No. 07-21 & 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, ET AL.,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, ET AL.
Respondents.

INDIANA DEMOCRATIC PARTY, ET AL.,
Petitioners,
v.
TODD ROKITA, ET AL.
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Washington Legal Foundation ("WLF") is a public interest law and policy center with supporters in all 50 states, including many in Indiana. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to maintain the integrity of the electoral process, including the ability to ensure that voting is limited to those eligible to do so. *See, e.g.*, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

INTRODUCTION

In 2005, the Indiana legislature enacted Pub. L. No. 109-2005 (the "Voter ID Law") and required each individual, who is otherwise eligible to vote, to provide at the polls on Election Day a federal or Indiana government-issued identification card that bears the individual's photograph and an expiration date. Petitioners contend that the Voter ID Law is unconstitutional because it imposes a severe burden on the right to vote, especially as to the poor, elderly, and disabled. This greatly exaggerates the effect of the law and equally overstates Petitioners' case.

To understand the law and its effect and to properly frame the issue, it is helpful to first observe some basic principles. The right to vote is not absolute. It is a regulated right. This is necessarily so because the right would be

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[1] Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, *amicus* states that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

meaningless without the restrictions that define it and create an orderly system for its exercise. Accordingly, the Constitution vests the States with the authority and obligation to create an orderly election process and to monitor it through rules regulating the time, place, and manner of elections. *See* U.S. Const. art. I, § 4, cl. 1.

The States may also set eligibility requirements that determine who has the right to vote. Indeed, the State of Indiana has set certain eligibility requirements, none of which are challenged here.

Consistent with its constitutional authority, the State has enacted numerous laws regulating the election process. These laws are in some sense restrictions on the right to vote; yet such minimal burdens are necessary to the orderly administration of elections and exercise of the right.

Indeed, it is without question that the State's power to set such restrictions on the right to vote entitle the State to impose some level of responsibility on the eligible voter and require him to take some initiative in order to exercise his right to vote. Thus, for example, the eligible voter who wishes to vote by absentee ballot must request his absentee ballot in a timely manner. If he fails to do so, then he may be left unable to vote. This is not an act of the State depriving his right to vote, rather the voter has relinquished his right. In other words, a person who declines to accept the responsibilities and reasonable burdens associated with exercising their right to vote simply may not vote.

The State's constitutional authority also includes the right to make rules that enable it to enforce its eligibility requirements. This enforcement authority is necessary to make the State's eligibility requirements meaningful. Thus, for

example, prior to the enactment of the Voter ID Law, the State required each eligible voter to sign a poll book before voting as a means of identifying himself as the registered voter. This rule is unchallenged; indeed, it is highlighted by Petitioners as their favored rule for the enforcement of the State's eligibility requirements. In other words, it is unquestioned that the State of Indiana has the right to require eligible voters to prove their identity in order to *exclude* from voting those who are *not* eligible. In fact, a state's failure to take reasonable measures to exclude the ineligible would improperly dilute the effect of each eligible voter's right to affect the outcome of the election.

Put into proper context, the question here is what the State of Indiana may do to effectively police its admittedly legitimate eligibility determinations. That is, pursuant to its authority and obligation under the Constitution, may the State of Indiana exercise its unquestioned right to enforce its unchallenged eligibility requirements by requiring eligible voters to display photo ID at the polls on Election Day?

SUMMARY OF ARGUMENT

Petitioners contend that the State may not impose a photo ID requirement because it effectively precludes certain people from voting. But who is it that is most likely not to vote because of the Voter ID Law? Principally, it is those who are ineligible to vote. Those people, however, have no right to vote; they are not injured by the Voter ID Law and have no standing to challenge the identification requirement. It is, after all, the entire point of the law to exclude those who do not have the right to vote. As a secondary matter, there are those who may elect not to take the minimal effort required to exercise the franchise. But the law does not *deny* these people the right to vote; rather, they voluntarily surrender their right to vote by virtue of their indifference. They, too, lack

standing, as the law has not injured them – they have chosen to disenfranchise themselves.

Petitioners suggest that a third group that could be affected by this law include the elderly, the poor, and the disabled. However, the Indiana legislature has considered their interests and has crafted exceptions to accommodate them in order to ensure them the opportunity to vote. It is therefore unsurprising that Petitioners have been unable to identify anyone who is eligible to vote but will be unable to vote *because of* the Voter ID Law. Indeed, Petitioners have abandoned completely their attempts to stand in the shoes of identifiable injured voters. Petitioners' failed (and now abandoned) effort to find a single injured voter to support their pre-enforcement challenge to the Voter ID Law suggests that their true interest is protecting the ability to vote of either the ineligible voter or the indifferent voter (or both).

Petitioners thus resort to asserting the rights of hypothetical voters who might be precluded from voting or who might simply fail to bring photo identification with them to the polls on election day. These groups cannot serve as a basis for standing. Among other reasons, Article III standing clearly does not extend to hypothetical individuals with speculative injuries.

