

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM CRAWFORD, ET AL., :

4 Petitioners :

5 v. : No. 07-21

6 MARION COUNTY ELECTION :

7 BOARD, ET AL. ; :

8 and :

9 INDIANA DEMOCRATIC PARTY, :

10 ET AL., :

11 Petitioners :

12 v. : No. 07-25

13 TODD ROKITA, INDIANA :

14 SECRETARY OF STATE, ET AL. :

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16 Washington, D.C.

17 Wednesday, January 9, 2008

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States
20 at 10:04 a.m.

21 APPEARANCES:

22 PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of
23 the Petitioners.

24 THOMAS M. FISHER, ESQ., Solicitor General, Indianapolis,
25 Ind.; on behalf of the Respondents.

1 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,
2 Department of Justice, Washington, D.C.; on behalf of
3 the United States, as amicus curiae, supporting the
4 Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-21 and 07-25, Crawford v. Marion County Election Board and Indiana Democratic Party v. Secretary Rokita.

Mr. Smith.

ORAL ARGUMENT OF PAUL M. SMITH

ON BEHALF OF THE PETITIONERS

MR. SMITH: Mr. Chief Justice, and may it please the Court:

This case involves a law that directly burdens our most fundamental right, the right to vote. Those Indiana voters who lack the identification now required by the new photo ID law must overcome substantial practical and financial burdens before they can continue to exercise their constitutional right. Now, the State says that those burdens are justified by the need to stamp out the scourge of voter impersonation fraud at the polls, but this Court has made clear many times that such a justification should not just be accepted at face value, but instead it should be scrutinized to assure that the claimed State interest is both real and sufficiently weighty to justify the burden being imposed on constitutional rights.

1 JUSTICE SCALIA: Before -- before we get to
2 that, can we talk about standing a little? Who are
3 the -- who are the complainants here?

4 MR. SMITH: There are many plaintiffs, Your
5 Honor, including the ones that the courts below found
6 have standing, the Democratic Party.

7 JUSTICE SCALIA: Courts below are sometimes
8 wrong.

9 MR. SMITH: Yes, Your Honor, absolutely, and
10 especially when I'm a petitioner I agree with you on
11 that. But in this case, Your Honor, the Democratic
12 Party was found to have standing correctly, I believe,
13 on at least two grounds, associational standing as well
14 as what you might call haven standing, the
15 organizational interest being impaired by virtue of this
16 law.

17 JUSTICE SCALIA: Well, they still have to
18 identify individuals who are members. Now, what does it
19 take to be a member of the Democratic Party here?

20 MR. SMITH: Your Honor, in Indiana you
21 become a member of the Democratic Party by participating
22 in party affairs. They did identify members who are
23 activists, who are poll workers, and that's why the
24 district court said that as, as to the equal protection
25 claim those people were sufficient to satisfy

1 associational standing.

2 JUSTICE SCALIA: I thought -- I thought they
3 took the position that anybody who voted or intended to
4 vote Democratic is a member of the Democratic Party.

5 MR. SMITH: Well, there are different
6 degrees of membership, different ways to become a
7 member, as this Court has recognized --

8 JUSTICE SCALIA: Is there any way in which
9 you can say -- and I thought this was the theory of
10 associational standing -- that this individual has
11 voluntarily given this organization the right to
12 represent that person for particular purposes?

13 MR. SMITH: There is no formal method of
14 induction as you would have in the Elk's Club or
15 something, Your Honor. But there clearly are methods by
16 which you become a participant in the affairs of the
17 party. For example, to vote in the primary you have to
18 aver that you have either supported Democratic
19 candidates in the last election or intend to in a future
20 election.

21 JUSTICE SCALIA: But that doesn't mean that
22 I'm willing to have the Democratic Party represent me
23 for all sorts of purposes. And these people can bring
24 their own individual challenges. I mean, I'm not
25 questioning their ability to do it. But, but why is the

1 Democratic Party their representative?

2 MR. SMITH: Because they have -- the
3 Democratic Party is an association of people joined
4 together to elect candidates of a particular kind and
5 those people include many people who are burdened by
6 this law. This seems to be the absolutely
7 quintessential case for associational standing, Your
8 Honor.

9 JUSTICE SOUTER: As I understand it, though,
10 Mr. Smith, the trial court didn't rely on, simply on the
11 associational standing of the Democratic Party, did it?

12 MR. SMITH: No, that's correct, Your Honor.
13 Well, the court of appeals relied as well on Havens
14 Realty and said that the organizational interests of the
15 party are being impaired by virtue of the fact that this
16 is putting a burden on them achieving their goal, the
17 Democratic Party's goal, of electing its candidates.

18 JUSTICE SOUTER: And is doing so by forcing
19 them to get people properly identified.

20 MR. SMITH: Extend resources getting people,
21 get their identification. It's very much like the
22 Metropolitan Washington Airports Authority case which we
23 cited in our brief, which involved a nonprofit
24 organization aimed at trying to keep the noise level
25 down at National Airport that was impaired by an

1 unconstitutional statute in that case as well.

2 JUSTICE SCALIA: That organization had
3 members. I mean, you did join that organization.

4 MR. SMITH: Well, Your Honor --

5 JUSTICE SCALIA: And they identified members
6 who would be, who would be annoyed by the noise.

7 MR. SMITH: I'd note, Your Honor, that in
8 the Hunt case itself there were no members. The Court
9 said it doesn't really matter because the State agency
10 that had associational standing in Hunt functioned for
11 all purposes as the representatives of those, of those
12 apple farmers, but there was no formal membership
13 organization, no members per se at all. But the Court
14 said that shouldn't make a difference because there's
15 really no actual functional difference between the two
16 situations. I would certainly submit --

17 JUSTICE KENNEDY: I just think it's hard to
18 confine your rationale if you say that any association
19 could sue. If it says, you know, there are people that
20 if they knew what we were doing, if they knew this
21 problem they would really want us to sue on their
22 behalf, I don't know if I'm going to confine your
23 rationale.

24 MR. SMITH: Well Your Honor, the thing that
25 confines the rationale is it has to be something that

1 relates as well to the purpose of the organization, of
2 the association, the reason why these people are bound
3 together as a group, and that is of course to get people
4 to vote and vote to support -- support the goals of the
5 organization, support the candidates, the nominees of
6 the organization.

7 CHIEF JUSTICE ROBERTS: We can limit your
8 standing argument to -- I guess it's based on the
9 affidavits of Ms. Holland and Ms. Smith, the one who is
10 a clerk for the Democratic Party and the other who is a
11 judge for the Democratic Party. We don't have to agree
12 with you that anybody who votes, might vote Democratic,
13 is enough to give you standing.

14 MR. SMITH: But we also have other people in
15 the record, Your Honor -- for example, Theresa Clemente,
16 others who are active poll workers, activists in the
17 party, who -- had been polled and found that they didn't
18 have IDs and that they would be burdened by the
19 difficulty of getting IDs. So that that -- there is
20 specific standing evidence in there of specific people
21 who, much more than just your average voter, are active
22 in party affairs. They may not have a -- be
23 card-carrying members of the Democratic Party, but they
24 are as much a part of the Democratic Party as anybody
25 possibly could be, who were identified in response to

1 interrogatories, about 9 or 10 of them, and were found
2 to be satisfactory for purposes of standing by the
3 district court on the equal protection claim.

4 Now, in addition I would note as I suggested
5 to Justice Souter, you don't have to go to the
6 associational standing because the Democratic Party
7 clearly is injured in its own right as an organization.

8 Now, if I could turn to the merits then, the
9 --

10 JUSTICE SCALIA: Excuse me. Even in its own
11 right, it has to identify somebody that's a member or
12 not.

13 MR. SMITH: No. When it's in its own right
14 the association, the organization, is injured, Your
15 Honor. Now, the question -- if what you're suggesting,
16 is there enough evidence here that people are actually
17 being prevented from voting?

18 JUSTICE SCALIA: Exactly, Democrats in
19 particular, I suppose.

20 MR. SMITH: A great deal of evidence in the
21 record of the burdens that are imposed on people who try
22 to comply with this law and continue exercising their
23 constitutional right to vote.

24 CHIEF JUSTICE ROBERTS: Well, I understood
25 Judge Barker to say that you had not come up with a

1 single instance of somebody who was denied the right to
2 vote because they didn't have a photo ID.

