

No. 07 - 25 JUL 02 2007

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In The
Supreme Court of the United States

INDIANA DEMOCRATIC PARTY, et al.,

Petitioners,

v.

TODD ROKITA, in his official capacity
as Indiana Secretary of State, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners in Case No. 06-2317 before the Court of Appeals for the Seventh Circuit, and before this Court, are the Indiana Democratic Party and the Marion County Democratic Central Committee. They shall hereinafter be referred to as the "Democratic Party petitioners" or "Democrats".

The respondents are Todd Rokita, in his official capacity as Indiana Secretary of State; J. Bradley King and Kristi Robertson, each sued in their official capacities as co-Directors of the Indiana Election Division; and the Marion County Election Board. Mr. Rokita and Mr. King remain in their offices. Ms. Robertson has been replaced by Pamela Potesta.

Both in the trial court and on appeal this case was consolidated with a case brought by petitioners William Crawford, Joseph Simpson, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition of Housing and Homeless Issues, and the Indianapolis Branch of the NAACP (Appellate Cause No. 06-2218). They shall hereinafter be referred to as the "*Crawford* petitioners". The respondents in that case are the Marion County Election Board and the State of Indiana. The State of Indiana was allowed to intervene in that case by the district court.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Indiana Democratic Party is an Indiana not-for-profit corporation with its principal place of business in Indiana. It has no parent corporation and does not issue stock.

Petitioner Marion County Democratic Central Committee is an unincorporated political party organization with its principal place of business in Indiana. It has no parent corporation and does not issue stock.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

Petitioners herein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated January 4, 2007, is reported at 472 F.3d 949 (7th Cir. 2007) and is reprinted in the *Crawford* petitioners' Appendix¹ at pages App. 1 through App. 15. A timely petition for rehearing, with suggestion for rehearing en banc, was filed and was denied, with four judges dissenting, on April 5, 2007. The denial is reported at 484 F.3d 436 (7th Cir. 2007), and is reprinted in the Appendix at pages App. 150 through App. 155. The decision of the trial court is reported at 458 F.Supp.2d 775 (S.D.Ind. 2006) and is reprinted in the Appendix at pages App. 16 through App. 149.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit is dated January 4, 2007. The Seventh Circuit's Order denying the petition for rehearing with

¹ All references to (App. ___) are to the *Crawford* petitioners' Appendix, which Democrats have adopted by letter to the Clerk dated July 2, 2007.

suggestion for hearing en banc is dated April 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

United States Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code § 3-11-8-25.1 provides that all voters seeking to vote in-person must present proof of identification in order to vote, unless they are voting in-person in a state licensed facility in which they reside. If the voter does not have identification, he or she may only submit a provisional ballot. The statute is reproduced in the Appendix at App. 156 through App. 158. Indiana Code § 3-11-10-1.2 states that this proof of identification is not required for mail-in absentee ballots. It is reproduced in the Appendix at App. 158.

Indiana Code § 3-11.7-5-2.5 specifies the steps that a prospective voter must go through, once a provisional ballot is cast, in order to have his or her provisional ballot counted after being refused the opportunity to cast a regular ballot. It is reproduced in the Appendix at App. 159 through App. 161.

Indiana Code § 3-5-2-40.5 defines “proof of identification” that must be produced to vote in-person as:

a document that satisfies all the following:

- (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual’s voter registration record.
- (2) The document shows a photograph of the individual to whom the document was issued.
- (3) The document includes an expiration date, and the document:
 - (A) is not expired; or
 - (B) expired after the date of the most recent general election.
- (4) The document was issued by the United States or the State of Indiana.

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STATEMENT OF THE CASE

A. Introduction

This case concerns the constitutionality of Indiana’s highly restrictive voter identification statute that requires

those seeking to vote in-person to produce photo identification issued by either the State or federal government. The record evidence shows that this voter identification requirement will deter eligible citizens from voting. As the record also demonstrates, the State has imposed this severe burden on the fundamental right to vote without any showing that it responds to an actual problem in an appropriately tailored manner. The district court's jurisdiction was based on 28 U.S.C. § 1331 because this case presents issues arising under the United States Constitution.

