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## **REVIVING THE POLL TAX: THE SEVENTH CIRCUIT UPHOLDS PHOTO ID REQUIREMENTS AT THE POLLS**

MATTHEW W. MCQUISTON\*

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### INTRODUCTION

It is election day. On your way to work, you stop at your local polling place to cast your vote. When you enter the room, however, an election official demands to see your driver's license. Because you cannot afford a car, you do not have a driver's license. You try to explain this to the election official, who, despite your pleas, notifies you that you cannot vote today without one. Moreover, he tells you that to vote in the future you must obtain a government-issued photo ID. You understand that such an ID costs money, of which you have very little. Understandably, you would prefer to spend that money on the necessities of life. Helpless, you leave the polling place, discouraged that voting has become a luxury you can no longer afford.

In 2005, the Indiana legislature passed a law which will lead to just this type of scenario, requiring government-issued photo

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identification at the polls.<sup>1</sup> To most voters, this might seem like a harmless requirement that imposes a minimal burden on our right to vote. However, for the indigent, elderly, and disabled, who often lack both the need for government-issued identification and the means to obtain it, the Indiana “Photo ID Law” presents a major obstacle to the right to vote.<sup>2</sup> Nonetheless, in its January 2007 decision of *Crawford v. Marion County Election Board*, the United States Court of Appeals for the Seventh Circuit upheld Indiana’s Photo ID Law.<sup>3</sup> In doing so, the Seventh Circuit has eroded protection of the right to vote and has started down a dangerous path.

In *Crawford*, a divided court, led by Judge Posner, misapplied the legal test articulated in the U.S. Supreme Court case of *Burdick v. Takushi*.<sup>4</sup> In effect, the majority’s interpretation of *Burdick* threatens to eliminate strict scrutiny review of voting rights cases altogether, in contradiction of the plain language of the *Burdick* decision.<sup>5</sup> Such an interpretation is far too deferential to state legislatures, and limits the court’s ability to ensure that state voting legislation complies with the Constitution.

This Comment will demonstrate that the Seventh Circuit erred in its interpretation of *Burdick* and incorrectly upheld a statute that violates the constitutional rights of many Indiana voters. Section I will describe the context in which the Seventh Circuit decided *Crawford*. Section II will recount the course of the *Crawford* litigation, including a description of the Seventh Circuit’s opinion in that case and the court’s denial of the plaintiffs’ petition for rehearing *en banc*. Finally, Section III will discuss why the Seventh Circuit misapplied *Burdick* and the impact of this decision.

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<sup>1</sup> See Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2005).

<sup>2</sup> See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 955 (7th Cir. 2007).

<sup>3</sup> *Id.* at 954.

<sup>4</sup> See 504 U.S. 428, 434 (1992); *Crawford*, 472 F.3d at 952-53.

<sup>5</sup> See *Burdick*, 504 U.S. at 434; *Crawford*, 472 F.3d at 952.

I. CONTEXT OF THE *CRAWFORD* DECISIONA. *The Voting Rights Act and HAVA*

In 1965, Congress enacted the Voting Rights Act (“VRA”) in response to widespread state practices that denied voting rights to racial minorities.<sup>6</sup> In effect, the VRA affirms the Fifteenth Amendment’s protection of voting rights.<sup>7</sup> The VRA outlawed such discriminatory practices as literacy tests and poll taxes.<sup>8</sup> The reach of the VRA, however, extends beyond overt discrimination, prohibiting as well practices that diminish the voting power of minorities.<sup>9</sup> Such “vote dilution” includes gerrymandering districts, annexing of outlying areas with predominantly white populations, and replacing elected officials with appointed officials.<sup>10</sup> Both cases of vote denial and vote dilution fall under the rubric of Section II of the VRA.<sup>11</sup>

The Supreme Court elaborated the requirements to bring a successful Section II case in *White v. Regester*.<sup>12</sup> In *White*, the Court held that plaintiffs could prevail on a Section II challenge to an electoral system without directly proving that government decision-

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<sup>6</sup> See *Allen v State Bd. of Elections*, 393 U.S. 544, 566 (1969); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006); Pasquale A. Cipollone, Comment, *Section 2 of the Voting Rights Act and Judicial Elections: Application and Remedy*, 58 U. CHI. L. REV. 733, 736 (1991).

<sup>7</sup> See U.S. CONST. amend. XV, §§ 1, 2 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of involuntary servitude”); *Lopez v Monterey County*, 525 U.S. 266, 269 (1999).

<sup>8</sup> Voting Rights Act, 42 U.S.C. §§ 1973(b), 1973(h) (1965).

<sup>9</sup> Tokaji, *supra* note 6, at 703.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 692.

<sup>12</sup> 412 U.S. 755, 766 (1973), *vacated by White v. Regester*, 422 U.S. 935 (1975).

makers acted with discriminatory intent.<sup>13</sup> The Court reversed course, however, in the case of *Mobile v. Bolden*.<sup>14</sup> In *Mobile*, a plurality of the Supreme Court required a plaintiff bringing a Section II claim to prove intentional discrimination.<sup>15</sup>

*Mobile* involved an at-large election scheme for the city commissioners of Mobile, Alabama.<sup>16</sup> Under that scheme, all voters in Mobile elected each of the commissioners.<sup>17</sup> Because whites were a numerical majority in Mobile, they were able to form a “bloc” to shut blacks out of the commission.<sup>18</sup> Accordingly, the minority citizens of Mobile sued the commission as a class, alleging that the at-large scheme violated the VRA, among other allegations.<sup>19</sup> The Court disagreed with the minority citizens, holding that it would find an electoral system unconstitutional only upon direct evidence of discriminatory intent.<sup>20</sup>

Congress amended the VRA in 1982, in direct response to *Mobile*, to adopt the “results test” applied in *White*.<sup>21</sup> Under this test, a plaintiff could establish a Section II violation by demonstrating discriminatory effects alone, without any showing of discriminatory intent.<sup>22</sup> This remains the applicable test for Section II violations of the VRA today.

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<sup>13</sup> See *id.*; Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 5 N. ILL. U. L. REV. 185, 204 (2005).

<sup>14</sup> See *Mobile v. Bolden*, 446 U.S. 55, 65 (1980), *superseded by statute*, Voting Rights Act of 1982, 42 U.S.C.S. § 1973b, *as recognized in* *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006).

<sup>15</sup> *Mobile*, 446 U.S. at 65.

<sup>16</sup> *Id.* at 58.

<sup>17</sup> *Id.* at 60.

<sup>18</sup> See Br. of Appellant at 21-22, *Mobile v. Bolden*, 446 U.S. 55 (1980) (No. 77-1844), 1977 U.S. Briefs 1844; Tokaji, *supra* note 6, at 704.

<sup>19</sup> *Mobile*, 446 U.S. at 58.

<sup>20</sup> See *id.* at 57.

<sup>21</sup> *Thornburg v. Gingles*, 478 U.S. 30, 35 (1985).

<sup>22</sup> *Id.*; see also Voting Rights Act, 42 U.S.C. §§ 1973(a), (b) (whereas the original version of § 2 mirrored the Fifteenth Amendment, barring practices that deny or abridge the vote on account of race, the amended version provides: “no

Although the VRA protected the individual right to vote, after the tumultuous 2000 presidential election and the case of *Bush v. Gore* it became clear that new measures were needed to ensure the fairness of U.S. elections.<sup>23</sup> This concern led to the passing of the Help America Vote Act of 2002 (“HAVA”).<sup>24</sup> HAVA set general minimum election standards, including a limited requirement that voters present identification in the form of a photo ID, current utility bill, bank statement, or government check.<sup>25</sup> HAVA also set standards for voting equipment, voter registration, and created the Election Assistance Commission to help implement the act.<sup>26</sup> However, aside from these minimum standards, HAVA left the details of election administration to the states.<sup>27</sup>

### *B. Georgia and Indiana Enact Strict Photo ID Requirements*

From the electoral scrutiny that followed the 2000 presidential elections arose a variety of election reform measures across the country.<sup>28</sup> While some legislators have aimed their efforts at fraud prevention and electoral security, others have focused on the burden

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voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner 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. . .”) (emphasis added).

