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I. Introduction

In the recent voting rights case of *Crawford v. Marion County Election Board*,¹ the Supreme Court upheld Indiana's restrictive voter photo identification law against a facial challenge. In the aftermath of this ruling, a number of state lawmakers have expressed interest in enacting stricter voter identification requirements, perhaps swayed by a false sense of security that this decision immunizes them from suit.² However, even after *Crawford*, the state of identification laws remains largely in flux, and lawmakers should be wary of rushing to judgment on the meaning of this deeply divided decision – a decision that is anything but clear on whether such laws will be upheld in future challenges.

Indeed, there are several reasons why states should resist the urge to pass restrictive photo identification regulations, not the least of which is the continued risk of litigation challenging these laws. As discussed below, *Crawford* practically invites voters to attack these laws as they are applied in upcoming elections, once there is sufficient evidence of the burdens and hardships imposed by the restrictions. The decision even goes so far as to provide a roadmap of the type of evidence such challengers will have to produce to tip the scales of justice in their favor.

In addition, there are several policy reasons why states should avoid implementing photo identification regulations. These regulations only address voter impersonation fraud, a type of fraud that is very rare. Indeed one study noted that such fraud is “an occurrence more rare than getting struck by lightning.”³ That is not surprising given that in-person voter fraud is relatively easy to detect and that each act of voter impersonation fraud risks significant criminal penalties for “at most[,] one incremental vote.”⁴ Moreover, the burden of voter photo identification laws falls disproportionately on traditionally disenfranchised groups and the elderly, and such laws are often viewed as partisan attempts to limit voter participation. And there are several less restrictive options available to states seeking to reform their electoral process. Thus, states

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¹ *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1624 (2008).

² See, e.g., Ian Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, N.Y. TIMES, May 12, 2008, at A1, available at <http://www.nytimes.com/2008/04/29/us/29states.html?partner=rssnyt&emc=rss> (discussing proposed Missouri constitutional amendment which would enable election officials to require proof of citizenship from anyone registering to vote); Wayne Slater, *Texas Attorney General Greg Abbott Favors Requiring Voters to Produce Photo IDs*, THE DALLAS MORNING NEWS, May 18, 2008, available at http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/DN-votefraudside_18tex.ART.State.Edition1.46e0329.html (explaining pressure in Texas for a photo id requirement); Dion Lefler, *No Override of Voter ID Veto is Expected*, THE WICHITA EAGLE, May 19, 2008, available at <http://www.kansas.com/news/state/story/409426.html> (discussing proposed House Bill which would have required photo id to cast a ballot).

³ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 3 (2007), available at <http://truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf>.

⁴ *Id.* at 7.

should seriously consider whether the marginal benefits – if any – of imposing additional restrictions on voting rights through photo identification laws outweigh the associated costs of doing so.

Part I of this Issue Brief discusses the rise of voter photo identification regimes from the ashes of the unprecedented 2000 presidential election. Part II then turns to a discussion of the Supreme Court’s recent decision in *Crawford v. Marion County Election Board*, where a divided Court upheld Indiana’s restrictive photo identification requirement against a facial attack brought prior to the implementation of the law, while still leaving the door open for future challenges. Part III discusses the many policy reasons why states should avoid adopting similar restrictive identification requirements, both in light of and in addition to the Court’s holding in *Crawford*.

II. The Rise of the Voter Photo Identification Revolution

In November 2000, this country experienced the most divisive presidential election in recent history. As vote tallies changed with each passing hour, a cloud of disbelief in the results and mistrust of the system quickly set in across the country. Cries of fraud and misconduct and calls for recounts mired the nation in an exasperating struggle to determine who had actually won the election. The uncertainty, frustration, and anger experienced in this controversial and unprecedented election led to the development of what seems like a frenzied obsession with new voting rules and regulations as politicians, lobbyists, and organizations all scramble to offer solutions to the problems plaguing the voting system. The one thing – and perhaps the only thing – that everyone seemed to agree upon was that something had to change, and fast.

In an attempt to address some of the problems arising out of that election, Congress enacted the Help America Vote Act of 2002 (“HAVA”),⁵ legislation aimed at improving the administration of elections while instilling greater confidence in the integrity of the system. The legislation established several federal mandates under which states were required to modify or replace new voting machines, establish detailed provisional voting guidelines, comply with voter registration database requirements, and develop new voter identification requirements. In particular, HAVA ushered in a new regime under which certain voters – namely, those who registered to vote by mail and are voting in person for the first time – *must* present some kind of identification before they are permitted to vote. Under HAVA, voters can satisfy the identification requirement by providing one of several forms of ID, including a copy of a utility bill, a bank statement, a paycheck, or other such documents. Yet despite these new protections, problems continued to plague the electoral system and voter confidence was far from restored.

Following another tarnished election cycle in 2004, a commission chaired by former president Jimmy Carter and former secretary of state James A. Baker III issued a report calling for even greater changes in the electoral system.⁶ Published in September 2005, the Carter-Baker Commission Report found HAVA’s reforms to be lacking, and concluded that much more was required to repair a seemingly broken democratic process. Though the Commission detailed a number of suggested solutions aimed at improving voter participation and enhancing the

⁵ 42 U.S.C. § 15483.

