No. 07-25

In The
Supreme Court of the United States

INDIANA DEMOCRATIC PARTY, et al.,

Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM R. GROTH*
GEOFFREY S. LOHMAN
FILLENWARTH DENNERLINE GROTH & TOWE
1213 N. Arlington Ave., Ste. 204
Indianapolis, IN 46219
(317) 353-9363

*Counsel of Record
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, Indiana Democratic Party, *et al*. ("IDP"), for their reply in support of their petition for writ of certiorari, state as follows:

I. The Court should grant *certiorari* to give guidance to the lower federal and state courts of last resort on the proper scrutiny to apply to voter ID laws.

In the wake of the 2000 Florida election controversy, many states and the federal government have undertaken major changes in the rules for running elections and for the casting and counting of votes. Unfortunately, many of these changes have become mired in partisan controversy, especially new laws requiring that voters present photographic identification before casting a ballot. With the exception of the Arizona voter identification law, which the Court considered on a preliminary basis in *Purcell v. Gonzalez,* 127 S. Ct. 5 (2006), and which was enacted through voter initiative, *every* state that has passed a voter ID law has done so with the law supported only by Republican lawmakers and opposed by Democratic lawmakers. Richard L. Hasen, "*The Untimely Death of Bush v. Gore*," 60 STAN. L. REV. ___, draft at 118 (forthcoming October 2007), *available at* http://papers.ssrn.com.sol32/papers.cfm?abstract_id=976701 (hereinafter "*Hasen*"). Defenders of such laws see them as necessary to prevent fraud, while opponents believe such measures are a pretext to depress the vote of poor and minority voters more likely to vote Democratic.

Judges must currently channel their discretion through an unclear balancing test from this Court's *Anderson/Burdick* line of cases (a test that was further muddied by the Court's recent decision in *Purcell*, see Part IV, *infra*). It is no wonder that judges view these issues through different lenses in the wake of a highly politicized post-*Bush v. Gore* environment.

Even aside from the partisanship concern, splits in the lower courts merit the Court's review. *Compare*, *Weinschenk v. State*, 203 S.W. 3d 201 (Mo. 2006), and *In re Request for Advisory Opinion Regarding Constitutionality of 2005*, PA 71, No. 130589

(Mich. 2007). Though ostensibly decided under their respective state constitutions, both state supreme courts utilized the standards enunciated in *Burdick v. Takushi,* 504 U.S. 428 (1992), in determining the constitutionality of their state's voter-identification laws. In addition, two district courts have struck down under the First and Fourteenth Amendments voter ID laws requiring photographic identification. *Common Cause/Ga. v. Billups*, 439 F.Supp.2d 1294 (N.D. Ga. 2006); *ACLU of New Mexico v. Santillanes*, 2007 WL 782167 (D.N.M. 2007), *appeal pending,* No. 07-2067 (10th Cir.).

States are continuing to consider and pass these laws and they are invariably challenged in court. The Court should grant *certiorari* to give guidance to the lower courts on the proper scope of review so that they can more uniformly and predictably resolve this important issue *before* the 2008 election season, when litigation close to the election can cause tremendous voter confusion. *Purcell,* 127 S. Ct. at 7.

II. The "reports" of pervasive voter fraud are based on faulty assumptions and incorrect information.

The State asserts (at 2), without citing any record evidence actually considered by the Indiana Legislature, and *in the face of the State's concession that there is no documented history of voter impersonation in Indiana* (App. 39), that "voter fraud is a problem of disturbing prevalence around the country." Virtually all of the "reports" of such fraud did not involve in-person vote fraud of the type the Law claims to be designed to detect and deter. The lower courts as well, in rejecting the view that such fraud is effectively deterred by the presence of poll watchers and existing criminal sanctions, simply posited that the absence of prosecutions could be explained by the "endemic underenforcement of minor criminal laws . . . and by the extreme difficulty of apprehending a voter impersonator." (App. 7). But there is no evidence to support this hypothesis, and it is belied by common sense in that any such election crimes of necessity would take place in plain sight in front of election workers and watchers, would leave a paper trail, and would carry the risk of felony prosecution without any commensurate reward. Prof. Richard L.

