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

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RULE 29.6 DISCLOSURE STATEMENT

The corporate disclosure statement in Petitioners' Brief remains current and accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

ARGUMENT

Indiana has enacted the most restrictive voter identification law in the nation. The State defends the law by arguing that petitioners lack standing to challenge it and that even a hypothetical risk of fraud is sufficient to justify the very real burdens that the law imposes on Indiana voters, many of whom cannot easily obtain the required voter identification. The State's arguments do not withstand scrutiny.

First, the petitioners have standing under this Court's well-established rules. Second, the State's effort to argue that a law burdening the right to vote need not be subject to heightened scrutiny unless it absolutely prohibits some minimum, yet undefined, number of voters from voting is inconsistent with this Court's repeated recognition that the right to vote may be burdened by barriers placed in the way of prospective voters as well as by absolute prohibitions. Moreover, because "[t]he right to vote is personal," *United States v. Bathgate*, 246 U.S. 220, 227 (1918), the focus ultimately must be on how individual voters are affected by the law. Third, Indiana's reliance on anecdotal evidence from other states merely highlights the lack of *any* evidence in this record of even a *single* case of voter impersonation at the polls in Indiana. Indeed, the anecdotal evidence that Indiana cites has been rejected by courts in the states in which the fraud allegedly occurred as well as by formal studies. Finally, the State's argument that it has virtual *carte blanche* to regulate in this area ignores this Court's clear statement that "[a] court

considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury . . . ' against 'the precise interests put forward by the State as justification for the burden imposed by its rule'" and that, in doing so, a court must take into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).[1]

[1] The United States raises an additional argument that the petitioners' facial challenge is inappropriate under *United States v. Salerno*, 481 U.S. 739, 745 (1987), where this Court noted that in order for a statute to be declared unconstitutional on its face "the challenger must establish that no set of circumstances exists under which the Act would be valid." There is no constitutional application of a statute that imposes an unwarranted severe burden on the right to vote for some persons, even if other voters are not burdened. The residency requirement in *Dunn v. Blumstein*, 405 U.S. 330 (1972), for example, was unconstitutional on its face, even though it only applied to a small percentage of the potential electorate. Furthermore, to the extent that the law deters persons from voting and exercising a right found in, among other things, the First Amendment, *Salerno* does not preclude a facial challenge, *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). To require each person burdened by a poll tax, literacy test, white primary, durational requirement, or voter identification requirement to file a separate lawsuit would render the constitutional protection afforded voting illusory.

I. Petitioners have standing in this case

A. Crawford and Simpson have standing to assert the interests of their constituents and supporters

Since 1972 Petitioner William Crawford has represented in the Indiana House of Representatives what is arguably the most economically challenged district in the State; the district is home to many minority, elderly and poor persons. (District Court decision ["D.Ct."], Petitioners' Appendix to Petition for Writ of Certiorari ["Pet. App."] at 52; Crawford Dep. at 10-11, 21, 82, R.Doc. 65, Att. 17). Petitioner Joseph Simpson is an elected member of the Washington Township Board and an elected precinct committee-person. (Simpson Dep. at 12-13, 71; Interrog. ¶ 4, Ex. C, R.Doc. 64, Att. 16). Both men are candidates for reelection. (J.A. 80, 89). They brought this action for themselves and on behalf of the voters they represent. These include constituents who have informed Crawford at community events that they do not have the identification necessary to vote. (Crawford Dep. at 22, 80, R.Doc. 65, Att. 17; D.Ct., Pet. App. at 52; J.A. at 86). Simpson has personally observed that when voters are challenged some will walk away and not vote, and he has been informed by constituents that they object to the law. (D.Ct., Pet. App. at 53; Simpson Dep. at 34-43, 62-64, 79-80, R.Doc. 64, Att. 16). The State claims that the candidates lack standing because they cannot identify voters who would vote for them but for the challenged law. (State's Brief at 15). The State misconstrues the relevant law.

In *Powers v. Ohio*, 499 U.S. 400 (1991), this Court held that a criminal defendant has standing to assert the constitutional rights of jurors excluded by discriminatory peremptory challenges. Summarizing the rules of third-party standing, the Court said: "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, . . . the litigant must have a close relation to the third party, . . . and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411 (internal citations omitted).

The Court concluded in *Powers* that the discriminatory use of the peremptory challenges caused the defendant cognizable injury not because the jurors dismissed would have favored the defendant, but "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' . . . and places the fairness of a criminal proceeding in doubt." *Id.* at 1371. Similarly, it is not necessary to demonstrate that Crawford and Simpson will receive fewer votes because some of their constituents will be absolutely disfranchised by the new law or will be discouraged from voting by the challenge process. It is enough to show that unconstitutional burdens on the right to vote cast doubt on the integrity of the electoral process and place its fairness in doubt. The injury to the voter and the voting process is cognizable injury suffered by the candidates.

