Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

NO. 07-21

WILLIAM CRAWFORD, ET. AL.,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, ET AL.

Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, ET AL.,

Petitioners,

v.

TODD ROKITA, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR LAWYERS DEMOCRACY FUND AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Lawyers Democracy Fund,[2] a non-profit, tax exempt organization under section 501(c)(4) of the Internal Revenue Code, has as its mission to promote fair and honest elections, free of coercion, intimidation and fraud. Lawyers Democracy Fund seeks to assure that all citizens are able to exercise their right to vote and that reasonable, common sense anti-fraud protections be enacted to prevention dilution of each person's honest vote.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit panel below confirmed the common sense rationale for Indiana's Voter ID requirement. Citing the 2005 Carter-Baker Commission Report, the panel observed that today, no person in the United States can board an airline, enter a government building, or purchase liquor or cigarettes, without providing photo identification. Voting is one of the core elements of our American freedoms, and the right to vote is precious. Yet the historic record of vote fraud in America is clear. Attempts to steal the vote, and thus steal a measure

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

[2] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members or its counsel contributed monetarily to this brief.

of each honest citizen's franchise, are neither imagined, nor implausible. Unfortunately, a long list of such attempts can be compiled since the turn of this century just seven years ago.

Article I § 4 of the Constitutional vests the States with power to enact procedural requirements for elections, including the power to prevent vote fraud. The Court views such requirements with deference unless they impose a "severe burden" on the right to vote.

The Voter ID law does not impose a severe burden on the right to vote. On the contrary, by reducing vote fraud, it preserves the right to vote. An eligible voter whose ballot is nullified by an illegal vote has been disenfranchised just as much as an eligible voter who cannot cast a ballot.

More than 99% of Indiana voters already have photo ID and possession of such documentation is necessary to exercise numerous other constitutional rights, such as the right to file suit in federal court or to travel aboard commercial aircraft. Petitioners have not identified a single person whom photo ID would prevent from voting and the district court excluded their statistical evidence as "utterly incredible."

Indigent persons or persons with religious objections to photo ID may cast a provisional ballot, which will be counted if they file an affidavit to that effect within ten days after the election. Non-indigent persons can obtain the documents necessary to obtain photo id by exercising a minimal amount of foresight and initiative. This is no

more burdensome than the requirement to register to vote before the election.

If the Voter ID requirement creates a severe burden, it is hard to imagine any rule requiring voter identification that would pass muster.

More than half the states have enacted voter ID laws, and the Court should allow those experiments in democracy to continue.

There is no question that vote fraud is, in some places, a serious problem. The bipartisan Baker-Carter Commission concluded that there is "no doubt" that voter fraud and multiple voting take place and "could affect the outcome of a close election." The 1600 fraudulent ballots cast in the 2004 Washington gubernatorial elections substantially exceeded the 129 vote plurality of the winner, but the result stood because no one knew who the beneficiary of the fraud was.

Perhaps the most telling evidence however, is that Petitioners were unable to identify a single person injured by the law. This problem also confronted challengers to Georgia's and New Mexico's Voter ID statutes, as well as Arizona's citizen ID statute. These cognizable facts before the Court lead to only one conclusion. This reasonable, non-discriminatory voting requirement is akin to advance voter registration requirements, and subject to limited constitutional scrutiny.

ARGUMENT

I. NONE OF THE PETITIONERS IN THIS CASE HAVE STANDING TO PURSUE THE CLAIMS IN THIS LITIGATION

A. Article III Standing and Case or Controversy

The opponents of photo identification laws in this case find themselves facing the same stunning omission that every lawsuit challenging photo identification requirements up to this point has faced—no individual or group has standing to challenge the law in question. Opponents again fail to identify a single voter that is actually harmed by the provisions of any photo identification for voting requirement. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 783 (2006); *see also Common Cause/Georgia v. Billups,* 504 F.Supp.2d 1333, 1374, 1380 (N. D. Ga. 2007).

Although the Seventh Circuit addressed the issue of standing very succinctly, Article III standing is the " 'irreducible' constitutional minimum" that must be satisfied when a party brings a claim in federal court. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In order to assert a claim under federal jurisdiction, a plaintiff must show that (1) he or she has suffered an actual or threatened injury (an "injury in fact"), (2) the injury is fairly traceable to the challenged conduct of the defendant, and (3) the injury is likely to be redressed by a favorable ruling. *Id.* at 498-99.