⁶ COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS REPORT (2005).

integrity of the process, the recommendation that received the greatest attention was that which called for a photo identification requirement for all in-person voting.

The Commission's recommended photo identification requirement goes much further than HAVA's requirements – a quality not lost on the dissenting Commissioner, who stated that the identification requirement, recommended without any “serious cost-benefit analysis” of the restrictions imposed, “is so excessive” that it would preclude certain eligible voters from casting a ballot.⁷ Rather than accepting a number of different documents as proof of a voter's identity – documents that the vast majority of voters likely have easy access to without having to spend additional time and resources procuring – the Commission proposed that all voters must present a photo identification card. The Commission suggested that the identification resemble the REAL ID enacted in May 2005 – ID that requires verification of an individual's full legal name, date of birth, Social Security number, and United States citizenship. And the Commission recommended a phase-in period of five years to allow voters to secure acceptable identification.⁸

Following HAVA and the endorsement of the Carter-Baker Commission, and in the wake of rising anti-immigrant sentiment, a number of states began to enact their own identification laws, some of which imposed requirements far stricter than those required under federal law. And a few states, first and foremost Indiana, went so far as to require voters to produce photo identification in order to gain access to the polls.⁹

In Indiana, a voter must present a photo identification that shows a name that sufficiently conforms to the voter registration records, that has been issued by either Indiana or the United States, and that has not expired.¹⁰ Voters who are indigent or who have a religious objection to being photographed may cast a provisional ballot, but must travel to the county seat to execute an affidavit within ten days of the election before the state will count their vote. Likewise, a voter who forgets his photo identification on election day, or who does not yet have one at the time he goes to vote, may also cast a provisional ballot, but must present a photo identification to the circuit county clerk's office within ten days of the election before the state will count his vote. Both the voter identification requirement and the provisional ballot process were strenuously opposed by the Democratic members of the Indiana General Assembly, none of whom voted for the legislation and many of whom questioned the constitutionality of the law.

⁷ See SPENCER OVERTON, CARTER BAKER DISSENTING STATEMENT, *available at* <http://www.carterbakerdissent.com/dissent.php>.

⁸ COMM'N ON FED. ELECTION REFORM, *supra* note 6, at 18-21.

⁹ Several other states including Georgia and Missouri passed voter photo identification and Arizona passed a law requiring voters show proof of citizenship in order to register. These laws were challenged. The Georgia and Arizona laws are currently in effect, while Missouri's law was struck down as unconstitutional under the state constitution. A number of other states, including Florida, Hawaii, Louisiana, Michigan and South Dakota, request photo identification, but will accept other forms of ID if a voter does not have a photo identification. And approximately twenty other states require voters to produce some sort of identification, either with or without a photo. See posting of Tim Storey to The Thicket at State Legislatures, http://ncsl.typepad.com/the_thicket/2008/04/plaintiffs-fail.html (Apr. 28, 2008, 02:49); see also, Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1635 (2008) (Souter, J., dissenting) (describing identification laws across the states).

¹⁰ IND. CODE § 3-5-2-40.5.

Shortly after its enactment, challengers brought a lawsuit to test the validity of the law. These challengers faulted the regulations for imposing sometimes insurmountable costs and fees associated with obtaining the so-called “free” ID. Many of the State’s poor and disabled voters – in particular, those who do not drive – could find the costs of traveling to the nearest Bureau of Motor Vehicles – which often is quite a distance away – simply prohibitive, as many parts of Indiana have fairly limited public transportation. Challengers also pointed to the logistical obstacles and fees associated with procuring the documentation necessary to obtain the “free” photo identification. And while the sum total of the fees and burdens associated with the travel and documentation may not seem prohibitive on their face, the challengers pointed out that these burdens fall disproportionately upon the poor, elderly, and disabled. This challenge to the identification law made its way through the federal court system and was ultimately heard by the Supreme Court, which recently issued its decision, upholding the Indiana statutes against this facial attack.

II. The Supreme Court’s Decision in *Crawford v. Marion County Election Board*¹¹

On April 28, 2008, the Supreme Court issued a splintered 3-3-2-1 opinion, upholding the Indiana law against a facial challenge. However, as discussed below, the controlling opinion was rather narrow, applying its holding only to the record in the case at hand and leaving open the possibility of future challenges to both this and other photo identification laws.

