IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218

WILLIAM CRAWFORD, *et al.*,
Plaintiffs/Appellants,
v.
MARION COUNTY ELECTION BOARD,
Defendant/Appellee.

No. 06-2317

INDIANA DEMOCRATIC PARTY, *et al.*,
Plaintiffs/Appellants,
v.
TODD ROKITA, *et al.*,
Defendants/Appellees.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:05-cv-00634-SEB-VSS
The Honorable Sarah Evans Barker, Judge

BRIEF OF APPELLEES ROKITA, KING, AND ROBERTSON AND INTERVENOR/APPELLEE THE STATE OF INDIANA

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JURISDICTIONAL STATEMENT

The jurisdictional statements of Plaintiffs/Appellants William Crawford *et al.* and the Indiana Democratic Party *et al.* are not complete and correct.

1. In No. 06-2218, Plaintiffs/Appellants William Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition on Housing and Homeless Issues, and Joseph Simpson (collectively, the "Crawford Plaintiffs") filed their complaint in the Marion Superior Court on April 28, 2005, against the Marion County Election Board ("MCEB"). The complaint claimed that Senate Enrolled Act 483 ("the Voter ID Law") violated the Fourteenth Amendment, the Voting Rights Act (42 U.S.C. § 1971(a)(2)(A) & (B)), and Article 2, section 1 of the Indiana Constitution. Subsequently, the Crawford Plaintiffs filed a motion to raise an additional legal argument based on Article 2, section 2 of the Indiana Constitution. On May 27, 2005, pursuant to 28 U.S.C. §§ 1441(b), (c), MCEB removed the entire case to federal court. Because the matter called into question the constitutionality of a state statute, the State of Indiana filed a motion to intervene on June 23, 2005, which was granted the same day. The district court had jurisdiction over the Crawford Plaintiffs' federal claims pursuant to 28 U.S.C. § 1331, and had supplemental jurisdiction over the state-constitutional claims pursuant to 28 U.S.C. § 1367.

2. In No. 06-2317, Plaintiffs/Appellants Indiana Democratic Party and Marion County Democratic Central Committee (collectively, the "Democrats") filed

their complaint in the district court against Defendants/Appellees Todd Rokita, J. Bradley King, and Kristi Robertson (collectively, "State Defendants") on May 20, 2005. The Democrats alleged that the Voter ID Law violated the First and Fourteenth Amendments, the Voting Rights Act (42 U.S.C. § 1971(a)(2)(A) & (B)), the Help America Vote Act (42 U.S.C.§ 15483(b)(1) & (2)). On August 8, 2005, the Democrats amended their Complaint to name the MCEB as a defendant. The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3).

Unlike in No. 06-2218, the district court initially did not have jurisdiction over the state-constitutional claims pursuant to 28 U.S.C. § 1367 because sovereign immunity deprives federal courts of jurisdiction to enjoin state officials based on state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). Because the two cases were consolidated, however, and because the Democrats added the MCEB as a Defendant, the *Pennhurst* issue never arose and ultimately did not block adjudication of the Indiana constitutional claims.

3. On June 23, 2005, the district court consolidated these two cases into a single cause number (1:05-cv-00634-SEB-VSS). On April 14, 2006, the district court filed an "Entry Granting Defendants' Motions for Summary Judgment, Denying Plaintiffs' Motions for Summary Judgment, and Denying Plaintiffs' Motions to Strike." This was a final and appealable judgment, and no party filed any post-judgment motions.

On April 24, 2006, the Crawford Plaintiffs filed a Notice of Appeal, appealing the district court's April 14 order. This appeal was docketed in this Court on May 1, 2006, as Cause No. 06-2218. On May 5, 2006, the Democrats filed a Notice of Appeal, also appealing the district court's April 14 order. This appeal was docketed in this Court on May 8, 2006, as Cause No. 06-2317. On May 11, 2006, this Court issued an order directing that the two appeals be consolidated for purposes of briefing and disposition. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether an individual has proven first-party standing to challenge a voter-identification law where he claims that, when he presents his identification, he will be injured by "unwelcome confrontation" with a law to which he objects.

2. Whether an organization whose purpose is unrelated to voting has proven first-party standing to challenge a voter-identification law where it claims a legally protected interest in *not* having a law requiring voters to present photographic identification and claims that having such a law will, in the future, directly injure the organization by forcing it to spend money on obtaining identification for voters and educating the public about the law.

3. Whether an organization has proven representative standing to challenge a voter-identification law where its "members" have not consented to membership, and it cannot identify a single member who will be unable to vote.

4. Whether political parties, organizations, or politicians have third-party standing to raise the claims of voters against a voter-identification law where the parties cannot demonstrate that anyone will be injured by the law, and without showing why any hypothetical voter who would be injured could not bring suit on his own behalf.

5. Whether an action to enjoin enforcement of Indiana's Voter ID Law is justiciable against the Indiana Secretary of State and the Co-Directors of the Indiana Election Division when those officials have no role in enforcing the Voter ID Law.

6. Whether, pursuant to the Elections Clause and consistent with constitutionally protected voting rights, states may require registered voters to

present poll workers with government-issued photo identification in order to vote in person at a precinct polling place.

7. Whether the First Amendment's protection of freedom of association permits states to require registered voters to present poll workers with government-issued photo identification in order to vote in person at a precinct polling place during a political party's primary election.

8. Whether the Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A), permits states to exempt residents of nursing-home polling places from presenting photo identification when they vote.

9. Whether Article 2, section 2 of the Indiana Constitution permits a state law requiring registered voters to present poll workers with government-issued photo identification in order to vote in person at a precinct polling place.

This brief addresses only issues 5-7. The State Defendants and Intervenor/Defendant the State of Indiana hereby incorporate by reference the brief of Defendant MCEB, which addresses issues 1-4 and 8-9.

STATEMENT OF THE CASE

This is an appeal from the district court's judgment of April 14, 2006, which resolved the parties' cross-motions for summary judgment and rejected constitutional and statutory challenges to Indiana's Voter ID Law. Appellants' Required Short Appendix 1 (hereinafter "App."). Prior to those cross-motions, on May 20, 2005, State Defendants moved to be dismissed because they have no role in enforcing the Law. D. Ct. Docket Nos. 12, 13. On July 1, 2005, the district court stayed a final ruling on that motion pending a more in-depth investigation into the election process. D. Ct. Docket No. 24. In the Entry Granting Defendants' Motions for Summary Judgment, the court denied the motion as moot in light of its ruling in favor of the Defendants on the merits. App. 42, n.30.

On October 31, 2005, both the Crawford Plaintiffs and the Democrats filed motions for summary judgment. D. Ct. Docket Nos. 57, 62-70. On November 30, 2005, the MCEB and the Intervenor State of Indiana and the State Defendants filed cross-motions for summary judgment. D. Ct. Docket Nos. 74-76, 79-80, 82-87. On December 5, 2005, all Plaintiffs filed a joint motion to strike portions of the affidavit of Wendy Orange, and on December 21, 2005, all Plaintiffs filed another joint motion to strike various exhibits submitted by the Defendants. D. Ct. Docket Nos. 90-91, 101-02. The district court ruled on the Plaintiffs' motions to strike, denying them for the most part, in its memorandum decision issued on April 14, 2006. App. 123-26.

In addition, in its April 14, 2006, order, the district court expressly excluded, pursuant to Federal Rule of Evidence 702, consideration of the Democrats' expert report of Kimball Brace, which the court described as "utterly incredible and unreliable." App. 43.

STATEMENT OF FACTS

1. In 2000, the Indianapolis Star investigated the accuracy of Indiana's voter rolls and found that more than 300 dead people were registered to vote. State App. 36. Subsequently, that study was the subject of testimony before Congress concerning the need for election-fraud measures. State App. 122. In 2005, the Indiana Supreme Court decided not to use voter-registration lists to compile jury pools because, according to Justice Theodore Boehm, the state's voter-registration

lists are "overpopulated (because the lists included many who had died or moved)." State App. 127.

For this case, Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population data, conducted an examination of Indiana's voter-registration lists and concluded that they are among the most highly inflated in the nation. State App. 65. Specifically, when he compared actual voter registration with self-reported registration, he found that there were 4.3 million registered voters in 2004, while only 3 million voters reported being registered, resulting in estimated list inflation of 41.4%. *Id.* at 62.

