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

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RULE 29.6 DISCLOSURE STATEMENT

Petitioners refer to the Disclosure Statement contained in their petition.

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ARGUMENT

This case presents the question of whether the constitutionality of an identification requirement for in-person voting that severely burdens the voting rights of at least some voters depends on how many voters are actually prevented from casting a vote. The question is extremely important both doctrinally and politically. Due to the interest in, and proliferation of, such requirements throughout the United States, the question should be answered by this Court in advance of the 2008 national elections.

I. There is simply no evidence that justifies the State of Indiana's fraud concerns

There is no evidence that in-person voter impersonation fraud has ever occurred in Indiana. (App. 39). Instead, the State of Indiana argues that Indiana is a fertile area for such fraud because of the State's own failure to maintain its voter lists properly, allowing the lists to become inaccurate and bloated. The response to the State's management lapse should not be to discourage potential legitimate voters and to disenfranchise properly registered voters. Indeed, as this case was being briefed in the Seventh Circuit, the United States brought a lawsuit against the State of Indiana and the co-directors of the Indiana Election Division, resulting in an immediate Consent Decree under which Indiana and the defendant voting officials were required to comply with their mandatory duties under the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, to purge ineligible voters from the registration lists. *U.S. v. Indiana,* No. 1:06-cv-1000 RLY-TAB (S.D. Ind. June 27, 2006) (Joint Supplemental Appendix of Appellees in the United States Court

of Appeals for the Seventh Circuit at 1-8). Given that Indiana is finally going to comply with its duties under NVRA, Indiana can no longer be described as a fertile field for fraud.

Indiana also cites election reports from other states discussing occasional impersonation fraud. The reports are anecdotal and say nothing about Indiana's own experience. More significantly and persuasively, a recent detailed study of national claims of voter impersonation fraud has concluded that, "[v]oter fraud is extremely rare. At the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005." Lorraine C. Minnite, Ph.D., *The Politics of Voter Fraud,* PROJECT VOTE ["Minnite"] 3 (2007).[1] The Report notes further that "[t]he available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible." (*Id.*) Nineteen of these 24 convictions were not because of any impersonation fraud, but because the voters were not eligible to vote, either because they were convicted felons or non-citizens. (*Id.* at 8). The report further concludes that the lack of evidence of fraud is not because such fraud has not been codified as a crime or pursued, and that most allegations of fraud turn out to be something other than fraud. (*Id.* at 3, 9-11.) Thus, for example, although the State cites to voting problems in Wisconsin in 2004, further reviews disclose that "scrutiny from federal, state and local law enforcement and election officials produced several reports, an intensive review of voter registration practices . . . , many

[1] The study is not dated. However, it cites the Seventh Circuit's 2007 decision in this case, at 11, n. 15-16.

recommendations . . . and *very little conclusive evidence of voter fraud.*" (*Id.* at 35) (emphasis in original). And, in the Washington example cited by the State, voting irregularities appeared to be the product not of in-person impersonation voting fraud but of felons voting improperly and improper absentee ballots. *See Indiana Democratic Party v. Rokita*, No. 1:05-cv-00634-SEB-VSS, Docket No. 82, Ex. 4 at 9-11. Finally, the claims of fraud in Missouri's elections, again cited by the State, "have been disproved or significantly weakened by the discovery of major records management problems at the Elections Board." (Minnite at 30). In sum, despite the professed concerns about fraud, there is scant evidence that in-person voting fraud is a national problem. Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, April 12, 2007, at A1. And, there is absolutely no evidence, scant or otherwise, of in-person impersonation voting fraud in Indiana.

II. The Seventh Circuit's decision allows the right to vote to be severely burdened for a few citizens if not burdensome for too many, and this holding is contrary to, and destructive of, the personal right to vote recognized by this Court

Following the Seventh Circuit's lead, the State has sought to recast the test of *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to mean that, absent a substantive qualification that facially disqualifies voters or that infringes on other constitutional rights such as the constitutional prohibition against poll taxes, a severe burden on the right to vote for a minority of the population is subject to nothing but the most deferential scrutiny, provided that not too many

persons are so burdened. Applying this rule, the Seventh Circuit specifically held that the fewer the number of persons who will "disenfranchise themselves" by not obtaining the voter identification because of difficulty or impossibility, "the less of a showing that state need make to justify the law." (App. 5). There are at least two critical flaws with this approach.

First, the voter identification requirement can fairly be described as a new substantive qualification for voting in Indiana, potentially no less of an absolute preclusion than a residency requirement, *Dunn v. Blumstein*, 405 U.S. 330 (1972), or a property-holder requirement, *Hill v. Stone*, 421 U.S. 289 (1975). Indiana voters who are unable to successfully navigate the steps to obtain an identification card are not disenfranchising themselves, but have been disenfranchised by the identification requirement. Second, and more importantly, this is not the holding of *Burdick* and *Anderson*. These cases demand that a court not attempt to pigeonhole the substantive nature of the voting regulation, but instead first ask whether or not the fundamental right to vote "is subjected to 'severe' restrictions." *Burdick,* 504 U.S. at 434.