3 MR. SMITH: Well, Your Honor, the record in
4 this case was made when an election had not yet
5 happened. So that comment, while it was certainly made,
6 I don't quite understand its significance. This case
7 was brought to try to prevent an irreparable loss of
8 constitutional rights in advance of the implementation
9 of this law. I think it had been used in two little
10 towns in '05, Montezuma, Indiana, but other than that --

11 CHIEF JUSTICE ROBERTS: So elections were
12 conducted under this law?

13 MR. SMITH: I'm not even -- there were a
14 couple of hundred people that had voted under the law,
15 but nobody else had yet, at that point. Now, the --

16 JUSTICE SCALIA: Well, did you have anybody
17 who said, I don't have a voter ID?

18 MR. SMITH: Yes, we did, Your Honor.

19 JUSTICE SCALIA: I plan to come in this next
20 election, I plan to vote, and I don't have a voter ID
21 card?

22 MR. SMITH: Yes, we did, Your Honor. That's
23 the 9 or 10 people who came from the poll worker survey.
24 There was also a considerable amount of testimony about
25 other people who said they wanted to vote, who spoke to

1 many of the other plaintiffs, Mr. Crawford, the NAACP
2 chapter. There's a lot of other plaintiffs who also
3 submitted evidence of people saying: I don't have an
4 ID, I'm not going to be able to get one, I'm not going
5 to be able to vote.

6 CHIEF JUSTICE ROBERTS: But why -- and
7 they're not going to be able to get one even though the
8 State will provide them with one if they don't have one,
9 subject to some identification?

10 MR. SMITH: Yes, Your Honor. But what the
11 State did in 2002 was it ratcheted up the difficulty of
12 getting one by requiring for the first time that you
13 have an original certified birth certificate that you
14 paid for and that -- and then you have to go through the
15 hoops of what kind of identification you need for that.

16 JUSTICE ALITO: Well, is it your position
17 that a State can't require any form of identification
18 and can only require a signature, or would some lesser
19 form of identification than Indiana has required be
20 constitutional?

21 MR. SMITH: Your Honor, it may well be
22 possible that there's certain situations that it could
23 require it. Each case is a balancing test. As the
24 Court said in Timmons, you have to make hard judgments
25 on the specific facts of each case and identify both the

1 State interest being served, the incremental State
2 interest being served, and the degree of the burdens.

3 JUSTICE ALITO: What was the answer to my
4 question? Is any form of voter identification beyond a
5 signature permissible or not?

6 MR. SMITH: If it's readily available and
7 not especially burdensome and there is some reason to
8 think that it is preventing a fraud of some sort,
9 serving some --

10 JUSTICE KENNEDY: But clearly you answer all
11 of those questions that you've just posed, that you've
12 just responded with, "no". So then your answer to
13 Justice Alito should be no.

14 MR. SMITH: Well, Your Honor, it is true --

15 JUSTICE KENNEDY: Although that leads to the
16 next question, is whether or not there are ways in which
17 the -- the central purpose of this law can be preserved
18 but it could be less stringent. But I'd like you to
19 respond to both of those things.

20 MR. SMITH: Well, it is certainly true that,
21 in fact, there is no evidence in this record of any
22 significant amount of fraud that is still occurring with
23 the existing system of voter identification.

24 JUSTICE KENNEDY: That wasn't -- that wasn't
25 the problem I had with your answer to that question.

1 You posed a number of questions to Justice Alito, or a
2 number of responses, but to each one of those your own
3 answer in the brief was no, and therefore your question
4 -- the answer to Justice Alito's question should be no,
5 there is no system that you know of that can impose a
6 photo ID.

7 MR. SMITH: I think -- I think that the
8 current system works just fine. So if there's any
9 degree of burden being imposed on the voter by some
10 additional identification requirement, then I would say
11 it's unconstitutional.

12 JUSTICE GINSBURG: Mr. Smith --

13 JUSTICE KENNEDY: Your answer is no.

14 MR. SMITH: Yes, Your Honor.

15 JUSTICE GINSBURG: -- suppose at the time of
16 registration there was a photograph taken right in the
17 registration place and on the spot they gave you an ID
18 with that photo, and everybody who registers would get
19 one and there isn't any question of paying money to get
20 a birth certificate. Would that be satisfactory? Ir
21 that -- if you could make a photographic ID universally
22 available, you would still have the problem of the
23 religious objectors, but wouldn't everybody else be
24 covered?

25 MR. SMITH: If you had a world in which that

1 were true, Your Honor, I think that would be potentially
2 constitutional. That's a very different world than the
3 one we live in, and --

4 CHIEF JUSTICE ROBERTS: That would be
5 potentially constitutional?

6 MR. SMITH: Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: Okay. So we should
8 ignore your religious objection argument in this case?

9 MR. SMITH: Well, I was assuming that we
10 would make some additional exemptions for particular
11 people with those kinds of problems, if people can't
12 have one. If the question is, if everybody has a photo
13 ID in their pocket is it constitutional to require them
14 to show them at the voting booth, the answer to that I
15 think is yes.

16 JUSTICE SCALIA: Well, do we know that that
17 religious exemption won't be made?

18 MR. SMITH: Excuse me, Your Honor?

19 JUSTICE SCALIA: Do we know that that
20 religious exemption won't be made? Nobody's asserted
21 it.

22 MR. SMITH: No, I'm not -- I'm not --

23 JUSTICE SCALIA: No, no. I mean in this
24 case. In this case you're claiming there's a problem
25 for people who, for religious reasons, don't want to

1 have their photograph taken. Do we know that if that's
2 the reason that they assert, I can't get the photograph,
3 the State will say you can't vote?

4 MR. SMITH: I must be misunderstanding. We
5 have every reason to think that they will let them vote.
6 The only problem with that exemption, like the indigency
7 exception, is that it's kind of gratuitively burdensome
8 in that you have to go down to the county seat to vote
9 every time; you can't vote in your polling place because
10 you have to fill out this affidavit every time you vote.

11 JUSTICE GINSBURG: And you could, you could
12 do it twice. You could make the two trips, one to your
13 local place and one to the distant place.

14 MR. SMITH: Either way, your real voting
15 place is going to be the county clerk's office in the
16 county seat, forever. That's -- it's not that they
17 won't do it; it's --

18 CHIEF JUSTICE ROBERTS: Well, how far away
19 is the furthest county seat for somebody in the county,

20 MR. SMITH: I don't know the --

21 CHIEF JUSTICE ROBERTS: County seats aren't
22 very far for people in Indiana.

23 MR. SMITH: No. If you're an indigent
24 person, Your Honor, in Lake County, in Gary, Indiana,
25 you'd have to take the bus 17 miles down to Crown Point

1 to vote every time you want to vote. And if you're
2 indigent that's a significant burden, and --

3 JUSTICE SCALIA: It's not a burden if you're
4 not indigent?

5 MR. SMITH: Well, it's -- it's less of a
6 burden, Your Honor, considerably less of a burden. You
7 --

8 JUSTICE SCALIA: 17 miles is 17 miles for
9 the rich and the poor.

10 MR. SMITH: -- public transportation,
11 because the person presumably has no access to an
12 automobile because they don't have a driver's license
13 and they're indigent and they're living in Gary,
14 Indiana.

15 CHIEF JUSTICE ROBERTS: We have -- the
16 record shows that fewer than 1 percent of people in
17 Indiana don't have a photo ID.

18 MR. SMITH: That is not what the record
19 shows, Your Honor, and it's not what the district court
20 said. I think it's -- it would be really a travesty if
21 this Court decided the case on that assumption. What
22 the district court said is if you compare the voting age
23 population in the census to the total number of driver's
24 licenses and IDs that have been issued, you get that
25 disparity of 43,000 or 1 percent, but what the district

1 court went on to say is this is probably not accurate
2 because the total of licenses and IDs includes all the
3 people who have died and left the State and their
4 licenses are still unexpired.

5 CHIEF JUSTICE ROBERTS: Well, so do the
6 voting rolls. I thought the district court found 41 --

7 MR. SMITH: No, no. The population --

8 CHIEF JUSTICE ROBERTS: Mr. Smith.

9 MR. SMITH: So sorry.

10 CHIEF JUSTICE ROBERTS: -- 41.4 percent of
11 the people on the voting rolls in Indiana were either
12 dead or they were duplicate entries.

13 MR. SMITH: But she wasn't looking at the
14 voting rolls. She was comparing population in the
15 census as of 2005 with the driver's license records.

16 CHIEF JUSTICE ROBERTS: Do you take issue
17 with the 41.4 percent figure for bad entries on the
18 voting registration rolls?

19 MR. SMITH: No, I have no reason to -- it
20 may have gotten better now. They apparently have
21 instituted a lot of efforts in the last 3 years to make
22 it better, but --

23 CHIEF JUSTICE ROBERTS: And this is one of
24 them, I suppose, requiring photo ID?

25 MR. SMITH: No, I was referring to actually

1 cleaning up the voter rolls in compliance with the
2 consent decree they signed with the United States.

3 CHIEF JUSTICE ROBERTS: Well, don't you
4 think if you have the voter rolls with a significant
5 number of bad registrants, either dead or duplicates,
6 that that presents a significant potential for fraud?