Benson also looked at the registration rates before and after the National Voter Registration Act ("Motor-Voter" law) became effective on January 1, 1995. *Id.* at 7. He found that in 1988, the registration rate in Indiana was 69.71% of the voting-age population (VAP) with a voter turnout of 75.67% of VAP, while in 2004 the registration rate was 93.6% of VAP (with 12 counties reporting more registered voters than VAP), with a turnout rate of 58.5% of VAP, indicating that list inflation is high. *Id.* When he reviewed the number of deceased voters on the list, he found with a high rate of confidence that at least 35,699 Indiana registered voters are now deceased. *Id.* at 64. Additionally, his research indicated that in 2004 there were 233,519 potential duplicate registrations. *Id.* at 65.

The Motor-Voter law requires each state to make a reasonable effort to remove the names of ineligible voters from the official registration list, but it restricts how states may do so. Except in limited circumstances, states may not

remove voters from the registration list, at least for purposes of federal elections, due to the voter's failure to vote. 42 U.S.C. § 1973gg-6(b)(2). This restriction on list maintenance over the last decade has resulted in a substantially higher number of illegitimate voter registrations, sometimes called "list inflation." State App. 52-56. In 2004, 86.84% of the nationwide VAP was registered to vote, compared with 75.87% in 1992. *Id*. at 54. In fact in both 2000 and 2004, numerous states actually recorded registration rates at over 100%. *Id*.

More specifically, the Motor-Voter law requires states to take active steps to confirm the addresses of voters before purging them from the official list. 42 U.S.C. § 1973gg-6(c). The Motor-Voter law suggests that states can satisfy their duties under the removal-program requirement by sending notices to individuals identified by the U.S. Postal Service as having completed a change-of-address card. *Id*. The notice must instruct the voter to return the card, and that if the registrant does not do so and does not vote in the next two general elections, the voter may be removed from the registration list. 42 U.S.C. § 1973gg-6(d)(2). States may only remove voters from the registration list if (1) the voter confirms in writing that the voter has moved or (2) the voter fails to respond to the required notice *and* has not voted in the two general elections following the notice. 42 U.S.C. § 1973gg-6(d)(1).

This summer, the Indiana Election Division agreed with the federal government to undertake efforts authorized by the Motor-Voter law to update and maintain Indiana's bloated voter-registration list, by coordinating mailings to identify potentially invalid registrations and forwarding the results to county

registration boards. State App. 1-8. Ultimately, however, the Indiana Election Division has no authority to remove any voter registrations from the rolls, pursuant to either state law or the Consent Decree. Rather, only independently elected county voter registration boards have the authority under Indiana law to cancel existing registrations or to reclassify a voter as "inactive." Ind. Code §§ 3-7-38.2-2; 3-7-38.2-15, 3-7-43-1; 3-7-45-3.

The limits imposed by Motor-Voter in registration list maintenance leads to real problems in administering fair elections. According to scholars, high voter-list inflation enables voter fraud. John Fund, *Stealing Elections* 4 (2004); Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 321 (1996). Fraud has become ever more likely as "it has become more difficult to keep the voting rolls clean of 'deadwood' voters who have moved or died" because such an environment makes "fraudulent voting easier and therefore more tempting for those so inclined." *Id.*. Indeed, as documented in the district court and recounted by *Amicus Curiae* the American Center for Voting Rights, in-person voter fraud is a problem of disturbing prevalence around the country. App. 88-89; *see generally* Brief of *Amicus Curiae* the American Center for Voting Rights (ACVR Br.).

2. Against this backdrop of bloated and unreliable voter-registration rolls in Indiana, and in light of the record of in-person voter fraud that has occurred nationally, *see generally* ACVR Br., in 2005 the Indiana General Assembly enacted the Voter ID Law to prevent voter fraud and to protect public confidence in the legitimacy of elections. The Law requires citizens voting in-person on election day,

or casting an absentee ballot in person at a county clerk's office prior to election day, to present election officials with valid photo identification issued by the United States or the State of Indiana. Ind. Code § 3-11-8-25.1. The Law applies to voting at both primary and general elections. Ind. Code §§ 3-10-1-7.2; 3-11-8-25.1. It does not apply, however, to receiving and to casting an absentee ballot by mail, or to "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(f); 3-11-10-1.2.

To be acceptable at the polls, government-issued photo identification must show the name of the individual to whom it was issued, which must conform to the name on the citizen's voter-registration record, and an expiration date. Ind. Code § 3-5-2-40.5. The expiration date must have either not yet occurred or occurred after the date of the most recent general election (November 2, 2004, for example). Ind. Code § 3-5-2-40.5(3).

Voters are required to produce acceptable photo identification before signing the poll book. Ind. Code § 3-11-8-25.1(b). If a voter does not, a member of the precinct election board "shall challenge the voter." Ind. Code § 3-11-8-25.1(c)(2). If the voter signs an affidavit attesting to the voter's right to vote in that precinct, the voter may then sign the poll book and cast a provisional ballot. Ind. Code § 3-11-8-25.1(d). A voter who casts a provisional ballot may appear before the circuit court clerk or county election board by noon ten days following the election to prove the

voter's identity. Ind. Code § 3-11.7-5-1.[1] If by that time the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5. Voters may also validate their provisional ballots by executing an affidavit that the person is the same person who cast the provisional ballot and either (1) the person is indigent and is "unable to obtain proof of identification without payment of a fee;" or (2) has a religious objection to being photographed. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).

If, notwithstanding a voter's attempt to validate a provisional ballot using one of these methods, the election board determines that the voter's provisional ballot is not valid, the voter may file a petition for judicial review in the local Circuit court. Ind. Code § 3-6-5-34. Ultimately, therefore, the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Indiana Supreme Court.

In addition, the Law expressly provides that the BMV may not charge a fee to anyone of voting age for renewal or replacement of non-license photo identification. Ind. Code § 9-24-16-10. According to Stephen Leak, the BMV's Assistant Commissioner, the policy of the BMV is to issue renewals of non-license photo identification for free. State App. 131.

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[1] In 2006, the General Assembly passed HEA 1001, which modified the amount of time a voter had to validate a provisional ballot from 13 days to 10 days after election day. Ind. Code § 3-11.7-5-2.5 (2005).

3. The Voter ID Law is fully consistent with recent recommendations of the Commission on Federal Election Reform, (the Baker-Carter Commission), relied on by the district court. The Baker-Carter Commission recommended that states use so-called REAL IDs, referring to identification issued in compliance with the federal REAL ID Act of 2005, for purposes of identifying in-person voters. State App. 14; Real ID Act, Pub. L. No. 109-13, 119 Stat. 302 (codified at 49 U.S.C. § 30301). Federal law requires that all state photo identification for use by any federal agency must so comply by 2008. *Id*.

In recommending that states should require reliable photo identification at the polls, the Commission emphasized that "there is no doubt that [voting fraud] occurs" and observed that fraud dilutes the strength of legitimate votes and thereby disenfranchises honest voters. State App. 14. The Commission recognized that requiring reliable photo identification would deter voter fraud and enable better fraud detection. *Id.* The Commission also recognized that requiring voters to present photo identification would advance the independent, but equally compelling, government interest in protecting public confidence in the legitimacy of election outcomes. *Id.* Commission member and former U.S. Representative Lee Hamilton (D-Ind.) is reported to have said that "Indiana was right to adopt a voter ID law . . . ." State App. 129.

SUMMARY OF THE ARGUMENT

As the district court bluntly put it, "[t]his litigation is the result of a partisan legislative disagreement that has spilled out of the state house [and] into the

courts." App. 2-3. The political nature of this case is only underscored by the Plaintiffs' failure "to adapt their arguments to the legal arena." *Id.* at 2-3. The Plaintiffs claim that the Indiana Voter ID Law imposes onerous burdens on voters, but they have not provided "evidence of a single, individual Indiana resident who will be unable to vote" or be "unduly burdened by" the Voter ID Law. *Id.* As a consequence, the district court observed, this entire lawsuit was "weakly conceived." App. 85, n.75. On appeal, as in the district court, the Plaintiffs succeed only in making it abundantly clear that "in-person voter fraud is not a problem they would have chosen to address had they been in a position to substitute their judgment for that of the General Assembly . . . ." App. 95. But that, of course, is no basis for a constitutional attack.

Before addressing the merits, the Court should affirm the judgment of the district court as to the State Defendants—*i.e.* Secretary of State Rokita and Election Division co-Directors King and Robertson—because Plaintiffs have no standing to sue them under Article III. As the district court acknowledged, these Defendants have no role in enforcing the Voter ID Law. App. 42, n.30. Therefore, no injunction against them could possibly redress any hypothetical injury suffered by the Plaintiffs, and federal-court jurisdiction to adjudicate this dispute against them does not exist.

