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The World's News Network

A CLE on Voting Rights in the United States for the Gus J. Solomon Inns of Court Group
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Election 2012: Voting Laws Roundup

ANALYSIS

– 10/16/12

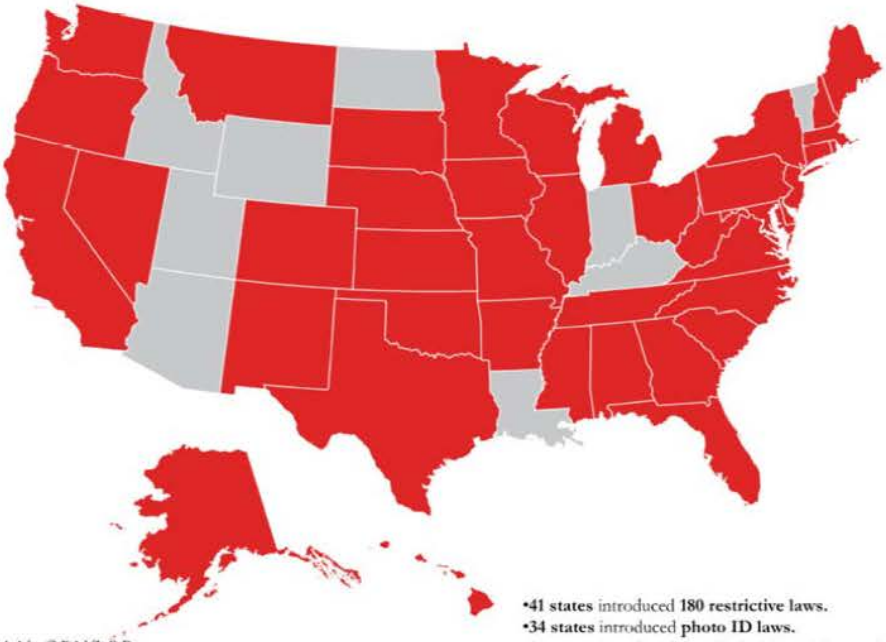
In the past two years, states across the country passed a wave of laws that could make it harder to vote. The Brennan Center chronicled these laws in our report, *Voting Law Changes in 2012*. Overall, 25 laws and 2 executive actions passed in 19 states since the beginning of 2011.

But then voting rights advocates fought back.

Citizens rejected these laws at the polls, nearly a dozen courts overturned or weakened restrictive measures, and the Department of Justice blocked others.

Below you will find a regularly-updated, comprehensive roundup of where laws were introduced, where they passed, where they were blocked or blunted, and where they are in effect for the 2012 election. (Click maps for larger view).

States with restrictive voting legislation introduced since 2011



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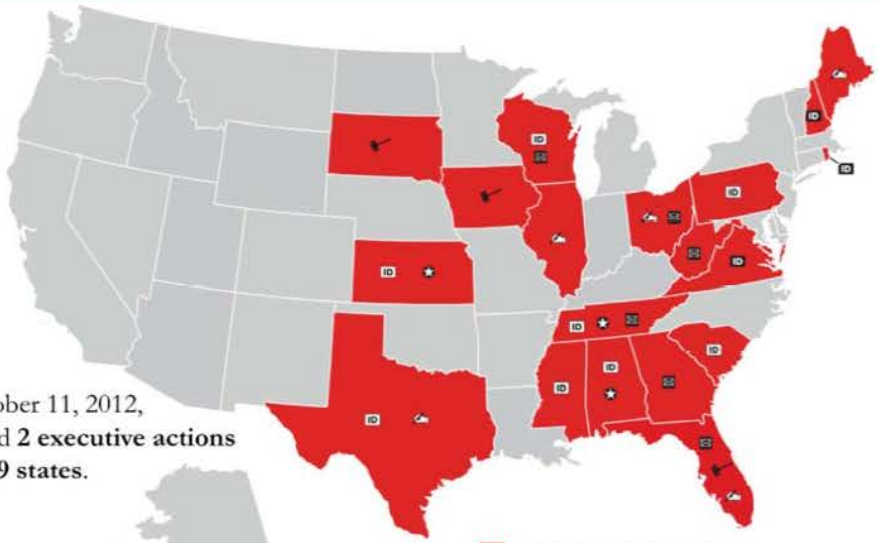
- **41 states** introduced **180 restrictive laws.**
- **34 states** introduced **photo ID laws.**
- **17 states** introduced **proof of citizenship requirements.**
- **16 states** introduced bills to **limit registration.**
- **9 states** introduced bills to **reduce early voting periods.**

States that passed restrictive voting laws



As of October 11, 2012,
25 laws and **2 executive actions**
passed in **19 states.**

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- States that passed voting restrictions
- ID Photo ID requirements passed
- ID Voter ID restriction passed
- Restrictions on early/absentee voting passed
- Restrictions on voter registration passed
- Proof of citizenship passed
- Executive or legislative action making it harder to restore voting rights

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Fourteen states have passed restrictive voting laws and executive actions that have the potential to impact the 2012 election**, representing 185 electoral votes**, or **68 percent** of the total needed to win the presidency.

A breakdown of laws and executive actions in effect in 2012:

Florida

- Early voting restriction
- Executive action making it harder to restore voting rights for those with past criminal convictions
- Voter registration drive restrictions are still in place, but the most onerous aspects of the law were blocked by a federal court

Georgia

- Early voting restriction
- Georgia also has a photo ID law, which passed in 2005

Illinois

- Voter registration drive restriction

Iowa

- Executive action making it harder to restore voting rights for those with past criminal convictions

Kansas

- Photo ID required to vote

New Hampshire

- Voter ID required — non-photo IDs allowed for 2012 election, but photo ID required starting September 1, 2013

Pennsylvania

- Photo ID requested but **NOT** required to vote, per October 2, 2012 court decision

Rhode Island

- Voter ID required — non-photo IDs allowed for 2012 election, but photo ID required starting January 1, 2014

South Dakota

- Law making it harder to restore voting rights for those with past criminal convictions

Tennessee

- Photo ID required to vote
- Proof of citizenship required to register
- Early voting restriction

Texas

- Voter registration drive restriction

- Texas passed a law requiring a photo ID to vote, but a federal court blocked that law in August — it will **NOT** be in effect for 2012

Virginia

- Voter ID required, including non-photo ID

West Virginia

- Early voting restriction

Wisconsin

- Voter registration restriction
- Wisconsin passed a law requiring photo ID to vote, but two state courts blocked that law — it will **NOT** be in effect for 2012

A breakdown of laws passed that will **NOT** be in effect in 2012:

Ohio

- Early voting hours were restored for the three days before the election

South Carolina

- A federal court did **NOT** approve South Carolina's photo ID law for the 2012 election — a voter can use their non-photo voter registration card after 2012, so long as they state the reason for not having obtained a photo ID

Please see this detailed compilation for a fuller listing of restrictive voting laws passed and pending. See below for further analysis.

Numbers Overview

At least **180 restrictive bills** introduced since the beginning of 2011 in **41 states.**

27 restrictive bills currently pending in **6 states.**

25 laws and 2 executive actions passed since the beginning of 2011 in **19 states** (Alabama, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Mississippi, New Hampshire, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin).

14 states have passed restrictive voting laws and executive actions that have the potential to impact the 2012 election (Florida, Georgia, Illinois, Iowa, Kansas, New Hampshire, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin). These states account for **185 electoral votes**, or **68 percent** of the total needed to win the presidency.

Of these, restrictions from **18 laws and executive actions** are currently in effect in **13 states** (Florida, Georgia, Illinois, Iowa, Kansas, New Hampshire, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin).

In the past two years, vetoes, referendums, court decisions, or the Department of Justice have blocked or blunted restrictive measures in **14 states** (Arizona, Florida, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, North

Carolina, Ohio, Pennsylvania, South Carolina, Texas, and Wisconsin). Note: this list does not include successful legislative victories such as those in Nebraska and other states.

Analysis of Laws Passed

- **Identification laws** (read a detailed summary of laws passed since the beginning of 2011)
    - **Photo ID laws.** At least 34 states introduced laws requiring voters to show photo ID at the polls, and four more introduced laws requesting such ID.[1] Photo ID bills were signed into law in eight states — Alabama, Kansas, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin — and passed by referendum in Mississippi. **New photo ID laws will be in effect in Kansas and Tennessee this November. Courts blocked laws in Pennsylvania, Texas, and Wisconsin. Rhode Island's law will not require photo ID for the 2012 election. South Carolina's will not be in effect for 2012. And Alabama's and Mississippi's are currently under review.** In addition, Minnesotans will vote on an amendment to the state Constitution that would require government issued photo ID to vote in person.
    - **Voter ID laws.** Virginia passed a law requiring an ID to vote, including various forms of photo ID. This law eliminated an option to sign an affidavit to confirm identity when voting at the polls or applying for an absentee ballot in person. New Hampshire's ID law requires a voter to produce documentary ID or submit an affidavit of identity. After September 2013, a voter must produce a New Hampshire or U.S. government photo ID or execute an affidavit of identity, no other form of identification will be accepted. Rhode Island's photo ID law allows for non-photo IDs until January 1, 2014.
- **Proof of citizenship laws.** At least 17 states introduced legislation that would require proof of citizenship, such as a birth certificate, to register or vote.[2] Proof of citizenship laws passed in Alabama, Kansas, and Tennessee, but only Tennessee's law will be in effect for 2012. The Tennessee law, however, applies only to individuals flagged by state officials as potential non-citizens based on a database check.
- **Making voter registration harder.** At least 16 states introduced bills to end highly popular Election Day and same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities.[3] Florida, Illinois and Texas passed laws restricting voter registration drives, and Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote. A federal judge blocked Florida's registration drive restrictions in August. Ohio ended its weeklong period of same-day voter registration, and the Maine legislature passed a law eliminating Election Day registration. Luckily, Maine voters later repealed the law, and Ohio's legislature repealed the voter registration restrictions. In addition, some opponents of the Minnesota constitutional amendment have argued that it has the possible effect of eliminating Election Day registration as it currently exists in that state. That amendment will be voted on by referendum in the 2012 general election.
- **Reducing early and absentee days.** At least nine states introduced bills to reduce their early voting periods, and four tried to reduce absentee voting opportunities.[4] Florida, Georgia, Ohio, Tennessee, and West Virginia succeeded in enacting bills reducing early voting. In Ohio, a court restored early voting to the weekend before the election.
- **Making it harder to restore voting rights.** Two states — Florida and Iowa — reversed prior executive actions that made it easier for citizens with past felony convictions to restore their voting rights, affecting hundreds of thousands of voters. In effect, both states now permanently disenfranchise most citizens with past felony convictions. South Dakota passed a law imposing further restrictions on citizens with felony convictions by denying voting rights to persons on probation.

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[1] 34 states: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. Additional 4 states: Michigan, New York, Ohio, and Rhode Island.

[2] 17 states: Alabama, California, Colorado, Connecticut, Kansas, Maine, Massachusetts, Michigan, Missouri, New Hampshire, Nevada, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington.

[3] 16 states: California, Florida, Illinois, Kansas, Maine, Michigan, Montana, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, South Carolina, Ohio, Texas, and Wisconsin.

[4] 11 total states: Florida, Georgia, Maryland, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin.

Tags: Democracy, Voting Rights & Elections, Allegations of Voter Fraud, Election Day Issues, Election Day Registration, Student Voting, Voter ID, Voter Registration Drives, Voter Registration Modernization

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Voting Rights Timeline (source: ACLU)

1776
White men with property have the right to vote but Catholics, Jews, Quakers and others are barred from voting.

1792
New Hampshire eliminates property ownership requirements, which gives more white men the opportunity to vote.
New Hampshire becomes the first state to eliminate the rule that only property owners and taxpayers can vote. Following New Hampshire's lead, other states begin to shift away from such restrictions in an effort to open the electorate to more white males.

1812
Massachusetts Governor Elbridge Gerry redraws voting district lines to favor the Republican-dominated legislature against the Federalist Party. Today, the term "gerrymander" means the drawing of legislative district lines, usually in a bizarre manner, to give an unfair advantage to one group or political party.

1848
The Treaty of Guadalupe-Hidalgo ends the Mexican American War, giving Mexicans in Arizona, California, New Mexico and Texas U.S. citizenship. Mexicans living in Arizona, California, New Mexico, Texas, and Nevada are guaranteed U.S. citizenship in 1848, but their voting rights are denied when English proficiency is required to vote. Property and literacy requirements are imposed to keep them from voting, along with violence and intimidation.

1856
Property qualifications for voting are eliminated in certain elections in North Carolina, giving all white men there the opportunity to vote.
North Carolina becomes the last state to eliminate the rule that citizens must own property in order to vote in certain elections, effectively extending the right to vote to all white men within the United States (with the exception of those convicted of certain crimes).

1866 (April 9)
The Civil Rights Act of 1866 grants citizenship, but not the right to vote, to all native-born Americans.

1869 (February 26)
Congress passes the Fifteenth Amendment giving African American men the equal right to vote.

1870 (February 3)
The Fifteenth Amendment is ratified by the states, giving freed slaves and other African Americans the equal right to vote.

1882
Congress passes the Chinese Exclusion Act denying citizenship and voting rights to Chinese

Americans.

1884
Idaho territorial legislature passes a test oath that disenfranchises all Mormons, and the oath is upheld by the U.S. Supreme Court. For the next 10 years, all Mormons, both polygamists and monogamists, were prohibited from voting, holding office, and serving on juries. During this time, Idaho gained statehood in 1890, six years before Utah ended its four-decade battle for statehood.

1888
The Florida legislature adopts multiple disfranchising provisions which cause voter turnout among adult African American men to plummet from 62 percent to 11 percent over the next four years. The disfranchising provisions adopted by the Florida legislature in 1888 included a poll tax and an "eight box law," under which voters were required to place ballots in correct boxes which were then shifted throughout the day.

1896
The adoption of a new "grandfather clause" by Louisiana legislators disfranchises African American voters. The percent of registered black voters drops from 44.8% in 1896 to 4.0% four years later. In addition to Louisiana, statewide disfranchising conventions specifically designed to undermine black voters are held in Mississippi, South Carolina, Alabama and Virginia from 1890 to 1902.
Adopted as an amendment to the state constitution, Louisiana's grandfather clause prompts a huge decrease in registered African
American voters. The provision requires voters to register between January 1, 1897 and January 1, 1898, and only allows literate property owners to register. Illiterate or non-property owning voters whose fathers or grandfathers could vote in 1867 also are allowed to register. Because nearly all African Americans were slaves two generations earlier, the measure effectively disfranchises all black voters who cannot read or write or who do not own more than $300 in property.

1915 (June 21)
The U.S. Supreme Court rules in Guinn v. United States that Oklahoma's "grandfather clause," which is used to disfranchise black men, is unconstitutional

1920 (August 26)
The Nineteenth Amendment, adopted by Congress on June 4, 1919, is finally ratified by the states and becomes national law, giving women the right to vote.

1924 (June 2)
The Indian Citizenship Act of 1924 declares all noncitizen Indians born within the United States to be citizens, giving them the right to vote. Despite passage of the Indian Citizenship Act, the right to vote is still governed by state law, and many Native Americans are effectively barred from voting until 1948.

1943 (December 17)

In a major civil rights victory, the Chinese Exclusion Act is repealed, giving Chinese immigrants the right to citizenship and the right to vote.

1952
The McCarran-Walter Act gives first generation Japanese Americans the right to become citizens.

1957 (August 29)
Congress passes the Civil Rights Act of 1957, giving the U.S. Attorney General the authority to bring lawsuits on behalf of African Americans denied the right to vote.
1960 (May 6)
Congress passes the Civil Rights Act of 1960. The Civil Rights Act of 1960 requires election officials to have all records relating to voter registration and permits the Department of Justice to inspect them. The Act also allows African Americans whose registration was previously rejected by local election officials to apply to a federal court or voting referee.

1960 (May 6)
Congress passes the Civil Rights Act of 1960. The Civil Rights Act of 1960 requires election officials to have all records relating to voter registration and permits the Department of Justice to inspect them. The Act also allows African Americans whose registration was previously rejected by local election officials to apply to a federal court or voting referee.

1964 (February 4)
Poll taxes are outlawed with the adoption of the 24th Amendment.

1964 (July 2)
Congress passes the Civil Rights Act of 1964, making it illegal to discriminate on the basis of race, national origin, religion, and gender in voting, public places, the workplace and schools

1965 (August 6)
President Lyndon B. Johnson signs the Voting Rights Act into law, permanently barring direct barriers to political participation by racial and ethnic minorities, prohibiting any election practice that denies the right to vote on account of race, and requiring jurisdictions with a history of discrimination in voting to get federal approval of changes in their election laws before they can take effect.

1965
By the end of 1965, 250,000 new black voters are registered, one-third of them by Federal examiners.

1971 (July 5)
The 26th Amendment gives 18-year-olds the right to vote.

1972 (March 21)
In Dunn v. Blumstein, the U.S. Supreme Court decides that Tennessee's "Duration Residency" Rule is unconstitutional, giving more people the opportunity to vote. Tennessee's duration

residency rule, which states that voters must live in the state for one year, and in the county for 90 days, before they are eligible to vote, is ruled unconstitutional. Tennessee had claimed that the rule deters voter fraud and ensures that voters are knowledgeable about what they are voting on, but the Court disagrees.

1974 (June 24)
The U.S. Supreme Court rules in Richardson v. Ramirez that states may deny convicted felons the right to vote.

1975
President Gerald Ford reauthorizes the special provisions of the Voting Rights Act, including new measures to permanently bar literacy tests nationwide and give assistance to language minority voters.

1990 (July 26)
Congress passes the Americans with Disabilities Act which, among other things, requires that election workers and polling sites provide a range of services to ensure that people with disabilities can vote.

1992
The language minority provisions of Section 203 of the Voting Rights Act are extended 15 years and strengthened by adjusting the population thresholds to allow for assistance to more voters with limited English proficiency. The bill is signed into law by President
George H.W. Bush.

1993 (May 20)
The National Voter Registration Act, also known as the "Motor Voter" Bill, makes registration more uniform and accessible, especially for minority and low income voters. The NVRA requires states to allow voter registration by mail, to allow voters to register when they apply for a driver's license and to allow voters to register at other state agencies such as welfare and unemployment offices.

2009 (October 28)
Military and Overseas Voter Empowerment Act. Congress established procedures for absent uniformed services voters and overseas voters to request and states to send voter registration applications and absentee ballot applications by mail and electronically.

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Ballot Integrity and Voting by Mail: The Oregon Experience

By Dr. Paul Gronke, Director, EVIC at Reed College

A Report for the Commission on Federal Election Reform

Co-Chairs:
President Jimmy Carter **Honorable James A. Baker, III**

This report was prepared under the auspices of the Center for Democracy and Election Management, American University, Dr. Robert Pastor, Director. The research was also supported by a grant from the Andrew Mellon Foundation and the Michael E. Levine Research Fund at Reed College.

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TO: Dr. Robert A. Pastor, Executive Director
Commission on Federal Election Reform

FROM: Dr. Paul Gronke, Director, Early Voting Information Center

DATE: June 15, 2005

RE: **Ballot Integrity and Voting By Mail: The Oregon Experience***

The following is a short analysis of Oregon's unique experience with an all vote by mail system. The review is intended to provides the Commission a "road map" for a by-mail ballot, from issuance by the elections office, to the voter's hands, back to the county office, and finally to the tally. This map will help the Commission identify best practices for vote by mail systems, highlight potential pitfalls, and guide the Commission's deliberations as they evaluate the rapid expansion of by-mail voting.

This memorandum:

- Reviews prior experiences with by-mail voting systems, including cases of absentee ballot fraud, and summarizes scholarly research on the participatory and partisan impact of voting by mail (VBM).
- Reports the results from a field study of ballot integrity under vote by mail in the State of Oregon (where by mail voting has been in place statewide since 1998).
- Provides a set of recommendations for implementing vote by mail systems.

Prior Implementation and Evaluation of By Mail and Absentee Voting

For a rapidly increasing number of Americans, voting at the precinct place on election day is a historical relic. EVIC research finds that non-precinct balloting exceeded 30% in thirteen states (see Appendix I)[1]. Voting is an individualized act, not a community experience. Ballots are cast at the individual's convenience, weeks or even months before election day, and are delivered to election officials by the United States Postal Service (USPS).[2] (For a detailed flowchart of Oregon's vote by mail balloting process, see Appendix II.)

Absentee Balloting and Ballot Integrity: A Brief History

The rapid expansion of early voting and no excuse absentee balloting, combined with a number of high profile cases of voter fraud involving absentee voters, have raised questions about ballot integrity when voters may never personally encounter an elections official or poll worker. Critics of VBM and no-excuse absentee balloting raise a number of security issues. First, ballots sent through the mail might be obtained and filled out by someone other than the legal voter. Second, without the necessity of appearing in person, it is easier to falsely register and vote. Third, without the

* Special recognition goes out to Dr. David Mandell, research director for the Early Voting Information Center. I also need to thank Catherine Mingoya, Eva Galanes-Rosenbaum, and Vincent Vecera, research assistants for EVIC, for their help. Paddy McGuire, Deputy Secretary of State, John Lindback, Director of Elections, and John Kauffman, Director of Elections for Multnomah County were generous with time, advice, procedural guidance, and data on the Oregon election system. Finally, the David Levine Research Fund of Reed College provided research support and the Public Policy Workshop of Reed College provided office space for EVIC.

privacy of the ballot booth, a vote could be coerced or unduly influenced. The Florida Department of Law Enforcement has even referred to absentee ballots as "the tool of choice for those inclined to commit voter fraud."[3]

These concerns have been heightened by a number of disputed elections and documented cases of absentee ballot fraud. The November 2004 Washington gubernatorial election was the closest governor's race in this nation's history and was only resolved in the courts on June 6, 2005. Those contesting the results pointed to absentee ballots as a source of some of the problems. In January 2005, King county election officials announced plans to pursue the prosecution of three people suspected of casting absentee ballots for their dead relatives.[4] And on May 13, 2005, King County's absentee ballot supervisor testified that, due to ongoing computer problems, absentee ballots were misplaced and not tabulated during the November ballot count.[5]

Absentee ballots played a key role in the 1998 Miami mayoral election fraud case. The courts overturned the original election results and installed Joe Carollo as mayor after throwing out all 4,740 absentee ballots that had been cast in the previous November's election.[6] During the investigation, police discovered more than 100 absentee ballots in the home of local political boss Alberto Rossi. Other recent allegations of election fraud involving absentee ballots have occurred in Denver, Colorado; Benton Harbor, Michigan; Albany, New York; and Tallahatchie County, Mississippi.[7]

Oregon's Implementation of Vote by Mail

In 1981, the Oregon legislature approved a test of VBM for local elections; by November 1998, after a series of experiments, Oregon citizens approved vote by mail in a statewide initiative.[8] Oregon election officials view VBM as a success. The official guide to VBM, published by the Secretary of State's office, claims that it "raises voter participation, decreases costs and increases the overall integrity of the election process. It is a system that the vast majority of Oregonians love."[9]

Some, but not all, of these claims have empirical support. The evidence on turnout is mixed. Liberalized absentee balloting leads to a small but measurable growth in turnout, although one study finds an effect only in primary elections. Vote by mail increases turnout, perhaps by as much as 10%. However, the turnout increases result from the retention of existing voters and not from the recruitment of new voters into the system, and the increase is noticeable only in low profile contests. There is no evidence that it provides any partisan advantage. In summary, there is some evidence that VBM results in a small increase in the size of the electorate, and no evidence that it changes the composition of the electorate.[10]

The evidence on ballot integrity is more positive. Analyses of VBM by two separate academic teams concluded that VBM (and absentee balloting systems more generally) result in a more accurate count.[11] Despite having moved to an all by mail voting system in 1998 and having been a battleground state in the last two presidential elections, Oregon has been relatively free from the controversies that have dogged some absentee ballot systems.[12] In 2004, one group claimed to have a list of six individuals who had voted twice. On further investigation it turned out that in five of these cases the claim was false. Elections officials had already caught the sixth case before this list was released and were in the middle of an investigation.[13]

Finally, there is no clear evidence on cost savings, at least according to a report issued by the predecessor to this commission. What does seem apparent is that an all-mail system is less

expensive to administer than a "hybrid" system of polling place and absentee balloting. On voter reactions, Oregonians consistently report strong levels of satisfaction with VBM.[14]

A Comparative Case Study of Voting by Mail in Three Oregon Counties[15]

What is the view of the Oregon system from within, from those who actually implement and administer it? In a set of interviews conducted as part of this research, county officials gave four reasons why VBM has been a success. First, they argue, the choice is no longer between a by mail election and a precinct election, but between VBM and a hybrid system, where some percentage of voters go to the polls and another percentage mail in their ballots.[16] Second, they argue that the mandatory signature checking process combined with other tracking and safety measures insure a relatively high level of ballot integrity. Third, the longer period for processing ballots under VBM enables a more consistent and less panicked handling of unanticipated problems.[17] Fourth, VBM has been a cooperative endeavor, in which county election officials not only work with the USPS and other entities, such as large universities, but also with each other to learn and to disseminate best practices.

Vote by Mail vs. "hybrid" elections

All of the county election officials that were interviewed stressed that the choice Oregon faced in 1998 was between an entirely VBM and a hybrid election, not between VBM and precinct elections.[18] Oregonians had already been taking advantage of looser absentee ballot requirements. According to Wasco County officials, in the last election with poll sites, 86% of the voters chose absentee ballots.[19] As Wasco county election officer Karen LeBreton Brown put it, "we felt that our voters had voted with their feet. They had said we want Vote by Mail."[20]

All of the election officials also emphasized the difficulty of supervising these "hybrid" elections where they were forced to deal with the large volume of absentee ballot requests while at the same time managing poll sites and poll workers. Absentee ballots were processed individually, and it was much more difficult to guarantee that those who cast absentee ballots didn't also show up at the polls. Multnomah County Director of Elections John Kauffman commented that, prior to the introduction of VBM, "we were really conducting two elections at once."[21] He added that, "under the old system we were putting out fires all over the county on election day."[22] Benton County Supervisor of Elections Jill Van Buren concurred, commenting that now with VBM, "If someone from another county comes in and has a problem, we can contact that county and deal with that problem."[23] James Morales added that the longer time frame of VBM makes it possible to address problems that could prevent a legitimate ballot from being counted. The difficulties of running both kinds of elections simultaneously increased the likelihood of confusion and of mistakes.

The longer time period also enables the election offices to issue replacement ballots when voters have lost, damaged, or failed to receive a ballot. When a voter comes into an election office and requests a (new) ballot, the election officials first make sure that the voter is registered for that county and has already been issued a ballot. If the person's registration in the county cannot be verified, the office may issue a provisional ballot and has up to ten days after the election to resolve the eligibility of the voter.[24] If the person's registration can be verified, they are issued a new ballot with a new identification number. Not only is the return identification envelope marked as containing a replacement ballot, the new identification number is linked to the identification number of the original ballot. This linkage prevents both ballots from being counted.[25]

This replacement ballot process limits the possibility of someone casting two ballots in the same county. It does not eliminate the possibility of someone casting ballots in multiple counties. While this possibility has been widely discussed, there is no concrete evidence that this has been a widespread practice. Following HAVA requirements, Oregon will have its centralized voter registration in place by November 2006, greatly reducing this risk.[26]

The Signature Verification Process and Other Security Measures

Defenders of Oregon's VBM argue that the relative smoothness of recent elections is no accident and reflects safeguards that have been built into VBM, making its security superior not only to most absentee balloting systems but to most poll based elections as well.

One of the primary VBM security measures in Oregon is the signature verification process. Election workers compare the signature on <u>every</u> return identification envelope with the signature scanned from the voter's registration card. While the state does not consider these election workers to be handwriting experts, these workers are required to complete a signature identification course.[27] According to the Oregon's Secretary of State's office, in the November 2004 election 1,057 ballots were not counted because the signature could not be verified. This compares to 606 in November 2003 and 602 in November 2002. [28]

Benton County Clerk James Morales expressed his opinion that fewer and fewer poll workers seemed to know the names and faces of the voters who were showing up at their precincts, and that this growing level of anonymity of persons who make a physical appearance at the polls was no longer as significant a check against voter fraud as it once was.[29] While voters did have to sign a poll book, these signatures were never checked until after the election. And then it was impossible to link the signature and person with a particular ballot and throw out a ballot that may have been wrongfully cast.[30]

The signature verification process, the tracking system for each ballot, and postal services cooperation in preventing ballots from being delivered to names not recognized as receiving mail at an address reduce the risk of large scale attempts to cast fraudulent ballots.

Where there does seem to be more of a risk for election fraud is with the return of legitimate ballots. "By mail" is a misnomer. While all ballots are delivered to the voter through the mail, only some are returned that way. Others are dropped off at the election office or at official drop sites.[31] In Benton County, almost half of their ballots now come back through drop sites.[32] In 2004 in Multnomah County, Oregon's most populous, 11.5% of ballots were dropped off at the county office and 23% at drop boxes. Still others are left at unofficial drop sites or picked up at people's door by volunteers, most often sponsored by political groups or by elected officials who see this as a valued form of constituent service. While there are no documented cases in which ballots left at unofficial drop sites or picked up by volunteers being destroyed or tampered with, these practices are a cause of concern.[33] Election officials admit that they have no way of knowing whether they received every single ballot that was handed over to someone other than an authorized election official.

Oregon Director of Elections John Lindback notes that the Secretary of State's Office discourages voters from doing anything but dropping their ballot off at a designated site. [34] While the state legislature is moving to ban unofficial drop sites,[35] Oregon legislators are unwilling to curtail their ability to have campaign volunteers pick up ballots. [36]

Voting by mail as a cooperative endeavor
Partnership with the USPS is essential to the management and integrity of VBM. All county election offices work with their local postal service to make sure ballots are safely delivered and that postal offices are aware of VBM rules, such as that ballots are never sent to a forwarding address.

Cooperation with the USPS also helps Oregon maintain its voter rolls.[37] Multnomah County, the home of Portland and the most populous and urban county in Oregon, reports that 4%-6% of the ballots it sends out each election are return to them as "undeliverables."[38] Other counties report different levels of undeliverables, likely due to the level of mobility in that county (see Appendix IV).[39] As noted earlier, election officials instruct the Postal Service to never forward a ballot. If the address on the ballot is not up to date, the post office must return the ballot to the county election office. While the ballots are never forwarded, the information from the forwarding address is used to update the voters' registration. If there is a forwarding address from inside the county, the voter's registration is updated with that address and a ballot will be sent to this location the next election. If the forwarding address is for out of county or out of state, the voter's registration is marked inactive and no ballot is sent the next election. Kauffman argued that before VBM the voters' roll was often artificially inflated, with it taking two, three or four years for election officials to discover that a voter had moved out of the county.[40] Still, changes in USPS procedures or erosion in the quality of their staffing could impact the integrity of the ballot under Oregon's VBM system (or any absentee balloting system).

VBM also requires cooperation with universities, private mail services and group homes. Benton County officials stressed how important it has been for them to build a working relationship with Oregon State University (OSU), the university's registrars and with student associations. County officials had to learn which campus addresses were dorms, which were mailing houses, and keep a list of dorms and fraternities. This has allowed them to establish contact persons at these locations to help them keep tabs on the voters at those addresses and to make sure that ballots delivered to students who have moved are returned to the county as undeliverable. Benton County has also developed a special FAQ sheet for OSU students.[41]

All of the county clerks and election officials we interviewed emphasized how much they cooperate with each other, sharing solutions to problems and working towards the standardization of procedures. The Oregon Association of County Clerks holds two official meetings a year in which they discuss election related issues and suggested updates to the VBM Manual. The manual is even officially described as "adopted by Oregon Secretary of State in association with the Oregon Association of County Clerks." John Kauffman pointed to the rules that observers were asked to sign in November of 2004 as a good example of where coordination between county election officials improved the process.[42]

While a number of the election officials commented that the procedures used by the counties had become much more standardized and codified since the introduction of VBM, there is still much variation in what information is recorded by the various counties. The VBM manual specifies that the staff at elections must count and record such information as ballots return undeliverable and ballots returned unsigned.[43] However, many of the counties that we contacted did not have these data readily available. The VBM Manual also specifies that county election officials maintain "all statistical information for each precinct," but only suggests what statistics this "may include."[44]

Conclusions

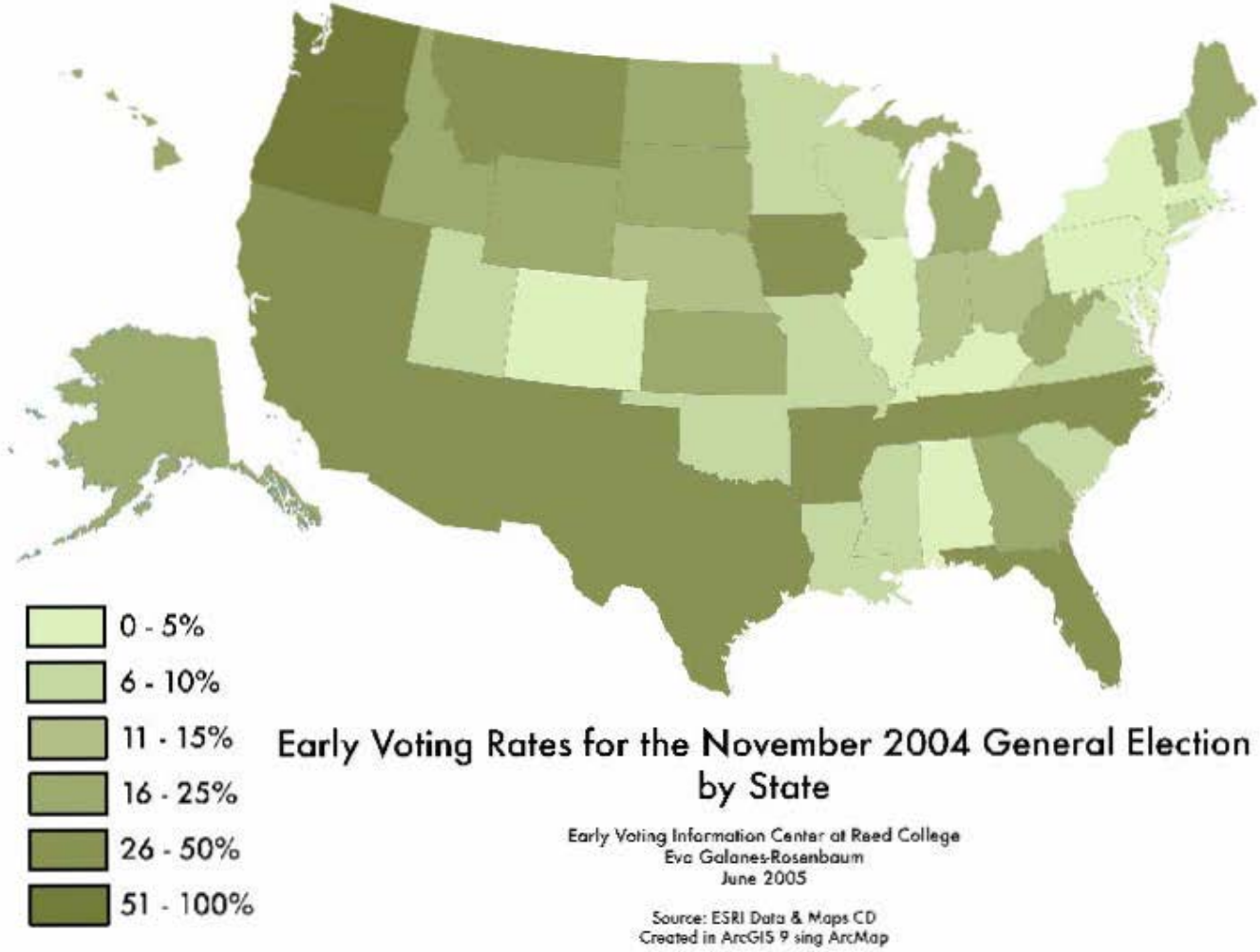
In 2001, the National Commission on Electoral Reform determined that vote by mail, along with other "early voting" systems, had the potential to modestly increase voter turnout, and that voting by mail specifically placed no additional demands on the voter (in contrast to absentee balloting). The systems allowed elections officials to provide greater administrative support to voters. The Commission expressed concern, however, over the potential for fraud and coercion under systems which lack the "fundamental privacy of the voting booth." In many respects, these conclusions remain valid, at least when examined in the context of Oregon's all-mail balloting system. VBM has increased participation rates in low profile contests. Oregon's system of delivering the ballot directly to the voter places few burdens on citizens to vote. And Oregon officials point proudly to procedures that help reconcile problems before the election is completed, so that as many legitimately cast ballots as possible get counted, hopefully avoiding post-election litigation.

Demographically, Oregon is a moderately wealthy state and is ethnically homogeneous. Oregon has historically had a participative culture, and vote by mail seems to have had little impact on it (in the words of Director Lindback, "Oregon may no longer have the old rituals, but we have our own new ones.") Oregon has historically had a clean, open, and permeable election system, with no history of machine politics or election fraud. Oregon election officials remain proud of their non-partisan tradition. The implication is that while voting by mail has worked well in Oregon, it may not work as well in regions, states, or localities with a more contentious political culture.

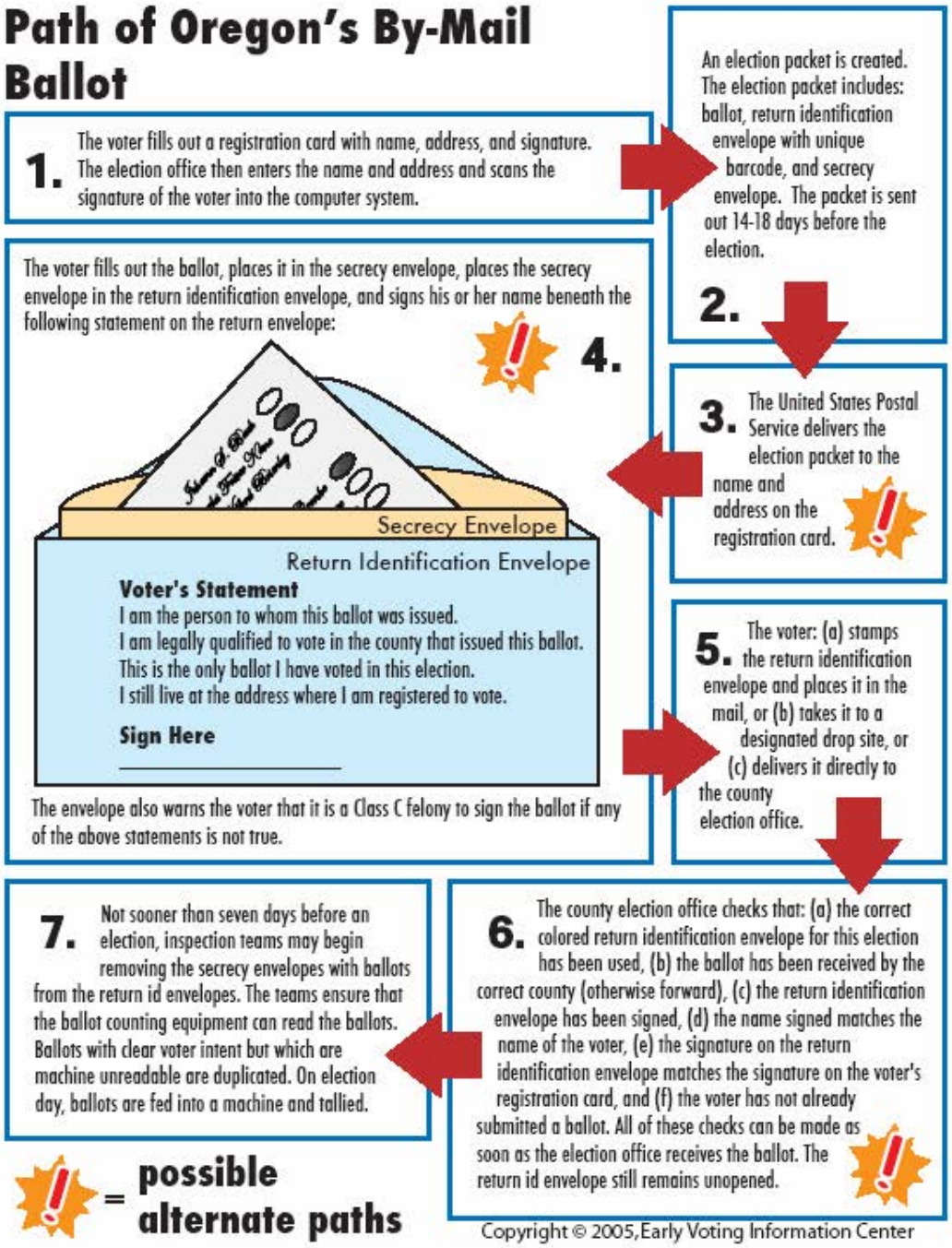
Recommendations

1. States must recognize that the choice is no longer between by-mail and precinct elections, but between by-mail and hybrid elections. Hybrid elections, because they run on two tracks at once, have ballot integrity issues that all-precinct or all-by-mail elections do not.
2. While most of the discussion of ballot integrity in VBM has focused on the front end (forged or false ballots), attention also needs to be focused on the back end (making sure ballots are not intercepted on the way from the voter to the county office).
3. Voting by mail is not a panacea for declining participation and should not be adopted solely for this reason.
4. Successful VBM requires building a partnership with the USPS and other institutions with large residential populations.
5. A properly instituted VBM system can improve the quality of the registration rolls and provides a longer time frame for election officials to catch problems.
6. Evaluating new systems for voting requires clear, consistent, and readily accessible records on election administration. Rules and procedures should be established by state law. Since electronic storage is almost costless, so there is no reason to purge old records.
7. In order for VBM to work, there must be buy in from county officials who actually implement and administer the system.
8. Further research is needed to properly assess the costs and benefits of VBM and no-excuse absentee balloting, particularly how these systems may change the conduct of political campaigns and alter the contribution of elections to American civic life.

Appendix I:


0 - 5%
6 - 10%
11 - 15%
16 - 25%
26 - 50%
51 - 100%
Early Voting Rates for the November 2004 General Election by State
Early Voting Information Center at Reed College
Eva Galanes-Rosenbaum
June 2005
Source: ESRI Data & Maps CD
Created in ArcGIS 9 sing ArcMap

Appendix II: Vote by Mail Flowcharts



What happens if the postal service cannot deliver the ballot?

The Postal Service will NEVER forward a ballot. Undeliverable ballots are returned to the county election office. All updates of voter registration are done after the election has been certified.

...if there's no forwarding address:

If the USPS reports that the voter is temporarily away

If the voter is temporarily away, the ballot is put aside for the election. No changes are made to the voter roll and the voter continues to be listed as active. If the voter contacts the election office, they will mail a replacement ballot to a temporary address.

Unrecognized name or address

The election office checks the address and the registration card. If there was a data entry mistake, the election packet is resent with the corrected address. If no error can be detected, the ballot is put aside for the election. After the elections, a forwardable notice is sent to the voter.

...if there is a forwarding address:

Forwarding address in the county

The ballot is put aside for the election. The voter's registration is updated. A Voter Notification Card is generated and sent to the new address. The voter will automatically be sent a ballot for the next election. The voter may appear in person to update his or her registration and receive a ballot for the current election.

Forwarding address in another county

The ballot is put aside for the election and the voter's registration is recorded as inactive. A forwardable notice is sent to the voter, letting them know that they need to re-register and that their old registration is now inactive. No ballot will be sent for the next election unless the voter re-registers.

Forwarding address in another state

The ballot is put aside for the election and the voter's registration is recorded as inactive. A forwardable notice of inactivation is sent.

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What happens if a person does not receive a ballot?

Voters who have not received, lost, or damaged their ballot may request a replacement ballot.

Voter not registered in the county

If the voter is not listed in the county registration record, he or she is issued a provisional ballot. All provisional ballots are researched to see if the voter was eligible (i.e. registered by the deadline but in a different county and had subsequently moved). All provisional ballots must be resolved by the date the election is certified.

...is the voter registered in the county?

If the voter is registered in the county and the voter's ballot has not already been received, he or she is issued a replacement ballot.

The replacement is given a new identification number and a corresponding barcode is printed on the new return identification envelope. The return identification envelope is flagged as a replacement ballot.

The new identification number of the replacement ballot is linked on the computer to the identification number of the original ballot. This prevents the ballots from both being counted.

1. If the county election office receives only the replacement ballot, the replacement ballot is processed normally.

2. If the election office receives only the original ballot, the original ballot is processed normally.

3. If the election office receives both the original and replacement ballots, the first ballot received is counted. The case is then forwarded to the office of the Secretary of State for investigation.

Voter registerd in the county

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What happens if the signature on the envelope is questioned?

Using a computerized image of the registration card, election workers check every signature.

...what if there is no signature?

Election officials highlight the signature box and send back the return id envelope with instructions to sign and return the envelope by 8:00 pm on election day. If there is not enough time to send the id envelope back, an election official calls the voter and asks him or her to come into the election office to sign the return id envelop. If the envelope is not signed before 8:00 pm on election night, the ballot is not counted.

...what if the wrong name is signed?

If the return id envelope is signed with a name other than the voter's, a letter is sent and instructions are given to the voter on what to do in order to have his or her ballot counted.

If the elections office receives ballots where each of two members of a household signed the other's return id envelope, both ballots are counted.

...what if the signature doesn't match?

An election officer contacts the voter and asks him or her to come into the election office. The voter can either re-sign the return identification envelope and have that signature checked against the signature on his or her registration card or fill out a new registration card.

If the voter does not respond to inquires, the case is passed on to the Secretary of State's office. If the Secretary of State's office does not get a response, he or she may choose to forward the case to the Attorney General for further investigation. If questions are not resolved within 10 days of the election, the ballot is not counted.

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Appendix III: Statistics for voting twice and signature not matching (cases reported to the state)

Year	DV (double voting)	BSV (ballot signature verification)
2004	62	1,057
2003	19	606
2002	25	602
2001	6	106
2000	53	239
1999	2	130
1998	53	32

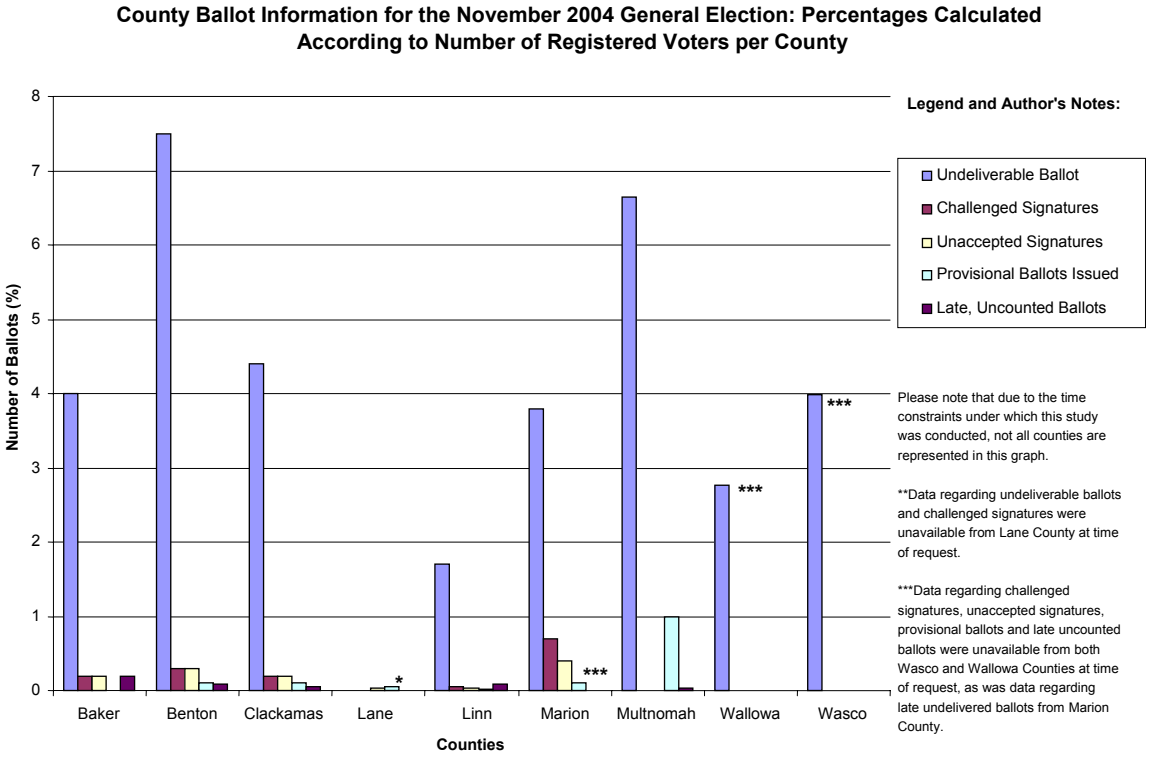
Notes on "Signature not matching cases" ("BSV") process:

- Data provided by the Division of Elections, State of Oregon
- The process involves, briefly, the county challenging a ballot for which signature does not match voter registration signature, they send letter to elector giving them 10 days to resolve issue with ballot so ballot may still be counted.
- If the county gets no response, they are to send it to Secretary of State, per VBM manual. In all of these cases, the non-response of the elector resulted in the county not being able to count the ballot.
- We send inquiry letter and if we receive a reasonable explanation, we admonish and advise – for instance if signature has changed, then the elector needs to update voter registration.
- If they inform us they actually voted their own ballot but allowed another person (such as spouse) to sign, and this hasn't happened before, we advise them this is not allowable and it resulted in their ballot not being counted and admonish them to never do this again.
- If no response is received, we send second and third inquiries by certified mail and attempt to call as well.
- For those with no response, or any more egregious circumstances, we send to AG for investigation.* It takes a few months for this process to play out as we send the notices out and allow for response time.
- AG conducts more investigation, sometimes on site, and provides us with an investigation report on which to base either closing or prosecution.
- Reasons for considering prosecution of these types of "BSV" cases includes: If elector didn't vote own ballot and other signer not authorized to do so, especially if forged other person's name.*
- Benefits of this process include voter education on what's allowed, voters realizing they must update their voter registration card so future ballot signatures will match and prevent this problem again,
- Some situations of address cancellations are cleared up for county, or name problems.
- The majority of these cases are not found prosecutable as a knowing violation with criminal intent.

Notes on "Voting twice cases" ("DV") process:

- The process involves, briefly, one county or more than one noting that a person has voted more than one ballot at one election.
- Our process involves again, sending inquiry letters, similar to above.
- If no response or appears more egregious, we send to AG for further investigation and possible prosecution. Some of the reasons discovered are discussed at end and also some reasons for transmitting a case of voting twice to AG.**
- Benefits of this process again include voter education and also in many cases, clearing up voting records for possible duplicates in one county to another (for instance one county didn't get cancellation notice when a person moved to another county…). Another common problem caught is name changes due to marriage… and sometimes county data entry errors on names…

Appendix IV: County Ballot Information from November 2004



Appendix V: Case Study Methodology

Personal Interviews

We conducted personal interviews as part of this research. We selected an urban county (Multnomah), a mixed county with a large student population (Benton), and a rural county (Wasco). We also interviewed the director of elections for the state of Oregon. We contacted the county clerk or director of elections and informed them that we were studying Oregon's vote by mail system for the "Early Voting Information Center at Reed College." If asked, we also informed officials that we were writing a report for the Carter/Baker Commission. The officials we spoke to were:

1. John Lindback, Oregon State Elections Director
2. John Kauffman, Director of Elections, Multnomah County, OR
3. James Morales, Benton County Clerk
4. Jill Van Buren, Benton County Supervisor of Elections
5. Karen LeBreton Coats, Wasco County Clerk
6. Linda Brown, Wasco County Chief Deputy County Clerk

Interview Protocol

We established a set of questions for each election official. The questions included:

SAMPLE QUESTIONS FOR COUNTY ELECTION OFFICIALS

- Did you supervise any elections before the introduction of VBM?
- If so, how does running an election under VBM compare to an election with polling places?
- What do you see as the advantages and disadvantages of it?
- As a mostly (rural, suburban, urban) county, are there any particular aspects of VBM that impact you differently than it might another county?
- What are some of the "red" flags that you look for: during registration, when ballots are received, when ballots are processed?
- What percentage of ballots is returned by mail, left at official drop sites and at unofficial drop sites?
- Can you describe how you use the ballots that the USPS was unable to deliver to maintain the voter rolls?
- When do you issue provisional ballots?
- How often do you receive more than one ballot with the same name on it?
- How are election workers trained to verify signatures?
- Do most of the people respond to your inquiries about their signature?
- How many signature questions never get resolved? Is this usually because the person doesn't respond in time, or because their response doesn't resolve the issue?
- How often did you have to forward a ballot with a questionable signature to the Secretary of State's office?
- Can you describe for me the process by which ballots are prepared for tallying after they have been removed from their security envelopes?
- (If Applicable)How do you handle getting ballot correctly to a student population that moves frequently?
- In cases of dorms and other dwellings with multiple voters, how do you make sure that the ballot gets to the right person?

Additional Sources of Information

We contacted all 36 counties in Oregon by letter and by phone to obtain, for the 2004, 2002, 2000, and 1998 elections, the number of:

1. undeliverable ballots that the postal service was unable to deliver,
2. signatures that were originally challenged

3. ballots rejected because the signature could not be verified
4. provisional ballots tallied that were issued
5. ballots that were not counted because they were received after the deadline

Part of the goal was to not only gather the information, but to determine what information counties were gathering and in what form. We found dramatic variation in what data were archived and the costs for obtaining such data. By the time of this report, we were able to obtain these data for 2004 from only nine counties.

Endnotes

[1] Figure 1 includes both in-person early voting and by-mail absentee balloting. Unfortunately, many states fail to distinguish between the two types of non-precinct voting. Any vote that is cast by a means other than at a precinct is counted as an "early" vote.
[2] Currently, 30 states allow "no excuse" absentee balloting, with some also allowing in person early voting. A full list of requirements is available at http://electionline.org/index.jsp?page=Early.absentee.voting.
[3] John Fund, *Stealing Elections*, (Encounter Books, 2004), pp. 47
[4] "Ballots of three dead votes being sent to prosecutor," *Seattle Times*, January 8, 2005.
[5] Testimony of Nicole Way in Timothy Boarders, et al v King County et al. and Washington State Democratic Central Committee et al and Libertarian party of Washington State et al [2005] WA, No.05-2-00027, 13-30. See also Keith Ervin, "Election manager linked to false report", *Seattle Times,* May 19, 2005.
[6] John Fund, *Stealing Elections*, (Encounter Books, 2004), pp. 47-50.
[7] "Hundreds in Colorado investigated for voter fraud," *The Associated Press State & Local Wire*, March 24, 2005; "Leader of quashed recall arrested, criminally charged," *The Associated Press State & Local Wire*, April 18, 2005; "Election inquiry on Soares' agenda," *The Time Union*, December 10, 2004; "Tallahatchie man sentenced on voter fraud conviction," *The Associated Press State & Local Wire*, December 9, 2004.
[8] A history of Oregon's vote by mail system is available at the Secretary of State's website, http://www.sos.state.or.us/executive/policy-initiatives/vbm/history.html
[9] "Vote by Mail." Bill Bradbury, Secretary of State. Available online at: http://www.sos.state.or.us/elections/vbm/vbm_guide.pdf
[10] On absentee balloting and turnout, see J. Eric Oliver, 1996, "The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout." *American Journal of Political Science.* On VBM and turnout, see Adam Berinsky, Nancy Burns, and Michael Traugott, 2001, "Who Votes By Mail? A Dynamic Model of the Individual-Level Consequences of Voting-By-Mail Systems, " *Public Opinion Quarterly*; Priscilla Southwell and Justin I. Burchett, 2000, "The Effect of All-Mail Elections on Voter Turnout,." *American Politics Quarterly.* On compositional effects, see Berinsky et al. and Priscilla Southwell and Justin I. Burchett, 2000, "Does changing the rules change the players? Vote by mail and the composition of the electorate," *Social Science Quarterly*.
[11] Caltech/MIT Voting Technology Project. 2001. *Voting: What is, What Could Be.* California Institute of Technology and Massachusetts Institute of Technology; Michael J. Hamner and Michael W. Traugott, 2004, "The Impact of Voting By Mail on Voter Behavior," *American Politics Research.* See also "Report of the Oregon Elections Task Force", February 6, 2001, pg. 3.
[12] For a discussion of some of the questions that did arise prior to the election see "Activists revive fears about Oregon voting," *The Oregonian*, September 22, 2004.
[13] "Election Anxiety Extends to Voting by Mail," *The Oregonian*, November 1, 2004.
[14] On costs, see John Mark Hansen, 2001, *To Assure Pride and Confidence in the Electoral Process,* Final report of the National Commission on Electoral Reform, University of Virginia, Chapter 5. On voter satisfaction, see Priscilla Southwell, 2004, "Five Years Later: A Re-assessment of Oregon's Vote by Mail Electoral Process, *PS: Politics and Political Science.*
[15] The methodology of this research, including the list of interviews, interview schedule, and other data sources, are contained in Appendix V.
[16] This claim is sustained by states such as Washington, which now exceeds 70% of ballots cast absentee, or more typically California, where 30% or more of ballots are absentee.
[17] P. 34-46 of Oregon's official guidelines, *Oregon's Vote by Mail Manual*, December 5, 2003, available here: http://www.sos.state.or.us/elections/vbm/vbm_manual.pdf.
[18] For a history of the Vote by Mail in Oregon see "A Brief History of Vote-by-Mail," Oregon Secretary of State, www.sos.state.or.us/executive/policy-initiatives/vbm/history.html (downloaded 6/8/05)
[19] Interview with Wasco County Clerk Karen LeBreton Coats and Chief Deputy County Clerk Linda Brown, June 5, 2005.
[20] LeBreton's perception of the popularity of VBM among Oregonians has been confirmed by a series of polls. Also see Southwell citations, fn. 15.
[21] Interview with Multnomah County Director of Elections John Kauffman, June 7, 2005.
[22] Kauffman interview.
[23] Morals and Buren interview.
[24] VBM Manual, p. 48.
[25]VBM Manual, p. 27.
[26] Kauffman notes that the centralized voter registration system will assign each voter a unique number that will stay with the voter even as he or she moves from county to county.

[27] LeBreton and Brown interview. In recent litigation over the petition signature verification, a handwriting expert estimated that he would spend 2 hours or more on each signature, an amount of time not feasible in the context of an election. Testimony of John Green in Sato, McIntire, Horton, and Piccolo v. Bill Bradbury, US District Court Case CV-04-853-PA.
[28] In Appendix III, we show the total number of challenged signatures reported to the Secretary of State's office since 1998. The total number of challenges is quite low, with little variation across the counties that we were able to examine see Appendix IV for these figures. It is important to note that the number of challenged signatures also varies with the number of elections. For instance, in 2004, Oregon conducted three statewide elections, and was also a focus of an intensive voter registration campaign. Both lead to higher than normal number of challenges.
[29] Interview with Benton County Clerk James Morales and Supervisor of Elections Jill Van Buren, June 3, 2005.
[30] Morales and Buren interview.
[31] For the rules governing official drop sites and their security see VBM Manual, pp. 17-20.
[32] Morales and Buren interview.
[33] "Report of the Oregon Elections Task Force," pg. 8.
[34] Interview with Oregon Director of Elections John Lindback, June 13, 2005.
[35] Oregon House bill 3090, which passed on May 17, 2005 but has not yet been scheduled for a hearing in the Senate, bans unofficial drop sites ("Political Notebook," *The Oregonian*, May 18, 2005).
[36] For recording of this debate see HOUSE-200505171527.ram at http://www.leg.state.or.us/listn/ (downloaded June 5, 2005)
[37] "Report of the Oregon Elections Task Force," p. 6-7.
[38] Kauffman interview.
[39] Undeliverable ballots include ballots from people who: had notified the post office that they were temporarily away; have moved but not given the post office a forwarding address; and had given the post office a forwarding address in county, out of county, or out of state. See "Handling Undeliverable Ballots," Benton County Elections, Oregon.
[40] Kauffman interview
[41] Morales and Buren interview.
[42] Kauffman interview.
[43] VBM Manual, p. 23.
[44] VBM Manual, p. 22.

Supreme Court of the United States
William CRAWFORD et al., Petitioners,
v.
MARION COUNTY ELECTION BOARD et al.
Indiana Democratic Party, et al., Petitioners,
v.
Todd Rokita, Indiana Secretary of State, et al.

Nos. 07–21, 07–25.
April 28, 2008.
Argued Jan. 9, 2008.
Decided April 28, 2008.

Background: Political party, party committee, state representative, elected public official, and nonprofit organizations brought action against county election board, Secretary of State, and Election Division directors, challenging state law requiring government issued photo identification to vote, as violative of the Fourteenth Amendment right to vote. The state of Indiana intervened to defend the validity of the statute. The United States District Court for the Southern District of Indiana, Sarah Evans Barker, J., 458 F.Supp.2d 775, granted summary judgment in favor of defendants. Plaintiffs appealed. The Court of Appeals, Posner, Circuit Judge, 472 F.3d 949, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Stevens, held that state's interests identified as justifications for Indiana statute requiring government issued photo identification to vote were sufficiently weighty to justify any limitation imposed on voters.

Affirmed.

Justice Scalia, with whom Justice Thomas and Justice Alito joined, concurred in judgment and filed opinion.

Justice Souter, with whom Justice Ginsburg joined, dissented and filed opinion.

Justice Breyer dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 ⚷3635

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Under equal protection standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚷3635

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy equal protection standard set forth in *Harper*. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚷3635

92 Constitutional Law

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92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Constitutional Law 92 ⚷3636

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3636 k. Political parties in general. Most Cited Cases

To satisfy equal protection standard, state law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚷3648

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3647 Qualifications of Voters
92k3648 k. In general. Most Cited Cases

Elections 144 ⚷9

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k8 Statutory Provisions Conferring or Defining Right
144k9 k. Constitutionality and validity. Most Cited Cases

State's interests identified as justifications for Indiana statute requiring government issued photo identification to vote, including deterring and detecting voter fraud, participating in a nationwide effort to improve and modernize election procedures, and safeguarding voter confidence, were sufficiently weighty to justify, under equal protection standard, any limitation imposed on voters.(Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; West's A.I.C. 3–11–8–25.1(e).

[5] Constitutional Law 92 ⚷656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

A facial challenge must fail where the statute has a plainly legitimate sweep. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.)

[6] Constitutional Law 92 ⚷1466

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1466 k. Voting rights and suffrage in general. Most Cited Cases

When evaluating a neutral, nondiscriminatory regulation of voting procedure, a court must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.)

*****1611 *181** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared

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by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After Indiana enacted an election law (SEA 483) requiring citizens voting in person to present government-issued photo identification, petitioners filed separate suits challenging the law's constitutionality. Following discovery, the District Court granted respondents summary judgment, finding the evidence in the record insufficient to support a facial attack on the statute's validity. In affirming, the Seventh Circuit declined to judge the law by the strict standard set for poll taxes in *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, finding the burden on voters offset by the benefit of reducing the risk of fraud.

Held: The judgment is affirmed.

472 F.3d 949, affirmed.

Justice STEVENS, joined by THE CHIEF JUSTICE and Justice KENNEDY, concluded that the evidence in the record does not support a facial attack on SEA 483's validity. Pp. 1615 – 1624.

(a) Under *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. However, "even handed restrictions" protecting the "integrity and reliability of the electoral process itself" satisfy *Harper*'s standard. *Anderson v. Celebrezze,* 460 U.S. 780, 788, n. 9, 103 S.Ct. 1564, 75 L.Ed.2d 547. A state law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman v. Reed,* 502 U.S. 279, 288–289, 112 S.Ct. 698, 116 L.Ed.2d 711. Pp. 1615 – 1617.

(b) Each of Indiana's asserted interests is unquestionably relevant to its interest in protecting the integrity and reliability of the electoral process. The first is the interest in deterring and detecting voter fraud. Indiana has a valid interest in participating in a nationwide effort to improve and modernize election procedures criticized as antiquated and inefficient. Indiana also claims a particular interest in preventing voter fraud in response to the problem of voter registration rolls with a large number of names of persons who are either deceased or no longer live in Indiana. While the record contains no evidence ***182** that the fraud SEA 483 addresses—in-person voter impersonation at polling places—has actually occurred in Indiana, such fraud has occurred in other parts of the country, and Indiana's own experience with voter fraud in a 2003 mayoral****1612** primary demonstrates a real risk that voter fraud could affect a close election's outcome. There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes. Finally, Indiana's interest in protecting public confidence in elections, while closely related to its interest in preventing voter fraud, has independent significance, because such confidence encourages citizen participation in the democratic process. Pp. 1617 – 1620.

(c) The relevant burdens here are those imposed on eligible voters who lack photo identification cards that comply with SEA 483. Because Indiana's cards are free, the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters' right to vote, or represent a significant increase over the usual burdens of voting. The severity of the somewhat heavier burden that may be placed on a limited number of persons—*e.g.,* elderly persons born out of state, who may have difficulty obtaining a birth certificate—is mitigated by the fact that eligible voters without photo identification may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court clerk's office. Even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek. Pp. 1620 – 1623.

