This Court’s recent campaign finance decisions have followed the same approach. For example, in *Randall v. Sorrell*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2479, 2494 (2006) (plurality opinion), this Court refused to accept on faith Vermont’s argument that its contribution limits were necessary to prevent corruption and the appearance of corruption, instead emphasizing that a reviewing court “must examine the record independently and carefully to determine whether . . . [the] contribution limits are ‘closely drawn’ to match the State’s interests.” Similarly, in *McConnell v. FEC*, 540 U.S. 93, 232 (2003), this Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 that prohibited campaign contributions by persons

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<sup>28</sup> In a later case, *Marston v. Lewis*, 410 U.S. 679 (1973) (*per curiam*), the Court accepted a far less restrictive 50-day voter registration cutoff imposed by Arizona in light of the state’s evidence that the cutoff was “necessary to permit preparation of accurate voter lists.” *Id.* at 681. The contrast between *Dunn* and *Marston* illustrates the point that even when prevention of vote fraud is a compelling interest, the means for combating it must be narrowly tailored to avoid imposing an unnecessary barrier to the right to vote.

under the age of seventeen, because the intermediate scrutiny demanded of regulations concerning campaign contributions was not satisfied by the government's "scant evidence" that such a regulation served the interest of protecting against fraudulent adult contributions in the name of their children. And, even where the Court upheld another portion of the law restricting large contributions to party committees on an anti-corruption rationale, it emphasized that the statutes were supported by an "ample record" and not just by "common sense." *Id.* at 145.

Still other cases involving access to the political process are also in accord. Across the board, this Court has required that actual facts support a State's action that burdens political rights. In both *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 204-05 (1999), and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995), this Court rejected states' arguments that their generalized interest in preventing electoral fraud justified restrictions on initiative circulators (*Buckley*) or on anonymous pamphleteering (*McIntyre*). This general interest was not sufficient to overcome the constitutional rights in question. And in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 228-29 (1989), this Court rejected California's assertion that statutory restrictions banning primary endorsements and regulating the internal affairs of party committees were necessary to protect primary



voters from confusion and undue influence given the lack of evidentiary support.<sup>29</sup>

The need to closely inspect and determine the legitimacy and strength of the asserted interests is particularly acute here. The history of voting in the United States is replete with examples of sinister efforts to disfranchise voters which were accepted by courts that refused to look behind the assertion of an innocent purpose. Accordingly, “applying heightened scrutiny helps to ensure that . . . limitations are truly justified and that the State’s asserted interests are

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<sup>29</sup> Even beyond the political process, this Court has refused in cases that call for anything more than the most deferential form of rationality review to allow a state’s bare and unsupported assertion of fraud prevention to justify governmental action. In *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), for example, where the Court applied “intermediate scrutiny” to assess a ban imposed by a Florida’s Board of Accountancy on in-person solicitation by certified public accountants and found it to be unconstitutional, this Court rejected the claim that the ban was necessary to protect consumers from fraud because although “the Board’s asserted interests are substantial, the Board has failed to demonstrate that its solicitation ban advances those interests.” See also, e.g., *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 165, 169 (2002) (village’s desire to prevent fraud did not justify regulation of solicitation given “an absence of any evidence of a special crime problem related to door-to-door solicitation in the record”); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636 (1980) (fraud justification for ordinance prohibiting solicitation by certain charities was not justified by village’s desire to protect citizens from fraud); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 268 (1974) (fraud concerns did not justify durational limitations on receipt of assistance).

not merely a pretext for exclusionary or anticompetitive restrictions.” *Clingman*, 544 U.S. at 603 (O’Connor, J., concurring in part and concurring in the judgment). In *Breedlove v. Suttles*, 302 U.S. 277, 283-84 (1937), the Court upheld Georgia’s poll tax as a good government measure, “a familiar and reasonable regulation long enforced in many states.” There is no dispute, however, that the poll tax was adopted as one of the “expedients to obstruct the exercise of the franchise by the negro race.” *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). Ultimately, even without finding unconstitutional purposeful racial discrimination, this Court overruled *Breedlove* in *Harper*. Similarly, in *Lassiter v. Northhampton County Board of Elections*, 360 U.S. 45, 51, 54 (1959), this Court upheld North Carolina’s literacy test for voting as “designed to promote intelligent use of the ballot” and as advancing “the desire of North Carolina to raise the standards for people of all races who cast the ballot.” Less than a decade later, in *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966), this Court recognized that literacy tests “have been instituted with the purpose of disenfranchising Negroes.”

