No. 07-21 and 07-25

IN THE
Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, *et al.*,
Respondents,
&
INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,
v.
TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* CYBER PRIVACY PROJECT, PRIVACY JOURNAL, PRIVACY ACTIVISM, LIBERTY COALITION, U.S. BILL OF RIGHTS FOUNDATION, ROBBIN STEWART AND JOELL PALMER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae Cyber Privacy Project ("CPP") is a non-partisan organization focusing on governmental intrusions against Fourth and Fifth Amendment rights of privacy, particularly in government databanks and national identification schemes for voting, travel and work, and on medical confidentiality and patient consent. CPP director Richard Sobel is a scholar of identity issues, has authored law review articles on the subject, and was an amicus with PrivacyActivism in *Hiibel v. Sixth Judicial District of Humboldt County*, 542 U.S. 177 (2004), and with the Program in Psychiatry and Law at Harvard Medical School in *Citizens for Health v. Leavitt*, 428 F.3d 167 (3d Cir. 2005), *cert. denied*, 127 S. Ct. 43 (Oct. 2, 2006). He teaches a course on "The Supreme Court and Privacy." Currently, he is a Visiting Professor at the Medill School at Northwestern University.[1]

Amicus curiae Privacy Journal is a monthly newsletter that has been in publication since 1974 and which has long reported on the trend towards a national identity card and advocated against the idea. Attorney Robert Ellis Smith is the publisher of the Privacy Journal and is the author of an account of privacy in American history, "*Ben Franklin's Web*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Site" (2004) and a report entitled "*A National ID Card: A License to Live*" (2002).

Amicus curiae Liberty Coalition works to help organize, support, and coordinate transpartisan public policy activities related to civil liberties and basic rights, and works in conjunction with groups of partner organizations that are interested in preserving the Bill of Rights, personal autonomy and individual privacy.

Amicus curiae PrivacyActivism is a non-profit organization dedicated to informing and empowering individuals about their privacy rights. Through public education, activism, and legal work, it strives to make complex issues of privacy law, policy, and technology accessible to all. PrivacyActivism was an *amicus* in *Hiibel v. Sixth Judicial Dist. of Humboldt County*, 542 U.S. 177 (2004).

Amicus curiae U.S. Bill of Rights Foundation is a non-partisan public interest advocacy organization seeking remedies at law on targeted legal issues that contravene the Bill of Rights and the related constitutional law.

Amici curiae Robbin Stewart and Joell Palmer are Marion County, Indiana voters. Mr. Stewart was denied the right to vote in the 2006 primary and general elections when he declined to provide photo identification without a warrant or some showing of probable cause. His provisional vote was not counted after he went to the clerk's office and asked that it be counted, but again declined to show photo identification. Mr. Palmer was denied the right to

vote in the 2006 primary election when he was unwilling to show photo identification. Mr. Palmer was a plaintiff in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

SUMMARY OF THE ARGUMENT

1. In order to preserve every citizen's constitutional right to vote, this Court must ensure that a predictable, constitutionally sound standard regulates when, and to what degree, the government can require that a citizen furnish identification before being allowed to exercise the fundamental right to vote. The most appropriate standard for this Court to adopt is one akin to the reasonable suspicion standard that applies when analyzing warrantless searches or seizures under the Fourth Amendment. Under such a standard, only those actually suspected of attempting to commit fraud could be required to furnish identification any more intrusive than simply stating one's name and address or signing a poll book. Only upon probable cause of voter fraud could a citizen be required to furnish photo identification.

The Indiana law before this Court contradicts this standard because: (i) the law is overbroad in that it arbitrarily requires every citizen who wishes to vote in person furnish a photo identification, even absent any suspicion of fraud; (ii) requiring photo identification is not the least intrusive means by which Indiana could serve its legitimate interest in prohibiting in-person voter fraud; and (iii) requiring that all in-person voters present photo identification has a disparate impact on certain minority groups'

ability to exercise the right to vote, and, as noted in dissent below and by Justice Kennedy in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (Kennedy, J. dissenting), even depriving one voter of the right to exercise his or her fundamental right to vote is too substantial a burden to withstand constitutional scrutiny.

2. The Voter Identification Law violates the Voting Rights Act of 1965, because it denies minority groups an equal opportunity to participate in the political process by imposing a "qualification or prerequisite to voting" that unfairly disadvantages such groups. 42 U.S.C. 1973(a).

3. The remedy for Indiana's unconstitutional abridgement of the right to vote is contained in section 2 of the Fourteenth Amendment, which calls for a reduction in the number of Representatives in Congress based upon the proportion of citizens' whose right to vote was abridged. In Indiana, this would result in a reduction in the number of Congressional Representatives by 1.

ARGUMENT

I. The Constitution Requires That A Predictable, Constitutionally Sound Standard Govern When And To What Degree The State Can Require That Citizens Identify Themselves In Order To Be Allowed To Exercise Their Constitutional Right To Vote, And The Voter Identification Law Contradicts Such A Standard.

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)(quoting *Illinois Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Voting is particularly foundational "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Harper v. Virginia State Bd. of Educ.*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)). As it has in other constitutional contexts, this Court must ensure that a predictable, proportional, constitutionally sound standard regulates when, and to what degree, the government may require that a citizen identify himself or herself to be allowed to exercise the fundamental right to vote.