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(d) Petitioners bear a heavy burden of persuasion in seeking to invalidate SEA 483 in all its applications. This Court's reasoning in *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 applies with added force here. Petitioners argue that Indiana's interests do not justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office, but it is not possible to quantify, based on the evidence in the record, either that burden's magnitude or the portion of the burden that is fully justified. A facial challenge must fail where the statute has a " 'plainly legitimate sweep.' " *Id.,* at ——, 128 S.Ct., at 1190. When considering SEA 483's broad application to all Indiana voters, it "imposes only a limited burden on voters' rights." *Burdick v. Takushi,* 504 U.S. 428, 439, 112 S.Ct. 2059, 119 L.Ed.2d 245. The "precise interests" advanced by Indiana are therefore sufficient to defeat petitioners' facial challenge. *Id.,* at 434, 112 S.Ct. 2059. Pp. 1623 – 1624.

(e) Valid neutral justifications for a nondiscriminatory law, such as SEA 483, should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. Pp. 1623 – 1624.

***183** Justice SCALIA, joined by Justice THOMAS and Justice ALITO, was of the view that petitioners' premise that the **voter-identification** law might have imposed a special burden on some voters is irrelevant. The law should be upheld because its overall burden is minimal and justified. A law respecting the right to vote should be evaluated under the approach in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245, which calls for application of a deferential, "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote, *id.,* at 433–434, 112 S.Ct. 2059. The different ways in which Indiana's law affects different voters are no more than different impacts of the single burden that the law uniformly imposes on all voters: To vote in person, everyone must have and present a photo identification that can be obtained for free. This is ****1613** a generally applicable, nondiscriminatory voting regulation. The law's universally applicable requirements are eminently reasonable because the burden of acquiring, possessing, and showing a free photo identification is not a significant increase over the usual voting burdens, and the State's stated interests are sufficient to sustain that minimal burden. Pp. 1613 – 1616.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined. BREYER, J., filed a dissenting opinion.
Paul M. Smith, for Petitioners.

Thomas M. Fisher, for Respondents.

Paul D. Clement, for United States as amicus curiae, by special leave of the Court, supporting the Respondents.

Kenneth J. Falk, Jacquelyn Bowie Suess, Gavin M. Rose, Indianapolis, IN, Laughlin McDonald, Neil T. Bradley, Atlanta, GA, Steven R. Shapiro, New York, NY, Pamela S. Karlan, Jeffrey L. Fisher, Stanford, CA, for Petitioners.

Angela Ciccolo, Victor L. Goode, Assistant General Counsel, Baltimore, MD, for Petitioner Indianapolis Branch of the NAACP.

James B. Osborn, Indianapolis, IN, Jon Laramore, Baker and Daniels, Indianapolis, IN, for Respondent, Marion County Election Board.

Steve Carter, Attorney General, Thomas M. Fisher, Solicitor General, Julie A. Brubaker, Heather L. Hagan, Deputy Attorneys General, for State Respondents.

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For U.S. Supreme Court briefs, see:2007 WL 3276506 (Pet.Brief)2007 WL 3276507 (Pet.Brief)2007 WL 4232929 (Resp.Brief)2007 WL 4232930 (Resp.Brief)2007 WL 4618316 (Reply.Brief)2007 WL 4466632 (Reply.Brief)

Justice STEVENS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and Justice KENNEDY join.

***185** At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

Referred to as either the "Voter ID Law" or "SEA 483," FN1 the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee***186** ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. Ind.Code Ann. § 3–11–8–25.1(e) (West Supp.2007). A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the ****1614** election. §§ 3 –11.7–5–1, 3–11.7–5–2.5(c) (West 2006). FN2 A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk's office within 10 days. § 3–11.7–5–2.5(b). No photo identification is required in order to register to vote, FN3 and the State offers free photo identification to qualified voters able to establish their residence and identity. § 9–24–16–10(b) (West Supp.2007). FN4

FN1. Senate Enrolled Act No. 483, 2005 Ind. Acts p.2005.

FN2. The affidavit must state that (1) the person executing the affidavit is the same individual who cast the provisional ballot on election day; and (2) the affiant is indigent and unable to obtain proof of identification without paying a fee or has a religious objection to being photographed. Ind.Code Ann. § 3–11.7–5–2.5(c). If the election board determines that the challenge to the affiant was based solely on a failure to present photo identification, the "county election board shall ... find that the voter's provisional ballot is valid." § 3–11.7–5–2.5(d).

FN3. Voters registering to vote for the first time in Indiana must abide by the requirements of the Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, described *infra*, at 1617 – 1618.

FN4. Indiana previously imposed a fee on all residents seeking a state-issued photo identification. At the same time that the Indiana Legislature enacted SEA 483, it also directed the Bureau of Motor Vehicles (BMV) to remove all fees for state-issued photo identification for individuals without a driver's license who are at least 18 years old. See 2005 Ind. Acts p.2017, § 18.

Promptly after the enactment of SEA 483 in 2005, the Indiana Democratic Party and the Marion County Democratic Central Committee (Democrats) filed suit in the Federal District Court for the Southern District of Indiana against the ***187** state officials responsible for its enforcement, seeking a judgment declaring the Voter ID Law invalid and enjoining its enforcement. A second suit seeking the same relief was brought on behalf of

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two elected officials and several nonprofit organizations representing groups of elderly, disabled, poor, and minority voters.[FN5] The cases were consolidated, and the State of Indiana intervened to defend the validity of the statute.

FN5. Specifically, the plaintiffs were William Crawford, Joseph Simpson, Concerned Clergy of Indianapolis, Indianapolis Resource Center for Independent Living, Indiana Coalition on Housing and Homeless Issues, Indianapolis Branch of the National Association for the Advancement of Colored People, and United Senior Action of Indiana. Complaint in No. 49012050 4PL01 6207 (Super. Ct. Marion Cty., Ind., Apr. 28, 2005), p. 2.

The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification. Second Amended Complaint in No. 1: 05–CV–0634–SEB–VSS (SD Ind.), pp. 6–9.

After discovery, District Judge Barker prepared a comprehensive 70–page opinion explaining her decision to grant defendants' motion for summary judgment. 458 F.Supp.2d 775 (S.D.Ind.2006). She found that petitioners had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements." *Id.,* at 783. She rejected "as utterly incredible and unreliable" an expert's report that up to 989,000 registered voters in Indiana did not possess either a driver's license or other acceptable photo identification. *Id.,* at 803. She estimated ****1615** that as of 2005, when the statute was enacted, ***188** around 43,000 Indiana residents lacked a state-issued driver's license or identification card. *Id.,* at 807.[FN6]

FN6. She added: "In other words, an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements of SEA 483." 458 F.Supp.2d, at 807. Given the availability of free photo identification and greater public awareness of the new statutory requirement, presumably that percentage has increased since SEA 483 was enacted and will continue to increase in the future.

A divided panel of the Court of Appeals affirmed. 472 F.3d 949 (C.A.7 2007). The majority first held that the Democrats had standing to bring a facial challenge to the constitutionality of SEA 483. Next, noting the absence of any plaintiffs who claimed that the law would deter them from voting, the Court of Appeals inferred that "the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls." *Id.,* at 952. It rejected the argument that the law should be judged by the same strict standard applicable to a poll tax because the burden on voters was offset by the benefit of reducing the risk of fraud. The dissenting judge, viewing the justification for the law as "hollow"—more precisely as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic"—would have applied a stricter standard, something he described as "close to 'strict scrutiny light.' " *Id.,* at 954, 956 (opinion of Evans, J.). In his view, the "law imposes an undue burden on a recognizable segment of potential eligible voters" and therefore violates their rights under the First and Fourteenth Amendments to the Constitution. *Id.,* at 956–957.

Four judges voted to grant a petition for rehearing en banc. 484 F.3d 436, 437 (CA7 2007) (Wood, J., dissenting from denial of rehearing en banc). Because we agreed with their assessment of the importance of these cases, we granted certiorari. 551

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U.S. 1192, 128 S.Ct. 33, 34, 168 L.Ed.2d 809 (2007). We are, however, ***189** persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm. FN7

FN7. We also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of SEA 483 and that there is no need to decide whether the other petitioners also have standing.

I

In *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. See *id.,* at 685, 86 S.Ct. 1079 (opinion of Harlan, J.). Applying a stricter standard, we concluded that a State "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.,* at 666, 86 S.Ct. 1079 (opinion of the Court). We used the term "invidiously discriminate" to describe conduct prohibited under that standard, noting that we had previously held that while a State may obviously impose "reasonable residence restrictions on the availability of the ballot," it "may not deny the opportunity to vote to a bona fide resident ****1616** merely because he is a member of the armed services." *Id.,* at 666–667, 86 S.Ct. 1079 (citing *Carrington v. Rash,* 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965)). Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications.

[1][2] Thus, under the standard applied in *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), however, we confirmed the general rule that "evenhanded restrictions that protect the ***190** integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*. 460 U.S., at 788, n. 9, 103 S.Ct. 1564. Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands.

[3] In later election cases we have followed *Anderson* 's balancing approach. Thus, in *Norman v. Reed,* 502 U.S. 279, 288–289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), after identifying the burden Illinois imposed on a political party's access to the ballot, we "called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation," and concluded that the "severe restriction" was not justified by a narrowly drawn state interest of compelling importance. Later, in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), we applied *Anderson* 's standard for " 'reasonable, nondiscriminatory restrictions,' " 504 U.S., at 434, 112 S.Ct. 2059, and upheld Hawaii's prohibition on write-in voting despite the fact that it prevented a significant number of "voters from participating in Hawaii elections in a meaningful manner," *id.,* at 443, 112 S.Ct. 2059 (KENNEDY, J., dissenting). We reaffirmed *Anderson* 's requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the " 'precise interests put forward by the State as justifications for the burden imposed by its rule.' " 504 U.S., at 434, 112 S.Ct. 2059 (quoting *Anderson,* 460 U.S., at 789, 103 S.Ct. 1564). FN8

FN8. Contrary to Justice SCALIA's suggestion, see *post,* at 1624 – 1625 (opinion

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concurring in judgment), our approach remains faithful to *Anderson* and *Burdick*. The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*, see 504 U.S., at 434, 112 S.Ct. 2059, and repeatedly cited *Anderson*, see 504 U.S., at 436, n. 5, 440, n. 9, 441, 112 S.Ct. 2059. To be sure, *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote; but in its place, the Court applied the "flexible standard" set forth in *Anderson*. 504 U.S., at 434, 112 S.Ct. 2059. *Burdick* surely did not create a novel "deferential 'important regulatory interests' standard." See *post*, at 1624 – 1625.

***191** In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman*, 502 U.S., at 288–289, 112 S.Ct. 698. We therefore begin our analysis of the constitutionality of Indiana's statute by focusing on those interests.

II

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential****1617** voters. While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified. Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.

The first is the interest in deterring and detecting voter fraud. The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.[FN9] The State also argues that it has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration—namely, that Indiana's voter registration rolls include a large number of names of persons who are either deceased or no longer live in Indiana. Finally, the State relies on its interest in safeguarding voter confidence. Each of these interests merits separate comment.

FN9. See National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 18 (2002) (with Honorary Co-chairs former Presidents Gerald Ford and Jimmy Carter).

***192** *Election Modernization*

Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote.

In the National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, 42 U.S.C. § 1973gg *et seq.*, Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process. § 1973gg. The statute requires state motor vehicle driver's license applications to serve as voter registration applications. § 1973gg–3. While that requirement has increased the number of registered voters, the statute also contains a provision restricting States' ability to remove names from the lists of registered voters. § 1973gg–6(a)(3). These protections have been partly responsible for inflated lists of registered voters. For example, evidence credited by Judge Barker estimated that as of 2004 Indiana's voter rolls were inflated by as much as 41.4%, see 458 F.Supp.2d, at 793, and data collected by the Election Assistance Committee in 2004 indicated that 19 of 92 Indiana counties had registration totals exceeding 100% of the 2004 voting-age population, Dept. of Justice Complaint in *United States v. Indi-*

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ana, No. 1:06–cv–1000–RLY–TAB (SD Ind., June 27, 2006), p. 4, App. 313.

In HAVA, Congress required every State to create and maintain a computerized statewide list of all registered voters. 42 U.S.C. § 15483(a) (2000 ed., Supp. V). HAVA also requires the States to verify voter information contained in a voter registration application and specifies either an "applicant's driver's license number" or "the last 4 digits of the applicant's social security number" as acceptable verifications. § 15483(a)(5)(A)(i). If an individual has neither number, the State is required to assign the applicant a **voter identification** number. § 15483(a)(5)(A)(ii).

***193** HAVA also imposes new identification requirements for individuals registering to vote for the first time who submit their applications by mail. If the voter is casting his ballot in person, he must present local election officials with written identification, which may be either "a current and ****1618** valid photo identification" or another form of documentation such as a bank statement or paycheck. § 15483(b)(2)(A). If the voter is voting by mail, he must include a copy of the identification with his ballot. A voter may also include a copy of the documentation with his application or provide his driver's license number or Social Security number for verification. § 15483(b)(3). Finally, in a provision entitled "Fail-safe voting," HAVA authorizes the casting of provisional ballots by challenged voters. § 15483(b)(2)(B).

Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology. That conclusion is also supported by a report issued shortly after the enactment of SEA 483 by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases. In the introduction to their discussion of **voter identification**, they made these pertinent comments:

> "A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own ***194** apartment building let alone their precinct, some form of identification is needed.
>
> "There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136–137 (Carter–Baker Report) (footnote omitted).[FN10]

FN10. The historical perceptions of the Carter–Baker Report can largely be confirmed. The average precinct size in the United States has increased in the last century, suggesting that it is less likely that poll workers will be personally acquainted with voters. For example, at the time Joseph Harris wrote his groundbreaking 1934 report on election administration, Indiana restricted the number of voters in each precinct to 250. J. Harris, Election Administration in the United States 208 (Brookings Institution 1934). An Election Commission report indicates that Indiana's average number of registered voters per polling place is currently 1,014. Election

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Assistance Commission, Final Report of the 2004 Election Day Survey, ch. 13 (Sept.2005) (Table 13) (hereinafter Final Report) (prepared by Election Data Services, Inc.), online at http:// www. eac. gov/ clearing house/ clearing house/ 2004– election– day– survey (all Internet materials as visited Apr. 16, 2008, and available in Clerk of Court's case file). In 1930, the major cities that Harris surveyed had an average number of voters per precinct that ranged from 247 to 617. Election Administration in the United States, at 214. While States vary today, most have averages exceeding 1,000, with at least eight States exceeding 2,000 registered voters per polling place. Final Report, ch. 13 (Table 13).

Voter Fraud

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation****1619** at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing ***195** such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists,[FN11] that occasional examples have surfaced in recent years,[FN12] and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor[FN13]—though perpetrated using absentee ballots and not ***196** in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

FN11. One infamous example is the New York City elections of 1868. William (Boss) Tweed set about solidifying and consolidating his control of the city. One local tough who worked for Boss Tweed, "Big Tim" Sullivan, insisted that his "repeaters" (individuals paid to vote multiple times) have whiskers:

" 'When you've voted 'em with their whiskers on you take 'em to a barber and scrape off the chin-fringe. Then you vote 'em again with the side lilacs and a mustache. Then to a barber again, off comes the sides and you vote 'em a third time with the mustache. If that ain't enough and the box can stand a few more ballots clean off the mustache and vote 'em plain face. That makes every one of 'em good for four votes.' " A. Callow, The Tweed Ring 210 (1966) (quoting M. Werner, Tammany Hall 439 (1928)).

FN12. Judge Barker cited record evidence containing examples from California, Washington, Maryland, **Wisconsin**, Georgia, Illinois, Pennsylvania, Missouri, Miami, and St. Louis. The Brief for Brennan Center for Justice et al. as *Amici Curiae* in Support of Petitioners addresses each of these examples of fraud. While the brief indicates that the record evidence of in-person fraud was overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud, there remain scattered instances of in-person voter fraud. For example, after a hotly contested gubernatorial election in 2004, Washington conducted an investigation of voter fraud and uncovered 19 "ghost voters." *Borders v. King Cty.*, No. 05–2–00027–3 (Super. Ct. Chelan Cty., Wash., June 6, 2005) (verbatim report of unpublished oral decision), 4 Election L.J. 418, 423 (2005). After a partial investigation of the ghost voting, one voter was confirmed to have committed in-person voting fraud. Le & Nicolosi, Dead Voted in Governor's Race, Seattle Post–Intelligencer, Jan. 7, 2005, p. A1.

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FN13. See *Pabey v. Pastrick,* 816 N.E.2d 1138, 1151 (Ind.2004) (holding that a special election was required because one candidate engaged in "a deliberate series of actions ... making it impossible to determine the candidate who received the highest number of legal votes cast in the election"). According to the uncontested factual findings of the trial court, one of the candidates paid supporters to stand near polling places and encourage voters—especially those who were poor, infirm, or spoke little English—to vote absentee. The supporters asked the voters to contact them when they received their ballots; the supporters then "assisted" the voter in filling out the ballot.

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

In its brief, the State argues that the inflation of its voter rolls provides further support for its enactment of SEA 483. The record contains a November 5, 2000, newspaper article asserting that as a result of NVRA and "sloppy record keeping," Indiana's lists of registered voters included the names of thousands of persons who had either moved, died, or were ****1620** not eligible to vote because they had been convicted of felonies.[FN14] The conclusion that Indiana has an unusually inflated list of registered voters is supported by the entry of a consent decree in litigation brought by the Federal Government alleging violations of NVRA. Consent Decree and Order in *United States v. Indiana,* No. 1:06–cv–1000–RLY–TAB (SD Ind., June 27, 2006), App. 299–307. Even though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral ***197** and nondiscriminatory reason supporting the State's decision to require photo identification.

FN14. Theobald, Bogus Names Jam Indiana's Voter List, Indianapolis Star, Nov. 5, 2000, App. 145.

Safeguarding Voter Confidence

Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." Brief for State Respondents, No. 07–25, p. 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Supra,* at 1618.

III

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of States have relied primarily on photo identification.[FN15] A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to ***198** cast a provisional ballot provides an adequate rem-

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edy for problems of that character.

FN15. For a survey of state practice, see Brief for Texas et al. as *Amici Curiae* 10–14, and nn. 1–23.

The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483.[FN16] The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning****1621** in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.[FN17]

FN16. Ind.Code Ann. § 3–5–2–40.5 (West 2006) requires that the document satisfy the following:

"(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

"(2) The document shows a photograph of the individual to whom the document was issued.

"(3) The document includes an expiration date, and the document:

"(A) is not expired; or

"(B) expired after the date of the most recent general election.

"(4) The document was issued by the United States or the state of Indiana."

FN17. To obtain a photo identification card a person must present at least one "primary" document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport. Ind. Admin. Code, tit. 140, § 7–4–3 (2008), http://www.in.gov/legislative/iact/T01400/A00070.pdf?. Indiana, like most States, charges a fee for obtaining a copy of one's birth certificate. This fee varies by county and is currently between $3 and $12. See Indiana State Department of Health Web page, http:// www. in. gov/ isdh/ bdcertifs/ lhdfees/ toc. htm. Some States charge substantially more. Affidavit of Robert Andrew Ford, App. 12.

***199** Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate;[FN18] persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

FN18. As petitioners note, Brief for Petitioners in No. 07–21, p. 17, n. 7, and the State's "Frequently Asked Questions" Web page states, it appears that elderly persons who can attest that they were never issued a birth certificate may present other forms

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of identification as their primary document to the Indiana BMV, including Medicaid/ Medicare cards and Social Security benefits statements. http:// www. in. gov/ faqs. htm; see also Ind. Admin. Code, tit. 140, § 7–4–3(a) "The commissioner or the commissioner's designee may accept reasonable alternate documents to satisfy the requirements of this rule").

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters,[FN19] that ***200** conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

FN19. Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election. It is, however, difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballots subject to later verification in every election when the BMV is able to issue these citizens special licenses that enable them to drive without any photo identification. See Ind.Code Ann. § 9–24–11–5(c) (West Supp.2007).

IV

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. Only a few weeks ago we held that the ****1622** Court of Appeals for the Ninth Circuit had failed to give appropriate weight to the magnitude of that burden when it sustained a preelection, facial attack on a Washington statute regulating that State's primary election procedures. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Our reasoning in that case applies with added force to the arguments advanced by petitioners in these cases.

[4] Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification; Judge Barker found petitioners' expert's report to be "utterly incredible and unreliable." 458 F.Supp.2d, at 803. Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.

***201** Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. The record includes depositions of two case managers at a day shelter for homeless persons and the depositions of members of the plaintiff organizations, none of whom expressed a personal inability to vote under SEA 483. A deposition from a named plaintiff describes the difficulty the elderly woman had in obtaining an identification card, although her testimony indicated that she intended to return to the BMV since she had recently obtained her birth certificate and that she was able to pay the birth certi-

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ficate fee. App. 94.

Judge Barker's opinion makes reference to six other elderly named plaintiffs who do not have photo identifications, but several of these individuals have birth certificates or were born in Indiana and have not indicated how difficult it would be for them to obtain a birth certificate. 458 F.Supp.2d, at 797–799. One elderly named plaintiff stated that she had attempted to obtain a birth certificate from Tennessee, but had not been successful, and another testified that he did not know how to obtain a birth certificate from North Carolina. The elderly in Indiana, however, may have an easier time obtaining a photo identification card than the nonelderly, see n. 17, *supra*, and although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification.

The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. While one elderly man stated that he did not have the money to pay for a birth certificate, when asked if he did not have the money or did not wish to spend it, he replied, "both." App. 211–212. From this limited evidence we do not know the magnitude of the impact SEA 483 will have on indigent voters in Indiana. The record does contain the affidavit of one homeless ***202** woman who has a copy of ****1623** her birth certificate, but was denied a photo identification card because she did not have an address. *Id.*, at 67. But that single affidavit gives no indication of how common the problem is.

[5] In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. See *Storer v. Brown*, 415 U.S. 724, 738, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).[FN20] A facial challenge must fail where the statute has a " ' "plainly legitimate sweep." ' " *Washington State Grange*, 552 U.S., at ——, 128 S.Ct., at 1190 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–740, and n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (STEVENS, J., concurring in judgments)). When we consider only the statute's broad ***203** application to all Indiana voters we conclude that it " imposes only a limited burden on voters' rights." *Burdick*, 504 U.S., at 439, 112 S.Ct. 2059. The " 'precise interests' " advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483. *Id.*, at 434, 112 S.Ct. 2059.

FN20. Three comments on Justice SOUTER's speculation about the nontrivial burdens that SEA 483 may impose on "tens of thousands" of Indiana citizens, *post*, at 1627 (dissenting opinion), are appropriate. First, the fact that the District Judge estimated that when the statute was passed in 2005, 43,000 citizens did not have photo identification, see 458 F.Supp.2d 775, 807 (S.D.Ind.2006), tells us nothing about the number of free photo identification cards issued since then. Second, the fact that public transportation is not available in some Indiana counties tells us nothing about how often elderly and indigent citizens have an opportunity to obtain a photo identification at the BMV, either during a routine outing with family or friends or during a special visit to the BMV arranged by a civic or political group such as the League of Women Voters or a political party. Further, nothing in the record establishes the distribution of voters who lack photo identification. To the extent that the evidence sheds any light on that issue, it suggests that such voters reside primarily in metropolitan areas, which are served by public transportation in Indiana (the majority of the plaintiffs reside in Indianapolis and several of the organizational plaintiffs are Indianapolis organizations). Third, the indigent, elderly, or disabled need not "travel all the way to their county seats every time they wish to vote," *post*, at 1642, if they obtain a free

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photo identification card from the BMV. While it is true that obtaining a birth certificate carries with it a financial cost, the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates. Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication.

[6] Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, "[w]e must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' " *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion))" *Washington State Grange,* 552 U.S., at ——, 128 S.Ct., at 1191.

V

In their briefs, petitioners stress the fact that all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it.[FN21] In her opinion rejecting petitioners'****1624** facial challenge, Judge Barker noted that the litigation was the result of a partisan dispute that had "spilled out of the state house into the courts." 458 F.Supp.2d, at 783. It is fair to infer that partisan considerations may have played a significant role in the decision to enact SEA 483. If such considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.

FN21. Brief for Petitioners in No. 07–25, pp. 6–9. Fifty-two Republican House members voted for the bill, 45 Democrats voted against, and 3 Democrats were excused from voting. 3 Journal of the House of Representatives of Indiana, Roll Call 259 (Mar. 21, 2005). In the Senate, 33 Republican Senators voted in favor and 17 Democratic Senators voted against. 3 Journal of the Senate of Indiana, Roll Call 417 (Apr. 12, 2005).

***204** But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting "the integrity and reliability of the electoral process." *Anderson,* 460 U.S., at 788, n. 9, 103 S.Ct. 1564.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

The lead opinion assumes petitioners' premise that the **voter-identification** law "may have imposed a special burden on" some voters, *ante,* at 1621 – 1622, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny, *ante,* at 1622 – 1623. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.

To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). This

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calls for application of a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. *Id.,* at 433–434, 112 S.Ct. 2059 (internal quotation marks omitted). The lead opinion resists the import of *Burdick* by characterizing it as simply adopting "the balancing approach" of *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (majority opinion of STEVENS, J.). See *ante,* at 1617; see also *ante,* at 1617, n. 8. Although ***205** *Burdick* liberally quoted *Anderson, Burdick* forged *Anderson* 's amorphous "flexible standard" into something resembling an administrable rule. See *Burdick, supra,* at 434, 112 S.Ct. 2059. Since *Burdick,* we have repeatedly reaffirmed the primacy of its two-track approach. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Clingman v. Beaver,* 544 U.S. 581, 586–587, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005). "[S]trict scrutiny is appropriate only if the burden is severe." *Id.,* at 592, 125 S.Ct. 2029. Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe.****1625** See *id.,* at 591, 593–597, 125 S.Ct. 2029. Burdens are severe if they go beyond the merely inconvenient. See *Storer v. Brown,* 415 U.S. 724, 728–729, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (characterizing the law in *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as "severe" because it was "so burdensome" as to be " 'virtually impossible' " to satisfy).

Of course, we have to identify a burden before we can weigh it. The Indiana law affects different voters differently, *ante,* at 1642 – 1643, but what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones, except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors. Nor are voters who already have photo identifications exempted from the burden, since those voters must maintain the accuracy of the information displayed on the identifications, renew them before they expire, and replace them if they are lost.

The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes. In the course of concluding that the Hawaii laws at issue in *Burdick* "impose[d]***206** only a limited burden on voters' rights to make free choices and to associate politically through the vote," 504 U.S., at 439, 112 S.Ct. 2059, we considered the laws and their reasonably foreseeable effect on *voters generally*. See *id.,* at 436–437, 112 S.Ct. 2059. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances. That was essentially the approach of the *Burdick* dissenters, who would have applied strict scrutiny to the laws because of their effect on "some voters." See *id.,* at 446, 112 S.Ct. 2059 (KENNEDY, J., dissenting); see also *id.,* at 448, 112 S.Ct. 2059 ("The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon *some individual voters* ... ." (emphasis added)). Subsequent cases have followed *Burdick* 's generalized review of nondiscriminatory election laws. See, *e.g., Timmons, supra,* at 361–362, 117 S.Ct. 1364; *Clingman, supra,* at 590–591, 592–593, 125 S.Ct. 2029. Indeed, *Clingman* ' s holding that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden.

Not all of our decisions predating *Burdick* addressed whether a challenged voting regulation severely burdened the right to vote, but when we began to grapple with the magnitude of burdens, we

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did so categorically and did not consider the peculiar circumstances of individual voters or candidates. See, *e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 438–441, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). Thus, in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), we did not link the State's interest in inhibiting party raiding with the petitioners' own circumstances. See *id.*, at 760–762, 93 S.Ct. 1245. And in *Storer v. Brown*, *supra*, we observed that the severity of the burden of a regulation should be measured according to its "nature, extent, and *likely impact*." *Id.*, at 738, 94 S.Ct. 1274 (emphasis added). We therefore instructed the District Court to decide on remand whether "a *reasonably diligent* independent candidate [could] be expected to satisfy the signature requirements, or will it be ***207** only rarely that the unaffiliated candidate will succeed in getting****1626** on the ballot?" *Id.*, at 742, 94 S.Ct. 1274 (emphasis added). Notably, we did not suggest that the District Court should consider whether one of the petitioners would actually find it more difficult than a reasonably diligent candidate to obtain the required signatures. What mattered was the general assessment of the burden.

Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, see *Anderson*, *supra*, at 786, n. 7, 103 S.Ct. 1564, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. See, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.[FN*] See *Harris v. McRae*, 448 U.S. 297, 323, and n. 26, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (poverty); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (disability); *Gregory v. Ashcroft*, 501 U.S. 452, 473, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (age); cf. ***208***Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878–879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (First Amendment does not require exceptions for religious objectors to neutral rules of general applicability).

FN* A number of our early right-to-vote decisions, purporting to rely upon the Equal Protection Clause, strictly scrutinized nondiscriminatory voting laws requiring the payment of fees. See, *e.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax); *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (ballot-access fee); *Lubin v. Panish*, 415 U.S. 709, 716–719, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (ballot-access fee). To the extent those decisions continue to stand for a principle that *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), does not already encompass, it suffices to note that we have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.

Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe bur-

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den are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. See Art. I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to ****1627** vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante,* whether the burden they impose is too severe.

The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned. There is no good reason to prefer that course.

* * *

***209** The universally applicable requirements of Indiana's **voter-identification** law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not "even represent a significant increase over the usual burdens of voting." *Ante,* at 1621. And the State's interests, *ante,* at 1613 – 1620, are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Indiana's "Voter ID Law" [FN1] threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, see *ante,* at 1620 – 1621 (lead opinion), and a significant percentage of those individuals are likely to be deterred from voting, see *ante,* at 1621. The statute is unconstitutional under the balancing standard of *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992): a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, see *ante,* at 1616 – 1620, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. I therefore respectfully dissent from the Court's judgment sustaining the statute.[FN2]

FN1. Senate Enrolled Act No. 483, 2005 Ind. Acts p.2005.

FN2. I agree with the lead opinion that the petitioners in No. 07–25 have standing and that we therefore need not determine whether the remaining petitioners also have standing. See *ante,* at 1616, n. 7.

***210** I

Voting-rights cases raise two competing interests, the one side being the fundamental right to vote. See *Burdick, supra,* at 433, 112 S.Ct. 2059 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure' ") (quoting *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)); see also *Purcell v. Gonzalez,* 549 U.S. 1, 3–4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) *(per curiam); Dunn v. Blumstein,* 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Reynolds v. Sims,* 377 U.S. 533, 561–562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The Judiciary is obliged to train a skeptical eye on any qualification of that right. See

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Reynolds, supra, at 562, 84 S.Ct. 1362 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of ****1628** the right of citizens to vote must be carefully and meticulously scrutinized").

As against the unfettered right, however, lies the "[c]ommon sense, as well as constitutional law ... that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick, supra,* at 433, 112 S.Ct. 2059 (quoting *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)); see also *Burdick, supra,* at 433, 112 S.Ct. 2059 ("Election laws will invariably impose some burden upon individual voters").

Given the legitimacy of interests on both sides, we have avoided pre-set levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue. And whatever the claim, the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State's reasons for imposing those precise burdens. Thus, in *Burdick* :

> "A court considering [such] a challenge ... must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth ***211** 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, 112 S.Ct. 2059 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)).

The lead opinion does not disavow these basic principles. See *ante,* at 1617 (discussing *Burdick*); see also *ante,* at 1616 – 1617 ("However slight [the] burden may appear, ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation" (internal quotation marks omitted)). But I think it does not insist enough on the hard facts that our standard of review demands.

II

Under *Burdick,* "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," 504 U.S., at 434, 112 S.Ct. 2059, upon an assessment of the "character and magnitude of the asserted [threatened] injury," *ibid.* (quoting *Anderson, supra,* at 789, 103 S.Ct. 1564), and an estimate of the number of voters likely to be affected.

A

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. [FN3] The travel is required for ***212** the personal****1629** visit to a license branch of the Indiana Bureau of Motor Vehicles (BMV), which is demanded of anyone applying for a driver's license or nondriver photo identification. See 458 F.Supp.2d 775, 791 (S.D.Ind.2006). The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive, [FN4] witness the fact that the BMV ***213** has far fewer license branches in each county than there are voting precincts. [FN5] Marion County, for example, has over 900 active voting precincts, see Brief for Respondent Marion County Election Board 4, [FN6] yet only 12 BMV license branches; [FN7] in Lake County, there are 565 active voting precincts, see n. 6, *supra,* to match up with only 8 BMV locations; [FN8] and Allen County, with 309 active voting precincts, see *ibid.,* has only 3 BMV license branches.

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FN9 The same pattern holds in counties with smaller populations. Brown County has 12 active voter precincts, see *ibid.*, and only one BMV office; FN10 while there were 18 polling places available in Fayette County's 2007 municipal primary,****1630** FN11 there was only 1 BMV license branch; FN12 and Henry County, with 42 polling places approved for 2008 elections, FN13 has only 1 BMV office.

FN3. Under Indiana's law, an ID does not qualify as proof of identification unless it "satisfies all [of] the following":

"(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

"(2) The document shows a photograph of the individual to whom the document was issued.

"(3) The document includes an expiration date, and the document:

"(A) is not expired; or

"(B) expired after the date of the most recent general election.

"(4) The document was issued by the United States or the state of Indiana." Ind.Code Ann. § 3–5–2–40.5 (West 2006).

FN4. The State asserts that the elderly and disabled are adequately accommodated through their option to cast absentee ballots, and so any burdens on them are irrelevant. See Brief for State Respondents 41. But as petitioners' *amici* AARP and the National Senior Citizens Law Center point out, there are crucial differences between the absentee and regular ballot. Brief for AARP et al. as *Amici Curiae* 12–16. Voting by absentee ballot leaves an individual without the possibility of receiving assistance from poll workers, and thus increases the likelihood of confusion and error. More seriously, as the Supreme Court of Indiana has recognized, Indiana law "treats absentee voters differently from the way it treats Election Day voters," in the important sense that "an absentee ballot may not be recounted in situations where clerical error by an election officer rendered it invalid." *Horseman v. Keller,* 841 N.E.2d 164, 171 (2006). The State itself notes that "election officials routinely reject absentee ballots on suspicion of forgery." Brief for State Respondents 62. The record indicates that voters in Indiana are not unaware of these risks. One elderly affiant in the District Court testified: "I don't trust [the absentee] system .... Because a lot of soldiers vote like that and their votes wasn't counted in the last election according to what I read, absentee." App. 209 (deposition of David Harrison).

It is one thing (and a commendable thing) for the State to make absentee voting available to the elderly and disabled; but it is quite another to suggest that, because the more convenient but less reliable absentee ballot is available, the State may freely deprive the elderly and disabled of the option of voting in person.

FN5. Under Indiana law, county executives must locate a polling place within five miles of the closest boundary of each voting precinct, and, with limited exceptions, no precinct may cover more than 1,200 active voters at the time it is established. See Brief for Respondent Marion County Election Board 3 (citing Ind.Code Ann. §§ 3–11–8–3(b), 3–11–1.5–3). The result is that the number of polling places tends to track the number of voting precincts in a

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county. In Henry County, for example, there are 42 active precincts, see n. 6, *infra*, and 42 polling places have been approved for the 2008 elections, see n. 13, *infra*.

FN6. See also Count of Active Precincts by County, online at http:// www. in. gov/ sos/ pdfs/ Precincts _ by_ County _ and_ State _ 022706. pdf (all Internet materials as visited Apr. 21, 2008, and available in Clerk of Court's case file).

FN7. See Marion County License Branches, http:// www. in. gov/ bmv/ 3134.htm.

FN8. See Lake County, http:// www. in. gov/ bmv/ 3150. htm.

FN9. See Allen County, http:// www. in. gov/ bmv/ 2954. htm.

FN10. See Brown County, http:// www. in. gov/ bmv/ 3302. htm.

FN11. See http:// www. co. fayette. in. us/ 2007 % 20 polling % 6D locations % 6D munic. htm.

FN12. See Fayette County, http:// www. in. gov/ bmv/ 3246. htm.

FN13. See News Release, Henry County, Indiana, Polling Places Approved for the 2008 Elections, http:// www. henryco. net/ cm/ node/ 52.

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably ***214** serious for many of the individuals who lack photo identification.[FN14] They almost certainly will not own cars, see Brief for Current and Former State Secretaries of State as *Amici Curiae* 11, and public transportation in Indiana is fairly limited. According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92 counties have no public transportation system at all,[FN15] and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties.[FN16] Among the counties with some public system, 21 provide service only within certain cities, and 32 others restrict public transportation to regional county service, ***215** leaving only 18 that offer countywide public transportation, see n. 15, *supra*. State officials recognize the effect that travel costs can have on voter turnout, as in Marion County, for example, where efforts have been made to "establis[h] most polling places in locations even more convenient than the statutory minimum," in order to "provid[e] for neighborhood voting." Brief for Respondent Marion County Election Board 3–4.

FN14. The travel burdens might, in the future, be reduced to some extent by Indiana's commendable "BMV2You" mobile license branch, which will travel across the State for an average of three days a week, and provide BMV services (including ID services). See http:// www. in. gov/ bmv/ 3554. htm. The program does not count in my analysis, however, because the program was only recently opened in August 2007, see Indiana BMV Opens License Branch at State Fair, http:// www. in. gov/ newsroom. htm ? detail Content= 93 _ 10400. htm, and its long-term service schedule has yet to be determined.

FN15. Indiana Public Transit: Annual Report 2006, p. 29, http:// www. in. gov/ indot/ files/ INDOT _ 2006. pdf (hereinafter Annual Report). The 21 counties with no public transportation, according to the study, are: Adams, Blackford, Brown, Carroll, Clay, De Kalb, Gibson, Jennings, Lagrange, Parke, Perry, Posey, Putnam, Rush, Spencer, Steuben, Tipton, Vermillion, Warren, Warrick, and Whitley Counties. See *ibid.*

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Transportation Association, which compiles public transit information across the States, confirms that each of those 21 counties lacks any public transportation offerings, and in fact adds another 13 counties to this category: Boone, Decatur, Fayette, Fulton, Hancock, Hendricks, Huntington, Miami, Morgan, Noble, Pike, Shelby, and Wells. See Transit Systems in Indiana, http:// www. public transport ation. org/ systems/ state. asp? state= IN# A44. The discrepancy appears to arise, in part, from the fact that the American Public Transportation Association has not counted demand response systems that have been established in at least 6 of these 13 counties. See Annual Report 36, 50, 56, 96, 110, 144.

FN16. In 2000, approximately 9% of Indiana's population lived within 1 of these 21 counties. See County and City Extra: Special Decennial Census Edition 169, 176 (D. Gaquin & K. DeBrandt eds.2002).

Although making voters travel farther than what is convenient for most and possible for some does not amount to a "severe" burden under *Burdick*, that is no reason to ignore the burden altogether. It translates into an obvious economic cost (whether in worktime lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID.

For those voters who can afford the round trip, a second financial hurdle appears:****1631** in order to get photo identification for the first time, they need to present "a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport." *Ante*, at 1620, n. 17 (lead opinion) (citing Ind. Admin. Code, tit. 140, § 7–4–3 (2008)). As the lead opinion says, the two most common of these documents come at a price: Indiana counties charge anywhere from $3 to $12 for a birth certificate (and in some other States the fee is significantly higher), see *ante*, at 1620, n. 17, and that same price must usually be paid for a first-time passport, since a birth certificate is required to prove U.S. citizenship by birth. The total fees for a passport, moreover, are up to about $100.[FN17] So most voters must pay at least one fee to get the ID necessary to cast ***216** a regular ballot.[FN18] As with the travel costs, these fees are far from shocking on their face, but in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.

FN17. See Department of State, How to Apply in Person for a Passport, http:// travel. state. gov/ passport/ get/ first/ first_ 830. html; Department of State, Passport Fees (Feb. 1, 2008), http:// travel. state. gov/ passport/ get/fees/fees_837.html (total fees of $100 for a passport book and $45 for a passport card for individuals 16 and older).

FN18. The lead opinion notes that "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Ante*, at 1623, n. 20. But the record discloses no reason to think that any appreciable number of poor voters would need birth certificates absent the Voter ID Law, and no reason to believe that poor people would spend money to get them if they did not need them.

B

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers "indigent" [FN19] as well as those with religious objections to being photographed, see *ante*, at 1621 (lead opinion), and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana's chosen exception does not amount to much relief.

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FN19. To vote by provisional ballot, an individual must (at the circuit court clerk's office) sign an affidavit affirming that she is "indigent" and "unable to obtain proof of identification without the payment of a fee." Ind.Code Ann. § 3–11.7–5–2.5(c)(2)(A) (West 2006). Indiana law does not define the key terms "indigent" or "unable," but I will assume for present purposes that the Indiana Supreme Court will eventually construe these terms broadly, so that the income threshold for indigency is at least at the federal poverty level, and so that the exception covers even individuals who are facing only short-term financial difficulties.

The law allows these voters who lack the necessary ID to sign the pollbook and cast a provisional ballot. See 458 F.Supp.2d, at 786 (citing Ind.Code Ann. § 3–11–8–25.1 (West Supp.2007)). As the lead opinion recognizes, though, *ante*, at 1621, that is only the first step; to have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an ***217** ID at that point),[FN20] see 458 F.Supp.2d, at 786. Unlike the trip to the BMV (which, assuming ****1632** things go smoothly, needs to be made only once every four years for renewal of nondriver photo identification, see *id.* at 791), this one must be taken every time a poor person or religious objector wishes to vote, because the State does not allow an affidavit to count in successive elections. And unlike the trip to the BMV (which at least has a handful of license branches in the more populous counties), a county has only one county seat. Forcing these people to travel to the county seat every time they try to vote is particularly onerous for the reason noted already, that most counties in Indiana either lack public transportation or offer only limited coverage. See *supra*, at 1616.

FN20. Indiana law allows voters to cast a provisional ballot at the county clerk's office starting 29 days prior to election day until noon of the day prior to election day, see Ind.Code Ann. § 3–11.7–5–2.5, and this might enable some voters to make only one burdensome trip to the county seat. But for the voters who show up at the polls to vote and are there told that they lack the photo identification needed to cast a regular ballot, the Voter ID Law effectively forces them to make two trips.

That the need to travel to the county seat each election amounts to a high hurdle is shown in the results of the 2007 municipal elections in Marion County, to which Indiana's Voter ID Law applied. Thirty-four provisional ballots were cast, but only two provisional voters made it to the County Clerk's Office within the 10 days. See Brief for Respondent Marion County Election Board 8–9. All 34 of these aspiring voters appeared at the appropriate precinct; 33 of them provided a signature, and every signature matched the one on file; and 26 of the 32 voters whose ballots were not counted had a history of voting in Marion County elections. See *id* ., at 9.

All of this suggests that provisional ballots do not obviate the burdens of getting photo identification. And even if that were not so, the provisional-ballot option would be inadequate***218** for a further reason: the indigency exception by definition offers no relief to those voters who do not consider themselves (or would not be considered) indigent but as a practical matter would find it hard, for nonfinancial reasons, to get the required ID (most obviously the disabled).

C

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not "severe" ones, and the next question under *Burdick* is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

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Although the District Court found that petitioners failed to offer any reliable empirical study of numbers of voters affected, see *ante*, at 1621 – 1622 (lead opinion),[FN21] we may accept that court's rough calculation that 43,000 voting-age residents lack the kind of identification card required by Indiana's law. See 458 F.Supp.2d, at 807. The District Court made that estimate by comparing BMV records reproduced in petitioners' statistician's report with U.S. Census Bureau figures for Indiana's voting-age population in 2004, see *ibid.*, and the State does not argue that these raw data are unreliable.

FN21. Much like petitioners' statistician, the BMV "has not been able to determine the approximate number of Indiana residents of voting age who are without an Indiana driver's license or identification card," 458 F.Supp.2d 775, 791 (S.D.Ind.2006), but the BMV does acknowledge "that there are persons who do not currently have [the required ID] and who are, or who will be, eligible to vote at the next election," *ibid.*

The State, in fact, shows no discomfort with the District Court's finding that an "estimated 43,000 individuals" (about 1% of the State's voting-age population) lack a qualifying ID. Brief for State Respondents 25. If the State's willingness to take that number is surprising, it may be less so in light of the District Court's observation that "several factors ... suggest the percentage of Indiana's voting age population with photo identification is actually ****1633** lower than 99%," ***219**458 F.Supp.2d, at 807, n. 43,[FN22] a suggestion in line with national surveyS SHOWING ROUGHLY 6%–10% of voting-age Americans without a state-issued photo identification card. See Brief for Petitioners in No. 07–21, pp. 39–40, n. 17 (citing National Commission on Election Reform, To Assure Pride and Confidence: Task Force Reports, ch. VI: Verification of Identity, p. 4 (Aug.2001), http:// webstorage 3. mcpa. virginia. edu/ commissions/ comm_ 2001_ taskforce. pdf). We have been offered no reason to think that Indiana does a substantially better job of distributing IDs than other States.[FN23]

FN22. The District Court explained:

> "[O]ur simple comparison of raw numbers does not take into account: individuals who have died but whose Indiana driver's license or identification cards have not expired; individuals who have moved outside the state and no longer consider themselves Indiana residents but who still retain a valid Indiana license or identification card; individuals who have moved into Indiana and now consider themselves Indiana residents but have not yet obtained an Indiana license or identification; and individuals, such as students, who are residing in Indiana temporally, are registered to vote in another state, but have obtained an Indiana license or identification." *Id.*, at 807, n. 43.
>
> The District Court also identified three factors that, in its view, might require deductions of the 43,000 figure. First, the District Court noted that BMV records do not cover all forms of identification that may be used to vote under the Voter ID Law (*e.g.*, federal photo identification, such as a passport). This is a valid consideration, but is unlikely to overcome the additions that must be made for the various factors listed above. Second, the court noted that the BMV records do not account for the exceptions to the photo identification requirement (such as the indigency and absentee-ballot exceptions). This factor does not warrant a deduction of the 43,000 number because, as I have argued, the indigency exception imposes serious burdens of its own, see *supra*, at —— – ——, and the absentee-ballot exception is not a wholly adequate substi-

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tute for voting in person, see n. 4, *supra*. Finally, the District Court noted that many individuals are not registered to vote. For reasons I lay out in note 24, *infra*, I am not convinced that this fact is relevant at all.

FN23. Although the lead opinion expresses confidence that the percentage of voters without the necessary photo ID will steadily decrease, see *ante*, at ——, n. 6, and suggests that the number may already have dropped, see *ante*, at ——, n. 20, there is reason to be less sanguine. See ACLU Sues To Halt License Revocation, Fort Wayne J. Gazette, Feb. 9, 2008, p. 3C ("The American Civil Liberties Union is suing the state to prevent the possible revocation of up to 56,000 driver's licenses that don't match information in a Social Security database. Many of the mismatches were created by typographical errors or by people getting married and changing their last names, the [BMV] said last week when it announced it had sent warning letters to about 206,000 people in Indiana"); see also Dits, Court Date is Set for Bid To Stop BMV Revoking Licenses, South Bend Tribune, Feb. 21, 2008, p. B1; Who To Blame in Name Game? Many Caught in Name Game; Merging BMV, Social Security Databases Forcing Many To Hire Lawyers, Post–Tribune, Jan. 8, 2008, p. A5; Snelling, Name Issue Blocks License, *id.* Jan. 7, 2008, p. A6.

***220** So a fair reading of the data supports the District Court's finding that around 43,000 Indiana residents lack the needed identification, and will bear the burdens the law imposes. To be sure, the 43,000 figure has to be discounted to some extent, residents of certain nursing homes being exempted from the photo identification requirement. 458 F.Supp.2d, at 786. But the State does not suggest that this narrow exception could possibly reduce 43,000 to an insubstantial number.[FN24]

FN24. The State does imply that we should further discount the 43,000 estimate to exclude citizens who are not registered to vote, or who are registered but not planning to vote. See Brief for State Respondents 25; see also *ante*, at —— (lead opinion) ("[T]he evidence in the record does not provide us with the number of registered voters without photo identification"). But that argument is flatly contradicted by this Court's settled precedent. As our cases have recognized, disfranchisement is disfranchisement, whether or not the disfranchised voter would have voted if given the choice. That is why in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), the Court did not ask whether any significant number of individuals deprived of the right to vote by durational residence requirements would actually have chosen to vote. And in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the Court did not pause to consider whether any of the qualified voters deterred by the $1.50 poll tax would have opted to vote if there had been no fee. Our cases make clear that the Constitution protects an individual's ability to vote, not merely his decision to do so.

****1634** The upshot is this. Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically, ***221** see 472 F.3d 949, 951 (C.A.7 2007) ("No doubt most people who don't have photo ID are low on the economic ladder"); cf. *Bullock v. Carter*, 405 U.S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) ("[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters ... according to their economic status").[FN25] The Voter ID Law places hurdles in the way of either getting an

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ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting. Cf. 458 F.Supp.2d, at 823 ("We do not doubt that such individuals exist somewhere, even though Plaintiffs were unable to locate them"); 472 F.3d, at 952 ("No doubt there are at least a few [whom the law will deter from voting] in Indiana ..."); see also *ante*, at 1621 (lead opinion).

FN25. Studies in other States suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities. See Overton, **Voter Identification**, 105 Mich. L.Rev. 631, 659 (2007) ("In 1994, the U.S. Department of Justice found that African–Americans in Louisiana were four to five times less likely than white residents to have government-sanctioned photo identification"); *id.*, at 659–660 (describing June 2005 study by the Employment and Training Institute at the University of **Wisconsin** –Milwaukee, which found that while 17% of voting-age whites lacked a valid driver's license, 55% of black males and 49% of black females were unlicensed, and 46% of Latino males and 59% of Latino females were similarly unlicensed).

Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim. Cf. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 461-462, 128 S.Ct. 1184, 1197, 170 L.Ed.2d 151 (2008) (ROBERTS, C. J., concurring) ("Nothing in my analysis requires the parties to produce studies regarding voter perceptions on this score"); *Dunn*, 405 U.S., at 335, n. 5, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("[I]t would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence ***222** requirements"); *Bullock, supra*, at 144, 92 S.Ct. 849 (taking account of "the obvious likelihood" that candidate filing fees would "fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs"). While of course it would greatly aid a plaintiff to establish his claims beyond mathematical doubt, he does enough to show that serious burdens are likely.

Thus, petitioners' case is clearly strong enough to prompt more than a cursory examination of the State's asserted interests. And the fact that Indiana's photo identification requirement is one of the most restrictive in the country, see Brief for Current and Former State Secretaries of State as *Amici Curiae* 27–30 (compiling state **voter-identification** statutes); see also Brief for State of Texas et al. as *Amici Curiae* ****1635** 10–13 (same),[FN26] makes a critical examination of the ***223** State's claims all the more in order. Cf. *Randall v. Sorrell*, 548 U.S. 230, 253, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion) (citing as a "danger sig[n]" that "contribution limits are substantially lower than ... comparable limits in other States," and concluding that "[w]e consequently must examine the record independently and carefully to determine whether [the] limits are 'closely drawn' to match the State's interests"); *id.*, at 284, 288, 126 S.Ct. 2479 (SOUTER, J., dissenting) (finding that deference was appropriate on the reasoning that limits were "consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont's," and that "[t]he Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont").

FN26. Unlike the Help America Vote Act of 2002, 116 Stat. 1666, 42 U.S.C. § 15301 *et seq.* (2000 ed., Supp. V), which generally requires proof of identification but allows for a variety of documents to qualify, see *ante*, at 1617 – 1618 (lead opinion), Indiana accepts only limited forms of feder-

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ally issued or state-issued photo identification, see n. 3, *supra*, and does not allow individuals lacking the required identification to cast a regular ballot at the polls. Only one other State, Georgia, currently restricts voters to the narrow forms of government-issued photo identification. See Ga.Code Ann. § 21–2–417 (Supp.2007). But a birth certificate is not needed to get a Georgia **voter identification** card. See § 21 –2–417.1; Ga. Comp. Rules & Regs., Rule 183–1–20.01 (2006).

Missouri's Legislature passed a restrictive photo identification law comparable to Indiana's, but the Missouri Supreme Court struck it down as violative of the State Constitution. *Weinschenk v. State,* 203 S.W.3d 201 (2006) *(per curiam).* Florida requires photo identification, but permits the use of several forms, including a debit or credit card; military identification; student identification; retirement center identification; neighborhood association identification; and public assistance identification. See Fla. Stat. Ann. § 101.043(1) (West Supp.2008). Moreover, a Florida voter who lacks photo identification may cast a provisional ballot, and that ballot will be counted so long as the signature on the ballot matches the one on the voter's registration. §§ 101.043(2), 101.048.

All other States that require identification at the polls either allow voters to identify themselves using a variety of documents, see Ala.Code § 17–9–30 (2007); Alaska Stat. § 15.15.225 (2006); Ariz.Rev.Stat. Ann. § 16–579 (West 2006); Ark.Code Ann. § 7–5–305(a)(8) (2007); Colo.Rev.Stat. §§ 1–1–104(19.5) , 1–7–110 (2007); Ky.Rev.Stat. Ann. § 117.227 (Lexis 2004); Mont.Code Ann. § 13–13–114 (2007); N.M. Stat. Ann. §§ 1–1–24, 1–12–7.1, as amended by 2008 N.M. Laws ch. 59; N.M. Stat. Ann. § 1–12–8 (Cum.Supp.2007); Ohio Rev.Code Ann. §§ 3503.16(B)(1), 3505.18 (Lexis Supp.2007); S.C.Code Ann. §§ 7–5–125, 7–13–710 (Cum.Supp.2007); Tenn.Code Ann. § 2–7–112 (2003); Tex. Elec.Code Ann. §§ 63.001 – 63.009 (West 2003 and Supp.2007); § 63.0101 (West Supp.2007); Wash. Rev.Code § 29A.44.205 (2006), or allow voters lacking identification to cast a regular ballot upon signing an affidavit (or providing additional identifying information), see Conn. Gen.Stat. § 9–261 (2007); Del.Code Ann., Tit. 15, § 4937 (2007); Haw.Rev.Stat. § 11–136 (2006 Cum.Supp.); La.Stat. Ann. § 18:562 (West Supp.2008); Mich. Comp. Laws Ann. § 168.523(1) (West Supp.2007); N.D. Cent.Code Ann. § 16.1–05–07 (Lexis Supp.2007); S.D. Codified Laws §§ 12–18–6.1, 12–18–6.2 (2004); Va.Code Ann. § 24.2–643 (Lexis 2006).

III

Because the lead opinion finds only "limited" burdens on the right to vote, see *ante,* at 1620, it avoids a hard look at the State's claimed interests. See *ante,* at 1616 – 1620. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of " 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' [and] 'the extent to which those interests***224** make it necessary to burden the plaintiff's rights.' " ****1636***Burdick,* 504 U.S., at 434, 112 S.Ct. 2059 (quoting *Anderson,* 460 U.S., at 789, 103 S.Ct. 1564).

As this quotation from *Burdick* indicates, the interests claimed to justify the regulatory scheme are subject to discount in two distinct ways. First, the generalities raised by the State have to be shaved down to the precise "aspect [s of claimed in-

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terests] addressed by the law at issue." *California Democratic Party v. Jones,* 530 U.S. 567, 584, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (emphasis deleted); see *ibid.* (scrutiny of state interests "is not to be made in the abstract, by asking whether [the interests] are highly significant values; but rather by asking whether the *aspect* of [those interests] addressed by the law at issue is highly significant" (emphasis in original)). And even if the State can show particularized interests addressed by the law, those interests are subject to further discount depending on "the extent to which [they] make it necessary to burden the plaintiff's rights." *Burdick, supra,* at 434, 112 S.Ct. 2059 (internal quotation marks omitted).

As the lead opinion sees it, the State has offered four related concerns that suffice to justify the Voter ID Law: modernizing election procedures, combating voter fraud, addressing the consequences of the State's bloated voter rolls, and protecting public confidence in the integrity of the electoral process. See *ante,* at 1616 – 1620. On closer look, however, it appears that the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case.

A

The lead opinion's discussion of the State's reasons begins with the State's asserted interests in "election modernization," *ante,* at 1617 – 1618, and in combating voter fraud, see *ante,* at 1618 – 1620. Although these are given separate headings, any line drawn between them is unconvincing; as I understand***225** it, the "effort to modernize elections," Brief for State Respondents 12, is not for modernity's sake, but to reach certain practical (or political) objectives.[FN27] In any event, if a proposed modernization were in fact aimless, if it were put forward as change for change's sake, a State could not justify any appreciable burden on the right to vote that might ensue; useless technology has no constitutional value. And in fact that is not the case here. The State says that it adopted the ID law principally to combat voter fraud, and it is this claim, not the slogan of "election modernization," that warrants attention.

FN27. See generally R. Saltman, The History and Politics of Voting Technology: In Quest of Integrity and Public Confidence (2006) (tracing the history of changes in methods of voting in the United States, and the social and political considerations behind them).

1

There is no denying the abstract importance, the compelling nature, of combating voter fraud. See *Purcell,* 549 U.S., at 4, 127 S.Ct. 5 (acknowledging "the State's compelling interest in preventing voter fraud"); cf. *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 231, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process"). But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot ****1637** fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana, see 458 F.Supp.2d, at 793; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot-stuffing, ballot miscounting, voter ***226** intimidation, or any other type of corruption on the part of officials administering elections. See Brief for Brennan Center for Justice et al. as *Amici Curiae* 7.

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted

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for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. See 458 F.Supp.2d, at 792–793; see also *ante*, at 1618 – 1620 (lead opinion). Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State. See 458 F.Supp.2d, at 793. This absence of support is consistent with the experience of several veteran poll watchers in Indiana, each of whom submitted testimony in the District Court that he had never witnessed an instance of attempted voter impersonation fraud at the polls. *Ibid.* It is also consistent with the dearth of evidence of in-person voter impersonation in any other part of the country. See *ante*, at 1619, n. 12 (lead opinion) (conceding that there are at most "scattered instances of in-person voter fraud"); see also Brief for Brennan Center for Justice, *supra*, at 11–25, 25 (demonstrating that "the national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the 'problem' of voter impersonation is not a real problem at all"). FN28

FN28. The lack of evidence of in-person voter impersonation fraud is not for failure to search. See, *e.g.*, Lipton & Urbina, In 5–Year Effort, Scant Evidence of Voter Fraud, N.Y. Times, Apr. 12, 2007, p. A1 ("Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews").

The State responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to detect.***227** But this is like saying the "man who wasn't there" is hard to spot, FN29 and to know whether difficulty in detection accounts for the lack of evidence one at least has to ask whether in-person voter impersonation is (or would be) relatively harder to ferret out than other kinds of fraud (*e.g.*, by absentee ballot) which the State has had no trouble documenting. The answer seems to be no; there is reason to think that "impersonation of voters is ... the most likely type of fraud to be discovered." U.S. Election Assistance Commission, Election Crimes: An Initial Review and Recommendations for Future Study 9 (Dec.2006) hereinafter EAC Report), http:// www. eac. gov/ clearing house/ docs/ reports– and– surveys– 2006 election crimes. pdf/ attachment _ download/ file. This is in part because an individual who impersonates another at the polls commits his fraud in the open, under the scrutiny of local poll workers who may well recognize a fraudulent voter when they hear who he claims to be. See Brief for Respondents Marion County Election Board 6 ("[P]recinct workers may recognize ****1638** an imposter, and precinct election workers have the authority to challenge persons appearing to vote if the election board member 'is not satisfied that a person who offers to vote is the person who the person represents the person to be' " (quoting Ind.Code Ann. § 3–11–8–27 (West 2006))).

FN29. "As I was going up the stair / I met a man who wasn't there." H. Mearns, Antigonish, reprinted in Best Remembered Poems 107 (M. Gardner ed.1992).

The relative ease of discovering in-person voter impersonation is also owing to the odds that any such fraud will be committed by "organized groups such as campaigns or political parties" rather than by individuals acting alone. L. Minnite & D. Callahan, Securing the Vote: An Analysis of Election Fraud 14 (2003), http://www.demos.org/pubs/EDR_=_Securing_the_vote.pdf. It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few ***228** who may commit it. If an imposter gets caught, he is subject to severe criminal penalties. See, *e.g.*, Ind.Code Ann. § 3–14–2–9 (West 2006)

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(making it a felony "knowingly [to] vot[e] or offe[r] to vote at an election when the person is not registered or authorized to vote"); § 3–14–2–11 (with certain exceptions, "a person who knowingly votes or offers to vote in a precinct except the one in which the person is registered and resides" commits a felony); § 3–14–2–12(1) (making it a felony "knowingly [to] vot[e] or mak[e] application to vote in an election in a name other than the person's own"); § 3–14–2–12(2) (a person who, "having voted once at an election, knowingly applies to vote at the same election in the person's own name or any other name" commits a felony); see also 42 U.S.C. § 1973i(e)(1) (any individual who "votes more than once" in certain federal elections "shall be fined not more than $10,000 or imprisoned not more than five years, or both"). And even if he succeeds, the imposter gains nothing more than one additional vote for his candidate. See EAC Report 9 (in-person voter impersonation "is an inefficient method of influencing an election"); J. Levitt, The Truth about Voter Fraud 7 (2007), online at http://truthaboutfraud.org/pdf/truthAboutVoterFraud.pdf ("[F]raud by individual voters is a singularly foolish and ineffective way to attempt to win an election. Each act of voter fraud in connection with a federal election risks five years in prison and a $10,000 fine, in addition to any state penalties. In return, it yields at most one incremental vote. That single extra vote is simply not worth the price" (footnote omitted)); cf. 472 F.3d, at 951 ("[A] vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote" (emphasis in original)).

In sum, fraud by individuals acting alone, however difficult to detect, is unlikely. And while there may be greater incentives for organized groups to engage in broad-gauged in-***229** person voter impersonation fraud, see Minnite & Callahan, *supra*, at 20, it is also far more difficult to conceal larger enterprises of this sort. The State's argument about the difficulty of detecting the fraud lacks real force.

2

Nothing else the State has to say does much to bolster its case. The State argues, for example, that even without evidence of in-person voter impersonation in Indiana, it is enough for the State to show that "opportunities [for such fraud] are transparently obvious in elections without identification checks," Brief for State Respondents 54. Of course they are, but Indiana elections before the Voter ID Law were not run "without identification checks"; on the contrary, as the Marion County Election Board informs us, "[t]ime-tested systems were in place to detect in-person voter impersonation fraud before the challenged statute was enacted," Brief for Respondents Marion County Election Board 6. These included hiring poll workers who ****1639** were precinct residents familiar with the neighborhood, and making signature comparisons, each effort being supported by the criminal provisions mentioned before. *Id.*, at 6–8.

For that matter, the deterrence argument can do only so much work, since photo identification is itself hardly a failsafe against impersonation. Indiana knows this, and that is why in 2007 the State began to issue redesigned driver's licenses with digital watermarking.[FN30] The State has made this shift precisely because, in the words of its BMV, "visual inspection is not adequate to determine the authenticity" of driver's licenses. See Indiana BMV, *supra* n. 30. Indeed, the BMV explains that the digital watermark (which can be scanned using equipment that, so far, Indiana does not use ***230** at polling places) is needed to "tak[e] the guesswork out of inspection." *Ibid*. [FN31] so, at least until polling places have tHE MACHINES AND SPECIAL software to scan the new driver's licenses, and until all the licenses with the older designs expire (the licenses issued after 2006 but before the 2007 redesigning are good until 2012, see 458 F.Supp.2d, at 791), Indiana's law does no more than ensure that any in-person voter fraud will take place with fake IDs, not attempted signature forgery.

FN30. See Indiana BMV, Digital Drivers

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License: Frequently Asked Questions, "What is a digital watermark and why is Indiana incorporating it into their driver license?", http:// www. in. gov/ bmv/ 3382. htm.

FN31. In the words of Indiana's Governor, Mitch Daniels: " 'Not very long ago, Indiana driver's licenses were a late-night talk show joke [because of] the ease of their fraudulent issuance and also their duplication .... [The new design] will make particularly their duplication dramatically more difficult.' " Udell, Digital Driver's Licenses Designed To Stem ID Theft, Evansville Courier Press, June 7, 2007, p. B6.

Despite all this, I will readily stipulate that a State has an interest in responding to the risk (however small) of in-person voter impersonation. See *ante*, at 1611 – 1612 (lead opinion). I reach this conclusion, like others accepted by the Court, because " '[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.' " *Randall,* 548 U.S., at 285, 126 S.Ct. 2479 (SOUTER, J., dissenting) (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring)). Weight is owed to the legislative judgment as such. But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind, see n. 26, *supra*), and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.[FN32]

FN32. On such flimsy evidence of fraud, it would also ignore the lessons of history to grant the State's interest more than modest weight, as the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules. See F. Ogden, The Poll Tax in the South 9 (1958) ("In Arkansas and Texas, the argument was frequently presented that a poll tax payment prerequisite would purify elections by preventing repeaters and floaters from voting"); see also Brief for Historians and Other Scholars as *Amici Curiae* 4–15 (detailing abuses); R. Hayduk, Gatekeepers to the Franchise: Shaping Election Administration in New York 36 (2005) ("In both historical and contemporary contexts certain groups have had an interest in alleging fraud and thereby shaping electoral rules and practices in a restrictive direction, and other groups have had an opposite interest").

