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The New Wave of Election Regulation: Burden without Benefit

By Justin Levitt

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American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

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Justin Levitt*

In 2008, for the first time in the nation’s history, a candidate identifying (at least in part) as a member of a racial minority group was a major party’s nominee for President of the United States. The overwhelming significance of this milestone has obscured, if only by comparison, the fact that the 2008 electorate was in some ways also quite distinctive. More than 130 million Americans, millions more than ever before, successfully cast a ballot. In aggregate, turnout was about 63% of eligible electors—the highest rate since 1960, and the third highest since 1920.¹

Yet the volume of voters itself masks a substantial and substantially noteworthy change in the character of those who were successfully motivated and able to exercise the franchise. Generally, white non-Hispanic turnout has exceeded minority turnout by a substantial margin; the gap has exceeded 10 points in every election since 2000—other than 2008.² In 2008, the gap narrowed substantially, with non-Hispanic white turnout estimated at 66.1%, and minority turnout estimated (at the highest level in a decade) at 56.8%. In 2010, as in most midterm years, the turnout wave receded, but the gap remained closer than in the past midterm elections of the decade.³

Then, over the last two years, America witnessed a flurry of election legislation. Unfortunately, the new regulations include several controversial laws that exact real burdens on real Americans. Moreover, available data suggest that these burdens fall unequally; while 2008 saw advances toward a voting population that more equitably approximates the electorate as a whole, 2010 represented a step backward, and the new laws threaten to continue an unfortunate regressive pattern.⁴ Crucially, these burdens are not only real and inequitable but also unnecessary, which renders them suspect as a matter of constitutional law⁵ and fundamentally flawed as a matter of public policy.⁶ Not only do they make it more difficult for eligible Americans to vote, but they do so without any meaningful benefit.

* Associate Professor of Law, Loyola Law School, Los Angeles. This Issue Brief is adapted from invited testimony delivered to the Senate Judiciary Committee, and from *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012), both of which are drawn from research conducted at (and with the assistance of) the Brennan Center for Justice at NYU School of Law. Thanks to Jason Campbell for suggested edits. All errors are my own.

¹ See Michael McDonald, 2008 General Election Turnout Rates (last updated Mar. 31, 2012), http://elections.gmu.edu/Turnout_2008G.html; Press Release, Curtis Gans, African-Americans, Anger, Fear, and Youth Propel Turnout to Highest Level Since 1960 (Dec. 17, 2008), <http://www.american.edu/spa/cdem/upload/2008pdfoffinaledited.pdf>.

² Turnout data by race and ethnicity were compiled from the U.S. Census Bureau’s Current Population Survey. See U.S. Census Bureau, Voting and Registration, Population Characteristic (P20) Reports and Detailed Tables [“Current Population Survey”] (last updated Sept. 28, 2011), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/index.html>. For a discussion of the limits of this data source in assessing turnout, see Michael McDonald, 2008 Current Population Survey Voting and Registration Supplement (last updated May 17, 2010), http://elections.gmu.edu/CPS_2008.html.

³ *Id.*

⁴ Some believe that the new laws’ impact reflects deliberate intent. See, e.g., Michael A. Memoli, *Bill Clinton Warns Against Stifling Economic Growth in Debt Ceiling Deal*, L.A. TIMES, July 6, 2011 (quoting Pres. Bill Clinton as saying: “They are trying to make the 2012 electorate more like the 2010 electorate than the 2008 electorate.”).

⁵ Election regulation must be sufficiently tailored to sufficiently weighty state interests in order to justify burdens on the electorate; the degree of scrutiny varies with the extent of the relevant burden. See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190-91 (2008) (plurality); *id.* at 209-11 (Souter, dissenting).

⁶ I follow Professor Spencer Overton’s lead in finding a careful and empirically grounded cost-benefit analysis of election

Voters' opportunities to register, to take advantage of early voting, and to vote on Election Day itself have all been limited by new, and apparently unjustified, electoral legislation. While photo identification requirements continue to receive tremendous scrutiny ahead of this fall's elections, other new burdens should not be lost in the shuffle. This Issue Brief first focuses on provisions in a new Florida law that exemptify new restrictions on registration and on voting before Election Day. It then evaluates the landscape of voter identification laws across the country, critically analyzing the laws' purported justifications and benefits.

I. Registration and Early Voting

In 2011 and 2012, several states renewed their efforts to restrict voter registration and to limit opportunities for citizens to cast valid ballots in advance of Election Day. Florida managed to do both at once, inconveniencing voters and local election officials alike while offering little meaningful benefit to the election process. Florida's new law, HB 1355,⁷ presents a useful vehicle to examine similar legislation around the country.

A. Restrictions on Voter Registration

HB 1355 is Florida's latest in a series of attempts to restrict voter registration.⁸ In 2005, ostensibly concerned by organizations allegedly withholding registration forms that they collected, the legislature sharply restricted voter registration drives.⁹ These restrictions included substantial fines for each and every form delivered to elections officials more than 10 days after the form was completed.¹⁰ The fine structure was sufficiently severe to cause the nonpartisan League of Women Voters to stop its Florida voter registration activity for the first time in the organization's 67-year history.¹¹

In subsequent litigation, a federal court rightly recognized that voter registration drives entail core political speech, protected by the First Amendment and inextricably intertwined with efforts to "persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared

legislation crucial not only to constitutional scrutiny, but also to evaluations of proposed regulations' merit as public policy. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634-37 (2007).

