Nos. 07-21, 07-25

In The
Supreme Court of the United States

CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Respondents. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the Nation.

MSLF has been involved in litigation aimed at protecting the right to vote free from vote dilution.

[1] Each party has filed with the Court blanket consent to the filing of *amicus curiae* briefs. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Most recently, MSLF represented a non-profit group that attempted to intervene in *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), a case in which a regulation that required proof of citizenship to register to vote was challenged on constitutional grounds. An issue in that case was decided by this Court. *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5 (2006) (*per curiam*).

STATEMENT OF THE CASE

Effective July 1, 2005, Indianans who vote in-person are required statutorily to present government-issued photo identification. Ind. Code § 3-11-8-25.1(b). In the absence of the requisite identification, poll workers are instructed to "challenge the voter." Ind. Code § 3-11-8-25.1(c)(2). The voter is then permitted to cast a provisional ballot. Ind. Code § 3-11-8-25.1(d). This provisional ballot may be validated within ten days following the election by providing the requisite identification and signing an affidavit. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

Photo identification is not required, however, for those who vote by absentee ballot, Ind. Code § 3-11-10-1.2; those who vote in a state licensed care facility where the voter resides, Ind. Code § 3-11-8-25.1(e); the indigent, Ind. Code § 3-11.7-5-2.5(c)(2)(A); and individuals with religious objections, Ind. Code § 3-11.7-5-2.5(c)(2)(B). Further, those individuals who lack the requisite identification may obtain one free

of charge, Ind. Code § 9-24-16-10(a), so long as the individual presents a document containing the person's name and current address and at least one "primary document," such as a birth certificate, passport, military or veteran identification card, or Indiana driver's education permit. *See* 140 Ind. Admin. Code § 7-4-3.[2]

It is the acquisition of these documents, which, in some cases, may cost money, that Petitioners contend infringes on their fundamental right to vote. Ind. Dem. Br. 31-41; Crawford Br. 39-45. Specifically, Petitioners claim that those people who do not vote absentee, are not in a licensed care facility, have no religious objections, are not indigent, and who lack both a government-issued photo ID and any of the documents necessary for obtaining a free government-issued photo ID, may be deprived of their fundamental right to vote. *Id*.

Thus, on June 13, 2005, two challenges to the constitutionality of the Indiana law – one filed by the Crawford plaintiffs, and one filed by the Indiana Democratic Party plaintiffs, both premised on the alleged denial of the fundamental right to vote – were consolidated in one district court case. *Crawford v. Marion County Election Bd.*, No. 1:05-cv-00804-SEB-VSS, Docket Nos. 1, 12 (S.D. Ind. June 13, 2005). After cross-motions for summary judgment were filed,

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[2] Hereinafter, these statutory provisions will be known, collectively, as "the Indiana law."

the district court upheld the constitutionality of the Indiana law. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775 (S.D. Ind. 2006). On appeal, this decision was upheld by the Seventh Circuit. *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *rehearing en banc denied*, 484 F.3d 436 (7th Cir. Jan 4, 2007).

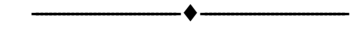
The Indiana Democratic Party plaintiffs petitioned this Court for *certiorari* on July 2, 2007, and the Crawford plaintiffs filed a petition for *certiorari* on August 6, 2007. On September 25, 2007, this Court granted the petitions and consolidated the two cases. *Crawford v. Marion County Election Board*, ___ U.S. ___, 128 S.Ct. 33 (Sept. 25, 2007); *Indiana Democratic Party v. Rokita*, ___ U.S. ___, 128 S.Ct. 34 (Sept. 25, 2007).

SUMMARY OF THE ARGUMENT

Though Petitioners come in all shapes and sizes, none of them satisfies the standing requirements, as set forth meticulously by this Court. The Indiana Democratic Party, the Marion County Democratic Central Committee, the United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP all lack both direct standing, and standing to sue on behalf of their members. Likewise, State Representative William

Crawford and Township Trustee Joseph Simpson lack standing to sue both on behalf of themselves, and on behalf of their electorate. Specifically, the alleged injury proffered by each of the Petitioners is, at best, conjectural and hypothetical; moreover, it is purely speculative to believe that a favorable decision could redress any of the Petitioners' alleged injuries.