The organizational Petitioners also cannot claim to be injured directly. Though they claim that they will be "forced" to expend resources toward voter education by virtue of the Voter ID Law, in reality they already expend substantial resources on registering sympathetic voters and persuading them to vote. Thus, cases in which a new law has foisted unforeseen and uncontrollable expenses on organizations are inapposite.

In cases such as this, where the States are acting within their constitutional power to regulate elections, constitutional challenges are analyzed under the test announced in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and clarified in *Burdick v. Takushi*, 504 U.S. 428 (1992). This test, which balances the burden on the rights at issue against the State's interests in enacting the regulation at issue, inherently recognizes that the right to vote is not always the only constitutional value at stake. It therefore avoids overly scrutinizing election laws that seek to vindicate a State's inherent and unquestionable right to run elections as it sees fit as well as laws that seek to prevent voter fraud and protect the right of eligible voters to have their votes count; any more stringent test – whether labeled as "strict scrutiny" or otherwise – simply does not properly take *all* relevant interests into account.

Petitioners attempt to distract the Court by focusing on the allegedly "severe" burden on certain hypothetical voters as individuals, arguing that if even one person is completely prevented from casting a ballot on election day, the burden is severe and the state's interests must be extremely weighty and narrowly crafted in order to survive. But this is merely a reprise of their failed standing argument; Petitioners have not shown any person or group of people who is eligible to vote and would be "burdened" by this requirement at all.

Moreover, Petitioners' focus on such hypothetical hard-luck voters misses the mark as a matter of law: the burden to be measured is the burden on the right at issue – the right of the people to associate with parties and candidates – and not the burden on getting to the polls. This must, therefore, be viewed on a much larger scale. Requirements that prospective voters register at least 29 days in advance of the election, show up at a certain time and place in order to cast a ballot, or request an absentee ballot well in advance of the election might

all be said to 'burden' the right to vote; yet such minimal burdens are necessary to the orderly administration of elections and exercise of the right and are undeniably valid. The Voter ID Law is no different. Moreover, the evidence shows that, as a whole, the Indiana voting population needs to do almost nothing in order to comply with the Voter ID Law. Most have the requisite dentification and nearly everyone else meets one of the exceptions. The burden is light.

Comparatively, then, Indiana's interests need not be weighty in order to prevail. But based on the unquestionably true statement that Indiana has the right to determine its voting eligibility requirements and exclude those who do not meet those requirements, Indiana also clearly has the right to require eligible voters to prove their identity in order to enforce those requirements. Indeed, a State's failure to take reasonable measures to exclude the ineligible would improperly dilute the effect of each eligible voter's right to affect the outcome of the election.

Petitioners engage in sleight of hand by ignoring this and arguing that there is not sufficient evidence of in-person fraud in Indiana to justify a law requiring eligible voters to identify themselves. But even arguing on Petitioners' turf, the Indiana legislature was justified in responding to evidence of in-person voting fraud across the nation, the threat that fraud poses in close elections, and the evidence of declining confidence in the accuracy of elections. The Voter ID Law addresses all of those concerns.

Boiled down it to its essence, this case is not about disenfranchising anyone. Rather, this case is about the reasonable steps that States may take pursuant to their constitutional obligations to protect the constitutional rights of eligible voters to have their votes properly counted. The Voter

ID Law is an evenhanded regulation of elections that does not burden any particular group more than any other. It should be upheld as constitutional.

ARGUMENT

I. NO PETITIONER HAS STANDING TO CHALLENGE THE VOTER ID LAW

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and this Court has specifically and precisely outlined its requirements. The party invoking federal jurisdiction bears the burden of showing that it has standing to assert its claim. First, a plaintiff must establish that he has suffered "'injury in fact' – an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. In addition, the plaintiff must show that the injury can be fairly traced to the defendant and that the relief sought will redress the injury. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007); *Lujan*, 504 U.S. at 560-61.

Pivotal to the standing analysis is the injury in fact requirement. This Court has repeatedly explained that injury in fact must be "concrete and particularized," "actual and imminent," and "not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Mere speculation is not enough to establish an injury in fact. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) ("Abstract injury is not enough. The plaintiff must show that he has sustained or ir immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.") (internal quotations omitted); *see also Bennett*

v. Spear, 520 U.S. 154, 167 (1997). Where the plaintiff fails to establish that the asserted injury is concrete and actual, he lacks standing to bring his claim.

Moreover, the party seeking to invoke federal jurisdiction must support its assertion of standing in accordance with the factual showing required at the relevant stage of litigation. As the *Lujan* Court explained:

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . In response to a summary judgment motion, . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts.

Lujan, 504 U.S. at 561 (quotations omitted). Plaintiffs cannot rely on mere assertions of harm to meet their standing requirement.

A. Petitioners' Theories of Associational and Third-Party Standing Fail Because Petitioners Have Not Identified a Single Individual Who Is Injured by the Voter ID Law

Petitioners advance theories of associational and third-party standing that rely on the existence of individuals who are injured by the Indiana Voter ID Law. *See, e.g.*, *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (holding that associational standing requires, among other things, that the associational plaintiff's "members would otherwise have standing to sue in their own right").