⁷ 2011 Fla. Laws ch. 40 (H.B. 1355). The law is currently subject to a court challenge. League of Women Voters of Florida v. Browning, No. 4:11-cv-00628 (N.D. Fla. filed Dec. 15, 2011).

⁸ In addition to the restrictions mentioned in the text, Florida's practices precluding voter registration in the event of minor errors on registration forms were challenged in *Diaz v. Cobb*, 541 F.Supp.2d 1319 (S.D. Fla. 2008), and *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008); Florida's error-laden practices for purging the registrations of voters based ostensibly on disenfranchising convictions were challenged in *NAACP v. Harris*, No. 01-0120 (S.D. Fla. filed Jan. 10, 2001).

⁹ 2005 Fla. Laws ch. 277, § 7 (H.B. 1567). These allegations are disputed. It is clear that the volume of submitted registration forms increases exponentially as the registration deadline approaches. See, e.g., Declaration of Glenn T. Burhans, Jr., In Support of Motion for Preliminary Injunction, ex. E, Fla. State Conference of the NAACP v. Browning, No. 4:07-cv-402 (N.D. Fla. 2007) (No. 6). It is possible that this represents the late submission of early-completed forms. But it more plausibly reflects the increasing volume of individuals completing forms as the registration deadline approaches. I am aware of no published study comparing the date on which registration forms are completed by electors (which is written on the form itself) to the dates on which those forms are submitted to officials (which is stamped on the form and/or entered in official systems); such a study would provide an empirical basis for assessing the degree to which completed forms are withheld.

¹⁰ League of Women Voters of Florida v. Cobb, 447 F.Supp.2d 1314, 1322 (S.D. Fla. 2006).

¹¹ *Id.* at 1325.

political, economic, and social positions.”¹² And it rightly recognized that undue efforts to restrict registration drives impermissibly limit both political speech and association. The court explained that Florida provided no evidence supporting the need for its 2005 fine structure—and preliminarily enjoined this portion of the law.¹³

One year later, the legislature enacted an amended statute;¹⁴ the new law retained the 10-day deadline, but substantially reduced and capped total fines, and exempted organizations from fines due to situations beyond their control. The new law was challenged, and upheld based on the more tailored regulatory structure—and based on the fact that the law did not place any direct preconditions on the protected activity of conducting a voter registration drive.¹⁵

HB 1355 marks a severe step backward on both fronts flagged by the courts: it is no longer tailored to any existing problem, and imposes serious pragmatic obstacles to organizations as preconditions of conducting voter registration drives. It requires any individual or group to fill out an official state form before offering to help distribute, collect, and submit the registration form of anyone other than immediate family; this registration includes the name, address, and sworn declaration of each individual soliciting or collecting registration forms, whether employee or casual volunteer.¹⁶ Groups may not collect and turn in a single form until they have been issued a number by the state; individuals who are not working with organized groups are subject to the same requirements. The law requires that every individual and group account for every registration form used by any volunteer, including blank forms printed from public websites; county officials have new *daily* reporting requirements.¹⁷ And without any indication that the ten-day deadline of prior law was insufficient to compel the prompt return of completed forms, the deadline has now become just 48 hours, with any waiver for extenuating circumstances now solely in the hands of the Secretary of State, a partisan elected official.¹⁸

These requirements are striking. Before offering to touch a voter registration form from anyone other than a family member, citizens volunteering their time must wait for permission from the government. In addition to tracking each and every registration form, blank or complete, volunteers must ensure that each form they collect is delivered to county officials within 48 hours, or face substantial fines issued or waived at the discretion of a partisan official.

These are stark limitations of, and penalties on, fundamental public engagement. They are the most restrictive provisions in the country, though recent legislation in Texas has some similar hallmarks.¹⁹ They should trouble observers and policymakers across the political spectrum. Indeed, far *less* onerous regulations of political campaign spending in Florida were recently challenged as severe constitutional burdens by the Institute for Justice.²⁰

¹² *Id.* at 1333.

¹³ *Id.* at 1338.

¹⁴ 2007 Fla. Laws ch. 30 (C.S.H.B. 537).

¹⁵ *League of Women Voters of Florida v. Browning*, 575 F.Supp.2d 1298, 1321-22 (S.D. Fla. 2008).

¹⁶ On its face, the statute applies to “any” assistance with voter registration. Regulations have narrowed the statutory scope to either soliciting for collection or collecting voter registration applications. FLA. ADMIN. CODE r. 1S-2.042(2)(b), (3) (2012).

¹⁷ FLA. STAT. § 97.0575(2) (2012); FLA. ADMIN. CODE r. 1S-2.042(5), (7)(c) (2012).

¹⁸ FLA. STAT. § 97.0575(3) (2012).

¹⁹ 2011 Tex. Gen. Laws ch. 507 (H.B. 1570) (amending TEX. ELEC. CODE §§ 12.006, 13.031, 13.047).

²⁰ *See Worley v. Roberts*, No. 4:10-cv-00423 (N.D. Fla. filed Sept. 28, 2010).