For the reasons set forth by Judge Evans in his dissent from the Seventh Circuit's affirmance of the District Court's grant of summary judgment, *see Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954-57 (7th Cir. 2007) (Evans, J., dissenting),

and those set forth by Judge Wood in her dissent from the Seventh Circuit's denial of *en banc* review, *see Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437-39 (7th Cir. 2007) (Wood, J., dissenting), *amici curiae* believe that Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005 (the "Voter Identification Law") should be subject to a strict scrutiny review. *Amici curiae* further believe, for the reasons set forth by Judges Evans, that the Voter Identification Law would fail such a review. *See Crawford*, 472 F.3d at 954-57.

Nevertheless, even if strict scrutiny is not applied, this Court's jurisprudence teaches that the requirement that in-person voters present photo identification in order to be allowed to vote unconstitutionally infringes upon the fundamental right to vote, because it fails to comply with any predictable, proportional, constitutionally justifiable standard.

It is common practice that voters identify themselves to election officials in some manner in order to vote. However, the extent to which the government may require that citizens identify themselves must be carefully tailored to the circumstances presented by each individual voter. For example, many states (including Indiana, before the passage of the Voter Identification Law), require that voters state their name and address and sign a poll book to verify identity. *Amici curiae* thus suggest that there are many steps on the spectrum of "identification" between requiring a name, address and signature in a poll book, and requiring a government-issued photo identification. Those steps,

like verbally identifying oneself, verifying one's address or length of residency, having a neighbor verify one's identity, presenting a utility bill or other mail, and presenting credit cards or other similar items, are effective but not burdensome. Requiring a government-issued photo identification, as the Voter Identification Law does, is at the ultimate end of the spectrum of "identification"; it is the most intrusive form of identification. Because government-issued photo identification contains far more information than has historically been required to maintain the integrity of the electoral process, the requirement for also constitutes an invasion of privacy.

Amici curiae suggest that the government should not be permitted to require any of the more intrusive forms of identification described above, unless it can articulate some reasonable suspicion that calls into question the voter's identity. Even then, as this Court's precedent teaches, the government should not be permitted to require official photo identification based upon less than probable cause that the voter is attempting to commit fraud. *See Hiibel v. Sixth Judicial Dist. of Humboldt County*, 542 U.S. 177, 187-189 (2004) (based upon reasonable suspicion of criminal conduct, the government may only require that citizens state their name).

The reasonable suspicion standard that *amici curiae* suggests is analogous to the reasonable suspicion standard that has developed in this Court's Fourth Amendment jurisprudence, *see, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 21 (1968), and which is an expression of the balancing test that has been

applied by this Court in other constitutional contexts, including when evaluating the constitutionality of state election laws. *See, e.g., Burdick*, 504 U.S. at 434.

In application, this reasonable suspicion standard will effectively ferret out in-person voter fraud, Indiana's purported basis for requiring photo identification at the polls, *see Crawford*, 472 F. 3d at 953-54, while imposing far less of an infringement upon any individual citizen's right to vote than does the current photo identification requirement. As Judge Wood recognized in dissent below, "[v]oting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. ***Even if only a single citizen is deprived completely of her right to vote … this is still a 'severe' injury for that particular individual***." *Crawford*, 484 F.3d at 438 (Wood, J., dissenting) (emphasis added). This point was also aptly noted by Justice Kennedy in dissent in *Burdick*, which addressed the constitutionality of Hawaii's ban on write-in votes:

> [S]ome voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. ***For those who are affected by write-in bans, the infringement on their right to***

> ***vote for the candidate of their choice is total***.

504 U.S. 428, 447 (1992) (Kennedy, J., dissenting) (citing *Reynolds*, 377 U.S. at 555) ("The 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.") (emphasis added). [2]

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[2] Harm to many voters is evident here. For example, Petitioners demonstrate harm by identifying several people who lacked photo identification and tried unsuccessfully to obtain one, and hence were not allowed to vote. *See Brief of Petitioner Indiana Democratic Party* at 32. Similarly, *amici curiae* Stewart and Palmer were both denied the right to vote in Indiana's 2006 primary and/or general elections when they were unwilling to provide photo identification. Mr. Stewart was required to cast a provisional ballot despite being known to the election official; this provisional ballot, however, was not counted despite that Mr. Stewart traveled to the election clerk's office and requested that it be counted, because he was again unwilling to provide photo identification. In addition, the Petitioners cite evidence that 60% of applicants for photo identification at the Indiana Bureau of Motor Vehicles are turned away for lack of proper supporting documentation, and that voter turnout in Marion County declined from 2002 to 2006 after the Voter Identification Law was put in place. *See id*. at 35. Nationally, in the 2004 presidential election, voter turnout declined 3% (6% for African Americans; 10% for Hispanic Americans) in states that impose identification requirements. *See* Christopher Drew, *Lower Voter Turnout Is Seen in States That Require ID,* N.Y. TIMES, Feb. 21, 2007 (citing studies conducted by the Eagleton Institute at Rutgers University and Ohio State University, on behalf of the federal Election Assistance Commission, available at http://www.eagleton.rutgers.edu/News-Research/VoterID_Turnout.pdf).

