IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 07-14664-CC

COMMON CAUSE / GEORGIA, *et al.*,
Plaintiffs-Appellants

v.

EVON BILLUPS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF OF BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae hereby certifies that it does not issue stock. It certifies further that the following persons and entities have or may have an interest in the outcome of this case:

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INTEREST OF THE AMICUS

The Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Through its Voting Rights and Elections project, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it. Of direct relevance here, the Brennan Center filed a brief amici curiae in *Crawford* v. *Marion County Election Board*, 128 S. Ct. 1610 (2008), comprehensively evaluating the sufficiency of alleged evidence of in-person impersonation fraud that was offered to justify Indiana's photo ID requirement for voting.[1] The Brennan Center brief was cited in Justice Stevens's plurality opinion and in Justice Souter's dissenting opinion.[2] The Brennan Center submitted similar briefs in the earlier appeal to this Court challenging Georgia's initial photo ID requirement and in cases involving challenges to photo ID requirements in the Seventh and Tenth Circuits and the federal district court in Albuquerque. The Brennan Center has also evaluated inflated claims of voter fraud in a report cited in Justice Souter's

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[1] *See* Brief of Amici Curiae Brennan Center for Justice, *et al.* in Support of Petitioners, *Crawford*, *supra*, *available at* http://tinyurl.com/3k9wzu.

[2] *See* 128 S. Ct. at 1619 n.12, 1637.

dissent in *Crawford*, and has testified before Congress and published two other reports on this subject.[3]

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Crawford* obviously has a critical bearing on this appeal. The plurality decision upheld Indiana's photo ID requirement but that decision was emphatically limited to the record before the Court, and, as Appellants show, the record here is materially different. The decision to uphold Indiana's law, therefore, does not determine the validity of Georgia's photo ID law at issue here.

Crawford's significance for this appeal lies in its reaffirmation of the balancing test first enunciated in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), for evaluating voting restrictions like Georgia's photo ID requirement. Under that test, "a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the

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[3] *See* Justin Levitt, *The Truth About Voter Fraud* (Oct. 2007), *available at* http://tinyurl.com/3p73zc ("*Truth About Voter Fraud*") (cited in *Crawford*, 128 S. Ct. at 1638 (Souter, J., dissenting)); Testimony of Justin Levitt, Counsel, Brennan Center, Before the United States Senate Committee on Rules and Administration (Mar. 12, 2008), *available at* http://tinyurl.com/6gbqzb; Brennan Center & Michael McDonald, *Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General* (Dec. 2005), *available at* http://tinyurl.com/62549u; Brennan Center & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005), *available at* http://tinyurl.com/6x945w.

burden imposed by its Rule." *Crawford*, 128 S. Ct. at 1616. The district court here did not apply this test. Instead it applied the deferential "rational basis" test reserved for economic and social legislation — a test specifically rejected in *Crawford* where restrictions affecting the right to vote are in issue. *Compare Common Cause/Georgia* v. *Billups*, 504 F. Supp. 2d 1333, 1381-82 (N.D. Ga. 2007) *with Crawford*, 128 S. Ct. at 1616 & n.8.

Under the balancing test, reaffirmed in *Crawford*, the mere existence of a state interest in preventing in-person impersonation fraud is not alone sufficient to support the validity of a photo ID requirement. Such state interests must be "sufficiently weighty" to outweigh *any* burdens — "however slight" — imposed on voters. 128 S. Ct. at 1616.

The Brennan Center submits this amicus brief to assist the Court in evaluating the *weight* to be given Georgia's interests in preventing in-person impersonation fraud, so that it can be properly determined whether the evidence supporting those interests, if any, is sufficient to outweigh the evidence of the significant burdens that Georgia's photo ID requirement imposes on voters currently lacking a valid state-issued photo ID.[4]

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[4] Appellants show that the district court's dismissal on standing grounds was incorrect. This brief addresses only the district courts' ruling addressing the merits.

In *Crawford*, the plurality found that the district court "overstated" the evidence of impersonation fraud offered to support Indiana's interests in adopting a photo ID requirement and that there were only "scattered instances" of such fraud. *Id.* at 1619 n.12. It nevertheless found that these scattered instances were sufficient to support Indiana's law because, in the plurality's view, plaintiffs failed to make a sufficient record showing the extent or magnitude of the burden imposed on voters. But as Appellants explain, the record in this case does show substantial burdens on indigent and elderly voters who currently lack a valid state-issued photo ID. That showing requires a closer look at the evidence supporting the "precise interests" put forward by Georgia — the need to prevent polling place impersonation fraud — to justify its photo ID requirement.