Given its burdens, the law will have some predictable effects—few of which meaningfully increase the reliability of the registration system. Instead, the law has caused both Democracia USA, one of the larger civic engagement organizations in Florida dedicated to empowering the Latino electorate, and the League of Women Voters, a nonpartisan civic engagement enterprise of unparalleled lineage, to shut down all voter registration activity within the state.²¹

When voter registration drives are unable to offer their assistance, citizens lose one vital means to ensure that they are properly registered to vote—not merely new registrants, but also the 14% of Floridians who move within the state and need to re-register.²² Moreover, the population impacted by such restrictions is not evenly distributed. According to the U.S. Census Bureau’s Current Population Survey,²³ minority citizens disproportionately register and re-register through voter registration drives: while 6% of non-Hispanic white voters reported registering through a voter registration drive in 2008, twice as many—12% of Hispanic voters and 13% of non-Hispanic African-American voters—reported registering through a drive.²⁴ Statistics from non-presidential years are similarly lopsided.²⁵

These new restrictions on civic participation are particularly troublesome in that they put trusted volunteer organizations out of the voter registration business *unnecessarily*. There is no compelling policy need for such burdens on informal voter registration on campuses, in houses of worship, at casual gatherings of friends, and in the many other circumstances in which people help their fellow citizens without first creating a bureaucratic reporting and tracking apparatus. Florida already had legal provisions requiring voter registration forms to be delivered in timely fashion.²⁶ Florida already had legal provisions vigorously defended in court as ensuring the accuracy of information on those forms.²⁷ Florida already had legal provisions penalizing intentional wrongdoing in the registration process.²⁸ The new regulations impose a burden out of proportion to their incremental benefit.

²¹ Letter from Lee Rowland & Mark Posner to Chris Herren, Chief, Voting Section, Civil Rights Div., Dep’t of Justice, at 14-15 (July 15, 2011), <http://www.scribd.com/doc/60105826/Florida-HB-1355-Sec-5-Comment-Letter>; Lizette Alvarez, *Florida Passes Bill to Limit 3rd-Party Voter Registration*, N.Y. TIMES, May 5, 2011, at A20.

²² U.S. Census Bureau, 2005-2009 American Community Survey, tbl. B07003, *available at* <http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml> (last visited May 1, 2012).

²³ Data were retrieved using the U.S. Census Bureau’s DataFerrett application, <http://dataferrett.census.gov/run.html>, for the Current Population Survey, Nov. 2006, Nov. 2008, and Nov. 2010.

²⁴ The statistics, drawn from the Current Population Survey, include individuals who report registering to vote in a particular manner. This tally may overrepresent the true total—for example, by excluding voters who did not know how they were registered, but were registered through a source other than a voter registration drive. This tally may also underrepresent the true total—for example, the figures for registration drives do not include voters who reported registering through the mail (19% of registrants in 2008), or at a school, hospital, or on campus (4% of registrants in 2008), both of which were likely to involve groups assisting with the registration process. Hispanic voters and African-American voters reported using both of these latter categories (mail and school/hospital/campus) at higher rates than non-Hispanic white voters.

Although the self-reporting captured in the Current Population Survey may raise some concerns about the accuracy of the data as an absolute matter, there does not appear to be reason to expect systematic bias in the *relative* rates at which individuals report that they were registered through voter registration drives.

²⁵ In 2006, 8% of non-Hispanic white voters reported registering through a voter registration drive, compared to 11% of Hispanic voters and 11% of non-Hispanic African-American voters; in 2010, 6% of non-Hispanic white voters reported registering through a drive, compared to 14% of Hispanic voters and 12% of non-Hispanic African-American voters.

²⁶ FLA. STAT. § 97.0575(3) (2010).

²⁷ *Id.* § 97.053(6).

²⁸ *Id.* §§ 104.011, 104.012, 104.0615.

Indeed, the new regulations might well *increase* the expense to election officials. Only the most formally structured voter registration drives will, practically, be able to comply with the advance documentation requirement; less formal citizen organizations will find it prohibitively impractical to ensure that volunteers at bake sales have submitted sworn paperwork before they offer to help send in a neighbor's voter registration form. Many of these larger, structured drives have historically conducted quality assurance, reviewing forms for errors or suggestions of impropriety, and flagging those forms for election officials to expedite processing. The 48-hour time limit on returning forms, however, is likely to constrain organizational ability to conduct centralized quality review. Instead, rational organizations seeking to forego liability will likely curtail centralized quality assurance in favor of speedy delivery, shifting processing and error-correction costs unnecessarily to the county supervisors.

B. Restrictions on Early Voting

Florida's new restrictions extend beyond voter registration. At least since 1998, Florida has allowed electors to vote ballots in-person before Election Day.²⁹ Such votes could originally be cast as soon as absentee ballots were available, on any day that the county supervisor's office was open. Beginning in 2004, the state limited its early voting period to the two weeks before Election Day; the next year, the legislature eliminated early voting on the Monday before an election.³⁰ Jurisdictions were required to offer early voting for 8 hours per weekday, and 8 hours in the aggregate per weekend—96 early-voting hours total—but had discretion to apportion those weekend hours as they chose.

HB 1355 changes the early voting schedule again, restricting local authority. The new early vote period runs from Saturday (10 days before Election Day) to Saturday (3 days before Election Day), with 6-12 voting hours per day.³¹ If county supervisors choose to offer the maximum permissible early vote schedule under HB 1355, voters would continue to have 96 total early-voting hours.