B. Statement of the Facts and Legal Background

1. Voting in Indiana

Effective July 1, 2005, Indiana law was changed to require that, with one exception, persons seeking to vote in-person must present photo identification, issued by the United States or Indiana, that is not expired or expired after the date of the most recent general election. IND. CODE § 3-5-2-40.5. If the prospective voter does not present such identification, he or she must execute a provisional ballot. IND. CODE § 3-11-8-25.1(d).

If the voter executes a provisional ballot, and wants to have the vote counted, he or she must appear before the Clerk of the Circuit Court or County Election Board no later than ten (10) days following the election and either provide the required proof of identification and execute an affidavit that he or she is the same person who voted previously by provisional ballot, or execute an affidavit indicating that the voter previously cast a provisional ballot and either is "indigent and unable to obtain proof of identification without the payment of a fee" or has a

religious objection to being photographed. IND. CODE § 3-11.7-5-2.5(c)(2).

The only exception to the proof of identification requirement for in-person voters is if the person lives in a state licensed facility, such as a nursing home, and votes there. IND. CODE § 3-11-8-25.1(e). In that case the person does not have to provide proof of identification.

Prior to the enactment of the new identification law, a person seeking to vote had only to sign a poll book at the polling place. The signature then could be compared to a photographic copy of the signature that was kept on file.² A challenge could be maintained to any voter suspected of misrepresenting his or her identity. (App. 29).

A person voting by absentee ballot generally does not have to provide identification in order to vote.³ However, Indiana law restricts absentee ballots to voters who verify legitimate reasons that they are unable to present themselves at the polls. See IND. CODE § 3-11-10-24(a)(1)-(10). These reasons include: having a specific and reasonable

² The only time that a prospective voter had to provide identification in Indiana prior to the challenged law would be as prescribed by the Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, 42 U.S.C. § 15483(b), which provides that the first time that a voter who registered by mail votes in a federal election the voter must present certain information for identification purposes. The voter must provide either "a current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." 42 U.S.C. § 15483(b)(2)(A)(i). If the voter provides this information with his registration application, he does not have to present it on election day.

³ The one exception to this is imposed by HAVA so that the first time absentee voter who registered to vote by mail must present a copy of one of the items noted in Note 1, *supra*.

expectation of being out of the county during the time polls are open; working in an election capacity; as well as being disabled, ill, elderly or caring for a disabled person. *Id.* The voter identification law challenged in this lawsuit did not change the identification requirements for absentee ballots. *See* IND. CODE § 3-11-10-1.2. The ballot is placed in a sealed envelope by the voter, who signs an affidavit on the envelope that verifies his or her identity. IND. CODE § 3-11-4-20. The signature is then compared to the ones on file at the time that the ballot is processed.

2. Some potential voters do not have the requisite photo identification

The parties agree “that the most likely source of acceptable identification is either the drivers’ licenses or identification cards issued by the [Indiana Bureau of Motor Vehicles] BMV.” (App. 31). The BMV has acknowledged “that there are persons who do not currently have a driver’s license or identification card and who are, or who will be, eligible to vote at the next election.” (App. 36). However, the BMV is unable to determine the precise size of this group. *Id.* A survey by AARP of Indiana notes that 3% of elderly registered voters surveyed do not have either a valid license or an identification card (App. 45), and 30% of these persons are not likely to obtain the identification, even if necessary to vote. The trial court had before it examples of a number of Indianapolis voters who are over 65 but who do not have either a license or identification card, a number of whom do not have a birth certificate. (App. 50 – App. 51). The director of *Crawford* petitioner United Senior Action, an Indiana elder organization, noted that many seniors do not have either a valid license or identification card. (App. 45). It is also not uncommon for

persons with disabilities to lack current identification (*Id.*). Additionally, homeless persons, some of whom vote, frequently have lost all their possessions, including identification.

3. It is difficult for some Indiana residents to obtain the BMV identification

a. Multiple documents must be presented in order to obtain identification from the BMV