On the merits, the Elections Clause of the United States Constitution expressly authorizes states to regulate the "Times, Places and Manner of holding elections for Senators and Representatives," and presupposes state power to

regulate state elections in the same way. U.S. Const. art. 1, § 4. As with commonly accepted voter restrictions such as advance registration, in-person-voting, and self-identification and signature requirements, Indiana's Voter ID Law fits well within the authority granted and embodied by the Elections Clause and, therefore, does not constitute a direct or severe impingement on the right to vote. Contrary to Plaintiffs' assertions, election regulations other than ballot-access restrictions routinely receive less than strict scrutiny. Dem. Br. 24. In fact, pursuant to this Court's standard for laws that regulate the mechanics of voting, nothing about the Voter ID Law is "grossly awry," so strict scrutiny does not apply. *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

The Plaintiffs contend that the Voter ID Law constitutes a direct and severe burden on the right to vote, similar to, for example, a one-year residency requirement, a property-ownership requirement, and even a poll tax. Dem. Br. 20. The Voter ID Law, however, is nothing like these or other substantive voter qualifications that have drawn strict scrutiny from courts. It is merely a reasonable procedural regulation designed to ensure that qualified voters are the individuals they purport to be. Notably, neither the Democrats nor the Crawford Plaintiffs have been able to identify any actual prospective voters who might be unable to vote in the next election because they do not have photo identification. All they have produced are unconfirmed anecdotes, impressions, hypotheses, and a deeply flawed statistical projection of the Law's operational impact (which the district court

properly excluded from evidence, a ruling not seriously challenged in the Democrats' brief).

Even if strict scrutiny were to apply, however, the Voter ID Law would still pass muster. No Plaintiff seriously disputes the notion that the state's interests in combating election fraud and in preserving the apparent legitimacy of elections are compelling interests of the highest order that may justify voting laws that arguably impinge on the right to vote. They argue instead that the state is required to prove in-person voter fraud before it may vindicate those compelling interests. But Supreme Court doctrine says exactly the opposite—states are not required to wait for electoral disasters to occur before taking action to prevent such problems. In any event, the state is entitled to rely on the occurrence of fraud in other states as a justification for its own fraud-prevention laws, and the state's voter-list-inflation problem further underscores the need for the Voter ID Law.

The Voter ID Law also is narrowly tailored to advance directly the state's interests in preventing in-person voter fraud and promoting the apparent legitimacy of elections. As the district court recognized, government-issued photo identification, such as driver's licenses, state-issued non-license photo identification, and passports, have come to embody the best balance of cost, security, and prevalence of any possible means of identifying voters. App. 87. And as much as the Plaintiffs complain that some legitimate voters will not have acceptable identification when they arrive at the polls, the fact remains that it is already possessed by the vast majority of citizens. App. 51.

Furthermore, the Law permits several ways for citizens to cope with any burdens that may arise. Indiana law permits the elderly and disabled to vote by mail-in absentee ballot without further justification and, thereby, allows individuals in those groups who do not have compliant identification to avoid the requirements of the Voter ID Law. And for those who arrive at the polls without their identification for whatever reason, the Voter ID Law permits them to cast a provisional ballot at the polls and to return to the county election board within 10 days with proper identification to validate the ballot and have it counted.

The Plaintiffs complain that permitting voters to cast mail-in absentee ballots without photo identification and exempting nursing-home residents who vote at their facilities undermines the legitimacy of the Law. Dem. Br. 45; Crawford Br. 44. But there would be little benefit to requiring absentee voters to submit photo identification since there would be no face to match with the photo. Indeed, that process might even compromise ballot secrecy. And as the district court observed, there are reasonable justifications for easing the Law's burdens on nursing-home residents who need not travel to vote in-person—as a class, they are more likely to be known by those working the polls in the facility, whose staff often holds the residents' documentary identification. App. 100-04. Ultimately, it is a bit disingenuous of the Plaintiffs to complain about this exemption when they also purport to worry about the Law's impact on the rights of the elderly.

Finally, there is no plausible basis for the Democrats to argue that the Law infringes on their party's First Amendment right to associate freely with others—an

argument that the district court inferred had been dropped. Dem. Br. 40-41; App. 115. Under Indiana's open-primary system, any voter, including those who associate with one party and who merely want to skew another party's primary results, may realistically vote the ballot of any party at the primary election. This circumstance completely destroys any claim that the mere act of voting in a party's primary is necessarily an act of association.

In any event, laws are invalidated based on associational rights only where states seek to discover the names of an organization's members, to restrict activities central to an organization's purpose, to disqualify an organization from public benefits or privileges, or to compel the organization to associate with unwanted members or voters. In contrast, the Voter ID Law is no more an impingement on any right to associate than voter registration or in-person voting requirements. The Democrats and voters who cast ballots in Democrat primaries still have the same opportunities to associate with one another as before.

ARGUMENT

I. The State Defendants Do Not Enforce the Voter ID Law and May Not Be Sued to Enjoin its Enforcement.

Even supposing the Voter ID Law causes any direct injury to the Democrats, *but see* MCEB Br. Part I, the Indiana Secretary of State and the Co-Directors of the Indiana Election Division are not, as a matter of Article III jurisdiction, proper defendants in this case. The district court deemed this issue moot in light of its ruling on the merits, App. 42, n.30, but also observed that the State Defendants have "no direct role in enforcing election laws." *Id*. at 8. While ruled moot by the

lower court, lack of jurisdiction remains an alternative ground for affirming the judgment in favor of the State Defendants. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979).

As the district court essentially acknowledged, this case is not justiciable against the State Defendants because this lawsuit seeks to enjoin enforcement of the Voter ID Law, and while these officials play important roles in running Indiana elections, they do not enforce the Voter ID Law. App. 42, n.30. Defendant Rokita, the Secretary of State, is Indiana's "chief election official." Ind. Code § 3-6-3.7-1. This means that he is responsible for enforcing and complying with some federal voting requirements, such as voting-accessibility rights for the elderly and handicapped, 42 U.S.C. § 1973ee, but it does not mean he enforces all laws that pertain to voting. Rokita must also perform "all ministerial duties related to the administration of elections by the State," Ind. Code § 3-6-4.2-2, but those duties do not include deciding whether individual ballots must be counted. Defendants King and Robertson implement the Help America Vote Act (HAVA), prepare and distribute ballots, and instruct county election and registration boards concerning their duties. 42 U.S.C. §§ 15421-15425; Ind. Code §§ 3-6-4.2-2.5, 3-6-4.2-14, 3-6-4.2-12.5. But, like the Secretary of State, these Defendants do not decide whether particular individuals may cast ballots.

The Voter ID Law provides that a voter who does not present valid photo identification at the polls on election day may cast a provisional ballot, which in turn will be counted only if the voter appears before the circuit court clerk or county

election board and either provides valid photo identification or satisfies a statutory exemption. Ind. Code §§ 3-11-10-1.2; 3-11.7-5-2.5. It is "a member of the precinct election board [that] shall ask the voter to provide proof of identification." Ind. Code § 3-11-8-25.1. It is also a member of the precinct election board that "shall challenge the voter" if a voter does not show identification. *Id.* A member of the precinct election board also determines whether the photo identification is the appropriate type. *Id.* Further, it is the duty of the county election board "to determine whether to count a provisional ballot." Ind. Code § 3-11.7-5-2.5.

Neither the Secretary of State nor the Election Division has any role—even supervisory—in this process. As the district court correctly observed, "[t]he Division has no direct role in enforcing election laws, nor does the Secretary of State." App. 10. County and precinct election boards operate completely independently of the State Defendants. State Defendants do not appoint the officials who will be enforcing the Law on election day. Ind. Code § 3-6-5-1 *et seq*. State Defendants cannot provide review of a county election board's decision not to cast a provisional ballot. App. 13. If an individual voter wishes to seek judicial review of a determination concerning whether a provisional ballot should be counted, the voter must sue the county board. Ind. Code § 3-6-5-34.

