UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218:

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

No. 06-2317:

INDIANA DEMOCRATIC PARTY, et al.,	)	
	)	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
TODD ROKITA, et al.,	)	
	)	
Defendants-Appellees.	)	Hon. Sarah Evans Barker, Judge

REPLY BRIEF OF PLAINTIFFS-APPELLANTS INDIANA DEMOCRATIC PARTY AND MARION COUNTY DEMOCRATIC CENTRAL COMMITTEE

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I. The Democratic Party has first-party, associational, and third-party standing.

A. The Democrats did not waive their first-party standing claim based on either their associational rights or the burden upon organizational resources.

Democrats have appealed the district court's denial of their claim that the Photo ID Law burdens their associational rights. (Democrats' Br. 40-42). Democrats did not waive that claim before the district court, nor did the district court rule that they did. (Short App. 113). Further, it is undisputed that the Democrats have standing to present their First Amendment freedom of association claim. (Short App. 58).

As to the Democrats' standing claim that the Photo ID Law will drain organizational resources, this claim mirrors the claims made by the organizational plaintiffs in Crawford. (See Crawford Br. 36, Crawford Reply Br. 6-9). The Court ordered the parties in this consolidated appeal to avoid repetitious arguments, and Democrats attempted to comply with this order by merely noting this claim. Furthermore, the Marion County Election Board ("MCEB") misstates the record by contending that the Democrats raised their organizational standing claim for the first time in a reply brief. The Democrats' raised this issue in a combined brief responding to the State's and MCEB's motions for summary judgment, and replying in support of Democrats' own motion. (R. Doc. 103). There is no waiver.

B. The Democrats and voters affiliated with the Democratic Party have suffered an injury-in-fact: all voters who lack qualifying identification have been severely burdened in their right to vote.

The MCEB, as did the district court, misapprehends the showing necessary to

establish injury-in-fact in this case. An injury-in-fact occurs where there is an invasion of a legally protected interest which is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury here is both actual and imminent because both the classifications created by the law – those registered voters who do and do not possess qualifying identification – and the burdens the law imposes on voters who lack identification are certain.

Contrary to the MCEB's suggestion, the constitutional deprivations alleged by Democrats have never been limited to circumstances resulting in denial of the right to vote, meaning certain disenfranchisement. Rather, Democrats have alleged that the constitutional rights of individual voters, as well as those of the Democratic Party, are violated by a statutory scheme that imposes a severe burden on the right to vote, without being narrowly tailored to meet the claimed justification for the law. Any registered voter who does not possess qualifying identification must, in order to have his vote counted, navigate a bureaucratic maze and expend both time and money either to obtain the identification or to fit within one of the law's narrow exceptions. Some voters will be able to run this gauntlet successfully; some will not. (See Dems' App. in Support of Summary Judgment; R. Doc 70, Aff. of Mary Anderson, Ex. 9; Aff. of Theresa Clemente, Ex. 8). Some will simply abandon their right to vote because the costs are too high. (See Report of Marjorie Hershey, Jt. App. 187-199). The fact that the Democratic Party cannot name the voters who will either fail to overcome these barriers, or abandon the

franchise, is irrelevant to their claim of standing.[1] *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (Democratic party had standing to present the claims of members who might be affected by challenged electoral practice, but who could not be discerned prior to the election) [2]; *see also*, *Wernsing v. Thompson*, 423 F.3d 732, 743-44 (7th Cir. 2005) (in facial challenges, an organization or person seeking standing is not required to prove actual denial of the right they seek to protect in order to demonstrate an injury-in-fact).

Furthermore, an injury-in-fact occurs where "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497 (7th Cir. 2005). The member of the burdened group need not allege that he would have obtained the benefit but for the barrier. *Id.* The district court acknowledged this in finding that the Democrats have associational standing to present the equal protection claims of the seven individuals identified by the Democratic Party as persons who lack qualifying identification. (Short App. 63-64). The applicability of this rule is not limited to equal protection claims, however. *Lac Du*

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[1] Indeed, except for the limited class of persons who actually go to the polls and cast provisional ballots that are not counted, for whom a paper record will develop, the identity of these lost voters will likely never be known.