As described in detail below, the Voter Identification Law runs contrary to the reasonable suspicion standard outlined above, because: (i) the law is overbroad in that it requires everyone who wishes to vote in person furnish a photo identification, without first seeking lesser-intrusive forms of identification and without complying with any constitutionally justifiable standard; (ii) requiring government photo identification is not the least intrusive means by which Indiana could serve its legitimate interest in prohibiting voter fraud; and (iii) requiring that all in-person voters present photo identification has a disparate impact on certain identifiable, typically minority, groups' ability to exercise their right to vote.[3]

[3] The Voter Identification Law also runs afoul of the Ninth Amendment, which reserves unenumerated rights to the people. *See* U.S. CONST. amend. IX. In a democracy, it is the people who legitimize the government, not the government that legitimizes the people. Thus, while the government may be able to require identification and set standards for the receipt of certain government benefits, it may not do so to abridge the exercise of fundamental rights, especially the right to vote. *See generally*, Richard Sobel & John A. Fennel, *Troubles With Hiibel: How The Court Inverted The Relationship Between Citizens And The State*, 48 S. TEX. L. REV. 613 (2007).

A. This Court Should Adopt A Predictable, Proportional, Constitutionally Sound Standard To Regulate When And To What Extent The Government Can Require That A Citizen Identify Himself As A Condition To Exercise The Constitutional Right To Vote.

Absent probable cause, the government cannot infringe upon the Fourth Amendment by requiring that a citizen identify himself to any degree more intrusive than requiring the citizen state his name. *See Hiibel*, 542 U.S. at 187-89. More official identification may not be demanded even if there is reasonable suspicion that the citizen is involved in criminal activity. *See id.* at 188-89. These notions have developed under this Court's Fourth Amendment jurisprudence, as explained below. As these cases teach, this reasonable suspicion standard is a distillation of the very balancing test applied in analyzing governmental infringements upon the fundamental constitutional right to vote. *See, e.g., Burdick*, 504 U.S. at 434. Thus, requiring that there exist a reasonable suspicion of voter fraud before permitting the government to impose more intrusive forms of identification when identifying voters, is supported by this Court's precedent and is constitutionally sound. The Voter Identification Law, however, contradicts this standard because it arbitrarily allows the government to impose restrictions and conditions upon the exercise of the fundamental right to vote.

Further, the Voter Identification Law creates a system whereby citizens are essentially required to obtain a license to vote (typically a driver's license) in order to be permitted to exercise their fundamental right in the electoral franchise. Such a system of licensing voting runs contrary to the values embedded in our Constitution. *See, e.g., Hynes v. Mayor and City of Oradell*, 425 U.S. 610 (1976). In *Hynes*, this Court struck down as unconstitutional a statute requiring that canvassers, including those canvassing in connection with political campaigns, identify themselves to, and register with, the municipality. *See id.* at 611, 622. The purported justification for the requirement was crime prevention. *See id.* at 620, n. 4.

Concurring in the Court's decision, Justice Brennan wrote that "[o]ffensive to the sensibilities of private citizens, identification requirements …, even in their least intrusive form, must discourage … participation [in the political process]." *Id.* at 638 (Brennan, J., concurring). Justice Brennan further stated that "a requirement that one must register before he undertakes to make a public speech for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.* at 629, n.4 (Brennan, J., concurring).

Requiring a license to vote is akin to, but even more intrusive than, requiring the registration of door-to-door political campaigners. If the latter impermissibly infringes upon the First Amendment, the former no doubt infringes upon the fundamental right to vote. As the court below duly noted, "the Indiana law will deter some people from voting."

Crawford, 472 F.3d at 951. "Even if only a single citizen is deprived completely of her right to vote … this is still a 'severe' injury for that particular individual." *Crawford*, 484 F.3d at 438 (Wood, J., dissenting). To avoid such severe injuries, it is imperative that this Court require that laws like the Voter Identification Law comport with a predictable, constitutionally sound standard, such as reasonable suspicion.

(1) The Development of the Reasonable Suspicion Standard In The Fourth Amendment Context.

A long line of cases has developed the contours of the right guaranteed by the Fourth Amendment to be free from unreasonable searches and seizures. A significant portion of these cases are devoted to addressing questions surrounding whether, and when, the government can "seize" a citizen on less than probable cause. What this Court has developed is a predictable, constitutionally sound standard under which the state is permitted to temporarily "seize" a citizen on less than probable cause, so long as the state can articulate a reasonable suspicion that the citizen is involved in criminal activity. *Terry*, 392 U.S. at 21. This temporary seizure upon a reasonable suspicion of criminal activity is intended to allow the state the opportunity to further investigate whether, in fact, a crime has been committed. *See id*. at 25. As is clear from *Terry* and its progeny, and as is described below, the reasonable suspicion standard is an expression of the balancing test that the Court employs when analyzing the constitutionality of state election laws.

The foundational case on this issue is *Terry v. Ohio*, 392 U.S. 1 (1968). There, the Court assessed the validity of a "stop and frisk" conducted by a police officer, after he observed two men engaging in conduct he deemed suspicious. *See id.* at 4-7. The Court concluded that while the officer lacked probable cause to arrest the two men, he nevertheless was within the bounds of the Fourth Amendment when he seized them, questioned them, and patted them down for weapons. *See id.* at 21-25. In so concluding, the Court noted that

> [i]n order to assess the reasonableness of [the police] conduct as a general proposition, it is necessary 'first to focus upon the governmental interests which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by ***balancing the need to search (or seize) against the invasion which the search (or seizure) entails***'.

Id. at 21 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 534-35 (1967)) (emphasis added). Thus, the reasonable suspicion standard *Terry* announced expresses the Court's balancing of the significance of the intrusion upon the protected right, against the importance of the governmental interests at stake.