"[V]oters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Therefore, "[t]he right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Id.* Candidates and voters have the close relationship demanded by *Powers.* They are "inextricably bound up." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

In concluding that Crawford and Simpson had standing to assert the rights of voters who inadvertently cannot present photo identification at the polls (D.Ct., Pet. App. at 96), the trial court acknowledged voters would be hindered in their ability to protect their own interests. *See also Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (noting that political parties and unions have standing to raise their members' interests in a challenge to a provisional ballot regulation because the voters will not learn until they vote that they will encounter difficulties). The ability of these persons to vote provisionally does not provide a satisfactory method to protect their interests, for the provisional process itself may discourage a voter and the reality is that many provisional voters will not take the steps necessary to attempt to validate the ballot within ten days after the election. In *Powers* the Court recognized that "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate

his own rights." 499 U.S. at 415. That assessment applies with equal force here.

Given the close relationship between the voter and candidate, numerous courts have ruled that candidates have standing to represent the rights of voters and potential voters. *See, e.g.*, *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003) (noting that the candidate had standing not only because he had been threatened by prosecution but also because his supporters would be deterred by the challenged law); *Pennsylvania Psychiatric Society v. Green Springs Health Services, Inc.*, 280 F.3d 278, 288 n.10 (3rd Cir. 2002), *cert. denied*, 537 U.S. 881 (2002); *Walgren v. Bd. of Selectmen of the Town of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1975); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973).

B. The NAACP and United Senior Action have standing to raise the interests of their members

The representative of the Indianapolis Branch of the NAACP ("NAACP") testified that the organization has members who indicated that they would not be able to vote given the way the law was construed. (J.A. at 47). The organization did not have a list of the members without identification because it has a policy of preserving anonymity to encourage people to come forward with their complaints. (J.A. at 48).

An organization has standing to protect its members' rights where the members would have

standing, the interests being protected are germane to the organization's purposes and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). "The NAACP has a long history of protecting African Americans' voting rights." *NAACP Philadelphia Branch v. Ridge*, 2000 WL 1146619 at *2 (E.D.Pa. Aug. 14, 2000). The interests it seeks to protect in this suit are therefore "germane to its purpose," *id*., and there is no need for individual members to participate in the litigation. "It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

United Senior Action ("USA"), a dues-paying membership organization, has members who do not have birth certificates or valid driver's licenses. (Neimier Dep. at 25, 69, Request 1, R.Doc. 62, Att. 7). As a result, it has "members who will not be able to vote or who will find impediments to voting in their way because of the challenged law." (Neimier Interrog. ¶ 6, R.Doc. 86, Ex. 64). Protecting the basic voting rights of its members is an essential part of USA's specific purpose "[t]o encourage the participation of senior citizens in our state and our local communities." (Neimier Dep., Request 1, R.Doc. 62, Att. 7). And, as with the NAACP, there is no need for participation of USA's individual members. USA also

satisfies the requirements of organizational standing.[2]

C. A number of the petitioners have standing under *Havens* because they are directly injured by the voter identification law

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), this Court held that a fair-housing organization had standing to challenge racial steering practices that impaired its "ability to provide counseling and referral services." In explaining its ruling the Court noted that "[s]uch concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constituted far more than simply a setback to the organization's abstract social interests." *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring) ("a private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed.").

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[2] It is true that neither organization provided the names of its members burdened by the law, but that fact alone is not an impediment to standing. "[U]nder Article III's established doctrines of representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought and we decline to create such a requirement." *Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999).

Based on this, the Seventh Circuit correctly found that the Democratic Party has standing because the law requires it "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law." (Pet. App. at 4). Similarly, the NAACP indicated that it would now have to use its limited time and membership resources to engage in educational and outreach efforts to inform the public about the law so as to protect voting rights. (J.A. at 289). These efforts will necessarily divert the NAACP from engaging in other activities and is further evidence of its standing in this case (*Id.*).

The Indianapolis Resource Center for Independent Living ("IRCIL"), which has a goal of removing barriers to voting at the polls by persons with disabilities, will now be required to use its limited resources to assist persons with disabilities in collecting the documentation necessary so that they will be able to vote. (J.A. at 283; Madill Dep. at 17-18, R.Doc. 62, Att. 9; D.Ct., Pet. App. at 55). In-person voting is an essential part of incorporating disabled persons into the community. (Madill Dep. at 75-76, R.Doc. 62, Att. 9). Concerned Clergy of Indianapolis, a membership civil rights organization dedicated and committed to assuring that persons are registered to vote, will also now be forced to expend its limited resources to assist persons in obtaining identification so they can vote. (J.A. at 287; D.Ct., Pet. App. at 54).