***231 **1640** 3

The antifraud rationale is open to skepticism on one further ground, what *Burdick* spoke of as an assessment of the degree of necessity for the State's particular course of action. Two points deserve attention, the first being that the State has not even tried to justify its decision to implement the photo identification requirement immediately on passage of the new law. A phase-in period would have given the State time to distribute its newly designed licenses, and to make a genuine effort to get them to individuals in need, and a period for transition is exactly what the Commission on Federal Election Reform, headed by former President Carter and former Secretary of State Baker, recommended in its report. See Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136, 140 (hereinafter Carter–Baker Report) ("For the next two federal elections, until January 1, 2010, in states that require voters to present ID at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified"). During this phase-in period, the report said, States would need to make "efforts to ensure that all voters are provided convenient opportunities to obtain" the required identification. *Id.,* at 141. The former President and former Secretary of State explained this recom-

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mendation in an op-ed essay:

> "Yes, we are concerned about the approximately 12 percent of citizens who lack a driver's license. So we proposed that states finally assume the responsibility to seek out citizens to both register voters and provide***232** them with free ID's that meet federal standards. States should open new offices, use social service agencies and deploy mobile offices to register voters. By connecting ID's to registration, voting participation will be expanded." Carter & Baker, Voting Reform Is in the Cards, N.Y. Times, Sept. 23, 2005, p. A19.

Although Indiana claims to have adopted its ID requirement relying partly on the Carter–Baker Report, see Brief for State Respondents 5, 13, 49; see also *ante*, at 1618 (lead opinion), the State conspicuously rejected the Carter-Baker Report's phase-in recommendation aimed at reducing the burdens on the right to vote, and just as conspicuously fails even to try to explain why.

What is left of the State's claim must be downgraded further for one final reason: regardless of the interest the State may have in adopting a photo identification requirement as a general matter, that interest in no way necessitates the particular burdens the Voter ID Law imposes on poor people and religious objectors. Individuals unable to get photo identification are forced to travel to the county seat every time they wish to exercise the franchise, and they have to get there within 10 days of the election. See *supra*, at 1617 – 1618. Nothing about the State's interest in fighting voter fraud justifies this requirement of a post-election trip to the county seat instead of some verification process at the polling places.

In briefing this Court, the State responds by pointing to an interest in keeping lines at polling places short. See Brief for State Respondents 58. It warns that "[i]f election workers—a scarce resource in any election—must attend to the details of validating provisional ballots, voters may have to wait longer to vote," and it assures us that "[n]othing deters voting so much as long lines at the polls." *Ibid*. But this argument fails on its own terms, for whatever might be the number of individuals casting a provisional ballot, the ***233** State could simply allow voters to sign the indigency affidavit at the polls subject ****1641** to review there after the election. FN33 After all, the Voter ID Law already requires voters lacking photo identification to sign, at the polling site, an affidavit attesting to proper registration. See 458 F.Supp.2d, at 786.

> FN33. Florida has accommodated voters in this manner. In Florida a voter who casts a provisional ballot may have that vote counted if the voter's signature on the provisional-ballot certification matches the signature on the voter's registration. See Fla. Stat. Ann. §§ 101.043, 101.048. The voter is not required to make a second trip to have her provisional ballot counted.

Indeed, the State's argument more than fails; it backfires, in implicitly conceding that a not-insignificant number of individuals will need to rely on the burdensome provisional-ballot mechanism. What is more, as the District Court found, the Voter ID Law itself actually increases the likelihood of delay at the polls. Since any minor discrepancy between a voter's photo identification card and the registration information may lead to a challenge, "the opportunities for presenting challenges ha[ve] increased as a result of the photo identification requirements." *Id.*, at 789; cf. 472 F.3d, at 955 (Evans, J., dissenting) ("The potential for mischief with this law is obvious. Does the name on the ID 'conform' to the name on the voter registration list? If the last name of a newly married woman is on the ID but her maiden name is on the registration list, does it conform? If a name is misspelled on one—Schmit versus Schmitt—does it conform? If a 'Terence' appears on one and a shortened 'Terry' on the other, does it conform?").

B

The State's asserted interests in modernizing

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elections and combating fraud are decidedly modest; at best, they fail to offset the clear inference that thousands of Indiana citizens will be discouraged from voting. The two remaining justifications, meanwhile, actually weaken the State's case.

***234** The lead opinion agrees with the State that "the inflation of its voter rolls provides further support for its enactment of" the Voter ID Law. *Ante*, at 1619. This is a puzzling conclusion, given the fact, which the lead opinion notes, that the National Government filed a complaint against Indiana, containing this allegation:

> "Indiana has failed to conduct a general program that makes a reasonable effort to identify and remove ineligible voters from the State's registration list; has failed to remove such ineligible voters; and has failed to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters." App. 309, 312.

The Federal Government and the State agreed to settle the case, and a consent decree and order have been entered, see *ante*, at 1619 – 1620, requiring Indiana to fulfill its list-maintenance obligations under § 8 of the National Voter Registration Act of 1993, 107 Stat. 82, 42 U.S.C. § 1973gg–6.

How any of this can justify restrictions on the right to vote is difficult to say. The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating; it shows that the State has no justifiable need to burden the right to vote as it does, and it suggests ****1642** that the State is not as serious about combating fraud as it claims to be.[FN34]

FN34. The voting-rolls argument also suggests that it would not be so difficult to detect in-person voter fraud after all. If it is true that practitioners of fraud are most likely to vote in the name of registered voters whom they know to have died or left the jurisdiction, then Indiana could simply audit its voting records to examine whether, and how often, in-person votes were cast using these invalid registrations.

***235** The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence.

It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence. The Court has, for example, recognized that fighting perceptions of political corruption stemming from large political contributions is a legitimate and substantial state interest, underlying not only campaign finance laws, but bribery and antigratuity statutes as well. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it. See *id.*, at 391, 120 S.Ct. 897 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). While we found in *Nixon* that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," *id.*, at 395, 120 S.Ct. 897, there is plenty of reason to be doubtful here, both about the reality and the perception. It is simply not plausible to assume here, with no evidence of in-person voter

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impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless "inherent" in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls. Cf. *id.*, at 390, 120 S.Ct. 897 ("[T]he perception of corruption [is] 'inherent in a regime of large individual financial contributions' to candidates for public office" (quoting *Buckley v. Valeo*, 424 U.S. 1, 27, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)) *(per curiam)*).

***236** C

Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country. The State recognizes that tens of thousands of qualified voters lack the necessary federally issued or state-issued identification, but it insists on implementing the requirement immediately, without allowing a transition period for targeted efforts to distribute the required identification to individuals who need it. The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposters at the polling places. It is impossible to say, on this record, that the State's interest in adopting its signally inhibiting photo identification requirement ****1643** has been shown to outweigh the serious burdens it imposes on the right to vote.

If more were needed to condemn this law, our own precedent would provide it, for the calculation revealed in the Indiana statute crosses a line when it targets the poor and the weak. Cf. *Anderson v. Celebrezze*, 460 U.S. 780, 793, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status"). If the Court's decision in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), stands for anything, it is that being poor has nothing to do with being qualified to vote. *Harper* made clear that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*, at 668, 86 S.Ct. 1079. The State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of ***237** every election, likewise translate into unjustified economic burdens uncomfortably close to the outright $1.50 fee we struck down 42 years ago. Like that fee, the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.

* * *

The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old. I would vacate the judgment of the Seventh Circuit, and remand for further proceedings.

Justice BREYER, dissenting.

Indiana's statute requires registered voters to present photo identification at the polls. It imposes a burden upon some voters, but it does so in order to prevent fraud, to build confidence in the voting system, and thereby to maintain the integrity of the voting process. In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring); *ante*, at 1616 – 1617

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(lead opinion) (similar standard); *ante,* at 1613 – 1614 (SOUTER, J., dissenting) (same standard). Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.

Like Justice STEVENS, I give weight to the fact that a national commission, chaired by former President Jimmy ***238** Carter and former Secretary of State James Baker, studied the issue and recommended that States should require voter photo IDs. See Report of the Commission on Federal Election Reform, Building Confidence in U.S. Elections § 2.5 (Sept.2005) (Carter–Baker Report), App. 136–144. Because the record does not discredit the Carter–Baker Report or suggest that Indiana is exceptional, I see nothing to prevent Indiana's Legislature (or a federal court considering the constitutionality of the statute) from taking account of the legislatively****1644** relevant facts the report sets forth and paying attention to its expert conclusions. Thus, I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* forbid Indiana from enacting a photo ID requirement. Were I also to believe, as Justice STEVENS believes, that the burden imposed by the Indiana statute on eligible voters who lack photo IDs is indeterminate "on the basis of the record that has been made in this litigation," *ante,* at 1622 – 1623, or were I to believe, as Justice SCALIA believes, that the burden the statute imposes is "minimal" or "justified," *ante,* at 1613 (opinion concurring in judgment), then I too would reject the petitioners' facial attack, primarily for the reasons set forth in Part II of the lead opinion, see *ante,* at 1616 – 1620.

I cannot agree, however, with Justice STEVENS' or Justice SCALIA's assessment of the burdens imposed by the statute. The Carter–Baker Commission *conditioned* its recommendation upon the States' willingness to ensure that the requisite photo IDs "be easily available and issued free of charge" and that the requirement be "phased in" over two federal election cycles, to ease the transition. Carter–Baker Report, at App. 139, 140. And as described in Part II of Justice SOUTER's dissenting opinion, see *ante,* at 1614 – 1621, Indiana's law fails to satisfy these aspects of the Commission's recommendation.

For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to ***239** travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. See *ante,* at 1616 – 1617 (SOUTER, J., dissenting) (noting that out of Indiana's 92 counties, 21 have no public transportation system at all and 32 others restrict public transportation to regional county service). For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50 (less than $10 today, inflation-adjusted). See *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 664, n. 1, 666, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *ante,* at 1643 (SOUTER, J., dissenting). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election*. See *ante,* at 1617 – 1618 (same).

By way of contrast, two other States—Florida and Georgia—have put into practice photo ID requirements significantly less restrictive than Indiana's. Under the Florida law, the range of permissible forms of photo ID is substantially greater than in Indiana. See Fla. Stat. Ann. § 101.043(1) (West Supp.2008) (including a debit or credit card, a student ID, a retirement center ID, a neighborhood association ID, and a public assistance ID).

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Moreover, a Florida voter who lacks photo ID may cast a provisional ballot at the polling place that will be counted if the State determines that his signature matches the one on his voter registration form. §§ 101.043(2); 101.048(2)(b).

Georgia restricts voters to a more limited list of acceptable photo IDs than does Florida, but accepts in addition to proof of voter registration a broader range of underlying documentation***240** than does Indiana. ****1645** See Ga.Code Ann. § 21–2–417 (Supp.2007); Ga. Comp. Rules & Regs., Rule 183–1–20.01 (2006) (permissible underlying documents include a paycheck stub, Social Security, Medicare, or Medicaid statement, school transcript, or federal affidavit of birth, as long as the document includes the voter's full name and date of birth). Moreover, a Federal District Court found that Georgia "has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [state-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID." *Common Cause/Georgia v. Billups,* 504 F.Supp.2d 1333, 1380 (N.D.Ga.2007). While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia *any* voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Compare Ind.Code Ann. § 3–11–4–1 (West 2006) with Ga.Code Ann. § 21–2–381 (Supp.2007). Finally, neither Georgia nor Florida insists, as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter–Baker Commission recommended nationwide. Nor is there any reason to think that there are proportionately fewer such voters in Indiana than elsewhere in the country (the District Court's rough estimate was 43,000). See 458 F.Supp.2d 775, 807 (S.D.Ind.2006). And I need not determine the constitutionality of Florida's or Georgia's requirements (matters not before us), in order to conclude that Indiana's requirement imposes a significantly harsher, unjustified burden.

***241** Of course, the Carter–Baker Report is not the Constitution of the United States. But its findings are highly relevant to both legislative and judicial determinations of the reasonableness of a photo ID requirement; to the related necessity of ensuring that all those eligible to vote possess the requisite IDs; and to the presence of alternative methods of ensuring that possession, methods that are superior to those that Indiana's statute sets forth. The Commission's findings, taken together with the considerations set forth in Part II of Justice STEVENS' opinion, and Part II of Justice SOUTER's dissenting opinion, lead me to the conclusion that while the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs. For these reasons, I dissent.

U.S.,2008.
Crawford v. Marion County Election Bd.
553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574, 76 USLW 4242, 08 Cal. Daily Op. Serv. 4913, 2008 Daily Journal D.A.R. 5979, 21 Fla. L. Weekly Fed. S 198

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Supreme Court of **Pennsylvania**.
Viviette APPLEWHITE; Wilola Shinholster Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; The League Of Women Voters Of **Pennsylvania**; National Association For The Advancement Of Colored People; **Pennsylvania** State Conference; Homeless Advocacy Project
v.
The COMMONWEALTH of **Pennsylvania**; Thomas W. Corbett, in his capacity as governor; Carole Aichele, in her capacity as Secretary of the Commonwealth
Appeal of Viviette Applewhite; Wilola Shinholster Lee; Gloria Cuttino; Nadine Marsh; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; The League of Women Voters of **Pennsylvania**; National Association for the Advancement of Colored People, **Pennsylvania** State Conference; Homeless Advocacy Project.

No. 71 MAP 2012.
Argued Sept. 13, 2012.
Decided Sept. 18, 2012.

Appeal from the Order of the Commonwealth Court dated 8/15/12 at No. 330 MD 2012, denying Appellant's Application for Preliminary Injunction.

ORDER

PER CURIAM.

***1** Before this Court is a direct appeal from a single judge order of the Commonwealth Court denying preliminary injunctive relief to various individuals and organizations who filed a Petition for Review challenging the constitutional validity of Act 18 of 2012, also known as the Voter ID Law. Appellate courts review an order granting or denying a preliminary injunction for an abuse of discretion. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (**Pa**.2003).

The Declaration of Rights set forth in the **Pennsylvania** Constitution prescribes that elections must be free and equal and "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." **PA**. CONST. art. 1, § 5. The parties to this litigation have agreed that the right to vote in **Pennsylvania**, as vested in eligible, qualified voters, is a fundamental one.

The Voter ID Law was signed into law by the Governor of **Pennsylvania** in March of this year. For the General Election this November, and for succeeding elections, the legislation generally requires presentation of a photo identification card as a prerequisite to the casting of ballots by most registered voters.

In this regard, the Law contemplates that the primary form of photo identification to be used by voters is a Department of Transportation (PennDOT) driver's license or the non-driver equivalent provided under Section 1510(b) of the Vehicle Code, 75 **Pa** .C.S. § 1510(b). *See* N.T. at 770–71. Furthermore, the Law specifically requires that—notwithstanding provisions of Section 1510(b) relating to the issuance and content of the cards—PennDOT shall issue them at no cost:

> to any registered elector who has made application therefor and has included with the completed application a statement signed by the elector declaring under oath or affirmation that the elector does not possess proof of identification ... and requires proof of identification for voting purposes.

Act of Mar. 14, 2012, P.L. 195, No. 18, § 2; *see* 25 P.S. § 2626(b). As such, the Law establishes a policy of liberal access to Section 1510(b) identification cards.

However, as implementation of the Law has proceeded, PennDOT—apparently for good reason—has refused to allow such liberal access. In-

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stead, the Department continues to vet applicants for Section 1510(b) cards through an identification process that Commonwealth officials appear to acknowledge is a rigorous one. *See* N.T. at 690, 994. Generally, the process requires the applicant to present a birth certificate with a raised seal (or a document considered to be an equivalent), a social security card, and two forms of documentation showing current residency. *See* N .T. at 467, 690, 793.[FN1] The reason why PennDOT will not implement the Law as written is that the Section 1510(b) driver's license equivalent is a secure form of identification, which may be used, for example, to board commercial aircraft. *See* N.T. at 699–700, 728–30, 780.

FN1. Applicants whose information is already in PennDOT's database may be exempted from these requirements. *See* N.T. at 466.

***2** The Department of State has realized, and the Commonwealth parties have candidly conceded, that the Law is not being implemented according to its terms. *See, e.g.,* N.T. at 1010 (testimony of the Secretary of the Commonwealth that "[t]he law does not require those kinds of—the kind of identification that is now required by PennDOT for PennDOT IDs, and it's the Homeland Security issues"). Furthermore, both state agencies involved appreciate that some registered voters have been and will be unable to comply with the requirements maintained by PennDOT to obtain an identification card under Section 1510(b). *See* N.T. at 713 (testimony from a deputy secretary for PennDOT that "at the end of the day there will be people who will not be able to qualify for a driver's license or a PennDOT ID card"), 749, 772, 810, 995. It is also clear to state officials that, if the Law is enforced in a manner that prevents qualified and eligible electors from voting, the integrity of the upcoming General Election will be impaired. *See, e.g.,* N.T. at 480.

Faced with the above circumstances and the present litigation asserting that the Law will impinge on the right of suffrage, representatives of the state agencies have testified under oath that they are in the process of implementing several remedial measures on an expedited basis. Of these, the primary avenue lies in the issuance of a new, non-secure Department of State identification card, which is to be made available at PennDOT driver license centers. However, preparations for the issuance of Department of State identification cards were still underway as of the time of the evidentiary hearing in the Commonwealth Court in this case, and the cards were not slated to be made available until approximately two months before the November election. N.T. at 534, 555, 706, 784, 993. Moreover, still contrary to the Law's liberal access requirement, applicants for a Department of State identification card may be initially vetted through the rigorous application process for a secure PennDOT identification card before being considered for a Department of State card, the latter of which is considered to be only a "safety net." N.T. at 709, 711, 791–95 (testimony from the Commissioner of the Bureau of Commissions, Elections and Legislation that applicants who are unable to procure a PennDOT identification card will be given a telephone number to contact the Department of State to begin the process of obtaining the alternative card); *see also* N.T. at 993.

In the above landscape, Appellants have asserted a facial constitutional challenge to the Law and seek to preliminarily enjoin its implementation. They contend, most particularly, that a number of qualified members of the **Pennsylvania** voting public will be disenfranchised in the upcoming General Election, because—given their personal circumstances and the limitations associated with the infrastructure through which the Commonwealth is issuing identification cards—these voters will not have had an adequate opportunity to become educated about the Law's requirements and obtain the necessary identification cards. While there is a debate over the number of affected voters, given the substantial overlap between voter rolls and PennDOT's existing ID driver/cardholder database,

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it is readily understood that a minority of the population is affected by the access issue. Nevertheless, there is little disagreement with Appellants' observation that the population involved includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged).

***3** On its review, the Commonwealth Court has made a predictive judgment that the Commonwealth's efforts to educate the voting public, coupled with the remedial efforts being made to compensate for the constraints on the issuance of a PennDOT identification card, will ultimately be sufficient to forestall the possibility of disenfranchisement. This judgment runs through the Commonwealth Court's opinion, touching on all material elements of the legal analysis by which the court determined that Appellants are not entitled to the relief they seek.

As a final element of the background, at oral argument before this Court, counsel for Appellants acknowledged that there is no constitutional impediment to the Commonwealth's implementation of a **voter identification** requirement, at least in the abstract. Given reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation, the Appellants apparently would accept that the State may require the presentation of an identification card as a precondition to casting a ballot. The gravamen of their challenge at this juncture lies solely in the implementation.

Upon review, we find that the disconnect between what the Law prescribes and how it is being implemented has created a number of conceptual difficulties in addressing the legal issues raised. Initially, the focus on short-term implementation, which has become necessary given that critical terms of the statute have themselves become irrelevant, is in tension with the framing of Appellants' challenge to the Law as a facial one (or one contesting the Law's application across the widest range of circumstances). In this regard, however, we agree with Appellants' essential position that if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future. Indeed, the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate.

Overall, we are confronted with an ambitious effort on the part of the General Assembly to bring the new identification procedure into effect within a relatively short timeframe and an implementation process which has by no means been seamless in light of the serious operational constraints faced by the executive branch. Given this state of affairs, we are not satisfied with a mere predictive judgment based primarily on the assurances of government officials, even though we have no doubt they are proceeding in good faith.

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards. If they do not, or if the Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a **voter identification** requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.

***4** Accordingly, the order of the Commonwealth Court is VACATED, and the matter is returned to the Commonwealth Court for further proceedings consistent with this Order. The Commonwealth Court is to file its supplemental opinion on or before October 2, 2012. Any further appeals will be administered on an expedited basis.

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Jurisdiction is relinquished.

Justice TODD files a Dissenting Statement which Justice McCAFFERY joins.
Justice McCAFFERY files a Dissenting Statement which Justice TODD joins.

DISSENTING STATEMENTJustice TODD.

I respectfully dissent.

By its *Per Curiam* Order today, this Court remands this matter for further hearings so that the lower court may attempt to predict—again—whether the Commonwealth can implement this new law without disenfranchising a substantial number of voters in November. In my view, the time for prediction is over.

Forty-nine days before a Presidential election, the question no longer is whether the Commonwealth *can* constitutionally implement this law, but whether it *has* constitutionally implemented it. Despite impending near-certain loss of voting rights, despite the Commonwealth's admitted inability thus far to fully implement Act 18 and its acceptance that, presently, "the Law is not being implemented according to its terms," and despite the majority's concession that the "most judicious remedy" in such circumstances would be to grant an injunction, the majority nonetheless allows the Commonwealth to virtually ignore the election clock and try once again to defend its inexplicable need to rush this law into application by November 6, 2012.

The majority correctly sets forth the standard of review that we, as the appellate court, are to apply in reviewing a lower court's order granting or denying a preliminary injunction. We review for an abuse of discretion. Yet, the majority utterly fails to apply that standard to this appeal. My application of the required standard leads me to the inescapable conclusion that the lower court indeed abused its discretion in failing to find that irreparable harm of constitutional magnitude—the disenfranchisement of a substantial number of eligible, qualified, registered voters, many of whom have been proudly voting for decades—was likely to occur based on the present structure, timing, and implementation of Act 18; in my assessment, the lower court should have granted a preliminary injunction. Therefore, I would reverse.

Like the majority, I am not "satisfied with a mere predictive judgment based primarily on the assurances of government officials." But, unlike the majority, I have heard enough about the Commonwealth's scramble to meet this law's requirements. There is ample evidence of disarray in the record, and I would not allow chaos to beget chaos. The stated underpinnings of Act 18—election integrity and voter confidence—are undermined, not advanced, by this Court's chosen course. Seven weeks before an election, the voters are entitled to know the rules.

***5** By remanding to the Commonwealth Court, at this late date, and at this most critical civic moment, in my view, this Court abdicates its duty to emphatically decide a legal controversy vitally important to the citizens of this Commonwealth. The eyes of the nation are upon us, and this Court has chosen to punt rather than to act. I will have no part of it.

Justice McCAFFERY joins this dissenting statement.

DISSENTING STATEMENTJustice McCAFFERY.

I completely agree with Justice Todd that the existing record in this case, together with the arguments and admissions made by the Commonwealth in its briefs and by its attorneys at argument before this Court, is fully sufficient to determine, without equivocation, that a preliminary injunction should be granted through the November 6, 2012 general election. I thus fully join her excellent dissenting statement.

As Justice Todd astutely observes, the *Per Curiam* Order merely gives the Commonwealth

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Court another opportunity to "predict" whether the implementation of Act 18 would disenfranchise any otherwise qualified elector in the November election, based on anticipated evidence of the Commonwealth's latest efforts—unmoored from the actual text of Act 18 and without benefit of governing regulation—to issue Photo ID cards to those who still lack them. However, a new prediction from the lower court will have no more legal significance before this Court than the existing one, and I *predict* that, once again, we will be presented with a record that establishes that many thousands—indeed, ultimately **uncountable** numbers—of otherwise qualified electors will lack a Photo ID for purposes of the upcoming election, and hence will be disenfranchised, despite the Commonwealth's last ditch efforts to loosen the standards established by Act 18. In the end, it is this Court that must determine whether the **Pennsylvania** Constitution requires the entering of an immediate preliminary injunction prior to the November election. For the good of the electorate, and to foster respect for the judiciary and the integrity of the electoral process, I agree with Justice Todd that **now** is the time for this Court to make that decision.

There is no doubt that the record, as it is, establishes the immediate and irreparable harm required for the injunction.[FN1] Prior to enacting Act 18, the General Assembly clearly failed to sufficiently consider the burdens and impediments that the law's requirements would place upon "the most vulnerable segments of our society." *Per Curiam* Order at 5. When Appellants' lawsuit challenging the constitutionality of Act 18 placed a spotlight on these burdens and impediments, the agencies charged with implementing Act 18 began efforts, first on or about May 23, 2012, and then on or about August 27, 2012, to relax the procedures for obtaining the requisite ID. Although these efforts may be laudable, they necessarily suffer from the compressed timeframe in which they are expected to achieve the purported goals of Act 18. Indeed, the August 27, 2012 effort was instituted a mere ten weeks before the election. Where a fundamental constitutional right is at issue—arguably **the** fundamental right—an implementation of even a lesser burden on the exercise of that right, ten weeks before it is to be exercised, is simply unreasonable and constitutionally insupportable. Indeed, the Commonwealth's activities in this regard are a tacit admission that Act 18 is simply not ready for the prime time of the November 6, 2012 election.[FN2]

FN1. Initially, it must be observed that the Commonwealth Court plainly erred by requiring Appellants to show immediate and "inevitable" harm. Perhaps that court made this error because of its mistaken belief that the only issue before it was whether a legislative requirement for a Voter Photo ID **generally** was facially unconstitutional, rather than whether the hasty implementation of Act 18 for purposes of the November 6, 2012 election violated the **Pennsylvania** Constitution.

FN2. Additionally, I believe that Appellants have established that the availability of the PennDOT locations where the Commonwealth's efforts are to take place are inadequate to the task in regard to the November election because of limited hours, limited locations, and a failure to take measures that were implemented by other states, such as the use of mobile Photo ID units.

***6** By contrast, the stipulations of the Commonwealth establish that, particularly as concerns the November 6, 2012 election, there is no genuine mischief for Act 18 to remedy. The Commonwealth stipulated, in relevant part, on July 12, 2012, as follows:

1. There have been no investigations or prosecutions of in-person voter fraud in **Pennsylvania**; and the parties do not have direct personal knowledge of any such investigations or prosecutions in other states;

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2. The parties are not aware of any incidents of in-person voter fraud in **Pennsylvania** and do not have direct personal knowledge of in-person voter fraud elsewhere;

3. [The Commonwealth] will not offer any evidence in this action that in-person voter fraud has in fact occurred in **Pennsylvania** or elsewhere;

4. The sole rationale for the Photo ID law that will be introduced by [the Commonwealth] is that contained in [the Commonwealth's] amended answer to Interrogatory 1, served June 7, 2012.[FN3]

FN3. Among the reasons cited were that requiring a photo ID "improves the security and integrity of elections in **Pennsylvania**"; "ensure[s] that the public has confiden[ce] in the electoral process"; and "detect[s] and deter[s] voter fraud".

5. [The Commonwealth] will not offer any evidence or argument that in [-]person voter fraud is likely to occur in November 2012 in the absence of the Photo ID law [Act 18].

Indeed, the Commonwealth offered **no** evidence below of the existence of in-person voter fraud in this state or that in-person voter fraud is likely to occur in the upcoming election. The Commonwealth's interest in the implementation of this law, at least as concerns the November election, is somewhere from slight to symbolic. I wholeheartedly reject the arguments made by counsel for the Commonwealth before this Court that we must defer to the legislative findings and the evidence the legislature purportedly received concerning the existence or potentiality of in-person voter fraud. The Commonwealth declined to test such "evidence" in a court of law, and instead stipulated that, essentially, there was no known evidence of in-person voter fraud, and that Act 18 was not genuinely needed to combat in-person voter fraud in the November election. Stipulations have legal consequences, and the Commonwealth must live with those it entered. The purported evidence received by the legislature is thus of no moment,[FN4] and the balance of potential harm unquestionably weighs heavily in favor of an injunction.

FN4. The Commonwealth's arguments may have had greater resonance if Act 18 addressed a more innocuous subject, such as a licensure requirement for a **privilege.** However, Act 18 indisputably places new burdens upon a cherished **right,** and the **legal** evidence, or lack thereof, concerning the actual need for these new burdens assumes heightened significance when these burdens are challenged as unconstitutional.

In its lucid and directed description of the **relevant** issues involved in this case, the *Per Curiam* Order corrects several grave errors made by the Commonwealth Court below. Notably, this Court determines that the immediate issue raised by Appellants concerns whether the implementation of Act 18 for purposes of the November 6, 2012 general election violates constitutional rights of qualified electors of this Commonwealth, which is a question distinct from that upon which the Commonwealth Court placed its basic focus: *i.e.*, whether a Photo ID law **generally** violates such rights. *See Per Curiam* Order at 5–6. The *Per Curiam* Order also correctly determines that any voter disenfranchisement arising out of the Commonwealth's implementation of a Voter Photo ID requirement before the November 2012 election **obliges** the Commonwealth Court to enter a preliminary injunction. *See id.* at 7.[FN5] Notwithstanding the astute recognition in the *Per Curiam* Order of the Commonwealth Court's errors and the Order's illumination of the Commonwealth Court's obligation to enter a preliminary injunction under certain circumstances, I believe circumstances already exist such that we should remand with the specific directive to the Commonwealth Court to immediately grant the requested preliminary injunction. I do not believe that further hearings are either necessary or appropriate.

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FN5. *See In re Canvass of Absentee Ballots of 1967 Gen. Election,* 245 A.2d 258, 262 (**Pa**.1968) (holding that the disenfranchisement of 5,506 citizens would be "unconscionable"); and *Perles v. Cnty. Return Bd. Of Northumberland Cnty.,* 202 A.2d 538, 540 (**Pa**.1964) ("The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.").

***7** The Commonwealth contends that the legislature, in enacting Act 18, relied in part upon the 2005 recommendations of the Commission on Federal Election Reform ("the Carter–Baker Commission"). However, the legislature pointedly ignored the Commission's recommendation that a Photo ID requirement be phased in over two federal election cycles to ease the transition from the existing system. The Carter–Baker Commission also wisely determined that confidence in our electoral process may be achieved in "a uniform **voter identification** system **that is implemented in a way that increases, not impedes, participation.** " Carter–Baker Commission (2005), at iii (emphasis added); *see also id.* at 6. Act 18, enacted in March 2012, and subsequently altered by *ad hoc* implementation procedures, which are still in flux, substantially threatens to do just the opposite. Where there is concededly no harm that will be remedied by implementing Act 18 prior to the November 2012 election, where the potential for harm to the cherished right to vote to uncountable numbers of citizens is substantially threatened, and where this harm cannot be remedied by any post-election lawsuit, contrary to the Commonwealth Court's astounding belief, the need for immediate judicial action cannot be denied.

I was elected by the people of our Commonwealth, by Republicans, Democrats, Independents and others, as was every single Justice on this esteemed Court. I cannot now be a party to the potential disenfranchisement of even one otherwise qualified elector, including potentially many elderly and possibly disabled veterans who fought for the rights of every American to exercise their fundamental American right to vote. While I have no argument with the requirement that all **Pennsylvania** voters, at some reasonable point in the future, will have to present photo identification before they may cast their ballots, it is clear to me that the reason for the urgency of implementing Act 18 prior to the November 2012 election is purely political. That has been made abundantly clear by the House Majority Leader. Exhibit 42 at R.R.2073a. I cannot in good conscience participate in a decision that so clearly has the effect of allowing politics to trump the solemn oath that I swore to uphold our Constitution. That Constitution has made the right to vote a right verging on the sacred, and that right should never be trampled by partisan politics.

Accordingly, I respectfully dissent from the *Per Curiam* Order to the extent that it does not direct the Commonwealth Court to grant immediate injunctive relief but, instead, remands to the Commonwealth Court for additional hearings. I would remand to the Commonwealth Court for the express purpose of directing that court to immediately grant a preliminary injunction.

Justice TODD joins this Dissenting Statement.

Pa.,2012.
Applewhite v. Com.
--- A.3d ----, 2012 WL 4075899 (Pa.)

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United States District Court,
District of Columbia.
State of TEXAS, Plaintiff,
v.
Eric H. HOLDER, JR., Defendant.

Civil Action No. 12–cv–128 (DST, RMC, RLW).
Aug. 30, 2012.

Adam W. Aston, John William McKenzie, Matthew Hamilton Frederick, Patrick Kinney Sweeten, Texas Attorney General, Austin, TX, Asha L.I. Spencer, Chicago, IL, for Plaintiff.

Elizabeth Stewart Westfall, Matthew Colangelo, Meredith E.B. Bell–Platts, Bruce I. Gear, Bryan L. Sells, U.S. Department of Justice, Washington, DC, for Defendant.

Before TATEL, Circuit Judge, and COLLYER and WILKINS, District Judges.

TATEL, Circuit Judge.

***1** Pursuant to section 5 of the Voting Rights Act of 1965, Texas seeks a declaratory judgment that Senate Bill 14 (SB 14), a newly-enacted law requiring in-person voters to present a photo ID, "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race [,] color," or "member[ship] [in] a language minority group." 42 U.S.C. §§ 1973c(a), 1973b(f)(2). To satisfy section 5's effect requirement, Texas must demonstrate that SB 14 will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). For the reasons set forth in this opinion, we find that Texas has failed to make this showing—in fact, record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect. Given this, we have no need to consider whether Texas has satisfied section 5's purpose element. Accordingly, we deny the state's request for a declaratory judgment.

I.

Under Texas's current election code, i.e., pre-SB 14, any Texan who wishes to vote must file a registration application with the county elections registrar. That application must include the voter's name, date of birth, and a sworn affirmation of U.S. citizenship. Tex. Elec.Code § 13.002. If the application is approved, the registrar delivers a "voter registration certificate" to the applicant, either in person or via U.S. mail. *Id.* §§ 13.142, 13.144. This "certificate"—actually a paper postcard—has no photograph, but does include a voter's name, gender, year of birth, and a unique voter ID number. When presented at the polls, a voter registration certificate entitles the registrant to cast an in-person ballot.

Registered voters who fail to present a voter registration certificate may nonetheless cast an in-person ballot if they (1) execute an affidavit stating that they do not have their certificate, and (2) present an alternate "acceptable" form of identification. *Id.* §§ 63.008, 63.0101. In addition to a voter registration certificate, Texas's current election code recognizes eight broad categories of documents as "acceptable" voter ID. These include birth certificates, expired and non-expired driver's licenses, U.S. passports, U.S. citizenship papers, utility bills, "official mail addressed to the person ... from a governmental entity," any "form of identification containing the person's photograph that establishes the person's identity," and "any other form of identification prescribed by the secretary of state." *Id* . § 63.0101. All in-person voters are subject to these ID requirements regardless of age or physical condition. But certain voters—including those who are 65 or older, disabled, or expect to be absent or in jail on Election Day—may choose to vote by mail without presenting identification. *Id.*

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§§ 82.001–004.

Senate Bill 14, enacted in 2011, is more stringent than existing Texas law. If implemented, SB 14 will require in-person voters to identify themselves at the polls using one of five forms of government-issued photo identification, two state and three federal: (1) a driver's license or personal ID card issued by the Texas Department of Public Safety (DPS); (2) a license to carry a concealed handgun, also issued by DPS; (3) a U.S. military ID card; (4) a U.S. citizenship certificate with photograph; or (5) a U.S. passport. Tex. Elec.Code § 63.0101 (January 1, 2012). Unlike Texas's current code, which allows voters to present either photographic or non-photographic ID, SB 14 requires every form of acceptable ID to include a photograph of the voter. Also unlike the current code, SB 14 prohibits the use of IDs that have expired more "than 60 days before the date of presentation" at the polls. *Id* . Finally, SB 14 will prohibit voters from identifying themselves using only the pictureless "voter registration certificate" issued by a county registrar.

***2** Prospective voters lacking one of the forms of photo ID listed in SB 14 will be able to obtain a photographic "election identification certificate" (EIC) for use at the polls. A pocket-sized card "similar in form to ... a driver's license," Tex. Transp. Code § 521A.001(e), an EIC, like a driver's license, will be distributed through the DPS, and prospective voters will have to visit a DPS office to get one.

Although SB 14 prohibits DPS from "collect[ing] a fee for an [EIC]," *id.* § 521A.001(b), EICs will not be costless. Not only will prospective voters have to expend time and resources traveling to a DPS office, but once there they will have to verify their identity by providing "satisfactory" documentation to DPS officials. Specifically, prospective voters will need to provide (1) one piece of "primary identification," (2) two pieces of "secondary identification," or (3) one piece of "secondary identification" plus two pieces of "supporting identification" in order to receive an EIC. 37 Tex. Admin. Code § 15.182. A "primary" identification is an expired Texas driver's license or personal identification card that has been expired for at least 60 days but not more than two years. *Id.* § 15.182(2). A "secondary" identification is one of the following:

- an original or certified copy of a birth certificate;

- an original or certified copy of a court order indicating an official change of name and/or gender; or

U.S. citizenship or naturalization papers without an identifiable photo.

Id. § 15.182(3). A wide array of documents qualify as "supporting identification," including school records, Social Security cards, pilot's licenses, and out-of-state driver's licenses. *Id.* § 15.182(4).

In sum, SB 14 will require every EIC applicant to present DPS officials with at least one of the following underlying forms of identification:

- an expired Texas driver's license or personal ID card;

- an original or certified copy of a birth certificate;

- U.S. citizenship or naturalization papers; or

- a court order indicating a change of name and/or gender.

Importantly, it costs money to obtain any of these documents. This means that EIC applicants—i.e., would-be voters—who possess none of these underlying forms of identification will have to bear out-of-pocket costs. For Texas-born voters who have changed neither their name nor gender, the cheapest way to obtain the required documentation will be to order a certified copy of their birth

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certificate from the Texas Bureau of Vital Statistics at a cost of $22. *See* Advisory Regarding Election Identification Certificates, ECF No. 308, at 2. (A copy of a court order indicating a change of name and/or gender costs $5 for the records search, plus $1 per page for the court order. Actually *obtaining* a legal change of name and/or gender costs far more—at least $152. *See* Attorney General's Response to the State's Advisory Regarding Election Identification Certificates, ECF No. 330, at 2–3.) More expensive options exist as well, ranging from $30 for an "expedited" birth certificate order all the way up to $354 for a copy of U.S. citizenship or naturalization papers. *See, e.g.*, Advisory Regarding Election Identification Certificates, ECF No. 308, at 2.

***3** SB 14 largely retains Texas's existing rules for elderly and disabled voters. Voters over age 65 will still be able to vote by mail, although they will have to present an SB 14–qualifying photo ID if they choose to vote at the polls. Disabled voters, too, will be able to continue voting by mail, and those who choose to vote at the polls will still be able to identify themselves using the photoless postcard "voter registration certificate" issued by county elections registrars. To obtain this latter exemption, however, disabled Texans will need to provide written documentation of disability from either the Social Security Administration or Department of Veterans Affairs. Tex. Elec.Code § 13.002(i).

Texas Governor Rick Perry signed SB 14 into law on May 27, 2011. The law, however, has yet to take effect because, as a jurisdiction covered by section 5 of the Voting Rights Act of 1965, 28 C.F.R. pt. 51 App., Texas may not implement any change in its voting procedures without first obtaining "preclearance" from either the United States Attorney General or a three-judge panel of this court. 42 U.S.C. § 1973c(a). To obtain preclearance, Texas must demonstrate that SB 14 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race[,] color," or "member[ship] [in] a language minority group." *Id.* §§ 1973c(a), 1973b(f)(2).

Texas filed a preclearance application with the Attorney General on July 25, 2011. Under the Voting Rights Act, the Attorney General has sixty days to "interpose[ ] an objection" to a changed voting procedure. *Id.* § 1973c(a). But here that process was delayed by the Attorney General's requests for additional information as to (1) the number of voters who lack a DPSissued driver's license or personal ID card, and (2) the percentage of those voters who are minorities. *See* 28 C.F.R. §§ 51.37(b), 51.39(a)(1) (stating that when supplemental submissions are provided "the 60–day period for the pending submission will be recalculated from the Attorney General's receipt of the supplementary information."). Nearly six months after filing its initial preclearance request, on January 12, 2012, Texas submitted to the Attorney General a computer-generated list of 795,955 registered voters it was unable to match with corresponding entries in DPS's driver's license and personal ID database. This "no-match" list consisted of "304,389 voters (38.2%) who are Hispanic and 491,566 (61.8%) who are non-Hispanic." Am. Compl., ECF No. 25 Ex. 7 at 2. But Texas warned that it had "reservations about the reliability of [its] data." Compl., ECF No. 1 Ex. 5 at 1. Specifically, Texas explained that its DPS database and its voter registration list "were not designed to be merged," and that "name changes [and] inconsistent use of nicknames or initials" between the two lists could cause "numerous incorrect 'no-match' results." *Id.* at 2. Moreover, pointing out that it had used Spanish surnames as a proxy for Hispanic voters—"an imprecise substitute for accurate racial data"—Texas explained that its no-match list constituted an unreliable estimate of ID possession rates among Hispanic voters. *Id.*

***4** On March 12, 2012, the Attorney General denied preclearance, concluding that Texas had failed to show that SB 14 will not have "the effect of denying or abridging the right to vote on account

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of race"—i.e., that it will not have a retrogressive effect. Am. Compl., ECF No. 25 Ex. 7 at 1–2 (citing *Georgia v. United States,* 411 U.S. 526 (1973); 28 C.F.R. § 51.52). The Attorney General gave two reasons for the denial. First, without responding to Texas's concerns about the reliability of its no-match list, the Attorney General concluded that Texas's data showed that "Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack" a DPS-issued driver's license or ID card. *Id.* at 2. Second, Texas had failed to show that the availability of a purportedly "free" EIC would mitigate the "impact of S.B. 14 on Hispanic registered voters." *Id.* at 3. The Attorney General pointed out that if a prospective voter lacks the documents needed to obtain an EIC, "the least expensive option will be to spend $22 on a copy of the voter's birth certificate." *Id.* Furthermore, "an applicant for an [EIC] will have to travel to a driver's license office," yet "in 81 of the state's 254 counties, there are no operational driver's license offices," and many of those offices have limited hours of operation. *Id.* at 4. These constraints, the Attorney General concluded, could impose additional burdens on prospective voters who need an EIC—particularly on those without a car. *Id.* Moreover, Texas had "failed to propose, much less adopt, any program for individuals who have to travel a significant distance to a DPS office, who have limited access to transportation, or who are unable to get to a DPS office during their hours of operation." *Id.* at 5. Given all this, the Attorney General concluded that Texas "has not met its burden of proving that ... the proposed requirement will not have a retrogressive effect, or that any specific features of the proposed law will prevent or mitigate that retrogression." *Id.* Although the Attorney General's denial rested on the potential retrogressive effect of SB 14 on Hispanic voters, he noted that Texas had "provided no data on whether African American or Asian registered voters are also disproportionately affected by S.B. 14." *Id.* at 3.

Finally, the Attorney General declined to determine whether SB 14 had been enacted with a discriminatory purpose—an independent reason for denying preclearance. Because Texas "failed to meet its burden of demonstrating that the proposed law will not have a retrogressive effect," the Attorney General explained, he had no need to "make any determination as to whether the state has established that the proposed changes were adopted with no discriminatory purpose." *Id.* at 5.

In the meantime, while the Attorney General was considering SB 14, he denied preclearance to South Carolina's new voter ID law. Shortly thereafter, on January 24, Texas, noting the South Carolina denial and the "seeming probability of an eventual rejection of Senate Bill 14 by DOJ," filed this request for judicial preclearance. *See* Compl., ECF. No. 1 at 8. Although Texas's initial complaint sought only a declaratory judgment of preclearance, the state later added a claim that section 5 of the Voting Rights Act, as reauthorized in 2006, "exceeds the enumerated powers of Congress and conflicts with Article IV of the Constitution and the Tenth Amendment." Am. Compl., ECF No. 25 at 1–2.

***5** The Attorney General of the United States was listed as the named defendant. (For the sake of clarity, we hereinafter refer to the party-defendant in this case as the "United States," and refer to the "Attorney General" only when discussing administrative preclearance decisions). In addition, we later granted motions to intervene filed by several voting rights groups, as well as a number of organizations representing racial minorities in Texas. *See* Minute Order, 04/13/2012. These included the Texas Legislative Black Caucus, the League of Women Voters of Texas, the Southwest Voter Registration Education Project, and the Mexican American Caucus of the Texas House of Representatives. We also granted motions to intervene filed by several individual Texas voters. In order to reduce the litigation burden on Texas, we directed all intervenors to consolidate their briefing and argument. *See id.*

Following the Attorney General's March 12

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denial of preclearance, this litigation took on obvious urgency, as it represented Texas's only chance of implementing SB 14 before the November 2012 elections. Although the D.C. Circuit recently affirmed the facial constitutionality of section 5, *Shelby County v. Holder*, 679 F.3d 848 (D.C.Cir.2012), we remain cognizant of the Supreme Court's holding in *Northwest Austin Municipal Utility District No. One v. Holder* that section 5 imposes "substantial federalism costs," 557 U.S. 193, 202 (2009) (internal quotation marks omitted). As a result, on March 27, before the United States had even filed an answer to Texas's amended complaint, we granted Texas's request for an expedited litigation schedule. In doing so, we rejected the United States's contention that a trial was infeasible before the end of the summer, scheduled a one-week trial on the judicial preclearance issue to begin on July 9, and promised to issue our decision by August 31—the date on which Texas needed a decision in order to implement SB 14 in time for the November election. *See* Order, ECF No. 107 at 1. As we explained, it would "raise serious constitutional questions" if Texas were prevented from implementing SB 14 merely because the United States was too busy to prepare for trial. *See Northwest Austin*, 557 U.S. at 204. These federalism concerns are particularly acute in the voter ID context. After all, states not covered by section 5 have successfully implemented voter ID laws to "**deter**[ ] **and detect**[ ] **voter fraud** .... **improve and modernize election procedures** .... [**and**] **safeguard**[ ] **voter confidence**." ***Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)**. Thus, given our "historic tradition that all the States enjoy 'equal sovereignty,' " *Northwest Austin*, 557 U.S. at 203 (citation omitted), we thought it essential to ensure that Texas had every possible opportunity to show that its own voter ID law could be implemented in time for the November elections. With the consent of the parties, we deferred consideration of Texas's constitutional challenge, explaining that this claim "shall not be addressed unless the Court denies judicial preclearance of [SB 14]." Initial Scheduling Order, ECF No. 43 at 1. We then set an accelerated discovery and briefing schedule. *Id.*

***6** Similar federalism concerns influenced our resolution of several discovery disputes. For example, seeking to show that SB 14 was motivated by discriminatory purpose, the United States moved to compel the production of testimony and documents from Texas state legislators. *See* Order, ECF No. 167. Texas sought to withhold this evidence, arguing that its production would violate legislative privilege. Cognizant that "federal intrusion into sensitive areas of state and local policymaking" imposes "substantial federalism costs," *Northwest Austin*, 557 U.S. at 202, and guided by *Arlington Heights v. Metropolitan Housing Development Corp.*, we largely sided with Texas. *See* 429 U.S. 252, 268 (1977) (recognizing a testimonial and evidentiary privilege for "members of [a] decision-making body"). We shielded all evidence relating to "legislative acts" or "a legislator's motivations with respect to a bill." Order, ECF No. 167 at 11. We also allowed Texas to withhold certain communications between legislators and executive agencies. *Id.* at 9. Finally, we shielded most, though not all, evidence in the possession of Texas Lieutenant Governor David Dewhurst. *See* Order, ECF No. 154. This latter issue was complicated by the fact that the Texas lieutenant governor serves both as a member of the executive branch and as President of the Senate, so the degree to which he qualifies as a "legislator" is unclear. *Id.* at 4. Describing this as a "very close call," and believing ourselves "obliged to apply the Voting Rights Act in a manner that minimizes federal intrusion," we erred on the side of shielding evidence in the lieutenant governor's possession. *Id.* at 6 (quotation omitted).

Our efforts to accelerate this litigation, however, were often undermined by Texas's failure to act with diligence or a proper sense of urgency. As memorialized in our May 7, 2012 order, Texas "repeatedly ignored or violated directives and orders of this Court that were designed to expedite discovery." Order, ECF No. 107 at 2. Most significantly, Texas failed to produce its voter registry,

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DPS ID, and license-to-carry databases to the United States until 35 days after the established discovery deadline. *Id.* Production of these databases to Defendant–Intervenors took place even later—40 days after the initial deadline—and was further complicated by data-accessibility errors. *See* Notice Concerning Database Discovery, ECF No. 119 at 2. These errors seriously hindered Defendant–Intervenors' ability to prepare and proffer expert testimony based on this data. *See* Order, ECF No. 137 at 2–4. Citing these delays, the United States again moved to postpone trial. We denied this motion, explaining that "[d]espite the fact that patience and equity do not count in Texas'[s] favor when considering discovery and scheduling issues, the statute requires our best efforts for an early trial date." *Id.* at 2–3. After all, we emphasized, "[t]he questions under the Voting Rights Act presented here are too important to let even Texas'[s] missed discovery ... force a change to the July 9 trial date." *Id.* at 2 (citation omitted).

***7** Although Texas was able to maintain the July 9 trial date, its dilatory approach to discovery prevented it from obtaining one potentially crucial piece of evidence. Nearly a month after discovery commenced, Texas served the Attorney General with a discovery request seeking data regarding the three types of federal ID permitted by SB 14: U.S. passports, military ID cards, and citizenship certificates. Memo. in Support of Mot. to Compel, ECF No. 130–1 at 1–2. Texas sought access to this federal data to determine the number of Texas voters who lack *any* form of SB 14–qualifying ID. In response, the Attorney General informed Texas that because federal identification databases are outside his "possession, custody or control," he was unable to produce them. *See* Order, ECF No. 179 at 2. He advised Texas to serve subpoenas on the three U.S. agencies who physically control the databases—the Departments of State, Homeland Security, and Defense. *See id.* at 2–3. Inexplicably, however, Texas never served these subpoenas. Indeed, for thirty days Texas failed to take any action at all vis-à-vis the federal databases. Texas finally filed a motion to compel the Attorney General's production of the federal databases on May 21—the last possible day to file such a motion. Order, ECF No. 137 at 4. We ultimately denied this motion, explaining that Texas had failed to establish that the Attorney General maintains control over the databases. Order, ECF No. 179 at 4. And because Texas had mysteriously failed to serve subpoenas on the agencies in physical possession of the databases, we concluded that "[a]ny prejudice to Texas from the failure to obtain this information is assignable solely to Texas." *Id.* at 5.

Nevertheless, mindful that the federal databases could prove crucial to Texas's case, we asked the state to decide: would it rather (1) commence trial on July 9, 2012 without federal data, or (2) delay trial, potentially obtain access to the databases, but risk an inability to implement SB 14 for the November 2012 elections? Texas responded clearly and unequivocally: it preferred to go ahead with the July 9 trial date, even without access to the federal databases. *Id.* at 6–7. Texas's counsel even downplayed the importance of federal data, stating: "I don't want to give the impression that if we can't get [information on federal IDs], we don't think we can prove our case." *Id.*

As Texas requested, trial commenced on July 9. Over the course of the week-long trial, we heard live testimony from 20 witnesses, including election lawyers; Texas state legislators; civil rights leaders; and experts in history, political science, and statistics. The parties also submitted thousands of pages of deposition testimony, expert reports, scholarly articles, and other paper evidence. The trial concluded with three-and-a-half hours of closing arguments.

Based on this extensive record, Texas argues that SB 14 was enacted to prevent voter fraud, and denies that race was a motivating factor. Texas also argues that record evidence affirmatively proves that SB 14 will have no discriminatory effect. For their part, the United States and Defendant–Intervenors argue that the specter of in-person

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voter fraud is a chimera meant to mask the discriminatory purpose behind SB 14. According to these parties, the record contains virtually no evidence of in-person voter fraud in Texas and this, combined with certain procedural irregularities that occurred during the passage of SB 14, the state's history of racial discrimination, and other evidence, proves that the bill's purpose was to disenfranchise minorities. Moreover, the United States and Defendant–Intervenors argue that SB 14 will have a discriminatory effect-that is, it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141.

***8** In resolving these legal issues, we do not review the Attorney General's denial of preclearance, but determine for ourselves whether SB 14 has the purpose or effect "of denying or abridging the right to vote on account of race [,] color," or "member[ship] [in] a language minority group." 42 U.S.C. §§ 1973c(a), 1973b(f)(2); *see* 28 C.F.R. § 51.49 ("The decision of the Attorney General not to object to a submitted change or to withdraw an objection [under section 5] is not reviewable."). We do so in the following opinion, which "shall constitute the Court's Findings of Fact and Conclusions of Law as required by the Federal Rules." *City of Rome, Ga. v. United States,* 472 F.Supp. 221, 223 (D.D.C.1979) (three-judge court); *see also* Fed.R.Civ.P. 52 Advisory Notes 1946 (stating that findings of fact "should be a part of the judge's opinion and decision, either stated therein or stated separately").

II.

Before examining the evidence, we set forth the legal framework that governs this case.

A.

As the Supreme Court has "often reiterated[,] ... voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979). Indeed, the right to vote free from racial discrimination is expressly protected by the Constitution. The Fifteenth Amendment provides that "[t]he 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. XV. Moreover, the Supreme Court has held that the Fourteenth Amendment, which prohibits states from "deny[ing] to any person ... the equal protection of the laws," U.S. Const. amend. XIV, applies to voting. As the Court has explained, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 665 (1966). Adopted in the immediate aftermath of the Civil War, these two amendments were aimed at protecting the rights and liberties of freed slaves in the former Confederacy.

Despite these Constitutional safeguards, "the blight of racial discrimination in voting ... infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966). Following Reconstruction, many Southern states began enacting ballot access measures which were "specifically designed to prevent Negroes from voting." *Id* . at 310. "Among the most notorious devices were poll taxes, literacy tests, grandfather clauses, and property qualifications." *Shelby Cnty.,* 679 F.3d at 853. Though race-neutral on their face, such measures were deliberately calculated to reduce the number of African Americans able to vote. *See Katzenbach,* 383 U .S. at 311 (noting that when literacy tests were enacted, "more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write"); *id.* at 311 n. 9 (quoting South Carolina Senator Ben Tillman as stating, "The only thing we can do as patriots and as statesmen is to take from the 'ignorant blacks' every ballot that we can under the laws of our national government.") (alterations omitted). The Supreme Court ultimately invalidated many of these laws on the grounds that they violated the Fifteenth Amendment. *Id.* at 311–12

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(collecting cases). Nevertheless, states were able to stay one step ahead of the courts " 'by passing new discriminatory voting laws as soon as the old ones had been struck down." ' *Beer,* 425 U.S. at 140 (quoting H.R.Rep. No. 94–196, at 57–58 (1975)).

***9** It was against this backdrop of "unremitting and ingenious defiance of the Constitution" that Congress passed the Voting Rights Act of 1965. *Katzenbach,* 383 U.S. at 309. Enacted pursuant to Congress's authority to enforce the Fifteenth Amendment "by appropriate legislation," U.S. Const. amend. XV, the Act was intended to eliminate the "insidious and pervasive evil" of racial discrimination in voting. *Katzenbach,* 383 U.S. at 309. As relevant here, section 5 of the 1965 Act required certain "covered jurisdictions" to "preclear" every proposed change in their voting procedures with either the Attorney General or a three-judge panel of this court. 42 U.S.C. § 1973c(a). Only if a covered jurisdiction can demonstrate that a proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" will that change take effect. *Id.* Thus, by requiring a covered jurisdiction to preclear a change *before* implementing it, section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims." *Katzenbach,* 383 U.S. at 328.

Under the 1965 Act, a jurisdiction was "covered" by section 5 if it "maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election." Voting Rights Act of 1965, Pub.L. No. 89–110, § 4(b), 79 Stat. 437, 438. In crafting this formula, "Congress chose [its] criteria carefully." *Shelby Cnty.,* 679 F.3d at 855. "It knew precisely which states it sought to cover"—those with the worst legacy of racial discrimination in voting—"and crafted the criteria to capture those jurisdictions." *Id.* "Unsurprisingly, then, the jurisdictions originally covered in their entirety, Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, were those southern states with the worst historical record of racial discrimination in voting." *Id.* (internal quotations and citations omitted).

Although section 5 was enacted as a temporary provision, Congress has consistently renewed it: in 1970 (for five years), in 1975 (for seven years), in 1982 (for twenty-five years), and in 2006 (for twenty-five years). Since its enactment, the relevant portions of the Voting Rights Act have largely remained the same, with one exception of particular significance to this case. In 1975, Congress expanded the coverage formula to include jurisdictions that had substantial non-English-speaking populations but provided English-only voting materials at the polls. Act of Aug. 6, 1975, Pub.L. No. 94–73, § 203, 89 Stat. 400, 401–02 (codified at 42 U.S.C. § 1973b(f)(3)). It was this change that brought Texas within the scope of Section 5's coverage. 28 C.F.R. pt. 51 App.

One final point bears particular emphasis: under section 5, the covered jurisdiction bears the burden of proof. This means that a covered jurisdiction must show by a preponderance of the evidence that a proposed voting change *lacks* both (1) discriminatory purpose and (2) retrogressive effect. As the Supreme Court has recognized, this is a "difficult burden," for "[a]s a practical matter it is never easy to prove a negative." *Reno v. Bossier Parish Sch. Bd. ("Bossier Parish I"),* 520 U.S. 471, 480 (1997) (quoting, in part, *Elkins v. United States,* 364 U.S. 206, 218 (1960)). Nevertheless, the burden of proof in section 5 cases is both "well established," *Georgia,* 411 U.S. at 538, and uncontested by Texas.

B.

***10** At the outset, Texas makes two arguments that, if correct, would allow it to prevail as a matter of law. We consider each in turn.

First, Texas argues that application of section 5's effect element to voter ID laws is inappropriate because such laws can never "deny[ ] or abridg[e] the right to vote." 42 U.S.C. § 1973c(a). According to Texas, voter ID requirements are, at worst, a

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"minor inconvenience[ ]," analogous to "laws requiring citizens to register to vote." Proposed Findings of Fact by State of Texas ("Texas Proposed Findings"), ECF No. 202 at 42. Of course, "many citizens decide that the benefits of voting are not worth the burdens associated with registering to vote." *Id.* But this, Texas contends, is precisely the point: would-be voters who refuse to countenance "minor inconveniences," like registration requirements, have *chosen* not to vote. Similarly, Texas contends that voters who opt to go without photo ID and decline to obtain one prior to the election have eschewed their right to vote. In either case, Texas concludes, the choice lies with prospective voters, so voting rights can hardly be considered to have been "denied" or "abridged" by the state. *Id.* at 43.

This argument completely misses the point of section 5. As explained above, covered jurisdictions must prove that *any* change in voting procedures would not "deny[ ] or abridge the right to vote." 42 U.S.C. § 1973c(a). This is true "no matter how small" the change. *Allen v. State Bd. of Elections,* 393 U.S. 544, 568 (1969). But in an attempt to advance its own definition of "deny" and "abridge"—one that would essentially exempt voter ID laws from section 5 preclearance—Texas ignores what the Supreme Court has said these terms mean. We thus repeat it here: in order to meet their burden, covered jurisdictions must show that none of their "voting-procedure changes ... would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141. In other words, covered jurisdictions must show that any change in voting procedures will not "worsen the position of minority voters" compared to the general populace. *Reno v. Bossier Parish Sch. Bd.* ("*Bossier Parish II* "), 528 U.S. 320, 324 (2000). And while it is true that some voter ID laws impose only "minor inconvenience" and present little threat to the "effective exercise of the electoral franchise"—and would thus be easily precleared under section 5—this cannot be the case for *all* potential voter ID laws. If, for example, a state charged $500 for acceptable forms of voter ID, obtaining that ID would impose more than a "minor inconvenience." The same would be true if voters were forced to travel to a distant and inaccessible state capital to obtain an ID. Again, we emphasize that Texas bears the burden of proof. Accordingly, if, as Texas argues, SB 14 imposes only a "minor inconvenience" on voters, the consequence of that argument is not that SB 14 would be exempt from section 5, but rather that it could easily be precleared because it would not undermine minorities' "effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141.

***11** Our rejection of Texas's unqualified assertion that laws are immune from section 5 so long as they can be tied to "voter choice" should come as little surprise, for another three-judge district court recently rejected a similar argument advanced by none other than the State of Texas. In *Texas v. United States,* 831 F.Supp.2d 244 (D.D.C.2011) (three-judge court), the court denied Texas's motion for summary judgment requesting preclearance of its redistricting plan. Along the way, the court rejected Texas's contention that if Hispanic voters would only *choose* to vote at the same rate as whites, a legislative district with a 50.1 % Hispanic citizen voting-age population would provide Hispanics the ability to elect their preferred candidates. *Id.* at 262–66. The court noted that "educational and economic conditions [are] such that mere attainment of citizen voting-age status might have no real effect on [Hispanics'] ability to elect representatives of choice." *Id.* at 264. The court thus concluded that it was required to perform "a more complicated retrogression analysis than Texas wants this court to approve." *Id.*

Comparable logic applies here. Just as educational and economic conditions might affect whether minorities "choose" to vote, those conditions could also affect whether minorities "choose" to obtain photo ID. Poorer people, for example, may be disproportionately unable to pay the costs associated with obtaining SB 14–qualifying ID. Thus,

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cognizant of the decision of our sister court and fully persuaded by its reasoning, we decline Texas's recycled invitation to collapse the entire retrogression analysis into a question of voter "choice."

Texas's second argument rests on the Supreme Court's decision in ***Crawford v. Marion County Election Board***. There, the Court upheld Indiana's voter ID law, holding that it "**imposes only a limited burden on voters' rights**" under the First and Fourteenth Amendments. **553 U.S. at 202– 03**. In some respects, the Indiana law is similar to SB 14, requiring in-person voters to present photo ID at the polls, while also requiring Indiana driver's license offices to provide free photo ID. ***Id.* at 185– 86**. Moreover, like Texas, Indiana's chief justification for its ID law was the prevention of in-person voter fraud. ***Id.* at 191, 194– 96**. Given these similarities, Texas contends that ***Crawford*** controls this case, especially in light of the Supreme Court's pronouncement that infringement on the "equal sovereignty" of states raises "serious constitutional questions." *Northwest Austin,* 557 U.S. at 203–04. After all, Texas argues, if Indiana can implement a photo ID law to protect against voter fraud, why can't Texas do the same?

By contrast, the United States argues that ***Crawford*** is largely irrelevant to this litigation. It points out that ***Crawford*** involved a First and Fourteenth Amendment facial challenge to a voter ID law enacted by a state not covered by section 5. As such, the ***Crawford*** plaintiffs, who sought to have the law invalidated, bore a "heavy burden of persuasion," requiring them to show that the law was invalid "in *all* its applications." ***Crawford*, 553 U.S. at 200** (emphasis added). Here, however, Texas bears the burden of proving that SB 14 *lacks* discriminatory purpose and retrogressive effect. *Georgia,* 411 U.S. at 538. Thus, the United States concludes, ***Crawford*** is essentially inapplicable to the issues before us.

12** In our view, the correct answer lies somewhere between these two positions. Contrary to Texas's argument, ***Crawford does not control this case. In ***Crawford*** itself, the Court noted that it was "**consider**[**ing**] ***only* the statute's broad application *to all Indiana voters." Crawford*, 553 U.S. at 202– 03** (emphases added). Here, not only do we face different questions—does SB 14 have discriminatory purpose or retrogressive effect?—but we focus on the limited subset of voters who are racial and language minorities. And unlike Indiana in ***Crawford***, Texas bears the burden of proof.

Contrary to the position taken by the United States, however, ***Crawford*** informs our analysis of SB 14 in two important ways. The first goes to purpose. It is crucial, we think, that the Court held in ***Crawford*** that Indiana could act to prevent in-person voter fraud despite the fact that "[**t]he record contains *no* evidence of any such fraud actually occurring in Indiana at any time in its history**." ***Id.* at 194** (emphasis added). Indeed, the Court emphatically held that "*[t]here is no question* about the legitimacy or importance of" this interest. ***Id.* at 202 – 03** (emphasis added). After all, "the 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.' " ***Id.* at 197** (quoting Jimmy Carter and James A. Baker III, *Building Confidence in U.S. Elections* § 2.5 (Sept.2005)). Given this, we reject the argument, urged by the United States at trial, that the absence of documented voter fraud in Texas somehow suggests that Texas's interests in protecting its ballot box and safeguarding voter confidence were "pretext." A state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well. As Texas points out, holding otherwise would, notwithstanding section 5's facial validity, seriously threaten the "equal sovereignty" of states. *Northwest Austin,* 557 U.S. at 203. The inquiry into whether SB 14 was enacted with discriminatory purpose thus cannot hinge on whether Texas can cite documented instances of in-person voter fraud—although, of course, other evidence, such as the types of circumstantial evidence discussed in *Arlington Heights,* could nonetheless sug-

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gest that Texas invoked the specter of voter fraud as pretext for racial discrimination. *See Bossier Parish I,* 520 U.S. at 489 ("Other considerations relevant to the purpose inquiry include, among other things, 'the historical background of the [jurisdiction's] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from the normal procedural sequence'; and '[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body.' " (quoting *Arlington Heights,* 429 U.S. at 268) (alterations in original)); *see also Arlington Heights,* 429 U.S. at 265 (noting that, in order to prove discriminatory intent, a plaintiff need not "prove that the challenged action rested *solely* on racially discriminatory purposes" (emphasis added)).