Many of cases after *Terry* further demonstrate this point. For example, in *Delaware v. Prouse*, 440

U.S. 648 (1979), the Court noted that "the permissibility of a particular law enforcement practice is judged by ***balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate government interests***." *Id.* at 654 (emphasis added). There, the Court ultimately concluded that the "***marginal contribution*** to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure … at the unbridled discretion of law enforcement officials." *Id*. at 661 (emphasis added).

Similarly, in *Florida v. Royer*, this Court made clear that the scope of the Fourth Amendment intrusion must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." 460 U.S. 491, 500 (1983). *Royer* further stated that the "reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement concerns. The scope of the detention must be ***carefully tailored to its underlying justification***[]" and that the government must use the "***least intrusive means reasonably available***[.]" *Id*. (emphasis added).

The contours of the reasonable suspicion standard was further defined in *Kolender v. Lawson*, 461 U.S. 352 (1983). There, this Court invalidated a statute that allowed police to demand identification absent any suspicion of criminal conduct. *See id*. In concurring in the judgment, Justice Brennan

explained that, absent probable cause, the circumstances under which the state may infringe upon a citizen's Fourth Amendment rights are "***strictly defined by the legitimate requirements of law enforcement*** and by the ***limited extent of the resulting intrusion on individual liberty and privacy***." *Id.* at 363 (Brennan, J., concurring) (emphasis added). Moreover, in discussing the expansion of the power to detain absent probable cause, Justice Brennan noted that "***the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion***." *Id.* at 365 (emphasis added).

Perhaps the most pertinent case here, is *Hiibel*. 542 U.S. 177. In *Hiibel*, this Court upheld the constitutionality of a Nevada statute that required that a citizen subjected to a reasonable suspicion stop identify himself by stating his name. *See id.* In so ruling, this Court recognized the key concept that, absent probable cause to arrest, the government may not require that a citizen identify himself to any degree more intrusive than stating his name. *See id.* at 187-89. In short, absent at least reasonable suspicion, officers may not require identification documents.[4]

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[4] Consistent with the PrivacyActivism *amicus* brief and the position of the petitioners in *Hiibel*, *amici curiae* here suggest that while government officials may ask voters for identification if they have reasonable suspicion of fraud, they may not demand identification absent probable cause of fraud. *See*

Thus, a review of the standards under which this Court will permit government intrusion upon Fourth Amendment rights reveals several key concepts that have aided the development of the reasonable suspicion standard. All of these concepts are equally applicable in the context of protecting the fundamental right to vote.

First, any infringement upon a fundamental right -- the right to be free from unreasonable searches and seizures or the right to vote -- must be considered by balancing the significance of the intrusion upon the protected right, against the importance of the governmental interests.

Second, any intrusion upon fundamental rights justified by some "marginal contribution" to the stated government interest will not be tolerated. *Prouse*, 440 U.S. at 661.[5]

Third, any government intrusion upon individual liberty and privacy should be as limited

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Hiibel, 542 U.S. at 198 (Breyer, J., dissenting) ("an 'officer may ask a *Terry* detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obligated to respond*'."), *quoting Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (emphasis in original).

[5] As noted by Petitioners, in defending a law such as the Voter Identification Law, the "[s]tate 'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'." *Brief for Petitioners Indiana Democratic Party, et al.*, at 44 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

and narrow as possible to fulfill the governmental interests at stake.

Fourth, citizens and governments have at least as much interest in protecting constitutional rights as the bedrock of "ordered liberty" as do the police in effective law enforcement.

Finally, even with reasonable suspicion of criminal conduct, the government can only constitutionally require that a suspect provide his or her name. Only with probable cause to arrest, can the government require any more intrusive form of identification.

(2) The Same Balancing Test Is Evident In This Court's Analysis Of State Election Laws.

As Judge Wood explained in dissent from the Seventh Circuit's denial of *en banc* review, this Court has applied the balancing test that yielded the reasonable suspicion standard, in the context of protecting against infringements into the fundamental right to vote. *See Crawford*, 484 F.3d at 437-39 (Wood, J., dissenting).

In *Burdick*, this Court set forth the analysis required to determine whether to apply strict scrutiny in cases involving claimed infringements on the right to vote. 504 U.S. at 434. As *Burdick* teaches,

> A court considering a challenge to a state election law must weigh "the

> character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests 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."

504 U.S. at 434 (quoting *Anderson v. Calabrezze*, 460 U.S. 780, 788-89 (1983)). In other words, the first step in evaluating a constitutional challenge to an election law is determining whether to apply strict scrutiny. In order to undertake that analysis, courts must engage in the very balancing test that is expressed, in Fourth Amendment parlance, as whether there exists a "reasonable suspicion" sufficient to justify the constitutional infringement.

The same balancing test is evident in the Court's analysis of other state election laws. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating California's "blanket primary" system by weighing the intrusion on the political parties' associational rights, against the interests of the state); *Norman v. Reed*, 502 U.S. 279, 293-94 (1992) ("To the degree that a State would thwart this interest [*i.e.*, the "constitutional right of citizens to create and develop new political parties"] by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation,

and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.") (citations omitted).

Thus, when evaluating state election laws, it is constitutionally necessary to do so by balancing the significance of the intrusion upon the protected right, against the importance of the governmental interests at stake. In the context of determining the precise circumstances, and the extent to which, the government can require that a citizen furnish identification before being permitted to exercise the fundamental right to vote, the appropriate application of such a balancing test can be articulated by asking whether there exists reasonable suspicion that the potential voter seeks to commit voter fraud. If there exists such a reasonable suspicion, a more significant governmental intrusion upon the rights to privacy and to vote may be justified; absent any such reasonable suspicion, however, the intrusion is simply too arbitrary, too significant, and too costly to basic rights, and hence fails to pass constitutional muster.

