

**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

No. 06-2218

WILLIAM CRAWFORD, <i>et al.</i> ,	)	Appeal from the United States
	)	District Court for the Southern
Plaintiffs-Appellants,	)	District of Indiana, Indianapolis
	)	Division
v.	)	
	)	Cause below: No. 1:05-cv-634
MARION COUNTY ELECTION	)	
BOARD,	)	Hon. Sarah Evans Barker, Judge
	)	
Defendant-Appellee.	)	

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No. 06-2317

INDIANA DEMOCRATIC PARTY,	)	Appeal from the United States
<i>et al.</i> ,	)	District Court for the Southern
	)	District of Indiana, Indianapolis
Plaintiffs-Appellants,	)	Division
v.	)	
	)	Cause below: No. 1:05-cv-634
TODD ROKITA, <i>et al.</i> ,	)	
	)	Hon. Sarah Evans Barker, Judge
Defendants-Appellees	)	

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**BRIEF OF BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW AS AMICUS CURIAE  
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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Appellate Court No: No. 06-2218, No. 06-2317

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Brennan Center for Justice at NYU School of Law, as amicus curiae in support of appellants

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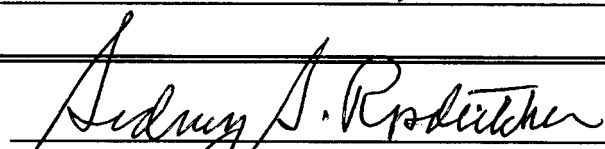
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Attorney's Signature:  Date: June 24, 2006

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

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## **INTEREST OF THE AMICUS**

With the consent of all parties, the Brennan Center for Justice at NYU School of Law (“Brennan Center”) respectfully submits this brief as amicus curiae in support of the Appellants, and urges reversal of the district court’s judgment.

The Brennan Center is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting & Representation project, a part of its Democracy Program, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it, including co-authoring two reports on the subject and participating as counsel or amicus in a number of federal and state cases involving voting and election issues.

## **STATEMENT OF THE ISSUE**

Whether Indiana’s interest in preventing impersonation fraud at the polls is sufficient under the First and Fourteenth Amendments to justify the requirement of Senate Enrolled Act No. 483 (“SEA 483”) that voters present government-issued photo identification as a condition for in-person voting.

## **SUMMARY OF THE ARGUMENT**

The district court purported to apply the balancing test of *Burdick v. Takushi*, 504 U.S. 428 (1992), which requires that the magnitude and character of a burden on voting be weighed against “the *precise interests* put forward by the state to justify those burdens, taking into consideration the extent to which those interests make it *necessary* to burden the plaintiffs’ rights.” *Id.* at 434 (emphasis added). Amicus submits that in granting summary judgment upholding Indiana’s photo ID requirement as a

condition to in-person voting, the district court failed to properly apply this balancing test.

Appellants' briefs show that the district court gave too little weight to the burdens imposed on low-income, elderly, and disabled voters. *See* Crawford Br. at 39-42; Indiana Democratic Party Br. at 20-30. In this brief, amicus reviews the nationwide experience which, together with the evidence of Indiana's own experience, shows that the district court failed to properly assess the extent to which the "precise interest" advanced by Indiana – impersonation fraud at the polls – makes necessary the burdens imposed by Indiana's photo ID requirement.

In granting summary judgment, the district court was obliged to treat all inferences in the light most favorable to the plaintiffs. Here, the district court not only construed every inference in the light most favorable to Indiana, but simply misread the record. That record makes it clear that impersonation fraud is not only a rare occurrence, but that the photo ID remedy imposed by Indiana is out of all proportion, and totally unnecessary, to address this remote risk. While the district court concluded that Indiana's photo ID requirement did not impose a "severe" burden warranting strict scrutiny, that did not end its obligation under *Burdick's* balancing test to fairly assess whether the burdens that *were* imposed were necessary to address the state's asserted interest in remedying impersonation fraud.

The district court acknowledged that there is no evidence of impersonation fraud in Indiana. Nevertheless, it concluded that studies and news reports from other states showed that this was a real danger. The district court's reading of this record was



not only mistaken, but the very documents it relied on establish that impersonation fraud rarely, if ever, occurs.

Most importantly, it is clear that the remedy Indiana has chosen is out of all proportion to the risk of impersonation fraud. The district court failed to examine the extent to which this risk made necessary a photo ID requirement, and simply accepted Indiana's unsupported assertion that "without a photo identification requirement it is nearly impossible to detect in-person voter impersonation." Order at 89; A-91.<sup>1</sup> That assertion is insupportable: every other state and the federal government provide voters with less burdensome alternative forms of identification, with the exception of Georgia. And Georgia's first try was held unconstitutional and its most recent attempt is being challenged in federal court in Atlanta.<sup>2</sup>

A Missouri law enacted on June 14, 2006, would require a photo ID of Missouri voters beginning in November 2008, without an alternate means of identification except in the case of voters who are elderly, disabled or have religious objections. But, as in Georgia, this statute was enacted over the objections of the state's

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<sup>1</sup> "Order" refers to the district court's Entry Granting Defendants' Motions for Summary Judgment, Denying Plaintiffs' Motions for Summary Judgment, and Denying Plaintiffs' Motions to Strike. "A" refers to the Crawford Appellants' Short Appendix.