A. The Stevens-Roberts-Kennedy Opinion

The controlling opinion for the Court – authored by Justice Stevens and joined by Chief Justice Roberts and Justice Kennedy – focused on the record before it, rather than photo identification laws overall. The decision began its analysis by setting forth the controlling standard, explaining that “a court evaluating a constitutional challenge to an election regulation [must] 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.” Even where a burden is slight, that burden “must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.”¹² However, when a plaintiff facially attacks a voting regulation, there is a heavier burden of proof necessary to succeed.¹³

Applying this standard to the case before the Court, Justice Stevens afforded significant deference to Indiana’s proffered interests, concluding that the State’s asserted interests in combating voter fraud, modernizing the electoral system, and instilling voter confidence in the election process were sufficient to justify the minimal burdens – if any – that the photo identification law imposed on Indiana voters. Justice Stevens was troubled by the lack of evidence proffered by the challengers and found that they failed to demonstrate that voters were burdened by the photo identification law; consequently, under the balancing test, the State’s asserted interests were sufficient to justify the law.¹⁴ The opinion did not, however, foreclose the possibility that this same law could successfully be challenged in the future by voters equipped

¹¹ *Crawford*, 128 S. Ct. at 1624.

¹² *Id.* at 1616.

¹³ *Id.* at 1621-22.

¹⁴ *Id.* at 1617, 1622.

with more detailed information as to the burdens the law imposes on the Indiana voting population.¹⁵

B. The Scalia-Thomas-Alito Concurrence

Unable to endorse Justice Stevens' opinion, Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment, writing separately to express his view that regulations such as Indiana's ID law that impose the same burden on all voters simply cannot by definition be severe, whether or not those burdens have substantially different impacts on distinct classes of voters, and therefore do not merit heightened scrutiny. In other words, when a law regulating voting rights affects most people, it ought to be upheld unless the resulting burden is a severe restriction on the right to vote. He ultimately concluded that the burdens imposed by the Indiana law – and indeed any photo identification law – cannot by definition be severe because they do not distinguish among voters.¹⁶ Accordingly, he concurred in the judgment upholding the statute, and in fact would extend that holding to all photo ID regulations in general.

C. The Souter-Ginsburg Dissent and the Breyer Dissent

Justices Souter and Ginsburg dissented from the majority opinion, as did Justice Breyer, who wrote separately. Much like the controlling opinion for the Court, the dissenters described the standard of review as a balancing analysis, one in which “the scrutiny varies with the effect of the regulation at issue.”¹⁷ However, unlike the majority of the Justices, the dissents concluded that the burdens imposed by the Indiana photo identification requirement were significant, and that they disproportionately impacted the more vulnerable segments of the population.

In a lengthy and forceful dissent, Justice Souter, joined by Justice Ginsburg, faulted the other Justices for accepting at face value Indiana's asserted interests while at the same time demanding specific and precise evidence from the challengers demonstrating the particular burdens the law imposes on voters. Rather than blindly accepting the State's interests, and rejecting outright the burdens imposed, Justice Souter closely analyzed each and weighed them against one another, ultimately concluding that the burdens outweighed the asserted regulatory interests. The dissent found particularly troubling the difficulties involved in securing photo identification – difficulties that fell disproportionately on poor, elderly and disabled voters – and concluded that the provisional ballot process did not adequately protect the right to vote. In sum, the dissent found the evidence sufficient to demonstrate the significant and disproportionate burdens imposed by the Indiana law – burdens that seriously threatened Indiana voters' right to vote.¹⁸

The dissent further faulted the majority for giving the State's justifications only a “cursory examination” rather than performing the required “rigorous assessment of the ‘precise interest put forward by the State as justifications for the burden imposed by its rule, [and] the extent to which those interests make it necessary to burden the plaintiff's rights.’” As Justices

¹⁵ See *id.* at 1623.

¹⁶ *Id.* at 1625-27 (Scalia, J., concurring).

¹⁷ *Id.* at 1628 (Souter, J., dissenting).

¹⁸ *Id.* at 1643.

Souter and Ginsburg discussed, close scrutiny of the State's interests reveals that they are only modest, at best, and there are less restrictive ways of addressing voter fraud.¹⁹ Thus, Justices Souter and Ginsburg would have invalidated the Indiana law.

Justice Breyer wrote separately, dissenting from the opinion of the Court for reasons slightly different than those set forth by Justice Souter. Much like the controlling and dissenting opinions, Justice Breyer too would apply a balancing standard of review to election regulations. But Justice Breyer wrote separately to emphasize that though the Constitution does not necessarily forbid photo identification requirements for voting, in enacting the regulation, Indiana failed to provide sufficient safeguards to ensure that the law did not improperly burden voters' rights. For example, the State failed to adequately phase in the law, did not ensure that obtaining adequate identification would be sufficiently feasible for Indiana voters, and did not consider the disproportionate impact the law will have on voters, in particular, the poor, elderly, and disabled. And the State provided no justification as to why it was necessary to impose identification requirements that are stricter than those found in every other state across the country. Balancing all of these factors, Justice Breyer concluded that there was simply no justification for the more restrictive – and thus more burdensome – parts of the statute, and that therefore, the Indiana law could not survive constitutional scrutiny.²⁰

III. Implications for the States: The Continuing Problems with Photo ID Laws

In light of – and in addition to – the Court's holding in *Crawford*, there are many reasons why states should avoid enacting photo identification requirements. For starters, states are in no way immune from lawsuits challenging such voting requirements. Indeed, as these laws go into effect in states across the country, voters will begin to gather the evidence required to attack these restrictions. Moreover, states stand to lose both credibility and integrity through enacting these restrictions. It is highly unlikely that these requirements will make any real or tangible improvements to the election process, for identification laws attack a problem that occurs extremely rarely, and do nothing to prevent the types of fraud that are most common. In addition, considering the deep and divisive partisan politics behind these laws and their effects on traditionally disenfranchised communities, they threaten to further erode voter faith in the integrity of the process. Put simply, there is no need or justification for such severe regulations, for less restrictive alternatives are readily available and equally effective in ensuring that a voter is who he or she claims to be. For all of these reasons, photo identification laws remain a poor option for states trying to address the serious and legitimate problems plaguing the electoral system.