7 MR. SMITH: I suppose. I don't know if I
8 can say significant. The situation has existed for now
9 a number of years, and the salient fact here is that
10 there's not a single recorded example of voter
11 impersonation fraud.

12 CHIEF JUSTICE ROBERTS: Well, that's because
13 it's less of an issue. If somebody wins an election by
14 500,000 votes, you may not be terribly worried if some
15 percentage were cast by fraud, but you might look to the
16 future and realize there could be a closer election and
17 there -- it's a type of fraud that, because it's fraud,
18 it's hard to detect.

19 MR. SMITH: No, it's actually not, Your
20 Honor. It's the type of fraud that the Elections
21 Commission said -- found is unlikely, the most unlikely,
22 because it's not that hard to detect. When you're going
23 into the polls and saying, I'm Joe Smith, you're dealing
24 with a neighborhood person who knows a lot of people who
25 are there, you have to match that person's signature.

1 And if that person shows up later on to vote --

2 CHIEF JUSTICE ROBERTS: But the problem with
3 the duplicate entries is there may be two entries for
4 John Smith because John Smith has moved and the voter
5 registration hasn't been updated. So all you need is
6 somebody else to go in and say: I'm John Smith, this is
7 my address. And later in the day somebody else comes in
8 and says: I'm John Smith and this is my address. And
9 because they're duplicates it's really difficult to
10 check.

11 MR. SMITH: Well, the duplicates,
12 presumably, are in two different places, right. So they
13 would vote in two different places.

14 But if -- what the -- the fraudfeasor
15 doesn't know is where the real John Smith is going to
16 vote. So if he goes in and votes in one place and says,
17 well, I'm going to -- I expect he's going to go in the
18 other place, sooner or later, if you had any significant
19 amount of this kind of fraud occurring, people would be
20 coming in and saying I can't vote. Somebody says I
21 already voted.

22 It's not happening and, indeed, every single
23 indication in this record is that the evidence of this
24 kind of fraud occurring, to call it scant is to
25 overstate it.

1 JUSTICE SCALIA: The people who are dead or
2 have moved away would certainly not be objecting.

3 MR. SMITH: No, Your Honor. I was talking
4 about the disparity between the number of people in the
5 voting-age population and the number of licenses and
6 saying you can't assume it's only a one percent
7 differential. It's actually more like an eight or nine
8 percent differential.

9 JUSTICE SCALIA: I wasn't talking about
10 that. I was talking about whether there is a genuine
11 threat of fraud which the State is moving to eliminate
12 --

13 MR. SMITH: The question is --

14 JUSTICE SCALIA: -- and your assertion that,
15 you know, it's not much of a problem because the person
16 whom you're impersonating would find out about it. I
17 mean -- but that's certainly not the case for people who
18 have moved away or people, you know, the people in the
19 graveyards that are still on the rolls.

20 MR. SMITH: It's certainly possible that
21 someone could commit this kind of a crime.

22 JUSTICE SCALIA: I'd say likely.

23 MR. SMITH: Well, one of the things that
24 makes it less likely is if you try to actually affect an
25 election you need to sway a lot of votes. And in order

1 to do that this way you'd have to have 100 or 200 or 500
2 co-conspirators, each of them assigned an identity,
3 learning the signature of that person, and --

4 JUSTICE BREYER: You don't really -- I mean,
5 that's what I wonder if there is no such evidence. How
6 could you get evidence? It used to be common maybe
7 urban legends, but of political bosses voting whole
8 graveyards of dead people. All right. Now, that would
9 be almost impossible to catch, I think. Someone walks
10 in, saying: I'm Joe Smith. He doesn't say: I'm Joe
11 Smith dead. He says, I'm Joe Smith, and he signs
12 something. And the poll worker looks at it and the
13 signature looks very weird.

14 Well, what's the poll worker supposed to do?
15 He's not going to go disrupt the election. And is there
16 going to be a policeman there to follow this person
17 home? Of course not.

18 So that's their claim. Their claim is that
19 we have a lot of anecdotes and there is a certain kind
20 of fraud that you really just can't catch at the poll.

21 MR. SMITH: Your Honor --

22 JUSTICE BREYER: Now, what's your response
23 to that? Because that's their argument on the other
24 side.

25 MR. SMITH: First of all, on the point of

1 the anecdotes, I would encourage you to look at the
2 Brennan Center brief.

3 JUSTICE BREYER: I know there are arguments
4 on both sides. But at the heart of this is what was
5 Judge Posner's claim and others that this isn't the kind
6 of fraud that you can just dismiss and say it never
7 happens because the person would walk into the poll
8 later and try to vote. What they are talking about is
9 what Justice Scalia was talking about, and I'm simply
10 trying to focus your answer on that part of the
11 question.

12 MR. SMITH: Well, Your Honor, many kinds of
13 fraud do get caught, and they are no more easily
14 detected than this kind of fraud to be detected. But
15 this kind of fraud is not being caught. No one has been
16 punished for this kind of fraud in living memory in this
17 country. This is not --

18 JUSTICE BREYER: Well, they say that's
19 because you can't catch it.

20 MR. SMITH: Well, but Your Honor --

21 JUSTICE BREYER: How would you catch it,
22 which is my question.

23 MR. SMITH: First of all -- first of all,
24 you talk about deterring it. You deter it by the
25 signature match, by having to have the same age, by

1 having to get past people who know a lot of the people
2 in the precinct, and by having very severe criminal
3 penalties. And then you have --

4 JUSTICE ALITO: If this is not a problem at
5 all, how do you account for the fact that the Commission
6 on Federal Election Reform that was co-chaired by former
7 President Carter and former Secretary of State Baker
8 recommended a voter ID requirement, and many other
9 countries around the world have voter ID requirements?

10 MR. SMITH: What they recommended, Your
11 Honor, is exactly what Justice Ginsburg anticipated,
12 which is get everybody the cards, and then we'll be like
13 Europe, and everything will work really fine, and it'll
14 actually help the poor to have these IDs for a lot of
15 other purposes.

16 JUSTICE GINSBURG: As I understand, they
17 were going to have some years in between when their
18 proposal was enacted, and they were going to have a
19 mobile unit going around to all the neighborhoods, lots
20 of advertising, because a premise of that Carter-Baker
21 report was that everybody would easily and costlessly
22 get this photo ID.

23 MR. SMITH: I would encourage the Court to
24 refer to the Democratic Party Exhibit 18, which is an
25 article by Carter, President Carter, and Secretary

1 Baker, following on their report, saying, look, there's
2 a problem here; that 12 percent of the voting age
3 population of this country doesn't have a license; we
4 did not recommend this being a mandatory thing until we
5 get those licenses in those people's hands.

6 JUSTICE ALITO: Well, why would they even
7 require that if it's not any problem at all? Doesn't it
8 at least show that it is a problem of some dimension,
9 maybe not as severe as Indiana claims, but there would
10 be no need for any sort of photo ID problem,
11 requirement, if there were no problem whatsoever. Isn't
12 that true?

13 MR. SMITH: Some States don't have signature
14 matches. There may have been a minimal amount of
15 additional benefit in some States from having that
16 added. That was a decision they ultimately made, with
17 some dissents.

18 The reality, though, is if you do it not
19 their way, but the Indiana way, which is to say you need
20 an ID, we're not going to help you get it, in fact we're
21 going to ratchet up the requirements for making you get
22 it, and we're going to charge you money for it, then
23 what you have is a very different system. Then you have
24 --

25 CHIEF JUSTICE ROBERTS: They help you get

1 it. They say if you don't have an ID we'll give you
2 one. If you don't have a photo ID, come in and we'll
3 give you one.

4 MR. SMITH: But what the record shows is
5 that 60 percent of the time, when people go in and ask
6 for one, they get sent home, because they don't have the
7 right documentation because the rules --

8 CHIEF JUSTICE ROBERTS: What documentation
9 did President Carter and Secretary Baker propose to
10 require for their photo IDs?

11 MR. SMITH: Your Honor, I think they were
12 very strong on having this birth certificate
13 requirement, as well. So they -- they were talking
14 about the real ID law and that sort of thing. So I'm
15 not specific about what the report says on that, but
16 they certainly thought there should be -- obviously, in
17 the wake of 9/11 there is some concern about giving out
18 these things too readily. So I'm reasonably sure they
19 supported a birth certificate requirement as well.

20 JUSTICE ALITO: Well, if you concede that
21 some kind of voter ID requirement is appropriate, the
22 problem that I have is where you draw the line on a
23 record like this where there's nothing to quantify in
24 any way the extent of the problem or the extent of the
25 burden, how many people will actually be prevented from

1 voting or significantly burdened from voting as a result
2 of the requirement? How do we tell whether this is on
3 one side of the line or the other side of the line?