Hasen, one of the nation's foremost election-law scholars, criticized the Seventh Circuit's opinion for "tak[ing] assumptions about voting behavior and turn[ing] those assumptions into matters of 'fact' without so much as a single citation to evidence to support such assertions." *Hasen*, draft at 138.

A study released earlier this year by Lorraine C. Minnite, Ph.D., assistant professor at Barnard College, Columbia University, concluded that virtually all of the "reports" of imposter voting, including those referred to by the State (at 1-3) from Wisconsin, Missouri and Washington, either have been disproved or have turned out to be something other than imposter voting. *The Politics of Voter Fraud*, Report to Project Vote (March 2007) *available at* http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf. Prof. Minnite reports that intense scrutiny from federal, state and local law enforcement officials in Wisconsin did not confirm any reports of impersonation fraud. *Id*. at 35; *see also*, Steve Schultze, *No Vote Fraud Plot Found,* Milwaukee Journal-Sentinel, Dec. 5, 2005, *available at* http://www.findarticles.com/p/articles/mi_qu4196/is_20051206/ai_m15901055. In Missouri a federal district judge recently found that the Government had failed to show the existence of any voter fraud in that state. *U. S. v. Missouri,* 2007 WL 1115204 (W.D.Mo. 2007). And in Washington, after one of the most substantial investigations in recent history following an extremely tight gubernatorial race in 2004, the U.S. attorney found insufficient evidence of fraud even to convene a grand jury. David Bowermaster, *Was McKay ousted over 2004 election?*, Seattle Times, Feb. 16, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/2003574683_mckay16m0.html. Despite a concerted national effort on the part of the Department of Justice to find cases of impersonation voter fraud over a five-year period, the DOJ found not a single prosecutable case. Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud,* N.Y. Times, Apr. 12, 2007.

A law which imposes any burden on a fundamental right should be based on empirical data, not simply rumor, anecdote, or speculation. Spencer Overton, *Voter Identification,* 105 MICH. L. REV. 631 (2007). The inquiry is whether the challenged restriction "unfairly or unnecessarily burdens the availability of political opportunity." *Anderson v.*

Celebrezze, 460 U.S. 780, 793 (1983). The State is not a wholly independent or neutral arbiter when it comes to the passage of election laws because it is "controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., and Breyer, J., concurring). First Amendment concerns arise when a State enacts a law that has the "purpose or effect" of subjecting a group of voters or their party to disfavored treatment by reason of their views. *California Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) ("encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process") (Kennedy, J., concurring); *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). And unlike the difficulty of enunciating neutral standards to identify and remedy unconstitutional gerrymandering, clear standards can be devised to guide both the lower courts and legislatures.

Although judicial deference to state lawmakers is usually appropriate, where a legislative body enacts a law on a party-line vote in the absence of any empirical evidence that, in Judge Wood's words, "imposes an additional significant burden on the right to vote of a specific group of voters" (App. 152), and particularly where there is a danger that this was done in an effort to shape electoral results, total deference is not just inappropriate, it is dangerous to the democratic process. RECENT CASES, *Seventh Circuit Upholds Voter ID Statute*, 120 HARV. L. REV. 1980, 1987 (2007) ("Although courts cannot perfectly gauge the process by which a law was created, the risks associated with this limitation are less than the risks of courts speculating, without concrete evidence, about voter ID laws.").

III. The Seventh Circuit misapplied the Court's precedents, particularly its decisions prescribing heightened scrutiny for laws that severely burden the right to vote or are discriminatory.

A. In setting the level of scrutiny, the Seventh Circuit failed to pay heed to numerous indicators that the Law may have been enacted for improper purposes.

In *Storer v. Brown*, 415 U.S. 724, 730 (1974), the Court observed that there is no "litmus-paper test" and that determining which election laws are constitutional from those that are not is "*very much a matter of considering the facts and circumstances behind the law*, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." (emphasis added). There are many facts and circumstances here which merit closer review of the Law.