The allocation of these hours, however, represents a significant change for the worse. The most significant restriction is that jurisdictions no longer have the option to offer early voting on the Sunday before Election Day.³² This was an option that several counties had offered in the past, as a service to their constituents, many of whom work long hours during the week, are more available on the weekend, and are most energized just before Election Day. The list of jurisdictions choosing to offer early voting on the Sunday before Election Day in the past includes the state's largest, most urban, and most diverse counties. Under HB 1355, the state has precluded these counties from offering the service they wished to offer.

The change directly impacts a notable form of mobilization in Florida: many houses of worship encourage their congregations to discharge their civic obligations after fulfilling their spiritual ones.³³ After Sunday morning church services, many congregants traveled to the polls in the counties that offered Sunday voting. HB 1355 removes the option, on the most important Sunday in the voting cycle.

²⁹ 1998 Fla. Laws ch. 129, § 17 (C.S.S.B. No. 1402).

³⁰ 2004 Fla. Laws ch. 252, § 13 (C.S.S.B. No. 2346); 2005 Fla. Laws ch. 277, § 45 (H.B. 1567).

³¹ FLA. STAT. § 101.657(1)(d) (2010).

³² Georgia's new law (HB 92) has a similar effect: it closes early voting on the Friday before Election Day. GA. CODE § 21-2-385(d) (2011). In this respect, Ohio's new law (HB 194) is even more restrictive: it precludes early voting on *any* Sunday during the early voting period. OHIO REV. CODE § 3509.01(B)(3) (2011).

³³ See Douglas C. Lyons, Commentary, "Souls to the Polls" Strategy Fighting Vote Suppression, FT. LAUDERDALE SUN-SENTINEL, Oct. 8, 2011.

As with the restriction on registration drives, the elimination of early voting on the Sunday before the election does not fall evenly on the population as a whole. In the past, minority citizens disproportionately voted on the final Sunday before Election Day.³⁴ In 2008, for example, African-Americans represented 13% of the total voters, and 22% of the early voters, but 31% of the total voters on the final Sunday; Hispanic citizens represented 11% of the total voters, and 11% of the early voters, but 22% of the total voters on the final Sunday. Notably, the pattern is similar in 2010: African-Americans represented 12% of the total voters, and 13% of the early voters, but 23% of the voters on the final Sunday; Hispanics represented 9% of the total voters, and 8% of the early voters, but 16% of the voters on the final Sunday.

These costs of eliminating the final Sunday from early voting are particularly notable, because restricting county flexibility has no appreciable upside. Before HB 1355, counties had the option to offer early voting on the final Sunday before Election Day *if they wished*. If Sunday voting were beneficial for voters or cost-effective for officials, county supervisors could decide for themselves to open early voting stations; if not, the supervisors could opt to use the weekend time exclusively on Saturday instead. HB 1355 removes that flexibility, forcing the counties to shut their early-voting doors on Sunday whether they would prefer to do otherwise or not. For counties that had previously offered Sunday voting, HB 1355 can only increase inconvenience, and in some circumstances, expense.

II. Voter Identification Restrictions

Registration and early voting, targeted by laws like the Florida statute examined above, are not the only subjects of recent and unjustified election legislation. The past two years have also brought renewed efforts to limit opportunities for citizens to demonstrate their identity at the polls. This paper devotes disproportionate attention to this issue, because of the disproportionate degree of misinformation it seems to have engendered.

In 2011, four states—Kansas,³⁵ Tennessee,³⁶ Texas,³⁷ and Wisconsin³⁸—passed new laws requiring most citizens to show particular types of government-issued photo identification cards in order to cast a ballot at the polls that can be counted.³⁹ Pennsylvania has done the same in 2012.⁴⁰ The

³⁴ In order to determine the race and ethnicity of early voters by day, I retrieved the individual early vote information from county Early Voting Reports, at <https://doe.dos.state.fl.us/fvrscountyballotreports/FVRSAvailableFiles.aspx>, and matched voters' unique registration numbers to the registration records on Florida's voter file, which list self-reported race and ethnicity. The percentages listed in the text represent conservative estimates of the impact on minority voters: voters of unknown race or ethnicity were treated for purposes of this analysis as white. If any such citizens were actually minority voters, the relevant percentages would be correspondingly higher.

³⁵ 2011 Kan. Laws ch. 56, § 11 (H.B. 2067) (amending KAN. STAT. § 25-2908).

³⁶ 2011 Tenn. Laws ch. 323, §§ 1, 7 (S.B. 16) (amending TENN. CODE § 2-7-112).

³⁷ 2011 Tex. Laws ch. 123, §§ 9, 14 (S.B. 14) (amending TEX. ELEC. CODE §§ 63.001, 63.0101). On March 12, 2012, the Department of Justice objected to preclearance of the law under the Voting Rights Act; Texas has since turned to the courts for preclearance. Letter from Thomas E. Perez, Asst. Att'y Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Tex. Sec'y of State (Mar. 12, 2012); Texas v. Holder, No. 1:12-cv-00128 (D.D.C. filed Jan. 24, 2012).