There is no evidence in this record of polling place impersonation fraud occurring in Georgia or anywhere else. Under *Crawford*, that should be the end of the matter. Nevertheless, in this brief, we summarize the nationwide evidence of alleged in-person voter impersonation fraud put forth in *Crawford* and elsewhere to support photo ID requirements. We show that evidence of such fraud is virtually nonexistent. Moreover, Georgia had no need to impose the burdens of a photo ID requirement to prevent such fraud: federal law and the laws of 48 states and the District of Columbia provide

voters with less onerous alternative identification methods, which have proven adequate — as the absence of evidence of such fraud attests. Hence, Georgia's interest in requiring photo ID to prevent polling-place impersonation fraud is not "sufficiently weighty" to outweigh the burdens on voters established by Appellants.

Accordingly, we urge the Court either to reverse and enter judgment for Appellants or to remand to the district court with directions to properly conduct the balancing test mandated by *Crawford*, including a careful review of the evidence of in-person impersonation fraud and the weight to be assigned to Georgia's interest in requiring a photo ID to prevent it.

ARGUMENT

I.

CRAWFORD REQUIRES CAREFUL REVIEW OF THE EVIDENCE SUPPORTING GEORGIA'S PRECISE INTERESTS IN REQUIRING PHOTO ID

While *Crawford* upheld Indiana's photo ID requirement, Justice Stevens's plurality opinion is carefully limited to the record in that case. *See Crawford*, 128 S. Ct. at 1615 ("We are . . . persuaded that the District Court and the Court of Appeals correctly concluded that the *evidence in the record* is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm.") (emphasis added); *id* at 1623 ("In sum, *on the basis of the*

record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.") (citation omitted; emphasis added). As Appellants show, the record here is materially different. Hence, *Crawford's* decision to uphold Indiana's photo ID requirement does not determine the validity of Georgia's photo ID requirement.

Crawford, however, does provide the test for evaluating the validity of Georgia's photo ID requirement. *Crawford* affirmed the rule first articulated in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983) — and reaffirmed in *Burdick* v. *Takushi*, 504 U.S. 428 (1992) — that "a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Crawford*, 128 S. Ct. at 1616 (plurality opinion) (quotations and citations omitted). Under this balancing test, the existence of *any* burden, "[h]owever slight that burden may appear . . . must be justified by relevant and legitimate state interests *sufficiently weighty* to justify the limitation." *Id.* (quotations and citations omitted; emphasis added).

The plurality specifically rejected a more deferential test — similar to the "rational basis" test mistakenly used by the district court here —

proposed by Justice Scalia's concurrence. Justice Scalia would have applied strict scrutiny to laws that "severely restrict the right to vote," evaluating all others under a "deferential 'important regulatory interests' standard." *Id.* at 1624 (Scalia, J., concurring in the judgment).

Six Justices, however, rejected this approach in favor of *Anderson*'s flexible balancing test, under which increasingly large burdens, even if not severe, require increasingly rigorous justification. *See id.* at 1616 n.8 (plurality opinion) ("[In *Burdick*], the Court applied the 'flexible standard' set forth in *Anderson*. *Burdick* surely did not create a novel 'deferential important regulatory interests' standard."); *id.* at 1628 (Souter, J., dissenting); *id.* at 1643, 1645 (Breyer, J., dissenting). The sole difference between the plurality and the dissents was their evaluations of the record evidence concerning the magnitude of the burdens imposed on indigent, elderly or disabled voters lacking the requisite photo ID. *Compare id.* at 1622 (plurality opinion) ("on the basis of the evidence in the record, it is not possible to quantify . . . the magnitude of the burden") *with id.* at 1627 (Souter, J., dissenting) ("Indiana's 'Voter ID law' threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens"); *id* at 1645 (Breyer, J. dissenting) ("[T]his statute imposes a disproportionate burden on those without valid photo IDs.").

While the plurality affirmed the legitimacy of Indiana's interests in protecting against in-person impersonation fraud, it had no need to rigorously assess the weight of these interests because it found insufficient evidence of burden to outweigh any evidence of the state's interest. *Id.* at 1622-23. But, as Justice Souter noted in dissent, his finding that "the Voter ID Law burdens [are] far from trivial," required "a rigorous assessment of 'the precise interests put forward by the state as justifications for the burden imposed by its rule' [and] 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 1635 (Souter, J., dissenting).