Nonetheless, even if standing were found for any of the Petitioners, the Indiana law would withstand constitutional scrutiny because the purported burden on the Petitioners is more than offset by Indiana's compelling interest in preserving the public's confidence in the electoral process. As a result, this Court should uphold the constitutionality of the Indiana law.



ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE ALLEGED DENIAL OF THE FUNDAMENTAL RIGHT TO VOTE.

Because the right to vote is "individual and personal in nature[,]" *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (citing *U.S. v. Bathgate*, 246 U.S. 220, 227 (1918)), any law that infringes upon even one person's fundamental right to vote is unconstitutional in its application. However, to challenge such a law, a person or entity has the burden of proving that he or it satisfies the Article III standing requirement. U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element of standing

'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . . ."). Petitioners include two political organizations: the Indiana Democratic Party and the Marion County Democratic Central Committee (together, "the Democrats"); two individuals: State Representative William Crawford and Township Trustee Joseph Simpson; and several non-profit political interest groups: the United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP (together, the "Organizational Petitioners"). None of these Petitioners satisfies the Article III standing requirement.

In *Lujan v. Defenders of Wildlife*, this Court made clear that one of the most important elements of standing is the certainty of injury. *Lujan*, 504 U.S. at 560-61. For a plaintiff to have standing to raise a claim, he must demonstrate an injury that is "concrete and particularized" rather than "conjectural or hypothetical. . . ." *Id*. at 560 (internal citations and punctuation omitted). Additionally, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 561 (internal citations and punctuation omitted).[3]

[3] In addition to these requirements, there also must be a "causal connection between the injury and the conduct complained of. . . . " *Lujan*, 504 U.S. at 560.

Moreover, this Court has recognized that an association has standing to bring a suit on behalf of its members only so long as, *inter alia*, the association's members would "otherwise have standing to sue in their own right."[4] *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977). Thus, the issue before the Court is whether any of the Petitioners or any of Petitioners' members satisfies the *Lujan* test for standing.

A. Each Of The Petitioners Fails To Demonstrate A Concrete And Particularized Injury In Fact.

1. The alleged injury to the "members" of the Democrats is, at best, conjectural and hypothetical.

Although the Seventh Circuit noted that "the Indiana law will deter some people from voting," *Crawford*, 472 F.3d 949, the notion that even one individual will be denied the fundamental right to vote is conjectural and hypothetical. The Seventh Circuit identified two potential injuries that could result from the Indiana law. First, individuals who do not already possess a photo ID may be denied the right to vote. *Crawford*, 472 F.3d at 951. Second,

[4] The other two requirements for associational standing include: 1) that the interest being protected is germane to the organization's purpose, and 2) that the participation of individual members is not required. *Hunt*, 432 U.S. at 343. However, these two requirements are not relevant in this inquiry.

individuals who do own a photo ID, but who "forget to bring it to the polling place may say what the hell and not vote, rather than go home and get the ID and return to the polling place." *Id*. Then, based on these conjectural and hypothetical injuries, the Seventh Circuit concluded that the Democratic Party has "standing to assert the rights of those of its members who will be prevented from voting by the new law." *Crawford*, 472 F.3d at 951. However, a more careful analysis of each scenario reveals the flaws in the Seventh Circuit's logic.

Under the first scenario, the Indiana law requires the presentation of a government-issued photo ID to vote in-person. Ind. Code § 3-11-8-25.1(b). Thus, Indianans who lack such an ID must obtain one prior to voting in-person, and can do so at no cost. Ind. Code § 9-24-16-10. However, before such an ID is issued, certain other documentation, such as a birth certificate, U.S. passport, or a Medicaid/Medicare card, is required. 140 Ind. Admin. Code § 7-4-3. For those who lack such documentation, a monetary fee and an inconvenience cost may be required to obtain them. Ind. Dem. Pet. 8-10. Exceptions are made for the elderly living in a nursing home, Ind. Code § 3-11-8-25.1(e); voters who vote by absentee ballot, Ind. Code § 3-11-10-1.2; the indigent, Ind. Code § 3-11.7-5-2.5(c)(2)(A); and individuals with religious objections, Ind. Code § 3-11.7-5-2.5(c)(2)(B).