First, the Law is the most stringent voter-identification law in the nation. *Second*, it was enacted entirely on a party-line vote, with every member of the minority political party opposing it. *Third*, it was enacted in the absence of any empirical evidence of the type of voter fraud (imposter voting) that the Law was designed to address. (See Part II, *supra*). *Fourth*, it excludes from its requirements the *only* type of voting – absentee voting – where there has been demonstrated evidence of fraud. *Fifth*, it disproportionately impacts supporters of the Democratic Party and people "low on the economic ladder" (App. 3), and, according to the undisputed expert opinion of Prof. Marjorie Hershey of Indiana University (App. 43-44), it will chill the exercise of this fundamental right by reducing turnout among those persons. *Sixth*, the Law's burdens fall most heavily upon indigent voters and closely resemble a poll tax by requiring an impecunious voter without the required photographic identification (and thus by definition one who does not or cannot afford to drive) to make a later second trip to the office of the county election board to "personally appear[ ]" for the purpose of signing the required indigency affidavit. Ind. Code §3-11.7-5-2.5(c)(2). (App. 159-161).

The Court has held that it is important to examine election laws in a "realistic light" to determine the extent and nature of a law's restrictions on voters. *Bullock v. Carter*, 405 U.S. 134, 144 (1972). If the government is permitted to enact restrictive voting laws based on nothing more than the mere perception, and in the face of evidence that imposter voting is so rare as to be *de minimis*, then the balancing test espoused by the Court in *Burdick* has ceased to be a meaningful check on unnecessary and burdensome election laws that abridge this most fundamental right in our system of representative self-government.

B. The Law's burdens are severe, in particular by requiring indigent voters to make a minimum of two trips to have their vote counted.

The severity of the bureaucratic and monetary burdens imposed by the Law upon individual voters is evident from its very text. The State suggests that government-issued photographic ID and the documents needed to prove one's identity in order to obtain such identification are easy to acquire. While many of those documents may be ordinary and common, most depend on that voter already having a government-issued photo ID of some kind to obtain them. Tracking down a certified copy of one's birth certificate costs money and takes extraordinary perseverance, particularly if an individual was born in a different state and is elderly.

Significantly, *indigent voters* without the required identification, defined by the Law as those who are "unable to obtain proof of identification without the payment of a fee," Ind. Code §3-11.7-5-2.5(c)(2), *must make a minimum of two trips for their ballot to be counted.* The first is to cast a provisional ballot on election day. The second, at a later time, is a trip, at the indigent voter's expense, to the county election board to validate a voter's provisional ballot by *personally appearing* to sign an indigency affidavit, which is *not* available on election day at the polls. This requirement is not even rational, and it constitutes a "pretty onerous burden on the poor, especially those who have to travel

back a second time to see an election official." *Hasen*, draft at 136-137 n.190.[1]

The unfortunate language chosen by the Seventh Circuit ("the benefits of voting to the individual voting are elusive . . . [and] some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote [and] will say what the hell," App. 3) trivializes the importance of the right to vote and, if not erased by a subsequent decision of the Court, will most assuredly have adverse and lasting ramifications beyond voter-identification laws. It will henceforth serve as a troubling gloss on the Court's prior holdings which have long described the right to vote as a "fundamental political right." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

C. The Law is "discriminatory" in the *Anderson*/*Burdick* sense.

Even if the Law's burdens were not severe, heightened scrutiny would still be appropriate since the Law is "discriminatory" within the meaning of *Burdick* and *Anderson v. Celebreeze*, *supra*. The Court has made clear that when it comes to voting, the word "discriminatory" means more than the traditional suspect classes.[2] Thus, "fencing out" from the franchise a

[1] The *Burdick* test requires heightened scrutiny of an election law that involves bureaucratic hurdles as opposed to an outright ban on constitutionally protected activity. *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 122 (1999).

[2] The State incorrectly claims (at 1) that none of the plaintiffs below provided any evidence suggesting that the Law has a disparate impact on any disadvantaged group. This is at once both untrue and of no constitutional significance. First, the IDP *did* present undisputed evidence from Prof. Hershey that the Law would disproportionately impact the disabled, homeless, persons with limited income, those without cars, people of color, language, minorities, and the elderly. (App. 43-44). Second, in the context of an equal-protection challenge, a law which burdens the fundamental right to vote, particularly in the absence of evidence that such burden is necessary to preserving the integrity of the electoral process, triggers heightened scrutiny even without a showing that the burden falls disproportionately on a suspect class. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Harper v. Va. Bd. of Elections,* 383 U.S. 663 (1966); *see also Bush v. Gore*, 531 U.S. 98 (2000).