Given the more substantial record of burden that Appellants have shown here, a more careful look at the evidence supporting Georgia's interests is warranted. In the next section, therefore, we examine the evidence of in-person impersonation fraud. There is no such evidence in the record here, which should end the matter under *Crawford*. In the event that this Court is inclined to consider extra-record evidence, however, we also review the district court findings cited by Justice Stevens in *Crawford* and various studies, including the Carter-Baker Commission Report cited in *Crawford*. We show that in fact there is virtually no evidence of the occurrence of in-person impersonation fraud and that the "problem" of in-

person impersonation fraud used to justify photo ID requirements is not a problem at all. We also show that the other interests relied on by the *Crawford* plurality to justify Indiana's photo ID law — modernization of election procedures and maintaining confidence in the integrity of the election process — are derivative of the alleged problem of in-person impersonation fraud and that, accordingly, they too are entitled to little weight.

II.

THE INTEREST IN COMBATING IMPERSONATION FRAUD AT THE POLLS IS NOT SUFFICIENTLY WEIGHTY TO JUSTIFY GEORGIA'S PHOTO ID REQUIREMENT

The district court did not identify a single example of successful — or attempted — in-person impersonation fraud, either in Georgia or anywhere else. There is good reason for this failing: the record contains no such evidence. The State conceded that it received no reports of such fraud and had no evidence that extant criminal penalties for such fraud failed to deter it sufficiently. *Common Cause/Georgia*, 504 F. Supp. at 1356, 1358.

Under *Crawford*, which cautioned against the use of extra-record "studies, the accuracy of which [have] not been tested in the trial court," *Crawford*, 128 S. Ct. at 1622, this should be the end of the matter. Nevertheless, to the extent this Court is inclined to consider additional

studies, we summarize the district court findings cited by the *Crawford* plurality and other studies, which collectively confirm the near-total absence of evidence of in-person impersonation throughout the nation.

A. The *Crawford* Record Shows that Polling Place Impersonation Fraud Is Virtually Non-Existent

Even the *Crawford* plurality characterized the evidence of polling-place impersonation fraud cited by the district court as "overstated."[5] While the plurality suggested that, nevertheless, the Record reflected "scattered instances" of in-person fraud, a closer look shows that even these "scattered instances" demonstrate that evidence of in-person impersonation fraud is virtually non-existent.

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[5] The plurality stated as follows: "Judge Barker [the district court judge] cited record evidence containing examples for California, Washington, Maryland, Wisconsin, Georgia, Illinois, Pennsylvania, Missouri, Miami, and St. Louis. The Brief of *Amici Curiae* Brennan Center for Justice *et al,* in Support of Petitioners addresses each of these examples of fraud. While the brief indicates that the record evidence of in-person fraud was overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud, there remain scattered instances of in-person voter fraud. For example, after a hotly contested gubernatorial election in 2004, Washington conducted an investigation of voter fraud and uncovered 19 "ghost voters," Borders v. King Cty., No. 05-2-00027-3 (Super. Ct. Chelan City., Wash., June 6, 2005) (verbatim report of unpublished oral decision), 4 Election L. J. 418, 423 (2005). After a partial investigation of the ghost voting, one voter was confirmed to have committed in-person voting fraud. Le & Nicolosi, Dead Voted in Governor's Race, Seattle Post-Intelligencer, Jan. 7, 2005, p. A1." 128 S. Ct. at 1619 n.12.

The plurality illustrates its reference to such "scattered instances" with only a single instance of "confirmed" impersonation fraud, from the bitterly contested 2004 gubernatorial election in Washington State. *See Crawford*, 128 S. Ct. at 1619 n.12 (plurality opinion); *Borders* v. *King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), *reprinted in* 4 Election L.J. 418, 420, 423 (2005). In that case, of the nearly 3 million votes cast, an initial investigation suggested 19 incidents that were suspected to involve voting in the name of the deceased, or so-called "ghost voting." *See* 4 Election L.J. at 420, 423. Subsequent investigations of nine of these incidents confirmed that all but one involved absentee ballots. A closer reading of the report of these investigations cited by the *Crawford* plurality shows that even the one case that involved an in-person vote was not, as the plurality suggested, a "confirmed" case of in-person impersonation fraud. According to the report, an election official stated that the cases being investigated were "not indications of fraud" because mistakes or clerical errors could not be ruled out. *See* Phuong Cat Le & Michelle Nicolosi, *Dead Voted in Governor's Race*, Seattle Post-Intelligencer, Jan. 7, 2005.

