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No. 07-21

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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondents Marion County Election Board, *et al.*[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case, addressing the inequities of the disparate impact theory in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002), and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Amicus considers this case to be of special significance in that Petitioners argue, in part, that this Court should review their Equal Protection claim using a disparate impact analysis, an approach this Court has dismissed in several opinions, including in the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, via the parties' letters of consent to the filing of all briefs amicus curiae in support of either party received by the Court and entered onto the case's docket on October 11, 2007, and October 17, 2007, respectively.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

voting context. As Amicus, PLF will focus on this narrow issue, demonstrating that a predominant disparate impact analysis is inapposite to this Court's Equal Protection jurisprudence and unsound as a matter of public policy.

SUMMARY OF ARGUMENT

Petitioners allege that the Indiana voter identification statute, IND. CODE § 3-11-8-25.1(b), violates the Fourteenth Amendment's guarantee of equal protection of the laws. Brief for Petitioners at 27. Specifically, Petitioners argue at length that because the statute disproportionately impacts certain groups of voters, including racial minorities, it infringes on these voters' Equal Protection rights. Brief for Petitioners at 39-45.[2] Petitioners ascribe no discriminatory intent to those framing the statute, claiming only that the statute results in a disparate impact on select groups.

In a line of opinions including *Washington v. Davis*, 426 U.S. 229, 242 (1976), this Court has held that showings of disparate impact alone are insufficient to prove violations of the Equal Protection Clause. Rather, a showing of discriminatory intent is necessary to sustain such a challenge to a state action. *Id.* In *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66-68 (1980), this Court applied this rule to the voting context, holding that facially neutral voting statutes will be struck down only when evidencing a discriminatory purpose; a disparate impact alone is not enough.

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[2] Whether this disparate impact is a statistical reality is far from certain, as addressed by the briefs of Respondents and supporting amici.

Furthermore, public policy considerations counsel against any expansion of stand-alone disparate impact analysis, without proof of discriminatory intent or purpose, into the Equal Protection realm. As this Court has recognized, relying solely on disparate impact in Equal Protection cases would cause havoc in legislatures, courts, and communities throughout the nation. *Lewis v. Casey*, 518 U.S. 343, 376-77 (1996). For these reasons, this Court should affirm the decision of the Seventh Circuit upholding the Indiana voter identification law.

ARGUMENT

I

TO VIOLATE EQUAL PROTECTION, STATE ACTIONS MUST INTENTIONALLY DISCRIMINATE, NOT MERELY RESULT IN DISPARATE IMPACT

A. The Constitution Requires Equal Laws, Not Equal Results

The theory of disparate impact saw its initial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that case, this Court held that an employer's requirement that job applicants must have completed high school and pass a general intelligence test unlawfully discriminated against blacks. 401 U.S. at 431-32. Because these requirements excluded a higher proportion of blacks than whites and were not demonstrably related to actual ability necessary for employment, the Court found that the employer had violated Title VII of the Civil Rights Act of 1964. *Id.* While the *Griggs* Court found disparate impact a valid inquiry with regard to Title VII, the opinion said

nothing of the theory's relation to the Equal Protection Clause of the Fourteenth Amendment.

Less than a year after *Griggs,* this Court did address disparate impact within the ambit of Equal Protection. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), a criminal defendant challenged his conviction, arguing that the procedures for selecting his grand jury were designed to exclude black and female jury members, thus violating his Equal Protection rights under the Fourteenth Amendment. *Id.* at 626. For this proposition, the defendant cited a wealth of statistical evidence showing that black and female citizens were underrepresented on grand juries in his parish jurisdiction. *Id.* at 627-28.

The *Alexander* Court overturned the conviction. *Id.* at 634. While this Court did consider the statistical disparities in reaching its decision, these numbers were not the dispositive factors; rather, the Court used them merely as evidence to conclude that the disparities were the result of discriminatory intent: "[W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral." *Id.* at 630. Thus, for Equal Protection purposes, disparate impact by itself was not sufficient to sustain a claim. It was the discriminatory purpose of the grand jury selection procedures that resulted in the constitutional violation.