4 MR. SMITH: Well, it is a difficult area of
5 the law for you for that reason, Justice Alito. But if
6 you like at Timmons what it says is there's no litmus
7 test, there's no escaping the hard judgments. This is
8 the area where the courts have to be not too deferential
9 even though there are hard judgment calls about matters
10 of degree, because this is an area where the concern is
11 that the Legislative Branch and the Executive Branch are
12 going to abuse their power to regulate the electoral
13 process to find subtle ways to skew the outcome on
14 election day.

15 As John Hard Ely says, this is an area where
16 judicial review is the most important, the most
17 legitimate. And so you can't shy away from that even
18 though there are difficult matters of balancing involved
19 and --

20 JUSTICE SOUTER: Well, you're telling us
21 that, you know, we've got to be careful and it's
22 difficult. But Justice Alito's question is: What are
23 we supposed to look at, how are we supposed to do it?

24 MR. SMITH: You are supposed to look at how
25 difficult it is to get the ID, what assistance is

1 provided or not being provided, how much it costs.

2 JUSTICE SOUTER: Let's get down -- let's get
3 down to the question of quantification, which is one of
4 the issues that he raised. What's your response to the
5 issue that there is no quantification of the actual
6 burden measured by the number of voters who are going to
7 be adversely affected? What's the answer to that?

8 MR. SMITH: The answer is that there's
9 plenty of evidence in the record about the number of
10 people in this country who don't have IDs.

11 JUSTICE SOUTER: Well, let's talk about
12 Indiana. What have you got -- what is -- what is your
13 best argument for Indiana?

14 MR. SMITH: The best argument for Indiana is
15 if you take the district court's 43,000 figure and you
16 adjust it for the two factors, death and departure, that
17 I mentioned before, the number becomes more like 400,000
18 people in the State of Indiana who lack IDs and are of
19 voting age, eligible -- voting age population people.

20 JUSTICE SOUTER: And how many of them are
21 going to suffer from an unreasonable denial of an
22 opportunity to get the ID which the State will provide
23 through the Bureau of Motor Vehicles? How do we
24 quantify that?

25 MR. SMITH: It is obviously for each person

1 a different matter of degree. The burdens here are
2 along a whole spectrum because some people don't have a
3 birth certificate, some people have -- don't have a
4 birth certificate, but they have money. Some people
5 don't have a birth certificate and they don't have
6 money.

7 JUSTICE SOUTER: Well, I know that. That's
8 why it's a tough issue. But how do -- how are we going
9 to -- how is a court going to arrive at some kind of a
10 bottom line judgment on this issue?

11 MR. SMITH: Well, because you -- you
12 basically have to take into account all of those
13 factors: How many people are potentially affected; how
14 difficult it is; how similar it is to, say, a poll tax,
15 for example, and say -- and then look at what purpose is
16 being served here. Is there any real incremental
17 benefit to anything by --

18 JUSTICE SOUTER: Okay, that's on -- that's
19 on the other side of the issue.

20 MR. SMITH: Right.

21 JUSTICE SOUTER: But walk -- walk us through
22 -- if you were writing the opinion and what you wanted
23 to put in the opinion was a reasonable estimate of the
24 number of people who are going to be substantially
25 burdened in having -- who do not now have the

1 identification, substantially burdened in getting it.
2 What approximate number would you arrive at and how
3 would you -- how would you get to it?

4 MR. SMITH: Well, Your Honor, I would say of
5 that 400,000 voting age people, probably about half of
6 them are registered voters. It stands to reason that
7 most of them are lower income people, and that
8 therefore, the burden even of having to pay for the
9 birth certificate is a significant one. That -- so that
10 a very substantial portion of that 200,000 people in
11 order --

12 JUSTICE STEVENS: Mr. Smith, is there
13 anything in the record about the extent to which the
14 political parties help people get their IDs, as they
15 sometimes drive them to the polls for voting and so
16 forth, the part they play in this process?

17 MR. SMITH: I'm not aware of anything, Your
18 Honor. This is a fairly new law at the time this record
19 was being put together in 2005. But certainly, the
20 parties --

21 JUSTICE STEVENS: Isn't it fair to presume
22 that the parties would play a role in helping people get
23 registered and getting to the polls?

24 MR. SMITH: But, you know, what there is in
25 the record, Your Honor, is the testimony from the

1 Lafayette Urban Ministry, which helps the needy in
2 Lafayette, Indiana. They had 150 people come to them
3 and say: We want your help to get IDs. A year later,
4 less than 75 had succeeded because they found themselves
5 caught in this Catch-22, where they went to get a birth
6 certificate, they didn't have a driver's license, they
7 didn't have the other kinds of very narrowly specified
8 IDs they needed, and so they were basically in this
9 bureaucratic maze, and they couldn't get out of it even
10 with the kind of assistance you're imagining, Your
11 Honor.

12 If I might reserve the balance of my time
13 for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Smith.

16 Mr. Fisher.

17 ORAL ARGUMENT OF THOMAS M. FISHER

18 ON BEHALF OF THE RESPONDENTS

19 MR. FISHER: Mr. Chief Justice, and may it
20 please the Court:

21 There is no evidence in the record of any
22 kind suggesting that 400,000 people in Indiana lack this
23 form of identification. The only evidence in the
24 record --

25 JUSTICE SOUTER: I take it you accept the

1 figure of, what, about 50,000, to be further discounted
2 by those who might vote absentee and so on?

3 MR. FISHER: We've never had a problem. In
4 fact, that data was submitted by the plaintiffs. It
5 came from the Bureau of Motor Vehicles and was matched
6 against census data.

7 I don't think there's ever been any dispute
8 about the accuracy of the record. Now, the judge did
9 acknowledge that there might be some outliers one
10 direction or another, but those cannot possibly account
11 for 10 times the number.

12 JUSTICE SOUTER: No, I just want to -- I
13 just want to know what your figure. Mr. Smith was
14 starting with 400 and then getting it down 2 and so on.
15 And my recollection in the red brief is that you said,
16 all right, let's take the 43,000 figure. I forget what
17 you discounted it for, but it got it down to 25,000.
18 Some of those would be able to vote absentee, but
19 this -- I take it you're conceding that, at least
20 subject to some discount, there are probably about
21 25,000 people who may be affected by this adversely. Is
22 that clear?

23 MR. FISHER: Well, I think we would say that
24 that's the number -- that's the number that could
25 conceivably be inconvenienced by this law. Now, to put

1 that in perspective, I think you have to compare it, for
2 example, to the number of people who are not registered
3 to vote, because there again that's an incidental
4 burden. That is something that inconveniences some
5 people.

6 And we're talking about 35 times more -- in
7 terms of a percentage, we're talking about 66.8 percent
8 or so of the population that reports being registered to
9 vote, far short of the percentage based on the
10 calculations of the district court or anything in the
11 ballpark of that that don't have photo identification.
12 So we're talking about an infinitesimal portion of the
13 electorate that could even be, conceivably be burdened
14 by this.

15 JUSTICE SOUTER: Well, isn't that a little
16 bit of a stretch, too, when you say "infinitesimal"? I
17 mean, if you take your two-thirds figure and so on,
18 isn't it fair to say that you're probably going to get
19 down to something like 10,000 people or 10,000 plus who
20 are going to be affected in the sense that they're going
21 to have to scurry around if, if they're going to get the
22 appropriate ID?

23 MR. FISHER: And at that level, you're
24 talking about less than a half a percent of the total
25 electorate. This is -- this is --

1 JUSTICE SOUTER: Okay. But 10 -- isn't the
2 concern over 10,000 voters a sufficiently substantial
3 concern to -- to be considered as something more than
4 merely de minimis and is something that should count in
5 a facial challenge?

6 MR. FISHER: Well, if that's going to be the
7 case, then you're going to have a big problem with voter
8 registration, which is a far bigger problem for more
9 voters. That is a procedure that the Court has long
10 accepted, has endorsed multiple times, and yet continues
11 --

12 JUSTICE SOUTER: Well, we haven't
13 endorsed -- I mean, correct me if I'm wrong, but we
14 haven't endorsed a registration procedure that would
15 require as much documentation and as much travel as --
16 as the -- as this voter ID procedure would have.

17 MR. FISHER: The point I'm making is that if
18 we're going to look at the percent conceivably burdened
19 by the law, then voter registration is called into
20 question. And I don't think that the Democratic Party
21 argues against that. I think in their reply brief they
22 accepted that that's a possible response.

23 Now, it's also terribly significant that we
24 don't have anybody in front of this Court in this case
25 who's injured by this law.

1 JUSTICE SCALIA: And why, why can't the
2 people injured by this law appear themselves and say the
3 law can't be applied to us? You seem to accept that a
4 facial challenge is appropriate here. Why is -- some
5 different kind of a facial challenge. I thought in the
6 usual facial challenge you have to show that there is no
7 situation in which the law cannot be constitutionally
8 applied.