The plurality also cites the report of the Carter-Baker Commission on Federal Election Reform.[6] *See Crawford*, 128 S. Ct. at 1618 & n.10, 1620 (plurality opinion); Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005) ("Carter-Baker Report"). But that report adds nothing to the body of evidence concerning the actual occurrence of in-person impersonation fraud. The Commission cites no credible evidence of polling-place impersonation fraud: the totality of evidence the Commission cites are the discredited story of impersonation fraud in Washington State discussed above, and other reports of impersonation fraud in Milwaukee. *See* Carter-Baker Report at 2-4, 18. The Milwaukee reports have also been discredited.

The reports of fraud in Milwaukee involved a year-long joint federal and state investigation into an alleged scheme to alter the result of the 2004 election in Wisconsin. This investigation disclosed no evidence of polling-place impersonation fraud. *See Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* (May 10, 2005), http://www.wispolitics.com/1006/electionfraud.pdf ("Wisconsin Report"). The few incidents that were substantiated involved registration fraud, double

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[6] The Carter-Baker Commission was not a commission of the federal government; it was an independent project organized by American University.

voting and voting by ineligible persons with felony convictions, not impersonation fraud at the polls. *See* Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 5, 2005.

The Carter-Baker Report is also frequently cited for its statement that although the Commission was "divided on the magnitude of voter fraud — with some believing the problem is widespread and others believing that it is minor — there is no doubt that it occurs." Carter-Baker Report at 18. But the report does not indicate that the "voter fraud" referred to is in-person impersonation fraud. As noted above, the only "evidence" of in-person impersonation fraud cited in the Report are the two discredited reports from Washington State and Milwaukee.

A closer examination of the remaining district court findings listed by the *Crawford* plurality shows that they are not simply "overstated," but contain virtually no evidence of in-person impersonation fraud.

One particular media report in the *Crawford* record merits special attention, because it pertains to Georgia, and because it is often erroneously cited, despite the fact that it has been repeatedly debunked. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 794 (S.D. Ind. 2006). A 2000 investigative report in the Atlanta Journal-Constitution claimed that more than 5,000 fraudulent votes were cast in Georgia between 1980 and

2000. This claim — including a ballot purportedly cast in the name of a dead man named Alan Jay Mandel — was false. Subsequent investigations revealed that Mandel's vote was the only one of 5,412 allegedly fraudulent votes that could be substantiated as having actually been cast in the name of a deceased voter, and even this solitary account turned out to be erroneous: Mr. *Mandel*'s supposedly fraudulent vote had actually been cast by a Georgia citizen named Alan Jay *Mandell*, who was alive and well. *See Common Cause/Georgia*, 504 F. Supp. at 1356; *Truth About Voter Fraud* at 14; *see also* Secretary of State for the State of Georgia Cathy Cox, *The 2000 Election: A Wake-Up Call for Reform and Change* 11 n.3 (Jan. 2001) ("a subsequent check of the records by Fulton County staff revealed that the media account [of a post-mortem vote by Mr. Mandel] was erroneous").

The story is similar with respect to each of the other district court findings listed in the *Crawford* plurality. The only evidence of impersonation fraud in California cited by the district court in *Crawford* was a single hearsay report of attempted polling-place impersonation fraud found in a single book — and that, according to the report's author, was foiled without a photo ID requirement. *See Rokita*, 458 F. Supp. 2d at 793-94 (citing Sabato & Simpson, *Dirty Little Secrets* 292 (1996)).

The only record evidence in *Crawford* of alleged polling-place impersonation fraud in Maryland, consisted of a single voter authority card signed in the name of a deceased person that was later shown to likely have resulted from a mistake, not impersonation fraud: the person who signed the card may have done so because his or her name was the same or very similar to that listed by election officials on the card. *See* Van Smith, *Elections Nights of the Living Dead*, Baltimore City Paper, June 22, 2005, http://tinyurl.com/56olze.

The only item in the *Crawford* record concerning Illinois was a quarter-century old newspaper article describing allegations of fraud in the 1982 gubernatorial election, and focusing on absentee ballot fraud and ballot tampering by election officials. *See Rokita*, 458 F. Supp. 2d at 794 (citing *Illinois Supreme Court Sets Date for Arguments on Gubernatorial Recount*, New York Times, Dec. 14, 1982, at A18).

Similarly, the only evidence in the *Crawford* record concerning Pennsylvania is a 1995 article describing various incidents of election fraud in Philadelphia — not one of which involved polling place impersonation fraud. *See Rokita*, 458 F. Supp. 2d at 794 (citing Scott Farmelant, *Dead Men Can Vote*, Philadelphia Citipaper.net, October 12-19, 1995).