In the district court, the Democrats claimed that State Defendants' roles in educating local election officials about the Voter ID Law are sufficient to establish justiciability. Dem. MSJ Reply 14. But the Plaintiffs seek facial invalidation, not better education. Dem. Br. 1-2. In any event, the Defendants' education role is

"advisory only . . . County Election Boards can take, and have taken, positions about election laws and procedures contrary to the position advanced by the State Election Division." App. 10. In fact, as the district court observed, the Democrats' argument for suing the State Defendants is directly contradicted by their simultaneous contention that the law will be enforced unevenly by county officials. *Id*. at 112.

State Defendants have no ability to redress any injuries of the Plaintiffs, so the judgment of the district court should be affirmed as to these Defendants on the alternative grounds of lack of Article III justiciability. *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) (no jurisdiction over a city ballot text dispute brought against the California Secretary of State); *Libertarian Party of Ind. v. Marion County Bd. of Voter Registration.*, 778 F.Supp. 1458, 1461 (S.D. Ind. 1991) (no jurisdiction over State Election Board because only the County Voter Registration Board could provide the requested relief).

II. The Voter ID Law is a Permissible Exercise of State Power Granted and Embodied by the Elections Clause and is Not a Direct or Severe Burden on the Right to Vote.

A. The Elections Clause enables states to impose exactly this sort of election regulation.

The United States Constitution grants the states the power to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congressional oversight. U.S. Const., art I, § 4, cl. 1. This authority, known as the Elections Clause, also presupposes the inherent power of states to regulate state elections in the same way. *Tashjian v. Republican Party of Conn.*,

479 U.S. 208, 217 (1986). In short, it confers on the states broad authority to regulate the conduct of elections. *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). In addition, the Elections Clause, in conjunction with Article I, section two, and Article II, section one, is the font of the constitutional right to vote, a right later reinforced by Amendments I, XIV, XV, XVII, XIX, XXIV, and XXVI.

States may not, of course, destroy a citizen's right to vote, but a state's authority to determine the procedures and mechanisms of elections held within its borders is unquestioned:

> It cannot be doubted that these comprehensive words [of Article I § 4] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, *prevention of fraud and corrupt practices*, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows as necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added).

As the district court correctly held, the Voter ID Law represents a basic exercise of Elections Clause authority. App. 87-88. It is fundamentally different from voter-qualification laws, such as age and residency requirements, in that it does not establish any criteria or barrier to voting, but is simply a method of verifying voter-eligibility criteria (broadly, identity). Rather than limiting the franchise to a certain class or subset of the population, the Voter ID Law protects the franchise by insuring that those who meet substantive eligibility requirements have their votes counted without being diluted by ineligible voters. State App. 14;

cf. United States v. Saylor, 322 U.S. 385, 387 (1994) (the right to vote includes the right to have one's voted counted).

To preserve the orderliness and fairness of elections presupposed by the Elections Clause, states have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote. "Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Courts have rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). Otherwise, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* at 433*; Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s 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."). This Court recently stressed this point in *Griffin*, where it upheld Illinois' restrictions on mail-in absentee voting, stating that "[b]ecause of this grant of authority and because balancing the competing interests involved in the regulation of elections is difficult

and an unregulated election system would be chaos, state legislatures may without transgressing the Constitution impose extensive restrictions on voting." *Griffin*, 385 F.3d at 1130.

In *Anderson*, the Supreme Court set forth the balancing test courts should apply when, as here, they are called upon to review a state's exercise of its Election Clause authority:

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

When modest, non-discriminatory restrictions on the right to vote are placed on this scale, the general interests of the electorate in preserving the integrity of free and fair elections are sufficiently weighty to justify the restrictions. *Id.* at 788; *Burdick*, 504 U.S. at 434. As this Court stated in *Griffin*, "the striking of the balance between discouraging fraud and other abuses and encouraging voter turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin*, 385 F.3d at 1131.

Many commonplace election regulations that may exclude some otherwise legitimate voters are permissible under this standard. For example, requiring

voters to register in advance of elections helps to prevent fraud, but it also undoubtedly excludes otherwise qualified and willing voters who forget to register or who do not have access to voter-registration personnel or materials. *ACORN v. Bysiewicz*, 413 F.Supp.2d 119, 148 (D. Conn. 2005) (holding that even if the plaintiff's contention that election-day registration would increase voter participation by 5.5%, equal to 130,000 voters, such effect did not constitute a severe burden and the registration deadline was constitutional).

Similarly, requiring voters to vote in public at a specified polling place acts as, among other things, a means to prevent fraud. Yet there may well be a class of people who do not qualify to vote absentee but for whom the burden of getting to the polls to vote is simply too much. *Griffin*, 385 F.3d at 1129-30. For them, requiring ballots to be cast at a specific polling place operates as a disenfranchisement. Even the fundamental requirement that voters identify themselves to clerks at the polling place—another piece of the fraud-prevention puzzle—may offend some legitimate registered voters and drive them away from voting.

Notwithstanding any accompanying "disenfranchisement," there can be no serious legal dispute with advance registration, polling-place voting, or self-identification requirements. Requiring voters to prove identity with commonly possessed documentation is no different. *League of Women Voters v. Blackwell*, 340 F.Supp.2d 823, 828-29 (N.D. Ohio 2004) (upholding requirement that first-time voters who registered by mail provide acceptable proof of identity even though some voters may be disenfranchised); *accord Bay County Democratic Party v. Land*, 347

F.Supp.2d 404 (E.D. Mich. 2004); *Colo. Common Cause v. Davidson*, 2004 WL 2360485 (D. Colo. 2004); *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (upholding Tennessee statute requiring disclosure of Social Security number as condition for voter registration); *Greidinger v. Davis*, 988 F.2d 1344, 1352-55 (4th Cir. 1993) (same, although state may not disclose social security number).

Indiana's Voter ID Law therefore easily passes the *Anderson* balancing test. As with other routine election regulations, any incidental, marginal deterrence of legitimate voters, while unfortunate, is more than outweighed by the protection afforded to legitimate voters as a whole. *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (refusing a request for preliminary injunction against a polling-place voter-challenge process because the public interest in "permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote" outweighs the interest in permitting "every registered voter to vote freely").

The Voter ID Law thus is merely one reasonable means of requiring voters to prove their identities. It is a legitimate, reasonable fraud-prevention measure well within the wheelhouse of the state's Elections Clause power.

B. The Voter ID Law does not impose a direct and material burden on the right to vote.

The Plaintiffs argue that the Voter ID Law is a direct and severe burden on the right to vote that should be subjected to stricter scrutiny than the balancing test supplied by *Anderson*. Dem. Br. 20; Crawford Br. 39. The burdens of the Law on the right to vote are neither direct nor dramatic, particularly given that the vast

majority of registered voters—99% according to an expert report submitted by the Democrats—already possess conforming identification. App. 85. Indeed, any burden from the Law is likely to approach zero over time as the small percentage of registered voters not yet in possession of valid photo identification acquires it.

1. *Anderson* balancing applies to more than ballot-access laws.

The Democrats argue that the Voter ID Law imposes a direct and severe burden on the right to vote simply because some voters may be less likely or unable to vote as a result of it. Dem. Br. 21. In *Griffin*, however, this Court applied the *Anderson* balancing test to restrictions on mail-in voting and explicitly rejected the argument that a voting regulation is automatically subject to strict scrutiny simply because it collaterally burdens legitimate voters. *Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004).

Rather than confront *Griffin*, the Democrats argue that ballot-access laws such as those upheld in *Anderson* and *Burdick* are uniquely immune from strict scrutiny because they impose only indirect burdens on voting rights. But not only does *Griffin* implicitly reject this argument, the Supreme Court expressly rejected it in *Burdick*. There, the petitioner argued that his challenge to Hawaii's no-write-in law involved a "voting rights rather than ballot access case" so that strict scrutiny should be applied. *Burdick v. Takushi*, 504 U.S. 428, 437-38 (1992). The Supreme Court responded that its precedents "minimized the extent to which voting rights cases are distinguishable from ballot access cases . . . the rights of voters and the rights of candidates do not lend themselves to neat separation." *Id.* Indeed, the

Court stressed that it has accepted the common-sense notion that restrictions on ballot access infringe some voters' rights to vote for candidates of their choosing. *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (*every* election law "inevitably affects—at least to some degree—the individual's right to vote").