In subsequent opinions, this Court has made it even more clear that disparate impact alone is not enough to find a state action unconstitutional. In *Washington v. Davis*, 426 U.S. 229, black applicants for a police training program sued under the Equal

Protection Clause, alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the application test on blacks as compared to whites. 426 U.S. at 233.

In *Washington v. Davis*, this Court held that the petitioners had failed to prove an equal protection violation, as the test-failure statistics spoke nothing to the intent of the test's administrators. *Id.* at 242. This Court declared that discriminatory intent is the critical element in an Equal Protection claim and that while disparate impact is not irrelevant to such a claim, it alone is not sufficient as proof of intentional discrimination. *Id.* As the Fifth Circuit has written in applying *Washington v. Davis*:

> The Constitution forbids only purposeful discrimination. The fourteenth amendment is violated only if a state decisionmaker selects or continues in a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

United States v. LULAC, 793 F.2d 636, 646 (5th Cir. 1986) (footnotes omitted).

The year after *Washington,* in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977), this Court reaffirmed its understanding of the relationship between disparate impact and the Equal Protection Clause. Nonprofit housing developers planned to develop a tract of land in a racially diverse neighborhood for low-income residents. When the Village refused to rezone the land for multifamily

housing, the developers sued under the Equal Protection Clause, alleging that the refusal was racially motivated. 429 U.S. at 258-59. This Court found that the developers failed to prove the key element of discriminatory intent, holding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 253.

This Court addressed the applicability of disparate impact in cases of alleged sex discrimination in *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an Equal Protection claim that the award of veterans' preference in employment had a disparate impact on women, because proportionally fewer women served in the armed forces. *Id.* at 259-60. The Court noted that the *Washington* and *Arlington Heights* decisions recognized that when a facially neutral law has a disparate impact upon groups that historically had suffered discrimination, an inquiry into a potentially unconstitutional purpose is warranted. *Id.* at 273. However, the Court reaffirmed that its decisions signaled no departure from the settled rule that the Fourteenth Amendment "guarantees equal laws, not equal results." *Id.* Citing its earlier opinions, the Court concluded that "even if a neutral law has disproportionately adverse effect upon a [ ] minority, it is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory purpose." *Id.* at 272.

This Court again emphasized this point more recently in *Lewis v. Casey,* 518 U.S. 343. In a case involving prisoners' rights of access to the courts, this Court noted that it had rejected long ago the disparate

impact theory of the Equal Protection Clause in *Washington v. Davis*:

> There we flatly rejected the idea that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law of official act does not violate the Constitution, solely because it has a . . . disproportionate impact.

518 U.S. at 375 (internal citations and quotation marks omitted). The *Lewis* Court read *Washington v. Davis* as "acknowledging the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id*. (internal citations, quotation marks, and parenthesis omitted).

As these opinions show, this Court has clearly and consistently ruled that an Equal Protection claim depends upon proof of a state action's discriminatory purpose or intent, and not merely its disparate impact. This same rule should govern the disposition of this case. Petitioners' Equal Protection claim relies exclusively on disparate impact arguments to show, putatively, that their constitutional rights have been violated. They make no allegation, let alone offer substantial proof, that a discriminatory purpose animated the enactment of Indiana's voter identification law. Petitioners argue explicitly that purposeful discrimination is not at issue. Brief for Petitioners at 52. Thus, their claim must fail.

B. This Court Has Rejected The Disparate Impact Theory of Equal Protection in Voting Cases

In *City of Mobile v. Bolden*, black voters in Mobile, Alabama, challenged the legality of the city's method for selecting its governing commission, arguing that the at-large electoral system violated the Equal Protection Clause of the Fourteenth Amendment. 446 U.S. at 65. The plaintiffs' claim relied primarily on the fact that few black commissioners had been elected under the system.