13** Our second point relates to section 5's effect element. In ***Crawford, the Court thought it critical that "**the photo identification cards issued by Indiana's** [**Bureau of Motor Vehicles**] **are** ... **free** ." **553 U.S. at 198**. Rejecting an argument that obtaining free photo ID cards imposed an undue burden on would-be voters, the Court explained:

> **For most voters who need them**, **the inconvenience of making a trip to the BMV**, **gathering the required documents**, **and posing for a photograph surely does not qualify as a substantial burden on the right to vote**, **or even represent a significant increase over the usual burdens of voting**.

Id. This holding, though made in the context of a constitutional challenge, has obvious ramifications for this section 5 case. If in most instances the "**inconvenience of making a trip to the BMV** ... **does not qualify as a substantial burden on the right to vote**," ***id***., we fail to see how that same inconvenience could, absent more, undermine the "effective exercise of the electoral franchise" for minority voters. Beer, 425 U.S. at 141. In other words, according to ***Crawford***, there are certain responsibilities and inconveniences that citizens must bear in order to exercise their right to vote, and a one-time trip to the driver's license office is, in most situations, simply one of those responsibilities.

It is important to bear in mind, however, that ***Crawford*** involved a facial challenge to the ID law's effects on "all **Indiana voters**." ***Crawford*, 553 U.S. at 203**. The Court was therefore discussing the burden of "**making a trip to the BMV**" *generally*. Indeed, the Court expressly held only that the burdens associated with obtaining a photo ID were insubstantial "[f]or *most* voters ." ***Id*. at 198** (emphasis added). Obviously, "most" is different from "all." ***Crawford*** thus cannot be read as holding that a trip to the BMV can never "**qualify as a substantial burden on the right to vote**." ***Id***. And logically so. After all, would-be voters who must take a day off work to travel to a distant driver's license office have most certainly been exposed to burdens beyond those usually associated with voting. The same is likely true if prospective voters must pay a substantial amount of money to obtain a photo ID or wait in line for hours to get one. In some circumstances these heavy burdens could well discourage citizens from voting at all. And if such burdens fall disproportionately on racial or language minorities, they would have retrogressive effect "with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141.

The upshot of all of this is that Texas can prove that SB 14 lacks retrogressive effect even if a disproportionate number of minority voters in the state currently lack photo ID. But to do so, Texas must prove that these would-be voters could easily obtain SB 14–qualifying ID without cost or major inconvenience.

III.

***14** With these principles in mind, we turn to the record. Because "courts have no need to find discriminatory intent once they find [retrogressive] effect," *Shelby Cnty.,* 679 F.3d at 869, and because evidence that a law which "bears more heavily on

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one race than another"—i.e., has disproportionate effect—is itself "the important starting point for assessing discriminatory intent," *Bossier Parish I,* 520 U.S. at 489 (internal quotations and citations omitted), we begin with section 5's effect element.

This discussion proceeds as follows. We begin with Texas's argument that, as a general proposition, voter ID laws have little effect on turnout—an argument that relies on social science literature and the experiences of Georgia and Indiana following enactment of their photo ID laws. Next, we consider evidence submitted by Texas, the United States, and Defendant–Intervenors analyzing whether minorities disproportionately lack the forms of ID permitted by SB 14. For the reasons given below, we reject all of this evidence and, because Texas has submitted nothing more, conclude that the state has failed to meet its burden of demonstrating that SB 14 lacks retrogressive effect. As we shall explain, however, this case does not hinge solely on the burden of proof. Undisputed record evidence demonstrates that racial minorities in Texas are disproportionally likely to live in poverty and, because SB 14 will weigh more heavily on the poor, the law will likely have retrogressive effect.

A.

Texas begins with a broad argument: that social science evidence demonstrates voter turnout is generally unaffected by the stringency of a state's voter ID laws. In other words, Texas contends that voters vote regardless of the identification requirements imposed on them at the polls and that SB 14 will thus have "no significant effect at all." Texas Proposed Findings, ECF No. 202 at 9. And because ID requirements have no bearing on whether voters—minorities or otherwise—turn out on Election Day, Texas concludes that SB 14 will have no retrogressive effect.

We are unable to credit this line of argument because the effect of voter ID laws on turnout remains a matter of dispute among social scientists. Texas relies heavily on a 2009 paper by Dr. Stephen Ansolabehere, a Harvard political scientist who (as discussed *infra*) happens to be one of the United States's expert witnesses in this case. In his paper, Dr. Ansolabehere concludes, based on a telephone survey of eligible voters nationwide, that "almost no one ... stay[s] away from the polls for want of appropriate identification." TA 1475. But the United States introduced into evidence a 2011 paper by Dr. Michael Alvarez of the California Institute of Technology which reaches precisely the opposite conclusion. Applying a statistical regression model to voting data from all 50 states, Dr. Alvarez concludes that photo ID requirements impose "significant negative burdens on voters." U.S. Ex. 551 at 29. The Alvarez study predicts that imposition of a photo ID requirement in any given state will depress overall voter turnout by approximately 10%. *Id.* Texas—which bears the burden of proof-has failed to produce any evidence undermining the validity of the Alvarez study. Instead, it focuses entirely on Dr. Ansolabehere's 2009 paper. Yet Dr. Ansolabehere himself testified that "other published research disagrees with me," Trial Tr. 7/12/2012 (PM) 33:6, specifically pointing out that Dr. Alvarez's study found that some photo ID laws have "quite a big effect" on turnout. *Id.* 102:17–18. We thus have no basis for finding that Dr. Ansolabehere's 2009 paper represents any sort of academic consensus about the impact of voter ID laws.

***15** Turning from national studies to state-specific data, Texas next focuses on the experiences of Indiana and Georgia—two states that recently implemented photo ID laws. Relying on expert testimony from University of Texas political scientist Daron Shaw, Texas argues that its population is demographically "similar to" Georgia's and Indiana's, and that these states' experiences with photo ID requirements suggest that SB 14 will have "no significant effect at all" on turnout in Texas. Texas Proposed Findings, ECF No. 202 at 9. At trial, Dr. Shaw testified that survey data from the 2008 Presidential primaries showed that virtually no Georgia or Indiana voters reported being turned away from the polls because of a lack of photo ID. Trial Tr. 7/11/2012 (AM) 24:6–19. Moreover, this finding

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remained constant across racial lines: in Indiana "0 percent of whites, 0 percent of blacks, 0 percent of Hispanics report that they were not allowed to vote"; in Georgia, "0 percent of whites, 1 percent of blacks, 0 percent of Hispanics said they were not allowed to vote" because they lacked photo ID. *Id.* 25:2–7. These figures were particularly notable, Dr. Shaw emphasized, because social scientists had previously concluded that "there were [disparate ID] possession rates by race" in both Georgia and Indiana. *Id.* 25:17–18. From this, Texas urges us to draw three conclusions: (1) photo ID laws ultimately prevent very few people from voting; (2) photo ID laws have no disproportionate effect on racial minorities; and (3) disparate ID possession rates have little effect on turnout. We reject these proposed findings because the circumstances in Georgia and Indiana are significantly different from those in Texas.

First, and most important, SB 14 is far stricter than either Indiana's or Georgia's voter ID laws. Indiana allows voters to use any photo ID that has "expired after the date of the most recent general election." Ind.Code Ann. § 3–5–2–40.5(a)(3). Georgia allows voters to present *any* expired driver's license at the polls. Ga.Code Ann. § 21–2–417(a)(1); *see also* Georgia Secretary of State, Georgia Voter Identification Requirements, *available online at* http://sos.georgia.gov/Gaphotoid/ (last visited August 28, 2012) (listing as "acceptable" voter ID "[a] Georgia Driver's License, even if expired"). By contrast, SB 14 prohibits the use of an ID which has expired "more than 60 days before the date of presentation" at the polls. Tex. Elec.Code § 63.0101 (January 1, 2012).

Moreover, the burdens associated with obtaining a purportedly "free" voter ID card will be heavier under SB 14 than under either Indiana or Georgia law. This is true for at least two reasons. The first relates to out-of-pocket cost. Under SB 14, EIC applicants will have to present DPS officials with a government-issued form of ID, the cheapest of which, a certified copy of a birth certificate, costs $22. By contrast, Georgia residents may present a wide range of documents to obtain a voter ID card, including a student ID, paycheck stub, Medicare or Medicaid statement, or certified school transcript. *See* Ga. Elec.Code § 183–1–20–.01. The diverse range of documents accepted by Georgia (24 categories in all) means that few voters are likely to incur out-of-pocket costs to obtain a voter ID. And although Indiana law, like SB 14, requires voters to present a government-issued document (such as a birth certificate) to obtain a "free" photo ID, in Indiana the "**fee for obtaining a copy of one's birth certificate**" is significantly lower than in Texas, ranging from $3 to $12, depending on the county. *See* ***Crawford*, 553 U.S. at 198 n. 17**.

***16** The second cost SB 14 will impose on EIC applicants is the burden associated with traveling to a DPS office. The United States submitted unrebutted evidence showing that "81 Texas counties have no [DPS] office, and 34 additional counties have [DPS] offices open two days per week or less." Proposed Findings of Fact by Eric Himpton Holder, Jr. ("U.S. Proposed Findings") Doc. 223 at 6, *see also* Am. Compl., ECF No. 25 Ex. 7 at 4. This means that in at least one-third of Texas's counties, would-be voters will have to travel out-of-county merely to apply for an EIC. Georgia and Indiana voters face no such burdens. Indeed, Georgia law requires each county to "provide at least one place in the county at which it shall accept applications for and issue [free] Georgia voter identification cards." Ga.Code Ann. § 21–2–417.1(a). Similarly, every Indiana county has a BMV office that is required by law to disperse "free" photo IDs. *See* Indiana Bureau of Motor Vehicles, Branch Locations and Hours, *available online at* http://www.in.gov/bmv/2337.htm (last visited August 28, 2012).

Given all this, we have little trouble finding that SB 14 will be far more burdensome than either Indiana's or Georgia's voter ID laws. And because the laws are so different, we place very little stock in Dr. Shaw's comparisons among these three

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states.

We briefly note two additional, independent reasons to reject Dr. Shaw's conclusions. First, Dr. Shaw's expert report concludes that "Indiana and Georgia provide ... relevant comparisons" to Texas because both states, like Texas "have substantial minority populations." TA 931. But these minority populations are different. As Dr. Shaw himself notes, although Indiana and Georgia both have "a sizable black population," neither state has "Hispanic populations on the order of those in Texas." ***Id*. at n. 3**. Of course, different minority groups have different cultural and historical experiences, and may accordingly be affected differently by similar laws. Indeed, the Supreme Court has emphasized the unique position of Texas's Hispanic community, explaining that the "political, social, and economic legacy of past discrimination *for Latinos in Texas* may well hinder their ability to participate effectively in the political process." *LULAC v. Perry*, 548 U.S. 399, 440 (2006) (internal quotation marks and citations omitted) (emphasis added). We thus find it completely inappropriate to compare Hispanics in Texas with African Americans in Indiana or Georgia.

Second, Dr. Shaw failed to conduct any further demographic comparisons among the three states. For example, nothing in Dr. Shaw's expert report or in his trial testimony speaks to poverty rates in Indiana or Georgia, much less whether such poverty rates break down along racial lines. As we explain below, record evidence in this case demonstrates that poverty rates in Texas do in fact break down along racial lines. Thus, without more, we have no basis for concluding that Indiana and Georgia are "relevant comparisons" to Texas. TA 931.

***17** Finally, and quite apart from the methodological flaws in Dr. Shaw's study, his conclusion that voter ID laws do not depress voter turnout suffers from an additional weakness. Although Dr. Shaw's expert report suggests that very few voters in Indiana and Georgia were turned away at the polls, his report does indicate that photo ID laws might dissuade some voters from attempting to cast a ballot in the first place. In the 2008 survey of Indiana voters relied upon by Dr. Shaw, 7% of eligible voters who failed to vote gave "I did not have the correct form of identification" as at least one of their reasons for not voting. *See* TA 933. (By way of comparison, only 2% of Texas non-voters in 2008 gave that answer. *Id.*). Asked about this statistic at trial, Dr. Shaw testified only that "it's not clear to me how to treat" this response. Trial Tr. 7/11/2012 (AM) 107:15–16. "[F]or instance," Dr. Shaw testified, "if someone says I wasn't registered to vote, and then says [as an additional reason], and I lacked proper identification, it's not clear to me how to treat those as a cumulative estimate of the effect of photo ID." *Id.* 107:17–20. We take this point, but reiterate once again that Texas has the burden of proof, and if Indiana's voter ID law *might* have discouraged up to 7% of eligible non-voters from even going to the polls, we cannot accept Texas's proposed finding that "generally ... photo ID laws do not decrease voter turnout." Texas Proposed Findings, ECF No. 202 at 7.

B.

We turn next to Texas's second major line of evidence: ID possession rates. Relying largely on telephone surveys of voters, Texas contends that Hispanics, African Americans, and whites in Texas all possess photo ID at roughly the same rates and that SB 14 will thus impose equal burdens on all voters. In response, the United States argues that Texas's studies are defective. It further offers a study of its own, which it claims shows that Hispanic and African American registered voters are in fact nearly twice as likely as white registered voters to lack photo ID.

This discussion proceeds in four parts. In subsection 1 we describe Texas's first survey, which allegedly shows no racial disparity in ID possession rates. In subsection 2 we summarize the United States's study of ID possession rates, not just because the United States offers it as affirmative evidence, but also because Texas uses the study as a

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starting point for its second set of surveys, which, in turn, we discuss in subsection 3. Finally, in subsection 4 we address an analysis submitted by Defendant–Intervenors. For reasons explained in detail below, we find none of these studies reliable.

1.

The first relevant attempt to determine the number of Texas voters who lack photo ID came in January 2012 when Texas submitted to the Attorney General a computer-generated list of 795,955 voters it was unable to "match" with entries in the DPS ID database. As mentioned earlier, *supra* Part I, this "no-match" list provided a partial basis for the Attorney General's denial of preclearance because it suggested that "Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack" a DPS-issued driver's license or ID card. Am. Compl., ECF No. 25 Ex. 7 at 2.

***18** After the Attorney General denied preclearance, Texas retained Dr. Shaw (the University of Texas political science professor) to survey the individuals on the January no-match list and determine whether they actually lacked valid photo ID. Contacted by telephone, survey respondents were asked questions about their race, whether they were registered to vote, whether they possessed any form of identification required by SB 14, and whether they were disabled. TA 937. Because "certain kinds of people—those of higher socioeconomic status, especially—are more likely to actually respond to poll-takers," Dr. Shaw "weighted" his results. TA 937 & n. 5. "Weighting" involves applying a statistical formula to the final data to correct for "response bias." As Dr. Shaw explained, "Weighting allows groups who are less likely to respond to pollsters to be properly represented in the poll." TA 937 n. 5.

In relevant part, Dr. Shaw's report concluded that, contrary to the Attorney General's conclusions, Hispanic respondents lacked "any form of identification necessary for voting" at "the same rate as for white respondents," i.e. "5% of the time (un-weighted), or 6% of the time (weighted)." TA 940. Dr. Shaw further reported that just over 9% of African Americans in the general sample (18 of 196 voters) "do not have an acceptable form of voter ID as per SB 14." TA 941. Seeking to minimize the disparity between white and African American ID possession rates, Dr. Shaw noted that

> [t]en of those 18 are over 65 years of age, however, and thus qualify for absentee ballots. And another four of the remaining eight self-identify as disabled, and thus also qualify for absentee ballots. In short, four out of 196 African Americans [or approximately 2%] reputedly 'at risk' due to Texas's new voter ID law could potentially be affected by SB 14.

TA 941. Based in part on Dr. Shaw's survey results, Texas argues that "SB 14's photo identification requirement will not have a disparate impact on Hispanic or African–American voters in Texas." Texas Proposed Findings, ECF No. 202 at 13.

The reliability of Dr. Shaw's study, however, is seriously undermined by his surveys' extraordinarily low response rates. Just over 2% of the individuals Dr. Shaw attempted to contact ultimately responded to his questions. TA 967–68. As explained in greater detail in Part III.B.3, *infra*, uncontested record evidence suggests that such low response rates render telephone surveys scientifically invalid. We thus find that Dr. Shaw's survey of those on the January no-match list is methodologically unsound and therefore unreliable.

Dr. Shaw's study suffers from at least one additional defect. At first blush, his survey suggests that African Americans in Texas are disproportionately likely to lack photo ID: over 9% of African American respondents reported lacking ID, compared to 5–6% of the general population. In fact, the actual disparity may be even larger since Dr. Shaw reported only unweighted numbers—not the weighted percentage—for African Americans. In response to this disparity, Dr. Shaw attempted to reduce the African American figure by removing disabled

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people and those over 65. But disabled voters and those over 65 will not be "exempt" from SB 14. Although they will be able to vote by mail without a photo ID, SB 14 imposes obligations on such voters who choose to vote in-person. Specifically, voters over the age of 65 who want to vote in person will have to present acceptable photo ID. And disabled voters who wish to identify themselves using their pictureless voter ID certificate will first have to obtain written documentation of disability from either the Social Security Administration or the Department of Veterans Affairs. Tex. Elec.Code § 13.002(i). Moreover, although Dr. Shaw removed these voters from the pool of African American voters, he failed to perform any similar reductions for the Hispanic or general samples, thus making cross-racial comparisons impossible. Dr. Shaw's selective reduction was therefore both inappropriate and methodologically unsound.

2.

***19** The second data set at issue is a computer-generated "no-match" list compiled in May, 2012 by the United States's expert, Harvard political scientist Stephen Ansolabehere. Much like Texas's January no-match list, Dr. Ansolabehere's list attempts to show the number of Texas voters who lack state-issued photo ID. Dr. Ansolabehere compiled his list by cross-referencing Texas's voter registry with (1) the DPS ID database (which contains both state-issued driver's licenses and personal ID cards), and (2) Texas's license-to-carry database.

Prior to cross-referencing these databases, Dr. Ansolabehere "cleaned" the driver's license and license-to-carry-databases to remove duplicative and immaterial entries. Specifically, Dr. Ansolabehere removed from these databases all entries with identical social security numbers. He also removed records for driver's licenses that were either expired or belonged to somebody marked "deceased." U.S. Ex. 544 11–13. As Dr. Ansolabehere explained:

> [Driver's license] records that correspond to deceased persons, expired licenses, and other cases may very well match to individuals on the [voter registry]. They should not be considered valid matches as they are not valid voters or do not have a valid state identification for purposes of voter identification. Keeping these cases in the matching process would create false positives in the match and lead to "too many" matches.

Id. at 13. Dr. Ansolabehere also performed a parallel "cleaning" of the voter registry list to remove duplicate entries, although (and we shall say more about this later) he failed to remove voters who had been designated "deceased." *Id.* at 11–12.

Dr. Ansolabehere then began constructing his no-match list. He defined a "matched" voter—i.e., a voter who presumably possesses state-issued ID—as "any [voter] on the Voter Registration database with the same identifying information ... on the Drivers' License or License to Carry Database." *Id.* at 5. "Same identifying information," for the purposes of Dr. Ansolabehere's study, constituted one of two things: a full 9–digit social security number match; or an identical first name, last name, and date of birth. *Id.* at 15.

Through this process, Dr. Ansolabehere constructed a no-match list consisting of nearly 1.9 million voters who apparently lacked Texas-issued photo ID. Almost 20% of these no-matches were marked by Dr. Ansolabehere as "ambiguous." This meant one of two things. First, the no-match could be a voter with a very common name who had been matched to a state ID but without "high probabilities of certainty." *Id.* (The State of Texas, for example, could well contain multiple people named "Michael Jones" born on January 6, 1981, so it would be unclear whether a "match" would be for the right Michael Jones). Second, the no-match could be a voter with a driver's license marked "Not Eligible" to drive. As Dr. Ansolabehere noted, it is "unclear" how the "Not Eligible" notation "affects the validity of the identification for purposes of voting" under SB 14. *Id.* at 14.

***20** Because Texas does not track voters by race, Dr. Ansolabehere cross-referenced his no-

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match list with a database provided by Catalist, LLC. A private vendor specializing in voter registration data, Catalist attempts to determine voters' race by applying a predictive algorithm that uses "name dictionaries and residential area information." *Id.* at 6, 8. As Dr. Ansolabehere explains in his expert report:

> A name dictionary would identify someone named Greg Jones as 60% likely to be White based on the frequency with which that name is used in the population. Someone named Greg Bernard Jones who lives in an area that is 31% Black has an 83% probability of being Black. The combination of name information and local area information, then, sharpens the algorithm for identifying race considerably.
>
> *Id.* at 8.

After cross-referencing his no-match list with Catalist's database, and thus assigning a racial classification to every individual on the no-match list, Dr. Ansolabehere reached two conclusions:

> 1) If ambiguous cases are treated as no-matches, 20.71% of registered African American voters, 17.49% of registered Hispanic voters, and 10.85% of registered white voters cannot be matched with IDs in the Texas databases;
>
> 2) If ambiguous cases are treated as matches, 15.97% of registered African American voters, 14.32% of registered Hispanic voters, and 9.65% of registered white voters cannot be matched with IDs in the Texas databases.

Id. at 31. In either event, the United States contends, Dr. Ansolabehere's data conclusively shows that registered African American and Hispanic voters in Texas are disproportionately likely to lack photo ID. For several reasons, we find that Dr. Ansolabehere's study cannot support this conclusion.

First, Dr. Ansolabehere's study, even were it methodologically flawless, is of limited value because it fails to examine all SB 14–qualifying ID. Recall that SB 14 permits in-person voters to present one of five types of photo ID. Two are issued by the state: a DPS-issued driver's license or ID card, or a license to carry a concealed handgun. Three are issued by the federal government: a passport, military ID, or citizenship certificate with photograph. Tex. Elec.Code § 63.0101 (January 1, 2012). Yet Dr. Ansolabehere limited his study to the two state forms of ID. This limitation is significant because the United States relies on Dr. Ansolabehere's study to support its broad conclusion that there exists "a substantial racial disparity in the possession of *identification required by SB 14.*" U.S. Proposed Findings, ECF No. 223 at 11 (emphasis added, some capitalization altered). But for this to be true, Dr. Ansolabehere's study would have to have considered all forms of "identification required by SB 14," not just the two state-issued qualifying forms. Yet despite the fact that Dr. Ansolabehere was retained *by the United States* and expressly asked for access to the databases regarding the three forms of federal ID, Trial Tr. 7/12/2012 (AM) 98:13–21, his expert report states that "[n]o federal lists were provided to me for the sake of this analysis," U.S. Ex. 544 at 9–10. Unless the United States is able to present a full picture of precisely who lacks *any* form of SB 14–approved ID, it has no basis for asking us to affirmatively find that SB 14 will discriminate against anyone—at least not on the basis of disparate ID possession rates.

***21** The failure to analyze federal data is not the only problem with Dr. Ansolabehere's study. It is also plagued by several methodological flaws that make it impossible to rely on it even for the more limited proposition that there exists a racial disparity in the possession of *state-issued* ID. First, concerned that his algorithm might result in " 'too many' matches," Dr. Ansolabehere "cleaned" the DPS database by removing 779,918 deceased drivers prior to creating his no-match list. U.S. Ex. 544 at 13. But Dr. Ansolabehere failed to remove nearly 50,000 of those exact same individuals from the voter rolls, thus virtually ensuring that these de-

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ceased voters would be included on the no-match list. We can think of no good reason for their inclusion. After all, Lyndon Johnson's 1948 Senate race notwithstanding, the dead cannot vote in Texas. *See* Robert Caro, Means to an Ascent 329 (First Vintage Books 1991). True, nothing in the record suggests that the dead voters on Dr. Ansolabehere's no-match list were disproportionately minorities. But his failure to remove them means, at the very least, that his no-match list overstates SB 14's effect.

Second, we have serious doubts as to whether Catalist's algorithm accurately identified the racial composition of voters in this case. Although Dr. Ansolabehere's expert report states that Catalist is an industry leader in "identifying races based on names and Census data," placed second in a "Multi–Cultural Name Matching Challenge," and has been used in several academic studies, U.S. Ex. 544 at 8–9, the record contains no direct evidence as to the accuracy of Catalist's algorithm. To the contrary, record evidence suggests—albeit not conclusively—that Catalist's error rate in this case may be quite high. When cross-examining Dr. Ansolabehere, Texas's counsel demonstrated anecdotally that a number of voters on his no-match list do, in fact, possess state-issued photo ID, and further showed that the race listed on many of those voters' IDs differed from Catalist's racial classification. *See* Trial Tr. 7/12/2012 (PM) 57:24–58:5; 83:4–21; 84:11–85:7. Moreover, when Texas's expert Dr. Shaw conducted a follow-up survey of voters on Dr. Ansolabehere's no-match list, only 68% of respondents identified as "black" by Catalist actually self-identified as "black." TA 973. As discussed in more detail below, *see infra* Section III.B.3, we have serious qualms about the methodological rigor of Dr. Shaw's surveys and so cannot conclude that this 68% figure is accurate. Nevertheless, this number raises a red flag. In litigation like this, which depends largely on accurate racial classification, even the *possibility* that 32% of those classifications are wrong is simply too high.

Finally, at trial Texas demonstrated how Dr. Ansolabehere's name matching algorithm, which requires an exact match, could lead to a number of false no-matches. For example, under Dr. Ansolabehere's algorithm, a "Bob Thomas" on the voter registry cannot be matched with an ID for "Robert Thomas." Nor can Juan Gonzalez be matched with Juan Gonzales. And any woman who changes her last name at marriage is a no-match if her voter registration remains in her maiden name. Importantly, however, SB 14 will permit voters to cast a ballot if the "name on the documentation is *substantially similar to* ... the name on the list." Tex. Elec.Code § 63.001 (January 1, 2012) (emphasis added). Given this, Dr. Ansolabehere's failure to match voters to state-issued IDs with "substantially similar" names undermines his conclusions. This is especially true given that English spellings of Spanish names often vary slightly (*Gonzalez v. Gonzales; Delacruz v. De la Cruz*)—which, in this context, would lead to a disproportionate number of no-matches for Hispanics. And notably, some of these false no-matches could probably have been eliminated. Dr. Ansolabehere testified that it is possible to employ a "fuzzy matching" subroutine, "where you take a list of potential nicknames and so forth and try to match on the basis of those, or initials and things like that." Trial Tr. 7/12/2012 (PM) 50:18–21.

***22** To sum up, Dr. Ansolabehere's study excludes federal forms of ID and uses an uncertain racial classification algorithm. Moreover, his no-match list is inflated: it includes both deceased voters and voters who may have ID under a "substantially similar" name. We therefore find Dr. Ansolabehere's study unreliable.

3.

Texas's final study of ID possession rates rests on yet another set of telephone surveys undertaken by Dr. Shaw. Following the submission of Dr. Ansolabehere's expert report, Texas retained Dr. Shaw to perform a second set of surveys—this time of the individuals on Dr. Ansolabehere's no-match list. Dr. Shaw conducted three surveys: (1) a general sample of 1,000 individuals from the no-match list;

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(2) a sample of 600 individuals Catalist identified as African American; and (3) a sample of 600 individuals Catalist identified as Hispanic. TA 973. As in Dr. Shaw's first survey, respondents were asked whether they possessed any form of ID required by SB 14—both state *and* federal—as well as questions about their race, voting habits, disability status, and opinions on voter ID laws. TA 978–82.

Although Dr. Shaw's second round of surveys resembled his first, two methodological features are worth highlighting. First, as mentioned above, Dr. Shaw concluded that Catalist's racial identification algorithm was largely inaccurate. TA 973. As a result, Dr. Shaw categorized respondents based on their self-identified race—i.e., how they answered the question "[w]hat would you say is your main race?"—rather than how they were classified by Catalist. *Id.; see also* TA 981. Second, unlike in his first study, Dr. Shaw "did not report weighted survey results" to the court, although he testified that he "[had] in fact, weighted" his results on his own. Trial Tr. 7/11/2012 (AM) 81:19–22.

Based on this second round of surveys, Dr. Shaw concluded that "there is no statistically significant difference in ID possession rates amongst whites, blacks, and Hispanics when the appropriate universe of ID types is accounted for." TA 976–77. Specifically, Dr. Shaw reported that in his general sample, 9.38% of whites lacked any of the forms of ID listed in SB 14, compared with 9.30% of African Americans, and 6.18% of Hispanics. TA 976. Asking about federal forms of ID apparently made a difference: Dr. Shaw reported that "amongst Hispanics, possession of a valid passport or citizenship certificate is higher than that for the Anglo population ." TA 975. Overall, though, Dr. Shaw testified that in the general sample, race-based "difference between these rates of [ID] possession" is statistically insignificant. Trial Tr. 7/11/2012 (AM) 35:21–36:2. Moreover, Dr. Shaw noted that "[i]f we rely on data from the Hispanic and black surveys (respectively), 6.72% of Hispanics and 7.64% of blacks do not possess one or more of the photo IDs identified in SB 14." TA 976. Both of these rates are lower than the percentage of whites who reported lacking ID in the general sample. *Id.*

***23** Again, however, Dr. Shaw's surveys were plagued by low response rates. His survey of the general sample from Dr. Ansolabehere's list had a response rate of only 2.0%, meaning that just one out of every 50 voters he attempted to reach actually answered his questions. TA 983. Response rates for the African American and Hispanic surveys were hardly any better-just 2.5% and 2.1%, respectively. TA 984–85. Significantly, Dr. Shaw conceded that he had never obtained such low response rates during any of the live interview telephone surveys he conducted over the course of his career. Trial Tr. 7/11/2012 (AM) 71:21–25. A low response rate, he testified, is "always a concern for surveys." *Id.* at 44:6. Dr. Shaw explained:

> There's always the possibility that the people you contacted are systematically different from the people you couldn't contact either because you couldn't reach them or because you reached them and they didn't want to participate in the survey. This is broadly referred to as non-response bias.

Id. 44:1–5. In other words, a low response rate increases the probability that the people who actually responded are in some relevant way different than the target population. This is hardly an ancillary concern. After all, the entire point of a telephone survey in this context is to obtain a representative sample of a target population.

Here, Dr. Shaw's concerns are well justified. Response rates of 2.0, 2. 1, and 2.5% fall far short of anything deemed acceptable in the polling industry. True, as Dr. Shaw testified, the Pew Research Center recently concluded that telephone surveys with response rates as low as 9% may be deemed reliable in some circumstances. *See* Pew Research Center, Assessing the Representativeness of Public Opinion Surveys, (May 15, 2012) at 8–10, *available online at* http://www.people-press.org/files/legacy-pdf/Assessing

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% 20the% 20Representativeness% 20of% 20Public% 20Opinion % 20Surveys.pdf ("Pew Study") (last visited August 28, 2012). But a 9% response rate, while low, is far higher than the response rates obtained by Dr. Shaw—4.5 times the rates he achieved for the general sample. Moreover, the Pew study, the validity of which is unquestioned by Texas, sets the industry floor: neither Dr. Shaw nor any other witness cited a single study that suggests that a response rate any *lower* than 9% is satisfactory. To the contrary, Dr. David Marker, a statistician who performs surveys for the federal government, testified that a 2% response rate is "exceedingly low," and "out of bounds with the surveys that are requested and used by the government." Trial Tr. 7/11/2012 (PM) 108:6–8. Dr. Marker further testified that "I don't believe a two percent survey can provide statistically valid estimates," *id.* 116:5–6, because such estimates "will not at all reflect the underlying true overall population estimates that you're trying to understand." *Id.* 108:21–23. The results of surveys with such low response rates, Dr. Marker bluntly concluded, are "really irrelevant." *Id.* 108:20–21. Thus, taking our cues from the polling industry itself, we have little trouble finding that Dr. Shaw's response rates fall well short of acceptable.

***24** In any event, even had Dr. Shaw obtained an adequate response rate, his survey would still lack certain hallmarks of reliability. The 2012 Pew study, for example, concluded that "telephone surveys that [1] include landlines *and* cell phones and [2] are weighted to match the demographic composition of the population ... provide accurate data." Pew Study at 1 (emphasis added); *see also* Trial Tr. 7/11/2012 (PM) 113:21–22 (Dr. Marker testifying as to the fact that the Pew study "uses cell phones and land lines"). Dr. Shaw himself testified that these are "protocols that Pew assumes *and that need to be in place in order to get that sort of quality*. " Trial Tr. 7/11/2012 (AM) 127:10–11 (emphasis added). Despite this, Dr. Shaw failed to include any cell phone numbers; instead, he contacted only individuals with landline phones. *Id.* 127:12–17. Nor did Dr. Shaw produce any "weighted results of the survey to the Court." *Id.* 127:24–25. Given that these "protocols ... *need* to be in place" to ensure quality, Dr. Shaw's failure to abide by them further undermines the validity of his surveys. *Id.* 71:21–25 (emphasis added).

At trial, Dr. Shaw sought to assure us that his weighted surveys, had they been submitted as evidence, would "look[ ] much the same" as the non-weighted surveys. *Id.* 130:20. Dr. Shaw testified that his survey found that groups that are harder to contact—"younger groups ... people with lower income, et cetera"—tend to possess ID at the same rate as easier-to-contact groups. *Id.* 40:20–41:1. Thus, Dr. Shaw testified, weighting for age or socioeconomic status "simply would have replaced a group with 90 percent identification rates with another group with 90 percent identification rates." *Id.* 40:23–25. As Dr. Shaw put it:

> [I]n that sense the discussion, the conversation about response rates ... while it's important and while it's interesting, I mean, ultimately the proof is in the pudding [I]f we were to [weight], what you're going to find is no change. I mean, these are 90 percent possession rates. The 90 percent possession rates, self-professed possession rates occur across a lot of different groups.

Id. 130:21–131:5.

This point merits two responses. First, we are unable to accept Dr. Shaw's vague representations about weighted data—representations that were not presented to the court and subjected to cross-examination. Second, even if ID possession rates are broadly the same across different age and socioeconomic groups, Dr. Shaw still has no basis for concluding that he obtained a representative sample within those groups. As Dr. Marker explained:

> [Weighting] only goes so far. The issue is, are the young people who responded, the two percent, are they like all of the other young people? Are the elderly who responded like the elderly who

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didn't? Are the blacks who responded like the typical blacks? And that doesn't get help by weighting.

***25** Trial Tr. 7/11/2012 (PM) 112:22–113:1.

To take but one example of this point, Dr. Shaw surveyed only people with landline phones. And though it may be true that 18–to–29–year–old landline users have photo ID at the same rates as other landline users, it may also be true that 18–to–29–year–olds who use only cell phones are disproportionately likely to lack photo ID. For that matter, it may be that 65–to–80–year–old Hispanic women who use only cell phones are also disproportionately likely to lack photo ID. Because Dr. Shaw declined to survey these individuals, he simply has no way of knowing.

One final note. The Pew study concluded that "[o]ne significant area of potential non-response bias ... is that survey participants tend to be significantly more engaged in civic activity than those who do not participate." Pew Study at 2. Notably, this is true even at the 9% response level deemed acceptable by Pew. *See id.* It thus seems probable that, as the Pew report suggests, the voters who responded to Dr. Shaw's survey were "significantly more" civically engaged than the general population. And it may also be that civically engaged voters of all races and income levels are significantly more likely to report possession of state-issued photo ID. This might be because the civically engaged are more likely to travel internationally (and thus have a passport); volunteer in their community (which often requires a car and driver's license); or simply renew their existing ID on time. Or it could be, as Dr. Shaw suggested at trial, that those who care about what their neighbors think "would be embarrassed to say they don't have a driver's license," even if they actually lack one. Trial Tr. 7/11/2012 (AM) 111:18–19.

True, all of this is speculative and uncertain. But that is precisely the point. We cannot tell from Dr. Shaw's surveys precisely who he contacted, if they were representative of the target population, and whether their answers were skewed. As Dr. Shaw himself testified, this is the inherent danger in low response rates. *See id.* 44:1–5. Because Dr. Shaw failed to achieve a minimally acceptable response rate and to apply the polling industry's standard practices, we find his study unreliable.

4.

Defendant–Intervenors point out that, effective January 1, 2004, Texas's voter registration form includes a field where voters are asked to write down their driver's license or personal ID number. Texas Elec.Code § 13.002(c)(8)(A). "[I]f the applicant has not been issued [such] a number," the applicant instead must provide "the last four digits of the applicant's social security number." *Id.* § 13.002(c)(8)(B). If the applicant lacks a driver's license number, personal ID number, and a social security number, the applicant then must include "a statement ... that the applicant has not been issued [any such] number." *Id.* at § 13.002(c)(8)(C). According to the record, 56.4% of Texas voters were registered on or after January 1, 2004, and those registered voters were thus required to use this voter registration form. Trial Tr. 7/13/2012 106:20–107:1–3. As Defendant–Intervenors point out, 9.7% of those voters with Spanish surnames failed to provide a driver's license or personal ID number on their registration form, compared with 7.5% of the general population. *Id.* 107:21–108:1. Relying on this "very substantial facial difference," Defendant–Intervenors argue that Hispanic voters in Texas disproportionately lack photo ID. *Id.* 108:1. We cannot infer from this data anything of the sort.

***26** The first problem is the same one that plagued Dr. Ansolabehere's no-match list: voters who lack a driver's license or personal ID card may nonetheless possess one of the three federal forms of identification acceptable under SB 14. Indeed, Defendant–Intervenors' dataset is even more limited than Dr. Ansolabehere's. For all its problems, at least Dr. Ansolabehere's no-match list purported to

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cover the entire voter registry. By contrast, Defendant–Intervenors' data covers just 56.4% of Texas voters. Furthermore, unlike Dr. Ansolabehere's study, Defendant–Intervenors' data fails to reflect the possibility that a voter may possess a license to carry a handgun.

In any event, faced with a registration form requesting either an 8–digit driver's license/personal ID number or the last four digits of a social security number, even voters who possess a driver's license may opt to provide a social security number. After all, four digits are easier to write than eight. Furthermore, many voters likely memorize their social security number but not their driver's license number. Thus, what voters write on their registration form is barely probative of whether they actually possess a state-issued ID card—much less whether they possess *any* SB–14 approved form of ID.

C.

We pause to summarize the evidentiary findings we have made so far. Contrary to Texas's contentions, nothing in existing social science literature speaks conclusively to the effect of photo ID requirements on voter turnout. Moreover, scant lessons, if any, can be drawn from Indiana and Georgia, largely because SB 14 is more restrictive than the photo ID laws adopted by either of those states. Finally, no party has submitted reliable evidence as to the number of Texas voters who lack photo ID, much less the rate of ID possession among different racial groups.

Given this, we could end our inquiry here. Texas bears the burden of proving that nothing in SB 14 "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141. Because all of Texas's evidence on retrogression is some combination of invalid, irrelevant, and unreliable, we have little trouble concluding that Texas has failed to carry its burden.

Significantly, however, this case does not hinge merely on Texas's failure to "prove a negative." *See Bossier Parish I,* 520 U.S. at 480 (internal quotation marks omitted). To the contrary, record evidence suggests that SB 14, if implemented, would in fact have a retrogressive effect on Hispanic and African American voters. This conclusion flows from three basic facts: (1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty. Accordingly, SB 14 will likely "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141.

***27** The first of these facts—that there exists a subgroup of registered voters, including minorities, who lack SB 14–approved photo ID—is undisputed by Texas and finds support in its own expert's study. Although we are unable to conclude that the individuals Dr. Shaw surveyed were representative of the target population, he did find—and this finding is unaffected by the flaws in his study—a subset of Texas voters who have none of the SB 14–qualifying IDs, neither state *nor federal.* Moreover, as Dr. Shaw testified, his surveys revealed that the race-based "difference between these rates of [ID] possession" is statistically insignificant. Trial Tr. 7/11/2012 (AM) 35:21–36:2. Citing Dr. Shaw's surveys, Texas itself urges us to conclude that "there is no racial or ethnic disparity *among the group of registered voters who currently lack a photo ID* and would be required to obtain one under SB 14." Texas Proposed Findings, ECF No. 202 at 19 (emphasis added). And during closing arguments, Texas's counsel conceded that "[t]he record does tell us that there is a subset of registered voters who lack the ID," and that "there's a significant percentage of ... minorities and Anglos who don't have SB 14 qualifying IDs." *See* Trial Tr. 7/13/2012 (AM) 24:3–6, 25:2–6. Thus, based on Texas's own evidence, we find that there is a subset of Texas voters who lack SB 14–approved ID—again, both state and federal—and that, *at min-*

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imum, racial minorities are proportionately represented within this subgroup.

Equally uncontested is the proposition that, for members of this subgroup to cast a regular in-person ballot under SB 14, they will have to obtain an acceptable form of photo ID, and that the cheapest option is an EIC. In order to obtain an EIC, would-be voters will need to present one of several underlying documents, and as Texas concedes, the least expensive option for most prospective voters who lack supporting identification will be a certified copy of their birth certificate—which costs at least $22. *See* Advisory Regarding Election Identification Certificates, ECF No. 308 at 2.

But this is not all. Recall that would-be voters will need to apply for an EIC at a DPS office, and that almost one-third of Texas's counties (81 of 254) lack one. *Supra* Part I at 7. This means that many would-be voters who need to obtain an EIC—individuals who by definition have no valid driver's license—will have to find some way to travel long distances to obtain one. This is hardly an insignificant concern, especially given that "everything is bigger in Texas." *See, e.g.*, Rick Perry, *Amid a Dim National Economy Texas Remains in the Spotlight*, October 31, 2008, *available at* http://www.tradeandindustrydev.com/region/texas/amid-a-dim-nationaleconomy–texas–remains–spotlight–554 (last visited August 28, 2012).

Reinforcing this proposition, Texas Representative Trey Martinez Fischer, who represents a district which includes the city of San Antonio and its outskirts, testified that "you will not find a DPS office from downtown San Antonio to the western boundary, which is heavily concentrated with African–Americans, and particularly Hispanics." Trial Tr. 7/10/2012 (AM) 119:23–25. State Senator Carlos Uresti echoed this concern, testifying that in his district—which is "70 percent Hispanic, about 5 percent African American"—"[t]here are some towns ... where the nearest DPS office is about a 100 to 125 mile[ ] one way" trip away. Trial Tr. 7/12/2012 (AM) 7:16–8:1. And far from disputing the long travel times imposed by the dearth of DPS offices, Texas's counsel told us that "I don't think that the facts of the geographic distances [between DPS offices] are necessarily contested." Trial Tr. 7/13/2012 52:4–5.

28** Of course, we remain cognizant of the Supreme Court's holding in ***Crawford that "**for most voters** ... **the inconvenience of making a trip to the BMV** ... **does not qualify as a substantial burden on the right to vote**." ***Crawford*, 553 U.S. at 198**. But ***Crawford*** was a facial challenge, and this general principle yields when the closest office is 100 to 125 miles away. Even the most committed citizen, we think, would agree that a 200 to 250 mile round trip—especially for would-be voters having no driver's license—constitutes a "substantial burden" on the right to vote. Our own Federal Rules of Civil Procedure support this conclusion, specifying that witnesses are unavailable to testify if they must travel more than 100 miles to do so. *See* Fed.R.Civ.P. 45(c)(3).

Significantly, these burdens will fall most heavily on the poor. Like any fixed cost, the $22 (minimum) EIC applicants will have to pay to obtain prerequisite documentation weighs disproportionately on those living in poverty. Moreover, while a 200 to 250 mile trip to and from a DPS office would be a heavy burden for any prospective voter, such a journey would be especially daunting for the working poor. Poorer citizens, especially those working for hourly wages, will likely be less able to take time off work to travel to a DPS office-a problem exacerbated by the fact that wait times in DPS offices can be as long as three hours during busy months of the year. U.S. Ex. 10 at 1. This concern is especially serious given that none of Texas's DPS offices are open on weekends or past 6:00 PM, eliminating for many working people the option of obtaining an EIC on their own time. *See* U.S. Ex. 361. A law that forces poorer citizens to choose between their wages and their franchise unquestionably denies or abridges their right to vote. The same

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is true when a law imposes an implicit fee for the privilege of casting a ballot, like the $22 many would-be voters who lack the required underlying documentation will have to pay to obtain an EIC. "[W]ealth or fee paying has ... no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper*, 383 U.S. at 670.

To be sure, a section 5 case cannot turn on wealth alone. In Texas, however, the poor are disproportionately racial minorities. According to undisputed U.S. Census data, the poverty rate in Texas is 25.8% for Hispanics and 23.3% for African Americans, compared to just 8.8% for whites. Mot. to take Judicial Notice of Census Data, ECF No. 219 Ex. 4 at 7, 16. This means that the burdens of obtaining an EIC will almost certainly fall more heavily on minorities, a concern well recognized by those who work in minority communities. Lydia Camarillo, a Texas voter education specialist who has worked for over 35 years in the Hispanic community, testified that because "Latinos are often among the working poor[,] ... Latinos struggling to afford groceries, rent, and child care may not be able to afford ... a copy of a birth certificate in order to get a voter ID." Defendant–Intervenors Ex. 9 at 224. Moreover, Camarillo testified, "[f]or working class Latinos, the requirement of travelling to the DPS during regular business hours may prevent them from obtaining ID because their work hours are not flexible." *Id.*

***29** Again, this is not all. Undisputed census data shows that in Texas, 13.1% of African Americans and 7.3% of Hispanics live in households without access to a motor vehicle, compared with only 3.8% of whites. Mot. to take Judicial Notice of Census Data, ECF No. 219 Ex. 4 at 8, 17. If traveling over 200 miles constitutes a substantial burden on people without driver's licenses who can nonetheless find a ride to a DPS office, *supra* at 47–48, imagine the burden for the predominantly minority population whose households lack access to any car at all. In fact, in some places it may be impossible to get to a DPS office without a car. State Senator Rodney Ellis testified that in his "inner city district" in Houston, DPS offices are not "easily accessible by public transportation." Trial Tr. 7/11/2012 (PM) 34:8–12. If DPS offices are inaccessible by public transportation in Houston, Texas's largest city, we seriously doubt their accessibility in rural areas—which, presumably, are less likely to have public transportation infrastructure. Unfortunately, we are left to wonder. Texas, which bears the burden of proof, submitted absolutely nothing to counter this testimony or to show whether its DPS offices are reachable via public transportation.

None of the burdens associated with obtaining an EIC has ever before been imposed on Texas voters. Based on the record evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote in the next election. This is retrogression. *See Bossier Parish II,* 528 U.S. at 324.

Significantly, Texas disputes none of the facts underlying this conclusion-not the $22 cost for a birth certificate, not the distance between DPS offices, not the poverty rates for minorities in Texas, not the disproportionate vehicle access rates. Instead, in a hodgepodge of arguments, Texas seeks to downplay SB 14's impact, contending, in essence, that the law's retrogressive effect will not be particularly severe. In addition, Texas insists that courts may not legally consider nonracial factors like poverty when determining whether a law warrants section 5 preclearance. We address each argument in turn.

In support of its assertion that the burdens imposed by SB 14 are less onerous than they may seem, Texas contends that because disabled voters and those over the age of 65 will be able to vote absentee, they are "[un]affected by SB 14's photo ID requirement." Texas Proposed Findings, ECF No.

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202 at 18. Texas also points out that the $22 fee for a birth certificate will only affect voters who lack the underlying documentation needed for an EIC. And, the state assures us, Texans will not really mind traveling long distances to obtain an EIC. For "the people who choose to live in that part of Texas," Texas's counsel stated during closing arguments, "it's just a reality of life that they have to drive long distances." Trial Tr. 7/13/2012 52:16–18.

***30** These arguments lack merit. To begin with, voters eligible for absentee ballots will not be "exempt" from SB 14. *See supra* at part III.B.1. Some voters over age 65 will undoubtedly prefer to cast their ballots at the polls—perhaps out of habit, a sense of civic pride, or simply because they wish to follow the news all the way up to Election Day before selecting a candidate. Reverend Peter Johnson, an African American clergyman and a leader in Texas's civil rights community testified:

> I have a group of African–American senior citizen women, they want to go to the voting polls and stand in line and vote at the voting polls. There's a certain degree of dignity for them to do this.... Because these people appreciate this sacred right to vote, and they're not going to vote absentee.

Trial Tr. 7/11/2012 (PM) 6:1–9. If these "senior citizen women"—or any other voters over 65—wish to cast an in-person ballot, they will not be permitted to do so unless they can produce an SB 14–qualifying photo ID.

In any event, even if, as Texas asserts, this so-called "allowance" for elderly voters, together with SB 14's special procedures for disabled voters, were to reduce the overall number of people affected by the law, we have no reason to believe that they would mitigate SB 14's disproportionate effect on racial minorities. To the contrary, at least with respect to voters over 65, record evidence indicates that any "benefit" will disproportionately accrue to white Texans. Undisputed census data shows that 19.4% of the white voting age population in Texas is over 65, compared to just 10.6% of African Americans and 8.7% of Hispanics. Defendant–Intervenors' Ex. 118. This suggests that far more white voters than minorities will be eligible to cast absentee ballots. Texas offers nothing to counter this evidence, much less provides any reason to believe that SB 14's absentee provisions will mitigate its retrogressive effect on minorities.

Texas's failure to support its factual assertions dooms its other claims as well. If the state believes that only a few Texans lack certified copies of their birth certificate, it should have produced evidence to that effect. The same is true with respect to its claim that Texans are preternaturally unperturbed by the prospect of traveling 200 to 250 miles. And for either of these propositions to have been relevant to the issue before us, Texas would have to have provided evidence that they mitigate SB 14's retrogressive effect on minority voters. Because Texas has offered no record evidence for either the truth of its contentions or their effect on racial minorities, we give no credence to this line of argument.

This brings us to Texas's second—and primary—argument. Relying on the literal language of section 5, which prohibits states from "denying or abridging the right to vote *on account* of race or color," or "*because* [a voter] is a member of a language minority group," 42 U.S.C. §§ 1973c(a), 1973b(f)(2) (emphasis added), Texas argues:

> ***31** The "effects" prong of section 5 does not extend to laws that merely have a disparate impact on the races. It allows courts to deny preclearance only if the effect of SB 14 is to deny or abridge the right to vote "*on account of* " race or color, or " *because of* " one's membership in a language minority group.

Texas Proposed Findings, ECF No. 202 at 44. According to Texas, if SB 14 denies or abridges the right to vote at all, it does so "on account of" factors like poverty or lack of vehicular access. To be sure, these factors may correlate with racial

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minority status, but because disenfranchisement is proximately caused by something other than race, Texas contends, this court may not deny preclearance under section 5's effect element. Indeed, Texas believes that its reading of section 5 is constitutionally compelled because "the Constitution does not allow ... federal officials to deny preclearance to State laws *that do not violate the Fifteenth Amendment* "—i.e., that do not directly discriminate on the basis of race. Texas Proposed Findings, ECF No. 202 at 46. "At the very least," Texas concludes, "*Northwest Austin* compels courts to construe section 5 to avoid this grave constitutional question absent specific and unambiguous statutory language to the contrary." *Id.*

For several reasons, we find this argument entirely unpersuasive. To begin with, as explained above, Congress passed the Voting Rights Act precisely to prohibit election devices proximately based on something other than race—"notorious devices" such as "poll taxes, literacy tests, grandfather clauses, and property qualifications." *Shelby Cnty.*, 679 F.3d at 853; *see also Allen*, 393 U.S. at 565 (holding that the purpose of the Voting Rights Act was to eliminate "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race"). In fact, the very point of such devices was that they were supposedly "race neutral," thus giving states an end-run around the Fifteenth Amendment's prohibition on racial discrimination in voting. Yet under Texas's interpretation, section 5's effect element could not have reached any of these laws. As Texas's counsel stated, "certainly I'm not promoting a literacy test, but if the evidence was that it didn't deny or abridge the right to vote on account of color and there was no racially discriminatory purpose ... you could have no violation under [section 5's] standards." Trial Tr. 7/13/2012 30:15–20. We cannot accept an interpretation of section 5 that would so severely constrain courts' ability to block precisely the type of "evil" that the Voting Rights Act was meant to address. *Katzenbach*, 383 U.S. at 328.

Moreover, Texas's reading of section 5 collapses its effect element into its purpose element. After all, any law that would deny or abridge the right to vote directly on account of race—e.g., a law that disenfranchises African Americans *because* they are African Americans—would have been enacted with a discriminatory purpose. And, to be clear, this is the only type of law Texas thinks section 5's effect element reaches, thus rendering the purpose and effect elements coterminous. But section 5 quite clearly has two separate and distinct requirements: covered states must prove that a change in voting procedures "*neither* has the purpose *nor* will have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c(a) (emphasis added). As the Supreme Court has repeatedly explained, "[w]e must have regard to all the words used by Congress, and as far as possible give effect to them." *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (quoting *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 475 (1911)). Interpreting "purpose" and "effect" as synonymous would run afoul of this principle. The Supreme Court has said as much, emphasizing that "Congress *plainly* intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent." *City of Rome v. United States*, 446 U.S. 156, 172 (1980) (first emphasis added).

***32** Finally—and unsurprisingly given both the purpose of the Voting Rights Act and section 5's plain text—Texas cites no authority for its novel reading of the statute. For decades, courts have applied the Supreme Court's longstanding interpretation of section 5's effect element, requiring covered states to prove that none of their "voting-procedure changes ... would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Never has a court excused "retrogression in the position of racial minorities" because that retrogression was proximately caused by something other than race.

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As we have indicated throughout this opinion, we are sensitive to the concerns raised in *Northwest Austin*. *See supra* Part I at 9–11, Part II at 19–23. But to hold, as Texas urges, that section 5 applies only to voting changes that themselves violate the Fifteenth Amendment would require us to ignore section 5's purpose and structure, as well as decades of Supreme Court decisions interpreting its language. We see nothing in *Northwest Austin* that would permit, much less require, this "inferior" court to undertake such a dramatic departure from well-established law.

IV.

To sum everything up: section 5 prohibits covered states from implementing voting laws that will have a retrogressive effect on racial minorities. *See Beer,* 425 U.S. at 141. Texas, seeking to implement its voter ID law, bears the burden of proof and must therefore show that SB 14 lacks retrogressive effect. *Georgia,* 411 U.S. at 538. But as we have found, everything Texas has submitted as affirmative evidence is unpersuasive, invalid, or both. Moreover, uncontested record evidence conclusively shows that the implicit costs of obtaining SB 14–qualifying ID will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty. We therefore conclude that SB 14 is likely to lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141. Given this, and given that Texas must show that SB 14 lacks *both* discriminatory purpose and effect, we have no need to examine whether the law was enacted with discriminatory purpose. Accordingly, we shall deny Texas's request for declaratory relief.

In reaching this conclusion, we emphasize the narrowness of this opinion. Specifically, we have decided nothing more than that, in this particular litigation and on this particular record, Texas has failed to demonstrate that its particular voter ID law lacks retrogressive effect. Nothing in this opinion remotely suggests that section 5 bars all covered jurisdictions from implementing photo ID laws. To the contrary, under our reasoning today, such laws might well be precleared if they ensure (1) that all prospective voters can easily obtain free photo ID, and (2) that any underlying documents required to obtain that ID are truly free of charge. Indeed, Georgia's voter ID law was precleared by the Attorney General—and probably for good reason. Unlike SB 14, the Georgia law requires each county to provide free election IDs, and further allows voters to present a wide range of documents to obtain those IDs. Ga.Code Ann. § 21–2–417.1(a); Ga. Elec.Code 183–1–20–.01. The contrast with Senate Bill 14 could hardly be more stark.

***33** Finally, during closing arguments, Texas's counsel complained that they had been shouldered with an "impossible burden" in this litigation. Trial Tr. 7/13/2012 27:14. This may well be correct, but Texas's lawyers have only their client to blame. The State of Texas enacted a voter ID law that—at least to our knowledge—is the most stringent in the country. That law will almost certainly have retrogressive effect: it imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty. And crucially, the Texas legislature defeated several amendments that could have made this a far closer case. Ignoring warnings that SB 14, as written, would disenfranchise minorities and the poor, *see, e.g.,* JA 1300–03; 1329, the legislature tabled or defeated amendments that would have:

- waived all fees for indigent persons who needed the underlying documents to obtain an EIC, Trial Tr. 7/12/2012 (AM) 30:17–31:7, 33:23–24;

- reimbursed impoverished Texans for EIC-related travel costs, JA 2139–42;

- expanded the range of identifications acceptable under SB 14 by allowing voters to present student or Medicare ID cards at the polls, Trial Tr. 7/12/2012 (AM) 34:21–24; JA 1246–47;

- required DPS offices to remain open in the

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evening and on weekends, JA 1337; and

• allowed indigent persons to cast provisional ballots without photo ID. Trial Tr. 7/12/2012 (AM) 35:3–37:1.

Put another way, if counsel faced an "impossible burden," it was because of the law Texas enacted—nothing more, nothing less.

V.

For the foregoing reasons, we deny Texas's request for a declaratory judgment. The parties are hereby ordered to meet and confer as to a schedule to govern the constitutional issue and to file an advisory within 14 days with a proposed schedule. A separate order has been filed on this date.

D.D.C.,2012.
Texas v. Holder
--- F.Supp.2d ----, 2012 WL 3743676 (D.D.C.)

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Supreme Court of the United States
William CRAWFORD et al., Petitioners,
v.
MARION COUNTY ELECTION BOARD et al.
Indiana Democratic Party, et al., Petitioners,
v.
Todd Rokita, Indiana Secretary of State, et al.

Nos. 07–21, 07–25.
April 28, 2008.
Argued Jan. 9, 2008.
Decided April 28, 2008.

Background: Political party, party committee, state representative, elected public official, and nonprofit organizations brought action against county election board, Secretary of State, and Election Division directors, challenging state law requiring government issued photo identification to vote, as violative of the Fourteenth Amendment right to vote. The state of Indiana intervened to defend the validity of the statute. The United States District Court for the Southern District of Indiana, Sarah Evans Barker, J., 458 F.Supp.2d 775, granted summary judgment in favor of defendants. Plaintiffs appealed. The Court of Appeals, Posner, Circuit Judge, 472 F.3d 949, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Stevens, held that state's interests identified as justifications for Indiana statute requiring government issued photo identification to vote were sufficiently weighty to justify any limitation imposed on voters.

Affirmed.

Justice Scalia, with whom Justice Thomas and Justice Alito joined, concurred in judgment and filed opinion.

Justice Souter, with whom Justice Ginsburg joined, dissented and filed opinion.

Justice Breyer dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 ⚷3635

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Under equal protection standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚷3635

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy equal protection standard set forth in *Harper*. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚷3635

92 Constitutional Law

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92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Constitutional Law 92 ⚷3636

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3636 k. Political parties in general. Most Cited Cases

To satisfy equal protection standard, state law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚷3648

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3647 Qualifications of Voters
92k3648 k. In general. Most Cited Cases

Elections 144 ⚷9

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k8 Statutory Provisions Conferring or Defining Right
144k9 k. Constitutionality and validity. Most Cited Cases

State's interests identified as justifications for Indiana statute requiring government issued photo identification to vote, including deterring and detecting voter fraud, participating in a nationwide effort to improve and modernize election procedures, and safeguarding voter confidence, were sufficiently weighty to justify, under equal protection standard, any limitation imposed on voters.(Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; West's A.I.C. 3–11–8–25.1(e).

[5] Constitutional Law 92 ⚷656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

A facial challenge must fail where the statute has a plainly legitimate sweep. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.)

[6] Constitutional Law 92 ⚷1466

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1466 k. Voting rights and suffrage in general. Most Cited Cases

When evaluating a neutral, nondiscriminatory regulation of voting procedure, a court must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. (Per Justice Stevens with two Justices concurring and three Justices concurring in the judgment.)

*****1611 *181** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared

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by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After Indiana enacted an election law (SEA 483) requiring citizens voting in person to present government-issued photo identification, petitioners filed separate suits challenging the law's constitutionality. Following discovery, the District Court granted respondents summary judgment, finding the evidence in the record insufficient to support a facial attack on the statute's validity. In affirming, the Seventh Circuit declined to judge the law by the strict standard set for poll taxes in *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, finding the burden on voters offset by the benefit of reducing the risk of fraud.

Held: The judgment is affirmed.

472 F.3d 949, affirmed.

Justice STEVENS, joined by THE CHIEF JUSTICE and Justice KENNEDY, concluded that the evidence in the record does not support a facial attack on SEA 483's validity. Pp. 1615 – 1624.

(a) Under *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. However, "even handed restrictions" protecting the "integrity and reliability of the electoral process itself" satisfy *Harper*'s standard. *Anderson v. Celebrezze,* 460 U.S. 780, 788, n. 9, 103 S.Ct. 1564, 75 L.Ed.2d 547. A state law's burden on a political party, an individual voter, or a discrete class of voters must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman v. Reed,* 502 U.S. 279, 288–289, 112 S.Ct. 698, 116 L.Ed.2d 711. Pp. 1615 – 1617.

(b) Each of Indiana's asserted interests is unquestionably relevant to its interest in protecting the integrity and reliability of the electoral process. The first is the interest in deterring and detecting voter fraud. Indiana has a valid interest in participating in a nationwide effort to improve and modernize election procedures criticized as antiquated and inefficient. Indiana also claims a particular interest in preventing voter fraud in response to the problem of voter registration rolls with a large number of names of persons who are either deceased or no longer live in Indiana. While the record contains no evidence ***182** that the fraud SEA 483 addresses—in-person voter impersonation at polling places—has actually occurred in Indiana, such fraud has occurred in other parts of the country, and Indiana's own experience with voter fraud in a 2003 mayoral****1612** primary demonstrates a real risk that voter fraud could affect a close election's outcome. There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes. Finally, Indiana's interest in protecting public confidence in elections, while closely related to its interest in preventing voter fraud, has independent significance, because such confidence encourages citizen participation in the democratic process. Pp. 1617 – 1620.

(c) The relevant burdens here are those imposed on eligible voters who lack photo identification cards that comply with SEA 483. Because Indiana's cards are free, the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters' right to vote, or represent a significant increase over the usual burdens of voting. The severity of the somewhat heavier burden that may be placed on a limited number of persons—*e.g.,* elderly persons born out of state, who may have difficulty obtaining a birth certificate—is mitigated by the fact that eligible voters without photo identification may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court clerk's office. Even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek. Pp. 1620 – 1623.

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(d) Petitioners bear a heavy burden of persuasion in seeking to invalidate SEA 483 in all its applications. This Court's reasoning in *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 applies with added force here. Petitioners argue that Indiana's interests do not justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office, but it is not possible to quantify, based on the evidence in the record, either that burden's magnitude or the portion of the burden that is fully justified. A facial challenge must fail where the statute has a " 'plainly legitimate sweep.' " *Id.,* at ——, 128 S.Ct., at 1190. When considering SEA 483's broad application to all Indiana voters, it "imposes only a limited burden on voters' rights." *Burdick v. Takushi,* 504 U.S. 428, 439, 112 S.Ct. 2059, 119 L.Ed.2d 245. The "precise interests" advanced by Indiana are therefore sufficient to defeat petitioners' facial challenge. *Id.,* at 434, 112 S.Ct. 2059. Pp. 1623 – 1624.

(e) Valid neutral justifications for a nondiscriminatory law, such as SEA 483, should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. Pp. 1623 – 1624.

***183** Justice SCALIA, joined by Justice THOMAS and Justice ALITO, was of the view that petitioners' premise that the **voter-identification** law might have imposed a special burden on some voters is irrelevant. The law should be upheld because its overall burden is minimal and justified. A law respecting the right to vote should be evaluated under the approach in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245, which calls for application of a deferential, "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote, *id.,* at 433–434, 112 S.Ct. 2059. The different ways in which Indiana's law affects different voters are no more than different impacts of the single burden that the law uniformly imposes on all voters: To vote in person, everyone must have and present a photo identification that can be obtained for free. This is ****1613** a generally applicable, nondiscriminatory voting regulation. The law's universally applicable requirements are eminently reasonable because the burden of acquiring, possessing, and showing a free photo identification is not a significant increase over the usual voting burdens, and the State's stated interests are sufficient to sustain that minimal burden. Pp. 1613 – 1616.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined. BREYER, J., filed a dissenting opinion.
Paul M. Smith, for Petitioners.

Thomas M. Fisher, for Respondents.

Paul D. Clement, for United States as amicus curiae, by special leave of the Court, supporting the Respondents.

Kenneth J. Falk, Jacquelyn Bowie Suess, Gavin M. Rose, Indianapolis, IN, Laughlin McDonald, Neil T. Bradley, Atlanta, GA, Steven R. Shapiro, New York, NY, Pamela S. Karlan, Jeffrey L. Fisher, Stanford, CA, for Petitioners.

Angela Ciccolo, Victor L. Goode, Assistant General Counsel, Baltimore, MD, for Petitioner Indianapolis Branch of the NAACP.

James B. Osborn, Indianapolis, IN, Jon Laramore, Baker and Daniels, Indianapolis, IN, for Respondent, Marion County Election Board.

Steve Carter, Attorney General, Thomas M. Fisher, Solicitor General, Julie A. Brubaker, Heather L. Hagan, Deputy Attorneys General, for State Respondents.

