

Nos. 06-2218 & 06-2317

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WILLIAM CRAWFORD, UNITED SENIOR ACTION OF INDIANA, INDIANAPOLIS RESOURCE
CENTER FOR INDEPENDENT LIVING, et al.,

Plaintiffs-Appellants,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, J. BRADLEY KING, in
his official capacity as co-director of Indiana Election Division, KRISTI ROBERTSON, in
her official capacity as co-director of Indiana Election Division, et al.,

Defendants-Appellees.

INDIANA DEMOCRATIC PARTY and MARION COUNTY
DEMOCRATIC CENTRAL COMMITTEE,

Plaintiffs-Appellants,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, J. BRADLEY KING, in
his official capacity as co-director of Indiana Election Division, KRISTI ROBERTSON, in
her official capacity as co-director of Indiana Election Division, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
CASE NO. 1:05-CV-0634-SEB-VSS
THE HONORABLE SARAH EVANS BARKER

BRIEF OF *AMICI CURIAE*

**AMERICAN CENTER FOR VOTING RIGHTS LEGISLATIVE FUND AND VINCENT I. PEREZ
IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE**

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae American Center for Voting Rights Legislative Fund (“ACVR”) is a nonstock corporation operating under section 501(c)(4) of the Internal Revenue Code. ACVR has no parent corporation, and because it has no stock, no publicly held company owns 10% or more of its stock.

The law firms whose partners or associates have appeared for ACVR and *amicus curiae* Vincent I. Perez in this case (including proceedings in the district court) or are expected to appear in this Court are Wilmer Cutler Pickering Hale and Dorr LLP and Lathrop & Gage L.C.

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INTERESTS OF THE AMICI

With the consent of all parties, the American Center for Voting Rights Legislative Fund (ACVR) and Vincent I. Perez submit this brief as *amici curiae* in support of the Appellees and urge affirmance of the district court's judgment.

ACVR is a bipartisan, national non-profit organization devoted to commonsense reforms that promote confidence in our Nation's electoral system. ACVR was founded in February 2005 on the belief that public confidence in our electoral system is the cornerstone of our democracy. The organization was established to further the common good and general welfare of citizens of the United States by educating the public about the importance of our electoral process, and by supporting efforts to increase public participation and confidence in our electoral process. ACVR supports election reforms such as those developed by the Commission on Federal Election Reform co-chaired by former President Jimmy Carter and former Secretary of State James Baker (the "Carter-Baker Commission") that will make it easy to vote but hard to cheat, and that protect the right of all citizens to participate in the electoral process free of intimidation, discrimination, or harassment. Where

necessary, ACVR also defends in court the rights of voters to participate in the electoral process. ACVR works for equal access to the ballot for all eligible citizens irrespective of race, gender, or partisan affiliation. ACVR neither supports nor endorses any political party or candidate.

Vincent I. Perez is an attorney who lives in Indianapolis, Indiana. Mr. Perez has worked as an elections judge and challenger in past Indiana elections. As an elections challenger, Mr. Perez witnessed attempts by people to vote while impersonating other people and was frustrated by the system's inability to prove and stop the fraud. Mr. Perez believes that in-person vote fraud is a significant problem and that Indiana's photo ID requirement would prevent many forms of such fraud.

SUMMARY OF ARGUMENT

As the Supreme Court has recognized, “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). Such regulation—by helping to ensure that elections are fair and honest—protects rather than interferes with the right to vote. The Court has

therefore adopted a “flexible standard” of review for election regulations, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), in which the rigorousness of the inquiry depends on the extent of the burden a regulation imposes on the right to vote. Regulations imposing severe burdens on the right to vote are subject to strict scrutiny; those imposing burdens that are not severe are subject to less intensive scrutiny and “reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests.” *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring).

Reasonable photo ID requirements easily satisfy this flexible standard of review. Indiana’s photo ID requirement is part of a bipartisan nationwide trend of measures designed to improve the United States’s election system. Photo ID requirements are highly popular, nondiscriminatory efforts that are clearly related to preventing fraud and increasing voter confidence—two important (indeed compelling) government interests. Contrary to the Appellants’ and their amici’s assertions, vote fraud—including votes cast illegally in the name of another legal voter or a fictional voter—is a significant problem in the United States, and photo ID requirements will help to prevent it.

Indiana's photo ID requirement also will prevent at least one significant form of voter registration fraud—voting by illegal aliens.

Photo ID requirements impose at most an incidental or minor burden on the right to vote and—contrary to critics' claims—do not discriminate against minority (or other) voters. Indeed, by increasing voter confidence in the electoral process, photo ID requirements may increase voter participation.