This Court, in a plurality opinion, rejected the voters' reasoning that this showing of disparate impact was sufficient to invalidate the at-large voting system as unconstitutional. *Id.* at 65-74.[3] In so doing, the Court wrote that such voting laws only "violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *Id.* at 66. For this proposition this Court cited the "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," *id.*, and that "[t]he Court explicitly indicated in *Washington v. Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination," *id.* at 67. Perhaps to eliminate any

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[3] In 1982, Congress amended the Voting Rights Act in response to portions of the Court's opinion in *Bolden*. 42 U.S.C. § 1973(a). This enactment did not impact this Court's holding with regard to the Equal Protection Clause of the Fourteenth Amendment, or its holding rejecting the voters' disparate impact Fifteenth Amendment claims, 446 U.S. at 62. In these realms, *Bolden* still controls.

remaining doubt about its rejection of disparate impact as the predominant theory in Equal Protection claims, and specifically those involving voting, this Court wrote in *Bolden* that

> [a]lthough dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court. More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination.

Id. at 67-68 (footnote and citations omitted). This Court should affirm its reasoning once again, and uphold the Indiana voter identification statute against Petitioners' disparate impact Equal Protection challenge.

II

PUBLIC POLICY CONCERNS COMPEL THE REJECTION OF DISPARATE IMPACT THEORY

A. This Court Has Recognized the Public Policy Concerns Inherent in the Use of Disparate Impact Analysis

In *Lewis v. Casey*, this Court recognized that the Court in *Washington v. Davis* rejected a predominant disparate impact theory to support an Equal Protection claim due in large part to the broad and adverse implications of a ruling to the contrary. The Court

noted: "Under a disparate-impact theory, . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down." 518 U.S. at 376. The Court went on to explain that

> we rejected in *Davis* the disparate-impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted). The dangers of such a rule "would give rise to an unending stream of constitutional challenges." *Hernandez v. United States*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring in the judgment).

Similar concerns animate nearly all of the Court's decisions declining to apply the disparate impact theory to Equal Protection claims, *see* Part I, *supra*, and in other contexts as well. As Roger Clegg wrote in his *Disparate Impact in the Private Sector: A Theory Gone Haywire*, Briefly, Dec. 2001, at 20-24, this Court has at various times rejected disparate impact as applied to Titles VI and VII of the Civil Rights Act, the Equal Pay Act, 42 U.S.C. § 1981, and Title IX of the

Education Amendments of 1972, to name a few such areas.

In the private employment context, this Court has expressed concern that the disparate impact theory could be extended to require the adoption of quotas. *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977 (1988). This Court found that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." *Id.* at 992. This Court thus recognized that employers in the private sector (like state actors in the public setting) are likely to opt for whatever tactics are necessary to avoid crippling litigation or enforcement actions. As this Court noted, these actions almost surely include instituting quotas to "even out the numbers," in effect actually illegally discriminating against one racial group in order to avoid being accused of discriminating against another based only on disparate impact. *Id.* at 993.

Concerns over disparate impact are not unique to this Court, or even to those who would advocate a strict disparate purpose approach to discrimination cases. Professor Michael Selmi, writing recently in the UCLA Law Review, opposes an approach based entirely on proof of discriminatory purpose. *Was the Disparate Impact Theory a Mistake?*, 53 U.C.L.A. L. Rev. 701 (2006). Nonetheless, Professor Selmi is highly critical of the disparate impact theory, arguing that it has diverted the attention of the public and, more importantly, the courts away from actual instances of true discrimination. *Id.* at 767-68. Though Selmi is of the opinion that a focus on discriminatory motive and intent is "outdated," he writes that he hopes his "[a]rticle will lead to a ceasefire on proposals to extend

the disparate impact theory into other areas." *Id.* at 782.

B. The Disparate Impact Theory Harms the Public

The potential for chaos that has informed this Court's rejection of the disparate impact theory in Equal Protection cases unfortunately has been realized in other arenas, such as education, where the theory has been allowed to operate. The following case studies illuminate the risks inherent to the disparate impact theory. These situations counsel against the further application of disparate impact theory, and in fact recommend the invalidation of disparate impact throughout the entirety of this Court's jurisprudence.