A. Voters Can Still Bring As-Applied Challenges to Photo ID Laws

As discussed above, the Court's decision in *Crawford* is anything but a beacon of clarity, and leaves voter photo identification laws open to future challenge, particularly as applied to particular voters. Indeed, Justice Stevens seems to invite this very type of attack – an invitation not at all lost on Justice Scalia who flatly rejects Justice Stevens' "record-based resolution."²¹

¹⁹ *Id.* at 1636.

²⁰ *Id.* at 1644-45 (Breyer, J., dissenting).

²¹ *Id.* at 1627 (Scalia, J., concurring).

The lead opinion carefully limits its holding to the very limited record and lack of evidence presented in the case before the Court and goes so far as to detail the very types of evidence that potential plaintiffs could produce in future cases to tip the balance in their favor – including the number and demographic distribution of registered voters lacking photo identification, as well as information about how those lacking proper identification can procure such ID, and the difficulties of doing so.

Indeed, it is important to keep in mind that Indiana’s law was challenged in the immediate aftermath of its passage – before any election had been held under a photo identification regime and thus prior to the development of any evidence as to the law’s actual impact on voters’ attempt to exercise their right to vote. Leading up to the Court’s decision, there was a dearth of information about the actual consequences that photo identification laws would have on the voting population. Much like the theoretical justifications proffered by the states to justify their laws, voters presented conjectural and anecdotal data hypothesizing about the burdens these requirements would impose on certain segments of society. Various studies surveyed the voting-age population to discern the number of citizens lacking photo identification in an attempt to surmise the burdens imposed by photo ID requirements and whether these burdens fell more heavily on certain citizens such as the poor, elderly, and disabled. However, the research was still developing and was far from complete, and it provided only limited answers to questions concerning the true impact of these laws. More information – in particular, hard data – was needed to demonstrate the true costs and burdens associated with these restrictions and to enable courts to more fully assess and weigh the burdens imposed against the proffered state interests.²²

As certain states hold upcoming elections under photo identification regimes, we will have a better sense of the effects of these laws, and will be better able to collect data to demonstrate their impact. This data should include information related to the quantity of voters lacking adequate photo identification, the magnitude of the burden associated with procuring such identification – including such burdens as economic fees and costs associated with travel and lost work hours – the impracticality and inadequacy of the provisional ballot option, the inequity of the enforcement of these regulations, and the distribution of individuals most impacted by the regulations, including whether the burdens fall more heavily upon certain sectors of society. Future elections will inevitably bring more evidence to light.

In fact, that is precisely what has happened in Indiana. Immediately following the November 2007 elections in Indiana, it became clear that a number of voters – citizens who had voted in prior elections – were precluded from voting for lack of proper identification. For example, “Ray Wardell, a 78-year-old Korean War veteran, could not get a new state voter ID card after his wallet was stolen because Indiana’s Bureau of Motor Vehicles (BMV) would not accept his Medicare card – even though it had accepted that photo ID instead of his birth certificate a year before.”²³ Likewise, Mike Westervelt, a student at Purdue University, could not obtain an Indiana voter ID card because the BMV refused to accept his New Jersey driver’s

²² See Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 653-63 (2007) (discussing the need for more empirical research on the burdens imposed by voter ID laws).

²³ Posting of Steven Rosenfeld to AlterNet, <http://www.alternet.org/story/68368/> (Nov. 20, 2007).

license as one of the necessary underlying documents.²⁴ He was thus denied the necessary ID even though Indiana lists out-of-state driver's licenses as an acceptable form of documentation for procuring a state ID. Kim Tilman has suffered economic hardships and time delays in her unsuccessful attempts to secure her Michigan birth certificate, a document necessary for her to procure an Indiana voter ID.²⁵ And Russell Baughman, a United States veteran who has served in three conflicts, was likewise turned away at the polls because the identification he presented – an expired driver's license, his Department of Veterans Affairs card, and his voter registration card – were not sufficient to procure a ballot.²⁶

The same challenges to ballot access occurred during the May primary in Indiana, the first post-*Crawford* election held under a photo identification regime. Certain voters were denied their right to vote for failure to produce adequate photo identification at the polls. For example, twelve nuns – all of who were in their 80s or 90s – were turned away from the polls by a fellow sister because they did not have a compliant Indiana or a federal identification bearing their photograph.²⁷ These women were not only denied access to the polls, but were not even provided with a provisional ballot because of the difficulties involved in getting them to a BMV to obtain an adequate ID.²⁸ Another voter who had recently married and subsequently changed her name could not vote because the name on her driver's license did not match the name on her voter registration, while yet another voter was denied the ballot because she did not have a state or federal ID but only a college-issued identification card along with an out-of-state license.²⁹ In addition, there were several problems with ballot access for students of Indiana's several private colleges. More than a dozen additional students who tried to vote were turned away and told that they did not have the right form of identification. What's worse, these students were not informed of the provisional ballot option and thus completely lost their opportunity to vote.³⁰