Thus, a hypothetical person who lacks both a government-issued photo ID and any of the documents required to obtain a free government-issued

photo ID, and who is neither elderly nor indigent, and who does not have a religious objection, and who does not qualify for an absentee ballot, could, arguably, be denied the ability to vote. Assuming, *arguendo*, that this inability to vote would rise to the level of an unconstitutional infringement upon the fundamental right to vote,[5] the Petitioners "have not presented any substantiation that any such voters actually exist." *Rokita*, 458 F.Supp.2d at 811. None of the Petitioners were able "to provide the names or otherwise identify any particular affected individuals . . . despite various polls and surveys that were conducted for the specific purpose of discovering such individuals." *Id*. at 823. Instead, the Petitioners failed to produce any "evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote" or "any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote." *Id*. at 822. As a result, the notion that some "member" of the Democratic Party of Indiana or the Marion County Democratic Central Committee

[5] As Respondents eloquently explain in their Brief In Opposition To The Petitions, the Indiana law is merely a non-discriminatory regulation of election procedures designed to protect against voter fraud, rather than a substantive and discriminatory barrier to voting. Response To Pet. 18-21.

actually was disenfranchised by this law is purely conjectural and hypothetical.[6]

Under the second scenario identified by the Seventh Circuit – the instance of a voter who owns a photo ID, neglects to bring it to the polls, and then chooses not to vote – the district court granted standing to the Democratic Party of Indiana and the Marion County Democratic Central Committee because of the "*potential exclusion* of votes by individuals intending to vote for Democratic candidates." *Rokita*, 458 F.Supp.2d at 812 (emphasis added). The district court did not even attempt to construe this "injury" as anything but conjectural and hypothetical. Instead, the district court misapplied the rule of law from *Campbell v. Louisiana*, 523 U.S. 392 (1998).

In *Campbell*, this Court concluded that a criminal defendant had standing to challenge racial discrimination as to potential jurors because such discrimination could "cast[ ] doubt on the integrity of the judicial process. . . ." *Id*. at 397. Likewise, the district court below analogized that the standing requirement was satisfied. It reasoned that certain people may show up at the polls intending to vote, discover they inadvertently forgot their photo ID, vote

[6] Moreover, as the district court rightly concluded, the Democrats lack standing to sue on behalf of individuals desiring to vote for democratic candidates, since such individuals are not "members" of either the Indiana Democratic Party or the Marion County Democratic Central Committee. *Rokita*, 458 F.Supp.2d at 811.

a provisional ballot, and then lazily choose not to validate their ballot, or forget to do so. Because Indiana law prohibits the state from counting these unvalidated provisional ballots, the district court speculated that doubt would be cast on the integrity of the election. *Rokita*, 458 F.Supp.2d at 812.

But precisely the opposite is true. It is speculative and hypothetical to infer that people will question the integrity of an election because certain people neglected to abide by relatively mundane procedural requirements. It is far more realistic to infer that, in the absence of the voter ID law, people will question the integrity of an election in which voter registration was "significantly inflated," *Rokita*, 458 F.Supp.2d at 826, given that voter fraud is particularly difficult to apprehend. *Id*. Indeed, inherent in the fundamental right to vote is the obligation of the legislature to prevent electoral fraud. *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Thus, no standing is conferred upon the Democrats.

More fundamentally, though, a person who fits into this second category fails to identify *any* injury in fact. Under this scenario, a person first fails to obey a simple, procedural voting rule requiring him to present a photo ID at the polls.[7] Then, rather than

[7] The Constitution compels states to regulate the "times, places and manner of holding elections for Senators and Representatives. . . ." U.S. Const. art. I, § 4. Pursuant to the Tenth Amendment, this power has been interpreted broadly as granting states the power to regulate elections. *Sugarman v. Dougall*,

(Continued on following page)

voting a provisional ballot and returning with a proof of ID, the voter decides not to vote at all, or decides not to bother to return to validate his provisional ballot. This is not a denial of the fundamental right to vote. Instead, this is a voluntary choice by the would-be voter not to exercise the right to vote.

Thus, under both the first and second scenarios, the Democrats' members' alleged injury is, at best, speculative and hypothetical, and under the second scenario, the members' purported injury is not an injury at all. In any case, the Democrats do not satisfy the standing requirement.

2. The Democrats lack a direct injury in fact.

The Seventh Circuit, citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982), held that the Democrats suffered a direct injury, which would confer standing upon them. *Crawford*, 472 F.3d at 951. Specifically, the Seventh Circuit reasoned that the Indiana law would compel the Democratic Party to "devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." *Id*.