It is true that “[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively,” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986), and that states have an interest in taking measures to ensure public confidence in elections. However, these realities simply do not allow a

state to impose, as Indiana has done here, a significant burden on the fundamental right to vote as a “solution” to a problem – in-person impersonation voting fraud – that does not exist and cannot be rationally feared given the general lack of evidence concerning the existence of such fraud. In *Burdick*, Justice Kennedy’s dissent explained that he would have struck down Hawaii’s ban on write-in voting because “[t]he interests proffered by the State, some of which are puzzling, are not advanced to any significant degree by the” ban. *Burdick*, 504 U.S. at 448 (Kennedy, J., dissenting). Indiana’s explanations are worse than “puzzling”: they are quite simply inadequate. Indeed, the lack of evidence of in-person fraud compounded by the burden imposed on registered voters means that “the State has failed to justify” the voter identification law “under any level of scrutiny.” *Id.*

Nor can the State argue that the voter identification law is supported by a strong interest in preventing “the eroding of the public confidence in the electoral process through the appearance of corruption.” *FEC v. National Right to Work Committee*, 459 U.S. 197, 208 (1982). While this is certainly an important interest, *Purcell*, 127 S.Ct. at 7; *Buckley v. Valeo*, 424 U.S. 1, 27 (1976), the State cannot be allowed to create an opinion about the public’s subjective perceptions when there is no evidence to support this perception. As the Missouri Supreme Court stated in *Weinschenk*, 203 S.W.3d at 218, in striking down a

voter identification statute on state constitutional grounds:

While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.

Moreover, it would be an intolerable irony, and unconstitutional, to shore up voter confidence by disfranchising part of the electorate.

### **III. The voter identification law is not narrowly drawn to meet any legitimate goal of fighting impersonation voting fraud**

Without any evidence of in-person voting fraud or any reasonable basis to suspect that such fraud is a risk in Indiana, the voter identification law simply cannot be deemed to be narrowly drawn to meet the State's avowed fraud concerns. Even were there some basis in evidence for the restriction, "[a] State . . . is constrained in how it may pursue that end: '[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Shaw*, 517 U.S. at 908 (internal citations omitted). The voter identification law, the means chosen by the State to attack the

perceived risk of in-person identification fraud, is not so tailored. “[T]here are other, reasonable ways to achieve” the State’s “goals with a lesser burden on constitutionally protected activity.” *Dunn*, 405 U.S. at 343. Here the State has chosen a remedy which is most burdensome, ignoring “other, reasonable ways to achieve” its goals.

In *Dunn*, in striking down the challenged durational residency requirement, this Court noted that the State’s interests in safeguarding against fraud were met by the “variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.” 405 U.S. at 353. Similarly, in *Harman*, in invalidating Virginia’s poll tax, the Court noted the “availability of numerous devices to enforce valid residence requirements – such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, [and] public scrutiny by candidates and other interested parties.” 380 U.S. at 542.

The same principle holds true here. Prior to 2005, Indiana combated the risk of in-person voter impersonation by requiring that persons presenting themselves at the polls sign in, thereby allowing for a signature comparison. All this was done under the watchful eyes of numerous election officials who could challenge the prospective voter, and against the backdrop of extensive criminal statutes punishing fraud in voting. Given that there has been absolutely no evidence of in-person fraud in Indiana, the voter identification law is simply not “necessary to meet the

State's goal of stopping fraud." *Dunn*, 405 U.S. at 353.<sup>30</sup>

The State cannot argue that further protections are necessary because of the alleged inadequacy of signature identification as an anti-fraud mechanism. After all, it chose to retain signature identification as the sole method of fraud prevention in absentee voting, despite the fact that the only evidence of voting fraud in Indiana is in absentee voting. The Indiana Supreme Court has stated the "absentee voter is not exposed to the extensive precautions followed by Election Day officials to guard the integrity of the ballots." *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006). Abandoning these extensive precautions while allowing lesser precautions to