[2] The MCEB's effort to distinguish *Sandusky* is specious. The MCEB concedes that the hypothetical voters in *Sandusky* suffered an injury-in-fact where they *might* be denied the right to cast a provisional ballot or their provisional ballots *might* not be counted, and thus, that they *might* lose the right to vote. (MCEB Br. 35). But disenfranchisement was not certain in *Sandusky*, any more than it is certain here.

Flambeu, 422 F.3d at 497 (Indian tribe treated differently from others had standing to present claim under Administrative Procedures Act). In *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996), this Court held, in a First Amendment freedom of association case, that an applicant for employment was not required to demonstrate that he would have obtained a job, but for the alleged political discrimination, in order to have suffered an injury-in-fact. *Id.* at 923. The fact that he was being treated differently from other applicants was sufficient to establish injury. *Id.* Similarly, registered voters who lack qualifying identification, whether because they have not yet obtained it or cannot obtain it, suffer an injury-in-fact because of the different, less-favorable treatment the Photo ID Law places on them, regardless of whether they are actually disenfranchised by its operation.

C. Democrats have associational standing to represent all Democratic voters and party supporters who lack qualifying identification, including the seven Democratic voters identified in this litigation.

It is beyond dispute that the Democrats have the authority to present the claims of the seven voters who lack qualifying identification and who identified themselves as members of the Democratic Party.[3] Moreover, contrary to the MCEB's arguments, each of them, like all registered voters who lack photographic identification, has suffered an injury-in-fact. The fact that these individuals may be eligible to vote by absentee ballot, and therefore not be required to present photographic identification, does not eliminate

[3] These individuals were identified as a result of a single survey of Democratic poll workers in Marion County. (R. Doc 86, Ex. 53, p. 6).

the injury-in-fact because these individuals are still being treated differently and in a way that makes it more difficult for them to obtain the benefit of voting given that the process for obtaining and casting a mail-in absentee ballot is more complex, *see e.g.*, I.C. § 3-11-10-1 (voting procedure for casting absentee ballot) and I.C. § 3-11-10-3 (requiring absentee ballot to be received in time to deliver to precinct election board prior to closing of polls); and more likely to result in errors that result in deprivation of the right to vote. *See Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006) (noting the more stringent procedures applied to absentee voting including fact that lack of proper endorsements on ballot irrevocably invalidates it, unlike election day ballots).

Indeed, the MCEB, despite almost forty (40) pages of argument on standing, has been unable to cite a single case in which a political party has been denied standing, associational or otherwise, to challenge an election regulation. In contrast, numerous courts have held both explicitly and implicitly[4] that political parties have standing to challenge election regulations on behalf of their members and voters. (See Democrats' Br. 13-16 (citing cases)). Democrats have associational standing.

D. Democrats have third-party standing to represent the interests of all registered voters associated with the Party who lack qualifying identification.

The MCEB claims that the Democrats cannot meet any of the three elements

[4] Since Article III courts have a duty to police their own subject matter jurisdiction, *Insurance Corp. of Ireland, LTD v. Compagnie de Buaxites de Guinee*, 456 U.S. 694, 702 (1982), every case in which a political party has been permitted to challenge an election law on behalf of voters or its members supports the conclusion that Democrats have standing here, regardless of whether an explicit discussion of standing is contained within the opinion.

necessary to establish third-party standing: (1) injury-in-fact to the association; (2) a close relationship between the first and third parties; and (3) and some obstacle to the first party's ability to protect his own interest. *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000). The MCEB contends that the Democratic Party has not proven that the Photo ID Law will cause it to lose votes. In order to reach this conclusion, the MCEB has chosen to ignore the report of Professor Marjorie Hershey, who concluded that because the law increases the costs of voting, it will likely decrease voter turnout. (Jt. App. 196-201, 229-30). The MCEB cannot seriously dispute that Democrats will suffer an injury if voters who support the Party do not cast ballots for its candidates, and as Professor Hershey's report makes clear, this result is inevitable. (Jt. App. 183-232). Therefore, Democrats have a "concrete interest" in challenging the Voter ID Law, and there is no doubt that Democrats are a "motivated, effective advocate" for the rights of Democratic voters. *Powers v. Ohio*, 499 U.S. 400, 411, 414 (1991).