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413 U.S. 634, 647 (1973) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (footnote omitted) (opinion of Blackmun, J.) (explaining the history and intent of these constitutional provisions)). As a result, this Court generally upholds non-discriminatory laws that merely regulate the voting process. *See* Respondents' Br. in Opp. 14-21.

Havens, however, is inapposite. There, this Court granted standing to a non-profit organization, whose purpose was to provide housing opportunities for minorities and that expended its resources to uncover illegal discrimination. *Havens*, 455 U.S. 368. As the district court rightly explained, however, there is no cognizable injury in fact when a reallocation of resources is the "sole and voluntary decision" of the allegedly injured party. *Rokita*, 458 F.Supp.2d at 816 (citing *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) ("The diversion of resources . . . might well harm [a plaintiff's] other programs, for money spent on [one thing] is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from [a plaintiff's] own budgetary choices."); *see also Common Cause/Georgia v. Billups*, 504 F.Supp.2d 1333, 1373 (N.D. Ga. 2007). As a result, should the Democrats choose to spend their money facilitating compliance with the Indiana law, they would do so out of their own volition, which would negate any notion that they suffer a cognizable injury in fact.

Furthermore, as the district court explained: "If an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a lawsuit. Such an interpretation flies in the face of well-established standing principles."

Rokita, 458 F.Supp.2d at 817; *see also Billups*, 504 F.Supp.2d at 1373.

3. The alleged injury to the members of the Organizational Petitioners is conjectural and hypothetical.

The district court observed:

> [W]hat the Organization Plaintiffs have presented to the Court . . . is nothing more than unsupported assertions. None of the Organization Plaintiffs has identified a single member who does not already possess the required photo identification and has an injury beyond "mere offense" at having to present photo identification in order to vote. . . ."

Rokita, 458 F.Supp.2d at 817. Because the alleged injury to the members of the Organizational Petitioners is speculative and hypothetical, they lack standing to seek redress on behalf of their members.

4. The Organizational Petitioners' purported direct injury is speculative and hypothetical.

The Organizational Petitioners also lack direct standing to challenge the Indiana law. Not only are the Organizational Petitioners' purported injuries self-inflicted and alleged in a manner that would, in effect, eviscerate Article III standing, *see* Section I(A)(2), *supra*, but also there exists yet another

reason to deny direct standing to the Organizational Petitioners. In *Havens*, this Court "did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs." *Fair Employment Council*, 28 F.3d at 1277. Thus, standing was premised on the fact that the plaintiffs had "already expended resources in order to investigate and uncover" the defendant's illegal conduct. On the contrary, the Organizational Petitioners here merely speculate that they might "under undefined circumstances in the future, be required to divert unspecified resources to various outreach efforts" to inform the public of the photo ID requirement. *Rokita*, 458 F.Supp.2d 775, 816 (citing *Havens*, 455 U.S. 363); *see also Billups*, 504 F.Supp.2d at 1372. Because of the uncertainty of such a potential diversion of funds, the Organizational Petitioners' purported injury is purely speculative and hypothetical.

5. The alleged injury to Representative Crawford and Mr. Simpson is speculative and hypothetical.

The standing of Representative Crawford and Mr. Simpson has been analyzed in three different ways. First, these elected officials contend that they "risk receiving fewer votes" as a result of the Indiana law, *Rokita*, 458 F.Supp.2d at 814; however, both were denied standing by the district court, which correctly found that their "speculations" about receiving fewer

votes had not "been supported by any evidence or concrete facts." *Id*. Thus, Representative Crawford and Mr. Simpson do not come close to satisfying their burden of identifying a "concrete and particularized" injury.

Additionally, both Representative Crawford and Mr. Simpson contend they have standing to "raise the injuries encountered by voters in their respective districts," *Id*.; however, the district court rightly denied standing for each of the individuals based on his inability to "identif[y] any such voters in either constituency group who stand to be harmed" by the Indiana law. *Id*.

Nonetheless, based on a third theory, the district court did hold that Representative Crawford and Mr. Simpson satisfied the standing requirement. *Id*. at 815. The district court somehow concluded that Representative Crawford and Mr. Simpson had standing to assert the rights of those individuals who possess the proper identification, but who, potentially, might inadvertently not bring the requisite ID to the polls, thereby compelling such individuals to vote a provisional ballot, thereby casting doubt on the integrity of the entire election. *Id*. But as explained in Section I(A)(1), *supra*, this far-fetched scenario would cast very little doubt on the integrity of the election. Yet the absence of the Indiana law, and the resultant threat of voter fraud, would inevitably impugn the election. Ultimately, any injury to either Representative Crawford or Mr. Simpson is purely speculative

and hypothetical, thus the officials fail to satisfy the standing requirement.