Remarkably, Petitioners have failed to identify a single individual who will be precluded from voting by the Indiana Voter ID Law. As the district court found, voters "who face insurmountable barriers in obtaining photo identification prior to the election" would have standing to sue, but the "Democrats have not presented any substantiation that any such voters actually exist." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 811 (S.D. Ind. 2006). Indeed, it is quite revealing that Petitioners initially attempted to stand in the shoes of a dozen individuals who they claimed were injured by the Voter ID Law but no longer advance their alleged injuries as a basis for standing; this failure to find any legitimate, eligible voter who would be injured by the law signals that the only people this law precludes from voting are the illegitimate, ineligible ones.

Having abandoned their efforts to identify particular individuals who are injured by the Voter ID Law, Petitioners simply hypothesize (1) that there are persons who will be precluded from voting by the Indiana Voter ID Law and (2) that there are other individuals who have photo IDs that comply with the law but who will inadvertently fail to bring their photo IDs to the polls on Election Day. Neither hypothetical group of individuals can serve as a basis for Petitioners' standing.

As to the former group, Petitioners claim that there are people who will be precluded from voting due to the Voter ID Law, and that the Seventh Circuit recognized that such people must exist and are likely to be Democratic voters. Brief for Petitioners Indiana Democratic Party and Marion County Democratic Central Committee at 59, Indiana Democratic Party v. Rokita, No. 07-25 (U.S. Nov. 5, 2007) (citing Pet. App. 3a-4a) (hereafter "Pets. Br."). There are at least two flaws in this position. First, although the Seventh Circuit did

suggest that there must be people that would be harmed by the law, that court clearly was theorizing, as a matter of economic principle, that because the Indiana Voter ID Law imposes new requirements on Indiana voters it is logical to assume that it will impose a burden on some voters. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007). The Court in no way endorsed the idea that such hypothetical voters would have Article III standing or could serve as a basis for the standing of one or more of the Organizational Petitioners. Indeed, like the District Court, the Seventh Circuit emphasized that Petitioners failed to identify anyone injured by the law: "[T]here is something remarkable about the plaintiffs considered as a whole . . . . There is not a single plaintiff who intends not to vote because of the new law – that is, who would vote were it not for the law. . . . There thus are no plaintiffs whom the law will deter from voting." *Id.* at 951-52. Second, Petitioners' reliance on hypothetical injured voters cannot meet their burden on summary judgment; they have failed to demonstrate specific facts necessary to support their claim of standing. *Lujan*, 504 U.S. at 561.

Petitioners' reliance on individuals who have valid photo ID but will inadvertently fail to bring such ID to the polls on Election Day similarly falters. First, a person who has a valid photo ID but simply forgets to bring it to the polls on Election Day is not denied the opportunity to vote. Indeed, such a person is permitted to cast a provisional ballot, which will be counted if that would-be voter returns to the polls within 10 days with his or her ID. Ind. Code § 3-11-7.5-2.5. Second, Petitioners surely would not have standing to challenge laws regulating when polling places close based on the mere assertion that some people will not make it to the polls before closing time due to traffic or inclement weather. This situation is no different, and Petitioners have no such standing here. Finally, the existence of such voters is mere hypothesis, and as

indicated above, relying on hypothesis at the summary judgment stage is a losing proposition. *Lujan*, 504 U.S. at 561.

Simply put, Petitioners lack any evidence that any relevant individual is injured by the Voter ID Law. Accordingly, Petitioners cannot maintain either associational or third-party standing.

B. Petitioners' Theory of Direct Standing Fails Because Petitioners Are Not Themselves Injured by the Voter ID Law

Unable to find an eligible injured individual in whose shoes they can stand, Petitioners may maintain this action only if they can sue in their own right. Accordingly, Petitioners, relying principally on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), contend that they have direct standing to challenge the Voter ID Law because the law forces them to divert resources from their core activities and expend those resources "to counteract the law's corrosive effect on voter turnout." Pets. Br. at 56. Petitioners' position overstates the effect of the Voter ID Law on their activities; they simply do not fit within the rule of *Havens*.

In *Havens*, an organizational plaintiff, Housing Opportunities Made Equal ("HOME"), filed suit against an apartment complex owner, alleging that the owner's racial steering practices were unlawful. 455 U.S. at 368-69. HOME alleged that it had expended significant resources to identify and counteract the defendant's discriminatory practices and sought to recover the resources it had already expended fighting the housing discrimination that was taking place. *Id.* at 369, 379. The Court concluded that HOME had standing to bring the suit, explaining that the defendant's conduct "perceptibly impaired" HOME's mission and resulted in a

"drain on the organization's resources." *Id.* at 379. *Havens* therefore clearly contemplates an actual "concrete and demonstrable" injury to the organization for the organization to have standing in its own right. *Id*.