<sup>2</sup> A federal court preliminarily enjoined Georgia's original photo ID requirement as an unconstitutional burden on voting. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). While Georgia's appeal was pending in the Eleventh Circuit, Georgia amended the law. The Eleventh Circuit remanded the case to the district court for consideration in light of the amendments. *See Common Cause/Georgia v. Cox*, No. 05-15784 (Feb. 9, 2006).

highest election official that there was no evidence of voter fraud and that the state's existing voter identification requirements were fully adequate.<sup>3</sup>

Indiana itself had no identification requirement prior to 2005, except that in 2003, like all other states, it adopted the identification requirements for first-time voters mandated by the federal Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.*, that include a variety of alternative forms of non-photo identification. The Indiana legislature enacted the photo ID requirement in 2005, without any evidence that existing requirements were inadequate. Thus, there is no evidence that the burdens imposed by Indiana's photo ID requirement are necessary to address Indiana's interest in preventing impersonation fraud at the polls.

### **ARGUMENT**

#### **IMPERSONATION FRAUD IS AN EXTREMELY UNLIKELY AND UNSUBSTANTIATED OCCURRENCE THAT DOES NOT JUSTIFY THE BURDEN INDIANA'S PHOTO ID REQUIREMENT IMPOSES ON VOTERS**

The First and Fourteenth Amendments to the U.S. Constitution protect the right to vote as a fundamental right. *See, e.g., Burdick*, 504 U.S. at 433 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (citation omitted). In *Burdick*, the Supreme Court made clear that election regulations pass constitutional muster only when they are reasonable and proportional responses to the state interests advanced to justify them.

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to

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<sup>3</sup> Compare Letter from Robin Carnahan, Missouri Secretary of State, to Matt Blunt, Missouri Governor (May 11, 2006), *available at* <http://www.sos.mo.gov/inc/05-11-06Carnahan-to-Blunt-VoterID.pdf> with *Common Cause/Georgia*, 406 F. Supp. 2d at 1332-33.

the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs' rights.

*Burdick*, 504 U.S. at 434 (quotation marks and citation omitted).<sup>4</sup>

Election laws that “impos[e] severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quotation marks and citation omitted). But as the Court has made clear, “[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.” *Id.* at 359 (citation omitted).

For the reasons explained in Appellants’ briefs, by preventing eligible Indiana citizens from exercising their right to vote unless they present a state or federal photo ID, SEA 483 imposes significant burdens on the franchise for low-income, elderly and disabled voters, for whom it is difficult or unduly costly to obtain a photo ID, but who have other valid means of verifying their identities recognized everywhere for the purpose of voting, except in Indiana and Georgia. *See Crawford Br.* at 43-46; *Indiana Democratic Party Br.* at 43-46. The district court never questions the expert affidavit of

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<sup>4</sup> This test was developed in the context of restrictions on candidates’ access to the ballot and write-in voting, which indirectly affected voters’ rights. Other courts apply a stricter test to regulations, like those here, directly burdening the right to vote. *See Stewart v. Blackwell*, 444 F.3d 843, 857-62 (6th Cir. 2006). This Court need not reach the question here because Indiana’s photo ID requirement fails to pass the *Burdick* balancing test.

Indiana University Professor Marjorie Hershey, which details the many burdens that the photo ID requirement imposes and how such burdens discourage voting, especially by Indiana's most disadvantaged citizens. *See* Jt. App. at 195-201.

Whether these burdens are “severe” – warranting strict scrutiny – or whether they are less than severe, the *Burdick* test required the district court to balance these burdens against the “precise interests” of the state and “the extent to which those interests make it *necessary* to burden the plaintiffs’ rights.” 504 U.S. at 434 (emphasis added). As this Court has explained, “the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). The test is a pragmatic one, in which there is “no substitute for the hard judgments that must be made.” *Timmons*, 520 U.S. at 358 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

In assessing laws whose burdens on voting rights are less than “severe,” courts do not simply apply the deferential “rational basis” test applied to economic and social legislation; rather, they apply an “intermediate level of scrutiny.” *Reform Party of Allegheny County v. Allegheny County Dep’t of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (en banc). Balancing is still required, and the state must establish that a regulation is reasonable in light of the interest it serves. As the Fourth Circuit noted, “a regulation which imposes only moderate burdens could well fail the [*Burdick*] balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational.” *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995); *see also New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) (“Although the Court finds that the burden imposed . . . is not insurmountable, the Court determines

that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed.”).