<sup>23</sup> Tokaji, *supra* note 6, at 693-95; *see generally* 531 U.S. 98 (2000) (per curiam).

<sup>24</sup> Tokaji, *supra* note 6, at 693-95; *see generally* 531 U.S. 98 (2000) (per curiam).

<sup>25</sup> Help America Vote Act, 42 U.S.C.S. § 15483(b) (LEXIS 2002) (requiring certain forms of identification for first-time voters who registered by mail after January 1, 2003).

<sup>26</sup> *See generally* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206 (2005).

<sup>27</sup> Tokaji, *supra* note 6, at 696.

<sup>28</sup> *See id.* at 689-90 (such measures include ballot security laws, voting machine requirements, standards for recounts and election contests, and absentee voting standards).

such security measures impose on minority voters.<sup>29</sup> These two conflicting viewpoints reflect a fundamental “tension between access and integrity” in elections, with liberals typically favoring access to the polls and conservatives favoring electoral integrity.<sup>30</sup>

The “integrity” side of this debate has prevailed in two states: Indiana and Georgia. Both states enacted laws more strict than the HAVA minimum standards, requiring voters to present government-issued photo identification at the polls to address legislative concerns about election fraud.<sup>31</sup> The Photo ID law specifically provides:

(1) [If a] voter is unable or declines to present the proof of identification; or (2) a member of the precinct election board determines that the proof of identification presented by the voter does not qualify as proof of identification under IC 3-5-2-40.5, a member of the precinct election board shall challenge the voter.<sup>32</sup>

A document satisfies the “proof of identification” requirement if it shows the “name of the individual to whom the document was issued, and the name conforms to the name in the individual’s voter registration record.”<sup>33</sup> A voter who lacks the required identification may cast a provisional ballot, in which case the voter has ten days either to file an affidavit of indigency or to procure the required identification.<sup>34</sup> The Photo ID Law exempts voters who submit

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 695.

<sup>31</sup> Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1; Ga. Code Ann. § 21-2-417 (2007) (enforcement enjoined by *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006)); Robert Berman, Voting Rights Section, U.S. Dep’t of Justice, *Section 5 Recommendation Memorandum*, at 5 (Aug. 25, 2005), available at [http://www.washingtonpost.com/wp-srv/politics/documents/dojgdocs1\\_11.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/dojgdocs1_11.pdf).

<sup>32</sup> Ind. Code §§ 3-5-2-7.2.

<sup>33</sup> Ind. Code § 3-5-2-40.5.

<sup>34</sup> Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1; *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950 (7th Cir. 2007).

absentee ballots or voters who live in nursing homes from complying with the photo ID requirement.<sup>35</sup>

Georgia's photo identification law is very similar, demanding a government-issued photo ID for access to the polls.<sup>36</sup> Like the Indiana Photo ID Law, the Georgia law also allows voters without sufficient identification to cast a provisional ballot, which election officials will count only if they are able to verify that the voter is "eligible and entitled to vote."<sup>37</sup> However, in many respects, the Georgia law is less severe than the Indiana Photo ID Law. For example, the Georgia law allows almost anyone to vote via absentee ballot, providing an alternative to the in-person photo ID requirement.<sup>38</sup> Furthermore, the Georgia law allows voters to obtain a voter identification card, which would satisfy the photo ID requirement, without charge.<sup>39</sup> Yet, the U.S. District Court for the Northern District of Georgia found that even this law exceeded constitutional bounds, and it granted an injunction preventing its enforcement.<sup>40</sup> This decision left the Indiana Photo ID Law alone as the strictest photo ID requirement in the country.

While other states have enacted laws that require identification at the polls, none have enacted any as harsh as the Indiana or Georgia laws. For example, Arizona requires voters to present a photo ID or two forms of non-photo identification, such as a current utility bill.<sup>41</sup> A similar law exists in Ohio, where voters must present a state-issued photo ID, a military ID, or a non-photo ID with the voter's name and current address.<sup>42</sup> Notably, however, the Arizona and Ohio laws allow those without government-issued photo identification to prove their

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<sup>35</sup> Ind. Code §§ 3-11-8-25.1(e); 3-11-10-1.2.

<sup>36</sup> See Ga. Code Ann. § 21-2-417 (2007).

<sup>37</sup> Ga. Code Ann. § 21-2-419 (2007).

<sup>38</sup> Ga. Code Ann. § 21-2-380(b) (2007).

<sup>39</sup> Ga. Code Ann. § 21-2-417.1(a) (2007).

<sup>40</sup> Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006).

<sup>41</sup> Ariz. Rev. Stat. § 16-579 (2007); Tokaji, *supra* note 6, at 699-700.

<sup>42</sup> Tokaji, *supra* note 6, at 699-700; H.B. 3, 126th Gen. Assem., sec. 3501.19, 2006 Ohio Legis. Bull. 75 (LexisNexis), available at 2005 Ohio HB 3 (LexisNexis).



identity through other means. No such safety valve exists for voters without the requisite photo identification in Indiana or Georgia.

C. *Burdick v. Takushi*:

*A Flexible Standard of Review For Voting Rights Legislation*

The U.S. courts have long recognized voting as a fundamental right.<sup>43</sup> Historically, they have applied strict scrutiny to any state limitation on voting rights, meaning such a limitation must be narrowly drawn to advance a state interest of compelling importance.<sup>44</sup> The Supreme Court, however, began to soften its stance in the early 1980's, beginning with the case of *Anderson v. Celebrezze*.<sup>45</sup>

In that case, Justice Stevens, writing for the majority, overturned an Ohio statute requiring presidential candidates to file a statement of candidacy.<sup>46</sup> The plaintiff, an independent candidate running for president, complied with all federal registration requirements.<sup>47</sup> However, he failed to file a statement of candidacy in Ohio and certain other states by those states' statutory deadlines.<sup>48</sup> The Court was especially concerned that Ohio's statute required filing by an early deadline.<sup>49</sup> In fact, while the major party nominations had only just begun, and the major parties were still five months away from choosing their candidates, Ohio required filing of a candidacy statement.<sup>50</sup>

Although the Court ultimately struck down the Ohio statute, it announced a two-step test for election cases, in favor of the strict

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<sup>43</sup> See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>44</sup> See, e.g., *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *American Party of Tex. v. White*, 415 U.S. 767, 780-81 (1974); *Storer v. Brown*, 415 U.S. 724, 736 (1974).

<sup>45</sup> See 460 U.S. 780, 789 (1983).

<sup>46</sup> *Id.* at 782, 806.

<sup>47</sup> *Id.* at 782.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 790-91.

<sup>50</sup> *Id.*

scrutiny approach: “consider the character and magnitude of the asserted injury” to the plaintiff’s First and Fourteenth Amendment rights, then “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>51</sup> In applying this test, the Court required judges to “determine the legitimacy and strength of each of those interests,” and “consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>52</sup>

Nine years later, the Supreme Court decided *Norman v. Reed*. At issue in *Norman* was a complex statutory scheme limiting ballot access for new political parties in the Chicago area through various means.<sup>53</sup> Taking into account the Court’s concern about limitations on ballot access, Justice Souter, writing for the majority, tempered the Court’s holding in *Anderson* by stating that strict scrutiny may still apply to any law that imposes a “severe” restriction on the right to vote.<sup>54</sup>

The same year the Supreme Court decided *Norman* came the case of *Burdick*. The *Burdick* case arose out of a Hawaii law that prohibited voters from “write-in” voting, in which a person votes for a person not listed on the ballot.<sup>55</sup> In 1986, only one candidate appeared on the ballot for a Hawaii House of Representatives seat in the Plaintiff’s district.<sup>56</sup> Feeling that he could not adequately express his preferences

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<sup>51</sup> *Id.* at 789.

<sup>52</sup> *Id.* (the Court ultimately found that the Ohio statute placed too great a burden on the freedom of choice and association of voters, and violated the First and Fourteenth Amendments).