sector of the population because of the way they may vote is constitutionally impermissible, irrespective of whether the group is defined by common interests or traditional political ideologies. *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

Granting *certiorari* in this case will also provide the Court with an opportunity to clear up some of the confusion that has become evident in the aftermath of *Bush v. Gore, supra*, and the Court's more recent decision in *Purcell v. Gonzalez, supra. Burdick's* opaqueness has been criticized by at least one justice of the Court, who observed that "[w]hen an election law burdens voting and associational interests, our cases are much harder to predict, and I am not sure that a coherent distinction between severe and lesser burdens can be culled from them." *Buckley v. Am. Const. Law Found., Inc.,* 525 U.S. at 208 (Thomas, J., concurring in the judgment); *see also, Republican Party of Arkansas v. Faulkner*, 49 F.3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes"); and Christopher S. Elmendorf, "*Structuring Judicial Review of Electoral Mechanics, Part I, Explanations and Opportunities*," 156 U. PA. L. REV. ___ (forthcoming December 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980079.

IV. The Court in *Purcell* recognized the importance of this issue but muddied the waters and left unanswered important questions regarding the constitutionality of voter ID laws.

The Court's recent decision in *Purcell*, while intending to clarify the standards for adjudicating election law cases brought shortly before an election, unfortunately has sown more confusion by suggesting that the amount of disenfranchisement caused by a voter identification law should be balanced with a concern that voter fraud may "[drive] honest citizens out of the democratic process." 127 S. Ct. at 7. The decision has engendered considerable controversy and even more confusion. *Hasen*, draft at 136-141.

The Court should grant *certiorari* to explain how the new balancing test recently enunciated in *Purcell* fits into the *Anderson/Burdick* balancing test.

V. The IDP was not required to show in this facial challenge precisely how many or which of its members would be prevented or discouraged from voting by the Law's requirements.

The Court has never required litigants challenging the facial constitutionality of an election law to show precisely which voters or how many will be adversely impacted by the significant bureaucratic and monetary hurdles placed in the paths of persons seeking to exercise the personal right to vote. "Once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Va. Bd. of Elections,* 383 U.S. at 665; *accord Bush v. Gore*, 531 U.S. at 105. And a plaintiff need not "await the consummation of the threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 (1979). Although it did so (App. 49-52), IDP was not required to identify any specific voters who would be harmed by the Law's application. *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

VI. IDP's standing to maintain this challenge to an election law of general applicability is not "uncertain."

The Seventh Circuit had no difficulty finding that IDP had standing to assert the rights of its members in maintaining this facial constitutional challenge to the Law. (App. 4-5). In attempting to cast doubt as to IDP's standing, the State cites no case wherein the standing of a major political party to maintain a constitutional challenge to an election law of general applicability has ever been found lacking. Quite the opposite, political parties have invariably been determined to have standing to challenge the constitutionality of federal or state election laws. *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (determining that a political party had sufficient personal stake in determining the constitutionality of a campaign financing law); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586-88 (5th Cir. 2006); *Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d at 574 (political party determined to have standing to assert the rights of its members who would vote in the next election); *Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998).

Were it not for IDP's standing to maintain this facial challenge, it is doubtful that any individual voter would have the inclination or resources to file an as-applied challenge to the Law. Rather than undertaking that burden, there is a real concern that individual voters who lack the required form of photographic identification or the means to obtain same, or who are dissuaded from voting by the bureaucratic obstacles the Law imposes, will choose simply to abstain "from exercising important first amendment rights" (such as voting). *Virginia v. Hicks*, 539 U.S. 111, 119 (2003); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2681 (2007) (Scalia, J., concurring in part and concurring in the judgment).

Petitioners' standing is clear. The Court should review the "exceptionally important unresolved question of law" (App. 151) presented by this petition.

CONCLUSION

Petitioners respectfully request that the petition be granted.

Respectfully submitted,

WILLIAM R. GROTH*
GEOFFREY S. LOHMAN
FILLENWARTH DENNERLINE
GROTH & TOWE
1213 N. Arlington Ave., Ste. 204
Indianapolis, IN 46219
(317) 353-9363

*Counsel of Record *Attorneys for Petitioners*