These are just a few examples of the many individual voters, American citizens who have voted in several prior elections, whose right to vote was severely burdened – indeed, denied – by the photo identification requirement in the very first election held under these regulations. In the aftermath of *Crawford*, voters can arm themselves with evidence of the burdens suffered as outlined in the opinion and can bring new as-applied challenges to the photo ID laws. As they do so, the states will be forced to provide more than just lip service to the precise interests that assertedly justify these harsh regulations. Indeed, states will have to come forward with concrete evidence showing that their interests are “sufficiently weighty to justify the limitation” the photo identification laws impose on voting rights,³¹ a Herculean task considering the complete lack of

²⁴ *Id.*

²⁵ *Id.*

²⁶ Andrew Prinsen, *Hung Up But Upheld*, Nuvo, Apr. 30, 2008, available at http://www.nuvo.net/articles/hung_up_but_upheld/.

²⁷ See Deborah Hastings, *Indiana Nuns Lacking ID Denied At Poll By Fellow Sister*, THE ASSOCIATED PRESS, May 6, 2008, available at <http://abcnews.go.com/Politics/wireStory?id=4798387>.

²⁸ Alec MacGillis, *Voter ID Law Consequences Mild in Ind.*, THE WASH. POST, May 6, 2008, available at http://blog.washingtonpost.com/the-trail/2008/05/06/voter_id_law_consequences_mild.html?hpid=artslot.

²⁹ Hastings, *supra* note 27.

³⁰ *Nuns with Dated ID Turned Away At Ind. Polls: Women, All in Their 80's, 90's, Showed Up With Old Passports*, THE ASSOCIATED PRESS, May 6, 2008, available at <http://www.msnbc.msn.com/id/24490932/>; see also MacGillis, *supra* note 28.

³¹ *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1616 (2008).

data linking photo identification with a reduction in voter fraud or with improved voter confidence.

States should thus remain wary of becoming too complacent with their identification requirements or of enacting stricter requirements. There seems little doubt that voter photo identification laws will continue to be subject to constitutional challenge, and that the plaintiffs will have additional evidence to prove their cases. *Crawford* is far from the last word on the legitimacy and constitutionality of photo identification requirements.

B. Voters Can Still Facially Attack Photo ID Laws

States should also keep in mind that the Court's holding in *Crawford* did not rule out the possibility of bringing facial challenges to photo identification laws. While Justice Stevens no doubt explained the heavy burdens facing such challenges, he did not completely or permanently close the door to future facial attacks. Though voters facially challenging photo identification laws confront a heavy burden of proof in demonstrating that the sliding scale tips in favor of striking down a law in its entirety, such challenges are permissible in all contexts – including election law challenges – and often provide the most effective means for avoiding irreparable injury that could result from the implementation of an overtly unconstitutional law.

As photo identification requirements are enforced throughout those states that have already put such regulations in place, data illustrating the burdens such restrictions impose on the voting population will quickly come to light, providing concrete evidence of the hardships experienced by certain segments of the voting population. While the evidence produced in Indiana in the *Crawford* litigation – data amassed prior to the enforcement of the state's photo ID regulation – was “not sufficient to support a facial attack on the validity of the entire statute,”³² it is quite possible that evidence of vote denial resulting from these ID requirements gathered after elections held across a number of states will raise grave concerns of the severe burdens and hardships caused by these laws. Accordingly, unlike the facial attack in *Crawford* which was brought prior to the implementation of the regulation, future facial challenges will have the benefit of the evidence accumulated throughout the states that already have photo identification requirements in place. Armed with this evidence, future challengers can demonstrate the inequitable burdens imposed by these restrictions.

Thus, though *Crawford* seems to disfavor facial challenges to voting regulations, it does not rule out the possibility of such actions. Rather, as the Court has done with other facial challenges, it seems to set the bar quite high so that such challenges become the exception, rather than the rule. This is a trend that has marked the Court's more recent election law jurisprudence. Yet, as elections bring to light hard data on the disenfranchising effects of photo identification requirements, courts may recognize that facial challenges provide the most effective method of preventing such irreparable harm from occurring in those states that have not yet held elections under a photo ID regime. Requiring as-applied challenges in such circumstances – where evidence of tangible burdens and hardship in other states has developed – seems as unsatisfactory as it does unjust.

³² *Id.* at 1615.