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<sup>30</sup> Contrary to the lower courts' unsupported assertions concerning the difficulty in detecting in-person voter impersonation (D.Ct., Pet. App. 7-8, 109), according to the Director of the Election Crimes Branch and Senior Counsel for Policy, both of the Public Integrity Section of the Justice Department, election crime prosecutions present an easier means of obtaining convictions than do other forms of public corruption because "[e]lection crimes usually occur largely in public," "[e]lection crimes often involve many players," and "[e]lection crimes tend to leave paper trails." CRAIG C. DONSANTO AND NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION CRIMES 2 (7th ed. 2007), <http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf>. They note further that the most common election frauds are those involving absentee ballots and "ballot-box stuffing" which necessarily involve poll official involvement. *Id.* at 101-03.

continue to exist with regard to absentee ballots cannot be described as narrowly tailored.<sup>31</sup>

To the extent the State has portrayed itself as susceptible to in-person voter identification fraud because of bloated voter rolls (D.Ct., Pet. App. at 109), the tailored remedy for this problem lies within the State's own control: to maintain appropriate voter lists. Indeed, subsequent to the district court's decision, Indiana was sued by the United States for failing to properly maintain voter rolls and entered into a consent judgment both admitting fault and agreeing to comply with the requirements of the National Voter Registration Act of 1993 to properly maintain voter registration lists. (J.A. at 299-306). The State has ignored this narrowly tailored approach.

Moreover, Indiana's adoption of a distinctively draconian voter identification regime further undercuts its claim of appropriate tailoring. The State has

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<sup>31</sup> The Seventh Circuit's comment that voter identification would not be possible with regard to absentee balloting is simply untrue (Pet. App. at 10). Of course, one of the identification methods provided to absentee voters under HAVA is submission of copies of photo identification. 42 U.S.C. § 15483(b)(2). However, the Seventh Circuit missed the point. The argument is not that the identification methods must be the same between the two types of balloting. The point is that Indiana cannot claim that signature identification and the other anti-fraud mechanisms inherent in personally appearing at the polls are inadequate when it has determined that signature identification is adequate to detect fraud in absentee voting.

adopted a regulation that, because it requires a specific form of identification, goes far beyond a mere requirement that prospective voters satisfy election officials as to their identity.<sup>32</sup> The experience of Indiana's sister states that do require voters to identify themselves, but allow for a host of forms of identification aside from drivers licenses or state-issued identification cards, demonstrates there are less onerous methods to achieve the goal of voter identification.<sup>33</sup> Indiana recognizes this by allowing persons who live in nursing homes that are also polling places to vote in-person without identification. The district court explained this exception by noting that for members of this "particularly disadvantaged" group, "sufficiently reliable methods of verifying their identification otherwise exist." (D.Ct., Pet. App. at 123). But this concedes that, particularly for disadvantaged groups, less burdensome methods of identification are appropriate.

It is true the law allows an indigent voter without identification to sign an affidavit if he or she is unable to pay the fee, and allows a voter who has a religious objection to being photographed to also sign an affidavit. IND. CODE § 3-11.7-5-2.5(c). However, this is hardly less burdensome. The affidavits are not

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<sup>32</sup> It is difficult to believe that when Congresswoman Carson, *see supra* entered her polling place to vote she was not immediately identified by every poll worker there.

<sup>33</sup> *See supra* notes 14-15 and Petition for Certiorari at 15-17 n.6-8.



available at the polls for immediate signature and relatively easy voting. Rather, the prospective voter must go through the challenge process, execute an affidavit concerning the provisional ballot, execute the provisional ballot, and then go to a remote government office at a later time to sign yet another affidavit. This is not tailored in any way to combat the State's asserted interests.

This lack of tailoring is not excused by the availability in Indiana of absentee balloting for persons who do not have identification. First, as is clear from Indiana law, IND. CODE § 3-11-10-24, for much of the potential electorate there is no absolute right to vote by absentee ballot in Indiana. Second, absentee balloting is simply not the equivalent of voting in-person. “[B]ecause 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.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

The “precise interests,” *Anderson*, 460 U.S. at 789, put forward by Indiana do not make it necessary to burden voting rights with the voter identification statute. Even if the fraud concern was legitimate, the State's interests could be satisfied by far less restrictive regulations. The statute is not narrowly drawn to meet the articulated state interest and is unconstitutional.