Indiana's photo ID requirement is also consistent with the 2005 recommendations of the bipartisan Carter-Baker Commission,^{1/} which recognized that, especially with the enactment of the new federal REAL ID program, photo ID is a fundamental part of living in modern society, and that requiring people to present photo ID before voting will increase confidence in our nation's elections.

^{1/} Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005), available at <http://www.american.edu/ia/cfer/report/report.html>.

ARGUMENT

Photo ID Laws Are Reasonable, Nondiscriminatory Efforts To Prevent Fraud and Increase Voter Confidence.

In numerous decisions going back more than 20 years, the Supreme Court has made clear that a “flexible standard” of review is to be applied to state regulations of the electoral process. Employing this approach, if the burden imposed on the right to vote is not severe, “reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests.” *Clingman*, 544 U.S. at 603 (O’Connor, J., concurring).

As the Court explained in *Burdick*:

It is beyond cavil that “voting is of the most fundamental significance under our constitutional structure.” It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.... Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”

....

... [W]hen a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s

important regulatory interests are generally sufficient to justify” the restrictions.

504 U.S. at 433-34 (citations omitted).

In the intervening years, the Court has continued to explain that reasonable, nondiscriminatory restrictions on voting rights are subject to this flexible standard of review, and will be upheld if they serve important State interests. In *Clingman*—the Court’s most recent extended discussion of the subject—the Court upheld Oklahoma’s semi-closed primary system, holding that it did not violate the right to freedom of association of the Libertarian Party of Oklahoma or of individual voters. 544 U.S. at 584. With respect to the standard of review, the Court explained:

To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.

Id. at 593 (quotation and citations omitted); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997).

Photo ID laws easily satisfy this flexible standard of review.

Although their critics like to portray them as unnecessary, burdensome, and discriminatory laws, the evidence shows just the opposite.

A. Photo ID Laws Support Important Government Interests.

Photo ID laws serve important—indeed, critical—state interests: preventing voter fraud (and the attendant dilution of the votes of legitimate voters) and enhancing public confidence in the electoral process. The importance of these state interests is beyond doubt. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (“Preserving the integrity of the electoral process, preventing corruption, and ‘sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government’ are interests of the highest importance.” (citations and brackets omitted)).^{2/} Moreover, it should be remembered that “the right of

^{2/} As the Supreme Court explained more than 120 years ago:

In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.

Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover 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." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

This Court has already noted that "[v]oting fraud is a serious problem in U.S. elections." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005). Indeed, there is ample evidence that in-person voter fraud (*i.e.*, fraud by people voting in person, as opposed to by absentee or mail-in ballot) remains a problem in this country. The report of the bi-partisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, provides several examples of in-person fraud:

The November 2004 elections also showed that irregularities and fraud still occur. In Washington, for example, where Christine Gregoire was elected governor by a 129-vote margin, the elections superintendent of King County testified during a subsequent unsuccessful election challenge that ineligible ex-felons had voted and that votes had been cast in the names of the dead... In Milwaukee, Wisconsin, investigators said they found clear evidence of fraud, including more than 200 cases of felons voting illegally and

his country can shut his eyes to the fear of future danger from both sources.

Ex parte Yarbrough, 110 U.S. 651, 666-67 (1884).

more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person.... By one estimate, for example, there were over 181,000 dead people listed on the voter rolls in six swing states in the November 2004 elections, including almost 65,000 dead people listed on the voter rolls in Florida.^{3/}

The Appellees presented additional examples (cited by the trial court),^{4/} and there is much more evidence of in-person vote fraud and the potential for such fraud:^{5/}

- The *Detroit News* reported that, “Detroit’s election records are so plagued with mistakes and inconsistencies—including voter registry rolls packed with as many as 20,000 dead people and roughly 100,000 wrong addresses—that the overall integrity of Detroit elections is in question.... Across Michigan, 132 people were listed as having voted in

^{3/} Commission on Federal Election Reform, *supra* n.1, at 4.

^{4/} See State’s Exs. 2, 3, 4, 6, 7, 10, 11, 12-14, 18; Entry Granting Defendants’ Motions for Summary Judgment, Denying Plaintiffs’ Motions for Summary Judgment, and Denying Plaintiffs’ Motions to Strike (“Order”) at 23-24, 88.

^{5/} For historical background on the problem of election fraud in the United States, see generally Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004* (2005), and John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (2004).

For background on recent election fraud issues, see American Ctr. For Voting Rights, *Vote Fraud, Intimidation & Suppression in the 2004 Presidential Election* (Aug. 2005), available at <http://www.ac4vr.com/reports/072005/default.html>; see also Testimony of Mark F. (Thor) Hearne, II, before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights, available at http://www.ac4vr.com/app/library/Hearne_Testimony_Election_Observers.pdf.