An organization has standing when it has "proven a 'drain on its resources' resulting from

counteracting the effects of" the law. *Association of Community for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (internal citation omitted). Regardless of any injuries to their members, the NAACP, IRCIL, and Concerned Clergy all have standing in this cause.

II. The Indiana law does impose a severe burden

A. The evidence demonstrates that the law burdens persons in effectively exercising their right to vote

The State repeats the argument that the law cannot be deemed to impose a severe burden because no voter has come forward and demonstrated that he or she was prevented from voting by the photo identification law. As a threshold matter, that assertion ignores the NAACP members who indicated they do not have the requisite identification as well as Representative Crawford's constituents who also do not have the appropriate identification. It ignores the homeless persons who are registered to vote but do not have either BMV identification or the necessary documents to procure the identification. (J.A. at 10-14, 15-19). It ignores persons like Therese Clemente who, in an effort to exercise her right to vote at the polls, made multiple fruitless trips to her local BMV in an effort to present the proper combination of documents in order to be able to vote. (J.A. at 92-95).

Furthermore, as the petitioners have stressed, the right to vote can be severely burdened by obstacles that fall short of absolutely preventing the person from exercising the franchise. (Petitioners' Brief at 35-36). Respondent Marion County Election Board notes in its Brief (at 9) that during the most recent election in Marion County thirty-four persons were forced to vote by provisional ballot because of a failure to have appropriate identification. Only two returned within the designated time period so that thirty-two registered voters, many of whom had voted in numerous prior elections, did not have their votes counted. In Muncie, Indiana, at the conclusion of the most recent election day, the mayoral election was only nine votes apart with fourteen provisional ballots and five contested absentee ballots outstanding. Nick Werner, *Question of who won race for Muncie mayor might be answered today*, THE STARPRESS.COM, http://www.thestarpress.com/apps/pbcs.dll/article?AID=/20071116/NEWS01/71116033. Not all the provisional voters came to the clerk's office within the ten-day period so their votes went uncounted in the final total. *Ballot Count Ups Lead to 11 Votes in Muncie Mayoral Race*, WSBT 22, http://www.wsbt.com/news/indiana/11481896.html.

All of the provisional voters had obstacles placed in their way, obstacles created by the voter identification law, which ultimately caused many of them not to vote, although they had showed up at the polls on election day and attempted to do so. For these registered voters who went to the polls, many of them as

they had done for years, and did not ultimately succeed in casting their ballot, their right to vote was severely burdened by "state-imposed obstacles impairing voters in the exercise of their choices." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986).

B. A significant number of persons are adversely affected

The State argues that even if some voters are burdened by the voter identification law, the number is not great. As this Court has consistently stressed, however, "[t]he right to vote is personal." *Bathgate*, 246 U.S. at 227. And, the right is impinged upon when any one individual voter is "shortchanged." *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989).

The voter identification law does more than "shortchange" a very small number of voters and potential voters. The State seizes on the figure of 43,000 Indiana voting age residents without BMV identification or licenses, representing 1% of Indiana's voting age population. This number was the product of calculations by the district court which conceded that its methodology was neither "complete [n]or definitive." (D.Ct., Pet. App. at 69-70, n.43). Even this number is hardly negligible. However it ignores national studies demonstrating that from 6% to 11% of the American electorate is without official state identification. (Petitioners' Brief at 39-40). It ignores a recent study that specifically surveyed

Indiana voters in October of 2007 and found that approximately 16% of all voting eligible residents did not have either a current license or state identification card and 13% of current registered voters did not have licenses or identification cards. Matt A. Barreto, Stephan A. Nuño, Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, WORKING PAPER – WASHINGTON INSTITUTE FOR THE STUDY OF ETHNICITY AND RACE Tables 1.1, 1.2 (Nov. 8, 2007), http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf ("*Disproportionate Impact*"). The number of persons burdened by the law is significant.