It is within this framework that we address Indiana’s claimed interest in requiring a photo ID as a condition of voting in person.

**A. Impersonation Fraud Is Highly Unlikely And Exceedingly Rare**

The district court refers repeatedly to “voter fraud,” but Indiana’s photo ID requirement addresses only a single type of alleged voter fraud: impersonation of a registered voter at the polls. The photo ID requirement does not address more common types of voter fraud, such as fraud by absentee ballot or vote buying. Nor does it address voting by ineligible persons with felony convictions, or double voting at two different addresses, which can only be addressed through the updating of Indiana’s voter registration lists. Effective maintenance of Indiana’s voter registration lists is also the best means of combatting voting in the name of deceased persons, since that problem may be virtually eliminated by the timely updating of registration lists.<sup>5</sup> Moreover, as the evidence relied on by the district court shows, many reported incidents of voting in the name of the deceased – “ghost voting” – involve clerical errors by poll workers or the use of absentee ballots, *see infra* at 11, which are not remedied by Indiana’s photo ID requirement.

The district court acknowledged, and Indiana conceded, that there is no evidence of impersonation fraud in Indiana. *See* Order at 21; A-23. The district court also recognized that not a single Indiana resident has ever been indicted for

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<sup>5</sup> Under HAVA, states are required to implement centralized, computerized registration lists, to update them regularly, and to remove ineligible registrants. *See* 42 U.S.C. § 15483(a)(4); *see also infra*, Part B.1.

impersonation fraud. *Id.* at 21-22; A-23-24. Many veteran poll watchers affirmed that they had never seen any attempted impersonation fraud, and no evidence of impersonation fraud was presented to the Indiana legislature during the debate over SEA 483. *Id.* at 22; A-24. The district court nevertheless concluded that “evidence of published books and media reports” from other states indicated a genuine risk of impersonation fraud. *Id.* at 23; A-25; *see also id.* at 88-89; A-90-91 (citing State’s Exs. 3-18).<sup>6</sup> The district court simply misread the record, which supports a contrary conclusion.<sup>7</sup>

The district court cites a study conducted by Professor Lorraine Minnite of Barnard College and David Callahan of Demos. *See* Order at 24, 88; A-26, A-90 (citing State’s Ex. 6 (Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* (2003)) (“Minnite Study”). This study, the most comprehensive survey of election fraud to date, is based on a review of news and legal databases and interviews with attorneys general and secretaries of state in 12 states<sup>8</sup> about incidences of election fraud from 1992 to 2002. But the study contradicts the district court’s conclusion, finding that voter fraud of any kind is “very rare,” is not more than a “minor problem” and “rarely affects election outcomes.” Minnite Study at 4, 17. Notably absent from the

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<sup>6</sup> “State’s Ex.” refers to exhibits supporting Indiana’s Motion for Summary Judgment, R. Doc. 86.

<sup>7</sup> The district court also erroneously gave equal weight to every “book[] and media report[]” without evaluating their credibility.

<sup>8</sup> The twelve states surveyed, Alabama, California, Florida, Georgia, Illinois, Minnesota, Mississippi, New York, Oregon, Pennsylvania, Texas and Wisconsin, collectively represent about half of the national electorate. Lorraine Minnite and David Callahan, *Securing the Vote: An Analysis of Election Fraud* 15 (2003), available at [http://www.demos-usa.org/pubs/EDR\\_Securing\\_the\\_Vote.pdf](http://www.demos-usa.org/pubs/EDR_Securing_the_Vote.pdf).

study are any confirmed cases of in-person impersonation fraud. According to Minnite and Callahan, even where cases of alleged election fraud have received significant attention in the news media, such as the 2000 election in St. Louis, Missouri, the allegations have proved baseless. *Id.* at 17.<sup>9</sup>

To the limited extent fraud has been detected, the study concludes, it generally takes the form of organized fraud such as vote buying, use of fraudulent absentee or mail-in ballots, ballot box stuffing, or wrongful purging of registration rolls to exclude eligible voters. *Id.* at 14. Instances of these types of fraud far outweigh incidents of individual fraud. *Id.* Most importantly, the study concludes that the wrongful *disenfranchisement of voters* is a “far bigger problem” than voter fraud. *Id.* at 15.

The district court cites two books that discuss allegations of voter fraud generally, *see* Order at 21; A-23 (citing Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 292 (1996) (“Sabato”); John Fund, *Stealing Elections* 64 (2004) (“Fund”)), but these books contain few allegations of voting irregularities that could even conceivably have been remedied by a photo ID requirement. The Sabato book, for example, describes thousands of incidents of possible absentee ballot fraud and numerous problems plaguing California’s registration rolls. Sabato at 291-92. But Sabato describes only a single hearsay allegation of attempted impersonation fraud that was foiled without a photo ID requirement. *Id.* at 292.