So, rather than deeming the case a "ballot-access case" to which lower scrutiny applied, *Burdick* applied the balancing standard notwithstanding the law's implicit deprivation of voting rights in some circumstances. *Burdick*, 504 U.S. at 437. *Burdick* thus means what it says: reasonable, non-discriminatory election laws that do not severely burden the right to vote are constitutional if they rationally advance a legitimate state goal. This is true regardless whether election laws are termed "ballot-access laws" or something else. *See also Wexler v. Andersen*, No. 04-1682, Slip Op. 14 (11th Cir. June 20, 2006) (applying balancing test to voting-machine-technology equal-protection challenge); *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003) (same); *ACORN v. Bysiewicz*, 413 F.Supp.2d 119, 143 (D. Conn. 2005) (employing *Anderson/Burdick* balancing to Connecticut's requirement that voters register at least seven days in advance of election day); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404 (E.D. Mich. 2004) (applying balancing test to HAVA-identification requirements); *League of Women Voters v. Blackwell*, 340 F.Supp.2d 823 (N.D. Ohio 2004) (same).

2. Strict scrutiny applies at most to *substantive* voter qualifications, not *procedural* devices designed to ensure fair elections.

Again, voting regulations are subjected to strict judicial scrutiny only if they impose "severe" burdens on the right to vote. *Burdick*, 504 U.S. at 434. Requiring voters to show poll workers their driver's licenses hardly rises to the level of, for example, a one-year residency requirement, *Dunn v. Blumstein*, 405 U.S. 330 (1972), a property-ownership requirement, *Hill v. Stone*, 421 U.S. 289 (1975), a prior-participation requirement, *Ayres-Schaffner v. DiStefano*, 37 F.3d 726 (1st Cir. 1994), or even a ban on write-in voting, *Paul v. Ind. Election Bd.*, 743 F.Supp. 616, 623 (S.D. Ind. 1990). Nor does it infringe on a separately enunciated constitutional right, *Harman v. Forssenius,* 380 U.S. 528 (1965) (poll tax in violation of the 24th Amendment); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (poll tax in violation of the 14th amendment) ;[2] *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to travel), or dilute legitimate votes. *Wesberry v. Sanders,* 376 U.S 1, 17-18 (1964).

The main purpose underlying the Voter ID Law is to protect legitimate voters from having their votes diluted by fraudulent ballots. *Cf. DiStefano*, 37 F.3d at 729 n.8 (distinguishing between the substantive disqualification of a prior-participation requirement and "structural" regulations, such as registration requirements). The distinction between fraud-prevention procedures and voter qualifications was recognized in *Rosario v. Rockefeller*, 410 U.S. 752, 756-57 (1973), which upheld a

[2] The district court firmly rejected the argument that the Voter ID Law constitutes a poll tax. App. 91. The Plaintiffs do not contest that conclusion, but instead rely less directly on the poll-tax cases as mere analogies. For the same reasons that the Voter ID Law is not a poll tax, it is also not *analogous to* a poll tax.

New York law requiring voters to register with a political party 11 months prior to voting in that party's primary, which it distinguished from substantive voter qualifications such as laws disenfranchising soldiers, creating special electorates, and creating durational residency requirements. *Cf. Mescall v. Burrus*, 603 F.2d 1266, 1269 (7th Cir. 1979) (special-purpose-electorate case).

The Plaintiffs acknowledge that laws regulating the "mechanics" of the election process are subject to "lesser" scrutiny because they burden the right to vote only "indirectly." Dem. Br. 24. Yet they insist, without explanation, that requiring voters to present photo identification somehow constitutes a non-mechanical direct burden on the core right to vote. Dem. Br. 20. But the only theory they offer for distinguishing the Voter ID Law from registration, in-person voting, and signature requirements is that the Voter ID Law is new. Dem. Br. 22-23.

The Democrats attempt to bolster their argument that the Voter ID Law imposes direct and severe burdens by repeatedly referring to "classifications" supposedly created by the Law. Dem. Br. 20, 23-24. The Democrats alternatively seem to be referring either to the class of all voters who are unable to vote as a result of the Voter ID Law, or to non-drivers who "do not already possess a driver's license." Dem. Br. 23, 42. But the former is not really a class—it is just the set of registered voters who cannot vote because they do not comply with the Law—a "class" created by *any* election regulation. And the latter (non-drivers) is not only minute (only about 1% of the electorate is without BMV-issued photo identification,

according to the Brace study, App. 51), but also hardly constitutes a plausible target of electoral discrimination, particularly given that the state still charges for licenses but now issues non-license identification to voters for free. Ind. Code § 9-24-16-10.

The Democrats rely on an expert study by Kimball Brace purporting to show that the Voter ID Law will have a negative impact on poor registered voters. The district court not only excluded this deeply flawed report, but also observed that by its own terms the study did not prove disparate impacts on minorities or the elderly and showed only "a small potential disparate impact based on income level," though even that conclusion was highly suspect. App. 54-55. The Democrats do not mount a serious challenge to the exclusion of the Brace report (they neither list an issue presented nor develop an argument on this point), but they continue to insist that it provides meaningful data. As the district court makes quite clear, however, the Brace report suffers from deep methodological flaws, including failure to account for voter-roll inflation, inapt comparisons of demographic data, aggregation bias, unrepresentativeness, illogical inferences,[3] and lack of reliability testing. *Id*. at 46-52. Hence, the district court rejected the study, "[b]orrowing the apt computer expression, 'garbage in, garbage out.'" *Id*. at 46.

In any event, speculative studies such as the Brace report (and even the AARP study submitted by the Crawford Plaintiffs) concerning a law's possible

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[3] One such illogical inference creeps back into the Democrats' brief, which at first bombastically asserts that 51,392 registered voters in Marion County will not be able to vote because they "lack a qualifying form of identification," but then immediately acknowledges in a footnote that "some of these voters may possess qualifying forms of identification." Dem. Br. 29 & n.12. Bottom line: there is no sense to be made of the Brace data.

operational impact cannot be used as a basis for facial invalidation. *A Woman's Choice v. Newman*, 305 F.3d 684, 692-93 (7th Cir. 2002). Oddly enough, the Crawford Plaintiffs claim that their failure to present "evidence of anyone who will not be able to vote or who will suffer hardship because of the challenged law" should be excused because "[i]nasmuch as the injury will not occur until the election, the plaintiffs' difficulties in this regard are understandable." Crawford Br. 41. *A Woman's Choice* took a dim view of a pre-enforcement challenge based only on speculation about the impact of a new law, so the Plaintiffs should not get the benefit of the doubt here.

3. Other Indiana election laws (and other government policies) do not matter.

The Democrats urge the Court to deem the Voter ID Law a direct and severe burden in light of its enactment amidst Indiana's "matrix of electoral regulations," including polling hours, employee-leave policies, partisan-challenger rules, restrictions on absentee voting, and even the state's reduction of BMV offices. Dem. Br. 34-36. This argument invites review based on an infinite variety of external forces that may impact voter behavior—*i.e.,* no efficient public transportation to the polls or lack of sufficient government-funded education—no matter how far removed from the actual right to vote. App. 97-98. ("The 'cumulative burdens' argument resembles the college student 'wet Kleenex' prank of yore in which as entertainment, a soggy wet tissue mass is thrown against the dorm room wall to see if it will stick.").

The district court properly rejected this theory based on the simple proposition that in facial challenges statutes must be considered on their own merits and not in connection with other laws that may have some tangential relationship to the same subject matter. *Id.* In response, the Democrats cite no Supreme Court doctrine, or even lower court precedent, for their "tipping-point" argument. Instead, they rely solely on Justice O'Connor's concurring opinion in *Clingman* suggesting that an otherwise valid election law may nonetheless be invalidated if other laws make regulatory compliance impossible. *Clingman v. Beaver*, 544 U.S. 581, 608 (2005) (O'Connor, J. concurring). In particular, Justice O'Connor asserted that "Oklahoma's requirement that a voter register as an Independent or a Libertarian in order to participate in the LPO's primary is not itself unduly onerous; but that is true only to the extent that the State provides reasonable avenues through which a voter can change her registration status." *Id.*

Justice O'Connor's concurrence in no way supports the Democrats' argument. Her point was not that courts may conclude that the collective burden of complying with all the laws is simply too much to ask of the citizenry. Instead, she was suggesting the far more modest (and even unremarkable) proposition that a seemingly minor restriction on association can be too much if there is no remaining realistic means of associating. Here, there is no evidence showing that obtaining government-issued photo identification is an unrealistic demand of citizens who wish to vote in person at the polls.