The MCEB further claims that the injury to any voters who lack qualifying photographic identification is sufficiently concrete and identifiable to permit them to assert their own claims. For many individuals affected by the law, this will not be true. For instance, a voter who is challenged at the polls on the basis of having a name that does not "conform" with his name on the poll book will have no way of knowing he will be challenged, just as a voter who forgets his ID will be unaware of an impending challenge. But even if voters were aware that they will not be permitted to cast an effective ballot, as a practical matter they are not likely to challenge the Law because

there is little at stake for the individual voter as compared to the economic burdens of litigation. *Id.* at 414-15 ("The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights."). Elections are rarely decided by a single vote, and the incentive for an individual voter to file a legal challenge based upon his exclusion or potential exclusion from the polls is small.

Furthermore, contrary to the State's argument, the *overbreadth* exception to the third-party standing doctrine is applicable here, and therefore the need to demonstrate that there is some obstacle to voters bringing their own lawsuit is relaxed. *See, Massey*, 221 F.3d at 1035. The Photo ID Law will chill the exercise of the right to vote because certain voters, rather than expend the time and resources necessary to overcome the law's barriers, will abandon the franchise. The Law's existence will cause voters to refrain from this constitutionally-protected right, which is rooted in the First Amendment. Not only may they lose the franchise, but there are potential criminal repercussions in that voters risk prosecution by filing an affidavit asserting their indigency, a term that is nowhere defined in the Law.

II. The Secretary of State and Co-Directors are proper defendants in this action for prospective injunctive and declaratory relief.

The State claims, State's Br. 16-19, that the Secretary of State and Co-Directors of the Indiana State Election Division are not proper defendants in this case because they do not "enforce" the Photo ID Law. These State officials instruct county election officials as

to how the Photo ID Law should be interpreted and applied. For instance, the Secretary's website contains a wealth of information regarding the Photo ID Law, including one page offering legal interpretations of various critical provisions of the law, such as the meaning of the term "conform" and whether the Legislature intended that word to mean "similar" or "identical". http://www.in.gov/sos/elections/pdfs/PhotoIDAdvisory_4_30_06.pdf (site last accessed July 27, 2006).

The Secretary and Co-Directors' numerous election-related roles are set forth in the district court's summary judgment entry. (Short App. 41-42). Clearly, the State defendants have some "role to play in the enforcement of the challenged statutes," *Hearne v. Bd. of Ed, City of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999), and significant legal responsibility for carrying out the Photo ID Law. They are thus proper defendants for purposes of prospective injunctive relief, *Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986) (holding that Mississippi Secretary of State, who by state law was responsible for the "general supervision" of the local school officials' administration of the challenged law, could be enjoined prospectively), and are "clearly capable of effecting [injunctive] relief." *Harman v. Forssenius*, 380 U.S. 528, 537 n.14 (1965).

Moreover, Plaintiffs also seek declaratory relief, and "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other". *Steffel v. Thompson*, 415 U.S. 452, 469 (1974).

III. The Photo ID Law directly burdens the right to vote.

A. The Elections Clause does not immunize the Photo ID Law from strict constitutional scrutiny.

The State asserts, State's Br. 24, that whatever the "incidental, marginal deterrence of legitimate voters" operation of the Photo ID Law will have, it is a permitted exercise by the State of its regulatory powers as a mere "procedural" device to promote fair elections. However, a state's broad power to regulate the time, place and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens", *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991), nor does it "justify, without more, the abridgement of fundamental rights, such as the right to vote". *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Contrary to the State's claim, State's Br. 20, the Law clearly imposes a requirement for voting and for having one's vote counted beyond Indiana's constitutional age, citizenship, residency and registration requirements. A person who does not or cannot present a required form of photo identification at the polls but who otherwise is a fully qualified elector will not have his vote counted. This is not "incidental" or "marginal" deterrence; it is direct disqualification from voting.

Any election law which infringes upon the right to vote is subject to searching judicial review. *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004) (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)). Thus, though states have wide latitude to regulate the

conduct of elections, they must do so within constitutional limits, for "[a]t some point the constitutional risks to the democratic electoral process become too great." *Randall v. Sorrell*, 548 U.S. ___, 126 S. Ct. 2479, 2492 (2006) (plurality opinion). The exercise of independent judicial judgment is necessary to determine when a state statute has reached those outer limits. Where there are strong indications that the law imposes too great a risk to the electoral process, "courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring', that is, toward assessing the proportionality of the restrictions." *Id.* Among the "danger signs" are the absence of similar election regulations imposed by other states and other state election laws that may work *in tandem with* the challenged law to severely burden First Amendment rights. *Id.* at 2493-94; *see also Clingman v. Beaver*, 544 U.S. 581, 598 (2005).