Petitioners in this case are unable to demonstrate even the first element of standing, because there is no entity or individual that has suffered an injury in fact. In order to show an injury in fact, a plaintiff must show an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (quotation marks and citations omitted).

Because of the lack of any individuals or entities that are harmed, if the Court reaches the merits of this case, there is no evidence in the record, or elsewhere, that it will actually grant relief to anyone. Indiana and Georgia first passed laws requiring photo identification for in-person voting in 2005. Ind. Public Law No. 109-2005; 2005 Ga. Laws, Act 53. Since that time, the plaintiff organizations opposing these laws politically and legally have failed to identify any individual who has actually had his or her right to vote violated by requiring photo identification for in-person voting. *Common Cause/Georgia,* 504 F.Supp.2d at 1374, 1380; *Rokita*, 458 F.Supp.2d at 783.

Petitioners can be divided into two distinct groups: (1) the organizational plaintiffs, including the Indiana Democratic Party, which are asserting claims on behalf of their members or in their own right; and (2) the individuals who are asserting individual and representative claims, including the state legislators. Each group lacks standing in this case.

B. The Organizational Plaintiffs Lack Standing to Assert Any Claims

1. The Democratic Party and other organizations cannot represent claims of their members in this case

Only under limited circumstances may organizations represent claims of their members. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000). In order for an organization to pursue an action on behalf of its members, the organization must show at least one member who has standing in their own right. *Id.* Like the plaintiffs in Georgia, the organizational plaintiffs in this case, including the Indiana Democratic Party, fail to locate a single member of any organization that has standing to sue. *Rokita*, 458 F.Supp.2d at 817 ("None of the Organization Plaintiffs has identified a single member who does not already possess the required photo identification and has an injury beyond 'mere offense' at having to present photo identification in order to vote which, as we have said, does not confer standing."); *see also Common Cause/Georgia*, 504 F.Supp.2d at 1380. As discussed below, the requirement of photo identification does not result in a denial of equal protection, and thus the district court's determination that the Democratic Party can assert claims on behalf of its members is incorrect. *Rokita*, 458 F.Supp.2d at 813-814. Thus, the organizational plaintiffs do not have standing to sue on behalf of their members.

2. The organizational plaintiffs cannot assert claims in their own right

The Seventh Circuit found that the Indiana Democratic Party had standing to pursue the claims outlined in the complaint independently, then quickly moved to the merits of the case. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951-952 (7th Cir. 2007). The Seventh Circuit relied on *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), to establish that the Indiana Democratic Party suffered an injury in fact, because the Indiana Democratic Party claims it would devote resources it would not otherwise spend to get its supporters to the polls if the state enforced the photo identification requirement. *Crawford,* 472 F.3d at 951. However, the assertion that the Indiana Democratic Party would reallocate resources is only that—an assertion. The Indiana Democratic Party has not demonstrated that it actually reallocated any of its resources, nor are there any facts, beyond vague assertions, to suggest that it plans to do so. *Rokita*, 458 F.Supp.2d at 816.

This Court should not stretch *Havens* to reach the same conclusion as the Seventh Circuit. In *Havens,* this Court found an organization had standing because counteracting the discriminatory housing practices of the defendants resulted in the organization devoting significant resources away from its core mission. *Havens,* 455 U.S. at 379. *Havens* is distinguishable because here, as opposed to the context of the discriminatory housing practices, an injury in fact cannot be clearly demonstrated. Resources the Indiana Democratic Party would expend for elections with or without the photo identification requirement relate to the exact same mission: getting Democratic voters to the polls.

Unlike the situation in *Havens*, where the organization had to devote specific resources away from its core mission, the method by which the Indiana Democratic Party performs or encourages its activities does not detract from its core mission. *Id.*

In addition, the organization in *Havens* had *already* expended significant resources to counteract the defendants' policies, *id.*, while the Indiana Democratic Party has expended nothing outside of its legal fees, only saying it will devote some funds to the subject in the future. *Rokita*, 458 F.Supp.2d at 816. The district court in *Common Cause/Georgia* refused to extend *Havens* when the NAACP made an argument almost identical to that of the Indiana Democratic Party in this case. *Common Cause/Georgia,* 504 F.Supp.2d at 1372. The district court found that the "injury" of reallocating funds is completely of the making of the organization, without evidence that the organization had expended any funds as a result of the photo identification law. *Id.* at 1372-1373. As is the case here, and unlike the organization in *Havens,* the NAACP also only said it would devote funds at some point in the future. *Havens,* 455 U.S. at 379; *Common Cause/Georgia*, 504 F.Supp.2d at 1372-1373.