B. The Voter Identification Law Contradicts The Reasonable Suspicion Standard.

For three principal reasons, the Voter Identification Law contradicts the reasonable suspicion standard that *amici curiae* suggest should be applied when determining whether the government can require any form of identification from a prospective voter. First, the Voter

Identification Law is overbroad. Second, requiring photo identification from every voter who wishes to vote in person is not the least intrusive means to serve the government's legitimate interest in prohibiting voter fraud. Third, requiring photo identification as a condition of exercising the fundamental right to vote has a disparate impact on certain identifiable (*i.e.*, minority) groups' exercise of that right.

(1) The Voter Identification Law Is Overbroad.

Although the Voter Identification Law is purportedly intended to combat in-person voter fraud, the law is overbroad in application because it requires that every potential in-person voter furnish a photo identification before being permitted to vote. *See Crawford*, 472 F.3d at 950. This is the case even where there is ***no suspicion that the person wishing to vote is intending on committing voter fraud***. Where there is no suspicion that a particular voter is prone to committing voter fraud, the government should not be permitted to require that the voter present any of the more intrusive forms of identification. Because the Voter Identification Law arbitrarily and disproportionately requires that every voter furnish photo identification -- the most invasive of all forms of identification because of the amount and type of information included -- the statute is not only overbroad, but also fails under the reasonable suspicion standard described above.

This Court has long held overbroad statutes unconstitutional, most often in the First Amendment context. Three such cases are particularly noteworthy here: *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Schneider v. State*, 308 U.S. 147 (1939), and *Maryland v. Munson*, 467 U.S. 947 (1984).

In *Schaumberg*, the statute required permits for door-to-door solicitations, and required that to be eligible for such a permit an organization must use at least seventy-five percent of its receipts for charitable purposes. *See* 444 U.S. at 622. In holding that charitable solicitations are protected speech under the First Amendment and holding that the statute was unconstitutionally overbroad, the Court agreed

> that the 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village [of Schaumberg] is entitled to protect. We also agree that the Village's proffered justifications are inadequate and that the ordinance cannot survive scrutiny under the First Amendment.

Id. at 636.

Preventing fraud was the principal justification for the statute. *See id*. at 636. The Court, however, found that although there was a

legitimate interest in preventing fraud, the town could "serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id*. at 637. The Court noted that the type of fraud sought to be prevented by the statute could be addressed by the establishment of criminal laws targeting such conduct, a more narrowly-drawn measure. *Id*. at 639. In this regard, the Court stated that "[b]road prophylactic rules in the area of free expression are suspect. Precision and regulation must be the touchstone." *Id*. (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Similarly, in *Munson*, the statute involved an ordinance that prohibited door-to-door solicitation by organizations that did not devote at least seventy-five percent of its receipts to charity. *See* 467 U.S. at 950, n. 2. In holding that the statute at issue was unconstitutionally overbroad, the Court noted that while the legislature's purpose was to prevent fraud and mismanagement, the statute was "too imprecise a tool to achieve that purpose." *Id*. at 967, n. 14.

In *Schneider v. State*, 308 U.S. 147 (1939), this Court found a municipal ordinance forbidding the distribution of literature from house to house without a police-issued permit violated the First Amendment. *See id.* at 164. One of the state's interests in requiring the permits was to ensure the absence of fraud in the distributed literature, or the causes being promoted. *See id*. at 163-64. The Court held that such fraud "may be denounced as offenses and punished by law" and that the more intrusive state

action of discretionary issuance of permits was unconstitutional. *Id.* at 164-65. Regarding the "denounce[ment]" of individual fraud cases, the court reasoned, "[i]f it is said that these means are less efficient and convenient than bestowal of power on police authorities … the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Id.* at 164.

The applicable lessons from these cases are several.

First, a statute is overbroad when it is not "narrowly drawn" to serve the state's "legitimate interests." *Schaumberg*, 444 U.S. at 637; *Munson*, 467 U.S. at 967, n. 14. Requiring that all in-person voters present photo identification to prevent the specter of fraud is even less narrowly drawn and more imprecise a tool than the statutes in either *Schaumberg* or *Munson*. While Indiana has a legitimate interest in prohibiting in-person voter fraud, requiring that every in-person voter present photo identification, even absent any indication that any specific voter may commit fraud, is "too imprecise a tool." *Munson*, 467 U.S. at 967, n. 14. It is like "us[ing] a sledgehammer to hit either a real or imaginary fly on a glass coffee table." *Crawford*, 472 F.3d at 955 (Evans, J., dissenting).

Second, broad "prophylactic rules" must be avoided where they infringe upon constitutional rights. *Schaumberg*, 444 U.S. at 637. There can be no doubt that the Voter Identification Law is just the sort of prophylactic rule that the *Schaumberg* Court

had in mind: it is aimed at a particular, narrow problem -- the specter of in-person voter fraud -- but it has unnecessary implications far beyond preventing any such fraud and does so even in the absence of any evidence of voter fraud.

Third, Indiana's interest in preventing in-person voter fraud can be served by denouncing the offenses, if any, that do occur and punishing them by law. As in *Schaumberg* and *Schneider*, the state's interest in fraud prevention does not empower it to abridge citizens' constitutional freedom to vote by requiring government-issued documentation. If Indiana wishes to further prohibit the criminal act of voter fraud, it can do so through enactment and enforcement of criminal laws targeted at those who raise a suspicion of having engaged in such activities. It should not attempt to do so through arbitrary, broad-based requirements that impose significant burdens on all citizens' rights to vote.