³⁸ 2011-12 Wis. Laws Act 23, §§ 1-2 (2011 A.B. 7) (amending WIS. STAT. § 5.02). As of this writing, there were four separate challenges to Wisconsin's new law. See League of Women Voters of Wis. v. Walker, No. 2011-cv-004669 (Dane County Circuit Ct. filed Oct. 20, 2011); Milwaukee NAACP v. Walker, No. 2011-cv-005492 (Dane County Circuit Ct. filed Dec. 16, 2011); Frank v. Walker, No. 2:11-cv-01128 (E.D. Wis. filed Dec. 13, 2011); Jones v. Deininger, No. 2:12-cv-00185 (E.D. Wis. filed Feb. 23, 2012).

³⁹ Other states are sometimes reported as requiring photo ID, but permit at least some alternatives. For example, Alabama's 2011 law requires either photo ID or sworn voucher by two election officials; it is not clear whether the

considerable misinformation surrounding these laws impedes reliable cost-benefit analysis. Though it is beyond the scope of this piece to clarify all of the relevant misinformation, it is nevertheless worth addressing a few of the more substantial and oft-repeated myths.

A. The Current Identification Landscape

Before 2011, only two states in the country—Indiana⁴¹ and Georgia⁴²—required government-issued photo identification in order to cast a ballot at the polls that can be counted. The new states above represent disturbing additions, but they remain a small minority of jurisdictions.

Instead, the vast majority of states allow citizens a broader set of options to prove their identity, without sacrificing any appreciable measure of security. The alternatives range from signature comparisons, to sworn affidavits, to documents like utility bills, bank statements, and employee IDs. Some of these other states ask those without government-issued photo ID to vote provisional ballots that are counted if no further evidence places a voter’s identity in doubt.⁴³ And all of these identification provisions are layered atop the security safeguards of the federal Help America Vote Act of 2002 (“HAVA”), which requires that each of a jurisdiction’s first-time voters registering by mail have her identity confirmed—either by verifying her social security digits or driver’s license number against reliable lists, or by presenting reliable documentation from a long and inclusive menu—before her ballot may be counted.⁴⁴

These other 43 states offer alternatives for a reason. They recognize that there are some legitimate, eligible American citizens who do not possess government-issued photo identification cards. And they do not wish to make it unduly difficult for these citizens to exercise the most fundamental right in our constitutional order.

B. Evaluating the Burden of Restrictive Identification Rules

voucher provision will reliably operate to allow eligible individuals without identification to vote a valid ballot. 2011 Ala. Laws 673 (H.B. 19). As of this writing, it does not appear that H.B. 19 has been submitted for preclearance under the Voting Rights Act. *See* U.S. Dep’t of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php> (last visited Apr. 1, 2012). Similarly, South Carolina’s new law, 2011 S.C. Laws 27 (H.B. 3003), allows voters to submit an affidavit in lieu of the preferred photo ID, if the voter “suffers from a reasonable impediment that prevents the elector from obtaining photograph identification,” whereupon the voter will submit a provisional ballot deemed valid unless there are grounds to believe that the affidavit is false. *Id.* § 5 (amending S.C. CODE § 7-13-710(D)(1)(b), (D)(2)); S.C. Att’y Gen. Op. to Marci Andino, Executive Dir., S.C. Election Comm’n, Aug. 16, 2011, <http://www.scag.gov/wp-content/uploads/2011/08/andino-m-os-9319-8-16-11-Photo-ID-Voter-ID-legislation.pdf>. As with Alabama, it is not clear whether this provision will reliably operate to allow eligible individuals without identification to vote a valid ballot. On December 23, 2011, the Department of Justice formally objected to preclearance; South Carolina has since turned to the courts. Letter from Thomas E. Perez, Asst. Att’y Gen., Civil Rights Div., Dep’t of Justice, to C. Havird Jones, Jr., Esq., S.C. Asst. Deputy Att’y Gen. (Dec. 23, 2011), <http://www.scribd.com/fullscreen/76397390>; *South Carolina v. United States*, No. 1:12-cv-00203 (D.D.C.).

⁴⁰ 2012 Pa. Laws 18 (H.B. 934) (amending 25 PENN. STAT. §§ 2602, 3050).

⁴¹ IND. CODE §§ 3-5-2-40.5; 3-11-8-25.1 (2012).

⁴² GA. CODE § 21-2-417 (2011).

⁴³ *See, e.g.*, FLA. STAT. § 101.048(2)(a) (2012).

⁴⁴ 42 U.S.C. § 15483(b) (2006).

There is no question that government-issued photo ID makes many common practices easier. Those without such ID will find it more difficult to take advantage of many of the privileges of modern society. Still, the purported inability of Americans to function without government-issued photo identification is frequently exaggerated. Proponents of restrictive ID laws often assert that it is impossible to board an airplane, drink a beer, check in at a hotel, or enter a federal building without government-issued photo ID.⁴⁵ These claims are both untrue and irrelevant.