<sup>53</sup> *See* 502 U.S. 279, 282-84 (1992) (Ballot access for new parties required 25,000 signatures on the party’s nominating petition. If a party gained at least 5% of the vote in the next election, that party would become “established,” and thus exempt from the signature requirement. However, the statute considered parties established only in the political subdivisions in which they had fielded candidates. For instance, an established party in Chicago would not necessarily be established in the greater Cook County area).

<sup>54</sup> *See id.* at 288-89.

<sup>55</sup> 504 U.S. 428, 430 (1992).

<sup>56</sup> *Id.*

with only one candidate on the ballot, the Plaintiff, Alan Burdick, asked state officials if he could submit a write-in vote.<sup>57</sup> The Hawaii Attorney General sent Burdick a letter stating that Hawaii law did not allow such votes.<sup>58</sup> Burdick sued Takushi, the Director of Elections for Hawaii, and claimed that Hawaii's refusal to allow write-in votes violated his First Amendment right to self-expression and association.<sup>59</sup>

Before the U.S. Supreme Court, Burdick argued that because voting is a fundamental right, any laws restricting that right must be subject to strict scrutiny.<sup>60</sup> A divided Court disagreed.<sup>61</sup> Writing for the majority, Justice Rehnquist denied that any absolute right to vote ever existed.<sup>62</sup> He reasoned that states have the right to regulate elections to ensure that they are "fair, honest, and orderly."<sup>63</sup> In effect, applying strict scrutiny to all voting rights cases would end voting regulation altogether, leading to chaos at the polls.<sup>64</sup>

Following this reasoning, Justice Rehnquist outlined a more flexible balancing test to determine when strict scrutiny should apply to cases involving the right to vote:

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

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 432.

<sup>61</sup> *See id.* at 433.

<sup>62</sup> *See id.*

<sup>63</sup> *Id.*; *see also* U.S. CONST. art. 1, § 4 ("the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof").

<sup>64</sup> *See Burdick*, 504 U.S. at 433.

rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>65</sup>

In other words, courts must weigh the burden on the right to vote against the stated governmental interest in enacting the legislation.<sup>66</sup> This, however, merely reiterated the rule elaborated in *Anderson*.<sup>67</sup> The Court proceeded to consolidate this balancing act with the “severe restriction” test announced in *Norman*.<sup>68</sup> Justice Rehnquist explained that if the burden on voting rights outweighs the governmental interest, the regulation is classified as a “severe” restriction, and strict scrutiny applies.<sup>69</sup> On the other hand, if the governmental interest outweighs the burden on the right to vote, the law is presumptively constitutional.<sup>70</sup>

In *Burdick*’s case, this new test meant the death of his claim. The Court concluded its opinion by stating that the Hawaii prohibition on write-in voting was “part of an electoral scheme that provides constitutionally sufficient ballot access.”<sup>71</sup> Thus, the law did not violate the First or Fourteenth Amendment rights of Hawaii’s voters.<sup>72</sup>

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<sup>65</sup> *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see also Norman v. Reed*, 502 U.S. 279, 289 (1992).

<sup>66</sup> *See Burdick*, 504 U.S. at 434; *Norman*, 502 U.S. at 289.

<sup>67</sup> *See* 460 U.S. at 789.

<sup>68</sup> *Norman*, 502 U.S. at 288-89.

<sup>69</sup> *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289) (“when [voting] rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance’”).

<sup>70</sup> *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788) (“If . . . the state 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”).

<sup>71</sup> *Burdick*, 504 U.S. at 441.

<sup>72</sup> *Id.*

*D. Common Cause/Georgia v. Billups:  
The Northern District of Georgia Gets It Right*

Until 2006, no one had successfully challenged a photo ID provision under *Burdick*.<sup>73</sup> However, that year, the case of *Common Cause/Georgia v. Billups* changed that. The plaintiffs in *Common Cause* included several nonprofit groups devoted to election reform, ethics in government, and helping minorities and the indigent.<sup>74</sup> The plaintiffs asserted that Georgia's photo ID law violated the Georgia Constitution, the Civil Rights Act of 1964, and Section II of the VRA, and was a poll tax in violation of the Twenty-fourth Amendment and the Equal Protection Clause.<sup>75</sup> The U.S. District Court for the Northern District of Georgia agreed, granting the plaintiffs' request for preliminary injunction to enjoin enforcement of the Georgia law.<sup>76</sup>

As the Georgia Secretary of State informed the Georgia legislature and Governor before passage of an early version of the law, "the Act would open the door even wider to fraud in absentee balloting, while imposing a severe and unnecessary burden on the right to vote for hundreds of thousands of poor, elderly, and minority voters."<sup>77</sup> She further argued that, during her nine years as Secretary of State, there had been no documented cases of fraudulent voting by someone showing up at the polls pretending to be someone else.<sup>78</sup>

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<sup>73</sup> *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1144, 1150 (2006).

<sup>74</sup> 439 F. Supp. 2d at 1300-01.

<sup>75</sup> *Id.* at 1297; *see supra* text accompanying notes 36-38 for a discussion of Georgia's photo ID law.

<sup>76</sup> *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1300 (N.D. Ga. 2006).

<sup>77</sup> *Id.* at 1304-05 (In 2005, the Georgia legislature passed the 2005 Photo-ID Act. In 2006, the 2006 Photo-ID Act repealed the earlier version, replacing it with identical photo ID requirements and a new provision requiring the Board of Elections to issue a voter-ID card to voters who present certain documents to verify their identity).

<sup>78</sup> *Id.*

After describing the Secretary of State's opposition to the Georgia law, the court considered the plaintiffs' evidence of harm. It first referred to census data indicating that minorities and the elderly were far less likely than white voters to have sufficient identification to vote under the new law.<sup>79</sup> Plaintiffs presented additional data from the Secretary of State indicating the undue burden the photo ID law imposes on the right to vote for minorities, the elderly, and the disabled.<sup>80</sup> Plaintiffs also submitted several "would-be voter" declarations from people asserting that the Georgia law personally impacted them.<sup>81</sup>

After a detailed recount of the evidence, the court turned to the merits of the case. It began by restating the heavy burden that the plaintiffs must overcome to prevail on a motion for preliminary injunction.<sup>82</sup> The court observed that to grant a preliminary injunction against a law passed by elected officials would be to interfere with the democratic process.<sup>83</sup> Therefore, the court expressed its reluctance to grant such a motion, and stated that it would do so "only upon a clear showing that the injunction before trial is definitely demanded by the Constitution."<sup>84</sup>

Defendants argued that the Georgia photo ID requirement is not a severe burden because it prevents no one from voting.<sup>85</sup> They

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<sup>79</sup> *Id.* at 1306.

<sup>80</sup> *Id.* at 1312 ("[N]early one-fourth of all registered voters aged sixty-five or over did not have a driver's license or Georgia ID card, and . . . 33.2 percent of African-American registered voters over age sixty-five did not have a license or Georgia ID. Nearly three-fourths of the voters who lacked driver's licenses or Georgia ID cards were on the active voter roll, meaning that they had voted during the last two election cycles).

<sup>81</sup> *See id.* at 1312-13. (Many of these people were disabled, making it difficult for them to travel to a registrar's center to obtain the necessary identification; others lived far from a registrar's center and simply had no way to get there).

<sup>82</sup> *Id.* at 1342-43.

<sup>83</sup> *Id.* at 1342.

<sup>84</sup> *Id.* (citing *Bankwest, Inc. v. Baker*, 324 F. Supp. 2d 1333, 1343 (N.D. Ga. 2004)).