There is no cost charged by the BMV for an identification card to a person who does not have a current license and who will be at least eighteen (18) years of age at the time of the next election. IND. CODE § 9-24-16-10. But, while an identification card can be obtained without payment of a fee, an applicant must nevertheless gather multiple documents in order to meet BMV requirements. *See* IND. ADMIN. CODE TIT. 140, r. 7-4-3. Specifically, the applicant must present to the BMV a primary document, a secondary document, and one proof of Indiana residency, or two primary documents and one proof of Indiana residency. Acceptable primary documents include: a United States birth certificate with authenticating stamp or seal, a United States passport, United States documents showing that the person is a citizen born abroad, a United States military, veterans or merchant marine card with a photograph, a United States veteran's universal access identification card with photograph, or an Indiana driver's license or learner/driver education permit. *Id.* Secondary documents can include such things as a valid banking card, a Medicare or Medicaid card, or a valid photo identification card. *Id.* Proof of residency can be satisfied by any primary or secondary document that contains the applicant's name

and current address, or another document containing such information. *Id.*

b. It is difficult for some to obtain their birth certificates

A prospective voter may face multiple hurdles and burdens in attempting to obtain the birth certificate that is necessary to obtain identification from the BMV. First, there is the cost of obtaining the birth certificate. Although the identification card in Indiana is free the sealed birth certificate can range in cost from \$12 to \$30, depending on where the person was born. (App. 31 – App. 38).⁴

Second, in order to obtain the birth certificate the hopeful voter must produce identification. And there are persons who simply do not have the information necessary to obtain the birth certificate, regardless of cost. For example, in Marion County, which includes the City of Indianapolis, a person who has the money to obtain his or her birth certificate may go to the Health and Hospital Corporation of Marion County. But, in order to receive the certificate, the person must produce photo identification. If the person cannot produce the identification, he or she is referred to another office, the Indiana State Department of Health, at another location, where other, non-photographic forms of identification may be presented. (App. 38).

⁴ Although Indiana law allows a voter to appear before the Clerk or County Election Board and sign an indigency affidavit that the voter is unable to obtain proof of identification without payment of a fee, IND. CODE § 3-11.7-5-2.5(c)(2)(A), the Clerk of Marion County stated that it was not clear that the cost of the birth certificate would be deemed to be a fee within the Statute and that there was no definition of indigency.

This bureaucratic maze leads to persons being unable to take or complete the steps necessary to obtain a birth certificate. The trial court noted that an organization that provides assistance to needy families in Tippecanoe County, Indiana assisted approximately 150 persons in 2004 in trying to obtain photo identification, but fully half of these failed to obtain the BMV identification because they did not have the necessary identification to obtain a birth certificate. (App. 36, n.18).

Additionally, there are elderly persons, born outside the state of Indiana, who were not born in hospitals and do not have any record of birth to obtain. Even if a person born out-of-state has a birth record, it may take months to receive it.

c. Other difficulties in obtaining the BMV identification

As indicated above, more than a sealed birth certificate is necessary to obtain the required photo identification. Secondary documents and proof of residency are required. Obtaining all these documents may prove difficult. One BMV employee noted that of fifty (50) people she sees each week who are seeking licenses or identification cards, fully sixty percent (60%) are turned away because they do not have all of the required documents. The perils of this process are exemplified by one Indiana resident, originally from Massachusetts, who had to make three trips to the BMV over a period of many weeks in an effort to obtain photo identification so that she could vote in-person, only to be ultimately turned away because her birth certificate contained only her maiden name. (App. 37).

Homeless persons, some of whom have voted in the past, frequently have none of their identification documents and little ability to obtain them. For example, an affidavit in the record discloses that one homeless person went to the BMV to obtain an identification card. He had a birth certificate and Social Security card, but was denied an identification card because, being homeless, he could not produce proof of a specific address.

4. The identification requirement will prevent or deter persons from voting and will have a negative impact on the petitioners

In addition to the evidence and examples set forth in the *Crawford* petitioners' petition, the unchallenged evidence from Professor Marjorie Hershey substantiated the concerns that the identification requirement will prevent or deter persons from voting. Professor Hershey noted that the Indiana law will chill the exercise of the franchise by, among others, the disabled, homeless, low-income and elderly, and will further depress the already low voter turnout in Indiana relative to other states. (App. 43 – App. 44). The Seventh Circuit concluded that although the “vast majority of adults” in Indiana possess the requisite identification to vote, “the Indiana law will deter some people from voting.” (App. 3).