November's local elections although they had recently died
....”^{6/}

- The *Chicago Tribune* published an analysis in December 2004 finding that Florida had more than 64,000 dead people on its voter rolls.^{7/} The *New York Daily News* has reported that some 46,000 people were illegally registered to vote in both Florida and New York City (and that between 400 and 1,000 registered voters voted twice in at least one election).^{8/}
- In September 2004, the *Kansas City Star* reported that more than 300 people may have voted twice in the same election in Missouri in 2000 and 2002, and the number “could be even higher.”^{9/}
- The U.S. Department of Justice has sued Missouri over its inflated voter rolls, noting that in some jurisdictions more than 150% of the voting age population was registered to vote.^{10/}
- “Hundreds of Coloradans are being investigated for voter fraud in the November [2004] elections. Prosecutors in at

^{6/} Lisa M. Collins, *In Michigan, Even Dead Vote*, *Detroit News*, Feb. 26, 2006, at 1A. For further background regarding fraud in Michigan, see Brief and Appendix for Michigan Republican Party as Amicus Curiae, *In re Request for Advisory Opinion Regarding Constitutionality of 2005 P.A. 71*, No. 130589 (Mich. filed July 19, 2006) (describing rampant fraud and containing death certificates for current voters in Michigan).

^{7/} Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, *Chicago Trib.*, Dec. 4, 2004, at C13.

^{8/} Russ Buettner, *Exposed: Scandal of Double Voters*, *N.Y. Daily News*, Aug. 22, 2004, at 4.

^{9/} Greg Reeves, *One Person, One Vote? Not Always*, *Kansas City Star*, Sept. 5, 2004, at A1.

^{10/} *Missouri Voter Lists Draw Suit*, *Columbia Daily Trib.* (Nov. 23, 2005), available at <http://www.columbiatribune.com/2005/Nov/20051123News009.asp>.

least 47 counties are probing cases involving accusations of forged signatures, felons voting or people who attempted to vote twice.”^{11/}

- It was reported in January 2005 that the FBI and U.S. Attorney’s office were investigating 59 cases of double voting in Duval County, Florida.^{12/} In Broward County, officials referred at least 30 cases of double voting to the Florida Department of Law Enforcement.^{13/}

Nor does it take a substantial amount of voter fraud to alter the results of an election. The 2001 National Commission on Electoral Reform reported that, since 1948, individual state presidential election results have been decided 31 times by less than 1% of the votes cast; about 4% of Senate and 2% of House seats are won by a margin of less than 1% of the votes cast; 5% of gubernatorial races are won by less

^{11/} Susan Greene & Karen E. Crummy, *Voter Fraud Probed in State Double Dippers*, Denver Post, Mar. 24, 2005, at A-01.

^{12/} David DeCamp, *Double Voting Being Investigated*, Fla. Times-Union, Jan. 25, 2005, at B-1.

^{13/} Amy Sherman, *Double-Voters’ Names Going to Prosecutors*, Miami Herald, Nov. 14, 2004, at 5B.

New Mexico attorney and ACVR board member Patrick Rogers also testified recently in front of the U.S. House of Representatives Committee on House Administration concerning several cases of voting fraud and included evidence of a non-citizen immigrant in Philadelphia who was induced into registering to vote, and then, when she did not vote in the November 2004 election, someone else illegally cast a vote in her name. *See Non-citizen Voting: Hearing Before the H. Comm. on House Admin.*, 109th Cong. (June 22, 2006) (statement of Patrick Rogers), available at <http://cha.house.gov/hearings/Testimony.aspx?TID=946>, testimony attachments available at <http://www.ac4vr.com/app/library/housetestimonyattachments.pdf>.

than 1% of the votes cast; and in any given year the probability that there is at least one election within 1% is 71% for Senate and 99% for House elections.^{14/}

The brief filed by *Amicus Curiae* Brennan Center for Justice dismisses the State’s evidence of voter fraud, arguing that (1) there is no evidence of in-person voter fraud in Indiana; and (2) the in-person fraud identified in other States would not have been prevented by Indiana’s photo ID requirement. According to the Brennan Center, photo ID requirements are useful in stopping only one type of vote fraud—a form the Brennan Center calls “impersonation fraud,” in which one person votes under the name of another person (often a dead person or someone who no longer resides in the precinct). The Brennan Center and Appellants suggest that the photo ID statute’s alleged failure to address other forms of fraud undermines its constitutionality. *See* Brennan Br. at 7; Indiana Democrats Br. at 45.