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For U.S. Supreme Court briefs, see:2007 WL 3276506 (Pet.Brief)2007 WL 3276507 (Pet.Brief)2007 WL 4232929 (Resp.Brief)2007 WL 4232930 (Resp.Brief)2007 WL 4618316 (Reply.Brief)2007 WL 4466632 (Reply.Brief)

Justice STEVENS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and Justice KENNEDY join.

***185** At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

Referred to as either the "Voter ID Law" or "SEA 483," FN1 the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee***186** ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. Ind.Code Ann. § 3–11–8–25.1(e) (West Supp.2007). A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the ****1614** election. §§ 3 –11.7–5–1, 3–11.7–5–2.5(c) (West 2006). FN2 A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk's office within 10 days. § 3–11.7–5–2.5(b). No photo identification is required in order to register to vote, FN3 and the State offers free photo identification to qualified voters able to establish their residence and identity. § 9–24–16–10(b) (West Supp.2007). FN4

FN1. Senate Enrolled Act No. 483, 2005 Ind. Acts p.2005.

FN2. The affidavit must state that (1) the person executing the affidavit is the same individual who cast the provisional ballot on election day; and (2) the affiant is indigent and unable to obtain proof of identification without paying a fee or has a religious objection to being photographed. Ind.Code Ann. § 3–11.7–5–2.5(c). If the election board determines that the challenge to the affiant was based solely on a failure to present photo identification, the "county election board shall ... find that the voter's provisional ballot is valid." § 3–11.7–5–2.5(d).

FN3. Voters registering to vote for the first time in Indiana must abide by the requirements of the Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, described *infra*, at 1617 – 1618.

FN4. Indiana previously imposed a fee on all residents seeking a state-issued photo identification. At the same time that the Indiana Legislature enacted SEA 483, it also directed the Bureau of Motor Vehicles (BMV) to remove all fees for state-issued photo identification for individuals without a driver's license who are at least 18 years old. See 2005 Ind. Acts p.2017, § 18.

Promptly after the enactment of SEA 483 in 2005, the Indiana Democratic Party and the Marion County Democratic Central Committee (Democrats) filed suit in the Federal District Court for the Southern District of Indiana against the ***187** state officials responsible for its enforcement, seeking a judgment declaring the Voter ID Law invalid and enjoining its enforcement. A second suit seeking the same relief was brought on behalf of

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two elected officials and several nonprofit organizations representing groups of elderly, disabled, poor, and minority voters.[FN5] The cases were consolidated, and the State of Indiana intervened to defend the validity of the statute.

FN5. Specifically, the plaintiffs were William Crawford, Joseph Simpson, Concerned Clergy of Indianapolis, Indianapolis Resource Center for Independent Living, Indiana Coalition on Housing and Homeless Issues, Indianapolis Branch of the National Association for the Advancement of Colored People, and United Senior Action of Indiana. Complaint in No. 49012050 4PL01 6207 (Super. Ct. Marion Cty., Ind., Apr. 28, 2005), p. 2.

The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification. Second Amended Complaint in No. 1: 05–CV–0634–SEB–VSS (SD Ind.), pp. 6–9.

After discovery, District Judge Barker prepared a comprehensive 70–page opinion explaining her decision to grant defendants' motion for summary judgment. 458 F.Supp.2d 775 (S.D.Ind.2006). She found that petitioners had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements." *Id.,* at 783. She rejected "as utterly incredible and unreliable" an expert's report that up to 989,000 registered voters in Indiana did not possess either a driver's license or other acceptable photo identification. *Id.,* at 803. She estimated ****1615** that as of 2005, when the statute was enacted, ***188** around 43,000 Indiana residents lacked a state-issued driver's license or identification card. *Id.,* at 807.[FN6]

FN6. She added: "In other words, an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements of SEA 483." 458 F.Supp.2d, at 807. Given the availability of free photo identification and greater public awareness of the new statutory requirement, presumably that percentage has increased since SEA 483 was enacted and will continue to increase in the future.

A divided panel of the Court of Appeals affirmed. 472 F.3d 949 (C.A.7 2007). The majority first held that the Democrats had standing to bring a facial challenge to the constitutionality of SEA 483. Next, noting the absence of any plaintiffs who claimed that the law would deter them from voting, the Court of Appeals inferred that "the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls." *Id.,* at 952. It rejected the argument that the law should be judged by the same strict standard applicable to a poll tax because the burden on voters was offset by the benefit of reducing the risk of fraud. The dissenting judge, viewing the justification for the law as "hollow"—more precisely as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic"—would have applied a stricter standard, something he described as "close to 'strict scrutiny light.' " *Id.,* at 954, 956 (opinion of Evans, J.). In his view, the "law imposes an undue burden on a recognizable segment of potential eligible voters" and therefore violates their rights under the First and Fourteenth Amendments to the Constitution. *Id.,* at 956–957.

Four judges voted to grant a petition for rehearing en banc. 484 F.3d 436, 437 (CA7 2007) (Wood, J., dissenting from denial of rehearing en banc). Because we agreed with their assessment of the importance of these cases, we granted certiorari. 551

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U.S. 1192, 128 S.Ct. 33, 34, 168 L.Ed.2d 809 (2007). We are, however, ***189** persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm. FN7

FN7. We also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of SEA 483 and that there is no need to decide whether the other petitioners also have standing.

I

In *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. See *id.,* at 685, 86 S.Ct. 1079 (opinion of Harlan, J.). Applying a stricter standard, we concluded that a State "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.,* at 666, 86 S.Ct. 1079 (opinion of the Court). We used the term "invidiously discriminate" to describe conduct prohibited under that standard, noting that we had previously held that while a State may obviously impose "reasonable residence restrictions on the availability of the ballot," it "may not deny the opportunity to vote to a bona fide resident ****1616** merely because he is a member of the armed services." *Id.,* at 666–667, 86 S.Ct. 1079 (citing *Carrington v. Rash,* 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965)). Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications.

[1][2] Thus, under the standard applied in *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), however, we confirmed the general rule that "evenhanded restrictions that protect the ***190** integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*. 460 U.S., at 788, n. 9, 103 S.Ct. 1564. Rather than applying any "litmus test" that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the "hard judgment" that our adversary system demands.

[3] In later election cases we have followed *Anderson* 's balancing approach. Thus, in *Norman v. Reed,* 502 U.S. 279, 288–289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), after identifying the burden Illinois imposed on a political party's access to the ballot, we "called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation," and concluded that the "severe restriction" was not justified by a narrowly drawn state interest of compelling importance. Later, in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), we applied *Anderson* 's standard for " 'reasonable, nondiscriminatory restrictions,' " 504 U.S., at 434, 112 S.Ct. 2059, and upheld Hawaii's prohibition on write-in voting despite the fact that it prevented a significant number of "voters from participating in Hawaii elections in a meaningful manner," *id.,* at 443, 112 S.Ct. 2059 (KENNEDY, J., dissenting). We reaffirmed *Anderson* 's requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the " 'precise interests put forward by the State as justifications for the burden imposed by its rule.' " 504 U.S., at 434, 112 S.Ct. 2059 (quoting *Anderson,* 460 U.S., at 789, 103 S.Ct. 1564). FN8

FN8. Contrary to Justice SCALIA's suggestion, see *post,* at 1624 – 1625 (opinion

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concurring in judgment), our approach remains faithful to *Anderson* and *Burdick*. The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*, see 504 U.S., at 434, 112 S.Ct. 2059, and repeatedly cited *Anderson*, see 504 U.S., at 436, n. 5, 440, n. 9, 441, 112 S.Ct. 2059. To be sure, *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote; but in its place, the Court applied the "flexible standard" set forth in *Anderson*. 504 U.S., at 434, 112 S.Ct. 2059. *Burdick* surely did not create a novel "deferential 'important regulatory interests' standard." See *post*, at 1624 – 1625.

***191** In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Norman*, 502 U.S., at 288–289, 112 S.Ct. 698. We therefore begin our analysis of the constitutionality of Indiana's statute by focusing on those interests.

II

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential****1617** voters. While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified. Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.

The first is the interest in deterring and detecting voter fraud. The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.[FN9] The State also argues that it has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration—namely, that Indiana's voter registration rolls include a large number of names of persons who are either deceased or no longer live in Indiana. Finally, the State relies on its interest in safeguarding voter confidence. Each of these interests merits separate comment.

FN9. See National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 18 (2002) (with Honorary Co-chairs former Presidents Gerald Ford and Jimmy Carter).

***192** *Election Modernization*

Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote.

In the National Voter Registration Act of 1993 (NVRA), 107 Stat. 77, 42 U.S.C. § 1973gg *et seq.*, Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process. § 1973gg. The statute requires state motor vehicle driver's license applications to serve as voter registration applications. § 1973gg–3. While that requirement has increased the number of registered voters, the statute also contains a provision restricting States' ability to remove names from the lists of registered voters. § 1973gg–6(a)(3). These protections have been partly responsible for inflated lists of registered voters. For example, evidence credited by Judge Barker estimated that as of 2004 Indiana's voter rolls were inflated by as much as 41.4%, see 458 F.Supp.2d, at 793, and data collected by the Election Assistance Committee in 2004 indicated that 19 of 92 Indiana counties had registration totals exceeding 100% of the 2004 voting-age population, Dept. of Justice Complaint in *United States v. Indi-*

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ana, No. 1:06–cv–1000–RLY–TAB (SD Ind., June 27, 2006), p. 4, App. 313.

In HAVA, Congress required every State to create and maintain a computerized statewide list of all registered voters. 42 U.S.C. § 15483(a) (2000 ed., Supp. V). HAVA also requires the States to verify voter information contained in a voter registration application and specifies either an "applicant's driver's license number" or "the last 4 digits of the applicant's social security number" as acceptable verifications. § 15483(a)(5)(A)(i). If an individual has neither number, the State is required to assign the applicant a **voter identification** number. § 15483(a)(5)(A)(ii).

***193** HAVA also imposes new identification requirements for individuals registering to vote for the first time who submit their applications by mail. If the voter is casting his ballot in person, he must present local election officials with written identification, which may be either "a current and ****1618** valid photo identification" or another form of documentation such as a bank statement or paycheck. § 15483(b)(2)(A). If the voter is voting by mail, he must include a copy of the identification with his ballot. A voter may also include a copy of the documentation with his application or provide his driver's license number or Social Security number for verification. § 15483(b)(3). Finally, in a provision entitled "Fail-safe voting," HAVA authorizes the casting of provisional ballots by challenged voters. § 15483(b)(2)(B).

Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology. That conclusion is also supported by a report issued shortly after the enactment of SEA 483 by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases. In the introduction to their discussion of **voter identification**, they made these pertinent comments:

> "A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own ***194** apartment building let alone their precinct, some form of identification is needed.
>
> "There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136–137 (Carter–Baker Report) (footnote omitted).[FN10]

FN10. The historical perceptions of the Carter–Baker Report can largely be confirmed. The average precinct size in the United States has increased in the last century, suggesting that it is less likely that poll workers will be personally acquainted with voters. For example, at the time Joseph Harris wrote his groundbreaking 1934 report on election administration, Indiana restricted the number of voters in each precinct to 250. J. Harris, Election Administration in the United States 208 (Brookings Institution 1934). An Election Commission report indicates that Indiana's average number of registered voters per polling place is currently 1,014. Election

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Assistance Commission, Final Report of the 2004 Election Day Survey, ch. 13 (Sept.2005) (Table 13) (hereinafter Final Report) (prepared by Election Data Services, Inc.), online at http:// www. eac. gov/ clearing house/ clearing house/ 2004– election– day– survey (all Internet materials as visited Apr. 16, 2008, and available in Clerk of Court's case file). In 1930, the major cities that Harris surveyed had an average number of voters per precinct that ranged from 247 to 617. Election Administration in the United States, at 214. While States vary today, most have averages exceeding 1,000, with at least eight States exceeding 2,000 registered voters per polling place. Final Report, ch. 13 (Table 13).

Voter Fraud

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation****1619** at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing ***195** such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists,[FN11] that occasional examples have surfaced in recent years,[FN12] and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor[FN13]—though perpetrated using absentee ballots and not ***196** in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

FN11. One infamous example is the New York City elections of 1868. William (Boss) Tweed set about solidifying and consolidating his control of the city. One local tough who worked for Boss Tweed, "Big Tim" Sullivan, insisted that his "repeaters" (individuals paid to vote multiple times) have whiskers:

" 'When you've voted 'em with their whiskers on you take 'em to a barber and scrape off the chin-fringe. Then you vote 'em again with the side lilacs and a mustache. Then to a barber again, off comes the sides and you vote 'em a third time with the mustache. If that ain't enough and the box can stand a few more ballots clean off the mustache and vote 'em plain face. That makes every one of 'em good for four votes.' " A. Callow, The Tweed Ring 210 (1966) (quoting M. Werner, Tammany Hall 439 (1928)).

FN12. Judge Barker cited record evidence containing examples from California, Washington, Maryland, **Wisconsin**, Georgia, Illinois, Pennsylvania, Missouri, Miami, and St. Louis. The Brief for Brennan Center for Justice et al. as *Amici Curiae* in Support of Petitioners addresses each of these examples of fraud. While the brief indicates that the record evidence of in-person fraud was overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud, there remain scattered instances of in-person voter fraud. For example, after a hotly contested gubernatorial election in 2004, Washington conducted an investigation of voter fraud and uncovered 19 "ghost voters." *Borders v. King Cty.*, No. 05–2–00027–3 (Super. Ct. Chelan Cty., Wash., June 6, 2005) (verbatim report of unpublished oral decision), 4 Election L.J. 418, 423 (2005). After a partial investigation of the ghost voting, one voter was confirmed to have committed in-person voting fraud. Le & Nicolosi, Dead Voted in Governor's Race, Seattle Post–Intelligencer, Jan. 7, 2005, p. A1.

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FN13. See *Pabey v. Pastrick,* 816 N.E.2d 1138, 1151 (Ind.2004) (holding that a special election was required because one candidate engaged in "a deliberate series of actions ... making it impossible to determine the candidate who received the highest number of legal votes cast in the election"). According to the uncontested factual findings of the trial court, one of the candidates paid supporters to stand near polling places and encourage voters—especially those who were poor, infirm, or spoke little English—to vote absentee. The supporters asked the voters to contact them when they received their ballots; the supporters then "assisted" the voter in filling out the ballot.

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

In its brief, the State argues that the inflation of its voter rolls provides further support for its enactment of SEA 483. The record contains a November 5, 2000, newspaper article asserting that as a result of NVRA and "sloppy record keeping," Indiana's lists of registered voters included the names of thousands of persons who had either moved, died, or were ****1620** not eligible to vote because they had been convicted of felonies.[FN14] The conclusion that Indiana has an unusually inflated list of registered voters is supported by the entry of a consent decree in litigation brought by the Federal Government alleging violations of NVRA. Consent Decree and Order in *United States v. Indiana,* No. 1:06–cv–1000–RLY–TAB (SD Ind., June 27, 2006), App. 299–307. Even though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral ***197** and nondiscriminatory reason supporting the State's decision to require photo identification.

FN14. Theobald, Bogus Names Jam Indiana's Voter List, Indianapolis Star, Nov. 5, 2000, App. 145.

Safeguarding Voter Confidence

Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." Brief for State Respondents, No. 07–25, p. 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Supra,* at 1618.

III

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of States have relied primarily on photo identification.[FN15] A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to ***198** cast a provisional ballot provides an adequate rem-

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edy for problems of that character.

FN15. For a survey of state practice, see Brief for Texas et al. as *Amici Curiae* 10–14, and nn. 1–23.

The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483.[FN16] The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning****1621** in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.[FN17]

FN16. Ind.Code Ann. § 3–5–2–40.5 (West 2006) requires that the document satisfy the following:

"(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

"(2) The document shows a photograph of the individual to whom the document was issued.

"(3) The document includes an expiration date, and the document:

"(A) is not expired; or

"(B) expired after the date of the most recent general election.

"(4) The document was issued by the United States or the state of Indiana."

FN17. To obtain a photo identification card a person must present at least one "primary" document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport. Ind. Admin. Code, tit. 140, § 7–4–3 (2008), http://www.in.gov/legislative/iact/T01400/A00070.pdf?. Indiana, like most States, charges a fee for obtaining a copy of one's birth certificate. This fee varies by county and is currently between $3 and $12. See Indiana State Department of Health Web page, http:// www. in. gov/ isdh/ bdcertifs/ lhdfees/ toc. htm. Some States charge substantially more. Affidavit of Robert Andrew Ford, App. 12.

***199** Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate;[FN18] persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

FN18. As petitioners note, Brief for Petitioners in No. 07–21, p. 17, n. 7, and the State's "Frequently Asked Questions" Web page states, it appears that elderly persons who can attest that they were never issued a birth certificate may present other forms

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of identification as their primary document to the Indiana BMV, including Medicaid/ Medicare cards and Social Security benefits statements. http:// www. in. gov/ faqs. htm; see also Ind. Admin. Code, tit. 140, § 7–4–3(a) "The commissioner or the commissioner's designee may accept reasonable alternate documents to satisfy the requirements of this rule").

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters,[FN19] that ***200** conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

FN19. Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election. It is, however, difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballots subject to later verification in every election when the BMV is able to issue these citizens special licenses that enable them to drive without any photo identification. See Ind.Code Ann. § 9–24–11–5(c) (West Supp.2007).

IV

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. Only a few weeks ago we held that the ****1622** Court of Appeals for the Ninth Circuit had failed to give appropriate weight to the magnitude of that burden when it sustained a preelection, facial attack on a Washington statute regulating that State's primary election procedures. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Our reasoning in that case applies with added force to the arguments advanced by petitioners in these cases.

[4] Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification; Judge Barker found petitioners' expert's report to be "utterly incredible and unreliable." 458 F.Supp.2d, at 803. Much of the argument about the numbers of such voters comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.

***201** Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. The record includes depositions of two case managers at a day shelter for homeless persons and the depositions of members of the plaintiff organizations, none of whom expressed a personal inability to vote under SEA 483. A deposition from a named plaintiff describes the difficulty the elderly woman had in obtaining an identification card, although her testimony indicated that she intended to return to the BMV since she had recently obtained her birth certificate and that she was able to pay the birth certi-

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ficate fee. App. 94.

Judge Barker's opinion makes reference to six other elderly named plaintiffs who do not have photo identifications, but several of these individuals have birth certificates or were born in Indiana and have not indicated how difficult it would be for them to obtain a birth certificate. 458 F.Supp.2d, at 797–799. One elderly named plaintiff stated that she had attempted to obtain a birth certificate from Tennessee, but had not been successful, and another testified that he did not know how to obtain a birth certificate from North Carolina. The elderly in Indiana, however, may have an easier time obtaining a photo identification card than the nonelderly, see n. 17, *supra*, and although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification.

The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. While one elderly man stated that he did not have the money to pay for a birth certificate, when asked if he did not have the money or did not wish to spend it, he replied, "both." App. 211–212. From this limited evidence we do not know the magnitude of the impact SEA 483 will have on indigent voters in Indiana. The record does contain the affidavit of one homeless ***202** woman who has a copy of ****1623** her birth certificate, but was denied a photo identification card because she did not have an address. *Id.*, at 67. But that single affidavit gives no indication of how common the problem is.

[5] In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. See *Storer v. Brown*, 415 U.S. 724, 738, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).[FN20] A facial challenge must fail where the statute has a " ' "plainly legitimate sweep." ' " *Washington State Grange*, 552 U.S., at ——, 128 S.Ct., at 1190 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–740, and n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (STEVENS, J., concurring in judgments)). When we consider only the statute's broad ***203** application to all Indiana voters we conclude that it " imposes only a limited burden on voters' rights." *Burdick*, 504 U.S., at 439, 112 S.Ct. 2059. The " 'precise interests' " advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483. *Id.*, at 434, 112 S.Ct. 2059.

FN20. Three comments on Justice SOUTER's speculation about the nontrivial burdens that SEA 483 may impose on "tens of thousands" of Indiana citizens, *post*, at 1627 (dissenting opinion), are appropriate. First, the fact that the District Judge estimated that when the statute was passed in 2005, 43,000 citizens did not have photo identification, see 458 F.Supp.2d 775, 807 (S.D.Ind.2006), tells us nothing about the number of free photo identification cards issued since then. Second, the fact that public transportation is not available in some Indiana counties tells us nothing about how often elderly and indigent citizens have an opportunity to obtain a photo identification at the BMV, either during a routine outing with family or friends or during a special visit to the BMV arranged by a civic or political group such as the League of Women Voters or a political party. Further, nothing in the record establishes the distribution of voters who lack photo identification. To the extent that the evidence sheds any light on that issue, it suggests that such voters reside primarily in metropolitan areas, which are served by public transportation in Indiana (the majority of the plaintiffs reside in Indianapolis and several of the organizational plaintiffs are Indianapolis organizations). Third, the indigent, elderly, or disabled need not "travel all the way to their county seats every time they wish to vote," *post*, at 1642, if they obtain a free

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photo identification card from the BMV. While it is true that obtaining a birth certificate carries with it a financial cost, the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates. Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication.

[6] Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, "[w]e must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' " *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion))" *Washington State Grange,* 552 U.S., at ——, 128 S.Ct., at 1191.

V

In their briefs, petitioners stress the fact that all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it.[FN21] In her opinion rejecting petitioners'****1624** facial challenge, Judge Barker noted that the litigation was the result of a partisan dispute that had "spilled out of the state house into the courts." 458 F.Supp.2d, at 783. It is fair to infer that partisan considerations may have played a significant role in the decision to enact SEA 483. If such considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.

FN21. Brief for Petitioners in No. 07–25, pp. 6–9. Fifty-two Republican House members voted for the bill, 45 Democrats voted against, and 3 Democrats were excused from voting. 3 Journal of the House of Representatives of Indiana, Roll Call 259 (Mar. 21, 2005). In the Senate, 33 Republican Senators voted in favor and 17 Democratic Senators voted against. 3 Journal of the Senate of Indiana, Roll Call 417 (Apr. 12, 2005).

***204** But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting "the integrity and reliability of the electoral process." *Anderson,* 460 U.S., at 788, n. 9, 103 S.Ct. 1564.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

The lead opinion assumes petitioners' premise that the **voter-identification** law "may have imposed a special burden on" some voters, *ante,* at 1621 – 1622, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny, *ante,* at 1622 – 1623. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.

To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). This

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calls for application of a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. *Id.,* at 433–434, 112 S.Ct. 2059 (internal quotation marks omitted). The lead opinion resists the import of *Burdick* by characterizing it as simply adopting "the balancing approach" of *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (majority opinion of STEVENS, J.). See *ante,* at 1617; see also *ante,* at 1617, n. 8. Although ***205** *Burdick* liberally quoted *Anderson, Burdick* forged *Anderson* 's amorphous "flexible standard" into something resembling an administrable rule. See *Burdick, supra,* at 434, 112 S.Ct. 2059. Since *Burdick,* we have repeatedly reaffirmed the primacy of its two-track approach. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Clingman v. Beaver,* 544 U.S. 581, 586–587, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005). "[S]trict scrutiny is appropriate only if the burden is severe." *Id.,* at 592, 125 S.Ct. 2029. Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe.****1625** See *id.,* at 591, 593–597, 125 S.Ct. 2029. Burdens are severe if they go beyond the merely inconvenient. See *Storer v. Brown,* 415 U.S. 724, 728–729, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (characterizing the law in *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as "severe" because it was "so burdensome" as to be " 'virtually impossible' " to satisfy).

Of course, we have to identify a burden before we can weigh it. The Indiana law affects different voters differently, *ante,* at 1642 – 1643, but what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones, except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors. Nor are voters who already have photo identifications exempted from the burden, since those voters must maintain the accuracy of the information displayed on the identifications, renew them before they expire, and replace them if they are lost.

The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes. In the course of concluding that the Hawaii laws at issue in *Burdick* "impose[d]***206** only a limited burden on voters' rights to make free choices and to associate politically through the vote," 504 U.S., at 439, 112 S.Ct. 2059, we considered the laws and their reasonably foreseeable effect on *voters generally*. See *id.,* at 436–437, 112 S.Ct. 2059. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances. That was essentially the approach of the *Burdick* dissenters, who would have applied strict scrutiny to the laws because of their effect on "some voters." See *id.,* at 446, 112 S.Ct. 2059 (KENNEDY, J., dissenting); see also *id.,* at 448, 112 S.Ct. 2059 ("The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon *some individual voters* ... ." (emphasis added)). Subsequent cases have followed *Burdick* 's generalized review of nondiscriminatory election laws. See, *e.g., Timmons, supra,* at 361–362, 117 S.Ct. 1364; *Clingman, supra,* at 590–591, 592–593, 125 S.Ct. 2029. Indeed, *Clingman* ' s holding that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden.

Not all of our decisions predating *Burdick* addressed whether a challenged voting regulation severely burdened the right to vote, but when we began to grapple with the magnitude of burdens, we

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did so categorically and did not consider the peculiar circumstances of individual voters or candidates. See, *e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 438–441, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). Thus, in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), we did not link the State's interest in inhibiting party raiding with the petitioners' own circumstances. See *id.*, at 760–762, 93 S.Ct. 1245. And in *Storer v. Brown*, *supra*, we observed that the severity of the burden of a regulation should be measured according to its "nature, extent, and *likely impact*." *Id.*, at 738, 94 S.Ct. 1274 (emphasis added). We therefore instructed the District Court to decide on remand whether "a *reasonably diligent* independent candidate [could] be expected to satisfy the signature requirements, or will it be ***207** only rarely that the unaffiliated candidate will succeed in getting****1626** on the ballot?" *Id.*, at 742, 94 S.Ct. 1274 (emphasis added). Notably, we did not suggest that the District Court should consider whether one of the petitioners would actually find it more difficult than a reasonably diligent candidate to obtain the required signatures. What mattered was the general assessment of the burden.

Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, see *Anderson*, *supra*, at 786, n. 7, 103 S.Ct. 1564, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. See, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.[FN*] See *Harris v. McRae*, 448 U.S. 297, 323, and n. 26, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (poverty); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (disability); *Gregory v. Ashcroft*, 501 U.S. 452, 473, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (age); cf. ***208***Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878–879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (First Amendment does not require exceptions for religious objectors to neutral rules of general applicability).

FN* A number of our early right-to-vote decisions, purporting to rely upon the Equal Protection Clause, strictly scrutinized nondiscriminatory voting laws requiring the payment of fees. See, *e.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (poll tax); *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (ballot-access fee); *Lubin v. Panish*, 415 U.S. 709, 716–719, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (ballot-access fee). To the extent those decisions continue to stand for a principle that *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), does not already encompass, it suffices to note that we have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.

Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe bur-

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den are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. See Art. I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to ****1627** vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante,* whether the burden they impose is too severe.

The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned. There is no good reason to prefer that course.

* * *

***209** The universally applicable requirements of Indiana's **voter-identification** law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not "even represent a significant increase over the usual burdens of voting." *Ante,* at 1621. And the State's interests, *ante,* at 1613 – 1620, are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Indiana's "Voter ID Law" [FN1] threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, see *ante,* at 1620 – 1621 (lead opinion), and a significant percentage of those individuals are likely to be deterred from voting, see *ante,* at 1621. The statute is unconstitutional under the balancing standard of *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992): a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, see *ante,* at 1616 – 1620, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. I therefore respectfully dissent from the Court's judgment sustaining the statute.[FN2]

FN1. Senate Enrolled Act No. 483, 2005 Ind. Acts p.2005.

FN2. I agree with the lead opinion that the petitioners in No. 07–25 have standing and that we therefore need not determine whether the remaining petitioners also have standing. See *ante,* at 1616, n. 7.

***210** I

Voting-rights cases raise two competing interests, the one side being the fundamental right to vote. See *Burdick, supra,* at 433, 112 S.Ct. 2059 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure' ") (quoting *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)); see also *Purcell v. Gonzalez,* 549 U.S. 1, 3–4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) *(per curiam); Dunn v. Blumstein,* 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Reynolds v. Sims,* 377 U.S. 533, 561–562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The Judiciary is obliged to train a skeptical eye on any qualification of that right. See

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Reynolds, supra, at 562, 84 S.Ct. 1362 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of ****1628** the right of citizens to vote must be carefully and meticulously scrutinized").

As against the unfettered right, however, lies the "[c]ommon sense, as well as constitutional law ... that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick, supra,* at 433, 112 S.Ct. 2059 (quoting *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)); see also *Burdick, supra,* at 433, 112 S.Ct. 2059 ("Election laws will invariably impose some burden upon individual voters").

Given the legitimacy of interests on both sides, we have avoided pre-set levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue. And whatever the claim, the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State's reasons for imposing those precise burdens. Thus, in *Burdick* :

> "A court considering [such] a challenge ... must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth ***211** 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, 112 S.Ct. 2059 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)).

The lead opinion does not disavow these basic principles. See *ante,* at 1617 (discussing *Burdick*); see also *ante,* at 1616 – 1617 ("However slight [the] burden may appear, ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation" (internal quotation marks omitted)). But I think it does not insist enough on the hard facts that our standard of review demands.

II

Under *Burdick,* "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," 504 U.S., at 434, 112 S.Ct. 2059, upon an assessment of the "character and magnitude of the asserted [threatened] injury," *ibid.* (quoting *Anderson, supra,* at 789, 103 S.Ct. 1564), and an estimate of the number of voters likely to be affected.

A

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. [FN3] The travel is required for ***212** the personal****1629** visit to a license branch of the Indiana Bureau of Motor Vehicles (BMV), which is demanded of anyone applying for a driver's license or nondriver photo identification. See 458 F.Supp.2d 775, 791 (S.D.Ind.2006). The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive, [FN4] witness the fact that the BMV ***213** has far fewer license branches in each county than there are voting precincts. [FN5] Marion County, for example, has over 900 active voting precincts, see Brief for Respondent Marion County Election Board 4, [FN6] yet only 12 BMV license branches; [FN7] in Lake County, there are 565 active voting precincts, see n. 6, *supra,* to match up with only 8 BMV locations; [FN8] and Allen County, with 309 active voting precincts, see *ibid.,* has only 3 BMV license branches.

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FN9 The same pattern holds in counties with smaller populations. Brown County has 12 active voter precincts, see *ibid.*, and only one BMV office; FN10 while there were 18 polling places available in Fayette County's 2007 municipal primary,****1630** FN11 there was only 1 BMV license branch; FN12 and Henry County, with 42 polling places approved for 2008 elections, FN13 has only 1 BMV office.

FN3. Under Indiana's law, an ID does not qualify as proof of identification unless it "satisfies all [of] the following":

"(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

"(2) The document shows a photograph of the individual to whom the document was issued.

"(3) The document includes an expiration date, and the document:

"(A) is not expired; or

"(B) expired after the date of the most recent general election.

"(4) The document was issued by the United States or the state of Indiana." Ind.Code Ann. § 3–5–2–40.5 (West 2006).

FN4. The State asserts that the elderly and disabled are adequately accommodated through their option to cast absentee ballots, and so any burdens on them are irrelevant. See Brief for State Respondents 41. But as petitioners' *amici* AARP and the National Senior Citizens Law Center point out, there are crucial differences between the absentee and regular ballot. Brief for AARP et al. as *Amici Curiae* 12–16. Voting by absentee ballot leaves an individual without the possibility of receiving assistance from poll workers, and thus increases the likelihood of confusion and error. More seriously, as the Supreme Court of Indiana has recognized, Indiana law "treats absentee voters differently from the way it treats Election Day voters," in the important sense that "an absentee ballot may not be recounted in situations where clerical error by an election officer rendered it invalid." *Horseman v. Keller,* 841 N.E.2d 164, 171 (2006). The State itself notes that "election officials routinely reject absentee ballots on suspicion of forgery." Brief for State Respondents 62. The record indicates that voters in Indiana are not unaware of these risks. One elderly affiant in the District Court testified: "I don't trust [the absentee] system .... Because a lot of soldiers vote like that and their votes wasn't counted in the last election according to what I read, absentee." App. 209 (deposition of David Harrison).

It is one thing (and a commendable thing) for the State to make absentee voting available to the elderly and disabled; but it is quite another to suggest that, because the more convenient but less reliable absentee ballot is available, the State may freely deprive the elderly and disabled of the option of voting in person.

FN5. Under Indiana law, county executives must locate a polling place within five miles of the closest boundary of each voting precinct, and, with limited exceptions, no precinct may cover more than 1,200 active voters at the time it is established. See Brief for Respondent Marion County Election Board 3 (citing Ind.Code Ann. §§ 3–11–8–3(b), 3–11–1.5–3). The result is that the number of polling places tends to track the number of voting precincts in a

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county. In Henry County, for example, there are 42 active precincts, see n. 6, *infra*, and 42 polling places have been approved for the 2008 elections, see n. 13, *infra*.

FN6. See also Count of Active Precincts by County, online at http:// www. in. gov/ sos/ pdfs/ Precincts _ by_ County _ and_ State _ 022706. pdf (all Internet materials as visited Apr. 21, 2008, and available in Clerk of Court's case file).

FN7. See Marion County License Branches, http:// www. in. gov/ bmv/ 3134.htm.

FN8. See Lake County, http:// www. in. gov/ bmv/ 3150. htm.

FN9. See Allen County, http:// www. in. gov/ bmv/ 2954. htm.

FN10. See Brown County, http:// www. in. gov/ bmv/ 3302. htm.

FN11. See http:// www. co. fayette. in. us/ 2007 % 20 polling % 6D locations % 6D munic. htm.

FN12. See Fayette County, http:// www. in. gov/ bmv/ 3246. htm.

FN13. See News Release, Henry County, Indiana, Polling Places Approved for the 2008 Elections, http:// www. henryco. net/ cm/ node/ 52.

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably ***214** serious for many of the individuals who lack photo identification.[FN14] They almost certainly will not own cars, see Brief for Current and Former State Secretaries of State as *Amici Curiae* 11, and public transportation in Indiana is fairly limited. According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92 counties have no public transportation system at all,[FN15] and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties.[FN16] Among the counties with some public system, 21 provide service only within certain cities, and 32 others restrict public transportation to regional county service, ***215** leaving only 18 that offer countywide public transportation, see n. 15, *supra*. State officials recognize the effect that travel costs can have on voter turnout, as in Marion County, for example, where efforts have been made to "establis[h] most polling places in locations even more convenient than the statutory minimum," in order to "provid[e] for neighborhood voting." Brief for Respondent Marion County Election Board 3–4.

FN14. The travel burdens might, in the future, be reduced to some extent by Indiana's commendable "BMV2You" mobile license branch, which will travel across the State for an average of three days a week, and provide BMV services (including ID services). See http:// www. in. gov/ bmv/ 3554. htm. The program does not count in my analysis, however, because the program was only recently opened in August 2007, see Indiana BMV Opens License Branch at State Fair, http:// www. in. gov/ newsroom. htm ? detail Content= 93 _ 10400. htm, and its long-term service schedule has yet to be determined.

FN15. Indiana Public Transit: Annual Report 2006, p. 29, http:// www. in. gov/ indot/ files/ INDOT _ 2006. pdf (hereinafter Annual Report). The 21 counties with no public transportation, according to the study, are: Adams, Blackford, Brown, Carroll, Clay, De Kalb, Gibson, Jennings, Lagrange, Parke, Perry, Posey, Putnam, Rush, Spencer, Steuben, Tipton, Vermillion, Warren, Warrick, and Whitley Counties. See *ibid.*

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Transportation Association, which compiles public transit information across the States, confirms that each of those 21 counties lacks any public transportation offerings, and in fact adds another 13 counties to this category: Boone, Decatur, Fayette, Fulton, Hancock, Hendricks, Huntington, Miami, Morgan, Noble, Pike, Shelby, and Wells. See Transit Systems in Indiana, http:// www. public transport ation. org/ systems/ state. asp? state= IN# A44. The discrepancy appears to arise, in part, from the fact that the American Public Transportation Association has not counted demand response systems that have been established in at least 6 of these 13 counties. See Annual Report 36, 50, 56, 96, 110, 144.

FN16. In 2000, approximately 9% of Indiana's population lived within 1 of these 21 counties. See County and City Extra: Special Decennial Census Edition 169, 176 (D. Gaquin & K. DeBrandt eds.2002).

Although making voters travel farther than what is convenient for most and possible for some does not amount to a "severe" burden under *Burdick*, that is no reason to ignore the burden altogether. It translates into an obvious economic cost (whether in worktime lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID.

For those voters who can afford the round trip, a second financial hurdle appears:****1631** in order to get photo identification for the first time, they need to present "a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport." *Ante*, at 1620, n. 17 (lead opinion) (citing Ind. Admin. Code, tit. 140, § 7–4–3 (2008)). As the lead opinion says, the two most common of these documents come at a price: Indiana counties charge anywhere from $3 to $12 for a birth certificate (and in some other States the fee is significantly higher), see *ante*, at 1620, n. 17, and that same price must usually be paid for a first-time passport, since a birth certificate is required to prove U.S. citizenship by birth. The total fees for a passport, moreover, are up to about $100.[FN17] So most voters must pay at least one fee to get the ID necessary to cast ***216** a regular ballot.[FN18] As with the travel costs, these fees are far from shocking on their face, but in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.

FN17. See Department of State, How to Apply in Person for a Passport, http:// travel. state. gov/ passport/ get/ first/ first_ 830. html; Department of State, Passport Fees (Feb. 1, 2008), http:// travel. state. gov/ passport/ get/fees/fees_837.html (total fees of $100 for a passport book and $45 for a passport card for individuals 16 and older).

FN18. The lead opinion notes that "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Ante*, at 1623, n. 20. But the record discloses no reason to think that any appreciable number of poor voters would need birth certificates absent the Voter ID Law, and no reason to believe that poor people would spend money to get them if they did not need them.

B

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers "indigent" [FN19] as well as those with religious objections to being photographed, see *ante*, at 1621 (lead opinion), and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana's chosen exception does not amount to much relief.

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FN19. To vote by provisional ballot, an individual must (at the circuit court clerk's office) sign an affidavit affirming that she is "indigent" and "unable to obtain proof of identification without the payment of a fee." Ind.Code Ann. § 3–11.7–5–2.5(c)(2)(A) (West 2006). Indiana law does not define the key terms "indigent" or "unable," but I will assume for present purposes that the Indiana Supreme Court will eventually construe these terms broadly, so that the income threshold for indigency is at least at the federal poverty level, and so that the exception covers even individuals who are facing only short-term financial difficulties.

The law allows these voters who lack the necessary ID to sign the pollbook and cast a provisional ballot. See 458 F.Supp.2d, at 786 (citing Ind.Code Ann. § 3–11–8–25.1 (West Supp.2007)). As the lead opinion recognizes, though, *ante*, at 1621, that is only the first step; to have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an ***217** ID at that point),[FN20] see 458 F.Supp.2d, at 786. Unlike the trip to the BMV (which, assuming ****1632** things go smoothly, needs to be made only once every four years for renewal of nondriver photo identification, see *id.* at 791), this one must be taken every time a poor person or religious objector wishes to vote, because the State does not allow an affidavit to count in successive elections. And unlike the trip to the BMV (which at least has a handful of license branches in the more populous counties), a county has only one county seat. Forcing these people to travel to the county seat every time they try to vote is particularly onerous for the reason noted already, that most counties in Indiana either lack public transportation or offer only limited coverage. See *supra*, at 1616.

FN20. Indiana law allows voters to cast a provisional ballot at the county clerk's office starting 29 days prior to election day until noon of the day prior to election day, see Ind.Code Ann. § 3–11.7–5–2.5, and this might enable some voters to make only one burdensome trip to the county seat. But for the voters who show up at the polls to vote and are there told that they lack the photo identification needed to cast a regular ballot, the Voter ID Law effectively forces them to make two trips.

That the need to travel to the county seat each election amounts to a high hurdle is shown in the results of the 2007 municipal elections in Marion County, to which Indiana's Voter ID Law applied. Thirty-four provisional ballots were cast, but only two provisional voters made it to the County Clerk's Office within the 10 days. See Brief for Respondent Marion County Election Board 8–9. All 34 of these aspiring voters appeared at the appropriate precinct; 33 of them provided a signature, and every signature matched the one on file; and 26 of the 32 voters whose ballots were not counted had a history of voting in Marion County elections. See *id* ., at 9.

All of this suggests that provisional ballots do not obviate the burdens of getting photo identification. And even if that were not so, the provisional-ballot option would be inadequate***218** for a further reason: the indigency exception by definition offers no relief to those voters who do not consider themselves (or would not be considered) indigent but as a practical matter would find it hard, for nonfinancial reasons, to get the required ID (most obviously the disabled).

C

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not "severe" ones, and the next question under *Burdick* is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

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Although the District Court found that petitioners failed to offer any reliable empirical study of numbers of voters affected, see *ante*, at 1621 – 1622 (lead opinion),[FN21] we may accept that court's rough calculation that 43,000 voting-age residents lack the kind of identification card required by Indiana's law. See 458 F.Supp.2d, at 807. The District Court made that estimate by comparing BMV records reproduced in petitioners' statistician's report with U.S. Census Bureau figures for Indiana's voting-age population in 2004, see *ibid.*, and the State does not argue that these raw data are unreliable.

FN21. Much like petitioners' statistician, the BMV "has not been able to determine the approximate number of Indiana residents of voting age who are without an Indiana driver's license or identification card," 458 F.Supp.2d 775, 791 (S.D.Ind.2006), but the BMV does acknowledge "that there are persons who do not currently have [the required ID] and who are, or who will be, eligible to vote at the next election," *ibid.*

The State, in fact, shows no discomfort with the District Court's finding that an "estimated 43,000 individuals" (about 1% of the State's voting-age population) lack a qualifying ID. Brief for State Respondents 25. If the State's willingness to take that number is surprising, it may be less so in light of the District Court's observation that "several factors ... suggest the percentage of Indiana's voting age population with photo identification is actually ****1633** lower than 99%," ***219**458 F.Supp.2d, at 807, n. 43,[FN22] a suggestion in line with national surveyS SHOWING ROUGHLY 6%–10% of voting-age Americans without a state-issued photo identification card. See Brief for Petitioners in No. 07–21, pp. 39–40, n. 17 (citing National Commission on Election Reform, To Assure Pride and Confidence: Task Force Reports, ch. VI: Verification of Identity, p. 4 (Aug.2001), http:// webstorage 3. mcpa. virginia. edu/ commissions/ comm_ 2001_ taskforce. pdf). We have been offered no reason to think that Indiana does a substantially better job of distributing IDs than other States.[FN23]

FN22. The District Court explained:

> "[O]ur simple comparison of raw numbers does not take into account: individuals who have died but whose Indiana driver's license or identification cards have not expired; individuals who have moved outside the state and no longer consider themselves Indiana residents but who still retain a valid Indiana license or identification card; individuals who have moved into Indiana and now consider themselves Indiana residents but have not yet obtained an Indiana license or identification; and individuals, such as students, who are residing in Indiana temporally, are registered to vote in another state, but have obtained an Indiana license or identification." *Id.*, at 807, n. 43.
>
> The District Court also identified three factors that, in its view, might require deductions of the 43,000 figure. First, the District Court noted that BMV records do not cover all forms of identification that may be used to vote under the Voter ID Law (*e.g.*, federal photo identification, such as a passport). This is a valid consideration, but is unlikely to overcome the additions that must be made for the various factors listed above. Second, the court noted that the BMV records do not account for the exceptions to the photo identification requirement (such as the indigency and absentee-ballot exceptions). This factor does not warrant a deduction of the 43,000 number because, as I have argued, the indigency exception imposes serious burdens of its own, see *supra*, at —— – ——, and the absentee-ballot exception is not a wholly adequate substi-

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tute for voting in person, see n. 4, *supra*. Finally, the District Court noted that many individuals are not registered to vote. For reasons I lay out in note 24, *infra*, I am not convinced that this fact is relevant at all.

FN23. Although the lead opinion expresses confidence that the percentage of voters without the necessary photo ID will steadily decrease, see *ante*, at ——, n. 6, and suggests that the number may already have dropped, see *ante*, at ——, n. 20, there is reason to be less sanguine. See ACLU Sues To Halt License Revocation, Fort Wayne J. Gazette, Feb. 9, 2008, p. 3C ("The American Civil Liberties Union is suing the state to prevent the possible revocation of up to 56,000 driver's licenses that don't match information in a Social Security database. Many of the mismatches were created by typographical errors or by people getting married and changing their last names, the [BMV] said last week when it announced it had sent warning letters to about 206,000 people in Indiana"); see also Dits, Court Date is Set for Bid To Stop BMV Revoking Licenses, South Bend Tribune, Feb. 21, 2008, p. B1; Who To Blame in Name Game? Many Caught in Name Game; Merging BMV, Social Security Databases Forcing Many To Hire Lawyers, Post–Tribune, Jan. 8, 2008, p. A5; Snelling, Name Issue Blocks License, *id.* Jan. 7, 2008, p. A6.

***220** So a fair reading of the data supports the District Court's finding that around 43,000 Indiana residents lack the needed identification, and will bear the burdens the law imposes. To be sure, the 43,000 figure has to be discounted to some extent, residents of certain nursing homes being exempted from the photo identification requirement. 458 F.Supp.2d, at 786. But the State does not suggest that this narrow exception could possibly reduce 43,000 to an insubstantial number.[FN24]

FN24. The State does imply that we should further discount the 43,000 estimate to exclude citizens who are not registered to vote, or who are registered but not planning to vote. See Brief for State Respondents 25; see also *ante*, at —— (lead opinion) ("[T]he evidence in the record does not provide us with the number of registered voters without photo identification"). But that argument is flatly contradicted by this Court's settled precedent. As our cases have recognized, disfranchisement is disfranchisement, whether or not the disfranchised voter would have voted if given the choice. That is why in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), the Court did not ask whether any significant number of individuals deprived of the right to vote by durational residence requirements would actually have chosen to vote. And in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the Court did not pause to consider whether any of the qualified voters deterred by the $1.50 poll tax would have opted to vote if there had been no fee. Our cases make clear that the Constitution protects an individual's ability to vote, not merely his decision to do so.

****1634** The upshot is this. Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically, ***221** see 472 F.3d 949, 951 (C.A.7 2007) ("No doubt most people who don't have photo ID are low on the economic ladder"); cf. *Bullock v. Carter*, 405 U.S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) ("[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters ... according to their economic status").[FN25] The Voter ID Law places hurdles in the way of either getting an

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ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting. Cf. 458 F.Supp.2d, at 823 ("We do not doubt that such individuals exist somewhere, even though Plaintiffs were unable to locate them"); 472 F.3d, at 952 ("No doubt there are at least a few [whom the law will deter from voting] in Indiana ..."); see also *ante*, at 1621 (lead opinion).

FN25. Studies in other States suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities. See Overton, **Voter Identification**, 105 Mich. L.Rev. 631, 659 (2007) ("In 1994, the U.S. Department of Justice found that African–Americans in Louisiana were four to five times less likely than white residents to have government-sanctioned photo identification"); *id.*, at 659–660 (describing June 2005 study by the Employment and Training Institute at the University of **Wisconsin** –Milwaukee, which found that while 17% of voting-age whites lacked a valid driver's license, 55% of black males and 49% of black females were unlicensed, and 46% of Latino males and 59% of Latino females were similarly unlicensed).

Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim. Cf. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 461-462, 128 S.Ct. 1184, 1197, 170 L.Ed.2d 151 (2008) (ROBERTS, C. J., concurring) ("Nothing in my analysis requires the parties to produce studies regarding voter perceptions on this score"); *Dunn*, 405 U.S., at 335, n. 5, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("[I]t would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence ***222** requirements"); *Bullock, supra*, at 144, 92 S.Ct. 849 (taking account of "the obvious likelihood" that candidate filing fees would "fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs"). While of course it would greatly aid a plaintiff to establish his claims beyond mathematical doubt, he does enough to show that serious burdens are likely.

Thus, petitioners' case is clearly strong enough to prompt more than a cursory examination of the State's asserted interests. And the fact that Indiana's photo identification requirement is one of the most restrictive in the country, see Brief for Current and Former State Secretaries of State as *Amici Curiae* 27–30 (compiling state **voter-identification** statutes); see also Brief for State of Texas et al. as *Amici Curiae* ****1635** 10–13 (same),[FN26] makes a critical examination of the ***223** State's claims all the more in order. Cf. *Randall v. Sorrell*, 548 U.S. 230, 253, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion) (citing as a "danger sig[n]" that "contribution limits are substantially lower than ... comparable limits in other States," and concluding that "[w]e consequently must examine the record independently and carefully to determine whether [the] limits are 'closely drawn' to match the State's interests"); *id.*, at 284, 288, 126 S.Ct. 2479 (SOUTER, J., dissenting) (finding that deference was appropriate on the reasoning that limits were "consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont's," and that "[t]he Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont").

FN26. Unlike the Help America Vote Act of 2002, 116 Stat. 1666, 42 U.S.C. § 15301 *et seq.* (2000 ed., Supp. V), which generally requires proof of identification but allows for a variety of documents to qualify, see *ante*, at 1617 – 1618 (lead opinion), Indiana accepts only limited forms of feder-

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ally issued or state-issued photo identification, see n. 3, *supra*, and does not allow individuals lacking the required identification to cast a regular ballot at the polls. Only one other State, Georgia, currently restricts voters to the narrow forms of government-issued photo identification. See Ga.Code Ann. § 21–2–417 (Supp.2007). But a birth certificate is not needed to get a Georgia **voter identification** card. See § 21 –2–417.1; Ga. Comp. Rules & Regs., Rule 183–1–20.01 (2006).

Missouri's Legislature passed a restrictive photo identification law comparable to Indiana's, but the Missouri Supreme Court struck it down as violative of the State Constitution. *Weinschenk v. State,* 203 S.W.3d 201 (2006) *(per curiam).* Florida requires photo identification, but permits the use of several forms, including a debit or credit card; military identification; student identification; retirement center identification; neighborhood association identification; and public assistance identification. See Fla. Stat. Ann. § 101.043(1) (West Supp.2008). Moreover, a Florida voter who lacks photo identification may cast a provisional ballot, and that ballot will be counted so long as the signature on the ballot matches the one on the voter's registration. §§ 101.043(2), 101.048.

All other States that require identification at the polls either allow voters to identify themselves using a variety of documents, see Ala.Code § 17–9–30 (2007); Alaska Stat. § 15.15.225 (2006); Ariz.Rev.Stat. Ann. § 16–579 (West 2006); Ark.Code Ann. § 7–5–305(a)(8) (2007); Colo.Rev.Stat. §§ 1–1–104(19.5) , 1–7–110 (2007); Ky.Rev.Stat. Ann. § 117.227 (Lexis 2004); Mont.Code Ann. § 13–13–114 (2007); N.M. Stat. Ann. §§ 1–1–24, 1–12–7.1, as amended by 2008 N.M. Laws ch. 59; N.M. Stat. Ann. § 1–12–8 (Cum.Supp.2007); Ohio Rev.Code Ann. §§ 3503.16(B)(1), 3505.18 (Lexis Supp.2007); S.C.Code Ann. §§ 7–5–125, 7–13–710 (Cum.Supp.2007); Tenn.Code Ann. § 2–7–112 (2003); Tex. Elec.Code Ann. §§ 63.001 – 63.009 (West 2003 and Supp.2007); § 63.0101 (West Supp.2007); Wash. Rev.Code § 29A.44.205 (2006), or allow voters lacking identification to cast a regular ballot upon signing an affidavit (or providing additional identifying information), see Conn. Gen.Stat. § 9–261 (2007); Del.Code Ann., Tit. 15, § 4937 (2007); Haw.Rev.Stat. § 11–136 (2006 Cum.Supp.); La.Stat. Ann. § 18:562 (West Supp.2008); Mich. Comp. Laws Ann. § 168.523(1) (West Supp.2007); N.D. Cent.Code Ann. § 16.1–05–07 (Lexis Supp.2007); S.D. Codified Laws §§ 12–18–6.1, 12–18–6.2 (2004); Va.Code Ann. § 24.2–643 (Lexis 2006).

III

Because the lead opinion finds only "limited" burdens on the right to vote, see *ante,* at 1620, it avoids a hard look at the State's claimed interests. See *ante,* at 1616 – 1620. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of " 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' [and] 'the extent to which those interests***224** make it necessary to burden the plaintiff's rights.' " ****1636***Burdick,* 504 U.S., at 434, 112 S.Ct. 2059 (quoting *Anderson,* 460 U.S., at 789, 103 S.Ct. 1564).

As this quotation from *Burdick* indicates, the interests claimed to justify the regulatory scheme are subject to discount in two distinct ways. First, the generalities raised by the State have to be shaved down to the precise "aspect [s of claimed in-

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terests] addressed by the law at issue." *California Democratic Party v. Jones,* 530 U.S. 567, 584, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (emphasis deleted); see *ibid.* (scrutiny of state interests "is not to be made in the abstract, by asking whether [the interests] are highly significant values; but rather by asking whether the *aspect* of [those interests] addressed by the law at issue is highly significant" (emphasis in original)). And even if the State can show particularized interests addressed by the law, those interests are subject to further discount depending on "the extent to which [they] make it necessary to burden the plaintiff's rights." *Burdick, supra,* at 434, 112 S.Ct. 2059 (internal quotation marks omitted).

As the lead opinion sees it, the State has offered four related concerns that suffice to justify the Voter ID Law: modernizing election procedures, combating voter fraud, addressing the consequences of the State's bloated voter rolls, and protecting public confidence in the integrity of the electoral process. See *ante,* at 1616 – 1620. On closer look, however, it appears that the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case.

A

The lead opinion's discussion of the State's reasons begins with the State's asserted interests in "election modernization," *ante,* at 1617 – 1618, and in combating voter fraud, see *ante,* at 1618 – 1620. Although these are given separate headings, any line drawn between them is unconvincing; as I understand***225** it, the "effort to modernize elections," Brief for State Respondents 12, is not for modernity's sake, but to reach certain practical (or political) objectives.[FN27] In any event, if a proposed modernization were in fact aimless, if it were put forward as change for change's sake, a State could not justify any appreciable burden on the right to vote that might ensue; useless technology has no constitutional value. And in fact that is not the case here. The State says that it adopted the ID law principally to combat voter fraud, and it is this claim, not the slogan of "election modernization," that warrants attention.

FN27. See generally R. Saltman, The History and Politics of Voting Technology: In Quest of Integrity and Public Confidence (2006) (tracing the history of changes in methods of voting in the United States, and the social and political considerations behind them).

1

There is no denying the abstract importance, the compelling nature, of combating voter fraud. See *Purcell,* 549 U.S., at 4, 127 S.Ct. 5 (acknowledging "the State's compelling interest in preventing voter fraud"); cf. *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 231, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process"). But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot ****1637** fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana, see 458 F.Supp.2d, at 793; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot-stuffing, ballot miscounting, voter ***226** intimidation, or any other type of corruption on the part of officials administering elections. See Brief for Brennan Center for Justice et al. as *Amici Curiae* 7.

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted

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for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. See 458 F.Supp.2d, at 792–793; see also *ante*, at 1618 – 1620 (lead opinion). Neither the District Court nor the Indiana General Assembly that passed the Voter ID Law was given any evidence whatsoever of in-person voter impersonation fraud in the State. See 458 F.Supp.2d, at 793. This absence of support is consistent with the experience of several veteran poll watchers in Indiana, each of whom submitted testimony in the District Court that he had never witnessed an instance of attempted voter impersonation fraud at the polls. *Ibid.* It is also consistent with the dearth of evidence of in-person voter impersonation in any other part of the country. See *ante*, at 1619, n. 12 (lead opinion) (conceding that there are at most "scattered instances of in-person voter fraud"); see also Brief for Brennan Center for Justice, *supra*, at 11–25, 25 (demonstrating that "the national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the 'problem' of voter impersonation is not a real problem at all"). FN28

FN28. The lack of evidence of in-person voter impersonation fraud is not for failure to search. See, *e.g.*, Lipton & Urbina, In 5–Year Effort, Scant Evidence of Voter Fraud, N.Y. Times, Apr. 12, 2007, p. A1 ("Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews").

The State responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to detect.***227** But this is like saying the "man who wasn't there" is hard to spot, FN29 and to know whether difficulty in detection accounts for the lack of evidence one at least has to ask whether in-person voter impersonation is (or would be) relatively harder to ferret out than other kinds of fraud (*e.g.*, by absentee ballot) which the State has had no trouble documenting. The answer seems to be no; there is reason to think that "impersonation of voters is ... the most likely type of fraud to be discovered." U.S. Election Assistance Commission, Election Crimes: An Initial Review and Recommendations for Future Study 9 (Dec.2006) hereinafter EAC Report), http:// www. eac. gov/ clearing house/ docs/ reports– and– surveys– 2006 election crimes. pdf/ attachment _ download/ file. This is in part because an individual who impersonates another at the polls commits his fraud in the open, under the scrutiny of local poll workers who may well recognize a fraudulent voter when they hear who he claims to be. See Brief for Respondents Marion County Election Board 6 ("[P]recinct workers may recognize ****1638** an imposter, and precinct election workers have the authority to challenge persons appearing to vote if the election board member 'is not satisfied that a person who offers to vote is the person who the person represents the person to be' " (quoting Ind.Code Ann. § 3–11–8–27 (West 2006))).

FN29. "As I was going up the stair / I met a man who wasn't there." H. Mearns, Antigonish, reprinted in Best Remembered Poems 107 (M. Gardner ed.1992).

The relative ease of discovering in-person voter impersonation is also owing to the odds that any such fraud will be committed by "organized groups such as campaigns or political parties" rather than by individuals acting alone. L. Minnite & D. Callahan, Securing the Vote: An Analysis of Election Fraud 14 (2003), http://www.demos.org/pubs/EDR_=_Securing_the_vote.pdf. It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few ***228** who may commit it. If an imposter gets caught, he is subject to severe criminal penalties. See, *e.g.*, Ind.Code Ann. § 3–14–2–9 (West 2006)

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(making it a felony "knowingly [to] vot[e] or offe[r] to vote at an election when the person is not registered or authorized to vote"); § 3–14–2–11 (with certain exceptions, "a person who knowingly votes or offers to vote in a precinct except the one in which the person is registered and resides" commits a felony); § 3–14–2–12(1) (making it a felony "knowingly [to] vot[e] or mak[e] application to vote in an election in a name other than the person's own"); § 3–14–2–12(2) (a person who, "having voted once at an election, knowingly applies to vote at the same election in the person's own name or any other name" commits a felony); see also 42 U.S.C. § 1973i(e)(1) (any individual who "votes more than once" in certain federal elections "shall be fined not more than $10,000 or imprisoned not more than five years, or both"). And even if he succeeds, the imposter gains nothing more than one additional vote for his candidate. See EAC Report 9 (in-person voter impersonation "is an inefficient method of influencing an election"); J. Levitt, The Truth about Voter Fraud 7 (2007), online at http://truthaboutfraud.org/pdf/truthAboutVoterFraud.pdf ("[F]raud by individual voters is a singularly foolish and ineffective way to attempt to win an election. Each act of voter fraud in connection with a federal election risks five years in prison and a $10,000 fine, in addition to any state penalties. In return, it yields at most one incremental vote. That single extra vote is simply not worth the price" (footnote omitted)); cf. 472 F.3d, at 951 ("[A] vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote" (emphasis in original)).

In sum, fraud by individuals acting alone, however difficult to detect, is unlikely. And while there may be greater incentives for organized groups to engage in broad-gauged in-***229** person voter impersonation fraud, see Minnite & Callahan, *supra*, at 20, it is also far more difficult to conceal larger enterprises of this sort. The State's argument about the difficulty of detecting the fraud lacks real force.

2

Nothing else the State has to say does much to bolster its case. The State argues, for example, that even without evidence of in-person voter impersonation in Indiana, it is enough for the State to show that "opportunities [for such fraud] are transparently obvious in elections without identification checks," Brief for State Respondents 54. Of course they are, but Indiana elections before the Voter ID Law were not run "without identification checks"; on the contrary, as the Marion County Election Board informs us, "[t]ime-tested systems were in place to detect in-person voter impersonation fraud before the challenged statute was enacted," Brief for Respondents Marion County Election Board 6. These included hiring poll workers who ****1639** were precinct residents familiar with the neighborhood, and making signature comparisons, each effort being supported by the criminal provisions mentioned before. *Id.*, at 6–8.

For that matter, the deterrence argument can do only so much work, since photo identification is itself hardly a failsafe against impersonation. Indiana knows this, and that is why in 2007 the State began to issue redesigned driver's licenses with digital watermarking.[FN30] The State has made this shift precisely because, in the words of its BMV, "visual inspection is not adequate to determine the authenticity" of driver's licenses. See Indiana BMV, *supra* n. 30. Indeed, the BMV explains that the digital watermark (which can be scanned using equipment that, so far, Indiana does not use ***230** at polling places) is needed to "tak[e] the guesswork out of inspection." *Ibid*. [FN31] so, at least until polling places have tHE MACHINES AND SPECIAL software to scan the new driver's licenses, and until all the licenses with the older designs expire (the licenses issued after 2006 but before the 2007 redesigning are good until 2012, see 458 F.Supp.2d, at 791), Indiana's law does no more than ensure that any in-person voter fraud will take place with fake IDs, not attempted signature forgery.

FN30. See Indiana BMV, Digital Drivers

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License: Frequently Asked Questions, "What is a digital watermark and why is Indiana incorporating it into their driver license?", http:// www. in. gov/ bmv/ 3382. htm.

FN31. In the words of Indiana's Governor, Mitch Daniels: " 'Not very long ago, Indiana driver's licenses were a late-night talk show joke [because of] the ease of their fraudulent issuance and also their duplication .... [The new design] will make particularly their duplication dramatically more difficult.' " Udell, Digital Driver's Licenses Designed To Stem ID Theft, Evansville Courier Press, June 7, 2007, p. B6.

Despite all this, I will readily stipulate that a State has an interest in responding to the risk (however small) of in-person voter impersonation. See *ante*, at 1611 – 1612 (lead opinion). I reach this conclusion, like others accepted by the Court, because " '[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.' " *Randall,* 548 U.S., at 285, 126 S.Ct. 2479 (SOUTER, J., dissenting) (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring)). Weight is owed to the legislative judgment as such. But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind, see n. 26, *supra*), and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.[FN32]

FN32. On such flimsy evidence of fraud, it would also ignore the lessons of history to grant the State's interest more than modest weight, as the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules. See F. Ogden, The Poll Tax in the South 9 (1958) ("In Arkansas and Texas, the argument was frequently presented that a poll tax payment prerequisite would purify elections by preventing repeaters and floaters from voting"); see also Brief for Historians and Other Scholars as *Amici Curiae* 4–15 (detailing abuses); R. Hayduk, Gatekeepers to the Franchise: Shaping Election Administration in New York 36 (2005) ("In both historical and contemporary contexts certain groups have had an interest in alleging fraud and thereby shaping electoral rules and practices in a restrictive direction, and other groups have had an opposite interest").

***231 **1640** 3

The antifraud rationale is open to skepticism on one further ground, what *Burdick* spoke of as an assessment of the degree of necessity for the State's particular course of action. Two points deserve attention, the first being that the State has not even tried to justify its decision to implement the photo identification requirement immediately on passage of the new law. A phase-in period would have given the State time to distribute its newly designed licenses, and to make a genuine effort to get them to individuals in need, and a period for transition is exactly what the Commission on Federal Election Reform, headed by former President Carter and former Secretary of State Baker, recommended in its report. See Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136, 140 (hereinafter Carter–Baker Report) ("For the next two federal elections, until January 1, 2010, in states that require voters to present ID at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified"). During this phase-in period, the report said, States would need to make "efforts to ensure that all voters are provided convenient opportunities to obtain" the required identification. *Id.,* at 141. The former President and former Secretary of State explained this recom-

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mendation in an op-ed essay:

> "Yes, we are concerned about the approximately 12 percent of citizens who lack a driver's license. So we proposed that states finally assume the responsibility to seek out citizens to both register voters and provide***232** them with free ID's that meet federal standards. States should open new offices, use social service agencies and deploy mobile offices to register voters. By connecting ID's to registration, voting participation will be expanded." Carter & Baker, Voting Reform Is in the Cards, N.Y. Times, Sept. 23, 2005, p. A19.

Although Indiana claims to have adopted its ID requirement relying partly on the Carter–Baker Report, see Brief for State Respondents 5, 13, 49; see also *ante*, at 1618 (lead opinion), the State conspicuously rejected the Carter-Baker Report's phase-in recommendation aimed at reducing the burdens on the right to vote, and just as conspicuously fails even to try to explain why.

What is left of the State's claim must be downgraded further for one final reason: regardless of the interest the State may have in adopting a photo identification requirement as a general matter, that interest in no way necessitates the particular burdens the Voter ID Law imposes on poor people and religious objectors. Individuals unable to get photo identification are forced to travel to the county seat every time they wish to exercise the franchise, and they have to get there within 10 days of the election. See *supra*, at 1617 – 1618. Nothing about the State's interest in fighting voter fraud justifies this requirement of a post-election trip to the county seat instead of some verification process at the polling places.