Simply put, the Voter Identification Law casts too wide a net. If the overbroad and disproportional law were allowed to stand, the result would essentially be a system whereby the state requires a license to vote. *See supra* at 12-13. Such a system runs contrary to the values embedded in our Constitution and runs afoul of this Court's precedent. *See, e.g.*, *Hynes*, 425 U.S. at 638 ("Offensive to the sensibilities of private citizens, identification requirements …, even in their least intrusive form, must discourage … participation [in the political process].") (Brennan, J., concurring).

(2) Requiring Photo Identification From Every Voter Is Not The Least Intrusive Means To Serve The State's Legitimate Interest In Prohibiting Voter Fraud.

As this Court makes clear in both the First and the Fourth Amendment contexts, any intrusion on constitutionally-protected rights must be the most minimal, narrowly tailored intrusion possible to serve the government's legitimate interests. In the case of the Voter Identification Law, however, requiring that every voter provide photo identification before being allowed to vote is not the least intrusive means by which the state could achieve its stated goal of preventing in-person voter fraud.

Indeed, a more narrowly tailored approach -- such as one that requires slightly more intrusive forms of identification (such as additional questioning or requests for corroborating documentation) from voters who election officials have a reasonable suspicion are prone to committing voter fraud -- would sufficiently serve the state's interest, while not unduly infringing upon any particular voter's right to vote.

There are many means by which election officials could (and historically have) identified voters, without requiring photo identification. Having voters sign poll books and comparing those signatures to signatures on file has been employed as a non-intrusive, yet effective, means to identify

voters in Indiana, and many other states, for many years. *See Brief for Petitioners Indiana Democratic Party, et al.*, at 4-5. Moreover, election officials could ask questions of potential voters -- such as their address, length of residency, or other similar identifiers -- and develop a reasonable certainty as to whether or not the person is who they claim to be. If the potential voter's signature does not match that on file, or the potential voter is unable to answer legitimate identifying questions, the election official may reasonably believe that the person is not who they claim to be, -- *i.e.,* ***the election official may develop a reasonable suspicion that the individual is attempting to commit voter fraud, a criminal act***. At that point, the official would be justified in escalating the investigation into the voter's identity by requesting one of the more intrusive forms of identification, such asking for corroborating documentation, or a more secure identification document if at least reasonable suspicion is developed. Only upon probable cause to arrest for voter fraud, however, should the government be permitted to require that a voter furnish photo identification. *See, e.g., Hiibel*, 542 U.S. at 188-89.[6]

These alternative measures are less intrusive and more narrowly tailored than requiring that every voter furnish government-issued photo

[6] Under Justice Kennedy's majority decision and Justice Stevens' dissent in *Hiibel*, if there is a likelihood that being required to provide government-issued identification might be testimonial and incriminating, the citizen could invoke their Fifth Amendment privilege. *See* 524 U.S. at 189-91; *id*. at 192-196 (Stevens, J., dissenting). *See also supra* at note 2.

identification. Yet, there is no reason to believe that these measures will not just as effectively discourage and detect voter fraud. Indeed, identification measures such as these have, apparently, worked for many, many years before the passage of the Voter Identification Law, as there has never been a reported instance of in-person voter fraud in the state's history. *See Crawford*, 472 F.3d at 955 ("the defenders of this law candidly acknowledged that no one -- in the history of Indiana -- had ever been charged with" voter fraud) (Evans, J., dissenting).

In sum, the more narrowly-tailored approaches described above comport with this Court's precedent, and avoid any undue infringement upon the fundamental right to vote.

(3) The Voter Identification Law Has A Disparate Impact On Certain Minority Groups' Right To Vote.

As reflected in recent studies on voter turnout, *see supra* note 2, there can be no doubt that voter identification requirements not only discourage voter turnout, but also have a disparate impact on certain identifiable groups. These groups include:

Poor voters: Such voters often do not have access to, or frequent need for, government-issued photo identification (for example, if they utilize public transportation rather than driving). They may lose or have their identification stolen. Many in this group may not have a permanent address, a requirement to obtain a government-issued photo

identification. They also are more likely to have difficulties traveling any distance to obtain an identification. They may lack telephones and/or access to Internet services necessary to ascertain (and then contact) the appropriate agency that can provide them with a certified birth certificate or other document needed to obtain photo identification. Significantly, many who fall into this category are minorities, principally African Americans and Hispanic Americans.

Elderly voters: Such voters are also likely to encounter greater difficulty in traveling any distance to obtain identification. They may lack the savvy or wherewithal to "negotiate the system" to ascertain and contact the appropriate agency that can provide them with underlying identity documents.

Women voters: Such voters whose maiden names have changed run the risk of having the name on their photo identification not "conform" to the name on their birth certificates or voter registration.

Disabled voters: Such voters may experience much greater difficulty in traveling any distance to obtain an identification, and my have no frequent need for government-issued photo identification.