Petitioners do not fit within this rule. They have not shown any "concrete and demonstrable" harm such as the expenditure of resources incurred by HOME in *Havens* (or that such an expenditure of resources is required by the law). Rather, Petitioners simply contend that they will "divert [the Democrats'] limited resources away from activities such as get-out-the-vote efforts and providing resources for Democratic Party candidates." Pets. Br. at 57. However, that Petitioners may elect on their own to expend their resources in a certain way in the future is not an injury under *Havens.* As the D.C. Circuit has explained, "[t]he diversion of resources . . . might well harm the [plaintiff's] other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff's] own budgetary choices." *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994). Simply put, neither the Democratic Party's allegations that it *may* expend funds in the future nor its unilateral decision to do so is sufficient to establish standing under *Havens*. Moreover, any additional cost incurred is at most a marginal addition to "get out and vote" activities routinely conducted by political parties.

The reality that none of the plaintiffs in this suit satisfy the standing requirements does not mean that some other party at some other point may not properly challenge the Voter ID law. Indeed, as Justice Stevens explained in his concurrence to the *per curiam* order vacating the stay of a similar Arizona voter identification law:

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring). Similarly, the Voter ID Law would be better analyzed with historical facts rather than on the basis of Petitioners' speculative injuries.

II. THE VOTER ID LAW IS CONSTITUTIONAL

A. The Constitutionality of the Voter ID Law Should Be Resolved Under the *Anderson/Burdick* Balancing Test

Petitioners argue that the Voter ID Law should be subject to strict scrutiny. *See* Indiana Democratic Party Petition for a Writ of Certiorari at 25, Indiana Democratic Party v. Rokita, No. 07-25 (U.S. July 2, 2007); Reply in Support of Petition for Writ of Certiorari at 5-8, Indiana Democratic Party v. Rokita, No. 07-25 (U.S. Aug. 17, 2007); Pets. Br. at 25-30. Their continuous refrain is that if even one person is prevented from voting by operation of the law, then strict scrutiny is appropriate, even, it would seem, if the person is not eligible to vote. *See* Pets. Br. at 33. This is simply not an accurate

statement of this Court's jurisprudence with regard to election regulations, and belies common sense.

As this Court has recognized, each election law "inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Nevertheless, in light of the fact that state laws determining voter eligibility are useless without some sort of enforcement mechanism, "the state's important regulatory interests are generally sufficient." *Anderson*, 460 U.S. at 788. And the Court has made explicit that strict scrutiny does not apply in all challenges to state laws regulating elections. *See Burdick*, 504 U.S. 428. Indeed, under *Anderson* and *Burdick*, this Court has made plain that election regulations are generally subject to a balancing test that weighs the burden on the right involved against the State's asserted justification for the law.

In *Anderson*, the Court explained that, although election and voting laws often burden in some way the individual's right to vote for the candidate of his or her choice, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *See Anderson*, 460 U.S. at 788; *see also id.* at n.9 ("We have upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself."). Thus, the court devised a specific balancing test to determine the validity of a law, under which a court:

> [M]ust first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the

> Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

In *Burdick*, this Court formally rejected the idea that "a law that imposes any burden upon the right to vote must be subject to strict scrutiny." 504 U.S. at 432. The Court explained that, in contrast to strict scrutiny, it had determined in *Anderson* that that case's "more flexible standard applies," and that a "severe" restriction on First and Fourteenth Amendment rights must be justified by a relatively more compelling State interest tailored more closely to the interest at hand than where the state election law imposes a "reasonable, nondiscriminatory restriction[]" upon those rights, where the State's interest can be less compelling and tailored more loosely towards achieving its desired ends.[2] *Id.* at 434 (citing *Anderson*, 460 U.S. at 788).

The Court's balancing test for election regulations reflects the fact that the individual voter's right is not the only constitutional value in the judicial calculus. First, the Constitution vests the States with the authority and obligation to regulate the voting process. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for

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[2] Thus, the Court emphasized that laws that burden the right to vote do not fit within its classic rational basis/intermediate scrutiny/strict scrutiny rubric, and the *Anderson*/*Burdick* test is itself the test that determines constitutionality, rather than simply being a conduit to determining the level of scrutiny that should apply.

Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, [including] registration, supervision of voting, protection of voters, [and] *prevention of fraud and corrupt practices*.") (emphasis added); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest."). Indeed, this Court has acknowledged that engaging in strict scrutiny would improperly "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433; *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Second, where election regulations seek to protect the integrity of the voting process, they address the problem of vote dilution by unauthorized participation and the constitutional right of qualified voters to have their votes count. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[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."); *see also United States v. Saylor*, 322 U.S. 385, 387 (1994) (the right to vote includes the right to have one's vote counted).