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<sup>9</sup> The 2000 Election in St. Louis featured allegations of illegal registrations, multiple voting, and voting by deceased individuals, felons and people whose addresses appeared to be vacant lots. Reporters’ subsequent investigations into these allegations, however, revealed little or no actual voter fraud. *Id.* at 43.

Likewise, Fund retails numerous reports of voting by felons and double voting – for which a photo ID is no solution. Fund at 64.<sup>10</sup> And though Fund describes 14 allegations of ghost voting in Missouri, there is no indication that any of these involved in-person, rather than absentee, voting. *Id*; *see also* Order at 24; A-26 (citing State’s Ex. 7) (repeating allegations of 14 ghost voting incidents).

The district court cites a Department of Justice (“DOJ”) report describing various election fraud investigations, suggesting that these investigations somehow justify Indiana’s photo ID requirement because they resulted in 52 convictions. Order at 23; A-25 (citing State’s Ex. 2). But not a single one of these convictions involved impersonation fraud. The DOJ study reports incidents of vote buying in Kentucky, North Carolina, and West Virginia, various incidents of individuals voting at more than one address, cases where voters mis-represented their felony-conviction status, and convictions for voter harassment. *None* of these crimes could be prevented by requiring voters to show a photo ID.

The district court’s reliance on the State of Washington’s recent experience is equally misguided. The district court cites one of the most substantial investigations into voter fraud in recent history, conducted in Washington after a bitterly contested gubernatorial election. *See* Order at 23, 88; A-25, A-90 (citing State’s Ex. 3 (*Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 6, 2005))). Out of a total of 2,812,675 ballots cast, this investigation uncovered only 19

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<sup>10</sup> A review characterizes Fund’s book as filled with “distortions and half truths” and provides a point by point refutation of many of Fund’s claims. *See Media Matters, John Fund’s Book on Voter Fraud is a Fraud* (Oct. 31, 2004), available at <http://mediamatters.org/items/printable/200411010001>.



cases of alleged fraudulent voting that could even possibly have been remedied by a photo ID requirement, involving ghost voting. But other evidence relied on by the district court suggests that the overwhelming majority of these cases of ghost voting would not have been prevented by a photo ID requirement for in-person voting, as they involved absentee ballots. *See* Order. at 88; A-90 (citing State’s Ex. 15 (Phuong Cat Le & Michelle Nicolosi, *Dead Voted in Governor’s Race*, Seattle Post-Intelligencer, Jan. 7, 2005) (noting that only 1 of 8 investigated cases of ghost voting may have involved in-person fraud)).<sup>11</sup> Moreover, even if some small number of ghost voting incidents involved in-person impersonation fraud, these could have been prevented had the state removed the names of deceased persons from its voter rolls. Finally, even assuming that all 19 instances involved in-person, rather than absentee, voting, this would yield a rate of ineligible votes preventable by a photo ID requirement of 0.0007%.

The district court also cites an investigation into an alleged conspiracy to alter the result of the 2004 election in Wisconsin. *See* Order at 23-24; A-25-26 (citing State’s Ex. 4). But this year-long joint federal and state investigation did not confirm any reports of impersonation fraud; indeed, the interim report cited by the district court, *see* Order at 23, 88; A-25, A-90 (citing State’s Ex. 4), indicates that no case of impersonation fraud had been confirmed, *see* State’s Ex. 4 at 1. And though the investigation ultimately turned up severe administrative and recordkeeping problems with the

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<sup>11</sup> Other evidence relied on by the district court suggests that many suspected cases of “ghost voting” that involve in-person, rather than absentee, voting are actually the result of clerical errors, as when election clerks mistakenly have a voter sign the registration card of a deceased voter whose name is strikingly similar, rather than signing for the correct name. *See* State’s Ex. 11 (Van Smith, *Elections Nights of the Living Dead*, Baltimore City Paper, June 22, 2005) (discussing likely mistakes involving, e.g., a son confused with his deceased father of the same name, or a “Charles A. Price” confused with a “Charles W. Price”).

Milwaukee elections board, it produced very little evidence of voter fraud. Moreover, those few incidents that were substantiated involved registration fraud, double voting and voting by ineligible persons with felony convictions, not voter impersonation. *See* Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 5, 2005, available at [http://www.findarticles.com/p/articles/mi\\_qn4196/is\\_20051206/ai\\_n15901055](http://www.findarticles.com/p/articles/mi_qn4196/is_20051206/ai_n15901055).

The same deficiencies are found in every article and report cited by the district court. *See* Order at 22-23; A-24-25 (citing State's Exs. 2-18); Order at 88; A-90 (citing State's Exs. 3-18). Many of the exhibits are newspaper reports featuring reports of "double voting" by voters at multiple addresses, or of individuals who live in one city voting in another. *See, e.g.*, State's Ex. 5 (describing voting at multiple addresses); State's Ex. 8 (same); State's Ex. 10 (voters living outside Miami voting in Miami). Other exhibits relied on by the district court detail voting by persons with felony convictions, some of whom may have been ineligible. *See, e.g.*, State's Ex. 3; State's Ex. 4; State's Ex. 7; State's Ex. 9. All of these types of fraud can only be prevented by an accurate registration list, not by a photo ID requirement. Indeed, several of the exhibits the district court cites merely reinforce this point. *See, e.g.*, State's Ex. 7 (noting that 10% of registered St. Louis voters are also registered elsewhere in Missouri); State's Ex. 9 (registration rolls contain numerous ineligible felons and voters registered at multiple addresses).