5. The purpose of the law is related to fraud prevention, but there is no evidence that in-person impersonation fraud has ever occurred in Indiana

The articulated purpose for the voter identification law is to combat voter fraud. (App. 106). However, the

State of Indiana is not aware of any incidents of attempted or successful in-person impersonation voting fraud that have ever occurred within the State. (App. 39). Indeed, no person has ever been charged with any crime relating to voting fraud associated with in-person voting in Indiana. (*Id.*). Veteran poll watchers have seen no evidence of in-person voting fraud. (*Id.*). On the other hand, there is evidence of fraud associated with absentee ballot voting in Indiana, although absentee balloting is not regulated by the identification law. (*Id.*).

C. Proceedings below

The separate cases brought by the *Crawford* petitioners and the Democratic Party petitioners were consolidated by the trial court and the consolidated case was submitted on cross-motions for summary judgment. Both sets of petitioners argued that the voter identification law was unconstitutional inasmuch as it imposes a severe burden on the fundamental right to vote and is not narrowly drawn to meet a compelling state interest.⁵ In granting the respondents' summary judgment motion, the trial court held that the Democrats had standing and that petitioners Crawford and Simpson also had standing to assert the rights of voters who "inadvertently" cannot present photo identification. (App. 96). The trial court held that the other petitioners did not have standing. The trial court further held that the statute was constitutional in

⁵ All petitioners also claimed that the voter identification requirements violated 42 U.S.C. § 1971(a)(2)(A) and the Indiana Constitution. The trial court found against petitioners on these arguments and they are not pursued before this Court.

that it did not create a severe burden on the right to vote and that the law was reasonable.

A divided panel of the Seventh Circuit affirmed the trial court's decision. It concluded that, inasmuch as the Democrats clearly have standing, other standing arguments did not need to be addressed. It noted that "most people who don't have photo ID are low on the economic ladder." (App. 3). It recognized that "even very slight costs in time or bother or out-of-pocket expense deter many people from voting" and that the evidence demonstrated that "the Indiana law will deter some people from voting." (*Id.*). In analyzing the right to vote, the panel concluded that "the benefits of voting to the individual are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote)." (*Id.*) (Court's emphasis). The panel then also concluded that the number of persons deterred or disfranchised by the voter identification law was few and, the fewer the number of people who would be disfranchised by the law, "the less of a showing the state need make to justify the law." (App. 5). Given this deferential standard, the State's asserted interest in preventing fraud was deemed sufficient justification for the law. Judge Evans, in dissent, argued that Indiana's voter identification law imposed a severe burden on the right to vote on some portion of eligible voters and therefore should be subject to elevated judicial scrutiny which it cannot satisfy. Judge Wood, writing for the four judges dissenting from the denial of rehearing en banc, argued that this "Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters" and that if even one citizen is deprived

of the right to vote, a severe burden on the right to vote is still present. (App. 154).

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ARGUMENT

Reasons for Granting the Petition⁶

Plenary review in this case is appropriate for two reasons. First, this case raises an issue of growing national importance regarding access to a fundamental right – an issue that is important for this Court to resolve before the next national election in 2008. The question of the appropriate standard for reviewing voter identification requirements was left unaddressed in *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5 (2006) (*per curiam*), and is properly before the Court now. Second, the Seventh Circuit's decision conflicts with decisions of this Court regarding the appropriate legal standard to be applied to cases involving severe burdens on the right to vote, by erroneously focusing on the *number* of people whose fundamental right is burdened, rather than on the *degree* of the burden and the strength of the state's justification for imposing it.

⁶ The Argument section of this petition is identical to the Argument contained in the petition filed by the *Crawford* petitioners.

I. Given the fact that restrictive identification requirements are being implemented and considered throughout the United States, the question presented by this case should be decided now, because its resolution prior to the 2008 elections is of great national importance

Indiana's voter identification law is currently the most onerous in effect in the nation. Alone among the states, it requires Indiana voters to produce a state or federally issued photo identification in order to cast a non-provisional ballot in person. However, Indiana is not unique in imposing identification requirements on those seeking to exercise the right to vote, and the restrictive conditions imposed in Indiana are a harbinger of future regulations in other jurisdictions. These restrictions raise "an exceptionally important unresolved question of law" (Wood, J., dissenting from denial of rehearing en banc, App. 151). Petitioners respectfully submit that plenary review should be granted in this case so that the legal uncertainty surrounding these laws can be settled before they become an issue in the national elections of 2008.