C. Photo ID Laws Are Bad for Policy Reasons

Even apart from the Court's decision in *Crawford* and the many avenues for litigation that remain open to potential challengers of photo identification laws, there are several policy reasons that strongly counsel states against adopting these restrictive regulations. For starters, these restrictions do not accomplish what they purport to achieve. Photo identification laws do not provide additional safeguards against the types of fraud and systemic problems that more likely to taint the electoral process, such as absentee ballot fraud, vote buying and ballot stuffing, and voter machine irregularities. Thus, voter confidence in the integrity of the system is unlikely to improve under a photo ID regime. In fact the partisan nature of these laws, along with the real and disproportionate burdens they impose, are likely to further erode voter faith in the democratic process. Thus, whether or not states believe that *Crawford* provides protection against future challenges – which it does not – photo identification laws remain a solution in search of a problem.

1. Photo Identification Laws Will Not Address Real Threats of Fraud

Though states currently justify photo identification laws as reasonable measures to combat problems of vote fraud, thus far they have supported this interest with unsubstantiated anecdotes of alleged fraud, and at no time have lawmakers presented evidence of any kind of correlation between stricter identification requirements and reduction in fraud. However, as several studies make clear, photo identification restrictions leave unaddressed the most prevalent types of fraud currently plaguing the electoral process.

First, it is undisputed that there is virtually no evidence that voter impersonation fraud poses any kind of serious problem anywhere in the country. As several state Secretaries of State explained in an amicus brief filed in *Crawford*, in over ten years of experience overseeing or administering federal elections in which “more than twenty-four million votes were cast,” they are “not aware of *any* cases of polling place voter impersonation fraud in those elections.”³³ There are also no confirmed reports of this type of fraud. Perhaps this is because voter impersonation fraud is a highly impractical, extremely inefficient, and wholly ineffective way to alter election outcomes. There is a real risk that potential impersonators will be recognized in neighborhood polling places, and the penalties for this conduct are severe. And such fraud only adds one vote for each impersonation – a highly ineffective method of affecting the overall election outcome. It is therefore not surprising that a recent study of election fraud concluded that “impersonation of voters is probably the least frequent type of [election] fraud because it is the most likely type of fraud to be discovered, there are still penalties associated with this type of fraud, and it is an inefficient method of influencing an election.”³⁴

³³ Brief for Ga. Sec. of State Cathy Cox et al. as Amici Curiae Supporting Petitioners, *Crawford v. Marion County Election Board*, 2007 WL 4162800, at *8 (2007) (Nos. 07-21, 07-25).

³⁴ U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 9 (2006), available at http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file. See also Press Release, Dep't of Justice, Fact Sheet: Dep't of Justice Ballot Access and Voting Integrity Initiative (July 26, 2006), available at http://www.usdoj.gov/opa/pr/2006/July/06_crt_468 (determining that voter-impersonation fraud is not a threat to the integrity of the electoral process).

Second, photo identification laws do nothing to combat the other types of fraud that have on rare occasions tainted elections in the past and that pose more of a threat to electoral outcomes. For example, a 2006 study of election fraud conducted by the Election Assistance Commission found consensus within the extensive electoral research that absentee ballot fraud – a type of fraud that the photo identification laws fail to address – is the most prevalent form of election fraud across the country.³⁵ Other more common forms of fraud include vote buying and voter registration fraud,³⁶ two additional types of fraud that photo identification regulations do nothing to rectify. Thus, although these other types of fraud are more prevalent than the virtually non-existent voter impersonation fraud (though still rare), and though these types of fraud may actually sway the outcome of an election by infecting hundreds or even thousands of ballots, photo ID laws utterly fail to provide any relief for these schemes.

Third, even though there have been a few documented allegations of these types of fraud in the past, deeper investigation into these cases have frequently proved the allegations baseless and have further demonstrated that vote fraud is in fact a very rare occurrence. In a comprehensive study of vote fraud, Professor Lorraine Minnite and David Callahan examined news reports and legal records and conducted interviews with state officials in twelve different states.³⁷ Through this research, they discovered that “some of the most notable allegations of fraud have proved to be baseless.”³⁸ They ultimately concluded that “[v]oter fraud appears to be very rare,” an in fact they found “little evidence of significant fraud in these states or any indication that fraud is more than a minor problem.”³⁹

Accordingly, before enacting any sort of desperate “quick-fix” solution for the theoretical problem of vote fraud – of any kind – states should consider empirical evidence as to whether the proposed remedies will effectively address the types of fraud (if any) that actually threaten to corrupt the election process.⁴⁰ Enacting laws that do not remedy actual problems promises only costs without benefits.

2. Photo Identification Laws Will Not Instill Voter Confidence

Though proponents of strict voter photo identification laws claim that they will provide protection against fraud and thus instill greater confidence in the integrity of the electoral process, states should be wary of blindly accepting such assertions. Long lines at the polling stations, inequitable enforcement of these restrictions, and frustrations with procuring adequate identification can reasonably be expected to result from these restrictions and may actually prove to be significant impediments to voter participation while further eroding faith in the democratic process. Thus photo identification may actually backfire in its attempt to bolster voter confidence.

³⁵ *Id.* at 18.

³⁶ *Id.* at 9.