B. The Ability Of A Favorable Decision To Redress The Alleged Injury Is Speculative.

Assuming, *arguendo*, that a concrete and particularized injury exists, the Democrats and the Organizational Petitioners lack standing to bring suit on behalf of their members because there is no evidence that the invalidation of the Indiana law will redress their members' purported injuries. Likewise, Representative Crawford and Mr. Simpson also fail to satisfy the standing requirement, as there is no evidence that a favorable decision will redress their injuries.

In *Los Angeles v. Lyons*, the plaintiff was the subject of allegedly unconstitutional police action. 461 U.S. 95 (1983). Nonetheless, this Court denied the plaintiff standing to sue for injunctive relief from those actions holding that "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, [the plaintiff] is no more entitled to an injunction that any other citizen of Los Angeles. . . ." *Id*. at 111.

Similarly, assuming that Representative Crawford, Mr. Simpson, and the members of the Democrats or the Political Organizations have experienced a concrete and particularized injury, there is not a "sufficient likelihood" that such an injury will occur

again if the Indiana law is not invalidated. If any one of the aforementioned Petitioners were unable to have his vote counted as a result of the person's lack of a photo ID, there is no evidence whatsoever that that person will not acquire the requisite photo ID in anticipation of a future election. Furthermore, assuming that some of the aforementioned Petitioners own the requisite photo ID but inadvertently failed to bring it to the polls, voted a provisional ballot, and then neglected to return to validate the provisional ballot, there is not "sufficient likelihood" that, in a future election, the photo ID will, again, be forgotten, lost, or stolen, or that the Petitioner will choose not to return to validate the provisional ballot.

Given this lack of evidence, there is not a "sufficient likelihood" that the affected Petitioners would be denied the right to vote in the future as a result of the Indiana law. Therefore, any redress to the Petitioners that may result from an injunction invalidating the law on constitutional grounds is purely speculative.

Furthermore, even in the absence of the Indiana law, there is no evidence that the aforementioned Petitioners would not be denied the ability to vote on other grounds. In *Warth v. Seldin*, the plaintiffs challenged zoning practices that allegedly made it too expensive for them to move to the city of Penfield, New York. 422 U.S. 490 (1975). This Court denied the plaintiffs standing because they could not show that, in the absence of the zoning practices, the plaintiffs

would be able to afford to move to Penfield. *Id*. at 505-506.

Likewise, in the absence of the Indiana law, there is insufficient evidence to prove that the aforementioned Petitioners would be permitted to vote. Perhaps Petitioners will arrive at the polls after the polls had closed. Perhaps Petitioners will vote improperly, thereby invalidating their ballot. Indeed, there may be "a number of factors that are unrelated to defendants' alleged abuses" that could prevent Petitioners from voting. *Winpisinger v. Watson*, 628 F.2d 133, 137 (D.C. Cir. 1980) (holding that the plaintiffs lacked standing because there were a number of factors, other than defendants' alleged conduct, that could affect how people vote). In any case, it is speculative to assume that Petitioners are "sufficient[ly] likel[y]" to be permitted to vote in the absence of the Indiana law.

II. PETITIONERS FAIL TO SATISFY EITHER PRONG OF THE *ANDERSON* BALANCING TEST.

Petitioners argue that the Indiana law fails to satisfy the balancing test described in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Ind. Dem. Br. 25-41; Crawford Br. 35-61. In that case, this Court held that, in evaluating constitutional challenges to state election laws, the "character and magnitude of the asserted injury" must be weighed against the "legitimacy and strength" of the state's justifications,

and the necessity "burden[ing] the plaintiff's rights." *Anderson*, 460 U.S. at 789. Assuming, *arguendo*, that Petitioners satisfy the standing requirement, their allegations regarding the constitutionality of the Indiana law collapse under their own weight.

A. The Character And Magnitude Of Petitioners' Injury, If Any, Are Not Severe.

Petitioners have characterized their injury as a deprivation of the fundamental right to vote. Ind. Dem. Br. 31-41; Crawford Br. 35-45; however, the existence of a constitutionally cognizable injury to Petitioners is dubious at best.