The type of voter identification requirement at issue in this case marks a striking departure from the preexisting regime governing registered voters' access to the polls. Prior to 2002, few states had blanket voter identification requirements, and none categorically required photo identification.⁷ With the passage of HAVA in 2002,

⁷ According to electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006* 13, <http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf>, there were 11 states prior to 2002 with identification requirements, although mandatory photo identification laws were not enacted until Indiana and Georgia's 2005 statutes. *Id.* at 13-14.

identification requirements were implemented nationwide for the limited group of first time voters in federal elections who had registered by mail. See 42 U.S.C. § 15483(b). Since that time, according to electionline.org, *Voter ID Laws (As of 10/17/06)*, www.electionline.org/Default.aspx?tabid=364, twenty-six states have adopted identification requirements that are more rigorous than the HAVA requirements. Two of these states require some form of identification, which can, but does not have to, include photo identification for all first time voters, regardless of how they registered to vote.⁸ A number of states require that all voters produce some form of identification, which can include photo identification as well as other forms of identification.⁹ Six

⁸ See KAN. STAT. ANN. § 25-2908(d); PA. STAT. ANN. TIT. 25 § 3050.

⁹ ALA. CODE § 17-9-30; ALASKA STAT. § 15.15.225; ARIZ. REV. STAT. ANN. § 16-579(A) (The Arizona statute requires identification for in-person voters as well as requiring persons seeking to register to vote for the first time to present proof of citizenship. After a district court denied a preliminary injunction enforcement of the statute, *Gonzalez v. Arizona*, 2006 WL 3627297 (D.Ariz. 2006), *aff'd* 485 F.3d 1041 (9th Cir. 2007), a two-judge motions panel of the Ninth Circuit granted an interlocutory injunction that was vacated by this Court prior to the fall 2006 elections, see *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5 (2006). On remand to the Ninth Circuit, the plaintiffs “chose not to seek injunctive relief with respect to the in-person voting requirement” and the Court affirmed the denial of the preliminary injunction with respect to the voter registration requirement. 485 F.3d at 1046-47); ARK. CODE ANN. § 7-5-305(a); COLO. REV. STAT. ANN. § 1-7-110; CONN. GEN. STAT. ANN. § 9-261(a); DEL. CODE ANN. TIT. 15, § 4937; KY. REV. STAT. ANN. § 117.227; MO. ANN. STAT. § 115.427 (Although the statute remains on the books in Missouri, it has been permanently enjoined, based on state constitutional violations, by the Missouri Supreme Court. See *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006)); MONT. CODE ANN. § 13-13-114; N.M. STAT. ANN. § 1-12-7.1(D); N.D. CENT. CODE § 16.1-05-07; OHIO REV. CODE ANN. § 3502.16(B)(1)(a); OHIO REV. CODE ANN. § 3505.18(A)(1); S.C. CODE ANN. § 7-13-710; TENN. CODE ANN. § 2-7-112(c); TEX. ELEC. CODE ANN. §§ 63.001, 63.008; VA. CODE ANN. § 24.2-643(B); WASH. REV. CODE ANN. § 29A.44.205.

of these states, including Indiana, have statutory provisions requiring that in-person voters present photo identification, although in three of the states – Hawaii, South Dakota and Louisiana – the photo identification is requested at the time of voting, and if the voter does not have photo identification, there is still a method for the person to cast a regular ballot at the poll.¹⁰

In addition, legislative initiatives exist to enact more restrictive voter photo identification laws in various states. For example, the Governor of Wisconsin has vetoed a photo identification law on three occasions that has prompted a legislative push to amend the Wisconsin Constitution to provide for photo identifications for voters.¹¹ In Mississippi, voter identification legislation has passed the state senate, although it has not received a

¹⁰ FLA. STAT. ANN. § 101.043 (West 2007); GA. CODE ANN. § 21-2-417 (The current Georgia statute replaced an earlier one which imposed a strict photo identification requirement for those seeking to vote in-person. After a preliminary injunction was entered against the statute, see *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D.Ga. 2005), the statute was modified to its present form. A preliminary injunction was again issued against enforcement of the revised statute with respect to the July 18, 2006 Georgia primary. *Common Cause/Georgia v. Billups*, 439 F.Supp.2d 1294 (N.D.Ga. 2006). Further proceedings in that case were stayed while the Georgia Supreme Court considered a state constitutional attack on the statute. The Georgia Supreme Court recently dismissed the challenge on standing grounds. *Perdue v. Lake*, ___ S.E.2d ___, 2007 WL 1660734 (Ga. 2007)); HAW. REV. STAT. § 11-136 (the statute states that identification shall be provided upon request and the website of the state of Hawaii notes that voters must have a picture identification. <http://www.hawaii.gov/elections/voters/voterhi.htm>); LA. REV. STAT. ANN. § 18:562(A); S.D. CODIFIED LAWS § 12-18-6.1.