³⁷ LORRAINE C. MINNITE, AN ANALYSIS OF VOTER FRAUD IN THE U.S. (2007) (adapted from Lorraine Minnite & David Callahan, SECURING THE VOTE, 2003).

³⁸ *Id.* at 8.

³⁹ *Id.*; see also Levitt, *supra* note 3, at 3.

⁴⁰ See Overton, *supra* note 22, at 653 (discussing the need for more empirical research on the effects of fraud).

In addition to the many obstacles imposed by a photo ID regulatory regime – obstacles that may ultimately diminish voter turnout – voters may further withdraw from the electoral process if they perceive these laws as nothing more than partisan politicking designed to tip election outcomes towards the party in power. Ushered in along strict party lines – strongly backed by Republicans and strenuously opposed by Democrats – these restrictions may be seen not as a shield to protect against fraud, but rather as a sword used to suppress participation by certain segments of society while preserving power for the controlling party.⁴¹ As such, these limitations on ballot access are reminiscent of a darker time in our nation’s history when similar voting restrictions were implemented in “a not-too-thinly-veiled attempt” to fence out certain citizens from the democratic process. Such blatantly discriminatory measures include literacy tests, poll taxes, and racial gerrymanders – each of which sought to preserve the power of the controlling majority at the expense of minorities, and each of which was struck down as unconstitutional. Thus, even with the Supreme Court’s recent *Crawford* decision, it is likely that voters may nevertheless lump this new form of voting regulation – one deeply infused with partisan biases – in the same category as these other attempts to suppress voting rights. Viewed as such, photo identification laws will in no way instill greater confidence but rather will shake voters’ faith in the system and quite possibly discourage turnout on Election Day.

Finally, it is worth noting that even if states perceive photo identification laws as legitimate means to quell voters’ fears of fraud and thus instill greater voter confidence, there is no evidence linking voter confidence with voter participation. Indeed, a recent study conducted by Professors Stephen Ansolabehere and Nathaniel Persily debunks this conventional thinking.⁴² In a series of surveys from 2006, 2007, and 2008, and involving over 36,000 respondents, Professors Ansolabehere and Persily examined the pervasiveness of fears of vote fraud as well as the impact (if any) such fears have on an individual’s likelihood of participating in the process. Despite the logical assumption that fears of fraud may suppress voter turnout, this comprehensive study revealed nothing of the sort. Rather, the survey results demonstrated that “[a]mong those who had some belief about the extent of Fraud or Impersonation, the correlation between that belief and turnout proved extremely weak and almost always statistically insignificant.”⁴³ Likewise, the survey revealed “no relationship between either individual-level or aggregate rates of voter identification and perception of fraud,” and in fact the same proved true with respect to “the correlation, or lack thereof, between the stringency of a state’s voter identification requirements and its residents’ perceptions of the frequency of fraud.”⁴⁴ In sum, the survey found virtually no relationship between fears of fraud and voter participation, and no correlation between voter identification requirements and voter confidence in the integrity of the electoral process.

Given that photo identification laws do not improve voter confidence, they do not provide a solution to the real problems plaguing the democratic process. In light of these recent

⁴¹ Indeed, that is precisely how Judge Evans characterized Indiana’s law in his dissent from the Seventh Circuit panel’s opinion upholding the statute, stating that the “Indiana voter ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.” *Crawford v. Marion County Election Board*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff’d*, 128 S. Ct. 1610 (2008).

⁴² Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge To Voter Identification Requirements*, 121 Harv. L. Rev. 1737 (2008).

⁴³ *Id.* at 1751.

⁴⁴ *Id.* at 1756-57.

research findings, and considering the real risks of voter frustration resulting from more restrictive and highly partisan voting regulations, states should think twice before signing into law regulations that may actually further dampen already declining voter turnout.

3. Photo Identification Laws Will Disproportionately Impact Elderly, Disabled, Poor, and Minority Voters

In addition to the lack of legitimate justification for these laws, states should be mindful of the disproportionate burdens identification requirements are likely to have on voters. As discussed above, though the *Crawford* challenge did not produce concrete evidence of these burdens because it was brought prior to any election held under the regulations, future elections are likely to shed more light on their true and inequitable impact.

For example, studies estimate that more than 21 million eligible voters – approximately 11% of the voting-age population across the country – do not have any type of government issued photo identification, and this number consists of a disproportionate number of poor and urban Americans.⁴⁵ This number also includes an estimated 3 million Americans with disabilities who lack the identification necessary to vote under the strictest photo ID regulations.⁴⁶ Research in Georgia reveals that “an estimated 152,664 individuals over the age of 60 who voted in the 2004 presidential election do not have a Georgia driver’s license and are likely not to have other photo identification,”⁴⁷ and that a disproportionate number of minorities likewise lack driver’s licenses.⁴⁸ And research conducted by the University of Wisconsin reflects similar results.⁴⁹ Even the Seventh Circuit acknowledged the disproportionate impact of these restrictions and their potential to prevent thousands of poor, elderly, disabled and minority voters from casting a ballot.⁵⁰

In addition, though states may offer photo identification free of charge, there may be significant costs involved in procuring the paperwork necessary to receive the “free” ID. For example, birth certificates cost between \$10-22 each, while passports are nearly \$100. Moreover, many voters will have to travel significant distance – often on public transportation, which itself has its own costs – to get both the underlying paperwork as well as the identification.