With respect to the first point (*i.e.*, the alleged lack of evidence of in-person fraud in Indiana), a state legislature clearly may act to

^{14/} *Reports of the Task Force on the Federal Election System*, Aug. 2001 (State’s Ex. 21 at 2-4).

address a potential problem on a prophylactic basis, and need not wait until it becomes a full-fledged crisis:

Legislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986); *see also* *Federal Election Comm'n 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.”); *Timmons*, 520 U.S. at 364 (“Nor do we require elaborate, empirical verification of the weightiness of the State’s asserted justifications.”). The legislature, in other words, need not wait until the house is robbed to begin locking the door.

Moreover, a State may take action to avoid the appearance of fraud as well as its actual occurrence. A Rasmussen Reports poll found that 58% of Americans believed that there was “a lot” or “some” fraud in American elections,^{15/} and a Gallup poll after the 2000 election showed

^{15/} Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee. L. Rev. 937, 942 (2005); Appellees’ Joint Supplemental Appendix (“Supp. App.”) 30.

that 67% of adults nationally had only “some” or “very little” confidence in the way votes are cast and counted in our country.^{16/} Public perceptions, grounded on publicly reported evidence of fraud such as that identified above, are a further justification for fraud-prevention requirements like Indiana’s photo ID law. *See, e.g., McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 143 (2003) (“Our cases have made clear that the prevention of corruption *or its appearance* constitutes a sufficiently important interest” (emphasis added)); *Nat’l Right to Work Comm.*, 459 U.S. at 208 (observing “the importance of preventing ... the eroding of public confidence in the electoral process through the appearance of corruption”); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (upholding campaign contribution limits in part to avoid “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse”).

As to the second point (*i.e.*, that Indiana’s photo ID requirement does not address many other forms of fraud): the order in which to address actual or potential problems in the electoral system (or in other

^{16/} Supp. App. 26 (Wendy W. Simmons, *Black Americans Feel ‘Cheated’ by Election 2000*, Gallup News Serv., Dec. 20, 2000).

areas) is a quintessentially legislative judgment that will not ordinarily be disturbed by the courts. As the Supreme Court explained in upholding an Illinois law that precluded pretrial detainees from voting by absentee ballot:

With this much discretion, a legislature traditionally has been allowed to take reform “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,” and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969) (citations omitted); *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

Furthermore, the Brennan Center wrongly dismisses the significance of photo ID requirements in preventing voter fraud. Contrary to the impression created by the Brennan Center, impersonation fraud is a significant problem. For example, the evidence cited above from Indiana’s neighbor Michigan and the evidence in Georgia, Maryland, New York, and Pennsylvania cited by the district court (*see State’s Exs. 11, 12, 14, 17*) involved not just inflated voter rolls but people actually casting ballots in the name of

other people. And none of those reports suggests that impersonation fraud is limited to absentee balloting, as the Brennan Center implies. *See* Brennan Br. at 11. The Brennan Center is thus simply incorrect to assert that “deficiencies are found in every article and report cited by the district court.” *Id.* at 12.

The Brennan Center also wrongly attempts to minimize the scope of impersonation fraud by asserting that “other evidence ... suggests that many suspected cases of ‘ghost voting’ ... are actually the result of clerical errors.” Brennan Br. at 11 n.11. The only “evidence” cited by the Brennan Center for that broad claim is one reporter’s *speculation* that a handful of ghost votes *might* have been explained by clerical error. *See* State’s Ex. 11 at 7.

In contrast to the Brennan Center’s speculation that clerical error explains away many alleged instances of vote fraud, there is actual evidence that clerical errors in fact open the door to fraud and make it difficult, if not impossible, to uncover the evidence necessary to prosecute vote-fraud crimes. As mentioned above, a joint federal-local law enforcement task force in Milwaukee found “clear evidence of fraud in the [Nov. 2, 2004] election,” including hundreds of felons voting and

“more than 100 individual instances of suspected double-voting, voting in names of persons who likely did not vote, and/or voting in names believed to be fake.”^{17/} The U.S. Attorney later downplayed notions of a “massive conspiracy” but charged 18 people with felonies, including four cases of “double voting,” which could involve impersonation fraud.^{18/} Further prosecutions were impeded by widespread recordkeeping failures:

the task force has found widespread record keeping failures and separate areas of voter fraud. These findings impact each other. Simply put: it is hard to prove a bank embezzlement if the bank cannot tell how much money was there in the first place. Without accurate records, the task force will have difficulty proving criminal conduct beyond a reasonable doubt in a court of law.

Preliminary Findings of Joint Task Force, May 10, 2005 (State’s Ex. 4 at 2). The U.S. Attorney publicly noted the difficulties of bringing prosecutions: “I don’t know how you are going to prove a case when there is no paper trail.”^{19/}

^{17/} Greg J. Borowski, *Inquiry Finds Evidence of Fraud in Election*, Milwaukee Journal Sentinel, May 11, 2005, at A1.

^{18/} Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 6, 2005, at A1.