B. The Photo ID Law imposes a non-trivial, severe burden on the right to vote.

The burdens imposed by this law on the right to vote are both direct and the consequences of non-compliance with its requirements are severe – the vote of a registered voter who is either unwilling or unable to produce a form of photo identification at the polls, or within the specified time after the election, will not be counted. The law's exclusionary effects are therefore not substantively different from the residency requirement struck down in *Dunn*, or the property-owning requirements declared unconstitutional in *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) or

the poll taxes struck down in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and *Harman v. Forssenius*, *supra*. A voter who was unable or unwilling to pay the $1.50 Virginia poll tax was excluded from voting, and an Indiana voter who is unable or unwilling to pay for and secure the identifying documents needed to receive a government-issued photo ID is not permitted to cast a vote that will be counted.[5]

The State claims, State's Br. 20-24, that the *Burdick v. Takushi*, 507 U.S. 428 (1992) balancing approach applies to *all* election laws, yet it makes no effort to distinguish any of the cases cited in Democrats' opening brief that have applied strict scrutiny where, as in this case, a state regulation operated to disqualify a class of citizens from voting. The best the State can do is claim that this Court "implicitly" ruled otherwise in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). But *Griffin* merely stands for the unremarkable proposition that a state does not offend the Fourteenth Amendment by failing to allow for unrestricted absentee balloting. *Dunn* clearly remains the law with respect to direct exclusionary infringements and it has never been explicitly limited, much less overruled, by any subsequent Supreme Court decision.[6]

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[5] Contrary to the State's contention, State's Br. 27, *Harper* was not based on a "separately enunciated constitutional right". The Twenty Fourth Amendment's prohibition of conditioning voter eligibility on the payment of poll taxes applies only to federal elections, whereas *Harper* dealt with the use of poll taxes in state elections, which disqualified a class of voters from voting, and applying a strict scrutiny analysis under the Fourteenth Amendment, the Supreme Court struck the eligibility requirement down.

[6] However, it should not be necessary for the Court to reach this issue because, whether judged under *Burdick* or *Dunn*, the Law must be evaluated under heightened scrutiny and it cannot withstand any level of heightened scrutiny.

The State's effort, State's Br. 27-28, to create a false procedural/substantive dichotomy based entirely on whether a particular election law is "designed to ensure fair elections" is both specious and immaterial to the Court's determination of the threshhold question of law, *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000), whether the burdens imposed by this Law, standing alone, are more than minimal and/or operate with a "number of facially valid provisions of election laws [ ] *in tandem* to produce impermissible barriers to constitutional rights". *Storer v. Brown*, 415 U.S. 724, 737 (1974) (emphasis added); *Dunn*, 405 U.S. at 346 (an election law must be judged in light of the State's "total statutory scheme for regulating the franchise"). Besides having similar exclusionary effects on otherwise registered and constitutionally-qualified voter, as the residency requirements struck down in *Dunn* and the $1.50 poll tax struck down in *Harper*, the Photo ID Law bears little similarity to the types of election regulations the Supreme Court in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995), described as governing the "mechanics of the electoral process", such as the candidate filing deadlines challenged in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the write-in deadlines at issue in *Burdick*, and the ballot access requirements in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Labeling a voting requirement as a "procedural" one simply because it is packaged as a "fraud-prevention" procedure, State's Br. 27, does not convert a substantive new voter qualification into a mere "procedural device" immune from heightened judicial scrutiny.

Both the district court and the State suggest that the Photo ID Law will not disqualify a large number of otherwise eligible voters, but that suggestion is neither legally relevant nor consistent with the evidence. The Supreme Court did not require or even discuss evidence concerning how many voters were disqualified from voting by Virginia's poll tax in *Harper*. Nor did it require evidence in *Dunn* concerning how many voters were precluded from voting by Tennessee's one year residency requirement, 405 U.S. at 335 n.5 (observing that it would be difficult to determine precisely how many would-be voters could not vote because of that requirement); or how many voters in *Harman* were precluded from voting by Virginia's residency certificate requirement. Those laws were struck down because they improperly burdened the rights of *some* voters, and the states did not have a compelling reason for doing so.