9 MR. FISHER: I agree with that. I don't
10 think that that -- that we take any issue with that
11 notion.

12 JUSTICE SCALIA: Then why are we arguing
13 about whether there is one half of one percent of the
14 electorate who may be adversely affected and as to whom
15 it might be unconstitutional? That one half of one
16 percent, if and when it is sought to be applied to them,
17 have a cause of action to say you can't apply it to me.
18 But why -- what precedent is there for knocking down
19 this entire law on a facial challenge when I think
20 everybody agrees that in the vast majority of cases it
21 doesn't impose a significant hardship?

22 MR. FISHER: None. I think that that's
23 exactly the point. That's why we argue there's no
24 standing.

25 JUSTICE SOUTER: You agree that if you're

1 going to take the -- if this Court takes the Salerno
2 standard, there can never be a facial challenge to a
3 registration requirement, a voter ID requirement. In
4 other words, it's not merely that this facial challenge
5 would be knocked out; there never could be one.

6 MR. FISHER: Well, I'm not sure that's the
7 case. And if you look back at Marston, the voter
8 registration --

9 JUSTICE SOUTER: Salerno says unless there
10 are no cases, the facial challenge is inappropriate.
11 And that -- in the real world that will never be true
12 with respect to a -- a voter ID law, will it?

13 MR. FISHER: Well, I hope not. But I think
14 that the Court has shown --

15 JUSTICE SOUTER: It never will be true, will
16 it?

17 MR. FISHER: Right.

18 JUSTICE SOUTER: It never be -- if that's
19 going to be the standard, there will never be a facial
20 challenge.

21 MR. FISHER: I'm not sure that that's
22 terribly significant, because if you have an as-applied
23 challenge --

24 JUSTICE SOUTER: There never will be there
25 one, will there?

1 MR. FISHER: As to an as-applied challenge?
2 I don't know why not.

3 JUSTICE SOUTER: No, as to a pre-enforcement
4 facial challenge to a law like this.

5 MR. FISHER: I think it could be
6 pre-enforcement and as-applied in a way that could have
7 ultimately --

8 JUSTICE SOUTER: Yes, but I want you to
9 answer my question.

10 MR. FISHER: I'm sorry. Yes, I think that's
11 true.

12 JUSTICE SOUTER: We're not going to have
13 facial challenges here, are we?

14 MR. FISHER: Right.

15 JUSTICE SOUTER: Okay.

16 JUSTICE SCALIA: Does that scare you,
17 Mr. Fisher, that there can't be a facial challenge?

18 MR. FISHER: No.

19 JUSTICE SCALIA: I mean, every facial
20 challenge is an immense dictum on the part of this
21 Court, isn't it?

22 MR. FISHER: I think that's right.

23 JUSTICE SCALIA: This Court is sitting back
24 and looking at the ceiling and saying, oh, we can
25 envision not the case before us, but other cases. Maybe

1 it's one half of one percent or maybe it's 45 percent,
2 who knows. But we can imagine cases in which this law
3 could be unconstitutional, and therefore, the whole law
4 is unconstitutional. That's not ordinarily the way
5 courts behave, is it?

6 MR. FISHER: I should hope not.

7 JUSTICE SCALIA: Now, we've done that in the
8 First Amendment area.

9 JUSTICE GINSBURG: That is not the case that
10 you are confronting.

11 MR. FISHER: That's right.

12 JUSTICE GINSBURG: I mean, the reason they
13 are bringing a facial challenge is because the horse is
14 going to be out of the barn. They will have the
15 election, and just what they are afraid of could happen,
16 that the result will be skewed in favor of the opposite
17 party, because there are people who have not been able
18 to vote. So, if you're going to talk about what is the
19 impact of this, they are in this bind after the
20 election -- well -- they've always -- already lost that
21 one.

22 Now, there is something in the briefs that
23 happened after this case was instituted, but we know
24 from Marion County that there were 34 people who were
25 not able to have a vote counted. And of those 34, only

1 two ended up qualifying after the fact. So, we know
2 that in that one particular county, most of the people
3 who were unable to satisfy the requirement initially
4 ended up not satisfying it.

5 Is that -- I mean that's not hypothetical.
6 That's real. But it does give you some confirmation
7 that it isn't mere speculation that there are going to
8 be many people who will not -- whose vote will not
9 count.

10 MR. FISHER: With respect, Your Honor, for
11 all we know, those may have been fraudulent ballots. It
12 may well be the case that all 32 did not show up to
13 validate their votes are fraudulent.

14 JUSTICE GINSBURG: It's the same board that
15 said in all our experience, in all of our memory, there
16 has never been an impersonator.

17 MR. FISHER: And that goes back to how we
18 would know, because without an ID check, it's impossible
19 to detect this kind of fraud.

20 JUSTICE BREYER: Well, if you're worried
21 about fraud --

22 MR. FISHER: I'm sorry.

23 JUSTICE BREYER: If you're worried about
24 fraud, what I don't understand, and I'd like to track it
25 through with you, is the registration system. As I read

1 the Indiana voter registration application, all a person
2 has to do to register is to write in, enclose a utility
3 bill that has his name and address, and if he doesn't
4 have a photo ID, he can write the four numbers of his
5 Social Security; and if he doesn't have that either he
6 doesn't have to do anything, and they will give him a
7 number -- and you mail it in. And you're registered.

8 So all a person who have to do if he wants
9 to be fraudulent is make out a fraud one of those, and
10 he has a photo ID; he can go to the polls. So my
11 question to you is this: given that system of
12 registration, focusing on the issue before us, why don't
13 you just say and we'll give to you -- you put on -- if
14 you don't have a photo ID, we'll give you one. Now
15 there it would not stand as an obstacle; that apparently
16 is what Georgia has done. And it doesn't require people
17 to go out and spend \$10 or \$5 or something digging up
18 their birth certificate, which if you tried to do, is
19 quite a job for many people.

20 And therefore, you'd have all the things you
21 want. All you would do is with the 43,000 people who
22 don't have the IDs, you'd say we'll get you one. No big
23 deal. You have a photo machine there when they come in
24 to register; they have to go down; you take a picture of
25 them and you hand it to them. And I would think that

1 that less restrictive way would satisfy your anti-fraud
2 interests far better than the way you've chosen, but I
3 leave my judgment out of it. I just would like you to
4 talk through why that isn't a less restrictive way,
5 which is far better in achieving your anti-fraud
6 interests, or at least as good.

7 MR. FISHER: Well, because I think we want
8 to have an idea that has some integrity to it. I mean,
9 this is a balancing test that the legislature itself
10 went through, which is to say they wanted to adopt a
11 form of identification that might be effective and has
12 been proven effective and has been accepted the world
13 over as the standard form of identification. And --

14 JUSTICE BREYER: We are going to give -- all
15 we are doing is, we will give you the photo. It has
16 nothing to do with validity. That photo proves that
17 Mr. Smith who comes in and asks for it is the same
18 Mr. Smith who registered to vote. And that's all your
19 system does in the first place. So what is the answer
20 to that?

21 MR. FISHER: I think again that we, on the
22 front end part of it is we are hamstrung on how we can
23 regulate voter registration, in part by the National
24 Voter Registration Act. Let me just make that part of
25 it clear.

1 JUSTICE BREYER: I'm not arguing about that.
2 I'm saying your whole -- I'll repeat it once more. I'm
3 saying your whole system is a system designed to assure
4 that the person at the voting booth is the same as the
5 person who registers. I accept that, absolutely right.
6 And I'm simply saying given that, why didn't you say
7 Mr. Proto -- Mr. Likely, like to register: "Come in.
8 If you don't have a photo ID, we will give you one."
9 Now, what's the objection to that?

10 MR. FISHER: I think in part it's the
11 administrative apparatus. I mean, we are buying into --
12 right now into a system that already exists, and in fact
13 with voter registration at the DMV as it's required, in
14 many ways that is what you have. You go to the DMV
15 anyway for other things.

16 JUSTICE SCALIA: Suppose you -- you have
17 your photograph taken when you register. You're really
18 an out of state person, you go in and register, you make
19 up an address, you come in, you have your photograph
20 taken; it proves that you were the person that
21 registers. It doesn't prove that you were the person
22 that lives at that address, or that you are of such and
23 such an age and whatnot, which the -- the means of
24 identification that you require would show, wouldn't it?

25 JUSTICE STEVENS: But you don't -- you don't

1 have the photo identification required at registration,
2 do you?

3 MR. FISHER: No, we don't. That's right.

4 JUSTICE SCALIA: You can't, can you?

5 MR. FISHER: I think there are problems with
6 that. That -- that was a different battle --

7 JUSTICE KENNEDY: And even so is, there
8 anything that prohibits the State from confirming the
9 validity of the registration at the polling place?

10 MR. FISHER: No. I think that's the main
11 point here, which is it's at that point where the ballot
12 is being cast, which is where we want identification,
13 and where we want to --

14 JUSTICE STEVENS: Why wouldn't you have the
15 same from in being sure the registration is correct? I
16 don't understand that.