^{19/} Schultze, *supra* n.18, at A1.

Indeed, it is likely that much impersonation fraud goes undetected. As the district court noted, “without a photo identification requirement it is nearly impossible to detect in-person voter impersonation.” *See* Order at 89. And impersonation fraud is not difficult for political partisans to engineer. Anyone who has access to voter rolls (as party operatives certainly do) can identify people who are unlikely to vote, either because they have not typically voted in the past or because they have moved away or died.^{20/} Also, late in an election day, party members working the polls can determine who has (and has not) voted and pass this information on to other party members who can come in and impersonate the non-voters.^{21/} The danger is especially great in precincts dominated by one party, where the other party often will have few poll watchers to watch for irregularities and will have to

^{20/} *See* State’s Ex. 14 (“City Hall insiders—nameless in order to save jobs—cite a litany of registration methods available to the would-be election rigger.... Corpses, say the sources, are perfect tools for election abuse. The scam works like this. A registered voter dies near the registration deadline ... but remains eligible. A hack sends somebody to pose as the dearly departed. If the fraudulent voter slips by poll watchers, the ‘ghost’ ballot glides through.”).

^{21/} Indeed, Indiana law specifically authorizes parties to have “pollbook holders” at precincts who can get a running list of who has voted throughout the day. *See* Ind. Code §§ 3-6-7-1, 3-11-8-10.5.

rely on poll watchers from outside the precinct who will not have any familiarity with local voters.

With nothing more than perhaps a signature to verify the identity of a voter, poll workers are, in effect, powerless to challenge potential imposters, and after the voting occurs, there is little chance of catching perpetrators. In the unlikely event that the real voter comes in later to vote, the imposter will be long gone, and even if the State later undertakes the costly effort to attempt to determine whether people fraudulently voted in the names of dead people or other registered voters, there is no way to find and punish the imposters after the fact.

In short, the number of prosecutions and convictions for impersonation fraud can hardly be expected to be an accurate measure of such fraud. Moreover, given the relative ease with which parties can commit impersonation fraud and the low risk of getting caught, evidence that people and parties are committing *other* forms of vote fraud makes it reasonable for the Indiana Legislature to conclude that impersonation fraud is a serious danger. In other words, even without direct evidence of impersonation fraud in Indiana, evidence of in-person fraud in other States together with Indiana's own long experience with

other forms of vote fraud^{22/} provide compelling justification for deterrent measures such as photo ID requirements.

Finally, the Brennan Center ignores the fact that Indiana's photo ID requirement prevents not only impersonation fraud but also voting by illegal aliens. Since Indiana requires proof of legal status in the United States before it will issue photo ID cards, *see* 140 Ind. Admin. Code 7-4-1 to -3 (2006), requiring voters to present photo ID at the polls makes it much harder for illegal aliens to vote. And the potential for voting by illegal aliens is a significant problem well within the purview of a legislature to address. A congressional task force found, for example, that there was "clear and convincing evidence that 748 invalid votes" by aliens were cast in a 1996 congressional election in

^{22/} As far back as the 1880s, Indiana was known for election fraud. *See* Campbell, *supra* n.4, at 95 (describing the use of "floaters"—*i.e.*, people voting multiple times—in Indiana in the 1888 presidential election and noting that "[b]y the late 1880s, Indiana had acquired a notorious reputation in the annals of electoral corruption ..."). In a nationally prominent scandal in 1914, federal authorities prosecuted 114 people for an election fraud scheme in Terre Haute that involved vote buying, voter intimidation, and fraudulent voter registrations that allowed some individuals to vote as many as 22 times. *See id.* at 147-49. More recently, the Indiana Supreme Court invalidated the entire 2003 mayoral primary election in East Chicago because of an absentee-ballot fraud scheme. *See Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004).

California.^{23/} The danger is not limited to California,^{24/} as Indiana now also has a significant number of illegal aliens. In 2000, Indiana had an estimated unauthorized resident population of 45,000—a 300% increase from 1990.^{25/}

In short, photo ID requirements are an obvious method for advancing the important government interests of reducing voter fraud and increasing public confidence in elections.

^{23/} H.R. Rep. No. 105-416, at 12 (1998), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:hr416.105.pdf.

^{24/} A Utah study found at least 129 registered voters who were deportable or “likely to be illegal aliens.” *See* Letter from John M. Schaff, Utah Auditor General, to John L. Valentine, Utah State Senate President (Feb. 8, 2005), *available at* http://le.utah.gov/audit/05_01lir.pdf.