Furthermore, the Democrats present no plausible theory that all the laws and practices they mention (such as closing some BMV branches or the polling hours) are part of a unified scheme, or that the Voter ID Law changes character when combined with other election laws. Instead, their theory is simply that, as the last in a line of highly discrete voting regulations and practices that supposedly impose a total quantum of burdens on voters that they deem excessive, the Voter ID Law must go. Such analysis would require the Court to undertake a purely quantitative analysis of the total burden imposed on voting by a wide variety of discrete factors. Accordingly, it has nothing in common with the qualitative analysis courts have applied to ensure that election laws do not facially foreclose all means for voters to cast ballots for minor parties and candidates. *See*, *e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 (1974) (rejecting a "totality" challenge because the law at issue did not "change its character when combined with other provisions of the election code"). The "totality" evaluation that the Democrats advocate is policy analysis, not legal analysis.

4. The Voter ID Law does not impose a direct or severe burden by providing vague standards.

The Democrats and *Amicus Curiae* League of Women Voters argue that "ambiguities" in the Voter ID Law confer broad discretion on poll workers and partisan challengers and, thereby, increase the burden on the right to vote. Dem. Br. 36-38; *see generally* Amicus League of Women Voters Br. For support, the Democrats rely principally on due-process vagueness-doctrine cases, such as *City of Chicago v. Morales*, 527 U.S. 41 (1999). They say that the Law invites precinct

workers to decide selectively and arbitrarily whether a voter's photo identification "conforms" to what the Law requires and whether the voter is the person depicted in the photo. Dem. Br. 36-38.

Unlike the criminal laws invalidated in due-process cases, however, the Voter ID Law poses no risk that individuals will be chilled from engaging in protected conduct, namely voting, because they fear treading too close to an uncertain line between lawful behavior and criminal conduct. Moreover, unlike the licensing schemes invalidated in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002), there is no risk of content-based censorship resulting from the unbridled, unreviewable subjective judgments of government bureaucrats. The Democrats seem to understand this distinction; hence, they do not urge the Court to strike down the Law as unconstitutionally vague.

The quasi-vagueness argument that the Plaintiffs do make, moreover, rings hollow because even if there is a legitimate dispute about the validity of a voter's photo identification, the voter may cast a provisional ballot and then validate it with the same or other compliant identification at the clerk's office, and then follow that with a demand for judicial review, if necessary. Ind. Code §§ 3-6-5-34; 3-11.7-5-2.5. In the end, if the identification is valid, the vote will be counted, and the right to vote preserved. In the criminal-due-process cases, by contrast, the right to move about freely is destroyed when an arrest is made, regardless of judicial review.

Furthermore, even if the charges are dismissed, police may exercise the same subjective judgment repeatedly to arrest those who look subjectively suspicious but who have committed no real crime. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972). In those circumstances, it is understandable that individuals would be chilled from exercising their rights to move about freely. In contrast, it is inconceivable that voters who have conforming photo identification would be chilled from voting because of the Voter ID Law.

The Democrats nevertheless argue that permitting poll workers to determine whether a particular photo identification "conforms" to the law confers far too much discretion on them. Dem. Br. 36-38. The statute's requirements for conformity, however, are neatly spelled out. The photo identification must have been issued by the State of Indiana or the federal government; it must have an expiration date; it must contain a photograph of the person to whom it was issued; and the name on it must conform to a name on the voter registration list. Ind. Code § 3-5-2-40.5.

The Democrats also complain that poll workers have too much discretion in deciding whether the person in the photograph is the person standing before them. It is unclear whether the Democrats think that human beings are completely incapable of matching photos to faces, or whether, instead, they think the statute should more precisely provide that hair color, complexion, nose shape, mouth shape, and chin strength all have to match, or that only some percentage of those (or other) points of comparison need to match. Regardless, the Democrats champion the

abilities of poll workers to compare a voter's signature with a computer image of a signature on the poll book, Dem. Br. 37, so it is hard to take seriously their distrust of photo judgments. As noted by the district court, many businesses and government agencies alike demand photo identification before rendering services or permitting access. App. 112 ("Indeed, comparing a person to the photograph on their identification card is now a routine task in our society, one that occurs countless times as persons board airplanes, cash checks, rent movies, enter federal (and county) courthouses, or engage in any of the numerous other activities that require presentment of identification."). These practices readily assume the ability of average individuals without special training to match photographs and faces.

Finally, the League of Women Voters suggests that requiring photo identification to bear a name that "conforms" to the name on the voter-registration list is too vague because names that contain hyphens or spaces are often improperly spelled on identification documents. First, requiring that a name on the identification "conform" to the name on the registration list is actually better for voters than defining with precision how close the match must be. This requirement essentially permits poll workers to forgive obvious typographical errors. Second, Indiana law takes account of the possibility that, for an infinite variety of reasons, a person's name may not appear properly on the voter registration list. Voters are permitted to indicate a "change of name" on the poll list, which would seem to cover any situation where the registration list contains a spelling inaccuracy. Ind. Code §§ 3-7-41-2; 3-11-8-25.1.

Third, it is entirely legitimate for the Law to place some responsibility on citizens to take care to register their names properly and to insist on accurate photo identification cards. Assuming the voter has taken care to check the accuracy of photo identification, the name-change process noted above should resolve any risk of minor discrepancies. Any remaining risk of illegitimate disqualification can be addressed through the provisional-balloting process.

The Democrats and the League also worry about the potential for selective enforcement and intimidation from partisan poll workers. Dem. Br. 37. But they in no way show how the Voter ID Law has any more "potential for selective enforcement" than any other election law, such as the signature requirement. In fact, prior to the Law, precinct election boards and political challengers could challenge voters based on misrepresentation of identity and the signature comparison. App. 13. If anything, possession of photo identification conclusively demonstrating one's identity would seem to make spurious partisan challenges less likely. In any event, any problems that arise with respect to selective enforcement can be addressed on a case-by-case basis. As explained by the district court, the mere hypothesis that such a problem may arise is not enough to justify invalidating a statute on its face, or to justify applying strict scrutiny. *Id*. at 107-08; *Hill v. Colorado,* 530 U.S. 703, 733 (2000).

III. The Voter ID Law Passes Even Strict Scrutiny.

While there is no basis for applying strict scrutiny, the Voter ID Law vindicates sufficiently compelling state interests and is sufficiently narrowly tailored to pass even that standard.

A. Protecting against in-person voter fraud is a compelling government interest advanced by the Voter ID Law.

The Plaintiffs largely concede that election fraud prevention is, generally speaking, a compelling government interest that may justify burdens on fundamental constitutional rights. Dem. Br. 38; Crawford Br. 43; *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process."); *FEC v. Nat'l Right to Work Comm.,* 459 U.S. 197, 208 (1982) (noting that Government interests in preventing corruption or the appearance of corruption "directly implicate the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process") (internal quotations omitted); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n.26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted.").

The well-established status of the state's compelling interest in detecting and deterring fraud notwithstanding, the Democrats argue that the state may only adopt a voter-photo-identification requirement if it can prove that in-person voter fraud is convincingly high. Dem. Br. 40. Likewise, the Crawford Plaintiffs assume that the state is required to prove that in-person voter fraud is a problem before it can enforce a photo identification requirement. Crawford Br. 43. However,

plaintiffs do not cite any cases for the proposition that a state must wait until it has proof of rampant voter fraud before enacting measures to shore up weak points in whatever fraud-prevention scheme already exists. As the district court concluded, App. 87-88, legislatures are permitted to respond to potential deficiencies in the electoral process prospectively. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

The Supreme Court has been quite clear that, at least with respect to highly plausible justifications such as the existence of election fraud, there is no requirement that available evidence supporting the legislature's enactments must actually have been considered by the legislature. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-94 (2000) (plurality opinion). In *Nixon*, which upheld Missouri's campaign-contribution limits, the plaintiffs and the court of appeals "[took] the State to task . . . for failing to justify the invocation of those interests with empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence." *Id* at 390-91. The law was valid the Court concluded, because even though the record did not show the legislature relied on any specific findings, "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391.

Contrary to the Democrats' arguments, the notion that elections need protection from fraud, whether at the hands of corrupt campaign donors or identity

thieves, is hardly novel. Almost every election regulation that exists, including registration, in-person voting, and the signature requirement, not to mention the proof of identity already required in many states and by HAVA, is targeted at preventing election fraud. From the options available to the General Assembly, such as signature comparisons, personal recognition, documentary evidence, and biometric fingerprinting (some of which are advanced by the Plaintiffs as preferable alternatives), the legislature chose an option that, the district court concluded, balances security, cost, and ease of compliance. App. 87.