Finally, the district court cites the report from the Carter-Baker Commission on Federal Election Reform<sup>12</sup> for the proposition that “there is no doubt that [in-person voter fraud] occurs.” Order at 24; A-26 (citing State’s Ex. 1 (Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005)) (“Carter Baker Report”) at 18). But in fact the quoted statement is preceded by the qualification that “there is no evidence of extensive fraud in U.S. elections” and that there was division among the members of the Commission on the magnitude of the problem. The Commission cites no evidence of impersonation fraud and merely refers to the since-discredited reports of such fraud in Milwaukee and Washington State. Carter Baker Report at 2-4, 18. Moreover, as one of the dissenters notes, the Commission “did not call as witnesses many of the most established experts on the issue [of voter ID requirements]. A commission’s reliance on anecdotes and political sound bites – rather than empirical data, testimony by top experts, and rigorous analysis – undermines its credibility.” Spencer Overton, “Establishing Procedures for Credible Advisory Commissions,” *available at* <http://www.carterbakerdissent.com/procedure.php>.

Moreover, although the majority of Commissioners supported the use of the REAL ID,<sup>13</sup> which includes a photo, for in-person voter identification, they recognized that 12% of voters lack any photo ID and that the expense of obtaining such

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<sup>12</sup> The Carter-Baker Commission was not a commission of the federal government. It was an independent project organized by the Center for Democracy and Election Management at American University.

<sup>13</sup> See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), which will require a standardized “REAL ID” for such purposes as boarding airplanes, effective in 2008. Three Commissioners dissented from the majority’s proposal to use the REAL ID for voting purposes.

identification could disenfranchise low income voters. *See* Carter Baker Report at 73 n.22. The majority's belief that offering free IDs can solve this problem simply ignores the burdens of obtaining even a free ID, including the difficulties in obtaining the underlying documentation required to acquire such IDs. In addition, the majority recommended that REAL IDs be used for voter identification only if: (1) there is a uniform national identification standard, eliminating the risk of discrimination from state requirements; (2) states make the ID free and widely available; and (3) states actively seek out and register unregistered citizens. *See id.* at 19-20. Tellingly, even President Carter and Secretary Baker, the Commission's co-chairs, rejected Georgia's initial photo ID law as "discriminatory" because "it was costly or difficult for poor Georgians." Jimmy Carter and James A. Baker III, *Voting Reform is in the Cards*, N.Y. Times, Sept. 23, 2005, at A19. Indiana's law is no less discriminatory.<sup>14</sup>

In sum, the evidence relied on by the district court suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent. The record here indicates that the "problem" of voter impersonation is hardly a real problem at all.

This is confirmed by a study by the Coalition of Homelessness and Housing in Ohio ("COHHIO") and The League of Women Voters of Ohio. *See* COHHIO & League of Women Voters Coalition, *Let the People Vote 1* (2005), available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>. Researchers

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<sup>14</sup> For a full critique of the majority's proposal to use the REAL ID, *see generally* Brennan Center and Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005), available at <http://www.brennancenter.org/resources/downloads/Response%20to%20Federal%20Election%20Reform%20Commission%20Report.pdf>.

conducted telephone interviews with either the Director or Deputy Director of each of the state's 88 county Boards of Elections during the first week of June 2005, and concluded that in-person voter fraud as a whole was an "exceedingly rare" occurrence, as evidenced by the fact that, out of a total of 9,078,728 votes cast, there were only four reported instances of ineligible persons voting or attempting to vote in 2002 and 2004, confined to 3 of the state's 88 counties. *Id.* at 2. And even these few instances involved "registration fraud," not impersonation fraud. *Id.*

There are obvious reasons why impersonation fraud occurs so rarely, if ever. *First*, if the impostor is impersonating a live, registered voter, the risks of getting caught are substantial. The impostor takes the chance that the real voter will appear to vote either before or after the impostor, thus exposing the fraud. *Second*, even if the impostor tries to impersonate a person who is deceased or has moved out of state, he risks getting caught if the registration list has been kept up-to-date, as is now required under HAVA. *See* 42 U.S.C. § 15483(a)(2). *Finally*, the impersonator risks exposure if any poll worker is familiar with either the impostor or the legitimate voter, or if the impostor is challenged by a poll worker or other challenger.