<sup>85</sup> *Common Cause*, 439 F. Supp. 2d at 1345.

contended that the Georgia law includes relaxed absentee voting requirements, allowing anyone without a photo ID to vote by absentee ballot.<sup>86</sup> Moreover, the Georgia law allows voters to obtain a voter identification card without any fee.<sup>87</sup>

Before addressing these arguments, the court began its analysis under the *Burdick* test. The character and magnitude of the injury, the district judge began, is significant because many voters who lack the required identification also lack the means to procure it.<sup>88</sup> The evidence showed that many of the voters who the law harms are “elderly, infirm, or poor.”<sup>89</sup> Such people often have no transportation to get to a voter registrar's office or have disabilities that prevent them from waiting in lengthy lines, and, therefore, cannot obtain even a free voter-identification card.<sup>90</sup> The court next discounted the argument that any voters harmed by the law may simply cast absentee ballots. The state failed to publicize the new rules governing absentee ballots in time for the 2006 elections.<sup>91</sup> The voting population of Georgia was largely unaware that it could cast absentee ballots, with no questions asked and without a photo ID.<sup>92</sup> More importantly, many indigent voters do not have the literacy required to cast an absentee ballot, making this alternative unreasonable.<sup>93</sup>

Likewise, casting a provisional ballot is an unrealistic alternative for many voters.<sup>94</sup> Under the Georgia law, a person with insufficient identification may cast such a provisional ballot, which election officials will count if the person returns with a photo ID within forty-eight hours.<sup>95</sup> Given the difficulty in obtaining a photo ID for many

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<sup>86</sup> Ga. Code Ann. § 21-2-380(b); *Common Cause*, 439 F. Supp. 2d at 1345.

<sup>87</sup> Ga. Code Ann. § 21-2-417.1(a); *Common Cause*, 439 F. Supp. 2d at 1345.

<sup>88</sup> *Common Cause*, 439 F. Supp. 2d at 1345.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1347-48.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 1348.

<sup>94</sup> *See id.* at 1349.

<sup>95</sup> *Id.*

voters, however, it is unrealistic to expect them to obtain the necessary identification and return to the polls within two days.<sup>96</sup> Accordingly, the court found the injury to the right to vote to be “severe.”<sup>97</sup>

Finally, the court analyzed the extent to which the State’s interest in preventing voter fraud makes it necessary to infringe upon the right to vote.<sup>98</sup> As noted above, the Georgia Secretary of State had not seen a single case of voter fraud in her nine years in office.<sup>99</sup> Although the defendants did produce some evidence of voter fraud, all evidence involved fraud in voter registration or absentee voting rather than in-person voting.<sup>100</sup> The district judge criticized the Georgia legislature for drafting a law that applies only to in-person voting, rather than addressing the areas where fraud is most prevalent, namely absentee voting and voter registration.<sup>101</sup>

Although Georgia’s attempt at providing free voter identification cards was commendable, the district court ultimately found that Georgia’s proffered interest, preventing in-person voter fraud, was insufficient to justify the severe burden it imposed on the indigent, minorities, and disabled.<sup>102</sup> Georgia inadequately educated the public about the existence of free voter-ID’s until only two weeks before the 2006 primary elections, depriving voters of the chance to obtain them in time to vote.<sup>103</sup> Accordingly, the court found that the Georgia law imposed an undue burden on the right to vote, in violation of the constitution.

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1349-50.

<sup>98</sup> *Id.* at 1350.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1351.

<sup>103</sup> *Id.* (This seems to imply that had Georgia adequately publicized the opportunity for free voter identification cards, it could have avoided a constitutional violation).



The court rejected the plaintiffs' alternative argument that the Georgia law constituted a constructive poll tax.<sup>104</sup> The plaintiffs argued that, despite the availability of free voter-ID cards, many voters still had to incur the costs of transportation to a registration center.<sup>105</sup> In dismissing this argument, the court reasoned that these costs already result from voter registration and in-person voting and are merely "tangential burdens."<sup>106</sup> Ultimately, however, the district court granted the plaintiffs' preliminary injunction and enjoined enforcement of the Georgia statute for unduly burdening the right to vote.<sup>107</sup>

## II. THE *CRAWFORD* LITIGATION

### A. *The Majority Opinion*

After the enactment of the Indiana Photo ID Law, several candidates for state office, voters, and organizations such as the Democratic Party and the NAACP sued various state election boards to enjoin enforcement of the law on the grounds that it unduly burdened the right to vote, in violation of the Fourteenth Amendment, Section II of the VRA, and the Indiana Constitution.<sup>108</sup> The district court granted summary judgment for the defendants.<sup>109</sup> On appeal to the Seventh Circuit, Judge Posner, writing for the majority in *Crawford*, disagreed with these plaintiffs.<sup>110</sup>

He began his analysis by noting that the vast majority of Indiana voters have some form of government-issued photo identification, and that it is "exceedingly difficult to maneuver" in today's society without

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<sup>104</sup> *See id.* at 1354-55.

<sup>105</sup> *Id.* at 1352.

<sup>106</sup> *Id.* at 1354-55 (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006), *aff'd*, 472 F.3d 949 (7th Cir. 2007)).

<sup>107</sup> *Common Cause*, 439 F. Supp. 2d at 1360.

<sup>108</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950 (7th Cir. 2007); Br. of Appellant at 1-2, *Crawford*, 472 F.3d 949 (7th Cir. 2007) (Nos. 06-2218, 06-2317), 2006 WL 1786073.

<sup>109</sup> *Id.* at 950.

<sup>110</sup> *Id.* at 954 (Judge Sykes joined Judge Posner in the majority opinion).

such identification.<sup>111</sup> He also emphasized the relative ease with which most people may obtain the required photo identification, the fact that those who do not obtain such identification may cast a provisional ballot, and the fact that many registered voters do not vote anyway, all of which minimize the impact of the Photo ID Law.<sup>112</sup>

Notwithstanding his clear disapproval of the plaintiffs' argument, Judge Posner did concede the law harms many voters: "the benefits of voting to the individual voter are elusive" because of the relative unimportance of any single vote, and "even very slight costs in time or bother . . . deter many people from voting."<sup>113</sup> Most people who do not have the requisite identification, he wrote, will not go through the hassle of obtaining it just for the right to vote.<sup>114</sup>

The majority proceeded to discuss the standing of the various plaintiffs.<sup>115</sup> Judge Posner admitted that the vast majority of those harmed by the Photo ID Law will be indigent, and thus, more likely to vote Democratic.<sup>116</sup> Consequently, he noted, the Photo ID Law harms the Democratic Party, satisfying the standing requirement.<sup>117</sup> Finding standing for at least one of the plaintiffs, the majority declined to address the standing of the other plaintiffs.<sup>118</sup>

Before even delving into the *Burdick* analysis, Judge Posner argued that strict scrutiny would be inappropriate in this case.<sup>119</sup> First, he stated that the Photo ID Law does not actually prevent any of the plaintiffs from voting.<sup>120</sup> He asserted that although "no doubt there are at least a few such people in Indiana" whom the law affects, the fact

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<sup>111</sup> *Id.* at 950-51.

<sup>112</sup> *Id.* at 951.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 951.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 952.

<sup>120</sup> *Id.*

that the law does not affect the plaintiffs themselves proves that it has a minimal impact.<sup>121</sup>

Next, he argued that strict scrutiny is inappropriate where the right to vote is on “both sides of the ledger.”<sup>122</sup> According to this argument, certain voting restrictions pit the right to vote against the state’s interest, such as a poll tax, where “on one side is the right to vote and on the other side the state’s interest in defraying the cost of elections . . . , or in excluding poor people or in discouraging people who are black.”<sup>123</sup> Other restrictions do not pit the right to vote against the state’s interest.<sup>124</sup> Judge Posner included the Photo ID Law in this group of restrictions.<sup>125</sup> He argued that the purpose of the Photo ID Law is to prevent fraud.<sup>126</sup> Because fraud dilutes the votes of law-abiding voters, any measure that prevents fraud protects voting rights in some way.<sup>127</sup> Thus, although this law harms the right to vote on one side, it protects the right to vote on the other.<sup>128</sup> According to the majority, strict scrutiny should not apply to such laws.<sup>129</sup> In other words, before the majority applied *Burdick*, it seemed the balance was already tipping in favor of the state.

At last, the majority applied the *Burdick* test, predictably coming to the result that strict scrutiny does not apply to the Photo ID Law.<sup>130</sup> First, the majority considered the burden the law places on voting

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<sup>121</sup> *See id.* (“The fewer the people who will actually disfranchise themselves rather than go to the bother . . . the less of a showing the state need make to justify the law”); *but see id.* at 955 (Evans, J. dissenting) (there is some evidence that the Indiana Photo ID Law will make it difficult for up to four percent of Indiana’s eligible voters to vote).