There can hardly be a dispute that requiring voters to present valid photo identification will lessen the opportunity for fraud. And where a new election regulation has a plain connection to protecting the integrity of elections, the government does not need to prove any level of need. *Nat'l Right to Work Comm.,* 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

The Constitution does not "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." *Munro,* 479 U.S. at 195-96. This principle is particularly important here, where evidence cited by both the district court and the American Center for Voting Rights, App. 23-24; *see generally* ACVR Br., establish the

existence of in-person voter fraud around the country. It is well-settled that the state is entitled to rely on the experiences of other jurisdictions when deciding issues of public policy. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (holding that speech regulations may be justified by occurrence of secondary effects in other states or cities).

If there is any remaining doubt about the circumstantial justification of a Voter ID Law in Indiana, the voter-list inflation that has occurred since the Motor-Voter law became effective, and which has increased the opportunities for fraud, should resolve that doubt. Expert witness Clark Benson has determined that Indiana leads the country in list inflation, with possibly 41.4% of registered names being illegitimate. State App. 62. Benson reports a considerable increase in registration rates after the passage of the Motor-Voter law (with some counties reporting 100% registration rates or more), tens of thousands of deceased voters on the rolls, and hundreds of thousands potential duplicate registrations. State App. 34-51, 62-65. Voter-registration-list inflation in Indiana is so obvious that the Indiana Supreme Court has decided the lists are too unreliable to use in compiling jury pools. State App. 127.

Benson reports two ways to combat the resulting greater potential for fraud: update and maintain the lists more effectively or require voters to identify themselves in some reliable way. State App. 58. Defendants King and Robertson have recently agreed with the Department of Justice to undertake particular efforts to update and maintain Indiana's voter list more effectively, which only underscores

the extent to which those lists are inflated. State App. 1-8. But the General Assembly chose to take the additional step of requiring voters to identify themselves at the polls. This is a perfectly reasonable way for the state to protect its elections from fraud that may otherwise be enabled by inflated voter registration lists, even as it strives for better maintenance of those lists. State App. 65.

B. The Voter ID Law vindicates the compelling state interest in reassuring voters that election results are legitimate.

One of the most significant and abiding election-law doctrines developed over the past 30 years has been the government's compelling interest in protecting public confidence in the integrity and legitimacy of representative government. The government is entitled to wide latitude in enacting measures that are reasonably geared toward preventing the perception of corrupt elections.

For example, the Hatch Act's ban on politicking by some federal-government employees is valid, in part, because it is "critical that [Government and its employees] appear to the public to be avoiding [political favoritism] if confidence in the system of representative Government is not to be eroded to a disastrous extent." *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973). Similarly, FECA's campaign-contribution limits are permissible based in part on "the impact of the appearance of corruption stemming from public awareness *of the opportunities for abuse* inherent in a regime of large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (emphasis added); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (observing "the importance of preventing . . . the eroding of public confidence in the

electoral process through the appearance of corruption"). The need to preserve public confidence in the legitimacy of representative government also was critical to the validity of the Bipartisan Campaign Reform Act's soft-money ban. *McConnell v. FEC*, 540 U.S. 93, 143-45 (2003).

Here, every bit as much as in the campaign-finance context, government is right to worry that confidence in the legitimacy of elections may erode based solely on "public awareness of the opportunities for abuse," *Buckley*, 424 U.S. at 27, inherent in polling-place voting unaccompanied by identification checks. This is particularly true in light of the extent of voter-list inflation that has occurred over the past decade or so in the wake of the Motor-Voter law.

Regardless whether particular instances of fraud are well documented, "common sense," *McConnell*, 540 U.S. at 145, tells us that the General Assembly is entitled to be concerned that the combination of inflated voter rolls, lax security, and closely contested elections might, over time, erode voter confidence in election results. And, as the Supreme Court has made crystal clear, states are not required to wait until public confidence in the legitimacy of representative government suffers before taking steps to protect electoral integrity. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

It is also relevant that public-opinion data supports the General Assembly's decision to strengthen election security in order to reassure the public concerning the legitimacy of elections. In 2000, a Rasmussen poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. State App. 17-18. A short

time later, a Gallup Poll showed that 67% of adults nationally had only "some" or "very little" confidence in the way the votes are cast in our country. *Id*. at 26-27. A 2004 Zogby Poll found that 9% of voters believe that their vote was counted inaccurately in the 2004 elections. Fund, *supra,* at 11. And scholar Richard Hasen has testified that more than 25% of Americans worried that the 2004 presidential vote was unfair. State App. 31.

Recent surveys document even stronger support for measures to protect electoral integrity. In a 2004 survey of 1000 likely voters, 82% of respondents, including 89% of Bush supporters and 75% of Kerry supporters, favored photo identification at the polls. Fund, *supra*, at 136

The polls show just how much the public seeks reassurance of electoral integrity. In *Nixon*, the Supreme Court observed that overwhelming public support for an election-reform law can establish the existence of a constitutionally sufficient justification for the law: "[A]lthough majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: An overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 394 (2000) (internal quotations and citations omitted).

In short, the data concerning the public demand for voter-photo-identification laws demonstrates an extraordinary consensus concerning the insufficiency of election security. A reasonable inference is that the legitimacy of elections—

particularly close elections—may ultimately be called into question if election officials do not act. Accordingly, the General Assembly had all the compelling interest it needed to enact the Voter ID Law.

C. The Voter ID Law is narrowly tailored because it requires readily available proof of identity while minimizing the possibility of disenfranchising legitimate voters.

1. Requiring voters to present photo identification at the polls directly advances both the compelling interest in preventing fraud and in the compelling interest in protecting the legitimacy of elections. The vast majority of the electorate already has some form of acceptable government-issued photo identification. App. 85. Also, government-issued photo identification is highly reliable and, consequently, widely relied upon. *Id.* at 87. And, as the Real ID Act's provisions become enforceable, state-issued photo identification will only become more reliable. 49 U.S.C. § 30301.

What is more, with enforcement of the Voter ID Law, poll workers who currently must rely on their highly limited signature-comparison abilities will now be able to check each voter's identification against both the registration list and the voter's face. The requirement that the identification card carry an expiration date ensures that the photograph will be relatively recent, making the poll workers' job of detecting fraudulent voters much easier and thereby deterring fraud. In fact, bad-faith challenges will likely be discouraged by the fact that all voters must now possess photo identification. As a result, the electorate will know that practical and

reliable security checks are in place and, therefore, will have less reason to question the legitimacy of electoral outcomes, particularly in close elections.

2. Yet the Voter ID Law also is limited in sensible ways in order to minimize the risk of excluding legitimate voters. As the district court observed, the Voter ID Law "is narrowly tailored because every hypothetical individual who Plaintiffs assert would be adversely affected by the law actually benefits from one of its exceptions." App. 83. First, it does not apply to voting absentee by mail, which means that those who are automatically entitled to vote absentee, including the disabled and seniors over age 65, Indiana Code § 3-11-10-24, face no ill effects from this law even if they do not have, and cannot obtain, acceptable photo identification. Therefore, the risk that the Voter ID Law will disenfranchise, for example, a voter born in a poor, rural, pre-War southern county that did not record at-home births, is non-existent. *Cf. Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004) (holding that there is no constitutional right to vote in a particular manner); *see also* Or. Rev. Stat. § 254.465 (providing for universal mail-in balloting for primary and general elections).

Similarly, residents of state licensed-care facilities who vote at polling places within those facilities need not present photo identification. Ind. Code § 3-10-1-7.2. As it happens, all state licensed-care facilities that are polling places are homes for the elderly, so their residents would be eligible to vote absentee anyway. This exception accommodates the very small set of the elderly who: (1) cannot travel to obtain photo identification; yet (2) also do not need to travel to vote at the polls; and

who (3) as a class are likely known to poll workers and unlikely to be fraudsters. App. 102. Accordingly, this exception helps with narrow tailoring.

Nor does this exception make the Voter ID Law fatally underinclusive, as the Plaintiffs suggest. As the district court observed, the nursing-home exception was a legislative judgment in response to a confluence of factors that make nursing-home residents a "discrete and readily identifiable category of voters whose ability to obtain photo identification is particularly disadvantaged, whose qualification for the exception (residing in a nursing home) is not readily susceptible to fraud, and for whom there otherwise exist sufficiently reliable methods of verifying identification." *Id*. at 104. These factors include the residents' limited mobility, their inability to vote unassisted, and the likelihood that (because of the residents' Medicaid or insurance benefits) the residents' identities are well established at the care facility where they vote. This exception therefore balances the needs of a particularly disadvantaged subset of the population with assurances of fraud prevention. *Id*. at 103-04.