Extending the holding of *Havens*, as the Seventh Circuit did in this case, undermines the concept of standing by allowing any organization to create standing by merely claiming that a law would result in a reallocation of its funds at some point in the future. *Id.* at 817. The requirement of an "injury in fact" is reduced to a mere "allegation of possible harm," and potentially allows every organization to

assert standing in its own right instead of bringing claims on behalf of its members. This Court and other federal courts face the distinct possibility of rendering a large number of opinions where no actual case or controversy exists. It is a major change in U.S. law to conclude that the " 'irreducible' constitutional minimum" of standing by showing an injury in fact is not required for an organization to pursue a claim in federal court. *Warth*, 422 U.S. at 498-99.

But even if this Court did extend *Havens*, there is no clear evidence that those less likely to possess photo identification are members of the Indiana Democratic Party. The Seventh Circuit relies on conclusory statements related to the likelihood of lower-income individuals to lack photo identification to support the concept that Democrats are less likely to possess photo identification, but the Seventh Circuit does not point to a specific study that yields that same conclusion. *See Crawford*, 472 F.3d at 951. The district court in Georgia dismissed a similar attempt to show a connection between partisan and income-based likelihood to lack photo identification under a *Daubert* motion. *Common Cause/Georgia*, 504 F.Supp.2d at 1371. The district court in Indiana discussed at length why the expert report offered by Petitioners to show discrimination was generally unhelpful. *Rokita*, 458 F.Supp.2d at 802-809.

Petitioners' reliance on *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise* 501 U.S. 252 (1991) is also inappropriate in this case. While Petitioners argue that this Court found standing for an organization based on frustration of

the group's primary purpose, this Court focused on the alleged personal injury to the respondents due to "increased noise, pollution, and danger of accidents," before also citing the increased difficulty for the group to fulfill its purpose. *Id.* at 264-265. The assertion of frustration of purpose without more was insufficient to establish an injury in fact. *Id.* If frustration of purpose alone is a sufficient basis for finding jurisdiction without any additional injury requirement, then groups wishing to challenge laws could create organizations with a "purpose" that would be affected by a law without ever having to show any injury in fact. Extending the doctrine of standing to this point renders it almost meaningless.

If the Court finds that frustration of purpose alone is sufficient to confer standing, *Metro Washington* still does not provide support for Petitioners' position. *Id.* CAAN had a very clear purpose in *Metro Washington*: to reduce noise and aircraft activity at Washington National Airport. *Id.* at 265. There is a clear connection between the challenged authority and a reduction in aircraft activity. *Id.* The primary purpose of the Indiana Democratic Party is not nearly as clear-cut as the purpose of CAAN, and there is no clear connection between photo identification requirements and the purpose of the Indiana Democratic Party. The Indiana Democratic Party will undertake the same activities regardless of whether the photo identification requirement is enforced. Thus, *Metro Washington* is inapplicable to this case.

Tex. Democratic Party v. Benkiser is also distinguishable in that it involved a very clear

financial injury that occurred to the state party, not a vague potential injury. 459 F.3d 582 (5th Cir. 2006). In *Benkiser*, the Fifth Circuit upheld the standing of the Texas Democratic Party because the party had a clear injury in fact. *Id.* at 586. If the state allowed the withdrawal of then-Congressman Tom DeLay, the Texas Democratic Party would be required to raise a large amount of funds for a specific time frame to run a more competitive race. *Id.* The court could readily identify the actual injury in *Benkiser*. *Id.* In contrast, the Indiana Democratic Party merely offers vague assertions of changes to internal accounts based on the photo identification requirement. *Rokita*, 458 F.Supp.2d at 816. The court in *Benkiser* also relied on the harm to the election prospects of the Texas Democratic Party, providing another basis for an injury in fact that the Indiana Democratic Party is unable to show in this case, because it cannot conclusively state the partisan impact of the law. *Benkiser*, 459 F.3d at 586-587.