¹¹ Steven Walters, *Doyle vetoes voter ID bill, but fight continues*, JS ONLINE (MILWAUKEE JOURNAL SENTINEL) (Aug. 13, 2005) <http://www.jsonline.com/story/index.aspx?id=348113&format=print>.

vote in the state's House of Representatives.¹² Earlier this year electionline.org reported that the following states were considering legislation or constitutional amendments that, if passed into law, would require some form of photo identification in order to vote without the use of a provisional ballot: Alabama (proposed constitutional amendment), Arkansas, California, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Nevada, New Mexico, North Carolina, and Tennessee.¹³ And, the Federal Election Integrity Act of 2006, H.R. 4844, which passed the House of Representatives, but was not acted upon by the Senate, would have amended HAVA to provide that all persons voting in person in a federal election present a government-issued and valid photo identification. Moreover, local governments are now taking the initiative to pass ordinances that require photo identification from those seeking to vote in-person. For example, the City of Albuquerque, by ordinance, has sought to require city voters to display current and valid photo identification as a condition of voting in-person in municipal elections, although the requirement has been enjoined by a district court as unconstitutional. See *ACLU of New Mexico v. Santillanes*,

¹² Brett Kittridge, *Who Killed Voter ID in Mississippi?*, MAJORITY IN MISSISSIPPI (Mar. 21, 2007) <http://majorityinms.wordpress.com/2007/03/21/who-killed-voter-id/>.

¹³ electionline.org, *2007 Voter ID Legislation*, <http://electionline.org/ResourceLibrary/ElectionAdministrationHotTopics/2007VoterIDLegislation/tabid/1125/Default.aspx>. This survey is dated as of April 11, 2007. Not mentioned in the survey is Texas, where passage of a voter photo identification law was narrowly blocked in May of 2007 by a minority of legislators in the state's senate. Terrence Stutz, *Ailing senator helps quash voter ID bill*, THE DALLAS MORNING NEWS (May 24, 2007), http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-nuvoterid_24tex.ART.State.Edition2.43a99d8.html.

2007 WL 782167 (D.N.M. 2007), *appeal pending* No. 07-02057 (10th Circuit).¹⁴

All of the legislation, future legislative initiatives, and the case at bar present the same legal question: given that this Court has found that the right to vote is “a ‘fundamental political right . . . preservative of all rights,’” *Harper v. Virginia Board of Election*, 383 U.S. 663, 667 (1966) (internal citations omitted), and that there is simply “[n]o right . . . more precious in a free country than that of having a voice in the election of those who make the laws . . .,” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), under what circumstances can voter identification laws that impose a severe burden on the ability of a segment of the population to vote be upheld as constitutionally valid?

The justification for identification requirements is invariably the desire to prevent fraud, although the proponents of voter identification laws, when challenged, have failed to present evidence of in-person impersonation fraud that would be remedied by the challenged laws. *See, e.g. Santillanes*, 2007 WL 782167 at *33 (“Defendant has presented no admissible evidence that the October 2005 City Charter amendment actually serves to combat an existing problem with voter impersonation fraud in municipal elections. . . .”); *Billups*, 406 F.Supp.2d at 1361 (“Indeed, Secretary of State Cox pointed out that, to her knowledge, the State had not experienced one complaint of in-person fraudulent voting during her tenure. . . .”); *Wein-schenk*, 203 S.W.2d at 218 (“The Photo-ID Requirement

¹⁴ The trend of enacting or tightening photographic voter identification requirements is not likely to abate. *See Note, Development in the Law – Voting and Democracy*, 119 HARV. L. REV. 1127, 1145 (2006).

could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri. . . .”). And, in this case, there is similarly no evidence of impersonation fraud in in-person voting in Indiana.