Severity is assessed at the level of the individual voter. Anything less would depreciate, and ultimately render meaningless, the right to vote, which is a "personal right . . . [that] is a value in itself . . . without more and without mathematically calculating [a citizen's] . . . power to determine the outcome of an election." *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989). The question must therefore be whether the voter identification requirement imposes a severe burden as to any voter or potential voter. It is not enough to say that a voter-identification law is not discriminatory because

most, but not all, citizens can, with a minimal amount of effort, comply with its terms. If, as the evidence demonstrates, and as the Seventh Circuit conceded, the Indiana law will prove to be a severe burden on some voters and "deter some people from voting" (App. 3), the law is unconstitutional unless it satisfies strict scrutiny.[2] The Seventh Circuit's holding misinterprets *Burdick* and *Anderson* by pre-ordaining that all voter identification laws, which by definition will burden only the small segment of the voting public that will have difficulty in obtaining the identification, will be subjected to the most deferential scrutiny.[3] This will allow the fundamental right to vote to be overcome by claims of fraud, like those here, that are unsupported by fact. Given the proliferation of voter identification regulations

[2] This does not mean that if an election regulation causes just one person to be unable to vote it automatically must be subjected to strict scrutiny. What it does mean is that the burden on the individual voter must be assessed as to whether it is unreasonable and a severe restriction as to that voter. As Judge Wood noted in this case, dissenting from the denial of the petition for rehearing en banc, "[e]ven if only a single citizen is deprived completely of her right to vote – perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification – this is still a 'severe injury' for that particular individual." (App. 154). But, "[o]n the other hand, some laws that place a minor obstacle to voting in the way of many citizens – perhaps one that prevents any person from voting who is not registered to vote 28 days in advance of the election – are rightly seen as 'reasonable [and] nondiscriminatory.' " (*Id.*)

[3] Judge Evans, dissenting from the panel's decision in this case identified the population that will be so burdened as "mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof." (App. 13). The new law's exclusion of absentee voters from the identification requirements also has race implications, as blacks are only half as likely as whites to vote absentee. John Mark Hansen, *Early Voting, Unrestricted Absentee Voting & Voting by Mail*, TASK FORCE ON THE FEDERAL ELECTION SYSTEM 3 (July 2001), available at http://www.tcf.org/Publications/ElectionReform/NCFER/hansen_chap5_early.pdf.

and proposals extant in America today, and the growing interest in them, this Court should grant plenary review at this juncture to remedy the doctrinal confusion evidenced by the Seventh Circuit's decision.

III. This is an appropriate case for plenary review and review should be granted prior to the national elections in 2008

As the petitioners demonstrated in their petition, the question of the appropriate test to evaluate voter identification laws is one that is essential to answer now, given the national interest that voter identification laws have provoked and will continue to provoke. The petitioners are proper parties to bring this question before this Court and the question should be decided at this time.

A. The petitioners have standing

There are no standing questions in this action. Petitioner Representative Crawford is a current office-holder and candidate who has been informed at town meetings and similar events that there are citizens who do not have the required identification to vote. Petitioner Simpson, also an office-holder and candidate, is aware that there are persons in his district who have voted in the past, but who do not now have the appropriate photo identification. (App. 53). Candidates for public office have standing to assert the right of voters inasmuch as harm to the potential voter translates to harm to the candidate. *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973); 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.9 n. 68 (2nd ed. 1984 and Supp. 2003).

Members of the petitioner Indianapolis Branch of the NAACP have stated that the Voter ID law will prevent them from voting. (App. 47). Petitioner United Senior Action has members who do not have birth certificates and has members who will be discouraged from voting because of the identification requirements. The organizations have standing to raise the interest of their members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

As a result of the voter identification requirement, petitioners Indianapolis Branch of the NAACP, Concerned Clergy of Indianapolis, and the Indianapolis Resource Center for Independent Living all will have to expend limited institutional resources to assist persons in obtaining the predicate documentation necessary to obtain identification cards. (App. 54, 55, 57). The goals of all these organizations are frustrated by hindering the ability to vote, and the organizations must spend resources to address this problem. This gives them standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

B. This case should be decided prior to the national elections in November of 2008

This case presents an extremely significant question of national importance that can, and should, be decided in advance of the national elections of 2008. It is true that there is a schedule of primaries prior to the election. Yet, given that primaries occur biennially, the State cannot suggest when an appropriate time to resolve this issue would be. The key must be to resolve the uncertainty surrounding the voter identification question promptly, and if possible, prior to the next general election. Justice

Douglas outlined the problem with waiting in his concurrence in *Ely v. Klahr*, 403 U.S. 108, 120-21 (1971) (Douglas, J., concurring),

> Primaries apart, there is always the problem of review by this Court. We are plagued with election cases coming here on the eve of elections, with the remaining time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented. If an election case is filed in our summer recess, we will not consider it until the first week in October; and our effort to note the appeal, hear the case, and decide it before November without disrupting the state election machinery is virtually impossible. The time needed is lacking.

There is time now to decide this issue without unduly disrupting the states' election machineries prior to the 2008 elections.

IV. Conclusion

The Constitution, art. I, § 4, cl. 1, allows Indiana to determine the "Times, Places and Manner of holding Elections for Senators and Representatives." However, this does not give Indiana the power to "evade important constitutional restraints" in constructing its laws governing elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). Plenary review must be granted because the panel decision in this case establishes a standard that allows for voter identification laws throughout the United States that unconstitutionally burden the right to vote.

Respectfully submitted,

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