17 MR. FISHER: Well, we -- well, I think we
18 may very well, but I think the policy --

19 JUSTICE STEVENS: Why wouldn't you require
20 photo ID then?

21 MR. FISHER: Well, I think the policy struck
22 nationally, under the motor voter, is to have an easy
23 registration system, so that it may be problematic to
24 introduce additional limits.

25 JUSTICE STEVENS: Is it the policy to have

1 it tougher to vote than to register? That doesn't make
2 sense to me.

3 MR. FISHER: Well, I think the theory is
4 easy --

5 JUSTICE SCALIA: The national policy it to
6 make it both easy to register and easy to vote.

7 MR. FISHER: Well, and tough to cheat,
8 hopefully, is the backside of that, which is what the
9 idea is trying to do.

10 CHIEF JUSTICE ROBERTS: Mr. Fisher, you make
11 -- rely on the argument that 40 percent of the
12 registrants -- or not registrants, the people on the --
13 yes, registrants -- on the voter list are -- are not
14 accurate. That argument is a little difficult to -- to
15 take because what you're saying is we do such a lousy
16 job on registration that we should be able to do a --
17 have a more stringent voting requirement. Why do you do
18 such a lousy job on registration?

19 MR. FISHER: Well, I think that -- that part
20 of the responsibility there does lie again with the
21 National Voter Registration Act which limits how we may
22 maintain those lists. The problem has grown since --

23 CHIEF JUSTICE ROBERTS: I thought you were
24 sued by the Federal Government because you did such a
25 bad job.

1 MR. FISHER: There may be -- there's part of
2 it is the responsibility on our end, but part of it is
3 also the -- the hoops we have to jump through pursuant
4 to the National Voter Registration Act, and we've got a
5 situation unfortunately where with inflated voter lists,
6 with reports of fraud around the country, the General
7 Assembly is generally concerned about voter confidence
8 and the legitimacy of elections, and that's precisely
9 what this law is trying to target. Trying to reassure
10 voters --

11 JUSTICE GINSBURG: How does Indiana stack up
12 against other States in the inflation of the voter
13 rolls?

14 MR. FISHER: We are among the most inflated.
15 I can't give you precise ranking but the expert that we
16 brought forward said we are among the most inflated.

17 JUSTICE GINSBURG: And you are under a
18 consent decree to do something about that?

19 MR. FISHER: That's right, and we are taking
20 those steps. Now I think it's important to bear in mind
21 that -- that the parties to the consent decree at the
22 State level, while they can't identify individuals who
23 have -- have dormant registrations, and they can send
24 those names, names that can be canceled to the local
25 authorities, the local authorities are under no -- no

1 responsibility under the consent decree or otherwise to
2 -- to cancel those. And in fact the expert report that
3 we had indicated that there were a number -- in 1998, I
4 think -- a number of duplicates and decedent
5 registrations that were sent to the local authorities,
6 only 30 percent of which were canceled.

7 JUSTICE SOUTER: Well, are you making the
8 argument that you can place a heavier burden on voters
9 to identify themselves because your State officials
10 refuse to follow the law?

11 MR. FISHER: Well, I think it's part of it,
12 is --

13 JUSTICE SOUTER: I think that's the argument
14 you were just making.

15 MR. FISHER: Well --

16 JUSTICE SOUTER: Even when we identify the
17 duplicates, the local officials are still leaving them
18 in the polls. I mean, surely you're not going to rest
19 your case on that, are you?

20 MR. FISHER: Well, I think the larger point
21 is that when we've got a situation where there is an
22 obvious gap in security at the polls, where the public
23 expects to show ID -- and -- as they would in any
24 ordinary, everyday situation -- that is going to create
25 a lack of confidence, particularly when combined with

1 what we have ended up with.

2 JUSTICE SOUTER: But you're still making the
3 argument that there's a lack of confidence because our
4 local officials won't cull the rolls of dead voters.

5 MR. FISHER: Not explicitly. That is true;
6 that's part of the argument, but the other part is that
7 there is a reasonable and obvious step to take to ensure
8 that there is no fraud at the polls.

9 JUSTICE SOUTER: Maybe there is a
10 reasonable, obvious step you can take to make your
11 officials obey the law when you tell them how to do it.

12 MR. FISHER: Well, we are limited even at
13 that by the NVRA.

14 JUSTICE SOUTER: Now wait a minute. Are you
15 telling me that you are limited by some Federal statute
16 from preventing local officials -- I'm sorry, from
17 forcing local officials to take the action to cull the
18 rolls of dead voters, when you have identified those
19 dead voters for them?

20 MR. FISHER: No, I'm not saying that, but I
21 am saying --

22 JUSTICE SOUTER: Then -- then it's Indiana's
23 responsibility to cull those rolls. Right?

24 MR. FISHER: Consistent with the NVRA, yes.

25 JUSTICE SOUTER: It's not a legitimate

1 argument to say we can put a heavier burden on
2 identifying -- on voters to identify themselves because
3 our officials are being contumacious. You don't rest on
4 that argument?

5 MR. FISHER: No, not at all.

6 JUSTICE SOUTER: Okay, good. I thought you
7 were.

8 MR. FISHER: No, that's not my theory. But
9 --

10 JUSTICE GINSBURG: One aspect of your system
11 -- I know your time is about to expire -- but it seems
12 to me that every indigent person in -- who doesn't have
13 a photo ID is put to a burden that the mass of voters
14 are not put to -- that is either the two-step process
15 and not going to my local precinct, but having to go to
16 the county courthouse. That burden is on every indigent
17 person who doesn't have a photo ID, so we are not
18 speculating about numbers. That would be true for every
19 indigent person who doesn't have photo ID, right?

20 MR. FISHER: Who -- right, and who would
21 have to pay a fee to get -- to get the ID.

22 JUSTICE SCALIA: And for nonindigent people.
23 I mean, there may be --

24 MR. FISHER: Well, that's right. Anybody
25 who --

1 JUSTICE SCALIA: Some very well-to-do
2 elderly, you don't drive, and they are in the same
3 position.

4 MR. FISHER: Well, and who can also vote
5 absentee without ID. But anybody who forgets their
6 identification on election day, for example, would have
7 to go through the same process, where they would cast a
8 provisional ballot and then have to return to the clerk
9 with in 10 days.

10 JUSTICE GINSBURG: Well, they can go home
11 and get the identification and go back to their
12 precinct; that's what the indigent can't do.

13 MR. FISHER: Or a nonindigent person who
14 doesn't have ID but then needs to go to the DMV.

15 JUSTICE KENNEDY: If we thought that the
16 birth certificate requirement for indigent people was --
17 was burdensome, are there any States that have
18 alternates to birth certificates? Do neighbors come in
19 and testify that this is the person? And I was going to
20 ask the Petitioners' counsel if there's some areas where
21 this statute -- where the central purpose and the
22 central function of this statute can be preserved but
23 there can be some reasonable alternatives for people who
24 have difficulty?

25 MR. FISHER: Well, let me do point out one

1 category where there are some reasonable alternatives.
2 With respect -- in Indiana -- with respect to the
3 elderly who can swear that they were never issued a
4 birth certificate, there is an alternate means of
5 identification, but that's the only category.

6 The other thing we run into is the REAL ID
7 Act. If Indiana wants to have an identification card
8 that can be acceptable in Federal facilities, it's going
9 to have to have minimal criteria for issuing those photo
10 identifications. And so I think with respect to that,
11 it would not be permissible to get around a birth
12 certificate, which is kind of a foundational document.
13 I mean there are alternatives, such as a passport, but I
14 don't -- you know, I don't mean to suggest that that's
15 necessarily going to be easier than it is to get a birth
16 certificate. It's just that --

17 JUSTICE SCALIA: Don't you need a birth
18 certificate to get a passport?

19 MR. FISHER: Well, that's what I mean.

20 JUSTICE SCALIA: Yes. So maybe that's
21 unconstitutional too.

22 (Laughter.)

23 MR. FISHER: Yes. And it -- it's worth
24 bearing in mind that this form of identification is
25 necessary to do so many everyday activities, and it's

1 not as if the State of Indiana went out and created an
2 entirely new system to impose on the entire electorate,
3 that everybody would have to start from square one. The
4 vast majority of voters are already in compliance with
5 this law, and the decision of the General Assembly, that
6 it is a reasonable step to take for a measure of
7 election security to bring the State's voting system
8 into the 21st century and to require the same photo
9 identification that you have to show typically to get on
10 an airplane, to get into many Federal courthouses, is a
11 reasonable step in the right direction to preserve voter
12 confidence.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Fisher.