3. The organizational plaintiffs cannot assert claims by those who forget or lose their photo identification

The district court incorrectly determined that the Indiana Democratic Party has the ability to bring claims on behalf of voters who forget or lose their photo identification. *Rokita*, 458 F.Supp.2d at 812. An individual who forgets photo identification is no different from an individual who forgets any other form of identification that may be required by his or her state, or that was required by the state of Indiana prior to passage of the photo identification requirement. Additionally, the Indiana Democratic

Party is unable to identify these voters. *Id.* at 811-812. It is entirely possible that the voters who forget their identification are part of different political parties. *Id.* The Court has made clear that a mere hypothetical harm is not enough to grant standing to a particular plaintiff. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). The Court should not rely on this potential issue to create standing in this case.

The Indiana Democratic Party and the other organizational plaintiffs do not have standing to assert claims on behalf of individual members or in their own right. They have not suffered a legally-cognizable harm to themselves, and have no members which have standing to bring an independent action.

C. Individual Plaintiffs Lack Standing to Assert Any Claims

The individual plaintiffs do not have standing to pursue claims that their constitutional rights are violated by the photo identification requirements. In order to assert a claim, the individual plaintiffs must show an actual or imminent invasion of a legally-protected interest. *Lujan*, 504 U.S. at 560. The individual plaintiffs in this litigation simply cannot show that any legal interest is even affected, let alone invaded. Some of the individual plaintiffs in this case already have photo identification, and others have ready access to photo identification, including one plaintiff that actually works at the Bureau of Motor Vehicles ("BMV"). *Rokita*, 458 F.Supp.2d at 798-799.

Contrary to the finding of the district court, merely not having photo identification does not confer

standing on an individual. The district court in *Common Cause/Georgia* recognized that failure to possess photo identification does not invade a legally-protected interest, because there are clear alternatives available to vote without identification. 504 F.Supp.2d at 1373-1374. Individuals who lack photo identification could easily obtain a free card from the state, or the individuals could choose to vote by absentee ballot with no photo identification requirement. *Id.* at 1377-1379; *Rokita*, 458 F.Supp.2d at 812-813, 827. While the *Rokita* court found that the imposition of a barrier to voting is sufficient to show invasion of an interest and grant standing to individual plaintiffs, it failed to take into account that no barrier has actually been erected by the statute because of the available alternatives to in-person voting. *Rokita*, 458 F.Supp.2d at 813-814. Individuals can obtain absentee ballots and freely vote without photo identification. *Id.* at 812-813, 827. Individuals can go to the BMV and obtain free identification cards that allow them to vote in person if they so choose. *Id.* Individuals can vote a provisional ballot and return with sufficient identification prior to certification of the election results. *Id.* The court in *Common Cause/Georgia* correctly recognized that simply requiring photo identification is not by itself a burden on the right to vote. 504 F.Supp.2d at 1377-1378.

Because no individuals are harmed by the photo identification law, there are no individuals with standing to pursue any claims in this litigation. Without any individual plaintiffs, the legislators cannot represent the interests of their constituents or any other individuals who may be affected by the

photo identification law. *See Laidlaw*, 528 U.S. at 181.

In spite of the best efforts of the Petitioners, no group or individual before this Court has standing to pursue the claims in the Petition. No individual or group has demonstrated the invasion of any legally-protected interest by the actions of the defendants, and cannot show standing to pursue any claims.

II. THE VOTER ID LAW IS A REASONABLE MEANS TO SERVE THE STATE'S COMPELLING INTEREST IN PRESERVING THE ACTUAL AND PERCEIVED INTEGRITY OF ELECTIONS.

There are two ways to disenfranchise a voter. One is to deny an eligible voter the opportunity to cast a ballot. The other is to allow an ineligible voter to cast a ballot that negates the properly-cast vote of an eligible voter. The latter is just as effective a means of disenfranchisement as the former:

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Purcell v. Gonzalez, ___ U.S. ___, 166 L.Ed. 2d 1, 4 (2006), *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The inability of petitioners and their *amici* to recognize that simple truth infects every aspect of their briefing, from the standard of review to the

deference due to the State of Indiana to the reasonableness of the Voter ID law.