The two references to Florida in the *Crawford* record also provide no reliable evidence of impersonation fraud. The first was an article from the Miami Herald discussing extensive problems with absentee ballot fraud and voting by ineligible non-residents in a 1997 Miami election, that contained suggestions of impersonation fraud by voters who, when confronted with allegations that they voted in districts where they did not reside, responded by saying someone must have voted in their names. *See Rokita*, 458 F. Supp. 2d at 826 & n.78. This 1997 election was overturned on the basis of *absentee ballot fraud*, without any reference to polling-place impersonation. *In re the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So. 2d 1170, 1172 (Fla. Dist. Ct. App. 1998). The second reference to Florida was a study that contains no mention of polling-place impersonation fraud in Florida, but instead discusses absentee ballot fraud in Miami's 1997 mayoral primary and refers to Florida's massive disenfranchisement of eligible, mostly African-American voters in the 2000 Presidential election whose names were erroneously put on felony lists. *See Rokita*, 458 F. Supp. 2d at 794; Lorraine C. Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* (2003), *available at* http://tinyurl.com/5c7wyb ("2003 Minnite Study").

Finally, the *Crawford* record contains third-hand allegations of impersonation fraud in Missouri, *see*, *e.g.*, *Rokita*, 458 F. Supp. 2d 794, but no evidence that any of such alleged fraud was accomplished *in-person* rather than absentee. Moreover, an intensive F.B.I. investigation was closed without any indictments for voter fraud; instead, the Department of Justice "threatened the Board [of Elections] with a lawsuit for abusing the voting rights of thousands of eligible St. Louis voters by illegally purging their registration records in violation of the National Voter Registration Act. It was these illegal purges that created . . . the appearance of election irregularities." Lorraine C. Minnite, *An Analysis of Voter Fraud in the U.S.* 16 (2007), *available at* http://www.demos.org/pubs/analysis_voter_ fraud.pdf; *see also Truth About Voter Fraud* at 24-26.

Most recently, the Supreme Court of Missouri, in striking down a photo ID law under the state constitution, concluded after a thorough review of the trial record that the "[p]hoto ID requirement could only prevent a particular type of fraud that does not occur in Missouri." *Weinschenk* v. *State of Missouri*, 203 S.W. 3d 201, 218 (Mo. 2006); *see also United States* v. *Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *10 (W.D. Mo. Apr. 13, 2007) (noting that the United States had not "shown that any

voter fraud has occurred" in Missouri in an action alleging violations of the National Voter Registration Act).[7]

B. Other Studies Show That Polling-Place Impersonation Fraud Is Not A Genuine Problem

Other studies also show that polling-place impersonation fraud is not a significant problem anywhere in the nation.

The Truth About Voter Fraud: This study, published by the Brennan Center and cited by Justice Souter, *see Crawford*, 128 S. Ct. at 1638, is an exhaustive analysis of multiple kinds of election-related fraud. *See Truth About Voter Fraud*. It specifically notes that in-person impersonation fraud is "more rare than being struck by lightning," *id.* at 6, and systematically debunks numerous reports of asserted in-person impersonation fraud, confirming that such fraud is so uncommon as to be virtually nonexistent. *See id.* at 14-15, 21-32.

Minnite Study: A 2003 study of voter fraud, updated and revised in 2007, remains one of the most comprehensive studies of voter fraud

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[7] The Brennan Center Brief Amici Curiae in *Crawford* addressed in detail all of the district court's findings concerning supposed evidence of in-person impersonation fraud, including those not referenced by the plurality. We respectfully refer the court to pp 11-28 of that brief, *available at* http://tinyurl.com/3k9wzu.

allegations to date.[8] *See* 2003 Minnite Study; Lorraine C. Minnite, *An Analysis of Voter Fraud in the U.S.* (2007). The study found that voter fraud of any kind is "very rare," is not more than a "minor problem" and "rarely affects election outcomes." 2003 Minnite Study at 4, 17. Notably absent from the study is any evidence of polling-place impersonation fraud. According to the study, even where election fraud allegations have received significant attention in the news media, the allegations typically proved baseless. *Id*. at 17, 40-43.

The study concludes that, to the limited extent fraud has been detected, it generally takes the form of organized fraud such as vote buying, use of fraudulent absentee or mail-in ballots, ballot box stuffing, or wrongful purging of registration rolls to exclude eligible voters. *Id.* at 14-15. Instances of these types of fraud far outweigh incidents of individual fraud. *Id.* Most importantly, the study concludes that the wrongful *disenfranchisement of voters* is a "far bigger problem" than voter fraud. *Id.* at 15.