C. The voter identification law is burdensome on particular groups

The State argues at length that the voter identification law does not adversely affect particular groups. In doing so it relies extensively on a recent study that seeks to divine information from a comparison of voter turnout in Indiana in the 2002 and 2006 general elections. Jeffrey Milyo, *The Effects of Photographic Indentification (sic) on Voter Turnout in Indiana: A County Level Analysis,* INSTITUTE OF PUBLIC POLICY, http://truman.missouri.edu/ipp/policyareas/?RAID=40. Milyo uses the fact that in-person voter turnout increased about 2% in the latter election as a springboard for his analysis. Obviously, the increase in turnout could have been a product of numerous factors not accounted for by Milyo ranging from high-profile elections to more favorable weather conditions. To the

extent Milyo rests his conclusions on the rise in the rate of voting, they founder on the fact that the number of voters declined between the Indiana primaries of 2003 and 2007, where the voter identification law was in effect for only the latter election.[3] The same pattern repeated itself in the general election in Marion County in November of 2003 and 2007.[4] It is unwise to attribute the 2% increase that Milyo discovered to what he describes as the law's beneficial effects. There are too many unaccounted variables and Milyo's study is not useful.

What is useful is to survey voters and prospective voters. The October, 2007 survey, *Disproportionate Impact*, confirms that "minority, low-income, and less educated Indiana residents are less likely to have access to valid photo identification." *Id.* at 15. The rate of access to identification peaks in the 55-69 age group, and drops significantly among those aged 70 or above. (*Id.*, Figure 2). This is consistent with the

[3] In the May 2003 primary 9% of Indiana registered voters participated, including 334,205 in-person voters. Indiana Secretary of State, *Selected Voter Registration and Turnout Statistics,* 1948-2004, http://www.in.gov/sos/elections/elections/index.html. In the May 2007 primary 8% of registered voters participated, including only 281,593 in-person voters. *Id.*

[4] In the 2003 general election in Marion County voter turnout was 26.81% of registered voters. Marion County Clerk's Office-Election Board, *Voter Turnout*, http://www.indygov.org/eGov/County/Clerk/Election/Election_Info/voter_turnout.htm. In 2007 the turnout was 26.32%. Marion County Clerk, *2007 General Election, Certified Results*, http://imcwwa2k3.indygov.org/elecnight/2007gen/.

record. (Petitioners' Brief at 13). It alone does not necessarily demonstrate an equal protection violation, but it is "especially difficult for the State to justify." *Anderson*, 460 U.S. at 793.

At a minimum, the voter identification statute incontestably imposes a severe burden on the ability of some persons to vote. Regardless of their age, race, or income status, the Indiana voters whose provisional votes were not counted this November, or the registered voters who did not wait for the challenge process but left the polls without voting, or who did not vote because they did not have the requisite identification, or the citizens who did not register to vote because they knew they would not be able to vote, all have had their right to vote burdened. The law imposes a severe burden because it burdens the right to vote of individuals. "The personal right to vote is a value in itself." *Morris*, 489 U.S. at 698.

D. The Indiana law imposes uniquely onerous burdens

The State describes Indiana's law as within the mainstream in America. However Indiana's statute is uniquely burdensome. (Petitioners' Brief at n.14-15).[5]

[5] Footnote 15 of the Brief describes the signature match that suffices to count a provisional ballot under Arizona law if photo identification or two pieces of non-photo identification are presented and a question is raised as to adequacy of the identification presented. If no identification or only one form of non-photo identification is presented, the person's "conditional

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Only Georgia, whose statute is currently under judicial review, also requires that photo identification must be provided if the in-person voter is to be able to cast a non-provisional ballot, and in Georgia anyone who presents voter registration will be issued photo identification. (*Id.*). In Indiana, the Byzantine requirements imposed on persons attempting to obtain identification from the BMV often leave individuals unable to procure the necessary identification documents to vote. *See*, *e.g.*, J.A. at 215, 220-21 (deposition testimony of BMV employee noting that in a given week 60% of applicants for licenses or state identification cards are turned away because they fail to have the appropriate documents mandated by the BMV). Indiana's requirement is extremely onerous and it stands alone in the United States. This is a constitutional "danger sign." *Randall v. Sorrell*, ___ U.S. ___, 126 S.Ct. 2479, 2494 (2006) (plurality opinion) (noting that Vermont's contribution limits are the lowest in the country).

The State argues that BMV identification is, or should be, possessed by all inasmuch as it is the "global standard" for identification, and therefore Indiana cannot be faulted for adopting this standard. (State's Brief at 29-30). Although it may be more

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provisional" ballot will not count unless he produces proper identification, which may be a utility bill, to the county recorder within three or five days. *Procedure for Proof of Identification at the Polls,* http://www.azsos.gov/election/Prop_200/PROOF_OF_IDENTIFICATION_AT_POLLS_PROCEDURE.pdf.

convenient to possess photo identification, it is not a necessity.[6] The reality, a reality not denied by the State, is that many Indiana residents do not have the required identification and it may be extremely difficult to obtain. These people may have difficulty in renting a video (State's Brief at 30), but that is not, and should not be, the constitutional measure for preserving the right to vote. That those without identification do not measure up to the State's view of 21st Century Americans does not alter the fact that it may be extremely burdensome, if not impossible, for some to obtain the identification.