In briefing this Court, the State responds by pointing to an interest in keeping lines at polling places short. See Brief for State Respondents 58. It warns that "[i]f election workers—a scarce resource in any election—must attend to the details of validating provisional ballots, voters may have to wait longer to vote," and it assures us that "[n]othing deters voting so much as long lines at the polls." *Ibid*. But this argument fails on its own terms, for whatever might be the number of individuals casting a provisional ballot, the ***233** State could simply allow voters to sign the indigency affidavit at the polls subject ****1641** to review there after the election. FN33 After all, the Voter ID Law already requires voters lacking photo identification to sign, at the polling site, an affidavit attesting to proper registration. See 458 F.Supp.2d, at 786.

> FN33. Florida has accommodated voters in this manner. In Florida a voter who casts a provisional ballot may have that vote counted if the voter's signature on the provisional-ballot certification matches the signature on the voter's registration. See Fla. Stat. Ann. §§ 101.043, 101.048. The voter is not required to make a second trip to have her provisional ballot counted.

Indeed, the State's argument more than fails; it backfires, in implicitly conceding that a not-insignificant number of individuals will need to rely on the burdensome provisional-ballot mechanism. What is more, as the District Court found, the Voter ID Law itself actually increases the likelihood of delay at the polls. Since any minor discrepancy between a voter's photo identification card and the registration information may lead to a challenge, "the opportunities for presenting challenges ha[ve] increased as a result of the photo identification requirements." *Id.*, at 789; cf. 472 F.3d, at 955 (Evans, J., dissenting) ("The potential for mischief with this law is obvious. Does the name on the ID 'conform' to the name on the voter registration list? If the last name of a newly married woman is on the ID but her maiden name is on the registration list, does it conform? If a name is misspelled on one—Schmit versus Schmitt—does it conform? If a 'Terence' appears on one and a shortened 'Terry' on the other, does it conform?").

B

The State's asserted interests in modernizing

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elections and combating fraud are decidedly modest; at best, they fail to offset the clear inference that thousands of Indiana citizens will be discouraged from voting. The two remaining justifications, meanwhile, actually weaken the State's case.

***234** The lead opinion agrees with the State that "the inflation of its voter rolls provides further support for its enactment of" the Voter ID Law. *Ante*, at 1619. This is a puzzling conclusion, given the fact, which the lead opinion notes, that the National Government filed a complaint against Indiana, containing this allegation:

> "Indiana has failed to conduct a general program that makes a reasonable effort to identify and remove ineligible voters from the State's registration list; has failed to remove such ineligible voters; and has failed to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters." App. 309, 312.

The Federal Government and the State agreed to settle the case, and a consent decree and order have been entered, see *ante*, at 1619 – 1620, requiring Indiana to fulfill its list-maintenance obligations under § 8 of the National Voter Registration Act of 1993, 107 Stat. 82, 42 U.S.C. § 1973gg–6.

How any of this can justify restrictions on the right to vote is difficult to say. The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating; it shows that the State has no justifiable need to burden the right to vote as it does, and it suggests ****1642** that the State is not as serious about combating fraud as it claims to be.[FN34]

FN34. The voting-rolls argument also suggests that it would not be so difficult to detect in-person voter fraud after all. If it is true that practitioners of fraud are most likely to vote in the name of registered voters whom they know to have died or left the jurisdiction, then Indiana could simply audit its voting records to examine whether, and how often, in-person votes were cast using these invalid registrations.

***235** The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence.

It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence. The Court has, for example, recognized that fighting perceptions of political corruption stemming from large political contributions is a legitimate and substantial state interest, underlying not only campaign finance laws, but bribery and antigratuity statutes as well. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it. See *id.*, at 391, 120 S.Ct. 897 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). While we found in *Nixon* that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," *id.*, at 395, 120 S.Ct. 897, there is plenty of reason to be doubtful here, both about the reality and the perception. It is simply not plausible to assume here, with no evidence of in-person voter

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impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless "inherent" in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls. Cf. *id.*, at 390, 120 S.Ct. 897 ("[T]he perception of corruption [is] 'inherent in a regime of large individual financial contributions' to candidates for public office" (quoting *Buckley v. Valeo*, 424 U.S. 1, 27, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)) *(per curiam)*).

***236** C

Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country. The State recognizes that tens of thousands of qualified voters lack the necessary federally issued or state-issued identification, but it insists on implementing the requirement immediately, without allowing a transition period for targeted efforts to distribute the required identification to individuals who need it. The State hardly even tries to explain its decision to force indigents or religious objectors to travel all the way to their county seats every time they wish to vote, and if there is any waning of confidence in the administration of elections it probably owes more to the State's violation of federal election law than to any imposters at the polling places. It is impossible to say, on this record, that the State's interest in adopting its signally inhibiting photo identification requirement ****1643** has been shown to outweigh the serious burdens it imposes on the right to vote.

If more were needed to condemn this law, our own precedent would provide it, for the calculation revealed in the Indiana statute crosses a line when it targets the poor and the weak. Cf. *Anderson v. Celebrezze*, 460 U.S. 780, 793, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status"). If the Court's decision in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), stands for anything, it is that being poor has nothing to do with being qualified to vote. *Harper* made clear that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*, at 668, 86 S.Ct. 1079. The State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of ***237** every election, likewise translate into unjustified economic burdens uncomfortably close to the outright $1.50 fee we struck down 42 years ago. Like that fee, the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.

* * *

The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old. I would vacate the judgment of the Seventh Circuit, and remand for further proceedings.

Justice BREYER, dissenting.

Indiana's statute requires registered voters to present photo identification at the polls. It imposes a burden upon some voters, but it does so in order to prevent fraud, to build confidence in the voting system, and thereby to maintain the integrity of the voting process. In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring); *ante*, at 1616 – 1617

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(lead opinion) (similar standard); *ante,* at 1613 – 1614 (SOUTER, J., dissenting) (same standard). Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.

Like Justice STEVENS, I give weight to the fact that a national commission, chaired by former President Jimmy ***238** Carter and former Secretary of State James Baker, studied the issue and recommended that States should require voter photo IDs. See Report of the Commission on Federal Election Reform, Building Confidence in U.S. Elections § 2.5 (Sept.2005) (Carter–Baker Report), App. 136–144. Because the record does not discredit the Carter–Baker Report or suggest that Indiana is exceptional, I see nothing to prevent Indiana's Legislature (or a federal court considering the constitutionality of the statute) from taking account of the legislatively****1644** relevant facts the report sets forth and paying attention to its expert conclusions. Thus, I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* forbid Indiana from enacting a photo ID requirement. Were I also to believe, as Justice STEVENS believes, that the burden imposed by the Indiana statute on eligible voters who lack photo IDs is indeterminate "on the basis of the record that has been made in this litigation," *ante,* at 1622 – 1623, or were I to believe, as Justice SCALIA believes, that the burden the statute imposes is "minimal" or "justified," *ante,* at 1613 (opinion concurring in judgment), then I too would reject the petitioners' facial attack, primarily for the reasons set forth in Part II of the lead opinion, see *ante,* at 1616 – 1620.

I cannot agree, however, with Justice STEVENS' or Justice SCALIA's assessment of the burdens imposed by the statute. The Carter–Baker Commission *conditioned* its recommendation upon the States' willingness to ensure that the requisite photo IDs "be easily available and issued free of charge" and that the requirement be "phased in" over two federal election cycles, to ease the transition. Carter–Baker Report, at App. 139, 140. And as described in Part II of Justice SOUTER's dissenting opinion, see *ante,* at 1614 – 1621, Indiana's law fails to satisfy these aspects of the Commission's recommendation.

For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to ***239** travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. See *ante,* at 1616 – 1617 (SOUTER, J., dissenting) (noting that out of Indiana's 92 counties, 21 have no public transportation system at all and 32 others restrict public transportation to regional county service). For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50 (less than $10 today, inflation-adjusted). See *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 664, n. 1, 666, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *ante,* at 1643 (SOUTER, J., dissenting). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election*. See *ante,* at 1617 – 1618 (same).

By way of contrast, two other States—Florida and Georgia—have put into practice photo ID requirements significantly less restrictive than Indiana's. Under the Florida law, the range of permissible forms of photo ID is substantially greater than in Indiana. See Fla. Stat. Ann. § 101.043(1) (West Supp.2008) (including a debit or credit card, a student ID, a retirement center ID, a neighborhood association ID, and a public assistance ID).

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Moreover, a Florida voter who lacks photo ID may cast a provisional ballot at the polling place that will be counted if the State determines that his signature matches the one on his voter registration form. §§ 101.043(2); 101.048(2)(b).

Georgia restricts voters to a more limited list of acceptable photo IDs than does Florida, but accepts in addition to proof of voter registration a broader range of underlying documentation***240** than does Indiana. ****1645** See Ga.Code Ann. § 21–2–417 (Supp.2007); Ga. Comp. Rules & Regs., Rule 183–1–20.01 (2006) (permissible underlying documents include a paycheck stub, Social Security, Medicare, or Medicaid statement, school transcript, or federal affidavit of birth, as long as the document includes the voter's full name and date of birth). Moreover, a Federal District Court found that Georgia "has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [state-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID." *Common Cause/Georgia v. Billups,* 504 F.Supp.2d 1333, 1380 (N.D.Ga.2007). While Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia *any* voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Compare Ind.Code Ann. § 3–11–4–1 (West 2006) with Ga.Code Ann. § 21–2–381 (Supp.2007). Finally, neither Georgia nor Florida insists, as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter–Baker Commission recommended nationwide. Nor is there any reason to think that there are proportionately fewer such voters in Indiana than elsewhere in the country (the District Court's rough estimate was 43,000). See 458 F.Supp.2d 775, 807 (S.D.Ind.2006). And I need not determine the constitutionality of Florida's or Georgia's requirements (matters not before us), in order to conclude that Indiana's requirement imposes a significantly harsher, unjustified burden.

***241** Of course, the Carter–Baker Report is not the Constitution of the United States. But its findings are highly relevant to both legislative and judicial determinations of the reasonableness of a photo ID requirement; to the related necessity of ensuring that all those eligible to vote possess the requisite IDs; and to the presence of alternative methods of ensuring that possession, methods that are superior to those that Indiana's statute sets forth. The Commission's findings, taken together with the considerations set forth in Part II of Justice STEVENS' opinion, and Part II of Justice SOUTER's dissenting opinion, lead me to the conclusion that while the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs. For these reasons, I dissent.

U.S.,2008.
Crawford v. Marion County Election Bd.
553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574, 76 USLW 4242, 08 Cal. Daily Op. Serv. 4913, 2008 Daily Journal D.A.R. 5979, 21 Fla. L. Weekly Fed. S 198

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Only the Westlaw citation is currently available.

Court of Appeals of Wisconsin.
MILWAUKEE BRANCH OF the NAACP, Voces De La Frontera, Ricky T. Lewis, Jennifer T. Platt, John J. Wolfe, Carolyn Anderson, Ndidi Brownlee, Anthony Fumbanks, Johnnie M. Garland, Danetta Lane, Mary McClintock, Alfonso G. Rodriguez, Joel Torres and Antonio K. Williams,
Plaintiffs–Respondents,
v.
Scott WALKER, Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, David G. Deininger and Timothy Vocke, Defendants–Petitioners.

No. 2012AP557–LV.
March 28, 2012.

Certification by Wisconsin Court of Appeals.

Before BROWN, C.J., REILLY and GUNDRUM, JJ.

***1** Pursuant to WIS. STAT. RULEE 809.61 (2009–10),[FN1] this court certifies the petition for leave to appeal and accompanying motion to stay in this case to the Wisconsin Supreme Court for its review and determination.

FN1. Although this citation is to the 2009–10 version of the Wisconsin Statutes, the remaining statutory references are to statutes created or amended by 2011 Wis. Act 23, and are therefore accompanied by citations to the sections of the Act creating or amending them.

ISSUES

The defendants-petitioners, Scott Walker et al., petition for leave to appeal the March 6, 2012, non-final order granting a motion for temporary injunction ("the Order") issued by the Circuit Court for Dane County, the Honorable David T. Flanagan presiding.[FN2] The Order imposed a temporary injunction commanding the defendants to immediately cease all efforts to enforce or implement those portions of the 2011 Wis. Act 23 ("the Act") that require eligible electors to verify their identity by presenting an acceptable form of photographic identification to election officials. The defendants-petitioners further request a stay of the temporary injunction pending disposition of the petition and of any subsequent appeal, if the petition is granted.

FN2. The circuit court subsequently issued a revised order granting the motion for temporary injunction on March 12, 2012. The differences between the March 6, 2012 order and March 12, 2012 order are negligible.

There are many issues in this case, but this certification focuses on the following questions: (1) What level of judicial scrutiny should be employed in reviewing the plaintiffs' challenge to the Act? (2) Does the Wisconsin Constitution provide greater protection to voting rights than is guaranteed under the United States Constitution? (3) Did the circuit court correctly assess the burden imposed by the Act from the facts of this record? and (4) Given the answers to these previous questions, are the Act's identification requirements permitted by the Wisconsin Constitution?

BACKGROUND

This case concerns a recent action by the Wisconsin Legislature requiring Wisconsin electors to produce one of several specific forms of photographic identification in order to receive an election ballot.

The plaintiffs in the case are twelve Wisconsin voters and two nonprofit organizations, Milwaukee Branch of the NAACP and Voces De La Frontera, whose activities include assisting voters in protecting and exercising their voting rights. The defendants are the Governor of Wisconsin and the indi-

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vidual members of Wisconsin's Government Accountability Board (GAB), who were sued in their official capacities. The plaintiffs are seeking a declaratory judgment and injunctive relief against enforcement of the Act's identification requirements.

Prior to the Act, an eligible Wisconsin elector voting at a polling place or by absentee ballot was not required to present identification, other than proof of residence in certain circumstances. Under the Act, an elector is required to present proof of identification in order to vote. Proof of identification is defined as identification that contains the name and a photograph of the individual, which name must conform to the name on the person's voter registration form. *See* WIS. STAT. § 5.02(16c); 2011 Wis. Act 23, § 2. [FN3]

FN3. For a list of acceptable forms of identification, *see* WIS. STAT. § 5.02(6m); 2011 Wis. Act 23, § 1.

The Act requires, with certain exceptions, that an elector who seeks to vote in person at a polling place must present one of the acceptable forms of identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that any photograph reasonably resembles the elector. WIS. STAT. § 6.79(2)(a); 2011 Wis. Act 23, § 45.[FN4] If an elector does not present acceptable identification, he or she must be offered the opportunity to vote by provisional ballot. Section 6.79(2)(d) and (3)(b); 2011 Wis. Act 23, §§ 47–50. A provisional ballot will thereafter be counted if the voter presents acceptable identification at the polling place before the polls close or at the office of the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election. WIS. STAT. § 6.97(3)(b); 2011 Wis. Act 23, § 90. If an elector presents identification bearing a name that does not conform to the one on the poll list or a photograph that does not reasonably resemble him or her, then the elector may not be permitted to vote. Section 6.79(3)(b); 2011 Wis. Act 23, §§ 48–50.

FN4. Similar requirements apply to absentee voters. *See* WIS. STAT. §§ 6.86(1)(ar), 6.87(1) and (4)(b)1.; 2011 Wis. Act 23, §§ 56, 63, and 66.

***2** In order to accommodate electors who do not possess an acceptable form of identification, the Act requires the Department of Transportation (DOT) to issue a free identification card to any elector who satisfies all other requirements for obtaining the card, is a citizen who will be at least eighteen years old on the next election day, and requests that the card be provided without charge for voting purposes. WIS. STAT. § 343.50(5)(a)3.; 2011 Wis. Act 23, § 138.

Finally, the Act requires the GAB to take various steps to implement the identification requirements, including: (1) revising instructions, forms, and informational materials for voters; (2) engaging in outreach to identify and assist groups needing help in obtaining acceptable identification; and (3) conducting a public information campaign to inform people about the identification requirements. *See* WIS. STAT. §§ 5.35(6)(a)4a., 6.869, 6.87(2), 6.875, and 7.08(8) and (12); 2011 Wis. Act 23, §§ 4, 62, 64, 73–82, 93, 95, and 144.

On December 16, 2011, the plaintiffs filed their complaint, alleging that the Act's identification requirements violated the Wisconsin Constitution by unreasonably burdening the right to vote and denying substantive due process and equal protection.[FN5] The plaintiffs subsequently moved for a temporary injunction of the identification requirements.

FN5. The plaintiffs also alleged that the Act's identification requirements improperly imposed voter qualifications beyond those specified in the Wisconsin Constitution. However, they later agreed to withdraw that claim from consideration in the case.

In support of their motion for a temporary injunction, the plaintiffs submitted two kinds of evid-

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ence. The first consisted of initial and supplemental expert reports establishing that there are approximately 221,975 constitutionally eligible voters in Wisconsin who lack either a Wisconsin driver's license or a state photo identification. The second consisted of affidavits from forty individuals who state that their voting rights have been burdened in various ways by the identification requirements.

On February 8, 2012, following briefing on the injunction motion, the circuit court for Dane County, the Honorable David T. Flanagan, III, presiding, issued an order denying the motion for temporary injunction. In it, the court acknowledged that the plaintiffs' request "poses a close and extremely serious question." However, the court concluded that the plaintiffs had not made a sufficient showing of irreparable harm to justify the requested injunction.

On February 13, 2012, the circuit court held a conference for the purpose of scheduling a trial on the merits of the case. The court determined that it would not be feasible to try the case and issue a decision prior to the April 3, 2012, election. At that point, the court decided to reconsider its previous decision denying the plaintiffs' motion for temporary injunction and scheduled an evidentiary hearing for March 1, 2012.

Following the evidentiary hearing, the circuit court issued a temporary injunction on March 6, 2012, ordering the defendants to cease immediately any effort to enforce or implement the identification requirements of the Act pending trial and further order of the court. In reaching its decision, the court found that the plaintiffs had demonstrated likely success on their claim that the Act's identification requirements unconstitutionally burden voting rights under the Wisconsin Constitution. The court further found that the plaintiffs had demonstrated a substantial probability of irreparable harm to the voting rights of a significant portion of the electorate, sufficient to justify a facial injunction of all enforcement or implementation of the identification requirements.

***3** On March 9, 2012, the defendants moved the circuit court to stay the temporary injunction, pending the defendants' petition for leave to appeal. The circuit court denied the motion on March 15, 2012, concluding that the defendants had not met the criteria for a stay. The defendants subsequently petitioned this court for leave to appeal and moved to stay the temporary injunction pending disposition of the petition and of any subsequent appeal, if the petition is granted. We now certify both the petition for leave to appeal and accompanying motion to stay in this case to the Wisconsin Supreme Court for its review and determination.

DISCUSSION

Because this case has not yet been briefed as an appeal, our framing of the issues is based on the circuit court's decision as well as the parties' arguments set forth in their petition for leave to appeal and response. As we understand it, the circuit court's reasoning for granting the temporary restraining order may be summarized as follows:

1) The plaintiffs' claims are founded exclusively upon the Wisconsin Constitution, which provides that "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." WIS. CONST. art. III, § 1.

2) A significant proportion of constitutionally eligible voters in Wisconsin—approximately 221,975 individuals—do not possess acceptable photo identification.

3) The Act imposes a substantial burden upon these voters in several respects. First, for some of these voters, the Act imposes an indirect financial burden in having to pay a fee to acquire documents—such as a birth certificate—that may be needed to obtain free identification from the DOT. Second, for some of these voters, the Act imposes a general burden in having to deal with multiple visits to government offices, delay, dysfunctional computer systems, misinformation, and a significant investment of time to avoid be-

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ing turned away at the ballot box. Third, for a smaller number of these voters, the Act imposes a specific burden related to their specialized circumstances (*e.g.*, individuals who cannot locate their birth certificates or have a birth certificate with a misspelled name, etc.).

4) There is no evidence of voter fraud that would have been prevented by the Act.

5) The Act's identification requirements are notably inflexible in that they do not mandate any heightened review or validation of the ballot of a constitutionally eligible voter who lacks the required identification. Under the Act, a constitutionally eligible voter who cannot produce the required identification at the polling place, or within three days thereafter, is simply prohibited from voting.

6) Constitutionally eligible voters who do not possess a driver's license are disproportionately elderly, indigent, or members of a racial minority.

7) The Wisconsin Supreme Court has not deferred to the legislature on questions of voter qualification.

***4** 8) The proper level of judicial review is strict or heightened scrutiny, as the Act implicates a fundamental interest in the constitutional right to vote.

9) The Act's identification requirements have been shown to be an improper impairment of the constitutional right to vote by (a) failing to account for the difficulty they demand upon indigent, elderly, and disabled citizens who are otherwise constitutionally eligible to vote; and (b) offering no flexibility to prevent the exclusion of constitutionally eligible voters. Thus, the Act is in violation of the WIS. CONST. art. III, § 1.

10) The decision of the United States Supreme Court in ***Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)**, does not require judicial deference to the Act for three reasons. First, unlike the present case, the ***Crawford*** case was based upon the United States Constitution. Second, unlike the present case, the ***Crawford*** case was based upon a flawed factual record lacking substantial evidence of the burden imposed by the challenged law. Finally, the law in ***Crawford*** was less rigid than the Act because it offered alternative voting opportunities to eligible voters who lacked the required identification. FN6

FN6. The law at issue in ***Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)**, permitted voters who were indigent or had a religious objection to being photographed to cast a provisional ballot that would be counted if they executed an appropriate affidavit before the circuit court clerk within 10 days following the election. ***Id.* at 186**.

In its petition for leave to appeal, the defendants-petitioners argue that the circuit court erred in several respects. Specifically, they accuse the court of (1) introducing new discrepancies into the interpretation of the right to vote under the state and federal constitutions; (2) facially enjoining a state election law that is constitutional as applied to the vast majority of voters; (3) holding that every statute implicating the right to vote is subject to strict scrutiny; and (4) concluding that the Act's identification requirements permanently disenfranchise every voting-eligible person who does not already possess a driver's license or a state photo identification.

The plaintiffs-respondents, of course, disagree. In their response, they contend that the circuit court adhered to existing Wisconsin precedent construing Article III, Section 1 of the Wisconsin Constitution. They further assert that the court adopted and applied the correct heightened level of scrutiny and employed the proper inquiry, balancing the harms and benefits of the Act. Additionally, they maintain that the court employed the correct legal standard to

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sustain a facial challenge to the identification requirements, finding the Act's inflexible and widespread application to be unconstitutional for a substantial number of voters.

From these arguments, several issues emerge. First, what level of judicial scrutiny should be employed in reviewing the plaintiffs' challenge to the Act? Second, does the Wisconsin Constitution provide greater protection to voting rights than is guaranteed under the United States Constitution? Third, did the circuit court correctly assess the burden imposed by the Act from the facts of this record? Finally, given the answers to these previous questions, are the Act's identification requirements permitted by the Wisconsin Constitution? Because these issues have great consequence to the voters of this state and election officials, we believe that the Supreme Court is the proper forum to hear this case.

CONCLUSION

***5** In sum, this case presents significant legal issues that impact the essential political functions of the State. Given the need for a prompt resolution, we respectfully certify the petition for leave to appeal and accompanying motion to stay in this case to the Wisconsin Supreme Court for its review and determination.[FN7]

FN7. As noted in the certification for *League of Women Voters of Wisconsin Education Network, Inc. v. Scott Walker*, No.2012AP584, this matter is also highly time-sensitive due to upcoming elections.

Wis.App.,2012.
Milwaukee Branch of NAACP v. Walker
Not Reported in N.W.2d, 2012 WL 1020254 (Wis.App.)

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C

Supreme Court of Minnesota.
LEAGUE OF WOMEN VOTERS MINNESOTA; Common Cause, a District of Columbia nonprofit corporation; Jewish Community Action; Gabriel Herbers; Shannon Doty; Gretchen Nickence; John Harper Ritten; Kathryn Ibur, Petitioners,
v.
Mark RITCHIE, in his capacity as Secretary of State of the State of Minnesota, and not in his individual capacity, Respondent.

No. A12–0920.
Aug. 27, 2012.

Background: Petitioners filed suit against the Secretary of State seeking to enjoin the Secretary from placing on the general election ballot a question pertaining to the proposed voter identification and provisional ballot constitutional amendment. The State House of Representatives and the State senate, individual legislators, and nonprofit organization filed motions to intervene.

Holdings: The Supreme Court held that:
(1) permissive intervention of House and Senate was appropriate;
(2) non-profit organization was not entitled to intervene as of right;
(3) Supreme Court had subject matter jurisdiction over the matter;
(4) nonprofit organizations had standing to bring suit; and
(5) ballot question on a proposed constitutional amendment implementing a photographic identification requirement for voters was not so unreasonable or misleading as to be a palpable evasion of requirement of State Constitution that constitutional amendments be submitted to a popular vote.

Petition denied.

Page, J., dissented, with opinion, in which Paul H. Anderson, J., joined.

Paul H. Anderson, J., dissented, with opinion.

West Headnotes

[1] Parties 287 ⚷40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in subject of action in general. Most Cited Cases

Parties 287 ⚷41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

Parties 287 ⚷42

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k42 k. Time for intervention. Most Cited Cases

There are four requirements that must be met for a party to intervene in a matter as of right: (1) a timely application, (2) an interest in the subject of the action, (3) an inability to protect that interest unless the applicant is a party to the action, and (4) the applicant's interest is not adequately represented by existing parties. 48 M.S.A., Rules Civ.Proc., Rule 24.01.

[2] Parties 287 ⚷40(1)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(1) k. In general. Most Cited

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Cases

For a party to permissively intervene in a matter, the only requirement is that the proposed intervenors have a common question of law or fact with the action. 48 M.S.A., Rules Civ.Proc., Rule 24.02.

[3] Constitutional Law 92 571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

Permissive intervention of State House of Representatives and State Senate was appropriate in suit brought by petitioners seeking to enjoin the Secretary of State from placing on general election ballot a question on proposed constitutional amendment implementing a photographic identification requirement for voters; House and Senate presented common questions of law and fact with the suit, and it was appropriate for the House and Senate to participate in the suit, given that the Secretary, as the named respondent, did not participate in a substantive way in the proceedings. 48 M.S.A., Rules Civ.Proc., Rule 24.02.

[4] Constitutional Law 92 571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

Non-profit organization that had expended resources seeking to have placed on general election ballot a question on proposed constitutional amendment implementing a photographic identification requirement for voters was not entitled to intervene as of right in suit brought by petitioners seeking to enjoin the Secretary of State from placing this question on the ballot, as the organization's only interest in the proposed constitutional amendment was lobbying for passage, and the organization's interests would be adequately represented by the State House of Representatives and State Senate, which had both been granted permissive intervention in the proceedings. 48 M.S.A., Rules Civ.Proc., Rule 24.02.

[5] Courts 106 4

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k3 Jurisdiction of Cause of Action
106k4 k. In general. Most Cited Cases

"Subject matter jurisdiction" is the power of the court to hear and determine cases that are presented to the court; the court's authority depends, in the first instance, on the claims made.

[6] Constitutional Law 92 571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

Statute granting authority to Supreme Court to hear claims of errors in the placement of any question on any official ballot provided subject matter jurisdiction to the Court to resolve issue of whether general election ballot question on proposed constitutional amendment implementing a photographic identification requirement for voters was so misleading that it violated the State Constitution because it deprived voters of the constitutional right to case a vote for or against the proposed constitutional amendment. M.S.A. Const. Art. 9, § 1; M.S.A. § 204B.44.

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[7] Constitutional Law 92 ⚷571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

Supreme Court has subject matter jurisdiction over a claim that a ballot question is so misleading that it violates the State Constitution because it deprives voters of the constitutional right to cast a vote for or against the proposed constitutional amendment. M.S.A. § 204B.44.

[8] Constitutional Law 92 ⚷703

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k703 k. Elections. Most Cited Cases

Nonprofit organizations had standing to bring suit seeking to enjoin the Secretary of State from placing on general election ballot a question on proposed constitutional amendment implementing a photographic identification requirement for voters, as statute permitted any individual to file a petition for the correction of an error in the placement of a question on an official ballot, and the organizations each constituted an "individual" within the meaning of the statute. M.S.A. § 204B.44.

[9] Amicus Curiae 27 ⚷3

27 Amicus Curiae
27k3 k. Powers, functions, and proceedings. Most Cited Cases

Generally, the Supreme Court does not decide issues raised by an amicus curiae that are not raised by the litigants themselves.

[10] Amicus Curiae 27 ⚷3

27 Amicus Curiae
27k3 k. Powers, functions, and proceedings. Most Cited Cases

Supreme Court may decide issues raised solely by an amicus curiae particularly if the issue is one the court could raise sua sponte.

[11] Action 13 ⚷13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

To have standing, a party must have a sufficient stake in a justiciable controversy to seek relief from a court.

[12] Action 13 ⚷13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

A party can acquire standing in one of two ways: (1) if the plaintiff has suffered some injury-in-fact, or (2) if the plaintiff is the beneficiary of some legislative enactment granting standing.

[13] Action 13 ⚷13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

Standing is essential to the Supreme Court's exercise of jurisdiction, which can be raised by the Court on its own motion.

[14] Constitutional Law 92 ⚷556

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative

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92k556 k. Ballots in general. Most Cited Cases

General election ballot question on a proposed constitutional amendment implementing a photographic identification requirement for voters was not so unreasonable or misleading as to be a palpable evasion of requirement of State Constitution that constitutional amendments be submitted to a popular vote; the ballot question, as framed by the legislature, did not use the same words used in the proposed amendment itself, nor did it list all of the potential effects of implementation of the identification system contemplated in the proposed amendment, but this discrepancy did not meet the high standard required for the judiciary to intercede into a matter that was constitutionally committed to the legislative branch. M.S.A. Const. Arts. 7, § 1, 9, § 1 ; M.S.A. § 204B.44.

[15] Constitutional Law 92 ⚷571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

In determining validity of legislative proposal containing a constitutional amendment for submission to the public, the Supreme Court, in its review process, must evaluate the ballot question with a high degree of deference to the legislature. M.S.A. Const. Art. 9, § 1; M.S.A. § 204B.44.

[16] Constitutional Law 92 ⚷571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

In determining validity of legislative proposal containing a constitutional amendment for submission to the public, the only proper question for the Supreme Court on review is whether the form of ballot actually used complies with the State Constitution; in other words, the Court's review is limited to determining whether the ballot question as framed is so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote. M.S.A. Const. Art. 9, § 1; M.S.A. § 204B.44.

[17] Constitutional Law 92 ⚷571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

Petitioners challenging the validity of a legislative proposal containing a constitutional amendment for submission to the public bear the burden of demonstrating that the ballot question as framed is so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote, and that therefore an error exists that the Supreme Court must correct. M.S.A. Const. Art. 9, § 1; M.S.A. § 204B.44.

[18] Constitutional Law 92 ⚷571

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(C) State Constitutions
92III(C)4 Submission to Popular Vote; Initiative
92k569 Judicial Proceedings
92k571 k. Pre-election challenges or review. Most Cited Cases

Supreme Court, on petition seeking to enjoin the Secretary of State from placing on general election ballot a question on proposed constitutional amendment implementing a photographic identific-

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ation requirement for voters, would not consider a challenge to the title for the ballot question, where issue was not raised in the petition. M.S.A. Const. Art. 9, § 1; M.S.A. § 204B.44.

Syllabus by the Court

***1** 1. Permissive intervention of the Minnesota House and Senate is appropriate when the intervenors present common questions of law and fact with the present action. Intervention of a nonprofit organization is inappropriate, however, when the entity's only interest in the proposed constitutional amendment at issue is lobbying for passage and the entity's interests will be adequately represented by the House and Senate intervenors.

2. Minnesota Statutes § 204B.44 (2010), provides this court with subject-matter jurisdiction over a claim that a ballot question is so misleading that it violates the Minnesota Constitution because it deprives voters of the constitutional right to cast a vote for or against the proposed constitutional amendment.

3. The ballot question on a proposed constitutional amendment implementing a photographic identification requirement for Minnesota voters is not so unreasonable and misleading as to be a palpable evasion of the constitutional requirement in Minn. Const. art. IX, § 1, that constitutional amendments shall be submitted to a popular vote.

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OPINION

PER CURIAM.

This action was brought under Minn.Stat. § 204B.44 (2010), seeking to correct an alleged error in the preparation of the ballot for the general election. Specifically, petitioners seek to prevent the people of Minnesota from voting on the question of whether photographic identification should be required to vote in Minnesota. The court is unanimous in concluding that petitioners are not entitled to this unprecedented relief.[FN1] We express no opinion in this case as to the merits of changing Minnesota law to require photographic identification to

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vote; that question, as petitioners concede, is not presented in this case. Because we conclude that the petitioners have not met their burden of demonstrating that there is an error that requires the judiciary to intercede, we deny the petition.

***2** In April 2012, the Legislature approved a proposed amendment to Article VII, Section 1 of the Minnesota Constitution. This section currently provides:

> Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

Minn. Const. art. VII, § 1. The proposed amendment would designate the provision above as (a) and add two subsections, (b) and (c), as follows:

> *(b) All voters voting in person must present valid government-issued photographic identification before receiving a ballot. The state must issue photographic identification at no charge to an eligible voter who does not have a form of identification meeting the requirements of this section. A voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot. A provisional ballot must only be counted if the voter certifies the provisional ballot in the manner provided by law.*
>
> *(c) All voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification prior to a ballot being cast or counted.*

Ch. 167, § 1, 2012 Minn. Laws 145, 145–46.

In the same session law, the Legislature also approved the language of the question to be placed on the November 2012 general election ballot concerning the proposed constitutional amendment:

> Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?

Id. § 2(a), 2012 Minn. Laws at 146. Finally, the Legislature approved a title for the ballot question: "Photo Identification Required for Voting." *Id.* § 2(b), 2012 Minn. Laws at 146.

In order to become effective, the amendment must be agreed to by "a majority of all the electors voting at the election," not just a majority of those voting on the amendment itself. Minn. Const. art. IX, § 1. The legislation at issue in this case provides that, if approved, the constitutional amendment would become "effective July 1, 2013, for all voting at elections scheduled to be conducted November 5, 2013, and thereafter." Ch. 167, § 2(a), 2012 Minn. Laws at 146.

On May 30, 2012, petitioners filed a petition with our court under Minn.Stat. § 204B.44, seeking to "strik[e] the ballot question pertaining to the Voter Identification and Provisional Ballot Amendment" and to enjoin the Secretary of State from placing the question on the November 2012 general election ballot. Petitioners allege that the Legislature's ballot question "is misleading because it does not accurately and factually describe the proposed amendment, and because it fails to describe at all certain important substantive provisions contained in the amendment."

***3** We issued a scheduling order that set deadlines for briefs, requests to intervene, and requests for amicus participation. *League of Women Voters Minn. v. Ritchie,* A12–0920, Order (Minn. filed

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June 1, 2012). The named respondent, Secretary of State Mark Ritchie, declined to file a brief on the merits, but submitted an affidavit of Gary Poser, Director of Elections for the State of Minnesota, that explained the dates by which a decision was needed to timely prepare ballots for the general election.

I.

We received motions to intervene from State Senator Scott J. Newman and State Representative Mary Kiffmeyer, Minnesota Majority, Inc., the 87th Minnesota House of Representatives, and the 87th Minnesota Senate. We granted intervention to the House and the Senate, but denied the motions of Minnesota Majority and the individual legislators. *League of Women Voters Minn. v. Ritchie*, A12–0920, Order at 2–3 (Minn. filed June 15, 2012). We issued our order on the intervention motions with opinion to follow, and now set forth the basis for that order. *Id.* at 4.

[1][2] All three motions to intervene sought intervention as of right under Minn. R. Civ. P. 24.01:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24.01 establishes four requirements for intervention as of right: (1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) the applicant's interest is not adequately represented by existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn.1986). All those seeking intervention contended that they satisfied each of the requirements. Alternatively, the proposed intervenors sought permissive intervention under Minn. R. Civ. P. 24.02, which requires only that the proposed intervenors have "a common question of law or fact" with the action.

[3] With respect to the House and the Senate, petitioners do not object to the permissive intervention of these bodies. Given that the named respondent, Secretary of State Mark Ritchie, did not participate in a substantive way in these proceedings, we agreed with petitioners that it is appropriate for the House and Senate, the bodies that passed the legislation at issue in this case, to participate, and so without deciding whether those bodies may intervene as of right, we granted their motion for permissive intervention.

With respect to the motion from Senator Newman and Representative Kiffmeyer, that motion sought intervention conditioned on the failure of the Legislature to do so. Given that the House and the Senate successfully intervened, we denied the motion to intervene by Senator Newman and Representative Kiffmeyer.

***4** [4] Finally, with respect to Minnesota Majority, it described itself as "a nonprofit corporation that promotes social welfare" and "an advocate for election integrity in Minnesota." Noting that it has been "actively involved in successfully placing this Voter Identification Amendment on the ballot," Minnesota Majority contended that it would "suffer substantially if the people of Minnesota [were] not permitted to vote to enhance the integrity of the Minnesota election process."

As petitioners point out, as a nonprofit corporation Minnesota Majority does not vote. Nor does Minnesota Majority assert that its members are eligible to vote in Minnesota and that it is representing the interests of its members. Rather, the only basis on which Minnesota Majority asserts standing to intervene is the fact that it expended resources to get the proposed constitutional amendment passed in the Legislature. But courts have denied intervention to entities whose only interest in legislation is that they lobbied for its passage. *See Northland*

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Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 344–45 (6th Cir.2007) (denying intervention to "a public interest group involved in the process leading to the adoption of [a] challenged statute" and noting that the group "is not itself regulated by any of the statutory provisions at issue here"); *Keith v. Daley,* 764 F.2d 1265, 1269 (7th Cir.1985) (affirming denial of intervention by an interest group in litigation brought by physicians challenging an Illinois statute regulating abortion because the group's interest as "chief lobbyist" in support of the bill was not "a direct and substantial interest sufficient to support intervention"); *United States v. 36.96 Acres of Land,* 754 F.2d 855, 857 (7th Cir.1985) (affirming denial of intervention by the Save the Dunes Council, a nonprofit corporation described as having "lobbied extensively for national legislation protecting the dunes and expanding the protected areas").[FN2]

Moreover, the position Minnesota Majority seeks to advance in this litigation is substantially the same as the position advanced by the House and Senate. We were also mindful of the expedited nature of these proceedings. For all of these reasons, we denied Minnesota Majority's motion to intervene.[FN3]

II.

[5] We next consider the House and Senate's argument that we lack subject-matter jurisdiction because the petitioners' claims do not fall under Minn.Stat. § 204B.44 (2010).[FN4] Subject-matter jurisdiction is the power of the court "to hear and determine cases that are presented to the court." *State v. Losh,* 755 N.W.2d 736, 739 (Minn.2008). The court's authority depends, in the first instance, on the claims made. *See Robinette v. Price,* 214 Minn. 521, 526, 8 N.W.2d 800, 804 (1943) (describing our jurisdiction as the authority to "hear and determine *a particular class of actions* " (emphasis added)).

[6] In this case, the petition alleges that an election official—the Secretary of State—is about to commit an error by placing the ballot question passed by the Legislature on the November 2012 general election ballot. As the basis for this court's subject-matter jurisdiction, the petition itself cites only Minn.Stat. § 204B.44(a), (b), and (d). The brief accompanying the petition asserts that the ballot question also violates Article IX, Section 1 of the Minnesota Constitution because the ballot question "does not accurately describe the proposed amendment."

***5** The House and Senate contend that the placement of the photographic identification question on the ballot is not a "cognizable 'error, omission, or wrongful act' " under Minn.Stat. § 204B.44 because the Legislature "debated, voted on, and passed" the proposed amendment and ballot question. According to the House and Senate, "[i]t is certainly not a wrongful act for the Legislature to properly exercise its constitutional authority and duty. Moreover, the Minnesota Legislature is not among the enumerated election officials listed in Minnesota Statutes section 204B.44."

We agree with the House and Senate that whether to place a proposed constitutional amendment before the people is a question that the Minnesota Constitution vests with the legislative branch. Minn. Const. art. IX, § 1. The petition does not, however, challenge the proposed constitutional amendment itself or the constitutional authority of the Legislature to submit the proposed amendment to the people. And while petitioners admittedly quarrel with positions taken during legislative debates on the proposed amendment and ballot question, and contend that the proposed amendment, if approved by voters, would require significant changes in Minnesota election law, the petition does not assert "the infirmity of the proposed amendment itself," as amici Newman and Kiffmeyer note.

Instead, petitioners challenge only the particular language of the ballot question as failing to describe accurately the proposed amendment.[FN5] The issue therefore is whether this court has subject-matter jurisdiction over the narrow claim of whether

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the ballot question is so misleading that it violates the Minnesota Constitution because it deprives voters of the constitutional right to cast a vote for or against the proposed constitutional amendment. *See Breza v. Kiffmeyer,* 723 N.W.2d 633, 636 (Minn.2006). We conclude that we have subject-matter jurisdiction to resolve this narrow issue.

[7] The statute petitioners invoke—Minn.Stat. § 204B.44—provides a statutory basis for our jurisdiction. Under Minn.Stat. § 204B.44(a), we have the authority to hear claims of errors "in the placement [of] ... any question on any official ballot." The petitioners argue that it would be an error for the Secretary of State to place the question as currently phrased on the ballot because the ballot question is "unreasonable and misleading" to such an extent that it "fails to provide voters with a fair opportunity to understand and vote." The plain language of section 204B.44 therefore gives us the authority to hear the type of dispute at issue here. *See Erlandson v. Kiffmeyer,* 659 N.W.2d 724, 729 (Minn.2003) (stating that section 204B.44 "allows any person to file a petition to correct or prevent certain types of errors, omissions, or wrongful acts").

Our precedent confirms the conclusion that we have subject-matter jurisdiction. *See Winget v. Holm,* 187 Minn. 78, 80, 244 N.W. 331, 332 (1932) (recognizing "no essential difference between submitting to the voters a candidate who has no legal right to appear on the ballot and submitting a proposed amendment to the constitution in a form therein prohibited" in upholding the court's original jurisdiction under the predecessor to section 204B.44). In *Winget,* we specifically affirmed our jurisdiction over pre-election challenges to proposed constitutional amendments. *Id.* at 81–82, 244 N.W. at 332. *Winget* was an attempt to prevent the Secretary of State from putting a proposed constitutional amendment on the ballot on the basis that it violated the single-subject rule required by Minn. Const. of 1857, art. XIV, § 1 (now Minn. Const. art. IX, § 1).[FN6] *Id.* at 79, 244 N.W. at 331–32. The Secretary of State challenged our jurisdiction, arguing that the proceeding was "premature; that the adoption of a constitutional amendment [was] the composite act of the legislature and the electors and that at no point before the final act of both may the court interfere." *Id.* at 81, 244 N.W. at 332.

***6** [8][9][10][11][12][13] In denying the Secretary of State's jurisdictional challenge, we first observed that it was settled "that courts have jurisdiction to determine whether an amendment to the constitution proposed by the legislature and submitted to the electors was proposed, submitted, and ratified conformably to the mandate of the constitution so as to become a part thereof." *Id.* at 80–81, 244 N.W. at 332 (citing *McConaughy v. Sec'y of State,* 106 Minn. 392, 119 N.W. 408 (1909)). We said that there was "no good reason" why we "should not interpose to save the trouble and expense of submitting a proposed constitutional amendment to a vote, if it be not proposed in the form demanded by the constitution," because even though such an amendment be "approved by the electors," the court would nevertheless "be compelled to declare it no part of the constitution." *Id.* at 81, 244 N.W. at 332. We reach the same conclusion here and hold that petitioners' challenge falls within the scope of our jurisdiction under section 204B.44(a).[FN7]

III.

We turn next to the merits of petitioners' constitutional challenge. In essence, petitioners argue that it would be unconstitutional to submit the proposed ballot question to the voters because the question is misleading. Petitioners seek unprecedented relief—removal from the general election ballot of a proposed constitutional amendment that the Legislature passed and proposed to the people.

Petitioners point to four alleged defects in the question framed by the Legislature. First, petitioners contend that the question is erroneous because it refers to "valid photo identification," whereas the actual amendment refers to "government-issued photographic identification." Second, petitioners contend the question is erroneous because it indic-

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ates that "all voters" will have to present photographic identification, but under the text of the amendment only "voters voting in person" will have to present such identification. Third, petitioners argue that the question is erroneous because it fails to describe that absentee voters will be subject to "substantially equivalent identity and eligibility verification" requirements, as referenced in the amendment. Fourth, petitioners argue that the question is erroneous because it fails to include any information regarding the provisional balloting referenced in the amendment. Based on these errors and omissions, petitioners request that we strike the question from the ballot.

For their part, the House and Senate argue there is no requirement that all substantive provisions of the proposed amendment be included on the ballot. Indeed, according to the House and Senate, it has been the longstanding practice in Minnesota to describe only the "general purpose" of proposed constitutional amendments when those amendments are submitted to the voters in the form of ballot questions. Because the question at issue here captures the essential purpose of the amendment, the House and Senate argue that our precedent requires us to defer to the Legislature's formulation of the question.

***7** [14] The Minnesota Constitution textually commits to the legislative branch the authority to submit proposed constitutional amendments to the people. Article IX, Section 1 of the Minnesota Constitution provides:

> A majority of the members elected to each house of the legislature may propose amendments to this constitution. Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election.

Minn. Const. art. IX, § 1; *see also* Op. Att'y Gen. No. 213– C (Mar. 9, 1994) (opining that amendments proposed by the Legislature are not subject to gubernatorial approval or veto). Because the constitution vests the authority to propose constitutional amendments with the legislative branch, proper respect for the separation of powers limits our authority in this area. *See* Minn. Const. art. III ("The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."); *see also Laase v. 2007 Chevrolet Tahoe,* 776 N.W.2d 431, 437 (Minn.2009) (discussing "constitutional principle of separation of powers").

[15][16] Our precedent reflects this limitation and the fact that, in our review process, we must evaluate the ballot question with a high degree of deference to the Legislature. *Fugina v. Donovan,* 259 Minn. 35, 40, 104 N.W.2d 911, 915 (1960) (noting, that in close cases, "the controlling consideration is the deference due the legislative judgment that this is a proper proposal to amend the constitution"). The only proper question for us on review is whether "the form of ballot actually used compl[ies] with the constitution." *State ex rel. Marr v. Stearns,* 72 Minn. 200, 217, 75 N.W. 210, 214 (1898), *rev'd on other grounds,* 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162 (1900). In other words, our review is limited to determining whether the ballot question as framed is " 'so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.' " *Breza v. Kiffmeyer,* 723 N.W.2d 633, 636 (Minn.2006) (quoting *Stearns,* 72 Minn. at 218, 75 N.W. at 214).[FN8]

Petitioners acknowledge *Breza,* but also appear to suggest that we were incorrect in *Breza* to adopt the standard articulated in *Stearns* for assessing the validity of questions involving proposed amendments to the constitution. It is accurate to state, as petitioners and the dissents do, that *Stearns* did not involve a constitutional amendment. Instead, that case arose in the context of a law concerning taxa-

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tion of railroad land, which was required to be submitted to voters for approval before taking effect. *See Stearns,* 72 Minn. at 217, 75 N.W. at 214. But we specifically said in *Stearns,* "[t]he constitution requires that all amendments to that instrument shall be submitted to the people for their approval or rejection. There is no essential difference between this requirement and the one as to the submission of the [railroad land taxation] law in question." *Id.* at 218, 75 N.W. at 215 (citations omitted); *see also State v. Duluth & N. Minn. Ry. Co. (Duluth Railway),* 102 Minn. 26, 30, 112 N.W. 897, 899 (1907) (concluding that a railroad land taxation ballot question was properly submitted because the law was "fairly expressed in the question submitted"). The constitution compelled this conclusion because the relevant constitutional provisions are virtually identical. The constitutional provision at issue in *Stearns* required that "[a]ny law [relating to railroad land taxation] ... shall ... be submitted to a vote of the people of the state." Minn. Const. of 1857, art. IV, § 32a (1871). The constitution uses nearly identical language in the provision at issue in this case: "Proposed amendments shall be ... submitted to the people for their approval or rejection." Minn. Const. art. IX, § 1.

***8** In *Breza,* we explicitly adopted the standard articulated in *Stearns* and *Duluth Railway* in the context of reviewing the sufficiency of a ballot question used to put a proposed constitutional amendment to a popular vote. *Breza,* 723 N.W.2d at 636. After laying out the standard from *Stearns,* we held that "[t]he ballot question in this case clearly does not meet the high standard set out in our precedent for finding a proposed constitutional amendment to be misleading." *Id.* The dissents contend that our adoption of the *Stearns* standard in *Breza* was dicta. The dissents are wrong.

The petitioners in *Breza* "claim[ed] that the ballot question on the amendment [was] unconstitutionally misleading as it relate[d] to the allocation of MVST revenues between public transit and highways." *Id.* at 634. In order to answer that question, it was necessary for us to decide the standard by which ballot questions on proposed constitutional amendments would be judged. We adopted the *Stearns* standard to answer the question posed in the case. *See id.* at 636. Our adoption of the standard, therefore, was not dicta. *See State ex rel. Foster v. Naftalin,* 246 Minn. 181, 208, 74 N.W.2d 249, 266 (1956) (" 'Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum.' ") (quoting *Union Pac. R.R. Co. v. Mason City & Fort Dodge R.R. Co.,* 199 U.S. 160, 166, 26 S.Ct. 19, 50 L.Ed. 134 (1905)).

In this case, petitioners ask the same question as was posed in *Breza.* In order to answer that question, the principle of stare decisis requires that we follow the standard adopted in *Breza. See, e.g., SCI Minn. Funeral Servs., Inc. v. Washburn–McReavy Funeral Corp.,* 795 N.W.2d 855, 862 (Minn.2011). The standard enunciated in *Breza,* therefore, controls our review of the ballot question at issue.

[17] The petitioners bear the burden of demonstrating that the ballot question meets this rigorous standard, and that therefore an error exists that we must correct. *See Weiler v. Ritchie,* 788 N.W.2d 879, 882 (Minn.2010). The ballot question at issue does not violate that "high standard." *Breza,* 723 N.W.2d at 636. The proposed amendment to Article VII, Section 1 of the Minnesota Constitution would add two subsections: the first, subsection (b), requiring in part that "[a]ll voters voting in person must present valid government-issued photographic identification before receiving a ballot," and the second, subsection (c), requiring that "[a]ll voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification prior to a ballot being cast or counted." Ch. 167, §§ 1(b), (c), 2012 Minn. Laws at 145–146. The ballot question summarizes these provisions and asks whether the Minnesota Constitution shall be amended "to require all voters to present valid photo identification to vote." *Id.* §

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2(a), 2012 Minn. Laws at 146.

***9** But petitioners argue, among other things, that the ballot question is misleading because there is a difference between "valid government-issued photographic identification," as required in the proposed amendment, and "valid photographic identification," as required in the ballot question. We agree with petitioners that there is a difference between a "government-issued photographic identification," and a "valid photographic identification." That the ballot question reads differently than the proposed amendment, however, does not render the ballot question " 'so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit' " the proposed constitutional amendment " 'to a popular vote.' " *Breza,* 723 N.W.2d at 636 (quoting *Stearns,* 72 Minn. at 218, 75 N.W. at 214).

Petitioners also argue that the ballot question is misleading because it indicates that "all voters" will be required to present "valid photographic identification," when in fact, according to petitioners, the proposed amendment requires that only *some* voters (namely, those voting in person) present valid photographic identification. This argument is unpersuasive. Petitioners read the ballot question as narrowly referencing only the obligations placed by the proposed amendment on voters voting in person, and therefore conclude that the question is misleading because it states that the proposed amendment will require *all* voters to present photographic identification. But the ballot question does not refer specifically to only the portion of the proposed amendment that will affect voters voting in person, and petitioners are simply wrong in arguing that the proposed amendment requires only those voting in person to submit photographic identification.

Under the proposed constitutional amendment, voters voting in person "must present *valid government-issued* photographic identification," whereas all voters "must be subject to substantially equivalent identity" verification. Ch. 167, §§ 1(b), (c), 2012 Minn. Laws at 145–46 (emphasis added). The ballot question states only that "all voters [must] present valid photo identification." *Id.* § 2(a), 2012 Minn. Laws at 146. The ballot question, therefore, does not explicitly address the constitutional provision applicable only to voters voting in person (who must present valid government-issued photographic identification) nor does it explicitly address the "substantially equivalent identity" provision (which applies to all voters). Rather, the ballot question constitutes an amalgamation of the individual provisions of the proposed constitutional amendment which, taken together, can fairly be characterized as generally requiring photographic identification for all voters. *Cf.* Minn.Stat. § 204B.36, subd. 3 (2010) ("When a question is to be submitted to a vote, a concise statement of the nature of the question shall be printed on the ballot.").

***10** Petitioners also contend that two omissions from the ballot question render the question constitutionally misleading. Specifically, petitioners argue that the ballot question does not tell voters that those voting by absentee ballot will be subject to "substantially equivalent identity and eligibility" requirements, nor does it reference the use of "provisional ballots" for voters without photographic identification. These omissions do not render the ballot question unconstitutional under our deferential standard of review.

The omission of "or substantially equivalent" does not render the ballot question misleading under our "high standard," *Breza,* 723 N.W.2d at 636, because "substantially equivalent identity ... verification" means just what it says. Equivalent is defined as "like in signification or import," or "corresponding or virtually identical [especially] in effect or function." *Merriam–Websters Collegiate Dictionary* 392 (10th ed.2001). By definition, therefore, all voters would be required to produce valid government-issued photographic identification, or something that is substantially alike in signification or import or that is virtually identical to a valid government-issued photographic identification.[FN9]

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Cf. People v. Leng, 71 Cal.App.4th 1, 83 Cal.Rptr.2d 433, 439 (1999) (explaining that because the equal protection guarantees of the United States and the California Constitution are "substantially equivalent" they are "analyzed in a similar fashion"); *Frey v. Comptroller of the Treasury,* 422 Md. 111, 29 A.3d 475, 495 (2011) (describing "substantially equivalent" taxes as those that are "sufficiently similar in substance to serve as mutually exclusive proxies for each other" (citation omitted) (internal quotation marks omitted)); *Ojo v. Farmers Grp., Inc.,* 356 S.W.3d 421, 433–34 (Tex.2011) (explaining that because a Texas statute specified that it provided "rights and remedies substantially equivalent to those granted under federal law," the court would determine the availability of a particular state remedy by looking to federal case law). Because all voters would present valid government-issued photographic identification or something that is virtually identical to such identification, the ballot question does not mislead voters to the extent that it is " 'a palpable evasion of the constitutional requirement to submit the law to a popular vote.' " *Breza,* 723 N.W.2d at 636 (quoting *Stearns,* 72 Minn. at 218, 75 N.W. at 214); *see also Duluth Railway,* 102 Minn. at 30, 112 N.W. at 898–99 (upholding ballot question as constitutional because the "clear and essential purpose" of the statute was "fairly expressed in the question submitted").[FN10]

The failure of the ballot question to mention provisional ballots likewise does not meet the high *Breza* standard. If the proposed constitutional amendment passes, voters who do not present valid government-issued photographic identification will cast a provisional ballot that will be counted only "if the voter certifies the provisional ballot in the manner provided by law." Ch. 167, § 1(b), 2012 Minn. Laws at 145–146. Petitioners point out that in *Breza* we upheld the ballot question because we could not "say the language [was] so unclear or misleading that voters of common intelligence [could not] understand the meaning and effect of the amendment." 723 N.W.2d at 636. Because the provisional ballot system is an "effect" of the proposed constitutional amendment, petitioners contend the question is unconstitutional. Petitioners' argument misinterprets what we said in *Breza.*

***11** We did not require, as a condition of upholding the ballot question in *Breza,* that the effects of the amendment at issue be included on the ballot. Rather, our reference to the "meaning and effect" of the amendment was made in the context of ensuring that voters were able to understand the "essential purpose" of the proposed constitutional amendment. *Id.; see also Duluth Railway,* 102 Minn. at 30, 112 N.W. at 898. The "essential purpose" of the proposed amendment at issue in this case is the requirement that voters provide photographic identification in order to vote. That "essential purpose" is communicated in the ballot question. *See Breza,* 723 N.W.2d at 636.[FN11]

In sum, the constitutional amendment, if passed, would require that voters who vote in person present a valid government-issued photographic identification and would require all voters present some form of identification that is substantially equivalent to a valid government-issued photographic identification. The ballot question asks the people to decide whether the Minnesota Constitution should be amended to require that all voters present "valid photo identification" to vote in Minnesota. We acknowledge that the ballot question, as framed by the Legislature, does not use the same words used in the amendment itself nor does it list all of the potential effects of implementation of the identification system contemplated in the proposed amendment. These failures may be criticized, and it may indeed have been wiser for the Legislature to include the entire amendment on the ballot.

[18] The proper role for the judiciary, however, is not to second-guess the wisdom of policy decisions that the constitution commits to one of the political branches. The people are the sole judge of the wisdom of such matters. Our precedent provides us with a much more limited role in reviewing the constitutionality of the manner in which the Legis-

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lature submits proposed constitutional amendments to the people. The failures about which petitioners complain do not meet the "high standard" required for the judiciary to intercede into a matter that is constitutionally committed to the legislative branch. *Breza,* 723 N.W.2d at 636. We therefore hold that petitioners have not met their burden to prove that there is an error that requires correction. FN12

Petition denied.

Dissenting, PAGE, ANDERSON, PAUL H., JJ.
Dissenting, ANDERSON, PAUL H., J.

PAGE, Justice (dissenting).

> **Bait and Switch:** the ploy of offering a person something desirable to gain favor (as political support) then thwarting expectations with something less desirable.
> Bait and Switch, *Merriam–Webster Online Dictionary, http://www.merriam-webster.com* (last visited July 27, 2012). What we are dealing with here is a classic bait and switch.

In April 2012 the Legislature approved a proposed amendment to Article VII, Section 1 of the Minnesota Constitution that would add two subsections to that section as follows:

> ***12** (b) *All voters voting in person* must present *valid government-issued photographic identification* before receiving a ballot. The state must issue photographic identification at no charge to an eligible voter who does not have a form of identification meeting the requirements of this section. A voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot. A provisional ballot must only be counted if the voter certifies the provisional ballot in the manner provided by law.
>
> (c) *All voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification* prior to a ballot being cast or counted.

Ch. 167, § 1, 2012 Minn. Laws 145, 145–46 (emphasis added).

The Legislature also approved the language of a question to be placed on the November 2012 ballot (the ballot question) concerning the proposed amendment. The ballot question approved by the Legislature is as follows:

> Shall the Minnesota Constitution be amended to require *all voters* to present *valid photo identification* to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?

Id. § 2(a), 2012 Minn. Laws at 146 (emphasis added). Finally, the Legislature approved a title for the ballot question: "Photo Identification Required for Voting." *Id.* § 2(b), 2012 Minn. Laws at 146.

I read Article IX, Section 1 of the Minnesota Constitution to require that the language of a proposed constitutional amendment itself appear on the ballot. Moreover, if there is to be a question on the ballot concerning a proposed constitutional amendment, that question cannot materially misstate the language of the proposed amendment. FN1 FN2 The language of the ballot question drafted by the Legislature at issue in this case deliberately and materially misstates the language of the proposed amendment. FN3 I therefore respectfully dissent.

A.

I begin with the standard by which this court should review the Legislature's ballot question.

The court applies an extraordinarily deferential standard to the Legislature's ballot question, and does so for two apparent reasons. One, the court contends that "our authority in this area" is limited by "proper respect for the separation of powers." That premise, in turn, rests on the court's assumption that in proposing constitutional amendments, the Legislature acts under its *legislative* power. That assumption is wrong. *See In re Opinion of the Justices,* 118 Me. 544, 107 A. 673, 674 (1919) (noting that in proposing amendments to the United

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States Constitution, Congress "strictly speaking, [is not] acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under the power expressly conferred by article 5 [of the United States Constitution]"); *State ex rel. McKittrick v. Kirby,* 349 Mo. 988, 163 S.W.2d 990, 993 (1942) (noting that "it has been universally held that the legislature, in proposing an amendment [to the constitution], is not exercising its ordinary legislative power but is acting as a special organ of government for the purpose of constitutional amendment" and collecting cases). Indeed, if proposing constitutional amendments were part of the Legislature's legislative function, its authority to do so would be inherent in Article IV of the constitution and no separate authority (such as Article IX) would be required. To the contrary, as the Maine Supreme Judicial Court has observed in the context of amendments to the United States Constitution:

> ***13** The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.

In re Opinion of the Justices, 107 A. at 674. The separation of powers therefore does not limit our review of the Legislature's proposed ballot question.

Two, the court further contends that the scope of our review here is limited by precedent. Specifically, according to the court, "our review is limited to determining whether the ballot question as framed is 'so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.' " (Quoting *State ex rel. Marr v. Stearns,* 72 Minn. 200, 218, 75 N.W. 210, 214 (1898), *rev'd on other grounds,* 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162 (1900)). Our precedent does no such thing.

We have considered two previous challenges to the language of ballot questions but those cases involved challenges to ballot questions proposing *statutory,* rather than *constitutional,* amendments. *Stearns,* 72 Minn. at 207, 75 N.W. at 210; *State v. Duluth & N. Minn. Ry. Co. (Duluth Railway),* 102 Minn. 26, 26, 112 N.W. 897, 897 (1907). When *Stearns* and *Duluth Railway* were decided, the Minnesota Constitution required that any change to the law allowing railroads to pay a gross earnings tax to the state, rather than pay property taxes to local governments, be put to a popular vote. Minn. Const. of 1857, art. IV, § 32a. *Stearns* and *Duluth Railway* arose from statutory changes subject to that constitutional provision.

In 1895 the Legislature passed a law requiring that, in addition to the gross earnings tax, land not "necessarily used in the actual management and operation" of railroads be "assessed and taxed as other lands are taxed in this state." Act of Mar. 19, 1895, ch. 168, § 1, 1895 Minn. Laws 378, 378. The statutory change was placed on the 1896 general election ballot with the question: "For taxation of railroad lands." *Stearns,* 72 Minn. at 217, 75 N.W. at 214. Nevertheless, the Aitkin County Auditor did not place various parcels of railroad land on the tax rolls, claiming (among other things) that the statutory change was never "submitted to, and adopted and ratified by, the electors of the state." *Id.* at 209, 75 N.W. at 211. In particular, the County Auditor claimed that the form of the ballot question was nothing more than a "cunning political device to catch votes" and that the Minnesota Constitution "require[d] that the law itself shall be submitted to the voters." *Id.* at 217, 75 N.W. at 214.

The court concluded that the statutory change had been "submitted to the electors in compliance with the constitution and the statute." *Id.* at 217, 75 N.W. at 214. In the process, the court noted that "[n]either the form nor the manner of submitting the question of the [statutory] amendment to the people is prescribed by the constitution." *Id.* at 218, 75 N.W. at 214. Rather, the court explained, the

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form and manner of placing the question on the ballot were "subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote." *Id.* at 218, 75 N.W. at 214. The court concluded that placement of the legislatively-proposed question on the ballot was proper, in the absence of an express constitutional requirement that the law itself be placed on the ballot. *Id.* at 218, 75 N.W. at 214–15. FN4

***14** However, the court proceeded in dicta to compare the process of submitting a *statutory* amendment for approval by voters to the process of submitting a proposed *constitutional* amendment for approval by voters. The *Stearns* court observed that "[t]he constitution requires that all amendments to that instrument shall be submitted to the people for their approval or rejection." *Id.* at 218, 75 N.W. at 215. The court continued: "There is no essential difference between this requirement and the one as to the submission of the law in question." *Id.* at 218, 75 N.W. at 215.

In fact, however, there are *two* essential differences. First, in passing a *law* and submitting it to the people for their approval, the Legislature is acting within its *legislative* power. There is every reason to construe the Legislature's power in that respect broadly. In contrast, in proposing a *constitutional amendment*, the Legislature is *not* acting within its broad legislative power, but rather under limited powers specially delegated to it by the people.

Second, even if the 1871 constitution did not prescribe "the form nor the manner of submitting the question" of a statutory change to the people, *id.* at 218, 75 N.W. at 214, the unambiguous text of Article IX *does* prescribe the manner in which a proposed constitutional amendment is to be submitted to voters for approval: by placing the proposed amendment itself on the ballot. The court's observation in *Stearns* was not only dicta, it was fundamentally wrong.

Finally, the court contends here that in 2006 "[w]e explicitly adopted the standard articulated in *Stearns* and *Duluth Railway* in the context of reviewing the sufficiency of a ballot question used to put a proposed constitutional amendment to a popular vote." (Citing *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn.2006)). We did no such thing. As *Breza* notes, the petitioners in that case "concede[d] that the ballot question accurately reflects ... the proposed constitutional amendment." 723 N.W.2d at 636. Similarly, the *Breza* court agreed that "[t]he form of the ballot question conforms to the language of the proposed amendment." *Id.* Thus the sufficiency of the ballot question was not disputed in *Breza* and anything we may have said about the standard for reviewing the sufficiency of the ballot question was therefore also dicta.

The sufficiency of the ballot question at issue here is therefore a question of first impression for the court, and in formulating the standard by which we are to review the question we are writing on a blank slate. What should the appropriate standard be?