Personal experience proves the falsity of the above assertions. Recently, I was asked to testify at a U.S. Senate hearing evaluating newly restrictive electoral laws.⁴⁶ When I arrived at the Los Angeles airport, my wallet contained two credit cards, a firing range card, a health insurance card, a blood donor card, a coffee shop frequent visitor card, and a few business cards—but no photo ID, government-issued or otherwise. The TSA officer at the airport check-in station examined my boarding pass, and asked me to step aside for additional questions; another officer reviewed my non-photo documents, and asked a bit more. I was then asked to step through the (regular) security line, where my bags were screened, and a backscatter image was taken. The procedure lasted approximately ten minutes longer than the procedure experienced by those in the same line who had photo ID on hand. This was policy, not parlor trick; the relevant federal agencies have consistently maintained a policy permitting those without particular photo ID to board a plane after additional screening.⁴⁷

After clearing security, I enjoyed a beer in the airport Chili's—without using photo ID. When I arrived in Washington, I checked into my hotel—without using photo ID. I then made my way into the Dirksen Senate building, to the Committee's hearing room—without using photo ID. Commercial vendors and federal governments alike have demonstrated that when it is financially or politically important to extend access even to citizens without certain photo identification, such citizens can be accommodated with minimal disruption to normal business practices.

Moreover, even if government-issued photo ID were required in order to board a plane or (another frequent falsehood) purchase full-strength Sudafed,⁴⁸ access to those conveniences is deeply beside the point. The franchise is referenced in two Articles and at least ten Amendments of the Constitution.⁴⁹ It is central to our constitutional order, a fundamental right protected vigorously for all

⁴⁵ See, e.g., Hans A. von Spakovsky, Opinion, *Not a Race Card*, NAT'L REV., Aug. 29, 2011; State Rep. Daryl Metcalfe, Opinion, *Plan Would Assure Integrity of Elections*, MORNING CALL (Allentown, Pa.), June 19, 2011.

⁴⁶ See *New State Voting Laws: Barriers to the Ballot?: Hearing Before the S. Comm. on Judiciary, Subcomm. on Constitution, Civil Rights & Human Rights*, 112th Cong. (Sept. 8, 2011) (statement of Justin Levitt), available at <http://judiciary.senate.gov/pdf/11-9-8LevittTestimony.pdf>.

⁴⁷ See, e.g., JUSTIN LEVITT, ANALYSIS OF ALLEGED FRAUD IN BRIEFS SUPPORTING CRAWFORD RESPONDENTS 23 (2007), <http://www.truthaboutfraud.org/pdf/CrawfordAllegations.pdf>; see also *Gilmore v. Gonzales*, 435 F.3d 1125, 1129-30, 1133 (9th Cir. 2006).

⁴⁸ Lizette Alvarez, *G.O.P. Legislators Move to Tighten Rules on Voting*, N.Y. TIMES, May 29, 2011, at A1 (“If you have to show a picture ID to buy Sudafed, . . . you should show a picture ID when you vote,” Gov. Nikki Haley said this month when she signed the bill into law in South Carolina, using a common refrain among Republicans.”); Kris W. Kobach, Opinion, *The Case for Voter ID*, WALL ST. J., May 23, 2011 (“Carrying a photo ID has become a part of American life. You can’t . . . buy full-strength Sudafed over the counter without one.”). In truth, federal law permits the purchase of Sudafed with non-photo identification. See 21 U.S.C. § 830(e)(1)(A)(iv)(I)(aa) (2006); 8 C.F.R. § 274a.2(b)(1)(v)(B) (2012).

⁴⁹ See U.S. CONST. art. I, §§ 2, 4; *id.* art. II, § 1; *id.* amends. I, V, XII, XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

eligible citizens once it is granted to some.⁵⁰ Access to Sudafed is simply of a different magnitude. No American ever gave her life to preserve a fundamental constitutional right to buy decongestants.

There is also no question that most citizens, including most of those reading this piece, have valid photo ID. But the right of the franchise—and the responsibility to ensure its continued reasonable access—is not limited to the individuals perusing these pages, or even to the majority of the eligible American public. Voting is a fundamental right for more than just most of us.

It is, concededly, difficult to pin down the precise number of eligible American citizens who do not have the identification required by the most restrictive states above. But of the methods that have commonly been used to estimate this population, one stands out as fundamentally flawed: analyzing turnout. Many commentators have attempted to extrapolate, from past voting patterns, the degree to which change in participation for any given election is due to the impact of particular ID laws.⁵¹ These studies' methods vary, and they report different results. But more fundamentally, the basic approach is flawed. It is, for a start, conceptually incomplete: even if turnout provided an accurate assessment of the impact on past voters, it would cover only the impact on *past voters*, without any assessment at all of the impact on eligible Americans who have not yet participated but have every right to participate in the future. Any answer that turnout studies provide is an answer to the wrong question.

Moreover, even if turnout provided the right measure of impact, we are not yet reliably able to mine the available data for useful information on the question presented. It is difficult to parse the impact of any given legal change based on a few years of turnout data in a few jurisdictions. For example, proponents often cite the change in turnout—particularly minority turnout—in Georgia and Indiana before strict ID laws (in 2004) and after strict ID laws (in 2008), as evidence that ID laws did not impose any substantial impediment on the voters in those states, including the minority electorate.⁵² Both states, of course, were newly battleground states in 2008, with a minority candidate at the top of a major-party ticket for the very first time. Under those circumstances, any reasonable observer should have expected extraordinary increases in minority turnout, with or without ID laws. Without far more information, it is impossible to know whether a 19% increase in turnout⁵³ reflects, say, a 15% increase because of the circumstances of the 2008 election with a 4% increase because of ID laws, or a 30% increase because of the 2008 election and an 11% decrease because of ID laws.