<sup>122</sup> *Id.* at 952.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *See id.* at 952-53.

rights.<sup>131</sup> While the record from the district court provided evidence of this burden on many voters, the district judge found this evidence to be “totally unreliable” because of “methodological flaws.”<sup>132</sup> The majority deferred to the district court’s finding, thus concluding that the burden on voting rights is slight.<sup>133</sup>

The majority then examined the state’s interest in enacting the Photo ID Law.<sup>134</sup> Judge Posner wrote that the main purpose of the Photo ID Law is to prevent fraud where a person “shows up at the polls claiming to be someone else.”<sup>135</sup> Unless poll workers check photo identification of voters, Judge Posner argued, they have no way to prevent in-person fraud, making the law a necessity.<sup>136</sup>

The majority then addressed several arguments by the plaintiffs. The plaintiffs first stated the current criminal penalties are a sufficient deterrent against vote fraud, and Indiana has prosecuted no one for impersonating a voter, proving the problem is too minor to warrant the Photo ID Law.<sup>137</sup> The majority dismissed both arguments by asserting that the lack of prosecutions against fraudulent voters results from the difficulty of catching anyone in the act of vote fraud.<sup>138</sup> Next, the majority noted that the inflated voter registration rolls of Indiana provide indirect evidence of voter fraud.<sup>139</sup> Judge Posner acknowledged that this does not necessarily indicate the prevalence of fraud.<sup>140</sup> However, he placed the burden of proof on the plaintiffs, stating, “plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from

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<sup>131</sup> *Id.* at 952.

<sup>132</sup> *Id.*; *see also* *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 824-25 (S.D. Ind. 2006), *aff’d*, 472 F.3d 949 (7th Cir. 2007).

<sup>133</sup> *Crawford*, 472 F.3d at 952.

<sup>134</sup> *Id.* at 953.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

voting.”<sup>141</sup> Finally, he addressed the argument that the Photo ID Law is underinclusive because it does not require absentee voters to present ID’s.<sup>142</sup> The majority dismissed this argument by describing the practical difficulties of requiring absentee voters to present photo identification.<sup>143</sup>

The majority concluded by restating the principle that the states must retain the right to regulate elections.<sup>144</sup> In support of this principle, Judge Posner revealed that he considers the burden imposed by the Photo ID Law “ordinary and widespread,” and that to deem such burdens severe would subject all electoral regulation to strict scrutiny.<sup>145</sup> Finding that the burden is not severe, the majority affirmed the decision of the district court and upheld the Photo ID Law.<sup>146</sup>

### *B. Judge Evans’ Dissent*

Judge Evans wrote a sharp dissent against the majority opinion in *Crawford*. He began abruptly: “Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”<sup>147</sup> According to the dissent, the majority misapplied *Burdick*, and should have applied strict scrutiny to the Photo ID Law.<sup>148</sup>

Judge Evans explained that restrictions on the right to vote are poor policy.<sup>149</sup> Considering that fewer people vote now than ever,

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<sup>141</sup> *Id.* at 953-54.

<sup>142</sup> *Id.* at 954.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (citing U.S. CONST. art. 1, § 4 (“the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators”)).

<sup>145</sup> *Crawford*, 472 F.3d at 954.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 955.

states should look to increase voter participation, not restrict it.<sup>150</sup> While Judge Posner placed a heavy burden on the plaintiffs, Judge Evans placed the burden on the state to prove that the Photo ID Law is sufficiently necessary to warrant the harm it causes to voting rights.<sup>151</sup> Where the majority focused on the plaintiffs' rather weak evidence of harm to indigent voters, the dissent focused instead on the state's failure to provide any evidence that voter fraud is a serious problem.<sup>152</sup> Moreover, the dissent observed that a preliminary report to the U.S. Election Assistance Commission has found little evidence of in-person voter fraud.<sup>153</sup> Accordingly, the dissent found no adequate justification for the Photo ID Law, explaining that it is not "wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table."<sup>154</sup>

After finding that Indiana had an insufficient interest in enacting the Photo ID Law, Judge Evans explained that the ambiguous language of the law creates a possibility for abuse.<sup>155</sup> As discussed in Section I(B) above, the name on a voter's photo ID must "conform" to the name in the voter's registration record.<sup>156</sup> Judge Evans asked whether "conformity" would include the case where "the last name of a newly married woman is on the ID but her maiden name is on the registration list," or a "name is misspelled on one—Schmit versus Schmitt," or "[i]f a 'Terence' appears on one and a shortened 'Terry' on the other."<sup>157</sup>

The potential for abuse of the Photo ID Law, however, is far less important than the main threat of the law: stripping the right to vote

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*; *see also supra* text accompanying note 141.

<sup>152</sup> *See Crawford*, 472 F.3d at 953-55 (the dissent emphasized that at oral argument, the defendants admitted that *no one* in the history of Indiana had been charged with violating that state's voter fraud law).

<sup>153</sup> *Id.* at 955.

<sup>154</sup> *Id.* at 955, 56 (most problems in the U.S. voting system result from "mismanagement, not electoral wrongdoing").

<sup>155</sup> *Id.*

<sup>156</sup> Ind. Code § 3-5-2-40.5; *see supra* text accompanying notes 32-33.

<sup>157</sup> *Crawford*, 472 F.3d at 955.

from some eligible voters.<sup>158</sup> Judge Evans conceded that he does not know exactly how many voters would become unable to vote because of the Photo ID Law; however, he alluded to some evidence that this could apply to 4% of eligible voters in Indiana.<sup>159</sup> This group of harmed voters includes mainly the poor, elderly, minorities, and disabled.<sup>160</sup> Few in this group have any need for photo identification. Many cannot afford a car, and therefore have no need for a driver's license.<sup>161</sup> Likewise, many cannot afford to travel, and thus have no need for a passport.<sup>162</sup> Although Indiana residents may obtain an Indiana ID card, this requires a certified birth certificate.<sup>163</sup> Judge Evans noted that for a "poor, elderly person who lives in South Bend, but was born in Arkansas," the difficulty of getting a certified copy of a birth certificate makes this option unrealistic.<sup>164</sup> Although Judge Evans agreed that it is hard to maneuver in society without a photo ID, as Judge Posner observed, he recognized that the indigent, elderly, and disabled often lack maneuverability from the beginning.<sup>165</sup>

As Judge Evans pointed out, not all "maneuverable" citizens are immune from the harm this law creates.<sup>166</sup> In fact, on the day of Indiana's primary election, Representative Julia Carson, up for reelection in an Indianapolis district, rushed to the polling place to be there when it opened in the morning.<sup>167</sup> In her haste, she took only her congressional identification card.<sup>168</sup> After a poll worker informed her that this ID was unacceptable, she went home, picked up the required

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 956.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

photo ID, and returned.<sup>169</sup> Representative Carson had a vested interest in voting that day; most people, Judge Evans noted, would not have made the extra trip just to vote.<sup>170</sup>

Finally, the dissent describes its interpretation of *Burdick*. While the majority seemed to remove strict scrutiny from the voting rights equation entirely, Judge Evans found that *Burdick* left some room for strict scrutiny.<sup>171</sup> Strict scrutiny enters the analysis where the burden on voting rights is large and the state's justification hollow.<sup>172</sup> Applying that test to *Crawford*, Judge Evans concluded that strict scrutiny should apply, and the Photo ID Law imposes an undue burden on a specific segment of Indiana voters, violating the First and Fourteenth Amendments.<sup>173</sup>

### C. The Court Disagrees About a Petition for Rehearing

In April 2007, the Seventh Circuit denied the plaintiffs' petition for rehearing *en banc*.<sup>174</sup> Judge Wood, however, authored a dissent explaining her vote to grant the petition.<sup>175</sup> The dissent worried that the *Crawford* decision left unresolved an extremely important question of law: "what level of scrutiny should courts use when evaluating mandatory voter identification laws?"<sup>176</sup>

According to Judge Wood, the *Crawford* majority wrongly interpreted *Burdick* to mean that strict scrutiny *never* applies to

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*; see also *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992) ("when [voting] rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance'").