And just because it is reasonable to conclude that nursing-home residents, as a class, are more likely to be recognized by poll workers, that does not mean that the General Assembly was required to exempt *all* voters purportedly recognized by poll workers. As the district court put it, the Plaintiffs' "feeble effort . . . to match one or more of these explanations to a voter who is not eligible for an exemption does not establish that the nursing home exception is discriminatory or unconstitutional." *Id*. at 104. The General Assembly is entitled to make reasonable

judgments of this nature, and there is no evidence or plausible narrative to suggest that the legislature was trying to benefit a subset of nursing-home residents based on expectations concerning the way they are likely to vote. App. 102 ("Our examination of the record reveals no hint of discriminatory intent in the General Assembly's action.")

Another hallmark of narrow tailoring is that the Law permits voters who arrive at the polls without acceptable photo identification to cast provisional ballots. Ind. Code § 3-11-8-25.2. Provisional-ballot voters then have ten days to obtain acceptable photo identification and present it in-person to the county clerk or county election board, at which point the provisional ballot will be counted. Ind. Code § 3-11.7-5-1. Alternatively, if the voter is indigent and cannot obtain acceptable photo identification without paying a fee, or if the voter has religious objections to being photographed, the voter is permitted to cast a provisional ballot and then sign an affidavit of indigence or religious objection within 10 days at the clerk's office or before the county election board. *Id.* This 10-day provisional-ballot process provides an opportunity for legitimate voters to overcome any unexpected problems at the polls and is far more generous than the 48-hour provisional-ballot process recommended by the Baker-Carter Commission and enacted by Georgia. State App. 14; Ga. Code Ann. § 21-2-419.

3. Working at internal cross-purposes, the Democrats both insist that the state is not truly interested in preventing voter fraud because the Law does not apply to mail-in absentee ballots, and also complain that the absentee-voting

exemption is not widely enough available. Dem. Br. 30-32. It is not clear which argument they believe more: that the Law should apply to more voters, or that the Law should apply to fewer. Either way, their arguments ignore the fact that "absentee voting is an *inherently* different procedure from in-person voting," App. 97, and the Voter ID law's distinction between the two is "eminently reasonable." *Id*. at 98.

By any reasonable understanding, the Voter ID Law's inapplicability to mail-in absentee voting demonstrates that it is narrowly tailored. Seniors and the disabled—two groups who Plaintiffs suggest would be most adversely affected by the Law—are automatically qualified to vote absentee and so have exactly the sort of safety valve that the Democrats advocate. Ind. Code § 3-11-10-24; Dem. MSJ Reply 29-30.

Yet the distinction between absentee voting and in-person voting does not negate the value of the Law in preventing and detecting fraud. Because Indiana law limits absentee voting to certain classes of individuals—those who are truly absent in addition to the elderly and the disabled, Indiana Code § 3-11-10-24—the vast majority of voters will not only be required to show their photo identification on election day, but they will also continue to be routed away from absentee voting, which is itself highly vulnerable to fraud.

Yet the benefits provided by the Voter ID Law vis-à-vis in-person voting simply would not arise from applying the Law to mail-in absentee voting. It is self-evident that absentee-ballot fraud poses different problems than in-person fraud,

and the General Assembly is entitled to address those problems differently, if at all. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955). The Voter ID Law is narrowly tailored to serve the state's compelling interest in preventing and detecting fraud without overly burdening mail-in absentee voters without justification.

This distinction is even more compelling in view of the risk that voter anonymity might routinely be compromised if the Voter ID Law were imposed on mail-in absentee voting. Under the current system of mail-in balloting, requiring absentee voters to include photo identification with their ballots would have the result that election officials would be checking the photo identification at the same time that they unseal and thereby expose the ballot. State App. 136-39. Particularly in close cases that might be reviewed by several election personnel, this would destroy ballot secrecy. *Id.* In the district court, the Democrats *did not deny* this problem, but instead blithely suggested that the state could simply revamp its entire absentee-ballot process to accommodate this requirement. Dem. MSJ Reply 24-25. The legislature is entitled not to undertake this tremendous and costly burden, particularly where the return on the investment—photo identification with no face to match—would be so insignificant.

The Democrats also argue that voters without photo identification should be permitted to vote a regular ballot (*i.e.*, not a provisional ballot subject to subsequent validation) if they bring some alternative form of identification, such as a utility bill. Dem. Br. 44. For their part, the Crawford Plaintiffs go so far as to argue that

individuals should be permitted to vote if a poll worker recognizes them, or if they execute an affidavit of identity. Crawford Br. 45. These arguments are nothing more than public-policy disputes. There is no judicially applicable constitutional principle supporting the validity of the Democrats' suggested alternatives but not the Voter ID Law as enacted.

IV. Applying the Voter ID Law to Party Primaries Does Not Impose Any Burdens on the Democratic Party's Right to Free Association.

The Democrats argue that the Voter ID Law severely burdens their right to associate with voters who are registered but who lack photo identification. For its part, the district court summarily rejected this claim after concluding that the Democrats had dropped it. App. 113. As a consequence, a serious cloud of waiver hangs over this issue.

While the First Amendment protects the rights of citizens "to band together in promoting among the electorate candidates who espouse their political views," *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), the Voter ID Law steers clear of this right. Indeed, the Democrats have had so much trouble identifying any supporters disenfranchised by the Voter ID Law, App. 81, it is particularly difficult to take seriously an associational-burden claim.

To begin, Indiana's open-primary system essentially permits any voter, regardless of political affiliation or associational intentions, to vote the ballot of whichever party he chooses. Individuals voting a Democratic ballot may have no intention of associating with the Democratic Party and may not consider themselves

members of that, or any other, party.[4] For example, people who consider themselves Republicans may cast a Democratic Party ballot on primary day (and vice-versa) simply to distort the results of the primary. Though such voters are formally on record as having cast a Democratic ballot, in their own minds they have not undertaken to associate themselves with the Democratic Party. And beyond choosing the party's ballot, the act of voting in a primary does not in itself communicate association with anyone—it is, in fact, secret.

Even if primary voting were an associational act, the Voter ID Law impacts associational rights only in very slight, and entirely neutral, ways. In upholding Oklahoma's semi-closed-primary system (which prohibits parties from inviting members of other parties to vote in their primaries), the Supreme Court said that laws that burden associational rights only slightly do not receive exacting scrutiny. *Clingman v. Beaver,* 544 U.S. 581, 593 (2005) ("[M]inor barriers between voter and party do not compel strict scrutiny. 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."). In fact, the Court observed that it

[4] Indiana law provides that a voter may vote in a party primary if (1) the voter voted for a majority of the party's candidates in the last general election or (2) the voter did not vote in the last general election but intends to vote at the next general election for a majority of the party's candidates. Ind. Code § 3-10-1-6. Practically speaking, however, there is no means to enforce this law. A voter surely would not be required to disclose the candidates for whom he voted. And a voter acknowledging that he voted for a certain party's candidates in the last election does not mean that he intended to affiliate with that party indefinitely. Nor does acknowledging that a voter intends to vote in for a certain party's candidates in the next general election demonstrate an intent to affiliate with that party.

has invalidated regulations based on associational rights only where states seek (1) to discover the names of an organization's members, (2) to restrict activities central to an organization's purpose, (3) to disqualify an organization from public benefits or privileges, or (4) to compel the organization to associate with unwanted members or voters. *Id.* at 587.

Otherwise, "'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Id.* at 581 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). The Voter ID Law is a reasonable, content-neutral regulation of election mechanics—a narrowly tailored effort to prevent in-person voter fraud and to engender confidence in the legitimacy of elections—not an attack on political organizing. The Law is not targeted at the Democratic Party—it applies to all other parties that hold primaries. Nor is it designed to disrupt any relationships between political parties and their supporters—the Democrats and their supporters have the same opportunities to associate as before the Law. In fact, the Law is no more an impingement on any right to associate than the advance-registration requirement or the in-person voting requirement.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding tables and certificates, contains 13,854 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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I certify that two copies of the foregoing Brief of Appellees, along with a computer diskette containing the same, has been served this 19th day of July, 2006, by United States First Class Mail, postage prepaid, upon the following counsel of record:

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