This is a specific example of a general problem: in any given election, turnout may be affected by the competitiveness of high-profile races, candidate quality, fundraising and campaign spending, the media environment, the presence or absence of salient ballot measures, the efforts of mobilization groups on the ground, other legal restrictions or policies that facilitate access, and a host of other conditions, including the weather on Election Day. Without thousands of data points to account for all

⁵⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 210 (2008).

⁵¹ *See, e.g.*, Hans A. von Spakovsky, Opinion, *ID Laws Ensure Election Integrity*, USA TODAY, June 12, 2011; *see also generally* Brief of R. Michael Alvarez et al. as Amici Curiae in Support of Petitioners at 10-14, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25) (reviewing such studies).

⁵² *See, e.g.*, Hans A. von Spakovsky, Opinion, *Voter ID Was a Success in November*, WALL ST. J., Jan. 30, 2009.

⁵³ This was Georgia's increase from 2004 to 2008. *See* Michael McDonald, United States Election Project, Voter Turnout, http://elections.gmu.edu/voter_turnout.htm (follow "Turnout 1980-2012.xls" hyperlink) (last visited May 1, 2012).

of the other factors that could instead be driving turnout up or down, it is unreliable to draw conclusions about the impact of identification rules by looking at how many people vote in a given election.⁵⁴

Instead of reading the uncertain tea leaves of turnout, another methodology is available to determine how many eligible citizens have the sort of identification documents required by the most restrictive state laws: ask them. Several surveys have asked eligible Americans about the documentation they possess, with varying conclusions.

Some of this research surveys registered voters.⁵⁵ A 2008 survey found that 4.9% of *registered voters* nationwide did not have current government-issued photo ID; an additional 3.1% of respondents did not have current government-issued photo ID listing their full legal name (rather than, for example, a nickname or maiden name).⁵⁶ Another 2008 survey found that 5.7% of *registered voters* nationwide did not have a current valid driver's license or passport; an additional 1.1% of respondents had those documents, but not listing their full legal name.⁵⁷ Still another 2008 survey found that 1.2% of *registered voters* in Indiana, Maryland, and Mississippi did not have any government-issued photo ID, but did not inquire whether the subjects' ID was current or reflected their full legal name.⁵⁸ A 2007 survey found that 13.3% of *registered voters* in Indiana did not have a current government-issued photo identification card; an additional 3% of respondents did not have current identification listing their full legal name.⁵⁹

Other research surveys voting-age American citizens, whether currently registered or not. A 2007 survey found that 16.1% of *voting-age citizens* in Indiana did not have current government-issued photo identification; an additional 2.8% of respondents did not have current identification listing their full legal name.⁶⁰ And a 2006 survey found that 11% of *voting-age citizens* nationwide did not have current government-issued photo identification.⁶¹

Each of the above surveys appears reliable. Some of the variance can be explained by the difference in the questions asked (e.g., whether particular forms of ID are specified, or whether the ID is current) or the difference in the target population; some of the variance may simply reflect

⁵⁴ See Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009).

⁵⁵ As explained above, such numbers understate the impact of strict identification requirements, because they do not include eligible Americans who may participate in the future.

⁵⁶ Matt A. Barreto, *New Empirical Evidence on Access to Photo ID*, http://faculty.washington.edu/mbarreto/research/voterid_090611.pdf (last visited May 1, 2012).

⁵⁷ Email from Charles Stewart III, MIT, to Justin Levitt, Loyola Law School (Sept. 6, 2011, 13:27 PST); R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS, FINAL REPORT (2009), *available at* <http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf>. The same survey found that 4.7% of respondents had no valid driver's license or passport, but did have other government-issued photo identification; the survey did not inquire whether this latter ID was current.

⁵⁸ Robert A. Pastor et al., *Voting and ID Requirements*, 40 AM. REV. PUB. ADMIN. 461 (2010).

⁵⁹ Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 113 (2009).

⁶⁰ *Id.* at 113.

⁶¹ See BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3* (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

differences from state to state. Additional variance may simply reflect the natural variability inherent in surveys, which are estimates and subject to different weighting schemes and margins of uncertainty.

But even choosing the most conservative estimate—a survey targeting registered voters in select states, rather than the electorate as a whole, and without assessing whether the ID in question was current or reflected the same name on the registration rolls—1.2% of registered voters do not have the identification required by the most restrictive states. Even this conservative result amounts to an impact reaching more than two million registered voters if applied nationwide.⁶² And the larger estimates show an impact reaching more than twenty-two million voting-age citizens.⁶³

Moreover, every study to have examined the issue has found that those without government-issued photo identification are not evenly spread across the electorate. Just as the surveys differ in their overall assessment of the magnitude of the problem, they differ in their assessment of magnitude of the disparate impact. But the available data clearly show that those without government-issued photo ID are more likely to be nonwhite, more likely to be either younger voters or seniors, more likely to be from low-income households, and more likely to have less formal education.⁶⁴ And while I am not aware of a reliable measurement of the incidence of government-issued photo ID among persons with disabilities, there is reason to be concerned that they, too, are less likely to have the documents required by the most restrictive states.