Minority language voters: Such voters whose underlying identity documents are not in English may have difficulty reading and writing English and may need, and would have to pay, to have the documents translated. They may need to obtain those documents from their countries of origin, often a difficult task. Further, minority language voters

are more likely to be intimidated by, or unable to understand, the labyrinth of paperwork necessary to obtain a photo identification or the required underlying documentation. If they have matrilineal names they run the risk of having the name on their photo identification not "conform" to the name on the voter registration list (*e.g.*, "Manuel Alvarez Bravo" or "Manuel Alvarez" or "Manuel Bravo").[7]

To the extent that any member of these groups is already registered to vote (which in Indiana does not require photo identification, *see* http://www.indygov.org/eGov/County/Voter/Registration/forms.htm), they have a vested right to vote. Requiring such individuals to obtain photo identification as a condition of exercising that vested right amounts to nothing more than a modern-day, high-tech, arbitrary re-registration requirement, is a clear denial of due process, and should not be tolerated.[8]

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[7] To the extent that members of any of these groups are also members of other groups, all of the means by which those groups rights may be abridged also apply.

[8] Assuming that voter identification requirements reduces overall turnout by 3% (*see supra* note 2), and there are approximately 4.5 million eligible voters in Indiana (*see infra* at 37), then approximately 135,000 potential voters will be deterred from voting. While there is no evidence of even one in-person fraud, even if there were 2, the ratio of discouraged voters to discouraged defrauders is roughly ***67,500:1***.

II. The Voter Identification Law Violates The Voting Rights Act of 1965.

A. The Voting Rights Act Prohibits Racial Discrimination in Voting.

The Voting Rights Act of 1965 (the "Act") was enacted under Congress's authority to enforce the Fifteenth Amendment's proscription against voting discrimination. *See Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). The Act's purpose is "to rid the country of racial discrimination in voting." *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). The Act is aimed at both obvious and subtle state laws which effectively deny citizens the right to vote because of their race. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969). Further, the Act is "intended to reach any state enactment which alter[s] the election law of a covered State in even a minor way." *Id.* at 566.

Section 2 of the Act states, in pertinent part, that "[n]o voting qualification or prerequisite to voting . . . shall be imposed . . . which results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color" or membership in certain minority language groups. 42 U.S.C. 1973(a) (emphasis added). In essence, Section 2 claims challenge "electoral law[s], practice[s], or structure[s]" that "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Proof

of intent to discriminate is not required. *See id*. at 43-44.

Under the Act, the issue is whether, as a result of the challenged law, citizens "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 44 (internal citations omitted). To that end, a violation of Section 2 is established if the "totality of the circumstances" shows the challenged law results in denying a racial or language minority an equal opportunity to participate in the political process.[9] *See* 42 U.S.C. 1973(b); *Gingles*, 478 U.S. at 46. Equal opportunity is the "ultimate right" of Section 2. *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994).[10]

B. Requiring A Photo Identification To Vote Denies Or Abridges Certain Groups' Equal Opportunity To Vote.

As the dissent in *Crawford* so pointedly noted, the Voter Identification Law "is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic." 427 F.3d

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[9] In essence, the complexity of obtaining breeder documents and government-issued identification constitutes a modern day education test to vote, historically the most popular device for disenfranchisement. See Alexander Keyssar, *The Right to Vote, A Contested History of Democracy in The United States* (Basic Books, 2000).

[10] A strict scrutiny review should apply, because the groups whose rights to vote are being abridged by the Voter Identification Law are insular minority groups. *See U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152 n. 4 (1938).

at 954 (Evans, J., dissenting). Moreover, these "folks" are "mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof." *Id.* at 955. The Indiana law would result in the "denial or abridgement" of the right to vote of these citizens, people who encompass possibly four percent of eligible voters. *Id.* at 955.

The pragmatic concerns (difficulty in traveling to obtain identification, infrequency of other occasions for identification, lack of access to necessary documentation, etc.) are issues that flow directly from the Voter Identification Law and which will deny or abridge the equal opportunity of these already disenfranchised voters to participate in the political process. Indiana's statute is exactly the kind of "qualification or prerequisite to voting . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color" that Section 2 of the Voting Rights Act prohibits. 42 U.S.C. 1973(a). It has a disparate impact on minority voters. As "history demonstrates" about other "electoral reforms" the result is not to purify the public process but "to protect incumbents." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644, n. 9 (1996) (Thomas, J., dissenting). The Voter Identification Law should be struck down on these grounds alone.

III. The Court Of Appeals' View That Photo Identifications Are Commonplace And Necessary In Today's Society Is Misguided.

Writing for the majority below, Judge Posner incorrectly assumes that photo identifications are required and commonplace in today's society, and that without photo identification it is impossible to complete routine tasks. *See Crawford*, 472 F.3d at 951. As a justification for the lower court's conclusion that only few people will be deterred from voting because of the requirement that they obtain a government-issued photo identification, Judge Posner wrote:

> [I]t is exceedingly difficult to maneuver in today's America without a photo ID (try flying, or even entering a tall building such as the courthouse in which we sit, without one), and as a consequence the vast majority of adults have such identification[.]

Id. (citations omitted). Clearly, the majority was equating "photo ID" with a government-issued photo identification of the sort required by the Voter Identification Law. This justification, however, misstates the actual extent to which government-issued photo identifications are required today, and therefore underestimates the impact such a requirement will have on voters' abilities and desires to vote.