1. *Cureton v. National Collegiate Athletic Association*

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association of four-year colleges and universities located throughout the United States. The members are divided for purposes of athletic competition into Divisions I, II, and III. During the 1986-87 school year, the NCAA's Division I membership implemented Proposition 48, which required high school graduates to have a 2.0 grade point average (GPA) in eleven academic core courses and a minimum score of 700 on the Scholastic Aptitude Test (SAT) (or 15 on the ACT) in order to participate in Division I athletics. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999).

Proposition 48 was modified by Proposition 16 in 1992, which increased the number of required core courses to thirteen and used a sliding scale eligibility index. Four black student athletes who failed to

achieve eligibility because they did not meet the minimum standardized test score sued the NCAA, claiming that the minimum test score requirement has an unjustified disparate impact on black students in violation of Title VI of the Civil Rights Act and implementing regulations. The United States District Court for the Eastern District of Pennsylvania agreed and granted the plaintiffs' motion for summary judgment. *Id.* at 715.

The Third Circuit reversed, but avoided a decision on the merits. Instead, the court found that the NCAA was not subject to Title VI as it was not itself (as distinct from its member colleges and universities) a recipient of federal funding. *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999). The court, however, expressed its concern as to the scope and impact of the disparate impact theory, echoing this Court's language from *Lewis* on the practical implications of an expansive disparate impact theory:

> In reaching our result, we also point out the following. Neither Congress nor the Departments of Health and Human Services or Education has considered, at least in a formal proceeding of which we are aware, what the consequences would be if the disparate impact regulations were expanded beyond their current program limitations. It might well be that such expanded regulations could subject all aspects of an institution of higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended.

Id. Judge McKee, concurring and dissenting, *id*. at 119, observed that although this dispute was framed by issues of race, the record below noted:

> Low-income student-athletes also have been impacted to a greater degree than other student-athletes by Proposition 16 standards. For example, in 1997, 18 percent of all student-athletes with a self-reported family income below $30,000 failed to qualify, whereas only 2.5 percent of student-athletes with a family income greater than $80,000 failed to qualify.

Based on this data, Judge McKee found that Proposition 16 had a disparate impact on poor student-athletes regardless of race. He concluded: "Thus, the dynamics of the disparate impact here are the dynamics of socio-economic status. These are issues of class; not race." 198 F.3d at 119 (McKee, J., dissenting). This is a distinction that has escaped the government officials and others who advocate an expansive application of the disparate impact theory.

In the scholastic context, the fixation on meeting race quotas while ignoring other issues such as socio-economic status has grave consequences. Using the district court's rationale from *Cureton*, the use of the SAT to award National Merit Scholarships would violate Title VI if the awards were not precisely racially proportionate. Indeed, the use of objective standards such as the SAT and GPAs to award any type of scholarship or recognition would violate Title VI if the results did not comport with the racial profile of the test takers. The concept of subordinating individual academic excellence (or even, as in *Cureton*, bare adequacy) to racial proportionality would have a

devastating effect on the motivation of high school students.

Taken to its logical conclusion, the use of any cutoff point, such as a requirement of a 2.0 GPA in order to graduate from high school, would have violated the *Cureton* district court's interpretation of Title VI if it had a disparate impact on minorities. The district court's remedy, focused only on equality of results, would simply lower the standards to the point that everyone would qualify. While this would negate disparate impact, it also would remove a significant incentive for students to apply themselves to their studies. There had been no showing in *Cureton* that the NCAA used the SAT cutoff score as a pretext for race discrimination, only that there was a disparity in results. In the absence of such a showing, it would have been a grave misapplication of the law to require precise numerical proportionality for eligibility based on test results and GPA. The necessary result of such dogmatism would be to destroy the incentive of students, particularly those coming from backgrounds of poverty, to study and prepare themselves for life after athletics.