Moreover, the punishment for getting caught is severe. Conviction for voter impersonation in a federal election can result in five years maximum imprisonment and \$10,000 maximum fines. 42 U.S.C. § 1973i(c). Indiana classifies impersonation fraud as a Class D felony, *see* Ind. Code § 3-14-2-12 (2006), punishable by three years maximum imprisonment, and \$10,000 maximum fines, *see id.* § 35-50-2-7(a).

Successful impersonation also requires a series of events to favorably align themselves. An impostor must first gain access to an up-to-date registration list,

and identify a registered voter that is unlikely to vote. Then, even under identification requirements less onerous than Indiana's, the impostor would have to steal identification papers like a government check or bank statement and present them at the polls, forge a signature, or swear falsely, exposing the impostor to additional criminal penalties. Finally, the impostor must undertake all these risks for a very limited pay-off: it is unlikely in the great majority of cases that a single vote would decide the outcome of a race or ballot initiative. To succeed in influencing any election, then, an impostor would have to conspire with multiple other impostors, a scenario that, in light of the above discussion, is virtually inconceivable.

It is, therefore, unsurprising that there is no evidence of impersonation fraud in Indiana. Nevertheless, we do not suggest that Indiana may not take prophylactic measures to prevent even rare or unlikely types of fraud, provided those measures are not disproportionate to the nature of the problem. We therefore examine whether the photo ID requirement is a reasonable response to the remote – and unproven – risk of impersonation fraud.

**B. Indiana's Photo ID Requirement Is Not A Reasonable Or Proportional Response To Possible Impersonation Fraud**

A review of the procedures adopted by Congress, other states, and Indiana itself until recently, demonstrates that Indiana's strict photo ID requirement, allowing no alternative, less onerous form of identification, is neither necessary nor reasonable to address Indiana's interest in preventing impersonation fraud.

Prior to 2003, Indiana did not require any voters to present documentary proof of identity when voting in person. Instead, Indiana required that a voter announce her name to the election clerk, and provide her signature and current address. *See Ind.*

Code § 3-11-8-25 (2002). If there was any question regarding the voter's identity, the clerk would compare her signature to a photocopy of her signature in the registration records. *Id.* If the clerk questioned the validity of the signature, she could challenge the voter by swearing an affidavit stating the reason for the challenge.<sup>15</sup> If the voter then swore to an affidavit asserting that she was qualified to vote in that precinct, the voter was permitted to cast a regular ballot. *See id.* § 3-11-8-22 (2002).

In response to HAVA, Indiana revised its election code in 2003, effective in 2004. *See* Ind. P.L. 209-2003, § 134. Indiana adopted HAVA's identification requirements for certain first-time voters who registered by mail, who were required to provide some form of documentary identification, including a current and valid photo ID, or a current utility bill, bank statement, government check, paycheck, or other government document showing the name and address of the voter. *See* Ind. Code § 3-11-8-25 (2004). Only in 2005, with the enactment of SEA 483, did Indiana mandate that all in-person voters, except nursing home residents voting in their nursing homes, display a photo ID issued by the State or federal government and bearing an expiration date.

The district court identified no evidence that the requirements in place prior to SEA 483's passage were inadequate to address the supposed danger of impersonation fraud. Moreover, in evaluating Indiana's claim that it needs the photo ID requirement to prevent impersonation fraud, we think it pertinent that SEA 483 is so at odds with the approaches of the federal government under HAVA and its sister states described below.

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<sup>15</sup> Voters could also be challenged by independent "challengers" who were appointed by political parties or independent candidates, and positioned in an area directly outside the polling place called the "chute." *See* Ind. Code §§ 3-5-2-10, 3-11-8-20.

## 1. HAVA Provisions Addressing Election Fraud

HAVA was enacted in response to the deep flaws in the 2000 presidential election, and to improve the administration of elections. *See generally* 42 U.S.C. § 15301. Three of HAVA's requirements are especially relevant here.

*First*, HAVA requires states to maintain complete and accurate registration lists by implementing a uniform, official, centralized, interactive and computerized statewide voter registration list that is regularly updated. The statute requires states to establish a “system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.” *Id.* § 15483(a)(4)(A). This HAVA requirement will eliminate most of the potential for voting by ineligible voters, including ghost voting.

*Second*, HAVA requires all voter registration applicants to provide their driver's license number or the last four digits of their social security number (if they have such numbers) with their applications. *Id.* § 15483(a)(5)(A). The state must then try to match the numbers and other information provided by applicants against state motor vehicle authority or Social Security Administration databases. *Id.* § 15483(a)(5)(B). HAVA exempts applicants whose information is successfully matched from the ID requirements for first-time voters who register by mail. *See id.* § 15483(b)(3)(B).

*Third*, if a first-time voter who registered by mail is unable to provide any of the above numerical identifiers or the state is unable to match that number, HAVA requires these voters to produce certain documentation to confirm their identities. *Id.* § 15483(b). HAVA allows voters to use any of the following means of verifying identity: a current and valid photo ID, a current utility bill, bank statement, government check or



paycheck, or another government document that shows the name and address of the voter. *Id.* § 15483(b)(2).