In the instant case, it was impossible to determine with any numerical precision how many otherwise eligible voters would be burdened, and for some precluded from voting, for several reasons beyond Plaintiffs' control. First, determining precisely how many registered voters do not possess photo identification turned out not to be possible because the State has failed to purge the voter rolls as is required by the NVRA, 42 U.S.C. §1973gg-6(a)(4). (See Part IV, *infra*). As the State's own neglect has permitted the voting rolls to become bloated with the names of voters who have moved or died, comparing the names of residents who possess licenses or other State-issued photo identification with the names of eligible voters on the voting rolls could not produce the precise number who do not possess the necessary identification. Although the district

court faulted Plaintiffs for this imprecision, subsequent litigation against the State by the Department of Justice makes it clear that the state of the evidence is attributable to the State's failings and not that of the Plaintiffs.[7] Second, this case was brought as a facial challenge before the first election at which the Law would be applied so as to limit the Law's unconstitutional effect to as few voters as possible. As the disqualification of voters was to occur in the future, it was both logically and empirically impossible to prove with numerical precision how many voters would be affected.

Nevertheless, the evidence does establish that the Law will severely burden a substantial number of otherwise eligible voters. Plaintiffs' expert found that of the 610,556 registered voters listed on the Marion County rolls, a minimum of 51,392 (8.4%) and as many as 140,569 (23%) do not possess photo identification issued by the State Bureau of Motor Vehicles.[8] Concededly, because the voter rolls have not been purged as required by federal law, the number of registered voters without photo identification

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[7] That DOJ's complaint alleges that Co-Director King in a May 25, 2006 letter "plainly admitted that 'Indiana is not meeting its voter list maintenance obligations under the [NVRA]'". (Dems' Supp. App. 5).

[8] The State misstates the record when it contends that the Democrats' expert, Kimball Brace, concluded that 99% of registered voters in Indiana possess identification that conforms with the Photo ID Law (State's Br. 24-25). The State cites to the district court's opinion, not Brace's report, to arrive at this 99% figure. (Short App. 51-52). The district court, performing its own analysis without benefit of testimony or the input of the parties, arrived at the number merely by comparing the total number of non-duplicate records in the BMV database (which it pulled from Brace's report) to the court's own extrapolation of the 2005 voting age population in Indiana. (App. 51, n.40). As the district court conceded, its methodology was neither "complete [nor] definitive." (App. 52, n.43). The district court further observed that "several factors . . . suggest the percentage of Indiana's voting age population with photo identification is actually lower than 99%," noting that its comparison of these raw numbers did not take into account persons who had died but whose licenses had not expired, persons who may have moved out of state but who still have licenses, or persons who temporarily reside in the state but have Indiana driver's licenses. (App. 52, n.43).

found by Plaintiffs' expert may be high. Nonetheless, it does constitute clear evidence that there are a large number of registered voters without photo identification, and the percentages are consistent with those that have been indicated by other studies. For instance, the Carter-Ford Commission found in 2001 that an estimated 6% to 10% of voting-age Americans do not possess a driver's license or state-issued photo ID.[9] A recent study conducted in Georgia found that an estimated 675,000 out of 4.26 million registered voters in Georgia (15.8%) did not possess state-issued photographic identification. Errin Haines, "Georgia Court Blocks Voter ID Law Enforcement", www.boston.com/news/nation/articles/2006/07/12/ga_court_blocks_voter_id_law_enforcement (last accessed July 26, 2006). A University of Wisconsin-Milwaukee study found that 23% of persons aged 65 and older (a total of 177,399) did not possess a Wisconsin driver's license or photo ID and 98,247 Wisconsin residents ages 35-64 did not possess a driver's license or photo ID. John Pawasarat, "The Driver License Status of Voting Age Population in Wisconsin", www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (last accessed July 26, 2006).

For voters who, until the Photo ID Law was passed, have managed to live their lives without photo identification, obtaining the identification required by the Law in order to vote is requiring them to invest substantial time, effort and resources to obtain identification they will need to use only once every two years. For instance, Theresa

[9] NAT'L COMM'N ON FED. ELECTION REFORM (2001), at Chapter 6, p. 4, available at http://millercenter.virginia.edu/programs/natl_commission_final_report/1_task_force_report/complete.pdf (last accessed July 31, 2006).