2. *Association of Mexican-American Educators v. California*

In 1983, the California Legislature amended the state Education Code to prohibit the state commission on teacher credentialing from issuing a credential for teaching in the state public schools unless the applicant has demonstrated proficiency in basic reading, writing, and mathematics skills. The Legislature further authorized the state Superintendent of Public Instruction to adopt an appropriate test to measure proficiency in these basic

skills. Pursuant to that mandate, the Superintendent adopted the California Basic Education Skills Test (CBEST). CBEST is a pass/fail examination comprised of three sections: reading, writing, and mathematics. The reading and mathematics sections each contain fifty multiple choice questions, forty of which are scored. The writing section consists of two essays. Since the inception of CBEST, minority applicants have disproportionately received failing scores. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 577-78 (9th Cir. 2000).

A class action was brought under Titles VI and VII on behalf of racial minorities who have been, are being, or will be adversely affected by failing CBEST scores that have kept them from obtaining teaching credentials. *Id*. Although based on the technical allegations that CBEST had not been properly validated, *id*. at 584, and that the cut-off score was too high, *id*. at 589, the basic thrust of the lawsuit was that the test was too hard. The Ninth Circuit, sitting en banc, found that Title VII applied, *id*. at 584, and affirmed the trial court ruling that "the passing scores on the CBEST reflect reasonable judgments about the minimum level of basic skills competence that should be required of teachers." *Id*. at 590.

The court could have cited, but did not, Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which provides that it is lawful for an employer to act upon the results of any professionally developed ability test provided that such a test is not designed, intended, or used to discriminate on the basis of factors such as race or national origin. CBEST was developed with the assistance of the Educational Testing Service, an organization "well known and respected as a developer

of standardized tests." 231 F.3d at 588. Further, there was no suggestion that CBEST was intended to discriminate on the basis of race. The state was therefore able to avoid the embarrassment of being forced to license teachers who were themselves woefully deficient in education. However, the state did not get off unscathed. The court refused to award the state its more than $216,000 of court costs (none of which were attorneys' fees) after years of litigation. *Id.* at 591-93. Thus, even though the state ultimately prevailed, it cost both time and taxpayers' money to fight the plaintiffs' improper use of the disparate impact theory.

3. *African American Legal Defense Fund v. New York State Department of Education*

Another example of the use of the disparate impact theory for counterproductive purposes is *African American Legal Defense Fund, Inc. v. New York State Dep't of Educ.*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998). This lawsuit, brought under the implementing regulations for Title VI, claimed that the State of New York's statutory policy of funding public schools based on attendance numbers had a disparate impact on minority students because of their lower attendance rates. Since minority students were absent more frequently than non-minorities, schools with large minority populations received proportionately less state funding than schools with smaller ratios of minorities. The plaintiffs suggested that state funding be based instead on student enrollment without regard to actual attendance. *Id.* at 338. The district court, however, found that

> with respect to plaintiffs' claim that the attendance-based system of distribution has a disparate impact on minorities because of such factors as single parenting, poor housing, and medical problems, which contribute to absenteeism among inner-city students, . . . one cannot look to Title VI's regulations for remedy for any alleged disparate impact of this nature, however real and distressing. . . . [C]learly it is not [the schools'] practices that have produced the absenteeism. Accordingly, Title VI's regulations support no action at law upon those factors.

Id. at 338-39.

The court thereupon dismissed the claim. *Id.* at 339. The alternative would have been to remove the incentive for schools to discourage absenteeism on the part of minority students, a policy with disastrous import for the education of those students.

These cases highlight the negative impacts of the disparate impact theory. In the name of avoiding discrimination, plaintiffs in these cases sought to impose policies that would have had significantly detrimental impacts on society in general, and on racial minorities in particular. They are symptomatic of the inherent problems of the disparate impact theory, and are evidence that this Court should reject its application not just in this case, but in all cases where the plaintiff is relying on the disparate impact theory to support an Equal Protection claim.

CONCLUSION

For the reasons stated above, the decision of the Seventh Circuit should be affirmed.

DATED: December, 2007.

Respectfully submitted,

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