The State seeks to deflect this point by arguing that obtaining identification is no more inconvenient than registering to vote in the first place. To the extent that the State is arguing that if registration is constitutional, photo identification must be as well, the State's argument is misplaced. The unconstitutionality of the voter identification law stems from the fact that *this* particular burden is not justified by the State's interests and the law is not tailored to meet any legitimate interest. *Burdick*, 504 U.S. at 434. The same is not true for registration requirements.

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[6] For example, it is not currently necessary that a person present state or federal issued identification to fly or to enter all federal courthouses. (*See Amicus* brief of Cyber Privacy Project, *et al*. at 35-36.) Indiana will issue a marriage license without photo identification. IND. CODE § 31-11-4-6. Checks can be cashed without photo identification. Anita Hamilton, *Profiting from the Unbanked* (Aug. 16, 2007), TIME.COM, http://www.time.com/time/magazine/article/0,9171,1653666,00.html.

To the extent that the State is arguing that it is no more burdensome to register to vote than it is to obtain identification, it is mistaken. In order to register to vote no identification needs to be produced; instead a simple form must be completed and submitted at numerous venues or by mail. IND. CODE §§ 3-7-13-1 through 3-7-24-17; Indiana Election Commission, *Indiana Voter Registration Application (VRG-7)*, http://www.in.gov/sos/elections/pdfs/50504.pdf. There is no comparison with the laborious process that voters without identification must go through so that they can gird themselves with the necessary documentation to be able to approach the BMV with a realistic hope of leaving with the elusive identification card. A person born in Marion County who needs to obtain a birth certificate may not be able to obtain the birth certificate from the Marion County Health Department without producing the license or state identification that she is attempting to procure by obtaining the birth certificate. (Ullrich Aff. ¶ 6 and attachments, R.Doc. 62, Att. 11). While this may not fit the text-book definition of "Hobson's choice" (State's Brief at 28), it is obviously a Catch-22 of classic proportions and "imposes a substantial burden on voter choice." *Burdick*, 504 U.S. at 444 (Kennedy, J., dissenting).[7]

[7] Licenses and identification cards issued before January 1, 2006, are valid for four years. IND. CODE §§ 9-24-12-1, 9-24-16-4. Thereafter, they are valid for six years. *Id.* Although a birth certificate will not have to be shown in order to obtain renewal, a license renewal applicant with a new address "will need to provide a computer-generated document such as a utility bill or

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III. There is no factual support for the State's concern that Indiana may experience in-person voter impersonation fraud

According to the State, the factual basis for the voter identification law is the risk Indiana faces from in-person voter identification fraud. Given that, the following uncontested facts bear repeating:

- The State has not identified even a single instance of voter impersonation fraud occurring at the polls in the history of Indiana. (D.Ct., Pet. App. 39).
- No Indiana voter has ever been charged with any crime relating to impersonation fraud in in-person voting. (*Id.*).
- No evidence of in-person impersonation fraud was presented to the Indiana legislature when it was considering the challenged legislation. (*Id.*).
- No such evidence was presented in this litigation.

The State argues that Indiana can rely on "credible nationwide reports" of such fraud. (State's Brief at 2-3). However, the largely anecdotal tales of fraud

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pay-check stub that contains your name and a new address." Indiana Bureau of Motor Vehicles, *Renewing a Driver's License*, http://www.state.in.us/bmv/3476.htm. And a person seeking to renew his identification card who has moved will have to satisfy the proof of residency requirements imposed at the time of initial application. Indiana Bureau of Motor Vehicles, *Identification Requirements*, http://www.state.in.us/bmv/3470.htm.

cited by the State have either been rejected by judicial findings, repudiated by state officials, or discredited by subsequent studies. For example, the State cites to reports of voter fraud in Missouri. However, the Missouri Supreme Court concluded in October of 2006 that the credible evidence from multiple election officials was that "voter impersonation fraud is not a problem in Missouri," *Weinschenk v. Missouri*, 203 S.W.3d 201, 210 (Mo. 2006), and struck down the state's voter identification law under the Missouri Constitution. *See also* Brief of *Amici Curiae* the Brennan Center, *et al.*, at 15-16.