A. Courts should defer to the legislative judgment about the wisdom of the Voter ID law

This Court has always recognized the difference between substantive restrictions on the right to vote and procedural requirements for the exercise of that right. The Constitution specifically delegates to the states the authority to implement the latter. Because the Voter ID law does not impose a severe burden on the right to vote, the Court should defer to the legislative judgment about the wisdom and necessity of such a law to avoid corruption in the electoral process.

This Court has held that many voting requirements were "constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995) (emphasis original). Accord, *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

Article I § 4 of the Constitution grants "broad power," *Cook*, 531 U.S. at 523," to the states to regulate the procedure for elections: "The Times, Places, and Manner of holding Elections for Senators

and Representatives, shall be prescribed in each State by the Legislature thereof."[3]

The Court has held that this delegation includes, not just the nuts and bolts of holding elections, but fraud prevention as well:

> [T]hese comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, **prevention of fraud and corrupt practices**, counting of votes, duties of inspectors and canvassers, and making and publication of election returns . . . .

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

Voting being a fundamental right, the deference due the state legislature is not unlimited. The Court must weigh "the character and magnitude of the asserted injury" against "the precise interests" the state is seeking to serve. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). A restriction deserves strict scrutiny only when it places "severe burdens on plaintiffs' rights." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). When the burden is not severe, the review is "less exacting" and a "State's important regulatory interests will usually be enough

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[3] Article II § 1 also vests authority in the state legislatures to determine the method of choosing electors for the presidency.

to justify reasonable, non-discriminatory restrictions." *Id.*, *quoting Burdick,* 504 U.S. at 434 (internal punctuation omitted). *Accord*, *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("[w]e have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process").

For a variety of reasons, the Court should find that the burden here imposed is insufficiently severe to warrant strict scrutiny. Instead, the Court should defer to the expertise of the legislature.

First and foremost, as the Seventh Circuit recognized, strict scrutiny "would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger." 472 F.3d at 852. The objective of voter ID is to prevent an ineligible voter from disenfranchising an eligible voter by nullifying the latter's ballot:

> [T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quint-essentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.

Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

In the context of campaign finance laws, the Court has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Fed.*

Election Comm'n v. Nat'l Right to Work Committee, 459 U.S. 197, 210 (1982). As vote fraud is one type of electoral corruption, the Court should apply the same standard here.

The National Voter Registration Act, the so-called Motor Voter Law, 42 U.S.C. § 1973gg *et seq*., and the voter id provisions of the Help America Vote Act (HAVA), 42 U.S.C. § 15483, both make it substantially easier to register to vote. The minimal voter ID provisions in HAVA make it considerably easier for ineligible voters to register.

Suppose an eligible voter challenged these statutes on the ground that they increased the likelihood of vote fraud. One doubts that this Court would apply strict scrutiny to such a challenge. Instead, the Court would defer to Congress on just where on the continuum the line should be drawn.

Second, photo ID is a widely used form of identification that virtually everyone has and is relatively easy to get. The district court found as a fact that more than 99% of all Indiana voters already had photo ID in the form of a valid driver's license. 458 F.Supp. 2d at 807. Indiana's requirements for obtaining photo ID are not materially different from those in the federal National Driver Register, 49 U.S.C. § 30301.

Photo ID is essential for the exercise of numerous rights. To exercise the constitutional right of access to the federal courts, one must present valid photo ID even to enter the building. To exercise one's constitutional right to travel to the seat of

government to petition Congress, photo ID is a prerequisite to boarding the aircraft. Most banks will not disburse cash without a photo ID; many commercial office buildings deny access to visitors without photo ID. As the district court held:

> The incontrovertible fact that many public and private entities already require individuals to present photo identification substantially bolsters the State's contention that among all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity.

458 F.Supp. 2d at 826 (internal punctuation omitted).

Third, the district court found as a matter of fact that petitioners could not identify a single eligible voter who would be unable to cast a ballot due to the photo ID law, 458 F.Supp. 2d at 822, and that petitioners' statistical evidence was "utterly incredible and unreliable." *Id.* at 803:

> [I]t is a testament to the law's minimal burden and narrow crafting that Plaintiffs have been unable to uncover anyone who can attest to the fact that he/she will be prevented from voting despite the concerted efforts of the political party and numerous interested groups who arguably represent the most severely affected candidates and communities.