⁴⁵ See Demos: A Network For Ideas and Action, *Voter Identification: A Threat to Election Integrity*, 2, available at <http://www.demos.org/page337.cfm> (citing MARK HANSEN, TASK FORCE ON THE FEDERAL ELECTION SYSTEM REPORT (2001)); NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 32 (2001).

⁴⁶ *Id.* (citing AM. ASS’N OF PEOPLE WITH DISABILITIES ET AL., STATEMENT IN OPPOSITION TO A NATIONAL VOTER IDENTIFICATION CARD 2 (2005)).

⁴⁷ Letter from Cathy Cox, Ga. Sec’y of State, to Sonny Perdue, Governor (Apr. 8, 2005), available at <http://www.aclu.org/FilesPDFs/ACF2209.pdf>; see also *States Debate Photo ID at the Polls*, THE ASSOCIATED PRESS, Mar. 31, 2005 (citing estimates by the AARP).

⁴⁸ *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1342 (N.D. Ga. 2005).

⁴⁹ *Voter Identification: A Threat to Election Integrity*, *supra* note 45 (citing JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 1, 11 (2005), available at http://www.brennancenter.org/page/-/d/download_file_50902.pdf).

⁵⁰ *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1635 (2008) (“No doubt most people who don’t have photo ID are low on the economic ladder”); *id.* at 955 (Evans, J., dissenting) (“[T]his law will make it significantly more difficult for some eligible voters . . . [a]nd this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof.”)

For many elderly or disabled voters, such travel is physically challenging. And for many low-income voters who are paid by the hour, such travel time equates to lost wages. Thus, even a “free” ID may prove prohibitively costly and physically impractical for several voters – a reality not lost on the dissenting Justices in *Crawford*.⁵¹

Considering the disproportionate and significant impact that strict identification laws are likely to have, hasty enactment of these regulations will no doubt reflect poorly on lawmakers, in particular where there are insufficient safeguards to ensure that these voters will not be precluded from participating in elections. Without a better understanding of the true burdens these laws are likely to impose on discrete sectors of voters, many of whom have traditionally been excluded from the political process, it is simply bad policy to risk their disenfranchisement.

4. There Are Several Less Restrictive Alternatives Available to States

Finally, it is bad policy for states to adopt highly restrictive and significantly burdensome voting regulations when there are several less restrictive – and indeed more effective – means to address vote fraud and improve the integrity of the electoral system. States undoubtedly can and should strive to combat fraud where it actually exists and improve voter confidence. However, there are other ways to accomplish these admirable goals that do not pose the same risks or raise the same policy concerns that photo identification regulations present.

Indeed, the overwhelming majority of states have adopted such less restrictive measures, and there is no indication that fraud or lack of voter confidence is any more of a problem in these states than under photo identification regimes. The vast majority of states effectively administer their elections without these restrictions, relying instead on other types of identity checks, or in some cases, foregoing any kind of identity check as a condition for admission to the polls. Some of these states use signature matching – a method of identification used in Indiana for over 70 years prior to the enactment of its photo ID law – which serves as an adequate means of ensuring voter identity. Other states request identification and find acceptable any one (or in some cases two) of the numerous forms of non-photo identification permitted under HAVA – including utility bills, bank statements, paychecks, a government check, or any other government document showing a voter’s name and address – and/or provide an affidavit bypass for voters unable to meet documentation requirements.⁵²

Thus, for states considering the need to enact tighter identity checks at polling places, there are ample options available that would prove less burdensome and equally effective at combating potential vote fraud. There is therefore no need to resort to extremes in enacting the most restrictive – but no more effective – regulations. As the majority of states seem to recognize, photo identification will not solve the real problems in our electoral process, and indeed, will likely do more harm than good.

⁵¹ *Id.* at 1630 (Souter, J., dissenting); see also SPENCER OVERTON, STEALING DEMOCRACY 152-54 (2006).

⁵² Pew Center on the States, Voter ID Laws, <http://www.pewcenteronthestates.org/uploadedFiles/voterID.laws.6.08.pdf>; see also Pew Center on the States, Voter Identification Map, <http://www.pewcenteronthestates.org/uploadedFiles/voterID.laws.6.08.pdf>.

IV. Conclusion

Eight years after the controversial 2000 presidential election, the American electoral system remains far from perfect. Law makers are encouraged to continue their efforts to seek effective remedies for the very real troubles tainting our elections. However, voter photo identification laws are not the solution. These laws not only do nothing to combat the types of fraud that threaten the integrity of electoral outcomes, they will also subject states to risks of future litigation, and will impose disproportionate burdens on the poor, the disabled, and the elderly. Thus, notwithstanding the Court's ruling in *Crawford*, photo identification laws are still a solution in search of a problem – restrictions that will not ameliorate the real or perceived issues with our electoral system, but rather will further undermine voting rights and voter confidence.