To be sure, the Legislature's choice of whether to propose a constitutional amendment subject to voter approval or pass legislation subject to gubernatorial veto is a matter entitled to significant deference. The Legislature is also entitled to significant deference with respect to the *content* of proposed amendments to the constitution. But the Legislature having proposed a constitutional amendment, our deference is to the mandate of the people as expressed in Article IX, Section 1 of the Minnesota Constitution: "Proposed amendments shall be ... submitted to the people for their approval or rejection at a general election."

***15** But the issues presented by this case involve a right enshrined in the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments to the United States Constitution and in Articles I and VII of the Minnesota Constitution. The right to vote is the most fundamental of rights, because without it citizens lack the ability to protect all other rights,

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both enshrined in the constitutions and inherent. As the Supreme Court of the United States has said:

> "[T]he political franchise of voting" [is] a "fundamental political right, because preservative of all rights," [and] "is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

Harper v. Va. Bd. of Elections, 383 U.S. 663, 667, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and *Reynolds v. Sims,* 377 U.S. 533, 561, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). When a proposed constitutional amendment would limit the exercise of this most fundamental of rights, this court should be especially wary. When the question placed before the voters—on the basis of which the voters will decide whether to approve or reject the proposed amendment—is deceptive and misleading, we should not only be wary; our scrutiny should be at its strictest. FN5

In other states, courts review constitutional amendments proposed by the legislature under a more exacting standard. For example, in 1982 the Florida Legislature proposed a constitutional amendment that would ban former legislators from lobbying for a 2–year period after leaving office, unless the legislator made full disclosure of his or her financial interests. Although the summary of the proposed amendment prepared by the Legislature for the ballot faithfully tracked the text of the proposed amendment, the Florida Supreme Court nevertheless struck the proposed amendment from the ballot, concluding that the ballot summary was misleading because it failed to inform voters that the proposed amendment would end an already-existing constitutional provision that imposed an *absolute* 2–year ban on lobbying by former legislators. *Askew v. Firestone,* 421 So.2d 151, 156 (Fla.1982). As the Florida court later put it,

> the gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot either "fly under false colors" or "hide the ball" as to the amendment's true effect. The applicability of this requirement also is simple: It applies across-the-board to all constitutional amendments, including those proposed by the Legislature.

Armstrong v. Harris, 773 So.2d 7, 16 (Fla.2000).

Similarly, in *Armstrong* the Florida court found unconstitutionally misleading a ballot summary concerning a constitutional amendment that claimed the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment." *Id.* at 16–17. In fact, the proposed amendment would have changed Florida's constitution to ban punishment both "cruel *and* unusual." *Id.* at 17. Moreover, the Florida court found the ballot summary misleading because it claimed the purpose of the proposed amendment was to "preserve" the death penalty, when in fact the "main effect" of the amendment was to "nullify the Cruel or Unusual Punishment Clause." *Id.* at 18.

***16** But there is no need for me to propose a standard here because even under the standard the court applies—as inappropriately deferential as it is—this ballot question fails. I turn next to that analysis.

B.

The ballot question drafted by the Legislature here offers supporters of the requirement that voters' identities be verified by photographic identification before they can cast a ballot something desirable—the promise that all voters will be required to show photo identification in order to receive a ballot—to gain the favor of their political support for the proposed amendment. But it delivers

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something considerably less desirable: a constitutional amendment with many exceptions to the photo identification requirement. A ballot question that so materially and deliberately misstates the language of the proposed amendment to which it relates is nothing more than a bait and switch.

The plain language of the text of the proposed amendment passed by the Legislature differs markedly and materially from the proposed amendment the Legislature's ballot question describes. The ballot question asks whether the Minnesota Constitution should be amended to require "all voters" to present photo identification. But the proposed amendment as drafted requires only "voters voting in person" to present photographic identification. Unless the Legislature intends to eliminate absentee voting and mail balloting—something that proponents of the proposed amendment steadfastly and specifically denied during the Legislature's deliberations over the proposed amendment—"all voters" and "voters voting in person" are not the same. "All voters" includes "voters voting in person," but "voters voting in person" does not include "all voters." Voters voting by absentee and mail ballot do not vote in person. As a result, voters voting on the proposed amendment will not know from reading the ballot question that a "yes" vote will not in fact require "all voters" to show photographic identification in order to receive a ballot to vote. The ballot question is deceptive and misleading in that respect.

The ballot question also asks whether the Minnesota Constitution should be amended to require that "all voters" present "valid" photo identification in order to vote. But the proposed amendment's limits on a voter's photo identification are more stringent than just "valid." The proposed amendment limits the acceptable photographic identification that in-person voters must present to "valid *government-issued* photographic identification." (Emphasis added.) From the ballot question, voters would reasonably conclude that the proposed amendment would allow a voter to receive a ballot on the presentation of *any* valid photo identification, whether it be a student ID from a private college or university, a private employer's identification badge, or a photographic credit card. They would be wrong. If the proposed amendment is adopted, none of these forms of photographic identification would satisfy the constitutional requirement, regardless of their validity, because they are not "government-issued."

***17** The court dismisses these misrepresentations as merely situations in which the ballot question could be clearer, and attributes them to the Legislature's attempt to concisely summarize the proposed amendment as a ballot question. *See Duluth Railway*, 102 Minn. at 30, 112 N.W. at 898 (explaining that courts may not review the language of a ballot question prescribed by the Legislature for a proposed statutory change "simply because" the courts may believe "the question was not phrased in the best or fairest terms").

To be blunt, in this case that is nonsense. This is not a case in which the ballot question was simply "not phrased in the best or fairest terms." *Id.* This is a case in which the words of the ballot question were phrased to actively deceive and mislead. By adding three words—"voting in person"—to the phrase "all voters" and two words—"government—issued"—to the phrase "valid photo identification," the ballot question would have been no less concise but far more accurate. The Legislature's failure to add these five words is, in my view, fatal to the ballot question.

Furthermore, the court's superficial analysis of the ballot question fails to do justice to our jurisprudence or to our role as a court. According to the court, the ballot question "summarizes" provisions of the proposed amendment, even though the provisions of the proposed amendment are inherently contradictory. The court assures readers in one breath that the proposed amendment in fact requires all voters to submit photographic identification—and therefore the ballot question is not misleading—and admits in the next breath that some

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voters will be required to present something different. The court acknowledges there is a difference between "valid photographic identification" and "valid government-issued photographic identification," but then seems to dismiss the difference as something about which voters either do not care or are not entitled to be informed.

Moreover, the court takes umbrage with the dissents' approach as "[g]oing well beyond the limited nature of the question presented here" and addressing "the merits of the constitutional amendment." I have done nothing more than the court did in *Breza*—the case the court looks to as establishing our standard of review. In *Breza,* the court compared the language of the Legislature's ballot question to the language of the proposed amendment. 723 N.W.2d at 636 (concluding that "[t]he form of the ballot question conforms to the language of the proposed amendment"). I know of no other way to judge whether the Legislature's ballot question misleads voters as to the language of the proposed amendment itself.

Having rejected the Legislature's challenges to our jurisdiction here, the court's refusal to strike a ballot question so fundamentally deceptive and misleading from the ballot essentially asserts no jurisdiction at all. It would have been better for the court to dismiss the petition in its entirety, without opinion, than to establish as precedent the utter lack of oversight the court exercises here.

***18** Simply put, the ballot question formulated by the Legislature is deceptive in that it fundamentally misstates the purpose and scope of the amendment as proposed, and does so in a way calculated specifically to garner support for the amendment from those who may not otherwise favor it. For example, there may be those who believe that everyone should be required to present photo identification, *without exception,* in order to receive a ballot to vote and who would not support anything less. By portraying the proposed amendment as requiring photographic identification of "all voters"—when in fact, if passed, the amendment will not—the deceptive ballot question falsely induces those voters to vote in favor of the amendment.

At the same time, there may be voters who believe that everyone should be required to present photo identification only if the price is right—if it does not significantly increase government spending. In fact, in order to avoid unconstitutionally restricting the right to vote, the State will be required to provide free photographic identification to eligible voters who lack it. *See* ***Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 128 S.Ct. 1610, 170 L.Ed. 2d 574 (2008)**. The proposed amendment reflects this requirement. But surely the group of eligible voters who lack "valid government-issued photographic identification" is greater than the group of eligible voters who lack any "valid photographic identification" at all. By portraying the proposed amendment as allowing someone to vote by presenting *any* "valid photo identification," when in fact it does not, the Legislature's ballot question minimizes the cost of implementation of the proposed amendment and falsely induces this second group of voters to vote in favor of the amendment as well.

There may also be voters who favor requiring photo identification in order to vote, but who oppose having to obtain government-issued identification, and having to provide all of the personal information the government might require as a condition of obtaining that identification, as simply too much government intrusion into their personal lives.[FN6] The ballot question deceives and misleads those voters who would support requiring valid photographic identification in order to vote, but who would be opposed to limiting the required valid photographic identification to government-issued identification.

I characterize these misstatements of the provisions of the ballot question as deliberate because they were called to the attention of the sponsors of the proposed amendment during the Legislature's deliberations. For example, during the March 8, 2012 meeting of the House Government Operations

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and Elections Committee, this colloquy occurred:

REP. BEV SCALZE: I guess my concern is the language that will be on the ballot in November of 2012 because the language says that um ... shall it be amended to require all voters to present valid photo identification on Election Day. But my election judges tell me that about 20 percent of the people vote by absentee ballot and I represent a city that half of their uh ... housing units are in multiples.

***19** So um ... we've made great efforts uh ... through uh ... multi-housing coalition and things like that to enable the managers of these units to go to the polling place. If somebody moved in November 1st and their photo ID is not current the voters are not going to be able to know that they have to make a provision for those people that maybe have a problem like that. And the 20 percent of people that vote by absentee ballot could use the last four digits of their social security number.[FN7]

So somebody going into the voting booth voting on this particular Amendment they don't know that. It's like we're telling them part of the story. How are you going to let the voters know that 20 percent of the people, and that's what my election judges tell me, aren't going to have to show a photo ID because they're going to be voting by absentee ballot?

So this should really say that 80 percent of the voters, if that's what it is and that could be verified. How are we going to let the voters know in the ballot box?

REP. JOYCE PEPPIN: Representative Kiffmeyer.

REP. MARY KIFFMEYER: Thank you Madam Chair, Representative Scalze. Well first of all those 20 percent of the voters who are voting absentee already know those requirements because they vote absentee. So they fill out that information so I believe they are quite well aware of that and that that will be uh ... continued as is stated here today.

REP. JOYCE PEPPIN: Representative Scalze.

REP. BEV. SCALZE: And I don't mean the ... the absentee voters. Yes of course they know because they read the ballot. I mean the voters voting on this Constitutional Amendment. They don't know that 20 percent of the voters only have to show the last four digits of their social security number.

So we have two classes of voters. We have the absentee voters who could just use the last four digits of their social security number. The voters going into the voting booth in 2012 don't know that. They're on ... they're going on the ... on the uh ... idea that all voters will have to show a valid photo ID when in fact 20 percent of them won't know.

How do you educate the voters looking at your proposed amendment that says all voters?

REP. JOYCE PEPPIN: Representative Kiffmeyer?

REP. MARY KIFFMEYER: Thank you Madam Chair, Representative Scalze and members. I think you underestimate the fact that already 80 percent of Minnesotans have said that they support a photo ID requirement. Uh ... those who vote in absentee ballot are already familiar with the process and I think it will be ... you take that basis, that current basis and I'm sure there will be lots of voter education going on before the election day as well by everybody whose name is on the ballot, by all the supporting groups and I am absolutely confident they will be able to communicate the information.

But I think most importantly every voter stands in line and casts their ballot. They have personal experience with voting. They have personal experience with registering. They have personal ex-

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perience already. And so the simple language of the Constitutional Amendment I think to the large majority of people is pretty straightforward and quite clear.

***20** REP. JOYCE PEPPIN: And Representative Scalze I'd also add it says all voters to present valid photo identification on Election Day. So it's ... it doesn't say anything about absentee. So if it's Election Day they have to provide the photo identification is what the amendment says.

REP. BEV SCALZE: Thank you Ms. Chair and I understand that. It's just that the people voting on this amendment don't know that 20 percent of the people are not included with this amendment. That's the people I'm talking about, the people that are voting on this particular amendment.

REP. MARY KIFFMEYER: Madam Chair?

REP. JOYCE PEPPIN: Representative Kiffmeyer.

REP. MARY KIFFMEYER: That's the complete coverage.

REP. JOYCE PEPPIN: We'll move on....

Hearing on H.F. 2738, H. Gov't Operations and Elections Comm., 87th Minn. Leg., Mar. 8, 2012. FN8 Later in the same hearing, the following comment was made:

REP. STEVE SIMON: Just one thing. I had to address page two of the actual bill. I just want to caution—I didn't offer an amendment here, but if we're going to have a constitutional amendment, Representative Kiffmeyer, this is an engraved invitation for a lawsuit. Uh, there—as you probably know, there's—Minnesota Supreme Court authority right on point, that the question that you put to the voters has to accurately reflect what's in the actual constitutional amendment. It can't just be a, a sales job or a propaganda statement about everything that's good about it. There's nothing in here about government issue. The question that you're proposing that goes to Minnesota voters on the ballot says, "Just requiring all voters to protect [sic] valid photo ID." That's not an accurate or truthful reflection of this.

So, an engraved invitation for a lawsuit unless you put "government issued," in my opinion. It also doesn't make clear that it's only at a polling place. And probably biggest of all, there's nothing in here about the brand new, never in 150 years tried in Minnesota provisional ballot system. I, I would bet my next paycheck that if you don't have all three of those and maybe more details in there, it is a unanimous Minnesota Supreme Court decision that this is just a bumper-sticker propaganda statement about the merits of the bill and not an accurate description of the bill. Those three are very substantive parts about your proposal. I may disagree with the proposal, but that's part of your proposal—government issued, at a polling place, and provisional ballot. Instead, there's a, there's a phrase here that's being proposed to Minnesota voters, which is just kind of a sales pitch and not an accurate description.

Hearing on H.F. 2738, H. Gov't Operations and Elections Comm., 87th Minn. Leg., Mar. 8, 2012. Representative Simon may lose his bet, but his characterization of the Legislature's ballot question is accurate.

The court excuses the ballot question's deceptions and misrepresentations, contending that the ballot question merely "summarizes" parts (b) and (c) of the proposed amendment by asking "whether the Minnesota Constitution shall be amended 'to require all voters to present valid photo identification to vote.' " More specifically, the court asserts that because part (c) of the proposed amendment makes "all voters ... subject to substantially equivalent identity ... verification," those not voting in person will be required to produce "something ... virtually identical to a valid government-issued photo identification." On that basis, the court asserts that the proposed amendment "can fairly be characterized as generally requiring photographic identification for all voters." The court's reasoning is faulty for a

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number of reasons, not the least of which is that the only thing that is substantially equivalent to photographic identification is photographic identification.[FN9] If the Legislature had intended the term "substantially equivalent identity verification" to mean photographic identification, it would have said so, but it did not.

***21** The court has long held that the Minnesota Constitution is to be interpreted as a statute. *State ex rel. Mathews v. Houndersheldt,* 151 Minn. 167, 170, 186 N.W. 234, 236 (1922). The court has also long held that statutory distinctions in language are presumed intentional and are applied consistently with that intent. *See, e.g., In re Stadsvold,* 754 N.W.2d 323, 328–329, 331 (Minn.2008) (holding that "practical difficulties" is a lesser standard than "particular hardship"); *Transp. Leasing Corp. v. State,* 294 Minn. 134, 137, 199 N.W.2d 817, 819 (1972) (holding that a tax statute was "by its terms directed at the use, rather than ownership, of property" because "[i]t does not say that the owner must so use the property or that the user must be the owner."). In other words, when the Legislature uses two different words in the same statute, the court presumes that the Legislature means two different things. Similarly, when a constitutional amendment uses two different phrases, the court must presume that the amendment is referring to two different things.

If the Legislature had intended to require "all" voters to present photo identification in order to vote, part (b) of the proposed amendment would have so provided. It does not. The court concedes the point, and also does not interpret the proposed amendment to require *all* voters to present photographic identification. Rather, the court contends that it is enough that those not voting in person be "subject to substantially equivalent identity ... verification." But there is nothing "substantially equivalent" to the production of photographic identification in the polling place for verification of the identity of the voter who is not voting in person.[FN10] No matter what the Legislature may require of those not voting in person if this proposed amendment is adopted, there is simply no way to ensure that it is in fact the voter who has applied for the absentee ballot, who has received the ballot, who has marked the ballot, and who has returned the marked ballot. In portraying the proposed amendment as requiring "all" voters to present photo identification, the Legislature's proposed ballot question simply baits the voter by suggesting that a "yes" vote will produce a desired outcome when, in fact, the amendment will thwart the voter's expectations with something far less desirable.

Moreover, even if photographic identification satisfied the *identity* verification requirement for those voting in person, it cannot satisfy the *eligibility* verification requirement to which, under the proposed amendment, "all voters" would be subject. Eligibility to vote is defined in the Minnesota Constitution: 18 years of age or older; U.S. citizen for 3 months and a precinct resident for 30 days; and not "convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent." Minn. Const. art. VII, § 1. Even if "all voters" may be able to establish "identity" through "valid photo identification" or something "substantially equivalent" to photo identification—a point I do not concede—photo identification does not disclose length of residency or confirm that the person depicted has not been convicted of a felony, is not under guardianship, and is not mentally incompetent. Verifying a voter's eligibility to vote must necessarily require something more, again to which all voters will be subject.

***22** That the ballot question is intended to bait and switch the voter and that the proposed amendment is not intended to require all voters to present photo identification *of any kind,* even if the proposed amendment passes, is confirmed by the very sponsors of the amendment themselves. During debate on the proposed amendment, Representative Mary Kiffmeyer, one of the House authors and sponsors of the proposed amendment, stated:

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This Constitutional Amendment will allow absentee voting just as our current Constitutional language in Article 7 allows for absentee voting. This will continue that practice.

In your um ... folders today I have a copy of the current absentee ... ballot envelope, the exterior envelope. If you'll note on that exterior envelope there is a place already to capture the Minnesota State identification card number, the driver's license number, *the last four digits of social security or a checkbox in case you don't have any of those three at all.*

And so you can see there already that *this absentee ballot in its current form is already compliant with this Constitutional Amendment.*

Hearing on H.F. 2738, H. Gov't Operations and Elections Comm., 87th Minn. Leg., Mar. 8, 2012 (emphasis added.)

According to Representative Kiffmeyer, absentee voting in Minnesota is "already compliant" with the proposed amendment, even though absentee voting in Minnesota currently does not require that any absentee voters present photographic identification—or even something "substantially equivalent" to photographic identification—in order to receive a ballot. *See* Minn.Stat. § 203B.04, subd. 1 (2010) (allowing a voter without a Minnesota driver's license, a Minnesota state identification card, or a Social Security number to request an absentee ballot); Minn.Stat. § 203B.17, subd. 2 (2010) (allowing a voter in the military, the spouse or dependent of an individual serving in the military, and a voter temporarily or permanently outside the United States to apply for an absentee ballot without access to a passport number, Minnesota driver's license or state identification card number, or the last four digits of the voter's Social Security number).

In addition, at oral argument in this case, counsel for the Legislature stated that he did not know what "substantially equivalent identity and eligibility verification" would entail, because it was subject to enabling legislation that would need to be passed by the Legislature and signed by the Governor if the amendment is approved by voters. In fact, counsel for the Legislature conceded that enabling legislation that relieved some voters of the requirement to present photo identification would not be inconsistent with the requirements of the proposed amendment.

Finally, in a brief to this court in a companion case challenging the Secretary of State's title for the ballot question at issue here, 13 current Minnesota legislators—including Representative Kiffmeyer (described as a chief author of the proposed amendment), Senate Majority Leader David Senjem, and State Senator Scott Newman (also described as a chief author of the proposed amendment) FN11 —argued that the Secretary of State's title for the Legislature's ballot question—"Changes to In–Person & Absentee Voting & Voter Registration; Provisional Ballots"—is misleading, among other reasons, because:

***23** The Voter ID Amendment makes no changes to "voting." Rather, the Amendment requires a *prerequisite* to in-person voting. Indeed, the substantive provision that will affect most voters (in-person voters) makes clear that identification must be presented " *before receiving a ballot.*"

Brief for Petitioner at 24, 26, *Kiffmeyer v. Ritchie*, A12–1258 (Minn. July 20, 2012) (citation omitted.) To be clear, "the Amendment requires a prerequisite to *in-person* voting" only—namely, the presentation of photographic identification before receiving a ballot—and is intended to make no changes for those not voting in person. (Emphasis omitted) (emphasis added). This statement by these legislative leaders, including the House and Senate authors of the proposed amendment and the Senate majority leader, gives the lie to the ballot question and exposes it for what it is: deceptive and misleading. As these legislators make clear, the proposed amendment if passed will not "require all voters to

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present photographic identification to vote," as stated by the ballot question.

Other than suggesting—falsely—that I have acted as a fact-finder here and engaging in a bit of name-calling, the court makes no effort to explain why my analysis of the ballot question is wrong, because it cannot.

I would conclude that the ballot question proposed by the Legislature is materially and fundamentally deceptive and misleading, constitutes a bait and switch, and even applying the inappropriately deferential standard of review adopted by the court, is "so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the [amendment] to a popular vote." I would therefore strike the ballot question from the ballot.

C.

Because the court concludes that the language of the ballot question proposed by the Legislature is not misleading, it does not reach the question of the appropriate remedy.[FN12] The proper remedy is to require that the text of the proposed amendment as drafted by the Legislature be placed on the ballot, consistent with the requirements of Article IX, Section 1 of the Minnesota Constitution.[FN13] The text of Article IX, Section 1 of the Minnesota Constitution clearly provides, in relevant part: "Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election."

The court appears to assume that putting a proposed constitutional amendment before voters by means of a ballot question is inherent in the Legislature's authority to propose amendments. As discussed above, the power to propose constitutional amendments is not an exercise of ordinary legislative power inherent in the separation of powers; rather, it is a power expressly delegated to the Legislature by the people themselves. And rather than construe the power to propose amendments broadly because it is legislative power, we must construe the power to propose amendments narrowly because it is a delegated power. *See Crawford v. Gilchrist,* 64 Fla. 41, 59 So. 963, 966 (1912) (observing that "whether an amendment to the Constitution has been validly proposed and agreed to by the Legislature depends upon the fact of substantial compliance or noncompliance with the mandatory provisions of the existing Constitution as to how such amendments shall be proposed and agreed to"). We must also give effect to the will of the people. Here, the people have spoken.

***24** Article IX, Section 1 of the Minnesota Constitution limits the Legislature's power to "propos[ing] amendments" and "publish[ing them] with the laws passed at the same session." Article IX further requires that the "proposed amendment"—nothing more, nothing less—be "submitted to the people for their approval or rejection at a general election." Nothing in Article IX contemplates a ballot question, much less a deceptive and misleading one, being either published in the laws passed at the same session or submitted to the people for their approval or rejection, *in place of* the language of the proposed amendment itself.

D.

Underlying this case is the Legislature's purported concern about threats to the integrity of the ballot. Thus, it is ironic, if not Orwellian, that in the name of "protecting" the vote and preventing unspecified voting "fraud," the Legislature has resorted to a ballot question that deliberately deceives and misleads the very voters it claims must be protected. I cannot explain, nor can I understand, the court's willingness to be complicit with the Legislature in this effort. Nor can I explain or understand the court's fear of putting before voters for their approval or rejection the actual language of the proposed amendment as drafted by the Legislature. Therefore, I respectfully dissent.

ANDERSON, PAUL H., J. (dissenting).

I join in the dissent of Justice Page.

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ANDERSON, PAUL H., Justice (dissenting).

> Government is instituted for the security, benefit and protection of *the people,* in whom all political power is *inherent,* together with the right to *alter, modify or reform government* whenever required by the public good.
> Minn. Const. art. I, § 1 (emphasis added).

I respectfully dissent.

I write separately because the current Legislature has violated the Minnesota Constitution by refusing to put the text of a proposed constitutional amendment on the November 6, 2012 general election ballot. The Legislature compounds this constitutional violation by proposing to instead place an inaccurate, misleading, and deceptive question on the November ballot. By its actions, the Legislature has placed its will over the will of the people, as expressed in Minnesota's Constitution. The unfortunate result of the Legislature's actions, as affirmed by the majority, is the implementation of a process to amend Minnesota's Constitution which deprives Minnesotans of their constitutional right to knowingly consent to a constitutional amendment that will, if approved, "alter, modify or reform" their government. Minn. Const. art. I, § 1. For reasons more fully explained below, I cannot join the majority opinion of our court.

I. ISSUE STATEMENT AND OVERVIEW

In April 2012 the current Minnesota Legislature adopted a proposed constitutional amendment to Article VII, section 1 of the Minnesota Constitution. Ch. 167, 2012 Minn. Laws 145–46. The Legislature intends to seek the people's consent to this amendment at the November 6, 2012 general election. When the Legislature approved the text of the amendment, it also approved a ballot question that it intends to place on the so-called "pink" ballot for the general election.[FN1] The Legislature does not intend to place the text of the proposed constitutional amendment on the pink ballot.

***25** Petitioners, including the League of Women Voters, allege that defects in the ballot question approved by the current Legislature render the question unconstitutional and therefore the proposed constitutional amendment must be stricken from the ballot. More specifically, the League asserts that the ballot question is inaccurate, misleading, and deceptive because it improperly describes or fails to describe important substantive provisions contained in the proposed amendment and thus evades the constitutional requirement to submit the proposed amendment to the voters. The Legislature, which is the primary respondent for purposes of briefing and oral argument,[FN2] argues that the Minnesota Constitution grants it exclusive authority over the form and content of a ballot question. Alternatively, the Legislature argues that if our court has the power to review a ballot question, that power is very limited, such that our review is so deferential to the Legislature's authority that even an inaccurate, misleading, or deceptive ballot question is beyond our power to strike from the ballot.

As I noted at oral argument, the issues our court must decide seldom are much bigger than those raised here. The League and the current Legislature ask us to determine what process the people of Minnesota have mandated in Minnesota's Constitution for how they can give their consent to a constitutional amendment proposed by the Legislature. As part of this question, the parties also ask us to determine whether the Minnesota Constitution grants to the Legislature the exclusive authority to design the form and content of a ballot question, and whether our court has the authority to review the constitutionality of a ballot question designed by the Legislature. According to the majority: (1) the Legislature has the exclusive authority to design the form and content of a ballot question; (2) our court must defer to the Legislature when the Legislature exercises its authority to design the form and content of a ballot question; and, (3) the ballot question the current Legislature intends to place on the November 6, 2012 ballot is not "so unreasonable and misleading as to be a palpable evasion" of the requirements of the Minnesota Constitution. I

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disagree with this holding.

A significantly different point of view informs my analysis. When the issues before our court are properly framed, the decision we should render is not difficult to ascertain—it is even inevitable. It is a fundamental principle of constitutional law that our court has the authority to decide the issues before us because Minnesota is a constitutional democracy, and in a constitutional democracy the highest court has the ultimate duty to uphold the will of the people as expressed in their constitution. Thus, our court has a duty under the Minnesota Constitution to answer the questions the parties have submitted to us. Minn. Const. art. VI, § 1.

Because the issues before us center squarely on the correct interpretation of language used in the Minnesota Constitution, the search for an answer must begin by looking at the Constitution's text, in particular the text of Articles I and IX. Article I provides that all *inherent political power* in Minnesota originally resides with the people and only the people have "the right to alter, modify or reform government whenever required by the public good." Minn. Const. art. I, § 1. The text of Article I could not be more clear—the ultimate power to "alter, modify or reform government" by amending the Minnesota Constitution resides exclusively with the people. *Id.*

***26** When the text of Article I is examined together with the text of Article IX, it is not that difficult to ascertain the process the people have mandated to "alter, modify or reform" Minnesota's government by amending the Constitution. The second time the plain text of Article IX provides the answer. In simple and straightforward language, the people have mandated in Article IX that "[p]roposed amendments shall be ... submitted to the people for their approval or rejection at a general election." Minn. Const. art. IX, § 1. It is both logical and reasonable that the people of Minnesota mandated that the full text of any amendment to Minnesota's Constitution be submitted to them, because in the Constitution the people reserved to themselves the ultimate authority to determine how they are to be governed.

The plain language of the Minnesota Constitution and in particular the language of Article IX does not grant, either expressly or implicitly, to the Legislature the power to design the form and content of a ballot question that replaces the text of a proposed constitutional amendment on a general election ballot. Indeed, Article IX does not grant to the Legislature any power to submit a separate ballot question to the people. Most certainly, Article IX does not grant the Legislature the authority to design and submit an inaccurate, misleading, or deceptive question to the people. Simply stated, the Legislature does not have this power under the Constitution—inherent or otherwise.

In 2012 the current Legislature chose to follow a specific route in its effort to "alter, modify or reform" how Minnesotans exercise their fundamental right to vote. The Legislature did not choose to make this significant change by means of an ordinary legislative act, which, under Article IV of the Minnesota Constitution, requires the consent of the Governor.[FN3] Rather, the Legislature chose to follow a different, more difficult route—amending Minnesota's Constitution by seeking the consent of the people, as opposed to the consent of the Governor. Having chosen this route, the Legislature must follow the rules established by the people for altering, modifying, or reforming their government by constitutional amendment.

It is the duty of our court—the Minnesota Supreme Court—to correctly read, interpret, and apply the text of Minnesota's Constitution. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803) (stating it is the "essence of judicial duty" for a court to follow the Constitution). More than 200 years ago Chief Justice John Marshall [FN4] articulated the obligation that this duty imposes on a court when it interprets a constitution. Chief Justice Marshall said that a court "when impelled by duty to render [a constitutional interpretation], would be unworthy of its station, if it were unmindful of the

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solemn obligations which that station imposes." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 128, 3 L.Ed. 162 (1810).

Our court must be mindful of the solemn obligations presented by this case—obligations that require us to conduct a thoughtful, in depth, conscientious, and objective analysis of the issues before us. For the people's sake, we must do everything within our power to get it right. It is both logical and reasonable that the people of Minnesota followed the lead of our country's founders and Chief Justice John Marshall when they mandated that judicial review be an essential mechanism to protect their rights from the "ill humors" of a public majority or assembly.[FN5]

***27** A critical step in my legal analysis involves the juxtaposition of the process the current Legislature intends to implement for amending the Constitution with the constitutional amendment process mandated by the people under the plain text of Minnesota's Constitution. This juxtaposition leads me to a conclusion that is different from that reached by the majority. I conclude that the process mandated by the Minnesota Constitution for obtaining the consent of the people is incompatible with the process the Legislature seeks to implement and the majority ratifies. When such incompatibility exists—a constitutional mandate versus legislative action—it is the fundamental law embodied in and mandated by the Constitution that must prevail. *Marbury,* 5 U.S. (1 Cranch) at 178–79. If we follow the people's mandate, as expressed in the Constitution, our court has no alternative but to render a decision holding that the full text of any proposed constitutional amendment must be submitted to the people for their consent. Therefore, I conclude that the full text of the proposed constitutional amendment, approved by the current Legislature in April 2012, must appear on the pink ballot submitted to voters at Minnesota's November 6, 2012 general election.

A majority of the members of our court does not agree with my conclusion; therefore, I must dissent. That I dissent with a clear and strong voice is important, because when the people of Minnesota cast their votes at the November 6 general election, their will, as expressed in Minnesota's Constitution, will not be implemented. The people will not have before them the text of the proposed constitutional amendment. That text contains the critical information the Constitution requires for the people to validly give their consent; something the Legislature's ballot question does not contain. The majority, by deferring so completely to the Legislature and allowing an unconstitutional process for amending Minnesota's Constitution to be implemented, has allowed the Legislature to thwart the will of the people as expressed in the Constitution. The result is astounding. At the final step in the constitutional amendment process the people of Minnesota will be presented with an inaccurate, misleading, and deceptive ballot question. This failure by the Legislature to follow the Constitution seriously undermines the power of the people of Minnesota to be self-governed. In essence, the Legislature upstages the people by assuming the primary role in the amendment process and relegating the people to a secondary role.

Minnesotans need to know that the ballot question designed by the current Legislature should not be on the ballot; certainly, it should not be on the ballot because it is inaccurate, misleading, and deceptive. Nevertheless, it is on the ballot, and consequently there is a high probability that the people will not knowingly consent to a constitutional amendment that will alter, modify or reform their government.

II. DISSENT OUTLINE

***28** This dissent will proceed as follows. First there is a brief legislative and procedural history of the case. Second, there is the legal analysis detailing the basis for the dissent and the grounds for disagreeing with the majority. The legal analysis begins with a discussion of the special nature of constitutions and an explanation of the difference between fundamental or higher law and ordinary le-

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gislative acts. This section is followed by an examination of the critical role courts play in interpreting constitutions and implementing the people's will. Next, there is a discussion of Minnesota's Constitution, its relevant history, and its mandate for how it is to be amended. The next section demonstrates why the proposed amendment process presents an issue of first impression and specifically why *Stearns, Duluth Railway,* and *Breza* are not controlling.[FN6] This analysis is followed by a discussion detailing how and why the ballot question approved by the current Legislature is defective and therefore unconstitutional.

The analysis also demonstrates why there is no safe harbor where our court can seek shelter in order to avoid the essence of its judicial duty; that is, dealing with the key issue before us. The dissent ends with some observations that focus on the authenticity and credibility of certain critical aspects of this case. The analysis of the legal issues before our court is atypically long for a dissent; but the importance and significance of the issues before the court, especially those involving interpretation and amendment of the Minnesota Constitution, not only warrant, but require, such an in-depth analysis.[FN7]

III. THE PROPOSED AMENDMENT

In 2012 the current Legislature passed H.F. 2738, a bill that proposed an amendment to the Minnesota Constitution that would, among other things, require voters to present certain identification before voting. Ch. 167, §§ 1–2, 2012 Minn. Laws 145–46. Under section 1 of H.F. 2738, Article VII, section 1, of the Minnesota Constitution would be amended in the following ways:

> Section 1. *(a)* Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.
>
> *(b) All voters voting in person must present valid government-issued photographic identification before receiving a ballot. The state must issue photographic identification at no charge to an eligible voter who does not have a form of identification meeting the requirements of this section. A voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot. A provisional ballot must only be counted if the voter certifies the provisional ballot in the manner provided by law.*
>
> ***29** *(c) All voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification prior to a ballot being cast or counted.*

A. THE BALLOT QUESTION

The current Legislature debated how to best submit the proposed constitutional amendment to a vote by the people. At one point during the debates, the following form and content of a ballot question was under consideration:

> Shall the Minnesota Constitution be amended effective December 1, 2013, to require that all in-person voters present an approved form of government-issued photographic identification or equivalent at the time of voting; that those not voting in person provide government-issued proof of identity; that all voters be subject to substantially equivalent eligibility verification before a ballot is cast or counted; and that the state provide at no charge an approved photographic identification to eligible individuals?

S.F. 1577, § 2, 87th Minn. Leg.2012. But, the current Legislature rejected this comprehensive language. Instead, a majority of the Legislature voted

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in favor of the less-comprehensive language we have before us. Under section 2 of chapter 167, the proposed constitutional amendment will be presented to the people for their approval or rejection on the November 6, 2012 ballot in the following form:

> Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?

Ch. 167, § 2(a), 2012 Minn. Laws at 146. It is this less comprehensive language that the Legislature approved and seeks to use as the ballot question on the November 2012 ballot.

B. THE GOVERNOR'S VETO

Under Minn. Const. art. IV, § 23, the Legislature must present to the governor every bill the Legislature passes. The governor can then approve or veto the bill. If the governor vetoes the bill, the Legislature may override the veto by a two-thirds majority vote in both houses of the Legislature. *Id.* In accordance with Article IV, section 23, the Legislature submitted H.F. 2738 to Governor Mark Dayton. After receiving H.F. 2738 and in accordance with his constitutional authority, Governor Dayton vetoed the bill. The current Legislature did not override Governor Dayton's veto.

Governor Dayton made clear in his veto message that he opposed the proposed constitutional amendment and was vetoing its title, stating:

> Although I do not have the power to prevent this unwise and unnecessary Constitutional Amendment from appearing on the Minnesota ballot in November, the Legislature has sent it to me in the form of a bill. Thus, I am exercising my legal responsibility to either sign or veto the amendment. I am vetoing the amendment and its title; and I urge Minnesotans to reject it in November.

Letter from Mark Dayton, Governor of Minn., to Kurt Zellers, Speaker of the House, Minn. House of Representatives (Apr. 9, 2012). The Governor went on to explain why he vetoed the proposed amendment and title and why he was returning H.F. 2738 to the Legislature. The Governor's explanation contains many of the reasons the League has outlined in its brief and in oral argument as to why the ballot question is defective. Therefore, relevant parts of the Governor's veto message bear repeating here.[FN8]

IV. PETITIONERS' CHALLENGE

***30** The League commenced this action based on the language of the ballot question set out in section 2 of chapter 167. The League argues that the ballot question is unconstitutionally misleading both in its description of the proposed amendment and in its omissions. Specifically, the League argues that the ballot question is misleading in the following four ways: (1) the question states that "all voters" will be required to provide photographic identification but the proposed constitutional amendment only requires this identification of "in person" voters; (2) the question omits any mention of the proposed constitutional amendment's "substantially equivalent" verification provision; (3) the question fails to disclose that only "valid, government-issued photographic identification" will qualify as acceptable identification; and, (4) the question fails to disclose that the proposed constitutional amendment implements a provisional-voting system. The current Legislature responds to the League's argument, stating the Legislature "is not required to select a ballot question that 'is the best and fairest that could have been framed by a trained lawyer.' " The Legislature argues that our court has traditionally deferred to the Legislature's choice of language when submitting proposed amendments to the people.

V. LEGAL ANALYSIS

> *We are in bondage to the law in order that we may be free.*
>
> -Cicero [FN9]

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A. CONSTITUTIONS: HIGHER LAW VS. ORDINARY LAW

Given that the Minnesota Constitution embodies the most basic and fundamental law adopted by the people of our state, some preliminary commentary about the role of constitutions is in order.

Constitutions are special documents. America's legacy to the world is a written Constitution that was submitted to the people for their approval. The United States Constitution remains the quintessential constitution that people around the world speak of, look to, and read for inspiration. This is true because the principles and ideals the United States Constitution establishes for a constitutional democracy are fundamental and universal.

In 1988, Justice Lawrence Yetka, writing for our court in *State v. Hamm*—a case interpreting the Minnesota Constitution—explained why the U.S. Constitution is a written constitution and why it is unique and special. Justice Yetka said:

> When the makers of our constitution [U.S. Constitution] insisted on a written constitution, this was an unique idea in both the 18th and 19th centuries. However, the makers did so deliberately with a purpose in mind. England has never had any one written constitutional document. Its constitution consists of a series of significant documents in English history, starting with the Magna Charta. Other rights are protected by tradition on the assumption that Parliament will not tamper with those rights except at its peril. The American colonists feared the vagueness and uncertainty of such a system, *with the possibility of abuse by future rulers. Accordingly, they insisted on enumerating permanently certain limitations of the power of government. They specified that all government derives its power from the governed and that all powers not enumerated as being given to government were reserved in the people.* Thus, where we have a clear understanding, as we do in this case, as to what our constitution [Minnesota Constitution] meant in 1857, as defined almost contemporaneously in 1869 by this court, the only way that constitution should be changed is by the consent of the people in the form of a constitutional amendment *as provided by the constitution itself.*

***31** *State v. Hamm,* 423 N.W.2d 379, 382–83 (1988) (emphasis added).

Constitutions establish the machinery of government and are designed to protect the people's rights and freedoms, through basic and fundamental law. Importantly, they are not on the same "level with ordinary legislative acts." *Marbury,* 5 U.S. (1 Cranch) at 177. While a legislature cannot bind its successors with an ordinary legislative act, constitutional law is designed to last into the future—to bind future generations. Constitutions are different from ordinary law not only because they are concerned with basic or fundamental law, but also they are more difficult to revise than ordinary law. *Id.* at 176. Unlike ordinary law, a constitution is not "alterable when the legislature shall please to alter it." *Id.* at 177.

> The Legislature does not define the constitutional limits of its legislative powers, nor ultimately can it decide them. Within its powers its legislative judgment is supreme, it does not divide its duty with the courts, and to it the courts ascribe competent knowledge.... Nor in determining whether the legislation is within the constitutional powers of the Legislature do the courts divide their duties with the coordinate branch of the government. They cannot abdicate. If the Legislature transgresses its constitutional limits the courts must say so, for they must ascertain and apply the law ...

State v. Fairmont Creamery Co., 162 Minn. 146, 157, 202 N.W. 714, 719 (1925) (citation omitted).

Constitutions bind the people and their public assemblies to the basic and fundamental value choices embodied in a constitution. This binding of the people to the basic or fundamental law embod-

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ied in a constitution reflects the people's mistrust of any governmental authority placed above them. It is through a constitution that the people protect themselves and preserve their basic rights and freedoms from the Sirens' song of the future tyranny of public assemblies or the "ill humors," that may emanate from the people themselves. FN10 The Federalist No. 78 (Alexander Hamilton). To paraphrase Cicero, Minnesotans have bound themselves to both the United States Constitution and the Minnesota Constitution in order that they may be free.

Elections are the primary method used by the people to hold their leaders accountable. Elections are an institutionalized, peaceful means by which the people can revolt against those they have entrusted with limited sovereign power. Elections are the method the people use to hold those with sovereign power accountable or even to remove those people from office when they fail to be responsive to the people's will. Constitutions in a democracy embody and protect the basic right under which elections are implemented—the fundamental right to vote. The right to vote is why the case currently before our court is so important. We are addressing a case that involves that fundamental right and how that right is and will be embodied in and protected by the Minnesota Constitution.

B. THE COURT'S ROLE IN INTERPRETING A CONSTITUTION

***32** Courts play an essential role in a constitutional democracy. In the simplest terms, the United States and Minnesota Constitutions are contracts between the people and their government—governments that the people specifically vest with limited sovereign powers. In *Marbury v. Madison,* Chief Justice John Marshall observed that the U.S. Constitution is an express declaration of our society's most cherished and fundamental principles:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

5 U.S. (1 Cranch) at 176. The founders of both our country and our state understood that an independent judiciary is "peculiarly essential" to protect constitutional guarantees. The Federalist No. 78, at 484 (Alexander Hamilton) (Henry Cabot Lodge ed., 1923). The judiciary has a duty to ensure that government remains faithful to the Constitution and does not breach the contract. As Hamilton said in Federalist 78:

> Limitations of this kind [i.e., constitutional restraints on legislative authority] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id. In essence, when interpreting a constitution, the courts are to enforce this contract between the people and their government.

When the judiciary faithfully performs its duty, it serves as a bulwark against potential tyranny by either the legislative or the executive branch. It enforces the rights guaranteed and reserved to the people in their constitution. The genius of our constitutional system—and the special role of the judiciary within that system—was not lost on Alexis de Tocqueville, one of the nineteenth century's most prominent and astute observers of life and politics in the United States, who famously remarked that

> the power granted to American courts to pronounce on the unconstitutionality of laws still forms one of the most powerful barriers that have ever been raised against the tyranny of political assemblies.

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Alexis de Tocqueville, *Democracy in America* 98 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2002) (1835). Courts have a duty to act as the special guardians of constitutional liberty, a duty that no court or any individual judge should take lightly or shirk. As Chief Justice Marshall explains:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes.

***33** *Fletcher v. Peck,* 10 U.S. (6 Cranch) at 128. Put another way, courts cannot avoid their emphatic duty to "say what the law is," *especially* when that law is the fundamental law expressed by the people in a constitution. *Marbury,* 5 U.S. (1 Cranch) at 177.

Our supreme court has a duty to ensure that the people of Minnesota receive the full protection of the U.S. Constitution. We also have a co-equal duty to "independently safeguard for the people of Minnesota the protections embodied in our constitution." *State v. Askerooth,* 681 N.W.2d 353, 362 (Minn.2004). The special role of state supreme courts to interpret and enforce the protections of state constitutions is a unique aspect of the American federal system.[FN11] While *all* citizens of the United States are entitled to the protection of the rights guaranteed in the U.S. Constitution, our court has consistently held that the Minnesota Constitution may afford the citizens of Minnesota even greater protection of individual civil rights and liberties than the U.S. Constitution. *See Kahn v. Griffin,* 701 N.W.2d 815, 828 (Minn.2005); *O'Connor v. Johnson,* 287 N.W.2d 400, 405 (Minn.1979). Put another way, the U.S. Constitution is a floor, not a ceiling, and the citizens of Minnesota are entitled to dual constitutional protection that may not fall beneath that floor, but in some instances extends above the floor.

Our court has long approached the task of interpreting the Minnesota Constitution with great care—even delicacy. *See Kahn,* 701 N.W.2d at 828. But delicacy does not mean we can abdicate our duty to interpret and enforce both the U.S. Constitution and the Minnesota Constitution. *State v. Fuller,* 374 N.W.2d 722, 726 (Minn.1985) (stating that "[s]tate courts are, and should be, the first line of defense for individual liberties within the federalist system").

It should now be very apparent that in our constitutional democracy, the judiciary has a duty to fulfill its special role and provide the appropriate checks-and-balances that underscore our separation-of-powers system. One way the judiciary provides appropriate checks and balances is by deferring to the Legislature when the judiciary should, refusing to defer to the Legislature when it should not, and objectively distinguishing between the two sets of circumstances. Here, the ballot question approved by the current Legislature is not an ordinary legislative act to which we should defer. Rather, the question before us is a constitutional question, asking whether the process by which the Legislature seeks to amend the Minnesota Constitution complies with the rules that the people established therein.

In addition, the acts of the Legislature regarding the amendment process, and the ballot question, bear on the fundamental right of Minnesota citizens to vote. The Supreme Court has held that

> [e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be *carefully and meticulously scrutinized.*

***34** *Reynolds v. Sims,* 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (emphasis added). Legislative actions that implicate the right to

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vote must be given a "*close and exacting examination.*" *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 626, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (emphasis added). This standard has been adopted in Minnesota. *See Emison v. Growe,* 782 F.Supp. 427, 435 (D.Minn.1992) (citing *Reynolds,* 377 U.S. at 562, 84 S.Ct. 1362). I could not agree more. When voting rights are involved, we must conduct a careful, exacting, even meticulous review.

The case before us clearly affects Minnesotans' access to the voting franchise.[FN12] Rather than take the majority's approach of reviewing the ballot question "with a high degree of deference to the Legislature," we must examine the process by which the current Legislature drafted the ballot question for the proposed constitutional amendment with a skeptical eye. [FN13] Some might even say that our examination of this final step in the amendment process—the submission of the ballot question to the people without the full text of the proposed constitutional amendment—calls us to train a gimlet eye [FN14] on the whole process.

C. MINNESOTA'S CONSTITUTION(S): SOME RELEVANT HISTORY

The constitution Minnesota's citizens adopted in 1857 is still in effect, even though we started with two constitutions—a Democratic draft and a Republican draft. A review of some of the relevant history of Minnesota's Constitution is helpful to our analysis of the issues before us because the present Constitution represents Minnesota's original law. In 1857, the constitutional amendment process was a major area of discussion and dispute when the original constitution(s) were drafted, and both the Democratic and Republican drafts contained the exact same language for adopting proposed constitutional amendments. Indeed, as shown below, the relevant language has survived for over 150 years and remains part of the Constitution that we are interpreting today. *Compare* Minn. Const. art. IX, § 1 , *with* Minn. Const. of 1857: Democratic Version, art. XIV, § 1, *and* Minn. Const. of 1857: Republican Version, art. XIV, § 1.

In February 1857, the United States Congress passed the Enabling Act for a State of Minnesota, which paved the way for Minnesota's statehood and admission into the Union on May 11, 1858 and allowed the people of Minnesota to create a state government and to hold a constitutional convention. *See* Act of Feb. 26, 1857, ch. 60, 11 Stat. 166. The first elections for the nascent state government were fraught with aggressive campaign tactics and partisan acrimony between the Republican and Democratic Parties, including many accusations of election fraud. *See* William Anderson, *The Constitution of Minnesota,* 5 Minn. L.Rev. 407, 415 (1921). This acrimony extended to the constitutional convention.

The constitutional convention first met on July 13, 1857, and representatives of both political parties attempted to be the first to call the convention to order. But, the first meeting quickly became chaotic, which led the two political parties to meet separately and work on their own drafts of the new constitution. With each political party claiming legitimacy and blaming the other party's delegates for the disharmony, the separate meetings continued for the balance of the convention. For the next three weeks, each political party drafted a separate constitution until, finally, in August, certain delegates from both parties realized that a compromise was necessary to preserve the legitimacy of the new state.[FN15]

***35** The compromise, however, stalled over bitter disagreement on three key issues: the location of the State Capital; congressional, legislative, and judicial apportionment; and whether the issue of African–American suffrage should be left to a vote of the people along with the constitution. In order to save the constitutional convention process, the Republicans relented to the Democrats on all three issues, asking for only one thing in return—that the constitution allow for an easy way to submit future amendments to the voters for their consideration. The Republicans believed that a liberal amendment

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article would allow a future constitutional amendment to grant voting rights to African Americans, even if a vote on that issue was left out of the original constitutional approval process. Following the compromise, each political party adopted the new document without much debate or change.[FN16]

The 1857 constitution is still in effect today, which makes it one of our country's oldest state constitutions. It has been amended several times and has undergone one major revision. In 1971, the Legislature created the Minnesota Constitutional Study Commission to study how the constitution could be modernized and reformed. The result of the Commission's work was a proposed constitutional amendment to change "the appearance, if not the substance, of the Constitution." [FN17] On November 5, 1974, the people of Minnesota voted to adopt the reform amendment. It is important to keep in mind that the 1974 amendment revised but did not replace the 1857 Constitution. Therefore, the 1857 Minnesota Constitution remains the source of original intent and the final authority in matters of state constitutional law.

D. AMENDING MINNESOTA'S CONSTITUTION

With this history, we can now turn to considering what, exactly, is the process for amending the Minnesota Constitution. The amending article of the 1857 Constitution reads in part as follows:

> Whenever a majority of both houses of the legislature shall deem it necessary to alter or amend this constitution, they may propose such alterations or amendments, which proposed amendments *shall be* published with the laws which have been passed at the same session, and said amendments *shall be* submitted to the people for their approval or rejection.

Minn. Const. of 1857, art. XIV, § 1 (emphasis added).

The language in the 1857 constitution is plain: proposed amendments "shall be submitted to the people...." *Id.* Significantly, the plain text of the Constitution's original article was preserved during the 1974 revisions. [FN18] The second sentence of Article IX now reads, "Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election." Minn. Const. art. IX, § 1. In this sentence "shall" applies to both the publication of the proposed amendments and their submission to the people of Minnesota, because it operates upon the key verb phrase ("be" published or submitted), which the clause requires for grammatical coherence. Put more simply, the sentence only makes sense if read to mandate submission of a proposed amendment to the voters. *State ex rel. Gardner v. Holm,* 241 Minn. 125, 129–30, 62 N.W.2d 52, 55–56 (1954) (stating that when construing the Constitution, our court gives ordinary meaning to the words used).

***36** The foregoing interpretation receives further and nearly conclusive support in the Constitutional Study Commission's report accompanying the 1974 proposed reforms. In its report, the Commission carefully listed each article and noted which provisions were being changed substantially and which were not. Specifically listed under the "Provisions Not Recommended for Change" was "[s]ubmission of amendments to voters by simple majority of both houses." [FN19]

The plain meaning of the Constitution could not be more clear: proposed amendments shall be presented to the people of Minnesota for their consent. Just as proposed laws must be presented to the Governor for signature or veto under Article V, [FN20] under Article IX a proposed amendment must be presented to the people of Minnesota for their consideration and consent. Our court stated earlier this year, "If the plain language ... is clear and free from all ambiguity, we will not disregard the letter of the law under the pretext of pursuing its spirit." *Rohmiller v. Hart,* 811 N.W.2d 585, 589 (Minn.2012); *see also Tuma v. Comm'r of Econ. Sec.,* 386 N.W.2d 702, 706 (Minn.1986) ("Where

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the words of a statute are clear and free from ambiguity, we have no right to construe or interpret the statute's language. Our duty in such a case is to give effect to the statute's plain meaning." (citation omitted)).

It is possible that someone could argue that the word "submission" in the context of Article IX is ambiguous—that it means or could mean something other than the presentation of the text of a proposed amendment to the people of Minnesota; but, this argument lacks merit. Such an interpretation is not supported by consideration of what is meant by submission or "to submit."

Black's Law Dictionary notes that "submit" means "[t]o end the presentation of further evidence ... and tender a legal position for decision...." Black's Law Dictionary 1466 (8th ed.2004). The American Heritage Dictionary in part defines "submit" as "[t]o commit [something] to the consideration or judgment of another." American Heritage Dictionary 1790 (3d. ed.1992). In neither case, nor in the other available definitions, is there any allusion to *further* or additional context beyond that which has been submitted. In fact, the definition from Black's contravenes such a reading: to submit is to "end the presentation"; the act of submission is in itself an act of completion.

The meaning of the text of Article IX —proposed amendments "shall be ... submitted to the people for their approval or rejection at a general election"—is plain. Its direction is clear. The entire text of any proposed constitutional amendment must be submitted to the people of Minnesota for their consideration on a general election ballot. FN21

E. A CASE OF FIRST IMPRESSION

To avoid placing the text of the proposed constitutional amendment on the ballot and to rebut the clear meaning of Minnesota's Constitution, the current Legislature argues that there is controlling Minnesota case law holding that the full text of proposed amendments need not be submitted to the people for their consent. But a careful review of our case law shows that we have, in fact, never considered the specific meaning of Article IX; we have only addressed it when considering parallel, yet distinct, issues.

***37** The current Legislature argues that three of our cases control the outcome of this issue. *See Breza v. Kiffmeyer,* 723 N.W.2d 633 (Minn.2006); *State v. Duluth & N. Minn. Ry. Co. (Duluth Railway),* 102 Minn. 26, 112 N.W. 897 (1907); *State ex rel. Marr v. Stearns,* 72 Minn. 200, 75 N.W. 210 (1898), *rev'd on other grounds* 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162 (1900). But as Justice Page discusses in his separate dissent, none of these cases is, in fact, controlling here. While the case law upon which the Legislature and the majority rely may be interesting, it should not, and does not, bind us.

Two of the decisions, *Stearns* and *Duluth Railway,* addressed constitutional provisions that required certain *statutory* changes to be approved by voters. On February 21, 1871, while still in the midst of a railroad bonding scandal, the Legislature proposed to voters a constitutional amendment which would require any change to the statute allowing railroads to pay a gross earnings tax, instead of a property tax, to be approved by a majority of voters—a process that echoes, but is not, the constitutional amendment process. On November 8, 1871, Minnesota voters approved the amendment. *See* Minn. Const. of 1857, art. IV, § 32A (1871) (repealed 1974), *in* 1 Statutes at Large of Minnesota 45, 51 n.* (Bissell 1873).

We have twice considered challenges to laws passed pursuant to the now-repealed 1871 constitutional amendment. *See Duluth Railway,* 102 Minn. at 29, 112 N.W. at 898; *Stearns,* 72 Minn. at 217, 75 N.W. at 214. We noted in explaining the requirement to submit the proposed statutory amendments to voters that "[n]either the form nor the manner of submitting the question of the amendment to the people is prescribed by the constitution. These are left to the judgment and discretion of the

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legislature....” *Stearns,* 72 Minn. at 218, 75 N.W. at 214. There are two essential insights into the holdings of *Stearns* and *Duluth Railway,* as articulated by Justice Page, that bear repeating here. First, the sentence quoted above refers to a *statutory amendment,* and second, in both *Stearns* and *Duluth Railway* we considered the process by which voters could participate in the approval of an *ordinary law* and not a *constitutional amendment.*

Further, the constitutional provisions that were applied in *Stearns* and *Duluth Railway* had additional differences that distinguish them from the current case. Most significantly, when we discuss amending the constitution, we are considering a power held by the *people* of Minnesota, which, in Article IX, they have delegated in part to the Legislature. The first sentence of Article IX provides that, with this delegated power, the Legislature “may propose” constitutional amendments for consideration by the people. Minn. Const. art. IX, § 1. *Stearns* and *Duluth Railway* involved a wholly different function—the inherent *legislative* powers contained in Article IV. Here it is helpful to contrast our prior holding that “ ‘[l]egislative power ... is the authority to make laws,’ ” *State ex rel. Univ. of Minn. v. Chase,* 175 Minn. 259, 267, 220 N.W. 951, 954 (1928) (quoting *Springer v. Philippine Islands,* 277 U.S. 189, 202, 48 S.Ct. 480, 72 L.Ed. 845 (1928)), with our later observation that “the only way that [the] constitution should be changed is by the consent of the people in the form of a constitutional amendment as provided by the constitution itself.... If a written constitution can be amended by statute or by judicial fiat, it retains no sanctity whatsoever.” *State v. Hamm,* 423 N.W.2d 379, 383 (Minn.1988).

***38** The distinction between the power to amend the Constitution (which rests with the people of Minnesota and has only been partially delegated to the Legislature) and the power to make laws (which is inherently legislative) is of the highest importance when the constitutional amendment at issue involves, and would restrict, the right to vote—one of the most fundamental of rights held by the citizens of our state. The U.S. Supreme Court has described the right to vote as “a fundamental political right, because [it is] preservative of all rights.” *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *see also Davis v. Davis,* 297 Minn. 187, 193, 210 N.W.2d 221, 225 (1973) (“voting, ‘a fundamental political right ... preservative of all rights.’ ” (quoting *Reynolds v. Sims,* 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964))); *see also South St. Paul v. Hetherington,* 240 Minn. 298, 303, 61 N.W.2d 737, 740 (1953) (stating that “[t]he right to vote on a basis of reasonable equality with other citizens is a fundamental and personal right essential to the preservation of self-government. Fundamental rights may be lost by dilution as well as by outright denial”).

To be sure, the petitioners in *Stearns* argued that the voter-approved statutory change was invalid because the “law itself” was not submitted to the voters. 72 Minn. at 217, 75 N.W. at 214. And our court in *Stearns* disagreed, noting that a ballot question was sufficient, and then speculating that “[t]here is no essential difference between [the constitutional amendment process] and the one as to the submission of the [statute] in question.” *Id.* at 218, 75 N.W. at 215.

But any comment by our court in either *Stearns* or *Duluth Railway* regarding the process of amending the Minnesota Constitution is dicta by definition. There are two kinds of dicta, obiter dicta and judicial dicta. Obiter dictum is “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential....” Black's Law Dictionary 1102 (8th ed.2004). Or as this court has stated, “Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.” *Wandersee v. Brellenthin Chevrolet Co.,* 258 Minn. 19, 28, 102 N.W.2d 514, 520 (1960) (quotation omitted).

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Judicial dicta represent "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, *but that is not essential to the decision.*" Black's Law Dictionary 485 (8th ed.2004) (emphasis added). Judicial dicta are generally given much greater weight than obiter dicta, *see Bush v. Arrowood,* 302 Minn. 188, 208, 224 N.W.2d 489, 501 (1974), but are not binding, *id.*

The whole process considered in *Stearns* and *Duluth Railway* was different from the process for amending the Minnesota Constitution. The process in both cases regarded a statutory change, containing all of the checks and balances of the legislative process—including the Governor's signature—and housed within the powers of the Legislature under Article IV. There was simply no reason at that time for the court to weigh in on the process used for amending the Constitution, a process that was not at issue in either case. At best our commentary in *Stearns* and *Duluth Railway* was judicial dicta ("passed on by the court, but ... not essential to the decision"), but even more likely such gratuitous speculation was simply obiter dicta ("[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision"). Under either definition, *Stearns* and *Duluth Railway* are not controlling for the present case.

***39** The majority concludes that whatever distinctions can be found between our early case law and the present case were removed in 2006 when our court adopted the standard from *Stearns* and *Duluth Railway* in *Breza v. Kiffmeyer,* 723 N.W.2d at 636. But just like *Stearns* and *Duluth Railway*, *Breza* is distinguishable and does not control here. *Breza,* like the case before us, involved a dispute about the appropriate standard for determining whether the ballot question related to a proposed constitutional amendment was misleading. But *Breza* is not on point. Petitioners in *Breza* commenced an action to enjoin the Minnesota Secretary of State from proceeding with the general election on a proposed constitutional amendment because they alleged the ballot question was unconstitutionally misleading. *Id.* at 634. Yet the "[p]etitioners concede[d] that the ballot question accurately reflecte[d] ... the proposed constitutional amendment." *Id.* at 636. Thus, the constitutional mandate to submit the constitutional amendment to the voters was not in issue and the concession functioned to end the disputed issue in the litigation. Following the concession, there was no reason for our court to engage in anything more than a cursory analysis. Once our court makes a finding that "end [s] the controversy ... the rest of the language in the opinion [is] obiter dicta." *Keller Constr. Co., Inc. v. Commercial Union Ins. Co.,* 379 N.W.2d 533, 536 n. 2 (Minn.1986). Thus, *Breza* at best provides a weak foundation for the majority's analysis, a foundation that crumbles when subjected to any level of scrutiny.

The end result of the foregoing review of our case law is that we have never faced or decided a case on the merits which directly addresses the process for amending the Minnesota Constitution. Not in *Stearns,* not in *Duluth Railway,* and not in *Breza.* Moreover, any commentary in these cases on the process for amending the constitution is dicta. Thus, I conclude that the case before us, in which we must address the process of amending the Minnesota Constitution, is a case of first impression.

Even if the holdings in *Stearns*, *Duluth Railway*, and *Breza* were on point, these cases should not and cannot bind our court today. *Stearns* and *Duluth Railway* unnecessarily considered the process by which the Minnesota Constitution is amended. *Breza* looked to *Stearns* and *Duluth Railway* with only the most cursory analysis. *Breza* simply is not a well-considered opinion on the issue of amending the Minnesota Constitution. It is not wrong to look to *Stearns*, *Duluth Railway*, or *Breza,* nor is it disingenuous to seek guidance there; but once these cases are scrutinized it is problematic to cling to them for legal support. These three did not provide a solid foundation upon which to build the decision in this case, especially when the text of the

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constitution is considered.

***40** Our court is compelled by duty to render judgment on laws that violate the constitution. "There is no longer any doubt of the authority and duty of the court ... to declare such acts invalid, if repugnant to the constitution." *Ames v. Lake Superior & M.R. Co.,* 21 Minn. 241, 282 (1875). Put more fully by Chief Justice John Marshall:

> The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest.... It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part ... be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77, 2 L.Ed. 60 (1803). In short, we may not follow precedent that has been shown to be wrong.

Our duty does not allow us, much less require us, to affirm the current Legislature's flawed process for amending the Constitution just because that flawed process has been used in the past. The Legislature asserts that ballot questions have been used in the past when proposed constitutional amendments were presented to the people, that this past practice supports their actions, and that we should be guided by and follow this past practice because that is how we do it in Minnesota. It is an argument that we should address, but when the argument is examined carefully it readily becomes evident that it cannot prevail here—it lacks merit. Multiple wrongs do not make a right. This is one of the first lessons we learn as children and we must follow that lesson here. If the position that the current Legislature is arguing had prevailed in the past on issues of great import, then separate but equal could still be the law of the land,[FN22] children could still be laboring long hours in the coal mines of Appalachia,[FN23] and we could still be executing children [FN24] and the mentally ill.[FN25] Or more recently, consider the U.S. Supreme Court's decisions in two landmark cases where the Court rejected prior case law in favor of its reading of the U.S. Constitution's true meaning. [FN26] When faced with the situation we have before us today—a clear contradiction between past practice and the plain language of Minnesota's Constitution—our court " 'would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes.' " *Limmer v. Swanson,* 806 N.W.2d 838, 841 (Minn.2011) (Anderson, J. concurring) (quoting *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 128, 3 L.Ed. 162 (1810)). Again, we cannot be unmindful of the obligations this situation imposes, and we may not affirm or allow a practice that is repugnant to the constitution to continue.

F. THE BALLOT QUESTION: INACCURATE, MISLEADING, OR DECEPTIVE?

***41** As I indicated in the overview section, the answer to the key issue before us, when properly framed, is clear, even inevitable: The Minnesota Constitution requires the Legislature to present the people with a ballot containing the full text of a proposed constitutional amendment. The majority ignores the plain meaning of Article IX, section 1 when it concludes that the current Legislature has the power to submit the proposed constitutional amendment to the people solely in the form of the ballot question it adopted in April 2012. The majority compounds this error when it wrongly holds that our review is limited to determining whether the Legislature's proposed ballot question is "so unreas-

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onable and misleading as to be a palpable evasion of the constitutional requirement to submit the amendment to a popular vote." *Breza,* 723 N.W.2d at 636.[FN27]

Even if the majority were correct, and the current Legislature has the authority to submit its proposed ballot question to the people—either with or without the full text of the proposed constitutional amendment—the ballot question proposed by the current Legislature is so inaccurate and misleading that it violates Article IX, section 1 of the Minnesota Constitution. The majority essentially admits that the ballot question is misleading, but claims the question does not violate our so-called "rigorous constitutionally misleading standard." The majority is wrong. The ballot question is unconstitutionally misleading, even under the deferential standard articulated by the majority. More specifically, the majority acknowledges that "the ballot question, as framed by the Legislature, does not use the same words as the amendment itself and it does not list all of the effects of implementation of the identification system contemplated in the proposed amendment." The majority maintains, however, that it is not our court's role to determine "the simplest and fairest form of the question submitted...." *Duluth Railway,* 102 Minn. at 30, 112 N.W. at 898. But the majority misses the point when it defines our role so narrowly. Our court's concern over the Legislature's ballot question should be and is far more profound than a mere quibble over semantics.