Id. at 823.

Fourth, the law provides an escape hatch for those who forget their photo ID or cannot obtain one for religious or economic reasons. The voter may cast a provisional ballot and validate that ballot by appearing at the clerk of courts or county election board within ten days of the election and providing photo ID. If the voter has religious objections to photo ID, or is indigent, the voter can execute an affidavit to that effect and the provisional ballot will be counted.

This is no more burdensome than a state requirement that a voter register, in order to vote, "within a state-defined reasonable period of time before an election" – a burden that this Court characterized as "minimal." *Clingman v. Beaver*, 544 U.S. 581, 590-91 (2005) (internal punctuation omitted). It is considerably less onerous than the rule upheld in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), requiring such registration eight months before the presidential primary and 11 months before the non-presidential primary.

To be sure, it is theoretically possible to imagine an eligible first-time applicant, not indigent, who encounters unexpected difficulties in obtaining the necessary primary documents. But this is a one-time problem; once in possession of photo ID, the applicant need not submit any more primary documents.

It is also a problem that can be easily resolved by a little foresight and a little diligence. If the applicant starts the process of obtaining primary documents early enough before the election, those

obstacles can be overcome in time to be in possession of photo ID once the election rolls around.

In *Rosario*, the voter had to have enough foresight and initiative to act eight months before the presidential primary. The Court held that was not an undue burden in light of the importance of preserving "the integrity of the electoral process." 410 U.S. at 761. It is inconceivable that any significant number of people could not track down primary documents in eight months.

Fifth, applying strict scrutiny to this modest reform would almost surely end any further efforts to stamp out vote fraud. Justice Brandeis was right: "[O]ne of the peculiar strengths of our form of government" is "each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'" *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973), *quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

Prompted by the Baker-Carter Report, many states are tinkering with their election laws to root out vote fraud. Perhaps some of those efforts will work better than photo ID. Or perhaps there are better ways to implement photo ID than Indiana's. *Rodriguez* held that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education," 411 U.S. at 50, and the same is true of efforts to eradicate vote fraud.

The flexible and deferential legal standard announced in *Burdick* permits the states to function as laboratories of democracy. It recognizes that the legislature is far better equipped than courts to draw the delicate balance between encouraging all eligible voters to cast ballots and discouraging ineligible voters from trying to do so.

Petitioners and their *amici* argue that they are entitled to strict scrutiny if they can prove that photo ID prevents so much as one eligible voter from voting. This Court has never adopted so draconian a rule. *Burdick* itself recognizes that every election rule affects "at least to some degree" an eligible voter's right to vote. 504 U.S. at 433:

> Accordingly, the mere fact that a State's system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny.

Id. (citations and internal punctuation omitted).[4]

Instead, the Court required a balancing test, weighing the "magnitude" of the injury against the state's interests. 504 U.S. at 434. As the Seventh Circuit recognized in the instant case, the "fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer." 472 F.3d at 952. *See Nixon v. Shrink*

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[4] The Court has repeatedly equated ballot access and voting rights cases as equivalent for purposes of constitutional analysis. *Burdick*, 504 U.S. at 438, *quoting Bullock v. Carter*, 405 U.S. 134, 143 (1972).

Missouri Government PAC, 528 U.S. 377, 396 (2000) ("a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional").

One suspects that petitioners and their *amici* would not be thrilled if their logic were applied to laws like the Motor Voter Law or HAVA that are designed to encourage voter registration. Such laws inevitably make vote fraud easier. If the disenfranchisement of a single voter is enough to require strict scrutiny, then a single act of vote fraud requires strict scrutiny and, most probably, invalidation of these laws. That is no more reasonable than ousting photo ID if it excludes a single eligible voter.

Petitioners simply refuse to recognize that vote fraud disenfranchises eligible voters just as much as refusing to count their ballots in the first place. Reasonable people can, of course, disagree on where the line should be drawn. But that is precisely why *Burdick* adopts a deferential standard of review that the Court should apply in the instant case, just as it did in *Nat'l Right to Work*.

B. The Indiana Legislature could reasonably have concluded that Photo ID was a reasonable response to voter fraud

The district court made a number of factual findings, none of which are seriously contested. Those factual findings clearly establish that the Indiana legislature could reasonably have concluded

that vote fraud was a serious problem; that photo ID was a reasonable solution; and that photo ID would not seriously impact eligible voters.