DOJ Report: The Department of Justice ("DOJ") recently released the results of its investigation of voter fraud, a federal law enforcement

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[8] In the study, Professor Lorraine Minnite and David Callahan reviewed news and legal databases and interviewed attorneys general and secretaries of state in 12 states, representing about half of the national electorate, about incidences of election fraud from 1992 to 2002.

priority since 2002. *See* Press Release, DOJ, *Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative* (July 26, 2006), *available at* http://tinyurl.com/6ljbkb ("DOJ Report").[9] The DOJ Report describes 86 convictions for election-related misconduct over a nearly five-year period, but not a single one of these convictions involved impersonation fraud. *See id.*; *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 12, 2007. The report describes incidents of vote buying, improper use of personal information by local officials, various campaign finance convictions, and harassment to keep voters from the polls. None of these crimes could be prevented by requiring voters to show a photo ID.

COHHIO Study: A study of alleged fraud in Ohio further confirms that polling-place impersonation fraud is not a problem. *See* Coalition of Homelessness and Housing in Ohio & League of Women Voters Coalition, *Let the People Vote* 1 (2005), *available at* http://tinyurl.com/69aglq. Researchers interviewed the Director or Deputy Director of each of the state's 88 county Boards of Elections and concluded that voter fraud as a whole was an "exceedingly rare" occurrence, as evidenced by the fact that,

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[9] *See also* DOJ, *Election Fraud Prosecutions & Convictions*, Oct. 2002 — Sept. 2005, *available at* http://tinyurl.com/5r25wh.

out of a total of 9,078,728 votes cast, there were only four reported instances of ineligible persons voting or attempting to vote in 2002 and 2004, confined to three of the state's 88 counties. *Id.* at 2. The report does not indicate whether any of these four incidents involved even an allegation of polling-place impersonation fraud.

* * *

In sum, the national evidence reveals that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent. Georgia's interest in protecting against polling-place impersonation fraud, in the record or outside it, remains abstract and entirely unsupported by specific reliable facts. This absence of evidence of in-person impersonation fraud must be taken into account in determining whether Georgia's interests are "sufficiently weighty" to outweigh the burdens on indigent and elderly voters detailed by Appellants.

In the court below, the State sought to explain away the absence of evidence of in-person impersonation fraud on the grounds that it is difficult to detect. In truth, there are multiple means to discover in-person impersonation fraud, each of which would be expected to yield more reports of such fraud, if it actually occurred with any frequency. An individual seeking to commit in-person impersonation fraud must present himself at a

polling place, sign a pollbook, and swear to his identity and eligibility. There will be eyewitnesses: pollworkers and members of the community who may know the individual impersonated and recognize that the would-be voter is someone else. There will be documentary evidence: the pollbook signature can be compared, at the polls or after the election, to the signature of the real voter on a registration form, and the real voter can be contacted to confirm or disavow a signature in the case of a question. There may be a victim: if the voter impersonated is alive but later arrives to vote, the impersonator's attempt will be discovered by the voter. If the impersonation is conducted in an attempt to influence the results of an election, it will have to be organized to occur many times over, increasing the likelihood of detection.[10]

Yet in hundreds of millions of ballots cast, these many opportunities for detection have yielded virtually no confirmed instances of in-person impersonation fraud, precisely during a period when investigating voter fraud was expressly deemed a federal law enforcement priority, and when

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[10] As the Director of the Election Crimes Branch and Senior Counsel for Policy in DOJ's Public Integrity Section of the Justice Department explains, election crimes are easily detected because they "usually occur largely in public," "often involve many players," and "tend to leave paper trails." Craig C. Donsanto and Nancy L. Simmons, Federal Prosecution Of Election Crimes 2 (7th ed. 2007), *available at* http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf.

private entities were equipped and highly motivated to seek, collect, and disseminate such reports. The scarcity of reports of in-person impersonation fraud is itself meaningful.

The most reasonable explanation for the extraordinary rarity of reported in-person impersonation fraud is that in-person impersonation fraud is extraordinarily rare. Such fraud is extremely risky, exposes the perpetrator to severe penalties,[11] and has very little payoff.[12] It is not surprising, therefore, that it rarely occurs.