The Court's development of the *Anderson*/*Burdick* balancing test reflects that the Constitution gives states the power to determine who can vote (within constitutional constraints), takes account of the fact that the states have an interest in enforcing those judgments, and gives the states leeway to do so when acting to protect such legitimate interests. Thus, in light of these values, the judicial inquiry under the *Anderson*/*Burdick* balancing test is not an overly searching one. As the Seventh Circuit has explained, "striking of the balance between discouraging fraud and other abuses

and encouraging voter turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry," *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004), as it implicates both federalism and separation of powers concerns.

The Voter ID Law is a "generally applicable and evenhanded" regulation designed to "protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. It implicates the State's constitutional authority to regulate the voting process and places constitutional rights on both sides of the ledger. *See Crawford*, 472 F.3d at 952 ("A strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger. . . . The purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote."). Thus, the Court's *Anderson*/*Burdick* balancing test is especially appropriate here.

B. Indiana's Interest in Preventing Voter Fraud Outweighs the Minimal Burden the Voter ID Law Places on Indiana Voters

"Effective voter registration and voter identification are bedrocks of a modern election system." *Building Confidence in U.S. Elections*, Report of the Commission on Federal Election Reform 9 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf (last visited Dec. 7, 2007) (hereafter "Carter-Baker Report"). Recognizing this fact, Indiana has engaged in a two-step process to improve both voter registration – by purging its voter rolls of ineligible, deceased, or relocated voters – and

voter identification – by enacting the Voter ID Law. Petitioners attempt to derail this process by attacking the Voter ID Law as unnecessary and overly burdensome. All evidence is to the contrary.

1. The Burden on the Right to Vote is Slight

Any law regulating who can vote, or when, where, or how people can vote necessarily burdens to some degree the right of some person to vote. It may be a person under the age of 18, or a felon, or an alien – legal or illegal, or someone who is simply too lazy or apathetic to make the effort. But not all burdens are created equal; thus, under the *Anderson*/*Burdick* test, the Court "must first consider the character and magnitude of the asserted injury to the rights protected." *Anderson*, 460 U.S. at 789.

In this case, the nature and magnitude of the injury is slight; indeed, the effect on Petitioners is so slight that it does not meet the test of constitutional relevance required for Article III standing. *See supra* Section I. As discussed above, Petitioners have offered no evidence that any individual who is eligible to vote will be denied the right to vote and simply speculate that some hypothetical voter might be unable to vote because the Voter ID law will effectively prevent him from voting. *See supra* Part I.A; *see also* Pets. Br. at 59 (resting on the notion that "there can be no doubt that these people exist"). The fact that Petitioners (a major political party, several public interest groups, and two elected officials), despite considerable time and resources, have not been able to locate a single person who can assert any injury greater than mere inconvenience is telling. In fact, it demonstrates conclusively that the burden on the right to vote is minimal. *See Rokita*, 458 F. Supp. 2d at 823 (stating that although the court does "not doubt that such individuals exist somewhere," the difficulty in finding

someone burdened by the law is "a testament to the law's minimal burden and narrow crafting"); *Crawford*, 472 F.3d at 951-52.

Perhaps due to awareness of their difficulty identifying any injury resulting from the Indiana Voter ID Law, Petitioners focus instead on the practical effect of the law at a more granular level. They highlight the practical costs of the law in terms of time, transportation, and the costs associated with obtaining qualifying identification and argue that these costs constitute a "severe" burden that falls unevenly on the poor, elderly, and disabled. *See* Pets. Br. at 12-20; *see also Rokita*, 458 F. Supp. 2d at 795. In support, they have attempted to show that some segment of the population does not currently have valid identification and that it might be difficult for those people to obtain such identification. *See Rokita*, 458 F. Supp. 2d at 791-796.

But the evidence simply does not bear out any such claim. As the district court noted, Petitioners' own expert reported that 99% of registered Indiana voters already possess identification that is valid under the Voter ID Law, and that number is expected to increase in the coming months and years. *Rokita*, 458 F. Supp. 2d at 807. And of the 1% that does not already have valid identification, most are concentrated in Marion County, Indiana, with easy access to public transportation and multiple Bureau of Motor Vehicles branches, *see id*., making it relatively easy to obtain qualifying identification. In all, the evidence presented to the district court regarding the disparate impact on any particular group was inconclusive.[3] *See id.* at 805-809.

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[3] Notably, the district court found as fact that the Voter ID Law's burdens do not fall more harshly on any groups than any other groups. (continued...)

That Petitioners have been unable to demonstrate that the poor, disabled, and elderly are hurt by this law is unsurprising. The law takes into account their interests and accommodates them. There are exceptions to the photo ID requirement for absentee voters and those living in nursing homes; in addition, those who are indigent and cannot afford to obtain a qualifying photo ID (as well as those who have religious objections to being photographed) may avoid the photo ID requirement and cast a provisional ballot that will be counted if they file an affidavit indicating that they cast the ballot in question. *See* Ind. Code §§ 3-10-1-7.2(e); 3-11-8-25.1(f); 3-11-10-1.2; 3-11-7.5-2.5(a), (c); 3-11-7.5-1. Given all of these exceptions, it is no surprise that Petitioners have not only been unsuccessful in attempting to identify a single eligible individual who would actually be prevented from casting a vote in an election under Indiana's law, but also cannot locate a person who would suffer more than the inconvenience of a trip to the Bureau of Motor Vehicles or casting a provisional ballot and filing an affidavit.