HAVA's list of acceptable identification documents represents Congress's reasoned view of what is sufficient to combat impersonation fraud, and is considerably more flexible than Indiana's photo ID requirement. And, unlike Indiana, Congress deemed identification requirements necessary only for first-time voters who have not registered in person and whose information does not match data in existing government databases.

## **2. Alternative Methods of Voter Identification Used In Other States**

Like Congress, 47 other states and the District of Columbia have found it unnecessary to make a photo ID the exclusive requirement for voting. They provide alternative means for confirming voters' identities, and as the absence of any meaningful evidence of impersonation fraud indicates, these alternatives are adequate.

As in Indiana, most states required no documentary proof of voters' identity until very recently. Prior to 2002, only 11 states required all voters to show any documentary identification before voting in person. *See* [electionline.org](http://www.electionline.org), *Election Reform: What's Changed, What Hasn't and Why 2000-2006* 13 (2006), available at <http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf> ("Electionline Study"). And although all states have now implemented HAVA's identification requirements, and request some form of documentary identification – including non-photo ID – from "unmatched" first-time voters who registered by mail, *see id.* at 17, only two states – Indiana and Georgia – currently require all voters to produce photo identification before allowing them to vote without allowing some alternate means

of verifying identity. See National Conference of State Legislatures, *State Requirements for Voter Identification* (Feb. 2, 2006), at <http://www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm> (“NCSL Study”).<sup>16</sup>

Twenty-six states and the District of Columbia have adopted HAVA’s identification requirements for “unmatched” first-time voters registering by mail. See Electionline Study at 17; see also Electionline.org, *Voter ID Requirements*, available at <http://www.electionline.org/Default.aspx?tabid=364> (“Voter ID Req’s”). These states utilize a variety of mechanisms to verify the identities of non-first-time, or “repeat” voters. See *Voter ID Req’s*; see also NCSL Study. For example, several states permit repeat voters to verify identity by having them sign a registration card or book and comparing that signature with one on a master list. See, e.g., Nev. Rev. Stat. § 293.277; N.J. Stat. Ann. §§ 19:31a-8. Other states confirm repeat voters’ identities by having the voter orally recite or affirm identifying information. See, e.g., Mass. Gen. Laws ch. 54, § 76; Neb. Rev. Stat. § 32-914; Utah Code Ann. 20A-3-104.

Seventeen states<sup>17</sup> require all voters, including first-time and repeat voters, to produce some form of documentary identification, but accept both photo and non-photo ID.<sup>18</sup> See Electionline Study at 17; *Voter ID Req’s*. The list of acceptable forms of

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<sup>16</sup> The NCSL Study contains information updated as of February 2, 2006. Subsequent changes in state law, such as Missouri’s adoption of a photo ID requirement on June 14, 2006, are reflected in our analysis.

<sup>17</sup> Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Montana, New Mexico, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington.

<sup>18</sup> Prior to June 14, 2006, Missouri was also in this group, and allowed voters to use both photo and non-photo IDs to confirm identity. See Mo. Rev. Stat. 115.427 (2005).

ID varies, but almost every state's list includes options for voters that are either contained in the text of HAVA, or closely related to its model. *See generally Voter ID Req's.*

Various states have augmented HAVA's list of acceptable IDs with other documentary proof. Voters in Alabama and Arizona, for example, can verify identity with a hunting or fishing license, Kentucky and Tennessee voters can use credit cards, and North Dakotans can also use a U.S. Postal Service change of address verification letter. *See id.*

Moreover, in some of these states, voters lacking the form of documentary identification requested by the state can still prove identity through non-documentary verification. *See Voter ID Req's; see also NCSL Study.* For example, in Connecticut, voters unable to produce identification documents may verify their identity at the polls by signing an affidavit. In that state, if a voter is unable to provide a "form of identification which shows the elector's name and either the elector's address, signature or photograph," she may cast a regular ballot after signing an affidavit affirming her identity, under penalty of perjury. Conn. Gen. Stat. 9-261(a) (2006).

Only seven states – Florida, Georgia, Hawaii, Indiana, Louisiana, Missouri, and South Dakota – ask all voters to display a photo ID when they vote in person, and five of these seven states provide alternatives that allow voters lacking a photo ID to cast votes that are counted. Only Indiana and Georgia fail to provide a non-photo ID alternative to all in-person voters.

As noted, under a law enacted June 14, 2006, beginning in November 2008, most voters in Missouri will be unable to vote without a photo ID. Even after that time, however, Missouri voters who are disabled, elderly, or have religious objections can

sign an affidavit, and will have their votes counted as long as the signature on the affidavit matches the registration records. *See* Mo. S.B. 1014 (2006).