<sup>173</sup> *Crawford*, 472 F.3d at 956-57.

<sup>174</sup> *Crawford v. Marion County Election Bd.*, Nos. 06-2218, 06-2317, 2007 U.S. App. LEXIS 7804, at \*4 (7th Cir. Apr. 5, 2007).

<sup>175</sup> *Id.* at \*4 (Judges Rovner, Evans and Williams joined the dissent).

<sup>176</sup> *Id.*



election cases.<sup>177</sup> In contrast, the dissent interpreted *Burdick* to provide a threshold inquiry for courts to use in determining the appropriate level of scrutiny.<sup>178</sup> As stated in *Burdick*, the intensity of the court's inquiry into an election law depends on the extent to which it harms the First and Fourteenth Amendment rights of voters.<sup>179</sup> If such a law imposes a "severe" burden on constitutional rights, it must be narrowly drawn and advance a compelling interest.<sup>180</sup> By comparison, if such a law "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."<sup>181</sup> To determine if a burden is "severe," and thus whether strict scrutiny applies, courts must apply a balancing test, weighing the character and magnitude of harm against the stated governmental interest in enacting the regulation.<sup>182</sup>

The dissent began by comparing the burden of the Photo ID Law on the rights of eligible voters to that of a poll tax or literacy test.<sup>183</sup> Strict voter identification laws can have a profound impact on voter turnout, with the most significant decreases in turnout among minority populations.<sup>184</sup> The *Crawford* majority conceded that indigent voters are most likely to suffer the harm of the Photo ID Law and that such voters typically prefer Democratic candidates.<sup>185</sup> Yet, the majority discounted these facts, reasoning that the Photo ID Law does not harm very many indigent voters; thus, the state's interest outweighs the

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<sup>177</sup> *Id.* at 4-5.

<sup>178</sup> *Id.* at 5.

<sup>179</sup> *Id.*; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>180</sup> *Crawford*, 2007 U.S. App. LEXIS, at \*5-6.

<sup>181</sup> *Id.* at \*6; *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

<sup>182</sup> *Crawford*, 2007 U.S. App. LEXIS, at \*6.

<sup>183</sup> *Id.* at \*7.

<sup>184</sup> *Id.* (citing Christopher Drew, *Low Voter Turnout is Seen in States That Require ID*, N.Y. TIMES, Feb. 21, 2007, at 16).

<sup>185</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

harm caused by the law.<sup>186</sup> The dissent disagreed, and replied that even if the law disenfranchises only a tiny percentage of eligible voters, this is certainly enough to skew election results, given the narrow margins of many recent elections.<sup>187</sup>

Next, the dissent dismissed Judge Posner's statement that "[t]he fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer."<sup>188</sup> Voting is a fundamental *individual* right, the dissent argued.<sup>189</sup> Contrary to Judge Posner's analysis, if a regulation deprives even a single voter of the right to vote, it can be severe.<sup>190</sup> The dissent imagined such a case: "a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification" would still be a severe injury to the hypothetical Ms. Burzynski.<sup>191</sup> Meanwhile, some regulations that affect very many people are perfectly reasonable, such as a law that prevents voters who register within 28 days of an election from voting in that election.<sup>192</sup> Accordingly, the dissent argued, the number of people a contested regulation affects is an unreasonable consideration.<sup>193</sup>

The dissent then addressed the state's justification for the Photo ID Law. Whether the type of voter fraud where one person shows up at a polling place pretending to be another is an actual problem is a disputed question of fact.<sup>194</sup> That such a genuine issue of material fact exists calls into question the district court's decision to grant summary

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<sup>186</sup> See *id.*, Crawford, 2007 U.S. App. LEXIS, at \*7.

<sup>187</sup> Crawford, 2007 U.S. App. LEXIS, at \*7-8.

<sup>188</sup> *Id.* at \*8; see also Crawford, 472 F.3d at 952.

<sup>189</sup> See Crawford, 2007 U.S. App. LEXIS, at \*8.

<sup>190</sup> *Id.* at \*8-9.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at \*9.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

judgment.<sup>195</sup> Furthermore, as the dissent observed, *Burdick* demands an inquiry into the “precise interests put forward by the State as justifications for the burden imposed.”<sup>196</sup> The district court accepted Indiana’s claims of voter fraud as true without “any examination to see if they reflected reality.”<sup>197</sup>

Finally, the dissent appeals to history, reminding the majority that in recent history, states have used voting regulations to discriminate against minorities.<sup>198</sup> Within this context, the Photo ID Law will undoubtedly “harm an identifiable and often-marginalized group of voters to some undetermined degree.”<sup>199</sup> While the majority was quick to dismiss the plaintiffs’ claims of discrimination, the dissent recommended that the court should be more careful before disregarding such an injury.<sup>200</sup> Judge Wood concluded by noting that although it would be premature to decide whether the Photo ID Law would survive strict scrutiny, the court should have first determined whether strict scrutiny is the proper standard of review before making its decision.<sup>201</sup>

### III. THE SEVENTH CIRCUIT MISAPPLIED *BURDICK* AND REACHED THE WRONG RESULT

From the tenor of the majority opinion in *Crawford*, it seems Judge Posner intuitively doubted that the Photo ID Law would cause any actual harm.<sup>202</sup> This gut reaction is evident in his analysis.<sup>203</sup> For

<sup>195</sup> See *id.*; FED. R. CIV. P. 56 (a court will grant summary judgment where the evidence shows “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

<sup>196</sup> *Crawford*, 2007 U.S. App. LEXIS, at \*10.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at \*10-11.

<sup>202</sup> See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950-52 (7th Cir. 2007).

<sup>203</sup> See *id.*

instance, Judge Posner stated, “the new law’s requirement that the would-be voter present a government-issued photo ID . . . is no problem for people who have such a document, *as most people do*.”<sup>204</sup> He also wrote that few people will “actually disfranchise themselves rather than go to the bother” of obtaining an ID, revealing his doubts about the gravity of the plaintiffs’ claim.<sup>205</sup> This sentence in particular reflects the majority’s refusal to believe that some people simply cannot afford the expense of acquiring a photo ID. Although ID cards are free in Indiana to people without a driver’s license, applicants for an ID card must provide certain verifying documents, such as a passport or certified copy of a birth certificate.<sup>206</sup> These verifying documents, however, cost money.<sup>207</sup> In fact, Indiana law demands a fee for a certified copy of a birth certificate.<sup>208</sup> For indigent voters, it is not merely a matter of “going to the bother” to get an ID, but a matter of financial impossibility.

The majority then asked about “people who do not have photo IDs and must vote in person, *if they vote at all*.”<sup>209</sup> It seems the majority is implying that this law causes no actual harm because many indigent voters do not vote anyway. However, that many registered voters choose not to exercise their right to vote does not lessen the burden that the Photo ID Law imposes on that right. In other words, before the Indiana legislature enacted this law, every registered voter had the option to vote. Now, for many eligible voters, that option no longer exists.

While the majority trivialized the impact of the Photo ID Law by reiterating that anyone without a valid photo ID may cast a provisional

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<sup>204</sup> *Id.* (emphasis added).

<sup>205</sup> *Id.*

<sup>206</sup> Ind. Code § 9-24-16-10(b) (2007); 140 Ind. Admin. Code 7-4-2 (1996) (provides list of required documents to obtain an ID card).

<sup>207</sup> *See, e.g.*, Ind. Code § 16-37-1-9 (2007) (Local health departments determine the fee for a birth certificate).

<sup>208</sup> *See id.* (Although there are some exemptions from the fee requirement, these do not apply to people who need a birth certificate to apply for an ID card).