That the burden of the Voter ID Law is slight is highlighted by the work of the multi-partisan Commission on Federal Election Reform, headed by former President Jimmy Carter and former Secretary of State James Baker (the "Commission"). The Commission, which was convened to discuss possible reforms to all facets of United States elections, issued a report favoring implementation of a voter identification requirement. *See* Carter-Baker Report at 21.

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[3](...continued)
See Rokita, 458 F. Supp. 2d at 823-24. The evidence submitted by the Petitioners in the district court was wholly inconclusive as to how the identification requirement impacts the poor, *see id.* at 806, and altogether showed that those who would have the most difficult time obtaining a photo ID easily — the elderly and the disabled — met at least one of the exceptions built into the law. *See id.* at 823-24.

Recognizing that such a requirement would burden to some degree a small number of people, the Commission suggested implementing safeguards that it believed would lessen the burden. The Voter ID Law implements the Commission's major recommendations by providing for the availability of provisional ballots to those who arrive at a polling place without proper ID, *see* Carter-Baker Report at *iv*, 19, and providing that non-driver identification cards will be issued free of charge, *see* Carter-Baker Report at 20.

There are other indicators that a photo ID requirement is not unduly burdensome. For instance, as the Commission recognized, "[p]hoto IDs currently are needed to board a plane,[4] enter federal buildings, and cash a check. Voting is equally important." *Id.* at 18. As many public and private institutions begin to worry more about security, it is clear that in the very near future, participation in society in any kind of capacity will require some kind of identification. The burden on the right to vote is thereby diffused because it is shared with the need for the same identification for almost every other activity in life.

In addition, that federal law is moving in this direction further demonstrates that the burden of the Voter ID Law is minimal. The Help America Vote Act, which requires that first-time voters present identification when voting if they registered to vote by mail, contemplates the use of photo ID. *See* Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1712 (codified at 42 U.S.C. 15483(b)(2)); *see also*

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[4] Notably, the right to interstate travel, just like the right to vote, lies within the Constitution. *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966) ("The right to interstate travel is a right that the Constitution itself guarantees."). Yet, if plaintiffs mounted a constitutional challenge to the requirement that airline passengers display photo ID to TSA agents before passing through airport security, they would surely fail.

Carter-Baker Report at 2. More importantly, the REAL ID Act, which was signed into law in May 2005 and is being phased in through 2010, will require states to verify an individual's full legal name, date of birth, address, Social Security number, and United States citizenship before issuing a driver's license or non-driver identification card. The Commission recommended that States begin using the REAL ID to verify voter identities. *See* Carter-Baker Report at 19.

These federal laws further highlight that the burden on the right to vote posed by the Voter ID Law is slight, as it is clear that any person who wishes to drive or receive a state identification card in the near future for any purpose will need to meet the same (or even more stringent) evidentiary requirements as the Indiana law requires here. Thus, given the wide-ranging (and ever-growing) list of activities requiring identification, people lacking proper identification will soon have more of an incentive to obtain such identification than simply the ability to vote.

Further evidence of the reasonableness of Indiana's photo ID requirement and the minimal burden it imposes exists outside of this country. The requirement of showing proper identification is not unique to this country, and most democracies have a much higher voter turnout than we do here in the United States. As the Commission found, "voter registration in many countries is often tied directly to a voter ID, so that voter identification can enhance ballot integrity without raising barriers to voting. Voters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." Carter-Baker Report at 5.[5]

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[5] For example, all voters in Mexico must present voter IDs, which include not only a photo but also a thumbprint. "The IDs themselves are (continued...)

Based on this evidence, it is clear that the only people "severely" burdened by this law are those who are ineligible to vote in the first place. Nearly everyone else either already possesses valid identification or meets one of the exceptions within the law that will allow him or her to cast a vote on election day and have it counted. The state need not go out of its way to make it so that one can vote with only the most minimal expenditure of time or effort, yet Petitioners seem to argue that a state must do so lest it be considered a "burden" on the right. This is simply not a "burden" cognizable by the Constitution.

2. Indiana's Interest in Preventing Voter Fraud is Sufficient to Overcome This Slight Burden

After examining the character and magnitude of the asserted injury, this Court must consider "the precise interests put forward by the State as justifications for the burden imposed by its rule," which includes those interests' "legitimacy and strength" and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. Because Petitioners have shown only minimal, if any, burden on the right to vote because of the Voter ID Law, the State's evidentiary burden is comparatively low. *See Burdick*, 504 U.S. at 439 ("Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its

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[5](...continued)
essentially counterfeit-proof, with special holographic images, imbedded security codes, and a magnetic strip with still more security information. As an extra precaution, voters' fingers are dipped in indelible ink to prevent people from voting multiple times." John R. Lott, Jr., Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud have on Voter Participation Rates (Aug. 18, 2006), *available at SSRN: http://ssrn.com/abstract=925611 (last visited Dec. 7, 2007).*

direction."). Indeed, it would be somewhat nonsensical under a balancing test to demand any evidentiary showing from the State where Petitioners have failed to show any evidence of injury or harm.