15 MR. FISHER: Thank you.

16 CHIEF JUSTICE ROBERTS: General Clement.

17 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

18 ON BEHALF OF THE UNITED STATES,

19 AS AMICUS CURIAE,

20 SUPPORTING THE RESPONDENTS

21 GENERAL CLEMENT: Mr. Chief Justice, and may
22 it please the Court:

23 Any system of voting that involves
24 registrations or precincts will necessarily require some
25 mechanism for ascertaining a voter's identity.

1 Accordingly Petitioners cannot take issue that the
2 constitutionality of some mechanism for ascertaining
3 voter ID. And I take it from today's argument that they
4 would concede the constitutionality of a signature match
5 requirement. Likewise, nobody can really dispute the
6 proposition that a government-issued photo ID is an
7 awfully good way of verifying someone's identity.

8 So the dispute really boils down to, in a
9 system where the States can legitimately ask for some
10 kind of basis to ascertain ID, can they insist on a
11 particularly good one, the photo ID? And we would
12 suggest that there's nothing in the First or Fourteenth
13 Amendments that precludes that from happening.

14 Now, with respect to the nature of this
15 challenge, I think one thing that's very evident from
16 the questions is this was a challenge that was brought
17 to the statute on its face and was brought before there
18 was any enforcement of the statute or any significant
19 enforcement of the statute. Now, I would respectfully
20 suggest that there's a better way to test the
21 constitutionality of these statutes.

22 JUSTICE GINSBURG: Before you do that,
23 General Clement, I'd like to you to concentrate on the
24 one group of people where I think you can make a facial
25 challenge and may not all speculating, and that's the

1 indigent people who can't get -- don't have the photo
2 ID. They don't drive, and they can't get up the money
3 to get the birth certificate or whatever else. They do
4 have a burden that, it seems to me, the State could
5 easily eliminate if they want those people to vote, and
6 that is to say okay, do the affidavit, the whole thing
7 in your local precinct; we'll make it easy for you and
8 not send you away, send you off to the county courthouse
9 to get it validated. Why -- why, if you really wanted
10 people to vote, wouldn't you do it that way?

11 GENERAL CLEMENT: Well, Justice Ginsburg, I
12 mean I can understand that you're concerned with that
13 aspect of the statute and the fact that you can't
14 execute an indigency affidavit in the polling place. I
15 don't know why that's a basis for a facial challenge
16 though. In particular, I think if you look at the
17 Plaintiffs, the individual members, if they are members
18 of the Indiana party that have been identified, they've
19 certainly identified people who do not have the ID
20 currently. I'm not sure that they were specific as to
21 whether they were indigent or not. I'm not sure the
22 individuals, the nine individuals, were really parsed
23 out that way. And I would think the far better way to
24 go about dealing with that issue is to take as a
25 starting point -- I mean you pointed out that there were

1 32 provisional ballots cast in the Marion County
2 election. Now, I gather from the State that's something
3 like 0.02 percent of the ballots cast. So it suggests
4 that this is not a monumental problem, but those 32
5 provisional ballots seem to me to be 32 possible
6 plaintiffs with a much more concrete case --

7 JUSTICE GINSBURG: But I'm --

8 GENERAL CLEMENT: -- than anything we have
9 before us.

10 JUSTICE GINSBURG: Just on -- just on that
11 one class of people.

12 GENERAL CLEMENT: Sure.

13 JUSTICE GINSBURG: And that's not going to
14 change after the election. I mean here is a group of
15 people who are being put to a burden of going someplace
16 else. And my only question is, why couldn't the system
17 make it easy for them if we really want to help America
18 to vote, all Americans, and say we'll do it in the local
19 precinct, somebody will be there to help you fill out
20 the affidavit, instead of doing it in a way that's
21 really going to discourage people from voting?

22 GENERAL CLEMENT: And, Justice Ginsburg, I
23 mean I see your concern, and I think if we had an
24 as-applied challenge that wasn't this kind of grab bag
25 challenge that looks at all the various different

1 classes of people that might be adversely affected, if
2 we had a challenge that focused on that particular
3 issue, I would imagine -- I don't know for sure -- I
4 would imagine that the State would probably put on some
5 evidence that says, look, there's a reason we did it
6 that way; we piggybacked on the general provisional
7 ballot provisions and what we decided is that, if we had
8 people executing indigency affidavits at the polling
9 place, it would add to the lines as the the polls.

10 JUSTICE SOUTER: They didn't make that
11 argument now. I mean we don't have to wait until after
12 an election to hear that, any more than we have to wait
13 until after an election to identify the voters that
14 Justice Ginsburg has.

15 GENERAL CLEMENT: But with respect, Justice
16 Souter, I mean that's not the way this challenge
17 proceeded. I mean there was a challenge to everything
18 under the sun, to the whole sort of -- this statute ab
19 initio, and it wasn't something that really put the
20 State on notice that that was the nub of the dispute and
21 would put evidence in the record that might join the
22 issue.

23 And again I would say, of course, if there
24 were that kind of as-applied challenge, one of the
25 virtues of it would be that the remedy at the end of the

1 day would not be to strike the statute down on its face,
2 but it would be an injunction consistent with the
3 teaching of this Court in *Nayot* that said, look, you
4 need to have -- you need to be enjoined to offer the
5 affidavits at the polling place --

6 JUSTICE SOUTER: That would be a --

7 GENERAL CLEMENT: -- because --

8 JUSTICE SOUTER: That would be a virtue, but
9 one of the vices would be that it would be after the
10 election and the entire matter would be academic for
11 another 2 years, until another 2 years had passed.

12 GENERAL CLEMENT: Well, I don't think so. I
13 mean, at this point, like I said -- I mean we have these
14 32 potential plaintiffs.

15 JUSTICE SCALIA: The provisional ballots
16 would be counted, I assume.

17 GENERAL CLEMENT: What's that?

18 JUSTICE SCALIA: The provisional ballots
19 would be counted. The ones that were unconstitutionally
20 prevented from voting -- those claims would be counted.

21 GENERAL CLEMENT: Well, if the claim could
22 be brought in sufficient time, I suppose it would.

23 JUSTICE SOUTER: And if we assume that
24 everyone who has a decent claim under this Act went
25 through the hoops to get the provisional ballot at the

1 -- wherever the county office is and --

2 GENERAL CLEMENT: Sure.

3 JUSTICE SOUTER: -- that's an assumption
4 which need not necessarily be made.

5 GENERAL CLEMENT: But, conversely, nowhere
6 is it -- nowhere is it a rational assumption that all 32
7 of these individuals has a great claim. It may be that
8 some of them are people who just forgot their ID --

9 JUSTICE GINSBURG: Well, I'm not
10 concentrating --

11 GENERAL CLEMENT: -- and for those people I
12 don't think they have much of a claim.

13 JUSTICE GINSBURG: I was trying to deal with
14 this one category of person, and the State -- it was
15 addressed, and the State said, well, we can't do it that
16 way because that will lead to congestion at the polling
17 place. But it seems to me that that is powerfully hard
18 to reconcile with the claim that there are so few of
19 these people it's not really a problem. If there are so
20 few of them, then I don't understand why they should be
21 put to the burden of going someplace other than the
22 polling place.

23 GENERAL CLEMENT: Well, Justice Ginsburg, I
24 mean I think there's a rationale justification for that
25 which is that, you know, if -- especially if there are

1 only a handful of these people, is do you really want to
2 instruct every poll worker at every precinct on how to
3 deal with this unusual situation or do you want to say,
4 you know, that's sort of an outlying situation, let's
5 instruct one poll worker at the county elections office
6 how to deal with it?

7 Now, at the end of the day, you may not be
8 persuaded that that's the way to do it. I think that's
9 a reasonable argument, but an as-applied challenge could
10 focus like a laser beam on those particular voters and
11 those challenges. You could have particular indigent
12 voters in front of you.

13 And it seems to me that that's the
14 preferable way to adjudicate this kind of claims, and I
15 think what this Court could do is this Court could
16 reject the facial challenge that is before it here that
17 leave open the possibility of that as-applied challenge,
18 or one could certainly imagine a veteran who has a
19 Federal photo ID without an expiration date who comes
20 into court and says, look, it's irrational to make me go
21 get a different form of ID. That as-applied challenge
22 --

23 JUSTICE KENNEDY: If we did that, I assume
24 challenges could be made in advance of the election.

25 GENERAL CLEMENT: I don't see any reason why

1 they couldn't be. I mean it might depend a little bit
2 on the nature of the challenge.

3 CHIEF JUSTICE ROBERTS: And presumably the
4 challenges could be adjudicated. You have 10 days to go
5 down to the courthouse when you file a provisional
6 ballot, and if it turns out the election was decided by
7 three votes and there are 30 provisional ballots,
8 presumably the challenge can be brought at that point as
9 well.