1. The Legislature could reasonably have concluded that both the fact and the perception of voter fraud was a serious problem.

The district court held that, to the extent that Indiana was required to provide empirical support for its concerns about vote fraud, "it has clearly done so." 458 F.Supp. 2d at 826. The foundation for that factual finding is the conclusions of the bi-partisan Baker-Carter Report and the experience of other states with serious vote fraud.

The Comm'n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* (Sept. 2005) (Baker-Carter Report) (co-chaired by former Democratic President Jimmy Carter) concluded that "there is no doubt" that both vote fraud and multiple voting occur and "could affect the outcome of a close election." App. 138. The Report also concluded that the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." Baker-Carter Report at 18.

The most egregious illustration of actual fraud is the 2004 Washington State gubernatorial election, in which the winner had a plurality of 129 votes. In post-election litigation, the trial court concluded that more than 1,600 ballots had been fraudulently cast. Since the court could not determine how many of

those fraudulent votes had been cast for the winner, it refused to set aside the election. State S.J. Ex. 3 at 4-5; 19.

Other recent examples of election fraud, accepted as true by the district court, include:

- In Milwaukee in the 2004 general election, more that 200 ineligible felons voted; more than 100 persons voted twice, used fake names or false addresses, or voted in the name of dead people. More than 4,500 votes were cast than voters listed. State S.J. Ex. 4 at 2-4.

- In St. Louis, in the 2000 general election, there were more than 1,000 fraudulent ballots cast, including 14 dead people, 68 multiple votes, and 79 vacant-lot votes. Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (2004) at 64.

- In the 1997 Miami mayoral election, dozens and perhaps hundreds of persons not residing in the city cast fraudulent ballots. State S.J. Ex. 10 at 1-2.

- The Department of Justice has conducted more than 180 investigations into voter fraud since 2002, making 89 charges and securing 52 convictions. State S.J. Ex. 2 at 23.

- Dead people voted in Georgia, Illinois, and Pennsylvania. State S.J. Ex. 12-14; 18. The Seventh Circuit has held that voter fraud "is a serious problem in U.S. elections generally" and Illinois has a "particularly gamey history" of voter fraud. *Roupas*, 385 F.3d at 1130-31.

That is precisely the kind of empirical information on which this Court has held a legislature may reasonably rely in making policy. In *Nixon*, the Court rejected a First Amendment challenge to Missouri's restrictions on campaign contributions based on the State's interest in avoiding corruption. The evidence on which the Court relied included:

- The state treasurer gave the state's banking business to a bank that had contributed $20,000 to the treasurer's campaign.

- The state auditor got $40,000 from a brewery and $20,000 from a bank.

- A political action committee linked with an investment bank gave $420,000 to candidates in northern Missouri.

- A state representative was accused of taking kickbacks for sponsoring legislation.

- A state attorney general was indicted for using the state workers compensation fund to benefit campaign contributors.

Nixon, 528 U.S. at 393-94. The Court described this evidence as "not present[ing] a close call." *Id.* at 393. *Accord*, *Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976) (relying on the Seventh Circuit's description of incidents of corruption caused by campaign contributions).

Petitioners and their *amici* make much of the fact that no one in Indiana has ever been charged with voter fraud based on impersonating another voter. The inference they seek to draw from that fact is that such fraud never occurs. As the Seventh Circuit observed, it was at least as reasonable for the legislature to infer that the "extreme difficulty of apprehending a voter impersonator" explains the absence of such prosecutions. 472 F.3d at 953. Under *Burdick*, the Court should defer to the legislature on which inference is most plausible.

The legislature was also entitled to consider the ample evidence of a public perception that voter fraud was a serious problem. This Court has recognized that the appearance of corruption in elections is "[o]f almost equal concern" as actual corruption. *Nixon*, 528 U.S. at 389, *quoting Buckley*, 424 U.S. at 26, and cases there cited (internal punctuation omitted). The "avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent." *Id.* (internal punctuation omitted). *Accord*, *Purcell*, ___ U.S. at ___, 166 L.Ed. 2d at 4 ("[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy").