Indiana also seeks support for its voter identification law from what it describes as evidence of massive vote fraud in Washington's 2004 gubernatorial election. (State's Brief at 2-3). But whatever the scope of that vote fraud may have been, it did not involve voter impersonation at the polls. (R.Doc. 79, Ex. 2 at 19).[8] The fact that felons may have improperly voted in Washington, or provisional ballots may have been improperly counted, does not support Indiana's need for a voter identification law purportedly designed to address a problem – voter impersonation at

[8] A trial court found that 1,678 illegal votes had been cast. (R.Doc. 79, Ex. 2 at 19). However, the majority were those of felons voting improperly and provisional ballots being improperly counted. (*Id.*). The limited anecdotal examples of deceased persons voting appeared to involve primarily absentee balloting, not in-person voting. (R.Doc. 83, Ex. 15).

the polls – that does not seem to have occurred in either Indiana or Washington.

The State refers to a preliminary report concerning the 2004 elections in Milwaukee County, Wisconsin but fails to mention that there is no reference in the preliminary findings to any alleged in-person impersonation fraud. (R.Doc 79, Ex. 4). That is because the problem in Milwaukee County, like that in Washington State, had nothing to do with voter impersonation at the polls. After numerous investigations and reports, the primary problem turned out to be with miscast votes by former felons, many of whom had never been informed that they had lost their right to vote. Lorraine C. Minnite, *The Politics of Voter Fraud* 35 (2007), http://www.bradblog.com/Docs/PoliticsofVoterFraudFinal.pdf. Indiana's reliance on a 2000 newspaper article that ballots had been cast in Georgia in the names of deceased voters (R.Doc. 83, Ex. 12), is equally unhelpful because it ignores the far more relevant fact, noted in a federal district court decision, that the Georgia Secretary of State had "pointed out that, to her knowledge, the State had not experienced one complaint of in-person fraudulent voting during her tenure." *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1361 (N.D. Ga. 2006).

Although the Carter-Baker Commission did recommend that photo identification be used in elections as of 2010, it presented no facts to support any conclusion that in-person impersonation fraud in the United States is an actual problem, but instead recycled some of the reports relied on by the

State. Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, Sec. 2.5 (Sept. 2005), http://www.american.edu/ia/cfer/report/report.html. Significantly, both President Carter and Secretary of State Baker later condemned Georgia's voter identification statute as "discriminatory" and "too costly or difficult" and noted that states must aggressively seek out the "12 percent of citizens who lack a driver's license" to assure that all have identification. (R.Doc. 104, Ex. 18).

The utter lack of in-person impersonation fraud is apparent in the United States Department of Justice report discussing voting integrity and mentioned by the State (R.Doc. 79, Ex. 2). It contains no reference to in-person impersonation fraud. A subsequent "Fact Sheet" issued by the Department of Justice in July of 2006 reports that 86 individuals have been convicted of ballot fraud offenses; but there is absolutely no mention of any in-person impersonation fraud. Department of Justice, *Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative* (July 26, 2006), http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html.

Anecdotal reports of in-person impersonation fraud are not supported by facts and do not withstand scrutiny. This is the ultimate conclusion drawn by the United States Election Commission, which found that many of the allegations of voter fraud that have been repeated as fact "were not substantiated. . . . Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud. . . ."

United States Election Assistance Commission, *Election Crimes: An Initial Review and Recommendation for Future Study* 16 (Dec. 2006), http://graphics8.nytimes.com/packages/pdf/national/20070411voters_final_report.pdf. The Commission further found that "impersonation of voters is probably the least frequent type of fraud." *Id.* at 9.

IV. The precise interests put forward by the State do not justify the burdens imposed by the voter identification law and it is not narrowly drawn to meet the State's asserted interests

A. The precise interests advanced by the State do not justify the law

Prominently absent from the State's articulation of the proper standard to be applied to the voter identification law is this Court's instruction that a court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. "In passing judgment, the Court must . . . determine the legitimacy and strength" of the interests. *Id.* Even if the burden on voting rights is less than severe, a law must fail if it is not justified by the state's precise interests. *See*, *e.g.*, *Reform Party of Allegheny Co. v. Allegheny Co. Dep't of Elections*, 174 F.3d 305, 318 (3rd Cir. 1999) (*en banc*) (defendant failed to offer "'important' or 'sufficiently weighty' state interests that justify, even under intermediate scrutiny" the burdens imposed by the challenged law.)