The four remaining states that request photo IDs of all voters provide additional less burdensome alternatives. In Hawaii, for example, voters are initially asked to provide a photo ID, but if a voter is unable to produce one, she is not prevented from voting. Instead, she is asked to recite her date of birth and home address to corroborate the information provided in the poll book. If the recited information is accurate, she may vote a regular ballot. *See* Haw. Rev. Stat. § 11-136 (2005); *see also* NCSL Study.

South Dakota and Louisiana also initially request that voters show photo IDs, but, like Hawaii, these states provide alternatives for voters lacking them. South Dakota voters without a photo ID must complete an affidavit before voting. *See* S.D. Codified Laws § 12-18-6.2 (2005). And in Louisiana, a voter without a photo ID may vote after signing an affidavit so long as she provides either a current voter registration certificate or other information requested by the election commissioners of the precinct in which the individual is voting. *See* La. Rev. Stat. Ann. § 18:562(A)(2) (2006).

Florida permits first-time voters to verify identity using various forms of non-photo ID, *see* Fla. Stat. Ann. § 97.0535(3)(b) (2005). And Florida allows repeat voters who lack photo ID to sign an affidavit, and will count the ballot if the signature on the affidavit matches her registration form: the voter is not required to make an additional trip to an election office or to return to the polls with ID. *See* Fla. Stat. Ann. § 101.053(2) (2005); *see also* [http://election.dos.state.fl.us/online/faq.shtml#Elections\\_and\\_Voting](http://election.dos.state.fl.us/online/faq.shtml#Elections_and_Voting); Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of

Justice, to Charlie Crist, Florida Attorney General (Sept. 6, 2005), Att. A, at 2 (on file with Brennan Center) (preclearing Florida's photo ID law on the understanding that Florida will count ballots cast by voters lacking acceptable ID if the affidavit signature matches registration files).

In sum, besides Georgia, every state offers alternatives less burdensome than Indiana's requirement for verifying the identity of in-person voters exclusively with a photo ID.

\* \* \*

The United States already suffers from lower turnout rates than any democracy except Switzerland. *See* Jt. App. at 194. The Carter Baker Report notes that the 2004 elections produced as many problems, if not more, than 2000. *See* Carter Baker Report at 3. Among other things, "voters were discouraged or prevented from voting by the failure of election offices to process voter registration applications or to mail absentee ballots in time, and by the poor service and long lines at polling stations in a number of states. There were also reports of improper requests for voter ID and of voter intimidation and suppression tactics. Concerns were raised about partisan purges of voter registration lists and about deliberate failures to deliver voter registration applications to election authorities." *Id.* As the 2006 election approaches, moreover, the enactment of burdensome election regulations threatens to further disenfranchise voters.<sup>19</sup>

It is therefore significant that a photo ID requirement as a condition to voting did not exist in any state until last year and was enacted in Indiana, Georgia and

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<sup>19</sup> *See generally* Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* (2006); *Block the Vote*, Editorial, N.Y. Times, May 30, 2006 at A18.

Missouri through votes strictly along party lines and without a shred of evidence or explanation as to why alternative means of identification are inadequate. Voting requirements that unnecessarily burden qualified voters deserve careful scrutiny – whether it be “strict scrutiny” or some intermediate level of scrutiny – to be sure that these requirements are not simply exclusionary devices that further reduce competitive elections, unfairly disenfranchise disadvantaged groups, and undermine democracy.

Indiana’s photo ID requirement does not pass any level of scrutiny. Because Indiana has offered no evidence that impersonation fraud represents a genuine, rather than a hypothetical or speculative problem, the onerous restriction it has adopted cannot be considered a reasonable, nondiscriminatory response to the potential for impersonation fraud, given the variety of effective and less restrictive alternatives that prevail throughout the rest of the nation. Indiana’s decision to substantially burden its most disadvantaged voters by requiring them to present a photo ID before voting is a disproportionate and unreasonable response to the possible problem of impersonation fraud. It, therefore, violates the First and Fourteenth Amendments.

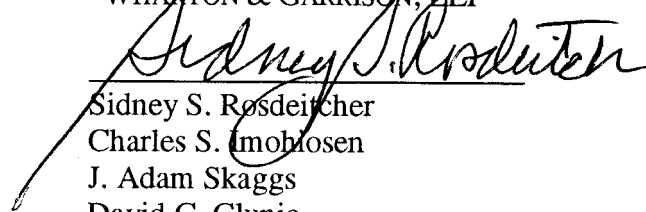
**CONCLUSION**

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

June 23, 2006

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 12-point Times New Roman and complies with the type-volume limitation of the rule, containing 6,747 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

  
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J. Adam Skaggs



**CERTIFICATE OF SERVICE**

This is to certify that I have this day caused a true and correct copy of the foregoing **BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL** to be served by United States first class mail upon the following:

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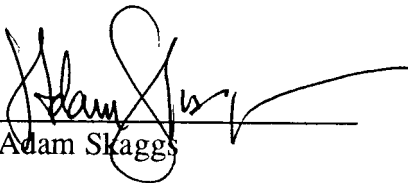
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