Clemente, a current Indiana resident who moved from Massachusetts, testified that she made three visits to a BMV branch and yet failed to obtain photo identification because even armed with a certified birth certificate on her third visit, she was denied Indiana photo identification because the birth certificate listed her maiden name which, of course, is different than her married name. (R. Doc. 70, Ex. 8). Requiring of non-drivers that amount of investment for such limited use is certain to result in the discouragement and thus disqualification of voting from many otherwise eligible voters. In *Harman*, the Supreme Court noted that individuals would likely find it easier to pay the $1.50 poll tax rather than complete the residency certificate requirement. In this case, paying even a $10.00 poll tax or filling out a residency certificate would be far easier than obtaining photo identification from the BMV.[10]

The other key piece of evidence that demonstrates that the Law will suppress voter turnout is the Report of Professor Hershey. (Jt. App. 183-227). The district court failed to deal with this evidence, and the State has similarly failed to deal with it in its Brief. That evidence, together with all of the other evidence showing the difficulties involved in obtaining photo identification, clearly establishes that the Law will significantly burden a substantial number of otherwise eligible voters, particularly those of limited means. *Tucker v. U.S. Dept. of Commerce,* 958 F.2d 1411, 1414-15 (7th Cir. 1992) (while the

[10] The Court in *Harman* also noted that one of the reasons that poll taxes resulted in voter disqualification was that the tax had to be paid well in advance of election day and therefore disqualified voters who did not plan ahead. 380 U.S. at 539-40. Identifying and communicating with the appropriate agencies in order to gather the necessary primary and secondary documents can easily take weeks if not months, so last minute decisions to vote are clearly not possible for individuals who do not already possess the necessary identification.

poor are not *per se* a protected class, government cannot use wealth to discourage or burden the right to vote).

IV. The State has failed to demonstrate the law's necessity or the existence of the problem the law allegedly seeks to ameliorate.

In addition to identifying and evaluating the precise interest put forward by the State as justification for the burden imposed by its rule, a court must also evaluate the extent to which those interests make those burdens *necessary*. *Anderson v. Celebrezze*, 460 U.S. at 789. A citizen has a constitutionally-protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *Dunn*, 405 U.S. at 336. Thus, if a statute grants the right to some citizens and denies the franchise to others, the courts must determine if the law's exclusions are *necessary* to promote a compelling state interest. *Id.* at 340-41. Having once granted the right to vote on equal terms, the State may not arbitrarily value one citizen's vote over that of another. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

The record is totally devoid of any evidence, including any evidence *actually considered by the Legislature*, that the burdens all parties acknowledge are imposed by the Photo ID Law are *necessary* to identify illegitimate voters, or that the law is a proportional means of deterring and detecting such fraudulent voters. *Randall v. Sorrell*, 126 S. Ct. at 2499 ("The record contains no indication that corruption (or its appearance) is significantly more serious in Vermont than elsewhere"). Clearly, the Law's application will sweep broadly, disqualifying voters about whose eligibility there could be no

legitimate question. A voter without a driver's license will not be permitted to cast a regular ballot even if he could be identified by a member of the precinct election board who also happened to be his mother.

The State's primary reason for imposing the burdens associated with the Law had nothing to do with any evidence of voter impersonation, because none exists and none was presented to and considered by the Legislature.[11] Instead, the State has claimed that the Law is justified by the fact that Indiana's voter registration rolls are inflated with the names of many voters who have moved or died. These inflated voter rolls were not caused by devious citizens planning to vote in multiple jurisdictions or in the name of dead persons, but rather were the result of the State's own failure to conduct the periodic uniform programs to purge the voter rolls of voters who have moved or died, as mandated prior to every federal election by the NVRA, 42 U.S.C. §1973gg-6(a)(4). (Dems' Response Brief, R. Doc. 103, at 26-28). While the district court chose not to address this argument, and the State in its summary judgment reply brief (R. Doc. 112) blithely claimed that the argument "lacked merit" and was unsupported by evidence, just eight days after Appellants filed their respective briefs in this Court, the United States Department of Justice filed suit against the State of Indiana, alleging in its complaint that Indiana "failed to conduct a general program that makes a reasonable effort to identify and remove ineligible voters from the State's registration list; has failed to remove such