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[11] Voter impersonation in a federal election can result in five years' maximum imprisonment and $10,000 maximum fines. *See* 42 U.S.C. § 1973i(c). Under Georgia law, impersonation fraud is punishable as a felony, Ga. Code Ann. § 21-2-571, and violators face substantial penalties, including fines as much as $10,000 and imprisonment from one to ten years. Ga. Code Ann. § 21-2-600.

[12] The court of appeals in *Crawford* commented on the limited payoff of any individual vote, suggesting that any single vote supposedly has a low "instrumental value" because it is unlikely to determine the election's outcome. *See Crawford* v. *Marion County Election Bd.*, 472 F. 3d 949, 951 (7th Cir. 2007). Of course, if a single vote really has such low instrumental value, impersonation fraud is likely to be discouraged by the severe penalties it may lead to, since no rational actor would risk fines or imprisonment to commit an act unlikely to have any effect on the results of an election.

III.

OTHER STATE INTERESTS REFERRED TO IN *CRAWFORD* ARE NOT SUFFICIENTLY WEIGHTY TO JUSTIFY GEORGIA'S PHOTO ID REQUIREMENT

The *Crawford* plurality identified two interests in addition to the alleged interest in preventing in-person impersonation fraud that a photo ID requirement might conceivably advance: the interests in modernizing election procedures and in enhancing confidence in the electoral system. Neither of these is sufficiently weighty to justify Georgia's photo ID requirement.

A. The Interest in "Election Modernization" Does Not Justify Georgia's Photo ID Requirement

In evaluating Indiana's photo ID law, the *Crawford* plurality cited an interest in "election modernization" — a need for identifying voters at the polls given the evolution of an urban society in which poll workers are less likely to be able to identify voters. *See* 128 S. Ct. at 1617-18. But in assessing the weight to be given to this interest, the Court should take into account the less burdensome requirements that have recently been adopted by forty-eight states, which have modernized their election processes by providing a broad range of means to verify voter identities. In the national context of election modernization schemes, Georgia is a stark outlier.

Georgia and Indiana are the only two states that will not accept an alternative means of identification to photo ID.

Prior to 2002, most states did not require voters to show any documentary identification before voting in person. *See* Electionline.org, Election Reform: What's Changed, What Hasn't and Why, 2000-2006 13 (2006), *available at* http://tinyurl.com/5zkrbj ("Electionline Study"). In 2002, Congress enacted the Help America Vote Act ("HAVA"), *see generally* 42 U.S.C. § 15301, *et seq.*, which, among other things, requires first-time voters who registered by mail and have not been "matched" against government databases to provide some form of identification, including non-photo ID. *See generally* National Conference of State Legislatures, *State Requirements for Voter Identification* (Jan. 9, 2008), *available at* http://tinyurl.com/2cu9vv ("NCSL Study").

Twenty-three states and the District of Columbia require the documentation enumerated in HAVA only from first-time voters registering by mail, *see* NCSL Study; *see also* Electionline Study at 17; Electionline.org, Voter ID Laws (Jan. 23, 2008), *available at* http://tinyurl.com/5d8xqg ("Voter ID Laws"),[13] while Kansas and

[13] These states utilize a variety of mechanisms to verify the identities of voters. *See generally* Voter ID Laws; NCSL Study. Some states permit these voters to verify identity by signing a registration card or book for

Pennsylvania require the ID specified in HAVA from all first-time voters, *see* Voter ID Laws.

The remaining twenty-five states require all voters — whether first-time or "repeat" voters — to produce some documentary ID. Eighteen of these states[14] request that all voters produce some form of documentary identification, but accept both photo and non-photo ID. *See generally* Electionline Study at 17; Voter ID Laws.[15] Only seven states — Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota — request that all voters display a photo ID when they vote in person, but unlike Georgia and Indiana, five of these states provide meaningful

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comparison with a signature on a master list. *See*, *e.g.*, Nev. Rev. Stat. § 293.277; N.J. Stat. Ann. § 19:31a-8. Other states confirm voters' identities by having the voter orally recite or affirm identifying information. *See*, *e.g.*, Mass. Gen. Laws ch. 54, § 76; Neb. Rev. Stat. § 32-914; Utah Code Ann. § 20A-3-104.

[14] Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Mexico, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington.

[15] The list of acceptable forms of ID varies, but almost every state's list includes options for voters that are either contained in the text of HAVA, or closely related to its model. *See generally* Voter ID Laws. Various states have augmented HAVA's list of acceptable IDs with additional, widely available alternative forms of documentary proof. *See id.* Moreover, in many states, voters lacking documentary identification can prove identity through non-documentary means, such as reciting unique identifying information or signing an affidavit. *See generally* Voter ID Laws; NCSL Study; *see also*, *e.g.*, N.M. Stat. §§ 1-12-7.1, 1-1-24; Conn. Gen. Stat. § 9-261(a).

alternatives that allow voters lacking photo IDs to cast votes that are counted.