Instead, the State seeks to recast these requirements to provide that there is no need to demonstrate justification for its precise interests absent a facially implausible justification or absent evidence concretely demonstrating harm to constitutional rights that is disproportionate to any apparent benefit. (State's Brief at 47). Implausibility and lack of proportionality cannot be determined until after the Court reviews the evidence to determine the legitimacy and strength of the proffered justifications. The reason that the contribution ban was struck down in *McConnell v. FEC*, 540 U.S. 93, 232 (2003), was not because the justification was deemed to be facially implausible, but because, after reviewing the government's "scant evidence" the Court concluded that the evidence did not support the precise interests advanced by the government. There was not a "convincing case of the claimed evil." *Id.* Similarly, in *Sorrell*, 126 S.Ct. at 2494, the Court formed no conclusion until after it "examine[d] the record independently and carefully to determine whether . . . [the] contribution limits are 'closely drawn' to match the State's interests." And in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390-91 (2000), the Court did not abandon the factual inquiry but relied on evidence of potentially corrupting contributions that had been adduced during the course of *Buckley v. Valeo*, 424 U.S. 1 (1976).

Here, there is "scant evidence" to support the State's justification for the burdens imposed by the voter identification law. The primary precise interest

put forward by the State is the need to prevent in-person impersonation fraud. However, there is no evidence in Indiana of such fraud and, despite the State's protestations to the contrary, there is no credible evidence that this is a problem anywhere in the United States. *See* Section III, *supra.*

The State attempts to bolster the legitimacy of its fraud concern by arguing that the law requiring voter identification for *in-person* voting is a response to the "culture" of election fraud in Indiana that was occasioned by *absentee* ballot fraud. Such an imprecise response is inconsistent with *Burdick* and *Anderson.* Indeed, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995), this Court noted that Ohio could not punish fraud indirectly by "indiscriminately" prohibiting all anonymous election-related speech. Indiana's response, also in the name of fraud prevention, is similarly indiscriminate.

Nor is the strength of the State's argument that the voter identification law is necessary to prevent fraud enhanced by its claims that the State's inflated voter registration lists make Indiana particularly prone to in-person voting fraud. The State does not deny that this is a problem of its own making and that federal law requires voter list maintenance, 42 U.S.C. § 1973gg-6, but argues that it cannot solve the problem it created until at least after the November 2008 election, and therefore extra fraud protections are necessary. Yet, by virtue of the consent decree it signed with the United States (J.A. at 299-306), Indiana has agreed to, among other things: distribute

notices so that county offices can identify and remove duplicate registrations as well as the names of deceased registrants; conduct a statewide mailing to identify ineligible voters; and, develop a written plan for identifying and deleting ineligible voters on the State's computerized database. Indiana is now sufficiently confident to announce that its new Statewide Voter Registration System, which creates a single database that links all Indiana's voter registration records, will "fight election fraud by keeping the voter rolls current and accurate." State of Indiana, *Statewide Voter Registration System*, http://www.indianavoters.com/PublicSite/PublicHome.aspx?AspxAutoDetectCookieSupport=1. Even if the Constitution could tolerate the imposition of a burden on voters to correct the State's prior failures, there is "scant evidence" that formerly bloated voter registration laws support the need for the law.

The State argues that the secondary interest supporting the law is the need to preserve public confidence in the electoral process. Bereft of any specific evidence that the public is concerned about the sole type of election fraud that the State has chosen to address, in-person impersonation fraud, the State argues that "common sense" validates Indiana's concern. (State's Brief at 54). The State cites *McConnell* for this proposition, but omits the fact that the Court noted there that Congress' belief in the corruptive aspects of soft-money contribution was supported by "[b]oth common sense and the ample record." 540 U.S. at 145. Here there is no record, ample or otherwise, to

support the State's supposition. It is equally likely that the electorate's confidence is negatively impacted by laws like Indiana's that are perceived as burdening the ability to vote of portions of Indiana's citizenry. To the extent that there is a public perception of in-person impersonation fraud, it is most obviously a misperception which cannot be a legitimate or strong interest that warrants burdening the right to vote.

B. The State's interests can be met in a much more tailored fashion

The State argues that the voter identification law is reasonable. It certainly is not. It is a solution to a problem that simply does not exist and it is a solution that imposes serious burdens on the voting rights of Indiana residents. Even assuming that Indiana could legislate to fight this non-existent problem, its response certainly is not tailored in any respect.

The State argues that courts are ill equipped to review its chosen method of voter identification. However, it is hardly an act of judicial legislation for this Court to take note of the fact that Indiana's response is far outside of the identification requirements established by the forty-nine other states as well as by Congress through HAVA, 42 U.S.C. § 15483.[9] This is a "danger sign" that indicates that

[9] The United States refers to HAVA requiring voters to provide identification. (*Amicus* Brief at 2). As Petitioners have

(Continued on following page)

the identification law is not "'closely drawn' to match the State's interests." *Sorrell*, 126 S.Ct. at 2494. Indiana has eschewed various other forms of identification, instead selecting one particular form of identification that is burdensome for some persons to obtain. This fails any level of scrutiny that demands tailoring.