The current Legislature has proposed a ballot question so defective that it essentially strips the people of their right to consent to a substantial change to the Minnesota Constitution.[FN28] An amendment to the Constitution works a foundational change to the nature of the social contract between the people and their government. Here, the Legislature seeks to have the people approve a ballot question that will, if approved, fundamentally alter the way Minnesotans vote. Yet the Legislature's ballot question fails to truthfully inform the people of the meaning and effect of the proposed amendment in four critical areas: (1) by stating that "all voters" will be subject to the same identification requirements even though the proposed amendment has no such requirement, (2) by failing to inform the people that the only type of identification accepted to prove one's eligibility to vote is "valid government-issued photographic identification," (3) by stating that the necessary identification will be provided to the people for "free," and (4) by failing to inform the people that the proposed amendment would implement a new system of provisional voting. Any one of these four inaccuracies and omissions alone would render the ballot question unconstitutional on the grounds that it is misleading and most likely deceptive. Certainly, the *sum* of these inaccuracies and omissions unquestionably render the ballot question unconstitutional.

***42** The majority dismisses the ballot question's inaccuracies and omissions because it reviews the current Legislature's ballot question with a high degree of deference. Yet the majority concedes that the judiciary *must review* the current Legislature's proposed ballot question. That review must begin by comparing the text of the proposed ballot question with the text of the proposed constitutional amendment.[FN29] How else could the judiciary determine whether a ballot question was unconstitutionally misleading—even under the majority's deferential standard? Surely the Legislature does not have *carte blanche* to submit a ballot question that is completely unmoored from the language of a proposed constitutional amendment. Put differently, if the Legislature passed a proposed constitutional amendment that provided funding for trails in Minnesota, the Legislature could not submit a ballot question to the people that stated the proposed constitutional amendment was about flying people to the moon.[FN30]

1. "All Voters"

The current Legislature's affirmative misstatement in the ballot question of the express language of the proposed constitutional amendment is, in and of itself, sufficient to render the ballot question un-

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constitutionally misleading. I make this point separately to supplement Justice Page's observations, because Justice Page's point bears repeating: the Legislature's ballot question materially and fundamentally misstates the language of the proposed constitutional amendment.

The majority claims that the current Legislature's inaccurate ballot question passes constitutional muster because the proposed constitutional amendment requires all voters to present photographic identification or its "substantial equivalent." Thus, the majority reasons, the Legislature summarized the proposed constitutional amendment "as generally requiring photographic identification for all voters." But simply saying something is so does not make it so.[FN31] The ballot question, contrary to the express language of the proposed constitutional amendment, asks whether "all voters" should be required to present photographic identification. *See* Ch. 167, § 2(a), 2012 Minn. Laws 145–46.

An obvious consequence of the current Legislature's inaccurate ballot question is that a voter of common intelligence cannot make an informed decision to vote "yes" or "no" at the November general election. A voter of common intelligence, when confronted with the Legislature's ballot question, would sensibly conclude that *all voters* must present valid photographic identification. But that voter—whether of common or even exceptional intelligence—would be wrong. I agree with Justice Page when he notes that the ballot question therefore falsely induces the support of the proposed constitutional amendment's most vocal proponents; it also provokes the wrath of the proposed constitutional amendment's most vocal antagonists. It should be beyond dispute that a ballot question that materially misleads the voters by misstating the language of a proposed constitutional amendment evades "the constitutional requirement to submit the law to a popular vote," and must be deemed unconstitutional. *Breza,* 723 N.W.2d at 636.

2. Valid Government–Issued Photographic Identification

***43** The proposed constitutional amendment requires in-person voters to present "valid government-issued photographic identification." Ch. 167, § 1(b), 2012 Minn. Laws 145–46. In contrast, the ballot question designed by the current Legislature only refers to "valid photographic identification." *Id.,* § 2(a), 2012 Minn. Laws at 146. The majority acknowledges that there is a difference between "government-issued photographic identification" and "valid photographic identification." But the majority then contends that the Legislature's omission of the crucial "government-issued" qualifier from the ballot question, while misleading, is not misleading enough to violate the Minnesota Constitution. In essence, the majority concludes that the defective ballot question is *close enough.*

I strongly disagree for several reasons. The difference between "*government-issued photographic identification* " and "*valid photographic identification* " is not benign; it is very significant. The current Legislature's ballot question fails to convey the most basic information about the proposed amendment, i.e., the specific form of identification that in-person voters must bring with them to the polls on election day. A voter of common intelligence would reasonably conclude that "valid photographic identification" encompasses identification issued by a wide range of private, non-governmental entities such as an employer, a private university, or even Sam's Club. The proposed constitutional amendment actually requires in-person voters to produce a much more limited and restrictive class of identification than the ballot question indicates. Even the deferential *Breza* standard adopted by the majority—as deferential and abstract as that standard is—makes clear that there is a constitutional boundary the Legislature cannot breach when formulating a ballot question. Thus, the Legislature's failure to truthfully inform the people what form of identification the proposed amendment requires of in-person voters is a breach that renders the ballot question unconstitutional.[FN32]

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3. Free Identification?

The ballot question asks whether the Minnesota Constitution should be amended to "require the state to provide *free* identification to eligible voters." Ch. 167, § 2(a), 2012 Minn. Laws 145–46 (emphasis added). This is not a true statement. The proposed constitutional amendment does not require that the state provide voters with "free" identification. Rather, the amendment provides: "[t]he state must issue photographic identification at *no charge* to an eligible voter who *does not have a form of identification meeting the requirements of this section.*" *Id.*, § 1(b) (emphasis added).

The current Legislature's use of the term "free" in the ballot question is at best misleading and most likely deceptive for an important reason: the ballot question's use of the term "free" conceals the true cost of the photographic identification requirement.

***44** "Free" is defined as "not costing or charging anything." Merriam–Webster's Collegiate Dictionary 463 (10th ed.2001). And while it is true that the amendment, if adopted by the people, requires the state to provide identification to eligible voters at "no charge," acquiring government-issued photographic identification is anything but "free." To the contrary, eligible voters who lack current or otherwise valid identification must provide the State with supporting documentation to obtain their "free" identification, typically one supporting primary document and one supporting secondary document. *See* Minn. R. 7410.0100–.0600 (2009). The cost of obtaining the required supporting documentation, especially for elderly and vulnerable populations, can be substantial. *See Weinschenk v. State*, 203 S.W.3d 201, 213 (Mo.2006) ("The fact that Missouri has waived collection of costs normally charged to persons seeking a non-driver's license does not make that license 'free' if Missourians without certified copies of birth certificates or passports must still expend sums of money to obtain the license.").

It is beyond dispute that the proposed constitutional amendment does not mandate that the State cover the cost of the supporting documents that an eligible voter must provide to receive the "free" identification. Thus, when the ballot question asks the voters whether the Minnesota Constitution should be amended to "require the state to provide eligible voters with free identification," it is not stating the truth. The identification that the State must provide to those voters is not free, and the current Legislature's failure to accurately inform the voters of the true cost of the photographic identification requirement renders the ballot question unconstitutional. FN33

4. Provisional Voting

The proposed constitutional amendment provides that "[a] voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot." Ch. 167, § 1(b), 2012 Minn. Laws 145–46. The amendment further mandates that "[a] provisional ballot must only be counted if the voter certifies the provisional ballot in the manner certified by law." *Id.* 2012 Minn. Laws at 146. But, the ballot question *entirely* fails to disclose that the proposed constitutional amendment, if adopted, would result in a major change to Minnesota's elections process—the creation of a provisional voting system.

Minnesota currently maintains a system of election day registration that allows eligible voters to register to vote when they (1) appear in person at the polling place for the precinct in which the person resides on election day, (2) complete a registration application, (3) make an oath, and (4) provide proof of residence. *See* Minn.Stat. § 201.054, subd. 1 (2010); Minn.Stat. § 201.061, subd. 3 (2010). An eligible voter may prove residence by presenting either a statutorily prescribed form of identification—which includes a "current valid student identification card"—or by having another registered voter vouch, in the presence of an election judge, that the eligible voter is a resident of the voting precinct. *See* Minn.Stat. § 201.061, subd. 3(4).

***45** The parties sharply dispute whether the proposed constitutional amendment will eliminate

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election day registration in Minnesota. But it should be beyond dispute that the proposed constitutional amendment requires Minnesota to adopt a provisional voting system—a system that *does not currently exist* under Minnesota law. Under a provisional voting system, a voter who does not appear on the list of eligible voters for a certain precinct may cast a provisional ballot, a *claim* that the person is entitled to vote; the provisional ballot is not reviewed until after the election. Federal law requires that states adopt and implement extensive—and often times expensive—procedures and standards to process provisional ballots. *See* 42 U.S.C. §§ 15482(a), 1973gg–2(b) (2006). As one federal appellate judge recently noted, the adoption and implementation of a provisional balloting system raises special and serious constitutional concerns:

> *Constitutional concerns regarding the review of provisional ballots by local boards of elections are especially great.* As in a recount, the review of provisional ballots occurs after the initial count of regular ballots is known. This particular post-election feature makes specific standards to ensure ... equal application particularly necessary to protect the fundamental right of each voter to have his or her vote count on equal terms. The lack of specific standards for reviewing provisional ballots can otherwise result in unequal evaluation of ballots.

Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 235 (6th Cir.2011) (emphasis added) (citations omitted) (internal quotation marks omitted).

The majority contends that the ballot question is not constitutionally defective because *Breza* does not require that "effects of the amendment at issue be included on the ballot," and provisional balloting is merely an "effect" of the adoption of the proposed constitutional amendment. As I indicated earlier, the majority compounds its erroneous reading of *Breza* when it states that the ballot question need not explain the "effects" of the proposed constitutional amendment so long as the ballot question conveys the "essential purpose." Nevertheless, the majority again misses the mark when it construes the provisional balloting as an "effect" of the proposed constitutional amendment. The amendment expressly states that "[a] voter unable to present government-issued photographic identification *must be permitted to submit a provisional ballot.*" Ch. 167, § 1(b), 2012 Minn. Laws 145–46 (emphasis added). The proposed constitutional amendment therefore, by its own terms, mandates the adoption of a provisional balloting system. Provisional balloting is not merely an "effect" of the amendment. Rather, the adoption and implementation of a provisional balloting system is a *direct consequence* of the people's adoption of the proposed constitutional amendment. The current Legislature's failure to inform the people that such a substantial change to Minnesota's election system will occur renders the ballot question unconstitutional.

VI. OBSERVATIONS ON AUTHENTICITY AND CREDIBILITY: THE LEGISLATIVE PROCESS, ELECTORAL FRAUD, AND POLARIZED LITIGATION

***46** There are several other aspects or factors that also have a bearing on my legal analysis of whether the current Legislature's proposed ballot question passes constitutional muster. These factors include the legislative process by which the language of that ballot question was adopted, the role of alleged electoral fraud, and the polarization that pervades this litigation. I will attempt to explain the relevance and importance of each of these factors to the validity of the ballot question.

A. THE LEGISLATIVE PROCESS

The starting point for this part of my dissent is the legislative process that led to an inaccurate, misleading, and likely deceptive ballot question being presented to our court for review. As previously noted, both the current Legislature and the majority appear to either explicitly or implicitly acknowledge that the ballot question adopted by the Legislature is inaccurate and may even be misleading.

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The record indicates that the ballot question was adopted with its authors' and its supporters' full knowledge that the question was misleading. The record reflects that the problematic aspects of the ballot question, both its inaccuracies and omissions, were repeatedly pointed out to the amendment's authors and its supporters. *See* Hearing on H.F. 2738, H. Comm. Gov't and Operations, 87th Minn. Leg., March 8, 2012 (audio tape) (comments of Rep. Kiffmeyer, House sponsor of the bill). Alternative ballot questions with more inclusive and comprehensive language were proposed and rejected.[FN34] The legislators who voted to pass the ballot question appear to have either ignored or feebly rebutted any and all pleas from their colleagues to improve the ballot question's language so that it is less misleading and deceptive.

The League appears to go so far as to implicitly assert that there is evidence to support a claim that there was a malefic intent behind the adoption of the current language and rejection of any alternative, more comprehensive language. [FN35] The issue of intent, malefic or otherwise, is not a question that is before our court; thus, any search for the answer to this assertion must be left to the people. But the record on how the language of the ballot question came to be adopted should get our court's attention and cause us to cast a skeptical—or even a gimlet—eye on the question's specific language. There is no question that the problematic language in the ballot question is the language the Legislature intended to present to the people.

B. ELECTION FRAUD

The current Legislature asserts that the reason the proposed constitutional amendment was adopted is the need to stop existing election fraud in Minnesota—specifically in-person voter impersonation fraud. It is beyond the scope of our court's review to question the merits of the reason for why the Legislature is submitting the proposed constitutional amendment to the people of Minnesota. But, once the Legislature has asserted election fraud in support of or as a justification for its use of a ballot question it concedes may be inaccurate or misleading, it is appropriate for us to examine the relevance of election fraud when considering the ballot question's validity. Moreover, when, as is the situation here, the issue before us involves the people's right to vote, our examination of that reason must be careful, meticulous, and done with a skeptical eye. Without some credible showing by the current Legislature that voter impersonation fraud, in-person or otherwise, exists or at least a showing that there is some other significant election fraud in Minnesota, the authenticity and credibility of the Legislature's arguments in support of its ballot question are seriously diminished.

***47** The assertion that Minnesota is experiencing election fraud sufficient to warrant the passage of a constitutional amendment that will result in a wholesale change to Minnesota's voting laws is an assertion that should not be made cavalierly. Those who are willing to make such an allegation should proceed with caution and must make sure that they know exactly what they are talking about when they use the term “election fraud.”

The concept of election fraud is nothing new to constitutional democracies. The history of election fraud has been well documented.[FN36] It exists because, in a constitutional democracy, all sovereign power resides with the people and the people transfer some of their sovereign power to those persons they choose, through the election process, to represent them. Elections and the transfer of sovereign power are an essential ingredient of a constitutional democracy, to the establishment and preservation of a civil society, and to the implementation and preservation of the rule of law. Unfortunately, when power is at stake, fraud will most likely be its constant companion. There will always be certain people who are willing to undermine the electoral process in order to seek some special advantage in a quest for power. These people are the ones who make fraud a fellow traveler in the electoral process.

Democratic societies routinely strive to elimin-

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ate or minimize fraud in the electoral process. Minnesota has a reputation for doing a good job to minimize or eliminate electoral fraud and has earned, as Governor Dayton noted, a "Best–in–the–Nation" FN37 FN38 reputation for how it conducts elections. This reputation has been tested and scrutinized during two recent statewide recounts—the 2008 U.S. Senate election and the 2010 Governor's election. *See, e.g.,* *In re Contest of Gen. Election held on November 4, 2008,* 767 N.W.2d 453 (Minn.2009). Importantly, our court's extensive examination of Minnesota's elections in both of those cases revealed no evidence of election fraud. *See id.* at 457 ("No claim of fraud in the election or during the recount was made by either party"). When allegations surface that there is serious election fraud in our state, Minnesotans, including the judiciary, sit up and take notice.

Election fraud is a term that is easy to use, but its meaning is imprecise and it is often used subjectively, particularly when used as part of an effort to achieve a particular purpose. Admittedly, there is a lack of consensus over what is meant by the terms election or electoral fraud. *See generally* Chad Vickery & Erica Shein, Int'l Found. for Electoral Sys., *Assessing Electoral Fraud in New Democracies: Refining the Vocabulary* (2012). But, there are some definitions which allow us to hone in on a precise meaning. "Illegal conduct committed in an election, usually in the form of fraudulent voting. Examples include voting twice, voting under another person's name (usually a deceased person) or voting while ineligible." *Black's Law Dictionary* 536 (7th ed.1999). In 2010, the International Foundation of Election Systems defined electoral fraud as "Deceptive or negligent interference with the electoral process that intends to prevent the outcome from reflecting the will of the people." Rafael López–Pintor, Int'l Found. for Electoral Sys., *Assessing Electoral Fraud in New Democracies: A Basic Conceptual Framework* 9 (2010). In their May 2012 white paper, Vickery and Shein provide some alternative approaches to and definitions of electoral fraud. *See* Vickery & Shein, *supra,* at 9–11. A precise, generally agreed upon definition of election fraud is hard to find; the term means different things to different people.

***48** Election fraud has several fellow travelers that affect election results but do not constitute fraud. There are at least four other general categories of practice that undermine the electoral process that come to mind: (1) malpractice; (2) systematic manipulation; (3) negligence; and, (4) incompetence. In the electoral process, incompetence and negligence occur with some regularity, and when they occur they can prevent the outcome of an election from reflecting the will of the people. One need look no further than the 2000 presidential election in Florida for a prime example for how either incompetence or negligence—or both—can dramatically change the outcome of an election. But what occurred in Florida with respect to butterfly ballots should not be categorized as election fraud.

Incompetence and negligence—two of fraud's fellow travelers—are not criminal. Manipulation can be fraudulent, but most often it is not. Malpractice can and frequently does constitute fraudulent acts. Herein lies the problem I have with the current Legislature's arguments—the imprecise use and application of the term election fraud when referring to practices that can affect or even distort the result of an election.

The Legislature appears to rely upon alleged election fraud as the purpose behind the proposed constitutional amendment and the ballot question. But, to support its allegations, the Legislature cites practices that have no relation to voter impersonation fraud—the type of electoral fraud that the proposed amendment is specifically designed to remedy. There may well be election practices occurring in Minnesota that undermine the electoral process. Wherever these practices fall on the spectrum of electoral fraud, there is no question that efforts should be made to eliminate those practices so that election results can be a valid reflection of the will of the people. But efforts to eliminate these prac-

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tices will depend upon a greater degree of sophistication and understanding of the concept of election fraud than the parties have demonstrated here.

The record before us is woefully deficient in that it fails to provide our court with even the most basic information about what fraud is to be eliminated in Minnesota. We have a right to expect a much better demonstration of what, if any, or how much electoral fraud is being manifested in our state. Tellingly, the current Legislature was unable to cite to any specific instance of in-person voter impersonation fraud. That is not to say that some parts of the Legislature's assertion of election fraud cannot be shown to exist, especially given the fact that elections are a fallible human institution. Mistakes, even fraud may well occur, but a credible showing of existing election fraud has not been made here. What can be said with some certainty is that the record and arguments fall short of meeting the necessary burden we require to prove the Legislature's allegations of electoral fraud. This shortcoming seriously undermines the authenticity and credibility of the Legislature's arguments.

***49** Even without the inferences one normally draws when undisclosed agendas are at work, a list of the remaining reasons or explanations for adopting the proposed amendment are not particularly charitable to the Legislature. The explanations even become a double-edged sword when, as previously noted, we consider that efforts to suppress the vote by certain classes of voters is on the list of explanations provided by the League. The allegation of election fraud then becomes a double-edged sword for the Legislature because a significant type of election fraud that is universally recognized around the world is a clandestine effort to shape election results by "distort[ing] the citizenry's preferences by denying voting rights to some citizens, while amplifying the voice of others." Andreas Schedler, *The Menu of Manipulation*, 13 J. Democracy 36, 44–45 (2002).

C. POLARIZED LITIGATION

How this case was litigated is also cause for concern. Early on it became evident that the positions taken by the parties on the validity of the proposed ballot question, vis-à-vis the constitutional amendment, were at polar opposites, both legally and politically. This polarization was evident in the parties' briefs and at oral argument.

It is unfortunate that our court has been drawn into the current national and state conflict between political forces over how citizens can exercise their right to vote. Nevertheless, we are at the epicenter of this conflict's highly polarized and partisan atmosphere as it plays out in Minnesota; thus we have no choice but to render a decision. That said, the parties should have been more cognizant of the distaste that courts generally, and our court, in particular, have for bringing a polarized, partisan atmosphere with them when they come to our courtrooms. It would have been more helpful had the parties demonstrated more objectivity in their arguments, and been more willing to acknowledge the law, both pro and con, when presenting their arguments to our court.

1. The League's Remedy—A Bridge Too Far

The League overreached when it took an inflexible approach to the remedy it sought from our court. The League's failure to recognize or its unwillingness to acknowledge the current Legislature's power under Article IX to propose constitutional amendments was both frustrating to observe and in many ways was counterproductive to achieving any impact with the League's arguments. The League appeared to be so focused on using a defective ballot question as a lever to pry the Legislature's proposed constitutional amendment off the November ballot that it ignored the plain text of Article IX.

Unquestionably, the League presented a compelling argument that the current Legislature's ballot question was defective, but in Minnesota a constitutionally defective ballot question in and of itself is not enough to remove a validly proposed constitutional amendment from the general election ballot. The League did not recognize or acknow-

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ledge the language in Article IX through which the people gave the Legislature the power to propose constitutional amendments by placing them on the general election ballot. By a majority vote the Legislature proposed a constitutional amendment to Minnesota's Constitution. It would be an act of judicial activism for our court to void this valid act, especially when there is an alternative mandated by the plain text of the Constitution—the placement of the full text of the proposed amendment on the ballot.

***50** The case before us is about a process, how the people give their consent to a proposed constitutional amendment. It is not about rejecting in total the current Legislature's validly proposed constitutional amendment. The League's failure to recognize the overreaching nature of its proposed remedy makes the idiom *a bridge too far* apt. *A bridge too far* refers to an act of overreaching—going too far and getting into trouble or failing because of that act.[FN39]

This flaw in the League's approach sufficiently undermined its arguments that it has failed to obtain any relief—not even the viable alternative of having the defective ballot question stricken and the full text of the proposed constitutional amendment put on the ballot in its place. The League's flawed tactic also left it open to justifiable criticism by the majority that it "seeks unprecedented relief" and also gave the majority an opening to ignore the plain text of the Constitution by stating that the issue of placing the full text of the proposed constitutional amendment is not before us because the League did not raise this issue.

2. The Current Legislature's Position—Rigid and Reticent

The current Legislature's arguments in many ways proved to be even less helpful than those of the League. The Legislature rigidly adhered to the position that exclusive authority over all aspects of the ballot question reside with the Legislature, that our court lacks any power to review the ballot question, and that the Legislature can design any ballot question it wants to place on the ballot. The Legislature refused to provide the necessary context for the proposed ballot question by repeatedly not responding to questions about the purpose and effect of the proposed constitutional amendment. It also repeatedly failed to answer several questions about whether the Legislature could draft a deceptive ballot question (*see* footnote 30). The Legislature was also unwilling to identify the source of its claimed broad powers with respect to how a proposed constitutional amendment is submitted to the people. Indeed, under the Legislature's view of the case as articulated to our court, the Legislature's claimed broad powers are superior to the people's power to "alter, modify or reform government."

The polarization, rigidity, and reticence of the current Legislature's presentation of its case not only diminished the merit and helpfulness of its arguments, but it also created a cause for concern. The Legislature's reticence when faced with relevant questions raised the issue of whether its response to this litigation may be driven by an undisclosed or unspecified agenda. Again, when such concerns arise they have a bearing on the authenticity and credibility of a party's arguments. Courts become wary when it appears a party's position is being driven by an undisclosed agenda or if it appears as though the parties are hiding the ball. *See Armstrong v. Harris,* 773 So.2d 7, 18 (Fla.2000) (The court, in discussing such an effort, stated "In evaluating an amendment's chief purpose, a court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's main effect.... [Here, t]he main effect of the amendment is not stated anywhere on the ballot. (The voter is not even told on the ballot that the word 'or' ... will be changed to 'and'—a significant change by itself.)" (footnotes omitted)).

***51** In his separate dissent, Justice Page states that the current Legislature's proposed constitutional amendment together with the ballot question involve a "bait and switch." Justice Page's analytical

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approach that led him to conclude there is a "bait and switch" involves an approach similar to what I used when I was engaged in the private practice of law: I always sought to take a common-sense and reasonable approach to any matter entrusted to my care. When deciding how to proceed with a matter, I would apply what I referred to as a common-sense or propriety test to determine the legitimacy of the matter—was it authentic, credible, or ethical. A matter had to pass this legitimacy test; otherwise I would consider it to be non-meritorious. I have applied a similar common-sense or propriety approach to the issues that come before me as a judge. When my common-sense test is applied here, many aspects of the Legislature's case come up short with respect to authenticity and credibility.

To say that aspects of the current Legislature's case fail a common-sense test for legitimacy is an indictment that requires further explanation. In a case as important as this one, where the constitutionality of a ballot question is disputed, it should be obvious that our court should inquire what is really at stake. The purpose and effect of the proposed constitutional amendment is relevant so that we can properly analyze the constitutionality of the ballot question. The parties not only appear to acknowledge the validity of such an inquiry, but at times appeared to invite us to make the inquiry. Nevertheless, there has been a failure and unwillingness by the Legislature to respond to or candidly answer questions about the proposed constitutional amendment—a failure that ultimately became pervasive in these proceedings.

Assuming that the putative purpose for the proposed constitutional amendment is to eliminate election fraud in the form of voter impersonation it becomes highly relevant that the ballot question's defenders could not identify any specific incident of past voter impersonation fraud that the proposed amendment would eliminate. When confronted with diligent questioning on this point, there was an apparent effort to seek refuge by claiming that the amendment will be prophylactic—its main affect will be to eliminate any potential for future election fraud. When the Legislature's responses are juxtaposed with the League's claims that the proposed constitutional amendment will disenfranchise several classes of Minnesota voters—namely the elderly, the young, persons of color, persons who are transient, rural voters, the disabled, and the poor—genuine questions about authenticity and credibility arise. In the end, when the Legislature's arguments and its responses or even lack of responses to relevant questions are "carefully and meticulously scrutinized" or given a "close and exacting examination," they ultimately raise many more questions than they answer.

VII. RESOLVING THE BALLOT QUESTION

***52** Having concluded that the constitution requires the full text of any proposed constitutional amendment must be submitted to the people, the second question to be answered is the validity of the ballot question. Once again, if we use the Minnesota Constitution as our template, the answer is not difficult. The issue is easily resolved by asking and answering a series of questions. The questions and answers are as follows.

• Does our court have the power to review a proposed ballot question to determine whether the ballot question is constitutional? The answer is yes.

• Does the Minnesota Constitution allow the current Legislature to place an inaccurate, misleading, and possibly deceptive ballot question on the ballot? The answer is no.

• Is the ballot question designed by the current Legislature inaccurate, misleading, and/or deceptive? I have already answered that question "yes." Moreover, I started this dissent stating that the ballot question was "inaccurate, misleading, and *possibly* deceptive." I then changed the "possibly deceptive" to *likely* deceptive. Having worked my way through all of the analytical steps of this dissent, I conclude that the ballot question is not only inaccurate and misleading, it is without

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doubt, *deceptive*.

• Can the current Legislature place the inaccurate, misleading, and deceptive ballot question it has designed on the ballot? The answer is a definite no.

VIII. THE MAJORITY OPINION

The place to end this dissent is with a few final comments regarding the majority's holding. As previously stated, I conclude the result reached by the majority thwarts the will of the people as expressed in Minnesota's Constitution, and deprives the people of the opportunity to speak and to be heard with a knowing and meaningful voice when they decide whether to adopt the proposed constitutional amendment.

Unquestionably, the proposed constitutional amendment will "alter, modify or reform government" in Minnesota as we know it today. It may even result in a major change, a sea-change in how Minnesotans vote. Nevertheless, the current Legislature asserts that it has the exclusive power to design the form and content of a ballot question and then present that ballot question to the people even if the question is defective or deceptive.[FN40] Moreover, the Legislature asserts that "good enough" or "close enough"—as only the Legislature has the power to define those terms—suffice when asking the people to consent to the adoption of a constitutional amendment. The majority apparently adopts this abstract "close enough" standard. While acknowledging our court's constitutional right of review, the majority nevertheless grants so much deference to the Legislature that the current Legislature is granted power well beyond that provided for in the Constitution. Such a result offends the doctrine of separation of powers and creates a dangerous precedent.

Close enough should not suffice when it comes to amending Minnesota's Constitution; that standard should be rejected. This is especially true when the current Legislature's definition of close enough is so broad that it includes an inaccurate, misleading, and deceptive ballot question. Even in horseshoes, a game in which close enough may count, the rules provide that the horseshoe must land within a certain distance of the stake for the throw to count. Here, the ballot question designed by the Legislature and being thrown at Minnesota voters on election day lands so far from the stake—the meaning and purpose of the proposed amendment—that it should not be allowed anywhere near the November 6, 2012 general election ballot.

***53** Finally, the result reached by the majority—putting a knowingly inaccurate, misleading, and deceptive question on the ballot—has a disconcertingly surreal aspect to it. Justice Page recognizes this aspect of the majority's opinion when he calls the result nonsense. I would put it a bit differently. To me it seems as though Alice of Alice in Wonderland has taken us by the hand, led us through the looking glass and together we have tumbled down the rabbit hole, landing in a realm where up is down and black is white.[FN41] A land where the doctrine of judicial review is turned on its head, ordinary law trumps basic and fundamental constitutional law, deference becomes abdication of duty, and the definition of close enough is so broad it encompasses inaccurate, misleading, and deceptive.

IX. CONCLUSION

The case before our court today is among the most vexatious cases I have been involved with during my 18–year tenure as a justice. Without question this case raises several of the most interesting and important issues a high appellate court in a constitutional democracy must review. But the underlying facts, the actions of the current Legislature, the nature of the litigation, and most importantly the majority's holding create a disconcerting set of circumstances that should raise serious concerns about how Minnesotans will be permitted to exercise their fundamental right to vote and how our court addresses these important issues. There are many reasons why Minnesotans need to take very seriously not only the how, why, wherefore,

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and result of this litigation, but they need to be concerned about what will happen next.

Over 200 years ago, Thomas Jefferson articulated his view on a fundamental underlying principle of our constitutional democracy—all inherent power resides in the people and it is the people who must decide the basic and fundamental law that is embodied in their constitution. Ultimate power in our society is with the people. Jefferson explained how this principle works when he said:

> I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Our constitutional democracy has thrived for over 200 years within the framework of this principle—sovereignty and all political power reside with the people. There is no other place it can reside. Some people lack confidence in the people's ability to "exercise their control with a wholesome discretion" and they count among their ranks the many cynics who readily and vociferously articulate their disbelief in this principle. These cynics lack confidence that the people will properly "exercise their control." Some of the more cynical even seek to wrest control of the political process from the people. They are so misguided. Our two constitutions do not allow for the taking of control—the fundamental right to vote—away from the people.

***54** For me it is profoundly disappointing that the current Legislature, with the consent of our court, will not follow the Minnesota Constitution and will avoid the people's mandate to put the full text of the proposed constitutional amendment on the general election ballot this November. It is equally disappointing that an unconstitutional ballot question—an inaccurate, misleading, and deceptive ballot question—will instead be on the ballot.

So what will happen next? What remains is for the people of Minnesota to follow Jefferson's wise instructions. Minnesotans need to educate themselves and educate each other about the purpose of the proposed constitutional amendment, its impact on them, and then decide what is the right thing to do. They must "exercise their control" by reading the full text of the proposed amendment before they enter the voting booth. If the voters of Minnesota take the necessary steps to independently educate themselves and each other, then, and only then, can they cast an educated, informed, and intelligent vote on whether to approve or reject the proposed constitutional amendment that will have been improperly submitted to them.

FN1. Where we part company with the dissenters is over the remedy and the scope of our review. Going well beyond the limited nature of the question presented here, the dissenters engage in fact-finding and go on at length about the alleged negative impact the change, if approved, may have on voting in Minnesota. Because the merits of the constitutional amendment are not before us, we take no opportunity to comment further on the dissents' factual conclusions and negative commentary on the merits and impact of the proposed constitutional amendment.

FN2. Minnesota Majority cites three cases that it contends support a determination that its interests are sufficient to support intervention. But insofar as these cases permit intervention, they are distinguishable. For example, in *Alaskans for a Common Language, Inc. v. Kritz,* 3 P.3d 906 (Alaska 2000), intervention was granted to a group because it represented two of the individuals designated under state law as sponsors of the ballot initiative. *Id.* at 912–13. Similarly, in *Sportsmen for I–143 v. Montana Fifteenth Judicial District Court,* 308 Mont. 189, 40 P.3d 400 (2002),

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the proposed intervenors were two groups of Montana citizens described in the opinion as "sponsors," who under Montana law were responsible for obtaining sufficient signatures to get the measure on the ballot. *Id.* at 402–03; *see also* Mont.Code. Ann. §§ 13–27–204. –207 (2011); *Montana Pub. Interest Research Grp. v. Johnson,* 361 F.Supp.2d 1222, 1228 (D.Mont.2005) (describing how sponsors of a proposed Montana initiative are needed to obtain the requisite signatures). Finally, *Idaho Farm Bureau Federation v. Babbitt,* 58 F.3d 1392 (9th Cir.1995), is distinguishable because in that case the proposed intervenors, two environmental groups, had members who claimed injuries in fact as Idaho residents who would have been impacted by the measures at issue. *Id.* at 1399.

FN3. While we denied their motions to intervene, we invited and received amicus briefs from Senator Newman and Representative Kiffmeyer, and from Minnesota Majority. We also received amicus briefs from the City of Saint Paul, AARP, Citizens for Election Integrity—Minnesota, and the Hennepin County Attorney's Office.

FN4. Minnesota Statutes § 204B.44 provides:

> Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur:
>
> (a) an error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot;
>
> (b) any other error in preparing or printing any official ballot;
>
> (c) failure of the chair or secretary of the proper committee of a major political party to execute or file a certificate of nomination;
>
> (d) any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

FN5. The dissents argue that Article IX, Section 1 requires that the entire text of a constitutional amendment be placed on the ballot. But petitioners did not raise such an argument in their petition or briefs. Indeed, when asked at oral argument, petitioners rejected any suggestion that the proper remedy would be the placement of the amendment's text on the ballot. For their part, intervenors-respondents also do not argue that we should place the text of the photographic identification amendment on the ballot. Given that neither party has asked for the remedy advocated by the dissents, we need not and do not decide in this case whether Article IX requires the text of a proposed constitutional amendment to be placed on the ballot. That question is simply not before us here.

FN6. Under Article IX, Section 1, "[i]f two or more amendments are submitted at the same time, voters shall vote for or against each separately."

FN7. Amicus Minnesota Majority challenges petitioners' standing to bring this matter, because the petitioners raise only "concerns" about the proposed amendment and cannot show actual harm. Generally, we do not decide issues raised by an amicus that are not raised by the litigants themselves. *See, e.g., In re Blodgett,* 510 N.W.2d 910, 912 n. 2 (Minn.1994); *State*

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by Clark v. Applebaums Food Mkts., Inc., 259 Minn. 209, 216 & n. 5, 106 N.W.2d 896, 901 & n. 5 (1960) (declining to decide the constitutionality of a statute where the issue was raised only by an amicus). We may, however, decide issues raised solely by an amicus "particularly if the issue is one the court could raise sua sponte." *Kline v. Berg Drywall, Inc.,* 685 N.W.2d 12, 23–24 n. 9 (Minn.2004) (deciding whether our court had jurisdiction over a dispute, even though the jurisdictional challenge was raised solely by an amicus). Because standing is essential to our exercise of jurisdiction, the issue is one "which can be raised by this court on its own motion," *Annandale Advocate v. City of Annandale,* 435 N.W.2d 24, 27 (Minn.1989), and we therefore will decide whether petitioners have standing, even though the issue was raised only by Minnesota Majority.

> To have standing a party must have "a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris, Inc.,* 551 N.W.2d 490, 493 (Minn.1996). A party can acquire standing in one of the two ways: (1) if the plaintiff "has suffered some 'injury-in-fact,' " *or* (2) if "the plaintiff is the beneficiary of some legislative enactment granting standing." *Id.* Minnesota Statutes § 204B.44 provides that "[a]ny individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur." This statutory provision constitutes a legislative grant of standing, making the individual petitioners proper parties to this lawsuit. Moreover, we have previously held that nonprofit organizations can sue under statutes providing that "any person" may bring suit. *See State by Humphrey,* 551 N.W.2d at 495–96 (allowing Blue Cross, a nonprofit corporation, to sue under a consumer protection statute providing that "any person injured ... may bring a civil action" (emphasis omitted)). Therefore, the three nonprofit organization petitioners constitute "individual[s]" within the meaning of Minn.Stat. § 204B.44 and have standing pursuant to the statute. Because petitioners have properly filed a petition for the correction of an error in the placement of a question on an official ballot, within the legislative grant of standing in Minn.Stat. § 204B.44, we conclude that all petitioners have standing in the present dispute.

FN8. Even though the parties in this case agree that the standard we adopted in *Breza* controls, the dissents would overrule this precedent. Because they refuse to adhere to our precedent, the dissents must then set forth a new standard. Justice Page's dissent articulates no discernible standard. Justice Paul Anderson's dissent discusses the "eye" through which the judiciary should view the ballot question and, based on the strength of yet another dissent, contends that we must view the ballot question with "a gimlet eye." *See infra* at D–21 (citing ***Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 210, 128 S.Ct. 1610, 170 L.Ed. 2d 574 (2008)** (Souter, J., dissenting)). If we overturned precedent based on nothing other than the desires of individual members of this court, we would become a country not of laws, but of men. John Adams, *Novanglus No. 7* (1774), *reprinted in* 4 *The Works of John Adams* 99, 106 (Charles Francis Adams ed., 1851) (defining a republic as "a government of laws, and not of men"). But we do not disregard our precedent so easily.

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Instead, we require "compelling" reasons to depart from precedent. *SCI Minn. Funeral Servs., Inc. v. Washburn–McReavy Funeral Corp.,* 795 N.W.2d 855, 862 (Minn.2011) (noting that "[w]e are 'extremely reluctant to overrule our precedent ...' and 'require a compelling reason' to do so." (citation omitted)). The dissents articulate no such reasons, and we therefore decline the dissents' invitation to depart from our precedent.

FN9. That current statutes on absentee voting may not require photographic identification, as the dissents note, is not relevant to the question of whether the ballot question is unconstitutionally misleading. The dissents suggest that there may need to be changes in current absentee voting procedure if the people approve the amendment. Any such changes may be an effect of the proposed amendment, but, as explained below, our precedent does not require that such effects be stated in the ballot question in order for that question to pass constitutional muster.

FN10. The dissents rely on the canon of construction that recognizes that when the Legislature uses different terms, it must mean different things. Based on this canon, the dissents conclude that the "government-issued photographic identification" means something different than "substantially equivalent" verification requirements, and that therefore the ballot question is a deceptive "bait and switch." The dissents' reliance on this canon is misplaced. As our precedent makes clear, even when the Legislature has chosen different terms, we have declined to give different interpretations to those terms when, as in this case, the terms are synonymous. *See Eclipse Architectural Grp., Inc. v. Lam,* 814 N.W.2d 692, 702 (Minn.2012) (concluding where the Legislature used both the terms "service" and "delivery" in a statutory scheme that "[b]ecause service and delivery are consistently used synonymously in the context of personal service, there is no basis for us to conclude that the Legislature intended the two terms to be applied differently"); *Witso v. Overby,* 627 N.W.2d 63, 67 n. 7 (Minn.2001) (declining to interpret "declare" and "determine" differently in a statutory scheme where "[t]he difference in meaning" between the two terms "[wa]s de minimis").

FN11. In his dissent, Justice Paul Anderson contends that our use of the phrase "essential purpose" adds confusion as to the proper standard. We disagree. The phrase is easily understood, easy to apply, and it has been part of our law for over 100 years. *See State v. Duluth & N. Minn. Ry. Co.,* 102 Minn. 26, 30, 112 N.W. 897, 898 (1907).

FN12. The brief filed by petitioners in support of their petition—but not the petition itself-challenges the title for the ballot question—"Photo Identification Required for Voting"—as enacted by the Legislature. Because this issue was not raised in the petition itself, we decline to consider it. *See State v. Koppi,* 798 N.W.2d 358, 366–67 (Minn.2011) (explaining that matters not raised in a petition for review are generally waived for appellate review, and are, therefore, not considered by our court).

FN1. Contrary to the court's characterizations, my issue here is not with the language of the proposed amendment itself. That is a topic for another day, as the proposed amendment itself is not before us. The court can no more legitimately claim

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that my criticisms of the ballot question are driven by my opposition to the proposed amendment itself, than I could legitimately claim that the court's failure to explain how "all voters" in the ballot question can be the same as "all voters voting in person" in the proposed amendment is driven by the court's support for the proposed amendment.

Rather, the question here is whether the Legislature's ballot question is deceptive and misleading. In answering that question, I express no opinion on the wisdom of the proposed amendment or its language. But, just as the court does, I must necessarily compare the language of the ballot question with the language of the proposed amendment. And it is that comparison, rather than any opinion as to the merits of the proposed amendment, that requires me to dissent. Comparing the plain language of the proposed amendment with that of the ballot question and giving the words used their common and ordinary meanings leads to only one conclusion: the ballot question misstates, in a deceptive and misleading way, what the proposed amendment will require of voters. That I have identified a defect in the proposed amendment that makes it impossible for all voters to be subject to substantially equivalent identity verification does not mean that the Legislature's properly proposed amendment should not be put to voters. What that defect does, however, is highlight and exacerbate the defect in the ballot question.

FN2. The court contends that I would overrule the court's precedent for evaluating disputed ballot questions. The court misstates the nature of my dissent. I do not argue for overruling the court's precedent in this area. Rather, as I demonstrate, the court *has no precedent for this question.*

The court also contends that I have "articulate[d] no discernible standard" for evaluating ballot questions. I agree that there are several elements of judicial review of ballot questions that I do not address—for example, whether a ballot question must explain all of the provisions of the proposed amendment. However, the fact that the ballot question materially misstates the provisions of the proposed amendment is enough to decide this case.

FN3. Although the Legislature's ballot question has other deficiencies, as the petitioners have demonstrated, I focus on only two of them here, which in my view are enough to require the question be stricken and replaced on the ballot with the actual proposed amendment as drafted by the Legislature.

FN4. The form of a ballot question was also directly challenged as misleading in *Duluth Railway,* also a case involving a change in the taxation of railroads. 102 Minn. at 29, 112 N.W. at 898. The *Duluth Railway* court reiterated that the form and manner of submitting a statutory change to voters "are left to the judgment and discretion of the Legislature." *Id.* at 30, 112 N.W. at 898.

FN5. That the subject matter of the proposed amendment itself implicates the right to vote also warrants greater scrutiny of the ballot question.

FN6. For example, legislation passed by the Legislature in 2011 but vetoed by the Governor, which would have required photo identification to vote, required a voter to provide, among other things, "a

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description of the applicant in the same manner as required on an application for a Minnesota driver's license" and "the length of residence at the applicant's current address" in order to obtain a voter identification card. S.F. 509, § 7, 87th Minn. Leg.2011.

FN7. Minnesota Statutes § 203B.17, subd. 2(f) (2010), allows a voter to request an absentee ballot by providing the last four digits of the voter's Social Security number. In fact, under current law a voter can request an absentee ballot by simply "attest[ing] to the truthfulness of the contents of the application under penalty of perjury" without providing any passport, driver's license, social security, or state identification number at all. *Id.* Before the House Government Operations and Elections Committee, Representative Kiffmeyer stated that the proposed constitutional amendment "will allow absentee voting just as our current Constitutional language in Article 7 allows for absentee voting. This will continue that practice." Hearing on H.F. 2738, H. Gov't Operations and Elections Comm., 87th Minn. Leg., Mar. 8, 2012.

Similarly, Minn.Stat. § 204B.45 (2010) allows for voting by mail in certain municipalities. In the same committee hearing, Representative Kiffmeyer stated that under the proposed amendment "mail balloting, which is popular in some of our townships uh ... in accordance with Minnesota law will also be continued." Hearing on H.F. 2738, H. Gov't Operations and Elections Comm., 87th Minn. Leg., Mar. 8, 2012.

FN8. A transcript of the March 8, 2012 House Government Operations and Elections Committee meeting was filed with the court as an appendix to the petition. The accuracy of the transcript has not been challenged.

FN9. At oral argument it was suggested that as judges we do not leave our common sense at the door. Because there is no way to subject absentee and mail ballot voters to identity verification substantially equivalent to that which in-person voters will be subject, and therefore no way under the proposed amendment "to require all voters to present valid photo identification to vote," it is the court, having concluded that the ballot question is not deceptive or misleading, that has left its common sense at the door.

FN10. The purpose behind requiring in-person voters to produce valid government-issued photographic identification is presumably to ensure confidence that the person receiving the ballot is entitled to vote. For the in-person voter, the poll worker receives the prospective voter's government-issued photographic identification, somehow determines whether the identification is valid, and then, if valid, compares the information on the identification with the information contained in the voter roll for that person and compares the photo on the identification with the face of the person presenting the identification.

The court evidently believes that under the proposed amendment all voters will be subject to substantially equivalent identity verification. For absentee voters not appearing in person and for voters voting by mail, such a verification process is not physically possible. It simply cannot be done.

First, the only thing that is substantially equivalent to valid government-issued photoidentificationisvalidgovernment-issued photo identification.

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Second, with respect to absentee and mail ballot voters, the only thing that is substantially equivalent to (1) the voter handing the poll worker the prospective in-person voter's government-issued photographic identification, (2) the poll worker determining whether the identification is valid, (3) the poll worker comparing that identification to the information on the voter roll, and then (4) the poll worker comparing the photo on the identification with the face of the person presenting the identification—to insure that the person presenting the identification is entitled to receive a ballot—all before *handing* the voter a ballot, is to take each of these same steps with respect to prospective absentee and mail ballot voters before *sending* them a ballot.

The court dismisses these problems as merely "effects" of the proposed amendment that, in the court's view, need not be reflected in the ballot question. Here again, the court wishes away the problem. It is not that the ballot question fails to disclose all of the changes the proposed amendment would require to Minnesota's voting law; rather, the problem is that there is no way to conform Minnesota's voting laws to the proposed amendment—at least not without violating the representations of the proposed amendment's sponsor, without eliminating absentee voting, without eliminating mail balloting, and without violating federal law.

To highlight just one of those problems, federal law requires that Minnesota allow overseas voters and absent uniformed service members to vote by absentee ballot in elections for federal office, and that Minnesota accept from overseas voters and absent uniformed service members a single post card that simultaneously acts as a voter registration application and an application for absentee ballot. 42 U.S.C. § 1973ff–1(a)(1) (2006). There is no way to subject overseas voters and absent uniformed service members to "substantially equivalent identity ... verification," and therefore no way that the proposed amendment can apply to "all voters" as indicated by the ballot question.

Thus, the identity of absentee voters and those voting by mail cannot be verified in a manner substantially equivalent to that required of in-person voters. To the extent the court concludes that, in essence, all voters will be required to produce photographic identification and therefore be subject to substantially equivalent identity verification, the court has swallowed the Legislature's bait, along with hook, line, and sinker.

FN11. The petitioners in *Kiffmeyer v. Ritchie*, A12–1258, included Representative Mary Kiffmeyer and Senators Scott J. Newman, Warren Limmer, Julianne Ortman, Mike Parry, Sean Nienow, David Brown, David Senjem, Bill Ingebrigtsen, Paul Gazelka, Roger Chamberlain, Ray Vandeveer, and Claire Robling.

FN12. Indeed, the court contends that because petitioners asked only that the Legislature's ballot question be stricken from the ballot and did not ask that the text of the proposed amendment itself be placed on the ballot, we cannot require it. The parties may be able to ignore the requirements of the constitution, but we cannot. The constitution mandates the remedy here, irrespective of whether the parties, for whatever strategic reasons, chose not to request it.

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FN13. If, as the court contends, my purpose in opposing the Legislature's ballot question were to prevent Minnesotans from voting on the proposed amendment, I would argue for adopting the petitioners' proposed remedy: striking the amendment from the ballot entirely.

FN1. The pink ballot is used for constitutional amendments. *See* Minn.Stat. § 204D.11, subd. 2 (2010).

FN2. Secretary of State Mark Ritchie, the named respondent, declined to file a brief on the merits. For the reasons explained in the majority's opinion, we granted the 87th Minnesota House of Representatives' and the 87th Minnesota Senate's motion to intervene, but denied the motions to intervene that we received from State Senator Scott J. Newman, State Representative Mary Kiffmeyer, and Minnesota Majority, Inc.

FN3. The current Legislature had previously attempted to pass similar voter-identification measures as legislation, but the governor vetoed the legislation. *See* S.F. 509, ch. 69, 87th Minn. Leg. (Minn. May 23, 2011). The Legislature then undertook to design the voter-identification requirement at issue in this case as a constitutional amendment rather than as ordinary legislation.

FN4. John Marshall was the fourth Chief Justice of the United States Supreme Court. He served in that capacity from 1803 to 1834.

FN5. The Federalist No. 78 (Alexander Hamilton).

FN6. *See Breza v. Kiffmeyer,* 723 N.W.2d 633 (Minn.2006); *State v. Duluth & N. Minn. Ry. Co.,* 102 Minn. 26, 112 N.W. 897 (1907); *State ex rel. Marr v. Stearns,* 72 Minn. 200, 75 N.W. 210 (1898), *rev'd on other grounds* 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162 (1900).

FN7. At this point, a cautionary note is in order. In footnote one, the majority criticizes the dissents for engaging in "fact-finding." The majority's criticism is off-target because this dissent does not engage in fact-finding, much less explore at length "the alleged negative impact" of the adoption of the proposed amendment. The dissent makes clear that the merit of the proposed amendment is a question for the people to decide, and focuses on the plain text of Minnesota's Constitution and the negative impact of the inaccurate, misleading, and deceptive ballot question. The majority fails to appreciate the huge difference between these two concepts.

> My reaction is that the majority's assertions are either intended to distract the reader from the main issue before us and certain weaknesses in the majority's analysis; or, the majority recognizes that its own analysis clearly has a significant focus on the proposed constitutional amendment and is written to satisfy a need to distract the reader from this focus.
>
> The first alternative is probably the correct one. I do not believe that the majority or either dissent is driven by support for or a lack of support for the proposed amendment. The majority apparently wants to draw attention away from the central issue—the plain text of the Minnesota Constitution. Readers are cautioned not to be sidetracked by this effort.

FN8. The Governor said:

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> This amendment is a proverbial wolf in sheep's clothing. It goes far beyond its stated intention to require Photo ID's. Instead, it dismantles Minnesota's Best–in–the–Nation election system ... would end same day voter registration ... and require an entirely new system of provisional balloting....
>
> A constitutional requirement that "all voters must be subjected to substantially equivalent identity and eligibility verification" places barriers to voting on our seniors who no longer drive, our soldiers who vote overseas, and our students who attend colleges and universities away from home. It will make voting much harder for thousands of other eligible voters, who will find it difficult or impossible to attain government-issued photo identifications in order to prove their identities ... Virtually no class of voter is left unscathed by these extreme alterations in our citizens' access to their elections.

FN9. Cicero, *Pro Cluentio* 146.

FN10. Jon Elster refers to this concept as a democratic people's precommitment against any future weakening of will. Elster states that people bind themselves to the basic and fundamental law of a constitution much like Ulysses bound himself to his ship's mast to protect himself against the foreseeable future weakness he would experience when he heard the Sirens' song. Ulysses understood that hearing the Sirens would deprive him of rational thoughts. *See* Jon Elster, *Intertemporal Choice and Political Thought, in* Choice Over Time 35, 37–45 (George Lowenstein & Jon Elster eds., 1992).

FN11. *See generally* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions,* 70 Alb. L.Rev. 865, 869–70 (2007).

FN12. This is true both because of the misleading nature of the ballot question, which inhibits voters' opportunity to exercise their voting right by inhibiting their free choice, *see infra* Section V.F., and because the proposed amendment changes the way that Minnesotans can access the voting franchise, *see infra* Part VI.

FN13. "Skeptical eye" is the term used by Justice David Souter, based on the U.S. Supreme Court's holding in *Reynolds.* ***Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 210, 128 S.Ct. 1610, 170 L.Ed. 2d 574 (2008)** (Souter, J., dissenting) ("[**t]he Judiciary is obliged to train a skeptical eye on any qualification of** [**the fundamental right to vote**]" (citing *Reynolds,* 377 U.S. at 562, 84 S.Ct. 1362)).

FN14. "Gimlet" is defined as "having a piercing or penetrating quality." Merriam–Webster's Collegiate Dictionary 492 (10th ed.2001). Appropriately, "gimlet-eyed" means "sharp-sighted." *Id.*

FN15. *See generally* Anderson & Oseid, *supra* note 11, at 887–93 (2007).

FN16. For more information, *see id.* at 890 ("A plethora of men copied the compromise constitution in longhand in one evening. One constitution was written on white paper and signed by fifty-three Republicans. One copy was written on blue paper and signed by fifty-one Democrats. In all, there were 299 differences between the two drafts, most of which have been categorized as non-substantive." (internal citations removed)).

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FN17. *Comments on the Restructured Constitution of 1974, in* 1 Minn.Stat. Ann. 129, 129 (West 1976).

FN18. The revisions altered the ordering and numbering of the articles in the constitution; the article for amending the constitution was moved from article XIV to article IX.

FN19. *Comments on the Restructured Constitution of 1974, supra* note 17, at 143.

FN20. Minn. Const., art. IV, § 23.

FN21. There is an additional relevant point that should be added to this discussion. Article IX says that proposed amendments "shall be published" with the session laws, and then submitted to voters. It would be difficult to believe that merely publishing a legislatively composed ballot question in the session laws, rather than the entire amendment, would be sufficient to meet this provision of the constitution. If that were the case, the text of proposed amendments could be held virtually in secret—neither published in the session laws nor submitted to the voters. Under the majority's approach, the same verb construction ("shall be") in the same sentence is held to mean the full text of the amendment in one instance, and apparently some arbitrary summary composed by the Legislature in another instance.

FN22. *See Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), *overruled by Brown v. Bd. of Educ.,* 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

FN23. *See Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936), *abrogated by U.S. v. Darby,* 312 U.S. 100, 115–16, 61 S.Ct. 451, 85 L.Ed. 609 (1941) ("[I]t was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached....").

FN24. *See Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), *abrogated by Roper v. Simmons,* 543 U.S. 551, 556, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ("In [*Stanford*], a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.").

FN25. *See Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled by Atkins v. Virginia,* 536 U.S. 304, 307, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ("[I]n the 13 years since we decided [*Penry*], the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal.").

FN26. In *District of Columbia v. Heller,* the Court significantly expanded Second Amendment rights, with Justice Antonin Scalia writing that, even if " 'hundreds of judges' " relied on prior case law, that reliance "cannot nullify" citizens' reliance on the constitution's "true meaning." 554 U.S. 570, 624 n. 24, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). And in *Lawrence v. Texas,* the Court overturned Texas's antisodomy law, with Justice Anthony Kennedy writing that "[t]he doctrine of *stare decisis*

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is essential to the respect accorded to the judgments of [courts] and to the stability of the law. It is not, however, an inexorable command." 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (citing *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). Justice Kennedy further noted that prior cases can be overturned when their rationale "does not withstand careful analysis." *Id.*

FN27. The majority claims that the *Breza* standard controls our court's review of the case. I have already explained why that is not so. The majority aggravates its error by vacillating between the standard it purports to adopt and a previously-unheard-of "essential purpose" standard. In *Breza*, we held that the language of the ballot question was not "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment," and therefore the question could be submitted to the people. 723 N.W.2d at 636. The majority now contends that *Breza* does not mean what it says. According to the majority, a ballot question need not explain the "effect" of a proposed amendment so long as it conveys its "essential purpose." Presumably, the majority's "essential purpose" standard is more deferential than the standard enunciated in *Breza;* it allows the Legislature to convey even less information to the people. Either way, the majority's inability to clearly articulate a comprehensible standard only underscores why the plain language of Article IX, section 1 mandates that the Legislature submit the text of the proposed constitutional amendment directly to the people.

FN28. This legislative claim offends the core principles of our constitutional democracy because, as we have emphatically stated, "The constitution belongs to the people. They have adopted it and they alone can amend it. Neither the Legislature nor this court has any right to bypass the people under the guise of a liberal interpretation which would amend the constitution, no matter how desirable the amendment might be." *Knapp v. O'Brien*, 288 Minn. 103, 106, 179 N.W.2d 88, 90 (1970) .

FN29. Similarly, when the Legislature uses two different words in the same statute, this court presumes that the Legislature means two different things. *See Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 709 (Minn.2012) ("The use of different words in the two provisions supports the conclusion that the sections address different behavior."); *Torgelson v. Real Prop. Known as 17138 880th Ave.*, 749 N.W.2d 24, 27 (Minn.2008) ("Although 'debt' and 'liability' can be synonymous, it is presumed that if the Constitution's authors used two different words, they intended two different meanings."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 170–73 (2012) (discussing the "presumption of consistent usage" as a contextual canon of statutory interpretation). We should apply the same presumption when the Legislature uses two different terms in a session law that proposes a constitutional amendment.

FN30. At oral argument, one of my colleagues posed this exact hypothetical to counsel for the current Legislature. Counsel claimed that such a ballot question "may or may not" violate the Minnesota Constitution. I submit that counsel overstated the difficulty of my colleague's question.

FN31. When searching for the meaning of

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a word, courts must be very cautious to avoid stepping through the looking glass, where Humpty Dumpty resides and words lose all meaning. *See* Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass* 254 (Knopf 1992) (1865). (" 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' ").

FN32. Regardless of whether one agrees with or disagrees with the proposed constitutional amendment on the merits—a question beyond the scope of our review—the ballot question's failure to include the "government-issued" qualifier misleads the people as to the impact of the proposed constitutional amendment. Requiring in-person voters to present "government-issued photographic identification" represents a significant change—maybe even a sea-change—in Minnesota election law. As petitioners point out, very few states strictly require voters to present "government-issued" photographic identification before they can cast their vote. *See* Wendy R. Weiser & Lawrence Norden, Brennan Center for Justice at NYU School of Law, *Voting Law Changes in 2012* 4–5 (2011), *http://www.brennancenter.org/content/resource/voting_law_changes_in_2012*. Even if the current Legislature were able to prove that Minnesota's voter identification regime requires a major overhaul—something it has not done and likely cannot do—the ballot question fails to convey to the people the most basic information about the proposed constitutional amendment.

FN33. In ***Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed. 2d 574 (2008)**, the Supreme Court held that an Indiana law requiring voters to present photographic identification did not violate the federal Constitution. In reaching its conclusion, the Supreme Court held that the burden imposed on eligible voters who lack photographic identification did not qualify as a substantial burden on the right to vote. ***Id.* at 198, 128 S.Ct. 1610**. The Supreme Court's decision in ***Crawford*** does not alter the conclusion that the current Legislature's use of the term "free" in the ballot question is unconstitutionally misleading for several reasons. First, ***Crawford*** was a facial challenge to the Indiana law. Petitioners thus bore the burden of showing that the statute was unconstitutional in *all* of its applications. ***Id.* at 200, 128 S.Ct. 1610**. The Court acknowledged the possibility that Indiana's photographic identification law may be unconstitutional when applied to certain elderly and vulnerable populations, even if the petitioners in that case could not satisfy their burden with respect to the facial challenge. ***Id.* at 199, 128 S.Ct. 1610**. Second, the issue before us, according to the majority, is whether the ballot question is "so unreasonable and misleading as to evade the Minnesota Constitution's requirement to submit the amendment to a popular vote." Here, the ballot question's use of the term "free" is unconstitutional not *because* of the burden it imposes on eligible voters who lack photographic identification. Rather, the use of the term "free" is unconstitutional because it *conceals the burden* that the proposed constitutional amendment imposes on the electorate, and therefore deprives the people of their right to consent to the imposition of *any* additional cost to the exercise of that fundamental right to vote.

FN34. For example, the Senate's version of the ballot question accurately tracked the language of the proposed constitutional

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amendment:

> Shall the Minnesota Constitution be amended effective June 30, 2013, to require that all in-person voters present an approved form of government-issued photographic identification at the time of the voting; that those not voting in person provide government-issued proof of identity; that all voters be subject to substantially equivalent voter eligibility verification before a ballot is cast or counted; and that the state provide at no charge an approved photographic identification to eligible individuals?

S.F. 1577, § 2, 87th Minn. Leg.2012.

FN35. To take but one example, during a floor debate, Rep. Winkler pointed out the numerous problems with the form and content and the current Legislature's ballot question to Rep. Mary Kiffmeyer, the House sponsor of H.F. 2738

> REP. WINKLER: Well Representative Kiffmeyer you certainly are skilled at not answering questions. I will hand that to you.... And you have a question submitted to the voters which talks about photo ID and a free ID. But it doesn't talk about the rest of the things that are contained in your amendment like provisional balloting and the substantially equivalent language.... It seems to me that what you're doing is trying to sell your amendment to the voters, mislead them into believing that this is just about saying who you are on Election Day, when, in fact, your bill is a Trojan Horse to do a lot of other things to disrupt and cause chaos in Minnesota's election.... This amendment including your title and the question, I believe, are a form of voter fraud because you are misleading the voters into believ[ing] that they're just voting on photo ID when they're voting on so much more.... You're trying to limit this concept of photo ID which you believe is popular as a way to usher in a whole set of changes to Minnesota's election law which I think will create chaos and confusion and will disrupt some very popular aspects of our voting, including absentee balloting and same day registration, so I think you're committing voter fraud.

H. Debate on H.F. 2738, 87th Minn. Leg., April 3, 2012 (audio tape) (statement of Rep. Winkler).

FN36. As previously noted, the election for Minnesota's Constitutional Assembly was surrounded with many allegations of fraud.

FN37. *See* Letter From Mark Dayton, Governor of Minnesota, to Kurt Zellers, Speaker of the House, Minnesota House of Representatives (Apr. 9, 2012) (vetoing H.F. 2738 and urging Minnesotans to reject the proposed constitutional amendment).

FN38. I would expand upon the Governor's statement by adding that Minnesota's reputation is not just national, it is international. I have had the privilege of representing the United States internationally as part of our country's effort to promote open, fair, and honest elections in foreign countries. I have lectured and been a presenter at several symposiums and meetings on issues involving election law and regulations; enfranchisement of voters; voting procedures; the use of electronic voting machines; election fraud; and post-election litigation.

> I have done this international work under the auspices of the United States Department of State, USAID, the International Foundation for Electoral Systems

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(IFES), and the American Bar Association Rule of Law Initiative. I was in the Philippines (2010), Libya (2012), and Tunisia (2012); I have also spoken on this topic in China and Russia. In October 2010, at the invitation of IFES I addressed an international group of government election officials, legislators, and Members of Parliament on these same topics.

As tempting as it may be to think that there may be something special about me that led me to be invited to make these presentations, that is not the case. It was not about me, it was about where I am from—the State of Minnesota. The people I met with wanted to know about election procedures and practices in Minnesota because Minnesota has an excellent reputation for conducting open, fair, and honest elections. One example of the respect Minnesota election procedures engender occurred at the 2010 Washington, D.C. IFES conference. Several delegates approached me and told me that they wanted to know more about how Minnesota conducts its elections, because as the delegate from Ukraine said, they wanted to "be like Minnesota." The Governor was correct when he stated that Minnesota has an excellent national reputation for how we conduct our elections, but he did not go far enough—Minnesota's excellent reputation is international in scope. *Id.*

FN39. *A bridge too far* is derived from the Market Garden offensive during World War II. Much like the Allies' September 1944 offensive in the Netherlands, the League started well with its on-target analysis of the defective ballot question. But then, much like the Allies, it overextended itself when it inflexibly asserted that the only remedy for a defective ballot question is removal of the proposed amendment from the ballot. This flaw in the League's approach leaves the League pretty much in the same position in which the Allies found themselves at the end of Market Garden—back where it started.

FN40. Neither the current Legislature nor the majority identify the source of this claimed power. Nowhere does the Minnesota Constitution expressly confer upon the Legislature the power to create, form, and design a ballot question and then place this ballot question on the general election ballot instead of the full text of the proposed constitutional amendment. In the absence of such a grant, it appears that the Legislature and the majority are making an argument that this power is inherent in the language of Article IX. But, I cannot find it there.

There are many obvious and inherent problems with an *inherent* powers argument. First, as an entity created by the people, the Legislature must yield any inherent power to the people unless there is an express grant of power. Second, the people made no such express grant of power to the Legislature. Third, there is no indication that this power is implied as being necessary for the Legislature to propose amendments to the Constitution. In fact, the exact opposite is more likely—the full text of the proposed amendment is unquestionably the best source of primary information for the voters. Courts are reluctant to recognize inherent power where there is no express grant of the power. *See Country Joe v. City of Eagan,* 560 N.W.2d 681, 683 (Minn.1997) (stating that "[a]s a limited statutory creation, the city has no inherent powers beyond those 'expressly con-

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ferred by statute or implied as necessary in aid of those powers which have been expressly conferred.' " (quoting *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966))). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (stating that "the president's power, if any, ... must stem either from an act of Congress or from the Constitution itself"). Finally, and most compelling, is the fact that Article I, section 1 of the Minnesota Constitution expressly states that "all political power is inherent" in the people.

FN41. Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass* (Knopf 1992) (1865).

Minn.,2012.
League of Women Voters Minnesota v. Ritchie
--- N.W.2d ----, 2012 WL 3643840 (Minn.)

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