In Arizona, voters recently passed a popular statewide initiative (Proposition 200) requiring prospective voters to present proof of citizenship before registering to vote. The requirement was recently upheld in an initial decision in federal court. *See Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2006 WL 1707956 (D. Ariz. June 19, 2006). The *New York Times* also recently noted that voting rolls in Arizona “include[] people who are ineligible to vote, like illegal immigrants and felons.” Randal C. Archibold, *Arizona Ballot Could Become Lottery Ticket*, N.Y. Times, July 17, 2006, at A1.

Furthermore, an amendment (S. Amdt. 4085) to the Comprehensive Immigration Reform Act of 2006 (S. 2611) that would require all voters nationwide to present photo ID was recently debated on the Senate floor. *See* 152 Cong. Rec. S5050-62 (daily ed. May 24, 2006).

^{25/} U.S. Immigration and Naturalization Service, Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, at 15, Table 1 (Jan. 2003), *available at* http://www.uscis.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf.

B. Photo ID Provisions Are a Reasonable Response to Voter Fraud and Impose at Most a Minor Burden on the Right To Vote.

Photo ID requirements such as those adopted by Indiana are a reasonable response to the evidence of voter fraud discussed above and impose, at most, a minor burden on the right to vote. First, rather than being a burden to the poor and to minorities, obtaining photo ID can, in the words of President Carter and Secretary Baker, “empower minorities [and the poor], who are often charged exorbitant fees for cashing checks because they lack proper identification.”^{26/} Indeed, “in a post-9/11 world, photo ID’s are required to get on a plane or into a skyscraper”^{27/} or even to enter the halls of justice. In fact, a person wishing to attend the oral arguments in this case will first have to present photo ID to gain entry to the courthouse.^{28/}

The reasonableness of photo ID requirements is demonstrated in part by the widespread public support they garner. For example, a Wall Street Journal/NBC poll conducted in April 2006 showed that 81%

^{26/} Jimmy Carter and James A. Baker III, *Voting Reform Is in the Cards*, N.Y. Times, Sept. 23, 2005, at A19.

^{27/} *Id.*

^{28/} Telephone interview with staff member of Clerk’s Office, U.S. Court of Appeals for the Seventh Circuit (July 26, 2006).

of respondents nationwide supported (and only 7% opposed) photo ID requirements.^{29/} Similar results were found in polls in Missouri (89% support)^{30/} and Pennsylvania (82% support).^{31/}

The Brennan Center attacks photo ID on the grounds that better maintenance of Indiana’s voter registration rolls would be “the best means” of combating ghost voting (Brennan Br. at 7) and argues that Indiana’s photo ID requirement is suspect because it is more restrictive than the requirements of the Help America Vote Act (HAVA), which the Brennan Center says “represents Congress’s reasoned view of what is sufficient to combat impersonation fraud.” *Id.* at 19. But, as Indiana persuasively argues in its brief (State’s Br. at 6-8), federal law severely hampers States’ efforts to clean their voter rolls. Moreover, Congress stated expressly in HAVA that its identification requirements are

^{29/} Press Release, American Ctr. for Voting Rights, *ACVR Legislative Fund Applauds NBC/WSJ Poll Finding 80% Support for Photo ID Requirement* (April 30, 2006), available at <http://www.ac4vr.com/app/content.asp?ContentId=808>; see also Hart/McInturff, *Study #6062, NBC News/Wall Street Journal Survey* at 13 (April 2006), available at <http://online.wsj.com/public/resources/documents/poll20060426.pdf>.

^{30/} Press Release, American Ctr. for Voting Rights, *Missourians Strongly Favor ID Plan* (March 23, 2006), available at http://www.ac4vr.com/states/MO_Polling_Release_032206.pdf.

^{31/} Press Release, American Ctr. for Voting Rights, *Pennsylvanians Support ID Requirement at the Polls* (Jan. 30, 2006), available at http://www.ac4vr.com/News/FINAL_PA_Poll_Release1_30_06.pdf.

merely a floor, not a ceiling that would preclude States from adopting more rigorous measures to combat fraud.^{32/}

Given the common sense nature of this reform, a growing number of States are adopting voter-identification requirements—including photo ID requirements—in order to curb election fraud and promote greater confidence in the electoral system. As the Brennan Center acknowledges, 24 States now require that all voters present some form of documentary identification prior to voting. *See* Brennan Br. at 20-21. Among those 24 States, seven of them—including States with Democratic legislatures such as Hawaii and Louisiana; swing States such as Florida and Missouri; and Republican States such as Georgia, Indiana, and South Dakota—specifically require that voters present photo ID. *See* Fla. Stat. § 101.043; Ga. Code Ann. § 21-2-417(a); Hawaii Rev. Stat. § 11-136; La. Rev. Stat. Ann. § 18:562(A)(2); Mo. Rev. Stat. § 115.427 (as enacted on June 14, 2006 by S.B. 1014);^{33/} S.D. Codified

^{32/} See 42 U.S.C. § 15484 (“The requirements established by this subchapter are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter”).