In *Dunn*, 405 U.S. at 353, this Court concluded that existing criminal sanctions were adequate to prevent fraud. The State does not respond to the argument that Indiana's criminal sanctions are similarly sufficient, but argues that one of the additional anti-fraud mechanisms in place before the voter-identification law, signature comparison, was not effective. Its rationale is that it must have been ineffective because no one was ever caught. This is pretzel logic. In its Brief (at 6, 10) Respondent Marion County Election Board describes the signature comparison as one of the "time-tested" fraud prevention mechanisms that were in place before the voter identification law, contributing to the fact that the

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noted (Brief n.1), HAVA requires disclosure of a driver's license number or the last four digits of a social security number. 42 U.S.C. § 15483(a)(5)(A). Once Indiana is fully compliant with HAVA, the only persons who will have to provide documentation to vote will be those who register by mail and who do not produce a driver's license number or the last four digits of the social security number, or if those numbers cannot be matched when compared to a state data base. 42 U.S.C. § 15483 (a)(5)(A), (b) Even then, utility bills and other non-photographic documentation will suffice and the documentation will only have to be produced once. 42 U.S.C. § 15483(b).

Board "has neither any memory nor any record of any instance of the in-person voter impersonation fraud the Voter Identification Statute is designed to combat." This is the definitive answer on the adequacy of signature comparison.

The State recognizes that absentee balloting in Indiana presents a serious challenge to its assertion that the voter identification law is narrowly tailored in that the sole fraud mechanism with regard to absentee balloting is signature comparison and the State did not see fit in the course of passing the law to impose any additional identification requirements with regard to absentee voting – the only area where fraud has occurred in Indiana. With regard to the latter point, the State argues that to combat absentee ballot fraud it has enacted statutory changes designed to tighten the requirements for absentee voting in Indiana, citing the former law that allowed persons to vote absentee who "will be absent from the county on election day," IND. CODE § 3-11-10-24 (amended eff. July 1, 2005), as opposed to the current law that allows persons to vote absentee who have "a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open." IND. CODE § 3-11-10-24. It is not immediately apparent what this statutory change means given that it has had no negative effect on absentee voting in Indiana. For example, the percentage of persons voting absentee has been as follows: 2007 Primary – 17%; 2006 General Election – 10%; 2006 Primary – 7%; 2004 General

Election – 10%; 2004 Primary – 6%. Indiana Secretary of State, *Selected Voter Registration and Turnout Statistics, 1948-2004*, http://www.in.gov/sos/elections/elections/index.html. The other change to Indiana law only applies where a voter's household member or attorney in fact personally delivers the sealed envelope concerning the absentee ballot and only requires the signing of an affidavit. IND. CODE § 3-11-10-24(c), (d). The State has not altered the fraud prevention mechanisms for absentee balloting by mail, the area of fraud present in Indiana. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145 (Ind. 2004). Rather than draw the law narrowly to address the only type of voting fraud that exists in Indiana, the State focuses its attention solely on in-person voting, abandoning the anti-fraud mechanisms that served Indiana well. The law is not appropriately tailored.

Perhaps the most glaring example of the lack of tailoring of Indiana's scheme is the fact that if voters cannot afford the underlying documentation for the identification, or have religious objections to being photographed, they cannot appear at the polls on election day and sign an affidavit and vote, but must instead vote via a provisional ballot and then go to a remote government office on another day and sign the appropriate affidavit. IND. CODE § 3-11.7-5-2.5(c)(2). The State responds that allowing voters to execute affidavits at the polls would cause delays. The State does not explain why having the prospective voter check a box that he or she is indigent or has a religious objection would cause further delay inasmuch

as under the current system the person must already sign an affidavit in order to vote provisionally. IND. CODE § 3-11-8-25.1(d). The State notes that the indigent or religious objector voter who plans ahead can vote at the absentee voter board in the office of the circuit court clerk up to the date before the election and then, when challenged, vote via a provisional ballot and then fill out the affidavit on the same day. IND. CODE § 3-11-10-26. This added procedure, which requires that the person travel to a remote site in advance of the election, provides no consolation to the voter who shows up at the polls expecting to vote and certainly does not respond to the objection that a tailored approach, adopted by a number of states, would assist that voter by allowing him to sign the affidavit at the polls and cast a regular ballot. *See* Brief of Petitioners n.14.

Indiana's response to its fraud concerns is not narrowly tailored to address those concerns. Its approach places artificial barriers in front of prospective voters and the law is unconstitutional.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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