This Court has made clear that the fundamental right to vote does not include "the right to vote in any manner" or "the right to associate for political purposes through the ballot. . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Indiana law permits those lacking a photo identification to vote in a nursing home (if the voter is a resident of the home), via absentee ballot (if the voter qualifies), or with a provisional ballot at the polls, which can be validated within ten days of the election. Thus, although the proscribed manners for voting may not be a voter's preferred method, the voter's fundamental right to vote is not inhibited by being denied the right to vote in-person on a non-provisional ballot on election day. Instead, the photo identification requirement is a reasonable method for the state to exercise its constitutional obligation to regulate elections.

Even assuming, however, that the fundamental right to vote is implicated, the burden on that right is not severe because the Indiana law affects the voting process, rather than increasing substantive qualifications for voting. This Court has definitively stated that "[m]any electoral regulations . . . require that voters take some action to participate in the [electoral] process." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). "To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result. . . ." *Id*.

Indisputably, it is "exceedingly difficult to maneuver in today's America without a photo ID. . . . " *Crawford*, 472 F.3d 949, 951. Nonetheless, the numerous exceptions in the Indiana law ensure that those without a photo ID can vote, provided they observe the mundane procedural requirements within the exceptions. Thus, the character and magnitude of Petitioners' injury, if any, are not "severe."

B. Even Absent Proof Of Actual Voter Fraud, The Legitimacy And Strength Of The State's Interest In Preserving The Public's Confidence In The Electoral Process Suffices To Uphold The Constitutionality Of The Law.

Petitioners have questioned the legitimacy and strength of Indiana's justifications for the photo

identification requirement because the desire to prevent future electoral fraud is "unsupported by evidence of past fraud." Ind. Dem. Pet. 19; *see also Purcell*, ___ U.S. ___, 127 S.Ct. at 8 (Stevens, J. concurring) (concluding that a factual conclusion regarding "the prevalence and character of the fraudulent practices" was necessary to determine the constitutionality of election regulations). However, such evidence is not required here.

Applying the *Anderson* framework, this Court held in *Burdick* that, when voting rights are not subject to "severe" restrictions, strict scrutiny should not apply. *Burdick*, 504 U.S. at 434. Instead, "reasonable, nondiscriminatory restrictions," which further a state's interests in preserving the electoral process, should be upheld. *Id*. Here, Petitioners' injury, if any, is far from severe, *see* Section II(A), *supra*, so the procedural voting regulations in the Indiana law should be upheld.

Moreover, the Indiana law satisfies the standard enunciated in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In that case, a minor political party argued its members' fundamental rights were impinged by a state law aimed at reducing confusion in the voting process resulting from ballot overcrowding by minor party candidates. *Id.* This Court held, in no uncertain terms that:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the

> imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the *electoral process* with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96 (emphasis added).

Thus, in spite of Petitioners' arguments to the contrary, no evidence of voter fraud is necessary to uphold the constitutionality of the Indiana election-procedure law, so long as the law is reasonable and does not significantly impinge on constitutionally protected rights.

1. The Indiana law "does not significantly impinge on constitutionally protected rights."

The Indiana law does not result in any constitutionally cognizable injury, and even if the law did impinge upon Petitioners' constitutionally-protected voting rights, its impact would not be severe. *See* Section II(A), *supra*. Thus, the law "does not

significantly impinge" on Petitioners' constitutionally protected voting rights.

2. The Indiana law is reasonable.

Furthermore, the Indiana law is reasonable. This Court has recently held that "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S.Ct. at 7. As a result, states have a compelling interest in preserving the integrity of the electoral process. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). To this end, without unconstitutionally increasing the substantive qualifications for voting, "government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Id*. (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of . . . elections . . . to reduce election and campaign-related disorder.").

The Indiana law is an utterly reasonable attempt by the State of Indiana to protect its compelling

interest of preserving the integrity of the electoral process. The legitimacy and strength of this compelling interest more than offset the burden, if any, on Petitioners. Therefore, even applying the *Anderson* balancing test, as Petitioners insist, the Indiana law should be upheld.

CONCLUSION

This Court should affirm the holding of the Seventh Circuit, which upheld the constitutionality of the Indiana law.

Respectfully submitted:

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