Thus, a Michigan voter lacking a photo ID may sign "an affidavit to that effect before an election inspector and [will] be allowed to vote" a regular ballot. Mich. Comp. Laws § 168.523. South Dakota voters without a photo ID may also vote after completing an affidavit providing their name and address. *See* S.D. Codified Laws § 12-18-6.2. Louisiana voters lacking photo ID may vote after signing a similar affidavit so long as they provide a current voter registration certificate or other information requested by the election commissioners. *See* La. Rev. Stat. Ann. § 18:562(A)(2).

Hawaii's voter identification statute provides that "[e]very person shall provide identification if so requested," Haw. Rev. Stat. § 11-136, and Hawaii's official manual for polling-place procedures directs poll workers to ask all voters for photo ID. *See* Hawaii Office of Elections, Chairperson and Voter Assistance Official's Manual 58-59 (2006). The manual makes clear, however, that if a voter is unable to produce a photo ID, she is simply asked to recite her date of birth and home address, and if her responses match the poll book, she may vote a regular ballot. *See id.*; NCSL Study.

Finally, in Florida, non-first-time voters lacking photo ID may sign an affidavit affirming their eligibility, and Florida will count the ballot if the

signature on the affidavit matches that on the registration form: the voter is not required to make an additional trip to an election office or to return to the polls with ID. *See* Fla. Stat. §§ 101.043(2), 101.048(2)(b).

Accordingly, Georgia's interest in modernizing its election procedures is no more weighty in justifying its outlier approach than its interest in preventing impersonation fraud. Its photo ID requirement addresses a problem that has been shown to be more hypothetical than real. In any event, the experience of 48 other states and the District of Columbia shows that there are alternative modern identification methods preventing polling-place impersonation fraud that are both effective and less likely to suppress voting by indigent and elderly voters who lack a photo ID.

B. The Interest in "Maintaining Voter Confidence" Does Not Justify Georgia's Photo ID Requirement

The *Crawford* plurality identified an additional interest supporting Indiana's photo ID requirement: maintaining voter confidence in the integrity of the electoral process. But given the absence of evidence that polling-place impersonation fraud is a real problem, the adoption of a photo ID requirement that keeps eligible voters from the polls is not a reasonable means of enhancing voter confidence. Surely confidence in the integrity of the electoral process is diminished — not enhanced — by adoption of a photo ID requirement that addresses a non-existent problem and that

unnecessarily and substantially burdens indigent and elderly voters who lack a photo ID but possess other means of identification.

Moreover, as the Missouri Supreme Court held in striking down Missouri's burdensome photo ID law, ungrounded perceptions must not be given enough weight to justify burdening real voters. The court recognized that if it upheld the law based on "the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used as a mechanism for further burdening the right to vote or other fundamental rights. . . . The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception." *Weinschenk*, 203 S.W. 3d at 218.

Finally, we note that a study recently published in the Harvard Law Review provides empirical evidence that strict voter identification requirements in fact do *not* raise the popular level of trust in the electoral process. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 Harv. L. Rev. 1737, 1759 (2008). The authors concluded that fears of voter fraud are "unaffected by stricter voter ID laws" and that "individuals asked to produce ID seem to have the same beliefs about the frequency of fraud as those not asked for ID." *Id.* Contrary

to the unsupported speculation that photo identification laws improve voter confidence, the data reveal that such laws do not appear to make citizens feel more secure about their elections.

In sum, Georgia's interest in enhancing confidence in the electoral system is not served by its photo ID requirement and does not outweigh the burdens it imposes on disadvantaged voters.

* * *

Given the paucity of evidence that in-person impersonation fraud is a real, as opposed to hypothetical problem, and the less onerous means adopted by the vast majority of jurisdictions, Georgia's interests in requiring a photo ID are not "sufficiently weighty" to outweigh the burdens imposed on Georgia's most vulnerable voters.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and either judgment should be entered for Plaintiffs-Appellants or the case should be remanded for reconsideration under the balancing test articulated in *Crawford*.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14-point Times New Roman and complies with the type-volume limitation of the rule, containing 6,517 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that I have this day caused a true and correct copy of the foregoing **BRIEF OF BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL** to be served on all counsel of record by Federal Express, as follows:

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