<sup>209</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950 (7th Cir. 2007).

ballot, this is an unreasonable alternative for many voters.<sup>210</sup> When voters cast provisional ballots, they must return to the polling place within ten days with a valid photo ID or an affidavit of indigency.<sup>211</sup> Yet, Judge Posner noted how “[t]he benefits of voting to the individual voter are elusive.”<sup>212</sup> Consequently, the cost of “following up” in time and effort alone often outweigh the minor benefit of voting, disfranchising many voters.<sup>213</sup> Considering that many indigent voters have great difficulty in finding transportation to a polling place, requiring them to return within ten days may be prohibitive.<sup>214</sup> Moreover, if a voter could not afford a photo ID before an election, she will not be able to afford one within ten days of an election.

Likewise, indigent voters often lack education.<sup>215</sup> It is precisely this group that will find executing an affidavit most difficult. For many, the term “affidavit” alone might be so intimidating as to discourage them from casting a provisional ballot. Indeed, many will not know what an affidavit is, how to write one, or what one requires. In fact, one of the requirements of an affidavit is notarization. Many notaries charge for their services, presenting another obstacle between indigent voters and the right to vote.<sup>216</sup> For these reasons, provisional ballots do not sufficiently ease the burden of the Photo ID Law on indigent voters.

During his *Burdick* analysis, Judge Posner inappropriately incorporated a utilitarian balancing test into the inquiry, when he stated, “plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from

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<sup>210</sup> *Id.*

<sup>211</sup> Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1.

<sup>212</sup> *Crawford*, 472 F.3d at 951.

<sup>213</sup> *See id.*

<sup>214</sup> *See Jane Rutherford, One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1521-22 (1998).

<sup>215</sup> *See Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1315-16 (N.D. Ga. 2006).

<sup>216</sup> *See* Ind. Code § 33-42-8-1 (2007) (notaries may charge up to \$2 per notarial act).

voting.”<sup>217</sup> This is an impossible standard to impose upon the plaintiffs. Judge Posner described in detail the difficulty of proving voter fraud.<sup>218</sup> Yet, for plaintiffs to prevail, he would require them to do just that, and prove that there are fewer impersonations than disfranchised voters.<sup>219</sup>

Furthermore, the actual number of people harmed by the law is not such an important concern under *Burdick*. According to Judge Posner’s argument, the plaintiffs’ claim failed largely because the Photo-ID Law harms only a small group of voters.<sup>220</sup> It seems the majority misinterpreted the Supreme Court’s mandate to consider the “character and magnitude of the asserted injury.”<sup>221</sup> By “magnitude,” it is doubtful the Supreme Court meant for courts to consider the mere number of individuals harmed by the law.<sup>222</sup> Voting is a fundamental *individual* right; thus, the more likely interpretation would be to consider the magnitude of the injury to each individual harmed.<sup>223</sup> In this case, the Photo-ID Law creates an impassable barrier to the right to vote for many voters.<sup>224</sup> Such a burden is undoubtedly severe to the individuals harmed.

Judge Posner cited *Anderson* as support for his argument to consider the magnitude of the injury in terms of number of people affected.<sup>225</sup> However, he ignored some very important language in that case that contradicts his interpretation. As Justice Stevens wrote, “[a]s our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political

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<sup>217</sup> Crawford v. Marion County Election Bd., 472 F.3d 949, 953-54 (7th Cir. 2007).

<sup>218</sup> *Id.* at 953.

<sup>219</sup> *Id.* at 953-54.

<sup>220</sup> *Id.*

<sup>221</sup> Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

<sup>222</sup> See Crawford v. Marion County Election Bd., Nos. 06-2218, 06-2317, 2007 U.S. App. LEXIS 7804, at \*8 (7th Cir. Apr. 5, 2007).

<sup>223</sup> See *id.* at \*8-9; *supra* text accompanying notes 188-92.

<sup>224</sup> See *supra* text accompanying notes 188-92.

<sup>225</sup> See Crawford, 472 F.3d at 952.

group whose members share a particular viewpoint, associational preference, or *economic status*.<sup>226</sup> The Photo ID Law is just such a restriction. Although it might not harm a large percentage of Indiana's population, the magnitude of the injury is large to the indigent, a group that shares the same economic status. Thus, Indiana should need an exceptionally noteworthy justification for the court to uphold the law. The *Crawford* majority ignored this, citing only the portion of the opinion that, out of context, supported its conclusion.

Even within this questionable utilitarian inquiry, the majority erred. Inexplicably, it placed the burden of proof on the plaintiffs to prove that the law harmed more people than it helped.<sup>227</sup> Judge Posner wrote that the plaintiffs failed this test, deferring to the district court's finding that the plaintiffs' evidence of harm was too weak to consider.<sup>228</sup> Even if the district court were correct in dismissing the plaintiffs' evidence, however, the state provided an equally weak justification for the law, considering no cases of in-person voter fraud have been ever been filed in Indiana to date.<sup>229</sup> Why the court dismissed the plaintiffs' evidence, yet gave credence to the state's equally fragile evidence, was never explained by the majority.

Judge Posner magnified the state's interest in enacting the Photo ID Law, citing indirect evidence of voter fraud in Indiana's inflated voter registration rolls, which contain a discrepancy between the number of registered voters listed and eligible voters.<sup>230</sup> However, most of this inflation results from duplicate registrations.<sup>231</sup> Duplicate registrations usually result from a voter moving or dying.<sup>232</sup> In these

<sup>226</sup> *Anderson*, 460 U.S. at 792-93 (emphasis added).

<sup>227</sup> *See Crawford*, 472 F.3d at 953-54.

<sup>228</sup> *See id.* at 952.

<sup>229</sup> *Id.* at 955; *supra* text accompanying notes 151-52.

<sup>230</sup> *Crawford*, 472 F.3d at 953.

<sup>231</sup> *See* Press Release, Indiana Secretary of State, U.S. Department of Justice Compels State Democrats to Sign off on Rokita Plan, *available at* <http://www.in.gov/sos/press/2006/06222006.html> (2006).

<sup>232</sup> *See* Caltech/MIT Voting Tech. Project, Voting: What Is, What Could Be 28 (2001), *available at* [http://www.vote.caltech.edu/media/documents/july01/July01\\_VTP\\_Voting\\_Report\\_](http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_)

cases, voter fraud is not as great a concern.<sup>233</sup> When people move, they rarely do so to commit vote fraud. Likewise, when registration lists contain the names of the deceased, photo ID requirements are unnecessary. The less restrictive means employed by most states would suffice to deter fraudulent use of a duplicate name.<sup>234</sup> In fact, any of the forms of identification listed in HAVA would be sufficient to deter in-person voter fraud, and would not impose such an onerous burden on any group of voters.<sup>235</sup> After all, how many people would go to the trouble of finding a duplicate name, then forging a utility bill or obtaining a fake credit card just to be able to cast a single fraudulent vote?

Furthermore, as Judge Wood reminded the majority, this entire proceeding involved the state's motion for summary judgment.<sup>236</sup> With such weak evidence on both sides, a genuine issue of material fact clearly existed, and summary judgment was inappropriate.<sup>237</sup> Compare the grant of summary judgment in *Crawford* to the holding in *Common Cause*.<sup>238</sup> Georgia law universally allows voters to submit absentee ballots, and provides for voter ID cards, without charge, to anyone in need of one.<sup>239</sup> Yet, the Georgia court found that even these safeguards were insufficient, and the law was in clear violation of the constitution.<sup>240</sup> Meanwhile, the Indiana Photo ID Law contains neither a liberal absentee ballot measure nor a provision for free voter ID

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Entire.pdf ("There is little evidence that such duplicate registrations have led to widespread duplicate voting").

<sup>233</sup> See *id.*

<sup>234</sup> See *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006).

<sup>235</sup> See Help America Vote Act, 42 U.S.C. § 15483(b) (2007).

<sup>236</sup> *Crawford v. Marion County Election Bd.*, Nos. 06-2218, 06-2317, 2007 U.S. App. LEXIS 7804, at \*9 (7th Cir. Apr. 5, 2007).

<sup>237</sup> *Id.*

<sup>238</sup> See *Common Cause*, 439 F. Supp. 2d at 1360.

<sup>239</sup> See *supra* text accompanying notes 38-39.