Regardless, Indiana's justification for the Voter ID Law – preventing and combating in-person election fraud – is both legitimate and compelling. *See Purcell*, 127 S. Ct. at 7 (highlighting "the State's compelling interest in preventing voter fraud"); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). Indiana clearly has the ability to determine who can vote, and its eligibility rules are unchallenged. That the State has an interest in making sure that these determinations are upheld follows as a matter of course. And the means by which it has chosen to combat such fraud are tailored closely to the ends it seeks. Aware of their evidentiary failures, Petitioners focus on the fundamental nature of the right to vote and appear to argue that even any marginal degradation of this right is constitutionally problematic. *See* Pets. Br. at 31-33. Ultimately, Petitioners' arguments do nothing to overcome the State's showing that the minimal burdens imposed by the Voter ID Law are more than supported by the state's authority and obligation to regulate the election process, coupled with the need to prevent and combat in-person voter fraud.

a. In-Person Voting Fraud is Prevalent, Even if Not Yet Detected in Indiana

The Commission reported that in-person voting fraud occurs even though, due to the nature of the crime, it is difficult to measure and identify. Carter-Baker Report at 45 ("While election fraud is difficult to measure, it occurs."). It also related many familiar indicators of fraud, including investigations by the Department of Justice and state and local officials, *id.*; the November 2004 Washington state gubernatorial election, in which 1,600 fraudulent ballots were cast, which resulted in Christine Gregoire being elected governor by a 129-vote margin, *id.* at 4, 90; and evidence that more than 200 felons voted illegally and 100 people voted twice, used fake names or false addresses, or voted in the names of dead people in Milwaukee, *id*.

Additionally, a 1997 congressional investigation found that up to 4,023 illegal voters cast ballots in a close House of Representatives election in California, and the Justice Department discovered after the September 11 terrorist attacks on our country that 8 of the 19 hijackers were registered to vote. John Fund, *This Will Make Voter Fraud Easier*, The Wall Street Journal, Nov. 2, 2007. The district court noted other evidence of fraud, as reported by several different studies, investigations, and media reports. *See Rokita*, 458 F. Supp. 2d at 793-94. The details of each study are different, but the results are the same: in-person voting fraud occurs. Thus, because Indiana has an interest in limiting its elections to only eligible voters, the Indiana legislature was completely justified in its decision to do something about it.

There is also clearly the *potential* for widespread in-person voting fraud in Indiana, even if the detailed accounts of voter fraud above have not been linked to that State, because

of Indiana's inflated voter rolls. As the State has explained at each stage of this case, investigations and studies have revealed that at least 300 dead people were still registered to vote in Indiana in 2000 (a more scientific study found that approximately 35,699 dead people were registered to vote in 2004), and that the voter rolls included 4.3 million Indianans, but only 3 million self-reported as being registered. *See* Brief of Appellees Rokita, King, and Robertson and Intervenor/Appellee the State of Indiana at 6, Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007) (Nos. 06-2218, 06-2317). Indiana's voter registration records are so at odds with reality that the state supreme court has decided not to use such records to compile jury pools. *Id.* at 5-6. List inflation is a genuine problem because registration lists containing the names of ineligible voters, many of whom are most likely known to others still residing in the state, makes it easier and therefore more tempting to vote in a name other than one's own. *See* John Fund, Stealing Elections 4 (2004); Larry J. Sabato & Glenn R. Simpson, Dirty Little Secrets 292, 321 (1996).

b. Voting Fraud Could Affect the Out-come of Close Elections and Diminishes Confidence in Election Results

The Commission reported that both fraud and multiple voting occur and "could affect the outcome of a close election." Carter-Baker Report at 18. In addition to Governor Gregoire's narrow win in 2004, there are many other notable closely contested elections in American history,[6] including

[6] For example, former Chief Justice Charles Evans Hughes was nearly President of the United States himself, but for Woodrow Wilson's 3,773-vote victory in California, which secured him that state's 13 electoral (continued...)

several recent elections. In 1974, Louis Wyman beat competitor John Durkin in the New Hampshire senatorial election by a margin of only 2 votes, out of 223,363 cast. *See* http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000782 (last visited Dec. 7, 2007). In 2005, Bob McDonnell was named the winner of the race for Virginia Attorney General by a margin of 323 votes out of 1,943,250 cast. *See* http://www2.sbe.virginia.gov/web_docs/Election/results/2005/nov2005/html/ (last visited Dec. 7, 2007). In Colorado, Bob Beauprez defeated Mike Feeley by 121 votes out of 175,938 cast to win election to the House of Representatives in 2002. T.R. Reid, *GOP Wins 2002's Closest Congressional Race*, Washington Post, Dec. 11, 2002, at A7. Finally, no one needs to be reminded that the 2000 presidential election was decided by a mere 537 votes in Florida, which gave George W. Bush Florida's electoral votes and ultimately secured to him the Presidency. *See* http://uselectionatlas.org/RESULTS/national.php?year=2000 (last visited Dec. 7, 2007). With results so close, any of these elections could have been or may have been swayed by election fraud, including in-person fraud.[7] Petitioners do not dispute this, and have even cited evidence of other close elections. *See* Pets. Br. at 19-20.