[11] While the amicus ACVR's brief suggests that the adoption of photo ID laws is a nationwide trend with bipartisan support, strict laws like Indiana's have been adopted in only three states, along strict party-line votes; in several other states, such laws have been proposed but not adopted.

ineligible voters; and has failed to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters". (Dems' Supp. App. 3). So as is now apparent, the State's primary *post hoc* justification for imposing these burdens was the result of the State's own failure to comply with the NVRA's explicit voter list maintenance mandates. *Harman,* 380 U.S. at 543 (noting the availability of numerous devices, including the purging of registration lists, to demonstrate the lack of necessity for the challenged restriction).

The State claims that it is not required to justify the heavy burdens imposed by the Law on non-drivers, or to demonstrate that the Legislature actually considered and relied on any evidence of the existence of voter impersonation, because the State has the right "to respond to potential deficiencies in the electoral process prospectively", citing *Munro v. Socialist Workers Party*, 479 U.S. at 195-96. But *Munro's* central holding – that a state is not required to come forward with empirical evidence supporting its articulated interest – applies to laws that regulate candidates' access to the ballot, *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997); and not to other election laws that directly impinge on voting rights.

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (plurality opinion), does not stand for the proposition, State's Br. 38, that the State may restrict its citizens' voting rights in the absence of any legislative findings supporting the need for such a restriction. *Nixon* upheld a law limiting campaign contributions of the type and character the Supreme Court had nearly a quarter century earlier approved in *Buckley v. Valeo*, 424 U.S. 1

(1976). The idea that large contributions can corrupt "is neither novel nor implausible". *McConnell v. FEC*, 540 U.S. 93, 144 (2003). *Nixon* did not announce any new exception to the rule that a government must demonstrate that the legislature relied on more than mere conjecture and anecdotal evidence to justify directly infringing the right of otherwise qualified citizens to vote. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("The Government does not point to any record evidence of legislative findings suggesting any special corruption problem in respect to independent party expenditures").

The State makes the sweeping claim, State's Br. 43, that "overwhelming public support for an election-reform law can establish the existence of a constitutionally sufficient justification for the law", again citing the *Nixon* plurality opinion, 528 U.S. at 394. But popular opinion can never defeat First Amendment protections, *id.*, and polls showing a lack of confidence in the electoral system may have far more to do with commonly-used laws or devices which are perceived by the public to skew election results, i.e., gerrymandering, a lack of confidence in the integrity of voting equipment or election officials, flawed ballot designs, etc., than signaling a desire for the adoption of exclusionary voter identification laws. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 499-500 (1985) (a law abridging First Amendment freedoms must be supported by legislative facts demonstrating the need for the law, not simply by

evidence of public perception of corruption or the public's "tendency to distrust" the electoral system).[12]

Indeed, under the State's view, election laws which directly infringe on the fundamental right to vote would require a lesser evidentiary basis and receive a lower level of judicial scrutiny than regulations affecting adult entertainment activities, *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); public indecency regulations, *Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991); or laws restricting commercial speech, *Central Hudson Gas & Electric Corp. v. Public Ser. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980), all of which are subject to intermediate scrutiny.

V. The Photo ID Law's burdens are magnified by its vagueness.

A further burden resulting from the Photo ID Law is its vagueness. This vagueness heightens the prospect of its selective or discriminatory enforcement at the polls, and increases opportunities for intimidation of voters by overzealous or uninformed precinct workers or political challengers. The State makes light of this assertion by observing that some businesses require photo identification before rendering services. State's Br. 35. But voting and performing business transactions are by no means constitutionally equivalent. The erroneous exclusion of legitimate voters carries far greater costs because assessing the will of the people is the essential task of democracies.

[12] ACVR's suggestion that Indiana's Law is consistent with the Carter-Baker Commission's recommendations is misleading. The Commission recommended a photo ID requirement only to the extent that it was part of a national, uniform requirement that included proactive governmental efforts to register voters. Moreover, as the Brennan Center brief showed, Carter and Baker published an article expressly rejecting Georgia's photo ID law, which cannot be meaningfully distinguished from Indiana's.