Take, for example, Judge Posner's belief that it is impossible to fly in an airplane without a government-issued photo identification. Contrary to this assertion, possession of a government-issued photo identification is not a requirement in order to fly in this country. This issue was recently addressed in *Gilmore v. Gonzalez*, 435 F.3d 1125 (9th Cir. 2006), *cert. denied*, 127 S. Ct 929 (Jan. 8, 2007) (No. 06-211). In *Gilmore*, a citizen challenged the constitutionality of the airline's policy of requiring photo identification in order to fly. *See id.* at 1129-30. In the course of the court's discussion, it noted that the "Security Directive" that was being challenged "require[s] airline passengers to present identification ***or be a 'selectee***'" to receive additional screening. *Id.* at 1133 (emphasis added). In short, it is possible to fly without photo identification, contrary to Judge Posner incorrect assertion below. *See also Brief of Amicus Curiae Lawyers Committee For Civil Rights Under The Law*, at 5, n. 2.

Similarly, take the lower court's example that it is impossible to enter a federal courthouse without a government-issued photo identification. A call to the federal courthouse in Chicago, Illinois, in which the Seventh Circuit sits, reveals that citizens who do not possess a driver's license or passport, can nevertheless enter the courthouse if they have some other form of non-government issued photo identification, such as a work or school identification. A call to the federal courthouse in Boston, Massachusetts similarly reveals that, while the preference is for any kind of photo identification (government- or non-government issued), a citizen can gain access to the courthouse without a photo

identification, if the citizen has non-photo identification such as credit cards or other similar items. In fact, no photo identification is required to enter this Court.

While most Americans possess some form of government-issued photo identification, as Petitioners and various *amici curiae* note in detail, many do not, and requirements for voter identifications should not be used as levers toward developing a national identification card or Real ID system. *See, e.g., Brief for Petitioner Indiana Democratic Party*, at 4, 12-20. *See also* Richard Sobel, *The Demeaning of Identity and Personhood Under the National Identification Systems*, 15 HARVARD J.L. & TECH. 329 (2002). Hence, having a photo identification is not nearly as vital to maneuverability and access in today's society as the lower court seems to believe, especially for those identifiable groups most acutely impacted by a photo identification requirement. *See supra* at 28-30. As such, the lower court failed to appreciate the significance and discriminatory effect of the requirement that all voters present government-issued photo identification, and instead improperly concluded that such a requirement is not a constitutionally cognizable infringement upon the right to vote.

IV. The Constitutional Remedy For Indiana's Abridgement Of The Right To Vote Is A Reduction in Congressional Representation.

The remedy for Indiana's unconstitutional abridgement of the right to vote is spelled out in section 2 of the Fourteenth Amendment, which clearly says that a state's Congressional representation "shall be reduced" if the state "denie[s] or abridge[s]" the "right to vote at any election for the choice of [a federal or state officeholder]." U.S. CONST. amend. XIV, § 2.[11] *Cf. Brief for Petitioners Indiana Democratic Party*, at 2. Thus, Indiana's Congressional delegation should be reduced in proportion to the percent of its population whose right to vote is abridged or denied by the Voter Identification Law.

In 2000, Indiana had a total voting age population of 4,407,679.[12] The voting age population for African Americans and Hispanics, the two groups most disadvantaged by the Voter Identification Law, was 342,087 and 136,266, respectively. The voting age population of those who considered themselves of

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[11] While Section 2 of the 14th Amendment actually only refers to male citizens 21 years and older, we can assume any such limitation was invalidated by the 19th (women's suffrage) and 26th (18 year old vote) Amendments, and the 14th Amendment now applies with respect to all eligible voters. *See* Akhil Amar, *America's Constitution, A Biography*, 392-94 (Random House, 2005).

[12] For all census figures cited herein, *See* http://www.census.gov.

two or more races, was 45,200. The total of these three identifiable groups is 523,553, or approximately 11.6% of Indiana's total voting age population. An 11.6% reduction in Indiana's 9 Congressional representatives, would reduce that number by 1, to 8. This number would be -- and no doubt should be -- larger if one were to take into account women, the disabled and the elderly.

Regardless of the actual numbers, the plain texts of the Fourteenth and Fifteenth Amendments state that any government action that "in any way abridge[s,]" the right to vote, as the Voter Identification Law clearly does, must fail constitutional scrutiny.[13]

[13] The Fifteenth Amendment's declares that the "right of citizens of the United States to vote shall not be denied or abridged … on account of race, color, or previous condition of servitude." U.S. CONST. amend. XIV, § 1.

CONCLUSION

In sum, this Court should adopt a predictable, constitutionally sound standard to regulate when, and to what degree, the government can require that citizens identify themselves in order to be allowed to exercise the fundamental right to vote. *Amici curiae* suggest that there are many levels of identification, from stating one's name and address to providing a piece of mail, that meet the standard. Photo or government-issued identification should only be requested if there is probable cause that a voter is attempting to commit fraud. Absent that constitutional threshold, the government should only be permitted to require less intrusive forms of identification (such as asking additional questions, or requiring corroborative documentation like utility bills), and only then upon reasonable suspicion of fraud. Under such a standard, only those actually suspected of attempting to commit voter fraud could be required to identify themselves to any significant degree.

The Voter Identification Law contradicts this reasonable suspicion standard, principally because it arbitrarily requires that every citizen who wishes to vote in person furnish a photo identification, even absent any suspicion of voter fraud. This is no different than requiring a license to vote. Moreover, the requirement that all in-person voters present photo identification has a disparate impact on certain minority groups' abilities to exercise the right to vote, thereby evoking the strict scrutiny standards and violating the Voting Rights Act.

Totally depriving even one voter of the opportunity to exercise his or her fundamental right to vote is too substantial a burden to withstand constitutional scrutiny. *See Burdick*, 504 U.S. at 434 (Kennedy, J. dissenting). Accordingly, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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