^{33/} Available at <http://www.senate.mo.gov/06info/pdf-bill/tat/SB1014.pdf>. For further background regarding Missouri’s new law, see Mark F. (Thor) Hearne II,

Laws § 12-18-6.1. Legislation is pending in seven other States that, if enacted, would require photo ID to be displayed at the polls.^{34/}

Furthermore, Albuquerque voters, with the support of the city's Democratic mayor, recently adopted a photo ID requirement for all Albuquerque elections, which proved successful during its first test in last November's election.^{35/}

Available polling also confirms the bipartisan support for photo ID plans: they were supported by 87% of Democrats and 94% of Republicans in Missouri, by 79% of Democrats and 86% of Republicans in Pennsylvania,^{36/} and by 66% of Democrats and 92% of Republicans in

The Missouri Voter's Protection Act—Real Election Reform for All Missouri Voters, St. Louis Lawyer 12 (June 2006), magazine available at <http://www.bamsl.org/members/stlawyer/archivehome.html>.

^{34/} The seven States are Illinois (HB 4224), Iowa (HF 2597), Maryland (HB 1194 and HB 1582), Minnesota (HF 1443), New Jersey (A114), Tennessee (SB 2827), and Washington (HB 2158 and SB 6333). The legislatures of Minnesota, New Hampshire, Pennsylvania, and Wisconsin also passed such legislation, but the legislation was vetoed.

^{35/} The photo ID ballot measure passed with 73 percent of the vote, see Erik Siemers, *ACLU Sues Clerk Over City's New Voter ID Rule*, Albuquerque Trib., Oct. 28, 2005, at A2, and pre-election polls showed photo ID with overwhelming support "among Republicans and Democrats, anglos and hispanics and across income levels" in Albuquerque, Dan McKay, *Voter Picture ID Has Wide Support*, Albuquerque J., Aug. 24, 2005, at A1. Albuquerque City Clerk Judy Chavez and other election officials "said the rule change didn't cause any problems." *New ID Rule Passes Test*, Albuquerque J., Nov. 16, 2005, at B1.

^{36/} See *supra* nn.30 & 31.

Albuquerque.^{37/} A Rasmussen Research poll found that 82% of Americans, including 75% of Democrats, favor photo ID at the polls.^{38/}

Moreover, the bipartisan Carter-Baker Commission on Federal Election Reform, which was formed to propose ways to increase confidence in the electoral system, recommended, by a 14-3 vote, a photo ID system for voting. As the report explained:

Building confidence in U.S. elections is central to our nation's democracy. At a time when there is growing skepticism with our electoral system, the Commission believes that a bold new approach is essential We should have an electoral system where registering to vote is convenient, voting is efficient and pleasant, voting machines work properly, *fraud is deterred*, and disputes are handled fairly and expeditiously.

This report represents a comprehensive proposal for modernizing our electoral system. We propose to construct the new edifice for elections on five pillars:

....

Second, to make sure that a person arriving at a polling site is the same one who is named on the list, we propose a uniform system of voter identification based on the "REAL ID card" or an equivalent for people without a drivers license.

^{37/} See McKay, *supra* n.35, at A1.

^{38/} See Fund, *supra* n.5, at 5.

Commission on Federal Election Reform, *supra* n.1, at iv (emphasis added).

This recommendation by the Carter-Baker Commission, and particularly its incorporation of the federal REAL ID standard, puts Indiana's photo ID requirement in proper perspective. When it takes effect in 2008, the REAL ID Act^{39/} will, for all practical purposes, require everyone in the United States to possess photo ID. The Act will prohibit federal agencies from accepting State-issued identification unless the identification contains, among other things, a digital photograph of the person. Act § 202(a)(1), (d)(1). Furthermore, to obtain an identification card compliant with the REAL ID Act, an individual will have to present rigorous proof of the person's (1) identity, (2) social security number (or verification that the person is not eligible for such a number), and (3) lawful status in the United States. *See id.* § 202(c)-(d). Thus, any person needing to prove his identity to obtain federal benefits, and any person wanting to access federal facilities or board commercial aircraft will need to present some form of photo ID. *See id.* § 201(3). And in order to obtain that ID, that

^{39/} REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005).

person will have to go through procedures at least as burdensome as what Indiana requires to obtain an ID for voting.