In *Purcell v. Gonzalez*, this Court reversed a stay of a voter identification law that had been issued by a two-judge motions panel of the Ninth Circuit. In so doing this Court noted that there had been no factual findings made by the district court and that it was necessary to develop those facts before a decision on the merits. ___ U.S. ___, 127 S.Ct. at 7-8. This Court noted that the prevention of voting fraud is most certainly a compelling governmental interest. *Id.*, 127 S.Ct. at 7. But the Court did not answer the question of whether “the plaintiffs’ strong interest in exercising the ‘fundamental political right’ to vote,” *Id.*, citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), can be severely burdened by the mere articulation of the desire to prevent future fraud, unsupported by evidence of past fraud. This question is especially pertinent where the state has in place “a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared,” given this Court’s previous determination that such measures are sufficient to combat general fraud concerns. *Dunn*, 405 U.S. at 353.¹⁵

¹⁵ Relevant Indiana statutes include IND. CODE §§ 3-14-2-11 (voting in improper precinct); 3-14-2-12 (voting in false name or duplicate voting); 3-14-2-14 (penalty for precinct officials who knowingly allow unauthorized voter); 3-14-2-16 (assorted election fraud); 3-14-5-1 (allowing for arrest of illegal voters and forwarding of affidavits to prosecutor); 3-14-5-3 (requiring that violations be reported to prosecuting attorney).

The Seventh Circuit recognized that Indiana's identification law is sufficiently onerous that the "law will deter some people from voting." (App. 3).¹⁶ The panel's view that the harm to the individual is "elusive" and that the number of voters affected will be few led it to conclude that a strict level of scrutiny would be inappropriate because "the fewer people harmed by a law, the less of a showing the state need make to justify the law." (App. 5). When the panel turned to the justification for the law, it did not dispute the evidence that there are no known examples of voting fraud in Indiana and that "no one – in the history of Indiana – had ever been charged with" crimes relating to in-person impersonation voting fraud. (App. 11, Evans, J., dissenting). The panel nevertheless found the large number of criminal statutes protecting against this precise form of voting fraud to be irrelevant. (App. 7). The panel hypothesized that photo identification was justified because election officials would be "unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature." (*Id.*). That is, the elections officials would not do their jobs. The panel hypothesized other reasons to conclude that impersonators would be hard to catch. (App. 7 – App. 8). The Seventh Circuit therefore credited an undocumented and hypothetical risk of fraud while hypothesizing that the existing

¹⁶ A similar conclusion was reached by the Task Force Report accompanying the 2001 Report of the National Commission on Election Reform co-chaired by Presidents Gerald R. Ford and Jimmy Carter estimated that some "6 to 10 percent of the American electorate does not have official state identification." *To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform*, Chapter VI – Verification of Identity, p. 4 (2001), http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf (last visited July 25, 2006).

protections in Indiana, both criminal and regulatory, would not be effective. Based on that balancing, it upheld voter identification requirements that admittedly burden, and in some instances deny, the voting rights of Indiana residents who lack the required identification and who are disproportionately poor, elderly and/or disabled. As Judge Wood noted in her dissent from the denial of rehearing en banc in this case, it is necessary to “decide what standard should govern review of such a law and what kind of empirical record must be assembled to support whatever standard it chooses.” (App. 155). That question was left unanswered in *Purcell* but should be answered at this juncture.

The need to articulate the standard of review to be applied to voter identification laws is a fundamentally important constitutional question that should now be resolved by this Court. See e.g., *Cook v. Gralike*, 531 U.S. 510, 518 (2001) (*certiorari* granted despite the lack of a circuit conflict concerning ballot provision because “the importance of the case prompted our grant of certiorari.”). It is imperative that the questions surrounding such laws be addressed in advance of the national elections of 2008 so that voters will not be improperly denied or discouraged from voting and so that, for all voters, in all jurisdictions, the elections may occur without any taint of constitutional impropriety.

II. The Seventh Circuit’s decision conflicts with decisions of this Court requiring strict scrutiny for laws that severely burden the right to vote

The logic utilized by the Seventh Circuit in this case is explicit. The panel concluded that although “the vast majority of adults have” the identification necessary to

vote, “the Indiana law will deter some people from voting.” (App. 3). This disfranchisement is not constitutionally significant, according to the panel majority, because the fewer the number of people who will “disfranchise themselves rather than go to the bother and, if they are not indigent and don’t have their birth certificate and must order a copy and pay a fee, the expense of obtaining a photo ID, the less of a showing the state need make to justify the law.” (App. 5). That is, the harm to an individual voter is of no measurable legal consequence for, according to the panel majority, “a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote. (App. 3) (Court’s emphasis). According to the panel, the right to vote cannot be deemed to be unconstitutionally burdened until, and unless, an unspecified minimal number of voters are precluded from voting. The Seventh Circuit found that evidence of a large enough number was wanting and therefore the Indiana statute was constitutional.