10 GENERAL CLEMENT: That is true, and there is
11 a provision for judicial review under Indiana law, of
12 the provisional ballots, if there's an ongoing dispute.
13 But I also take the point that some of this could be
14 taken care of well in advance of the election, which is
15 actually, I think, a very healthy way to deal with
16 election disputes. And so my hypothetical veteran with
17 the card, he has got the card in his wallet right now,
18 or her wallet right now. They can go get --

19 JUSTICE STEVENS: Is it not unrealistic to
20 assume it would be easier to file a lawsuit and go off
21 with the burden of litigation rather than go back to get
22 the second affidavit? If you're challenging two
23 affidavits, you know, to have a Federal case over it
24 seems a little bit improbable.

25 GENERAL CLEMENT: You know, it may be,

1 Justice Stevens, that it's easier to get somebody to
2 help you out with the Federal case than it is with the
3 second -- with the second affidavit. I don't know. I
4 mean, you know, I think if you look around where there
5 have been these laws --

6 JUSTICE SCALIA: Things called class
7 actions, right?

8 GENERAL CLEMENT: Yes. I think, if you look
9 where there have been these laws, there have been -- the
10 one observed phenomenon definitely is litigation.

11 So I do think that these claims will be
12 brought. I just really think that in choosing the mode
13 of litigation, you know, Justice Kennedy for the Court
14 in the partial-birth case said that as-applied
15 challenges are the basic building block of adjudication.

16 And this seems like a particularly
17 appropriate case to apply that lesson, because I can
18 imagine there --

19 CHIEF JUSTICE ROBERTS: Do you think there
20 is standing in this case to bring the facial challenge?

21 GENERAL CLEMENT: I think it's a close
22 question, Mr. Chief Justice. I would say that I think
23 there is standing. I think the standing that exists
24 here is the standing to represent the nine or so
25 individuals that are addressed specifically on pages 49a

1 and 51a of the district court opinion. Those are
2 individuals who do not have photo IDs.

3 I think that as to the membership issue,
4 boy, if the Indiana Democratic Party has any members,
5 its probably these individuals, because they are poll
6 workers and active in the parties.

7 And what I would say about those
8 individuals, though, is that it is telling that the only
9 individuals they have been able to identify who don't
10 have photo IDs also happen to be elderly individuals who
11 can, by right, vote by absentee ballot.

12 Now, that's not to say -- and I would -- I
13 would concede there is a legally protected interest in
14 voting in person sufficient to cross the Article III
15 threshold. But I think, when you are looking for the
16 real world impact, it is telling that the people they
17 have been able to identify do have a ready mechanism
18 available to them.

19 JUSTICE STEVENS: If you look at the real
20 world impact and you ask whether the Democratic Party
21 has standing to challenge the law, is it relevant that
22 the State legislature is split entirely on party lines?

23 GENERAL CLEMENT: May I answer the question?
24 You know, I don't think that's relevant in this -- I
25 would hate to think that a party line vote would

1 necessarily give the other party standing as a general
2 rule.

3 I don't think that you would adopt that, and
4 this goes out of the record, of course, to a recent
5 study. But the one study that's been done actually
6 shows that the Democratic Party did well in the 2006
7 elections, and turnout went up a little bit.

8 JUSTICE STEVENS: But don't you think it's
9 fair to infer that this law does have an adverse impact
10 on the Democrats that is different from its impact on
11 the Republicans?

12 GENERAL CLEMENT: Well, again, if I could
13 answer, I mean I would just say that, you know, if this
14 was a cleverly designed mechanism by the Republican
15 Party to disadvantage the Democratic Party, at least in
16 2006 it looks like it went pretty far awry from their
17 perspective.

18 CHIEF JUSTICE ROBERTS: Thank you, General
19 Clement. Mr. Smith, three minutes.

20 REBUTTAL ARGUMENT OF PAUL M. SMITH

21 ON BEHALF OF THE PETITIONERS

22 MR. SMITH: Thank you, Your Honor.

23 Let me start by addressing the question of
24 what reasonable alternatives there are to the strict law
25 that we are dealing with here. This is the most strict

1 law in the country. And what you have when you look at
2 the range of laws that are out there in other States is
3 a very different set of responses that occur when a
4 voter shows up without an ID in hand.

5 In Michigan and several other States, for
6 example, the response is to say: All right, we are
7 going to make you fill out an affidavit attesting to who
8 you are, and that you are a registered voter; that you
9 live in this precinct; and we'll let you go ahead and
10 vote a regular ballot.

11 That in those States they -- they consider
12 that a sufficient safeguard while looking at the IDs of
13 all the people who have the IDs.

14 In Florida they have a different approach,
15 which is to let you vote a provisional ballot, and then
16 what they do is they judge your signature match later on
17 in exactly the same process that's used for absentee
18 ballots.

19 We have a lot of information in this record
20 about why it's okay to have absentee ballots allowed
21 without an ID in Indiana, and they say, well, we have
22 these specialized committees that know how to do
23 signature matches; and they are trained; and so we get
24 thousands of these absentee ballots in. But we can very
25 carefully scrutinize them.

1 You could do very easily do exactly the same
2 thing with respect to the provisional ballots cast by
3 people who show up without their ID without --

4 JUSTICE SCALIA: Who do you do with
5 illiterates who don't have a signature? Do you match
6 "Xs," or what?

7 MR. SMITH: Well, Your Honor --

8 JUSTICE SCALIA: Aren't there going to be
9 problems under any system you imagine?

10 MR. SMITH: Yes, there are; and it's this
11 Court's job under the Burdick line of cases to weigh the
12 benefits and the burdens and come out with the
13 appropriate decision about whether the legislature went
14 too hard -- far.

15 Let me talk a little bit about this facial
16 versus as-applied approach. To paraphrase King Lear:
17 That way lies madness, Your Honor. This Court has never
18 looked at these issues on an as-applied basis.

19 The Burdick test, in its very nature, is
20 about facial weighing of systemic benefits and burdens
21 from the particular rule. And there is a reason for
22 that, because the concern is systemic; that the burdens
23 that are being imposed, a whole range of them depending
24 on the kind of people involved and their particular
25 circumstances, will have an effect on the outcome of the

1 election overall.

2 Imagine, if you will, what it would be like
3 to try to have all these class actions being brought,
4 some by the people who don't have IDs, some by the
5 people who have IDs but don't have enough money. You
6 would have to figure out exactly how much money people
7 are allowed to have in order to be in this exempt class.

8 The courts would then be creating exempt
9 classes, trying to decide whether the legislature would
10 have wanted an exemption drawn or not. The whole thing
11 would be a complete and utter morass. And, ultimately,
12 even if you did carve out an exception for indigent
13 people or for some other group of people, you ultimately
14 would leave untouched the real problem, which is the
15 concern that even for people who are relatively --
16 suffer relatively minor inconvenience, maybe one percent
17 of them are not going to show up and vote.

18 And that's exactly what the legislature may
19 have been trying to accomplish here. So that is not the
20 way the jurisprudence in this area ever looks at it.
21 Nobody applied the poll -- nobody challenged the poll
22 tax as-applied.

23 JUSTICE KENNEDY: You want us to invalidate
24 a statute on the ground that it's a minor inconvenience
25 to a small percentage of voters?

1 MR. SMITH: That it imposes a range of
2 burdens on people from quite severe to less severe, and
3 those burdens vastly outweigh the -- any incremental
4 state interest that is being served, Your Honor.

5 That's our -- our analysis, and I think it's
6 certainly completely consistent with every decision
7 right up through Klingman a couple of years ago. That's
8 the test that this Court applies.

9 CHIEF JUSTICE ROBERTS: You said it serves
10 no purpose. What if we determine that it does serve a
11 purpose in preventing fraud. How are we supposed to
12 weigh that against your asserted burden on the right to
13 vote?

14 MR. SMITH: Well, you have to make some
15 judgment about the incremental, additional benefit above
16 what's already been in place for decades, and it worked
17 extremely effectively, Your Honor. And, obviously, you
18 do the balancing. I'm just the advocate here. But it
19 seems to me you have to say is there any real benefit
20 here compared to these burdens?

21 JUSTICE SCALIA: Well, if you want to talk
22 about increments, why shouldn't we also ask whether our
23 judgment does more harm than good; whether -- whether
24 the remedy for -- for the inconvenience to a small
25 number of people is to wash away the whole statute,

1 which in most of its applications is perfectly okay?
2 Why don't we do that weighing of benefits and burdens of
3 increments versus needs?

4 MR. SMITH: Well, Your Honor, I think the
5 number of people who are adversely affected is part of
6 the analysis. But if you come in and you come to the
7 conclusion that there is essentially no real,
8 significant benefit from making all of these other
9 people who have IDs show them, then the balance comes
10 out that you throw the law out. That's the way the
11 analysis works.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Smith. The case is submitted.

14 (Whereupon, at 11:07 a.m., the case in the
15 above-entitled matter was submitted.)

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