The Carter-Baker Commission also recommended, in order to minimize the burden of a photo ID requirement, that States provide photo IDs to non-drivers free of charge. *See* Commission on Federal Election Reform, *supra* n.1, at 21. Indiana has done just that. *See* Ind. Code § 9-24-16-10 (prohibiting BMV from charging for identification card for individual without driver's license). Indeed, Indiana's law is less burdensome than the requirements proposed by the Carter-Baker Commission. Indiana's photo ID law exempts both the indigent, *see id.* § 3-11.7-5-2.5, and nursing home residents who vote at precincts located at their residential care facilities, *see id.* §§ 3-10-1-7.2(3), 3-11-8-25.1(e). And Indiana does not require photo ID for absentee voting, *see id.* § 3-11-10-1.2, an option that both the elderly and the disabled can take advantage of without restriction, *see id.* § 3-11-10-24(a)(4), (5).^{40/}

^{40/} *See* Ind. Code § 9-24-16-10. Indiana law also exempts an indigent voter from the photo ID requirement if the voter casts a provisional ballot and then appears before the county clerk of courts or election board and executes an affidavit stating that he or she is indigent and unable to obtain proof of identification without payment of a fee. Ind. Code § 3-11.7-5-1.

Especially in light of the Carter-Baker Commission and the REAL ID Act, it is hard to understand how Indiana's photo ID requirement can be viewed as so burdensome as to be unconstitutional. The REAL ID Act means that just about everyone in the United States will possess cards satisfying the REAL ID criteria sooner rather than later. If anything, Indiana is a few years ahead of the curve, but it should not be punished for demonstrating foresight and initiative. In light of where federal law is taking the Nation in less than two years, Indiana's photo ID requirement represents at most a minimal burden on the right to vote.

Finally, Appellants' and amici's assertions that a photo ID requirement will decrease voter turnout are nothing more than unsubstantiated speculation. Equally plausible is the possibility that voter-identification laws such as Indiana's photo ID law will strengthen voter confidence and increase turnout. Of course, photo ID laws would be constitutional even if they did have some negative impact on turnout. As this Court has explained, "striking [] the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not

interfere unless strongly convinced that the legislative judgment is grossly awry.” *Griffin*, 385 F.3d at 1131.

C. Photo ID Rules Are Nondiscriminatory.

It is also clear that photo ID requirements are nondiscriminatory. “Discriminatory” in this context does not simply refer to any difference in treatment as, obviously, virtually every regulation treats some people differently from others. As this Court explained in *Griffin*, “any such restriction [on voting] is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” 385 F.3d at 1130, 1131-33.

Rather, in this context, discriminatory means differentiating between individuals on some improper basis, such as race. *See McDonald*, 394 U.S. at 806-07. Although some have asserted that photo ID laws disenfranchise minority voters, Appellants have presented no evidence for that proposition, and, indeed, the available evidence is to the contrary. The district court found: “Plaintiffs have failed to submit ... any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in

order to vote.” Order at 80. Indeed, Appellants’ expert below found no disparate racial impact from Indiana’s photo ID law. Order at 52. Moreover, experience has failed to show any decrease in minority voter participation under other voter-identification regimes that did not involve photo ID requirements but that were likewise alleged to be discriminatory. To the contrary:

in the November 2000 election, the first presidential election in which Georgia’s original identification requirement was in effect, the Census Bureau reported that turnout of eligible African-American voters *increased* from the 1996 election, from 45.6% to 49.6% In the November 2004 presidential election, when the new identification requirements of the Help America Vote Act of 2002 (“HAVA”) were first effective nationwide, the Census Bureau reported that the turnout among African-American voters in Georgia went up again, from 49.6% to 54.4%.

....

Other states with large minority populations, including Florida, Alabama, Louisiana and Virginia, have identification requirements similar to those in Georgia, yet have had no negative effect on the turnout of minority voters according to available data.

Letter from U.S. Assistant Attorney General William E. Moschella to Senator Christopher Bond (Oct. 7, 2005) (State’s Ex. 18).^{41/} While voter

^{41/} Available at http://www.usdoj.gov/crt/voting/misc/ga_id_bond_ltr.htm.

turnout is obviously affected by many factors, at the very least the evidence does not support the contention that voter-identification requirements discriminate against minority voters.

Given the actual experience with voter-identification systems, it is not surprising that polling shows that minority communities—like the public at large—overwhelmingly favor photo ID requirements. In a poll of Pennsylvania voters, for example, 70% of African-Americans and 90% of Hispanics said they support a photo ID requirement for voting.^{42/} Similarly, in a 2005 survey of Missouri voters, 83% of African-American voters supported a photo ID requirement.^{43/}

^{42/} See *supra* n.31.

^{43/} See *supra* n.30.

CONCLUSION

For the reasons stated above and the reasons advanced by the Appellees, the Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,988 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: July 26, 2006

CERTIFICATE OF SERVICE

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The foregoing brief was filed pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B) by having it dispatched on July 26, 2006 to a third-party commercial carrier for overnight delivery to the Clerk.