<sup>240</sup> See *supra* text accompanying note 82 (The plaintiffs overcame an extremely strict burden of proof to prevail on their motion for preliminary injunction against the Georgia law).



cards.<sup>241</sup> Given the harsher nature of the Indiana Photo ID Law, one would have expected the court to deny the defendants' motion for summary judgment and allow the case to proceed. Nonetheless, where Georgia found a clear constitutional violation in a less burdensome law, the Seventh Circuit found that no reasonable jury could find for the plaintiffs, even construing all evidence in their favor.<sup>242</sup> If the Seventh Circuit was correct, and no reasonable jury could have found a constitutional violation in *Crawford*, then the holding in *Common Cause* must have been quite unreasonable.

Perhaps the majority's most creative argument was that whenever the right to vote lies on "both sides of the ledger," strict scrutiny is inappropriate.<sup>243</sup> As discussed in Section II(A) above, he explained that with a poll tax, the government interest, be it reducing election costs, limiting the right to vote to those who really care, or outright discrimination, is set squarely against the right to vote.<sup>244</sup> In contrast, the stated purpose of the Photo ID Law is to reduce voting fraud, which dilutes the votes of lawful voters.<sup>245</sup> Although the Photo ID Law harms voting rights on one hand, it arguably preserves them on the other.<sup>246</sup>

However, this "ledger" analysis has poor policy implications. Any reasonably creative politician could manipulate this test to avoid strict scrutiny for any law. For example, even a direct poll tax, which courts have universally found unconstitutional, can be seen in some ways as being on both sides of the ledger.<sup>247</sup> If a state declares that the purpose

<sup>241</sup> See *supra* text accompanying notes 31-35.

<sup>242</sup> See, e.g., *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1289 (7th Cir. 1997) (On a motion for summary judgment, courts should "review the record in the light most favorable to the non-moving party and . . . draw all reasonable inferences in that party's favor").

<sup>243</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007).

<sup>244</sup> *Id.*; see *supra* text accompanying note 122.

<sup>245</sup> *Crawford*, 472 F.3d at 952.

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (finding poll taxes unconstitutional).

of a poll tax is to preserve the integrity of elections by ensuring that people who actually care about politics are the ones voting, than such a clearly unconstitutional measure would be on “both sides of the ledger.” Surely, the *Crawford* majority would not advocate anything less than strict scrutiny in this case. The potential for abuse of such a test is clear, and the majority should not have included this inquiry in its *Burdick* analysis.

Finally, *Crawford* leaves judges within the Seventh Circuit unsure whether, if ever, to apply strict scrutiny to cases involving electoral regulation.<sup>248</sup> Under most circuits’ interpretation of *Burdick*, strict scrutiny applies to any severe regulation. To determine if a regulation is severe, courts weigh the harm to the right to vote against the state’s interest in enacting it.<sup>249</sup> Yet, in the post-*Crawford* Seventh Circuit, it is unclear when any regulation would be severe. The majority complicated the *Burdick* test by introducing a complex utilitarian analysis and an unreasonable “ledger” test into the inquiry.<sup>250</sup> This is likely to create confusion for courts in the future, as they grapple to reconcile the additional rules announced by the Seventh Circuit with Supreme Court precedent.<sup>251</sup>

#### CONCLUSION: *CRAWFORD*’S LEGACY

To paraphrase Benjamin Franklin, only a fool would sacrifice an essential liberty for a small amount of security.<sup>252</sup> Yet, by restricting the right to vote to fight the possibly imaginary problem of in-person

<sup>248</sup> See *Crawford v. Marion County Election Bd.*, Nos. 06-2218, 06-2317, 2007 U.S. App. LEXIS 7804, at \*4-5 (7th Cir. Apr. 5, 2007).

<sup>249</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>250</sup> See *supra* text accompanying notes 217, 243.

<sup>251</sup> See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983) (The Court is likely to overturn any law that limits the right to vote of an identifiable group that shares a “viewpoint, associational preference, or economic status.” What will a court do with a law that infringes on the rights of a very small group of people with similar economic status? To hold this law unconstitutional would obey *Anderson* but contradict *Crawford*).

<sup>252</sup> See *Grievance Administrator v. Fieger*, 476 Mich. 231, 371 (2006).

voter fraud, the Indiana legislature has done just that. By upholding this law, the Seventh Circuit has sent the message to legislatures that they may enact discriminatory voting restrictions, as long as the restrictions harm only a small group of people.<sup>253</sup>

The Photo ID Law is the practical equivalent of a poll tax. Although Indiana provides photo ID's free of charge, applicants often must pay for the verifying documents needed to acquire those ID's.<sup>254</sup> Although the resulting harm is less direct than with the poll taxes of the past, such photo ID measures often require voters to spend money to retain the right to vote. Those who cannot afford the expense, effectively lose that right.

To be sure, no court is likely to uphold a law that is discriminatory on its face. However, laws such as Indiana's photo ID requirement discriminate in subtler ways. In *Crawford*, the Seventh Circuit has indicated that it will defer to states' rights to regulate elections, and only in the most obvious cases will it overturn a discriminatory statute.<sup>255</sup>

Under the *Crawford* majority's interpretation of *Burdick*, strict scrutiny review of voting regulations would become exceedingly rare, if it would ever be present at all.<sup>256</sup> According to the majority, a regulation is "severe" only where it harms more people than it purports to help.<sup>257</sup> With a law of general applicability, such as a poll tax, lawmakers could argue the law helps all voters by preserving electoral integrity, keeping away people who have less of an interest in voting.<sup>258</sup> Such a measure harms only a minority of the population, while purporting to help a majority. Following Judge Posner's analysis closely, strict scrutiny would not apply in this case. It is doubtful that

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<sup>253</sup> See *supra* text accompanying note 216.

<sup>254</sup> See *supra* text accompanying notes 205-07.

<sup>255</sup> See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007).

<sup>256</sup> See *id.* at 952-54; see also *Crawford v. Marion County Election Bd.*, Nos. 06-2218, 06-2317, 2007 U.S. App. LEXIS 7804, at \*4-5 (7th Cir. Apr. 5, 2007).

<sup>257</sup> See *Crawford*, 472 F.3d at 953-54.

<sup>258</sup> See *supra* text accompanying note 246.

the Seventh Circuit would allow this to happen with such a universally condemned measure. However, with a lesser-known and subtler discriminatory measure, the majority may defer to the states' right to regulate elections.<sup>259</sup> With this avenue open to them, political parties might be encouraged to think of creative ways to exclude groups that tend to vote against them.

Photo ID requirements are just one of these creative methods of political exclusion. Contrary to the *Crawford* majority's assertions, they can exclude enough voters to skew election results.<sup>260</sup> For example, one study found that eleven percent of U.S. citizens do not have photo identification.<sup>261</sup> Among those without photo ID's, most tend to be poor, minorities, or disabled.<sup>262</sup> Meanwhile, this same group tends to vote Democratic.<sup>263</sup> If a photo ID requirement disfranchises even a fraction of the eleven percent of the population, this could certainly distort election results. As Judge Wood explained, merely hundreds of votes have decided many recent elections.<sup>264</sup> As the states within the Seventh Circuit realize that subtle discriminatory measures might produce real political gains, such measures will only rise in frequency.

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<sup>259</sup> See *Crawford*, 472 F.3d at 954.

<sup>260</sup> *Crawford*, 2007 U.S. App. LEXIS, at \*7-8 (citing Christopher Drew, *Low Voter Turnout is Seen in States That Require ID*, N.Y. TIMES, Feb. 21, 2007, at 16) (The New York Times reported that overall voter turnout in states with voter ID requirements decreases by about three percent, and by two to three times that much for minorities).

<sup>261</sup> Brennan Center for Justice, NYU School of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification 3* (2006), available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_39242.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf) (citing similar findings by the U.S. Department of Transportation and the U.S. Census Bureau).

<sup>262</sup> *Crawford*, 472 F.3d at 955.

<sup>263</sup> *Id.* at 951.

<sup>264</sup> *Crawford* 2007 U.S. App. LEXIS, at \*7-8.