There is substantial evidence in the record proving that the public believes, by wide margins, that vote fraud occurs:

- Before the 2000 elections, a Rasmussen poll showed that 59% of the electorate believed that there was "some" or "a lot" of vote fraud. State S.J. Ex. 22 at 1.

- After those elections, a Gallup poll showed that 67% of adults had only "some" or "very little" confidence in the way votes were cast. State S.J. Ex. 23 at 8-9.

- A 2004 Zogby poll found that 10% of voters believed their votes were not accurately counted. Fund, *Stealing Elections* at 2.

- More than 13.6% of Americans believed that the 2004 presidential vote was unfair. State S.J. Ex. 24 at 1.

Thus, the Indiana legislature had an ample basis for believing that vote fraud was a serious problem requiring a reasonable response

2. <u>The Legislature could reasonably have concluded that Voter ID is a reasonable way to combat voter fraud.</u>

There is no question that combating voter fraud is a compelling state interest, and for precisely the same reason that access to the ballot box is a

fundamental right: voter fraud disenfranchises eligible voters whose votes are nullified by fraudulent ones. Voter ID is a reasonable means to accomplish that compelling interest.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, ___ U.S. at ___, 166 L.Ed. 2d at 4, *quoting Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (internal punctuation omitted). Petitioners and their *amici* admit as much.

We have already alluded to some of the reasons why voter ID is a reasonable response to the problem of voter fraud: virtually everyone has government-issued photo ID; such ID is required for a host of activities; and a voter without photo ID can cast a provisional ballot and then validate that ballot with relative ease.

Perhaps the best evidence that voter ID is a reasonable response to the problem is that the bipartisan Baker-Carter Commission recommended it. The Baker-Carter Report recites that:

- Effective voter ID is one of the "bedrocks of a modern election system." Report at 10.

- "[I]n close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." Report at 18.

- "Photo IDs are currently needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." *Id.*

Indeed, the Baker-Carter Report is considerably stricter than the Indiana law here at issue with respect to provisional ballots. The Report recommends that voters be allowed to cast such ballots. After the 2010 elections, however, it recommends that the voter only have 48 hours to validate the provisional ballot, compared with ten days under Indiana law. And it does not have the escape hatch for indigent voters or those with religious objections to photo ID. Report at 20-21.

Moreover, there is a wide and growing consensus in favor of voter ID. In 2001, only 11 states required it. By September 2005, when the Baker-Carter Commission issued its report, 24 states required it and 12 more were considering doing so. Report at 18. Indiana's requirements for verifying citizenship are quite similar to those set forth in the National Driver Register, 49 U.S.C. § 30301.

Finally, there is strong public support for voter ID. As the district court found, 458 F.Supp. 2d at 794, a 2004 Zogby poll found that 82% of respondents, including 75% of Kerry supporters, favored photo ID. *Nixon* relied on similar, though less overwhelming public support, in finding Missouri's campaign finance restrictions to be reasonable. 528 U.S. at 394. It should do the same with voter ID.

Thus, the legislature had ample basis for believing that voter ID is a reasonable way to combat vote fraud.

3. The Legislature could reasonably have concluded that Voter ID would not seriously impact eligible voters who currently lack such identification.

Likewise, the Legislature had ample reason to conclude reasonably that Voter ID would not seriously impact eligible voters who currently lack such identification. First, there are the exemptions discussed above, principally the exemption for absentee ballot voting by mail. Among those automatic entitled to cast absentee ballots are Indiana's disabled and senior voters over age 65. Ind. Code § 3-11-1-24. In addition, residents of state-licensed care facilities who vote at polling places within those facilities are exempted from the Voter ID requirement. Ind. Code § 3-10-1-7.2; 3-11-8-25.1(e). Thus, the Legislature provided exemptions for foreseeable categories persons who were less likely to be able to travel to obtain Voter ID. Finally, the Voter ID law allowed any person who failed to present photo identification at the polls to complete a provisional ballot, and to provide the photo identification to an election office within 10 days. Thus, the Indiana law is replete with exemptions adopted to mitigate potential impacts of the Voter ID Law. The fact the law has been administered without any indication of problems with compliance since its enactment in 2005, combined with the 2006 data indicating that 99% of Indiana's voting age population had the requisite Voter ID, demonstrates

the Voter ID law does not "severely burden" voting rights, and is constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,130 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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