Voting also enjoys significant constitutional protections, whereas cashing a check, purchasing cigarettes, or visiting an adult entertainment facility do not. Polling places must be permitted to retain their essential democratic characteristics – they should not be turned into gauntlets resembling airport security checkpoints manned, not by government employees, but by unaccountable partisan election workers who will serve as gatekeepers, empowered to decide who will and who will not be permitted to cast a valid ballot.

There is actually a greater risk of content-based discrimination by the unbridled, unreviewable subjective judgments of unelected partisan officials than accountable governmental officials. *See, Burson v. Freeman*, 504 U.S. 191, 200-206 (1992) (detailing the history of voter intimidation and election fraud in the United States).

VI. The Photo ID Law is not narrowly tailored.

Electoral access and integrity need not be mutually exclusive objectives; each can be achieved without impairing the other. Anti-fraud proposals that affect the right to vote should be narrowly tailored to exclude as few voters as possible such as by providing alternatives for voters who are unable to produce the preferred form of identification.

Under heightened scrutiny it is not enough for the State to show that a statute furthers a substantial state interest, because in pursuing that interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. *Dunn*, 405 U.S. at 343. If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State must choose "less drastic means". *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004) (*en banc*) (quoting

Dunn, 405 U.S. at 343). Requirements for voting which represent a separate voting qualification imposed on bona fide electors must be separately tested by this stringent standard, *Dunn*, 405 U.S. at 344, and when a statute bars both qualified and unqualified persons from voting in order to prevent fraud, there is a heightened requirement to demonstrate a necessity for the restriction. *Id.* at 345. Thus, certain voting restrictions may be deemed unnecessary in light of, for example, other more tailored state laws which serve the same purpose of preventing fraud, such as voter registration laws, criminal penalties imposed on voters who commit fraud, or the swearing out of an oath. *Id.* at 346, 353. Moreover, where a State has available other remedial actions to accomplish its objectives, it can hardly be argued that a law which also excludes many legitimate voters is the most precise and targeted way to deal with the potential for fraud. *Id.* at 354.

The Photo ID Law is far from being the least drastic means of promoting electoral integrity. It is both overinclusive because it applies to all in-person voters rather than being narrowly targeted, and underinclusive because it excludes the one form of voting – mail-in absentee voting – that has experienced fraud. It is not narrowly tailored because it does not allow the much wider range of identifying documents such as the federal government under HAVA and other states permit, such as a current utility bill, bank statement, government check, paycheck or other government document showing the voter's name and address. 42 U.S.C. §15483(b)(2)(A)(i)(II). And it forces non-driving voters who are indigent and "unable to obtain proof of identification without payment of a fee", Ind. Code §3-11.7-5-2.5(c)(2), to personally appear before the county election

board, since indigency affidavits are not available at the polls.

VII. The Photo ID Law violates Democrats' right to free association

The right to associate in a political party is a "particularly important political right". *Randall v. Sorrell*, 126 S. Ct. at 2483 (citing *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). Democrats' associational interests here are stronger than those at issue in *Clingman v. Beaver*, where the Court applied less exacting scrutiny in upholding Oklahoma's law prohibiting the registered members of one party from voting in the primary of a different party, even where invited to do so. 544 U.S. at 588-89 ("a voter who is unwilling to disaffiliate from another party to vote in the [Libertarian Party's] primary forms little "association" with the [Libertarian Party] — nor the [Libertarian Party] with him"). The voters at issue here are not members of or associated with a different political party, rather they are affiliated with the Indiana Democratic Party whose only disqualification from voting in that Party's primary is their inability or unwillingness to obtain or show the required form of conforming photo identification at the polls on election day.

The State also claims that the law is no more an impingement on the right to associate than the advance-registration requirement or the in-person voting requirement. State's Br. 52. But the Supreme Court has repeatedly upheld registration requirements as "'classic' examples of permissible regulation". *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 196 n.17 (1999).[13]

[13] Democrats adopt all arguments made by the Crawford appellants not specifically included herein.

CONCLUSION

The district court's judgment must be reversed.

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CERTIFIED WORD COUNT

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,951 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED this 2nd day of August, 2006.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218:

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

No. 06-2317:

INDIANA DEMOCRATIC PARTY, *et al.,*	)	
	)	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
TODD ROKITA, *et al.,*	)	
	)	
Defendants-Appellees.	)	Hon. Sarah Evans Barker, Judge

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