That holding rests on a fundamental misreading of this Court’s decision in *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick*, this Court upheld Hawaii’s ban on write-in voting because the Court concluded that it imposed only a limited burden on the right of voters to make political choices. *Id.* at 438-39. In reaching this conclusion this Court relied on its earlier decision in a ballot access case, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for the proposition that “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.’” *Burdick*, 504 U.S. at 433 (internal citation omitted). Instead, the Court held “a more flexible

standard applies” where a court in an election law challenge must “weigh ‘the character and magnitude of the asserted injury’” to the constitutional right to vote against “the precise interest put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Id.* at 434, quoting *Anderson*, 460 U.S. at 789. Thus, under the *Burdick* standard, if the fundamental right to vote is “subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (internal citation omitted). However, if “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment right of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* (internal citation omitted).

Burdick, of course, was not a case about an eligible voter’s ability to cast a ballot and have it counted. It was instead a case about the available range of candidates for whom a citizen could vote. *Burdick* most certainly does not conclude that a severe burden on the right to vote can be subjected to relaxed scrutiny because it does not disfranchise “too many” voters. Neither *Burdick*, nor any other decision from this Court, has altered this Court’s jurisprudence that has consistently recognized that the right to vote is “individual and personal in nature,” *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). See also, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989) (voting is “a personal right” that is “a value in itself”). To the contrary, this Court has repeatedly and consistently recognized that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a

democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. at 555. Accordingly, "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. at 336.

The judicial focus must therefore be on whether the challenged law seriously and unreasonably burdens the right of a particular voter to exercise his or her fundamental right to vote.¹⁷ "This Court has held that a State may not dilute a person's vote to give weight to other interests . . . and a lesser rule could hardly be applicable to a complete denial of the vote." *Evans v. Cornman*, 398 U.S. 419, 423 (1970). Under the Seventh Circuit's rationale, this Court's decision in *Smith v. Allwright*, 321 U.S. 649 (1944), holding that the exclusion on racial grounds of a single voter from a party's primary election violated the Fifteenth Amendment and allowing the voter to pursue a claim for damages for the denial of this personal right, could no longer stand absent evidence that a sufficient number of potential voters were similarly disfranchised. The panel's decision in this case, which allows this fundamental personal right to be denied to some, if not to too many, is

¹⁷ Of course, this serious and unreasonable burden may involve something short of absolute disfranchisement. Thus, this Court found the Ohio statute in *Anderson* unconstitutional because it placed "a particular burden" on Ohio's independent voters, not because it placed an impossible burden. 460 U.S. at 792. The Court of Appeals' insistence that petitioners demonstrate that there are voters who will be absolutely prohibited from voting (App. 5) is therefore erroneous. The showing of a serious and unreasonable burden on the right to vote is sufficient regardless of whether most voters may be unaffected by, or able to overcome, the burden.

irreconcilable with this Court's precedents and introduces a calculus that undermines the fundamental right of individuals to vote.¹⁸ Plenary review should be granted to correct this deviation from the core principle underlying this Court's voting rights jurisprudence.

◆

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

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¹⁸ In addition to erroneously allowing the fundamental right to vote to be denied if the denial does not affect too many persons, the panel's decision ignores the fact that, as noted by Judge Wood in her dissent from the denial of rehearing en banc, it is not unprecedented that elections are decided by a difference of only a few votes. (App. 153). There are similar examples in Indiana. See e.g., *Horseman v. Keller*, 841 N.E.2d 164, 166 (Ind. 2006) (city council-person election decided originally by three votes, increasing to five votes after a recount); *Curtis v. Butler*, 866 N.E.2d 318 (Ind.Ct.App. 2007) (circuit court clerk certified as the winner of the election by three votes); *Hathcoat v. Town of Pendleton Election Board*, 622 N.E.2d 1352, 1354 (Ind.Ct.App. 1993) (town council election won by eight votes).

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