Indeed, even if this Court were to conclude that, under *Burdick*'s "flexible" standard "the character and magnitude" of the burden Indiana's law imposes, 405 U.S. at 434, falls short of requiring the most searching degree of scrutiny, the Indiana statute would nonetheless be unconstitutional. It is at best only tangentially related to "those interests [that] make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. In this case, the State has failed to justify the law "under any level of scrutiny" applicable to electoral restrictions, *Burdick*, 504 U.S. at 448 (Kennedy, J., dissenting).

Indiana's explanations fall far under the "puzzling" bar that Justice Kennedy erected in *Burdick*, *id.*; they are inadequate at best and pretextual at worst. The State has failed to explain why it has chosen to impose new and significant burdens on in-person voting to fight a non-existent problem of fraud while explicitly choosing not to impose any burdens on absentee balloting where the risk of fraud is demonstrably more substantial. It has failed to explain why signature comparison and detailed criminal provisions are adequate to prevent absentee vote fraud but not to prevent in-person vote fraud. It has failed to explain why Indiana requires more onerous identification requirements than any other state in the Nation. And it has failed to explain why indigent individuals and religious objectors must travel to election headquarters after each election in which they want to participate rather than receiving permanent exemptions or being permitted to file their

affidavits at their polling places. These are all “danger signs” of a constitutionally impermissible regime, *Sorrell*, 126 S.Ct. at 2492, that require rigorous judicial scrutiny. Under any scrutiny, the identification law is not tailored at all to meet the fraud concerns expressed by the State.

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## CONCLUSION

The judgment of the court of appeals should be reversed.

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**REGULATORY APPENDIX**

IND. ADMIN. CODE tit. 140, r. 7-4-3:

(a) As provided by 140 IAC 7-4-2 [*section 2 of this rule*], the bureau shall require the documents listed in subsections (b) through (e) as part of the application for an Indiana driver's license, learner/driver education permit, and identification card. Only original documents or certified facsimiles from the issuing agency will be accepted. The bureau reserves the right to refuse any identification presented that appears fraudulent or unreliable. Altered and expired documents will not be accepted. Documents presented to the bureau for identification purposes will be kept confidential. All documents must contain the applicant's name and must be in the English language or be presented with an English translation of the document. The commissioner or the commissioner's designee may accept reasonable alternate documents to satisfy the requirements of this rule and IC 9.

(b) Primary documents-acceptable United States documents are as follows:

(1) United States birth certificate with authenticating stamp or seal containing the applicant's date of birth, place of birth, and parent's names, issued by:

(A) county department or county board of health from the applicant's state of birth;

(B) a state department or state board of health from the applicant's state of birth; or

- (C) a verified delayed birth certificate.
- (2) Certificate of naturalization/citizenship.
- (3) Certification of report of birth (form DS-1350 issued by the United States Department of State).
- (4) U.S. consular report of birth (form FS-240 issued by the United States Department of State).
- (5) Birth certificates issued by United States territories, including American Samoa, Guam, Puerto Rico, and Virgin Islands.
- (6) U.S. military or merchant marine identification card with photo.
- (7) U.S. passport.
- (8) U.S. veterans universal access identification card with photo.
- (9) Indiana driver's license or learner/driver education permit.
- (c) Primary documents-acceptable immigration documents are as follows:
  - (1) Valid foreign passport with photo with a visa that includes a valid form I-94 indicating the authorized duration of stay in the United States.
  - (2) Valid foreign passport with a current visa that states "Upon Endorsement serves as Temporary I-551 evidencing Permanent Residence for 1-year" issued by the United States Department of Homeland Security.

(A) Canadian passports are not required to have a visa or a form I-94.

(B) Applicants from the Federated States of Micronesia, Palau, and the Republic of the Marshall Islands are not required to present a visa but must submit a form I-94.

(C) Passports with I-94 (issued by the United States Customs and Border Control or United States Citizenship and Immigration Services) indicating F-1/F-2 status must present a valid form I-20 (“Certificate of Eligibility” issued by the United States Immigration and Customs Enforcement). For these applicants, the form I-20 serves as a secondary document.