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[6](...continued)
votes and the victory in the 1916 presidential election. *See* http://uselectionatlas.org/RESULTS/state.php?year=1916&fips=6&f=1&off=0&elect=0 (last visited Dec. 7, 2007).

[7] Overall shifts in the balance of power also depend on relatively few votes being cast one way or another. According to security expert Bruce Schneier, who examined the potential for fraud in the 2004 congressional elections, Democrats could have added 13 seats and claimed a majority in the House of Representatives in 2002 by swinging 49,469 votes, or just over 1% of the 4.3 million total votes cast in those races (and only .01% of the 70 million votes cast in congressional races nationwide) that year. *See* http://www.schneier.com/essay-046.html (last visited Dec. 7, 2007).

Moreover, confidence in elections is an end unto itself, for as the Commission stated, "[b]uilding confidence in U.S. elections is central to our nation's democracy." Carter-Baker Report at iv. This Court has likewise recognized that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S. Ct. at 7.

The district court noted the already significant evidence of a lack of confidence in the accuracy of election results. *See Rokita*, 458 F. Supp. 2d at 794 (discussing studies showing 59% of voters believing there was "a lot" or "some" election fraud and 67% of adults having "some" or "very little" confidence in election results); *see also* John Fund, Stealing Elections at 2. The very perception of possible fraud causes nearly everyone to lose some degree of confidence in the system at large as well as the results of a particular election, and a solid identification system "could deter, detect, or eliminate several potential avenues of fraud." Carter-Baker Report at 18. Clearly this is a problem in need of a solution: "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id*.

c. ID Requirements Are a Necessary Tool in Preventing In-Person Election Fraud

An identification requirement is an important tool that can be used to ensure that only people eligible and registered to vote are voting. "A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site

is the same one that is named on the registration list." Carter-Baker Report at 18. As the Commission noted, approximately 40 million people move each year, and in many urban environments (and even small towns) people simply do not know their neighbors in the way that they used to. *Id.* So simply cleaning up the voter rolls is only part of the solution to the problem of combating voter fraud; instituting some kind of voter identification system is another. Petitioners' attempt to place blame on the State for the potential for in-person fraud based on the State's past failure to purge ineligible voters from its rolls, *see* Pets. Br. at 52-53, therefore misses the point entirely: Even if the rolls were accurate, Indiana still has an interest in making sure that those who show up at the polls are the people registered to vote. The only way for Indiana to accomplish this goal is to mandate that voters present a relatively fool-proof form of identification before casting a ballot.[8]

Indeed, the Commission specifically rejected the idea that the evidence of in-person fraud was so thin that voter identification requirements should be eliminated because it believed "that citizens should identify themselves as the correct person on the registration list when they vote." Carter-Baker Report at 18. But again, regardless of the magnitude of in-person fraud, any amount of fraud occurring in a close or disputed election could make up the margin of difference. *See id.* A voter identification requirement is thus at least a useful, if not necessary, feature of any attempt to prevent and combat voting fraud.

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[8] In addition, a photo ID requirement makes for ease in administration. Verifying the name and face on a photo ID is much easier for poll workers than comparing signatures. Thus, a photo ID requirement will reduce the likelihood of Election Day identity challenges and tend to have the effect of speeding up the process as a whole and curtailing voter intimidation.

Petitioners argue, however, that, as a matter of United States constitutional law, Indiana must wait until some in-person fraud of a great magnitude is detected in Indiana before taking action to prevent fraud from occurring. *See* Pets. Br. at 42-49 (arguing the lack of evidence of such fraud). But it is clear that the best way to ensure the integrity of Indiana's elections is to "prevent fraud before it can affect an election." Carter-Baker Report at 45. This Court has expressly stated that legislatures are permitted to operate prospectively to prevent harm to the electoral process. *See, e.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). This follows directly from the fact that the Constitution places the authority to regulate nearly all aspects of how elections will be conducted and who is eligible to vote with the states; the states' legislative judgments are not to be held up for cavalier second-guessing.

Simply put, the Indiana legislature, consistent with its constitutional authority and obligation, has determined that in-person fraud is an important issue that needs to be addressed. The Voter ID Law reflects the legislature's considered judgment and delicate balancing of the goal of promoting voter turnout and the compelling interest in preventing in-person voting fraud. Petitioners have failed to demonstrate a reason to disturb this balance. The Voter ID Law should stand.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Respondents' brief, the Court should affirm the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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