(D) Passports with I-94 indicating J-1/J-2 status must be submitted with a valid form DS-2019 (“Certificate of Eligibility” issued by the United States Department of State). For these applicants, the form DS-2019 serves as a secondary document.

(3) Authorization for parole of an alien into the United States (form I-512 issued by United States Citizenship and Immigration Services).

(4) Employment authorization card (I-688B issued by United States Immigration and Naturalization Services).

(5) Employment authorization card (I-766 issued by United States Immigration and Naturalization Services).

(6) Form I-94 stamped with “Section 207” refugee status.

(7) Form I-94 stamped with “Section 208” asylum status.

(8) Permanent resident card (I-551).

(9) Temporary I-551 stamp on a passport.

(10) Temporary resident card (I-688 issued by United States Immigration and Naturalization Services).

(11) Travel document (I-131 issued by United States Immigration and Naturalization Services).

(12) An I-797 “Notice of Action” (issued by United States Citizenship and Immigration Services) indicating an applicant’s approval may be used to extend the validity of an original primary document.

(d) Secondary documents-acceptable documents are as follows:

(1) Certified academic transcripts from schools in the United States or its territories.

(2) School report cards from schools in the United States or its territories dated within twelve (12) months of application.

(3) School identification card with photo or yearbook photo from schools in the United States and/or its territories dated within three (3) years of application.



- (4) An identification card with photo issued by a foreign consulate.
- (5) An identification card with photo issued by the federal government.
- (6) An Indiana identification card.
- (7) Driver's license, identification card, or permit with photo issued by another state.
- (8) Original driving record from another state.
- (9) Valid form I-20 with a valid form I-94 and an F-1/F-2 status in passport.
- (10) Valid form DS-2019 (issued by the United States Department of State) with a valid form I-94 and a J-1/J-2 status in passport.
- (11) Indiana county presentence investigation report with clerk stamp or seal.
- (12) Indiana gun permit.
- (13) Indiana probation identification card with photo, name, and date of birth.
- (14) Letter from probation officer, caseworker, or social worker on official letterhead, certified with stamp or seal, with the applicant's name and signature of the probation officer, caseworker, or social worker.
- (15) Prison release documentation.

- (16) U.S. district court presentence investigation report with stamp or seal.
- (17) Valid banking card or MasterCard, Visa, American Express, or Discover card issued in the name of the applicant with his or her signature.
- (18) Bank statement issued within sixty (60) days of application.
- (19) Form W-2 (federal or state) or Form 1099 with the applicant's name and address.
- (20) Computer-generated paycheck stub with applicant's name and address.
- (21) Valid employee identification card with photo.
- (22) Valid Indiana professional license.
- (23) Valid insurance card.
- (24) Medicare or Medicaid card.
- (25) U.S. military discharge or DD214 separation papers.
- (26) U.S. Uniformed Services Card.
- (27) Divorce decree certified by court of law with stamp or seal.
- (28) Application of marriage or record of marriage that is certified with stamp or seal.
- (29) Applicants under eighteen (18) years of age making application for an Indiana identification card

may present acceptable Social Security documentation as a secondary document.

(e) Any document from the list in the primary or secondary group, or any of the documents listed below, may be used as proof of Indiana residency as long as the document contains the applicant's name and current residential address. A post office box is not an acceptable residential address.

(1) Child support check stub from the Indiana family and social services administration with name and address of the applicant.

(2) Change of address confirmation (form CNL107) from the U.S. Postal Service listing the applicant's old and new address.

(3) Bill or benefit statement issued within sixty (60) days of application.

(4) Indiana driver's license, identification card, or permit with photo.

(5) Survey of the applicant's Indiana property produced by a licensed surveyor.

(6) Affidavit of Indiana residency.

(7) Voter registration card.

(8) Valid Indiana vehicle or watercraft title or registration.

(f) Under IC 9-24-9-2, each application for a license or permit must require a Social Security number.

Acceptable documents to verify an applicant's Social Security number are the following:

- (1) Social Security card.
  - (2) Social Security card bearing the legend "Valid for Work Only with DHS Authorization".
  - (3) Social Security card bearing the legend "Not Valid for Employment".
  - (4) Letter verifying the applicant's Social Security number issued in the applicant's name and signed and stamped by the Social Security Administration.
  - (5) Numident report stamped and issued in the applicant's name by the Social Security Administration.
-