These impacts are both substantial and statistically significant. For example, one 2008 survey found that while 3.7% of responding white *registered voters* nationwide did not have current valid government-issued photo identification, 7.3% of Latino voters and 9.5% of African-American voters lacked this ID.⁶⁵ And among *voting-age citizens*, a 2006 national survey found that 8% of white citizens but 16% of Latino voting-age citizens and 25% of African-American voting-age citizens do not have current, valid, government-issued photo identification.⁶⁶ While other studies differ in the precise magnitude of these (and other) differential ID rates, all show a substantial effect, with historically underrepresented groups much less likely to have current government-issued photo identification.

These statistics are not merely important for their reflection of the status quo, but for their reflection of significant impact into the future. It often takes ID to get ID. For example, Arkansas seems to require most native-born citizens to provide an official copy of a birth certificate to obtain a government-issued photo identification card,⁶⁷ and seems to require government-issued photo identification to obtain an official copy of a birth certificate.⁶⁸

⁶² See U.S. ELECTION ASSISTANCE COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2007-2008, at 29 (2009) (reporting at least 174,101,505 active registered voters as of the 2008 general election).

⁶³ See U.S. Census Bureau, 2006 American Community Survey, tbl. B05003, *available at* <http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml> (last visited May 1, 2012) (reporting 206,287,902 voting-age citizens as of the 2006 survey period).

⁶⁴ See sources cited *supra* notes 56-61.

⁶⁵ Barreto, *supra* note 56.

⁶⁶ BRENNAN CENTER FOR JUSTICE, *supra* note 61.

⁶⁷ See Ark. Driver Services, Frequently Asked Questions, <http://www.dfa.arkansas.gov/offices/driverServices/Pages/FAQ's.aspx#e> (last visited May 1, 2012).

⁶⁸ See Ark. Dep't of Health, Birth Records, Frequently Asked Questions, <http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/BirthRecords.aspx> (last visited May 1,

Even without this sort of vicious loop, those without current government-issued photo ID often face some difficulty in procuring it. All states of which I am aware require documentation to procure state-issued identification. Even when the identification card itself is offered free of charge,⁶⁹ an individual without identification must collect this documentation, which involves time and expense, and travel (without driving) to a government office open during limited (working) hours, which involves time and expense. Official copies of birth certificates cost between \$7 and \$30 depending on the state, with a median of \$15; expedited processing will cost more.⁷⁰ A passport costs at least \$55, and a replacement naturalization certificate costs \$345.⁷¹

Moreover, some eligible citizens will simply not be able to procure the requisite underlying documentation, no matter how much they are able to spend or how much time they are able to take. In August 2011, South Carolina's Attorney General recognized, in a formal opinion interpreting the state's new identification law, that there are legitimate electors

who have a valid reason, beyond their control, which would prevent them from obtaining a Photo ID. One such reason which is obvious is that there are numerous South Carolinians, generally over age 50, who do not have a birth certificate. A primary cause is that, decades ago, many babies were not born in hospitals, but were delivered by midwives and thus no birth certificates were obtained.⁷²

These eligible Americans have names. Neither Mrs. Naomi Gordon and her brother, Mr. Raymond Rutherford were able to obtain government-issued photo ID in South Carolina.⁷³ Both apparently had their names misspelled on their birth certificates by midwives; Mr. Rutherford has the particular difficulty of possessing a birth certificate with an incorrect spelling and a Social Security card with a correct spelling. They have been told that they have to have their names changed through the courts before they will be able to get government-issued photo ID.

Nora Elze, in Savannah, Georgia, was 88 last year, and had been married for 65 years.⁷⁴ But because the name on her birth certificate (her maiden name) and the name on her out-of-state ID (her married name) do not match, she has to produce a 65-year-old marriage license in order to obtain

2012).

⁶⁹ In some states, there is a further concern that officials will not suitably publicize the existence of a voter identification card offered free of charge, in an attempt to capture the incremental revenue provided by identification card fees. *See, e.g.*, Jessica Vanegeren & Shawn Doherty, *Top DOT Official Tells Staff Not to Mention Free Voter ID Cards to the Public—Unless They Ask*, CAPITAL TIMES (Madison, Wis.), Sept. 7, 2011.

⁷⁰ Nat'l Center for Health Statistics, *Where to Write for Vital Records*, <http://www.cdc.gov/nchs/w2w/w2w.pdf> (last updated Mar. 2012).

⁷¹ U.S. Dep't of State, *Passport Fees*, http://travel.state.gov/passport/fees/fees_837.html (last updated Feb. 14, 2011); U.S. Citizenship and Immigration Services, Form N-565, *Application for Replacement Naturalization/Citizenship Document*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=a910cac09aa5d010VgnVCM10000048f3d6a1RCRD> (last updated July 27, 2011).

⁷² S.C. Att'y Gen. Op., *supra* note 39.

⁷³ *See, e.g.*, Email from Dr. Brenda Williams to Voting Section, re File #2011-2495 (Aug. 14, 2011, 18:59 ET).

⁷⁴ JoAnn Merrigan, *Savannah Woman Told She Needs Proof of Marriage to Get Driver's License*, WSAV, Aug. 29, 2011, <http://www2.wsav.com/news/2011/aug/29/savannah-woman-told-she-needs-proof-marriage-get-d-ar-2337843/>.

government-issued photo identification. At last report, she had not found the marriage license, and had not been able to acquire the necessary identification.

Royal Masset, former political director of the Texas Republican Party, discussed a personally relevant situation in the press:

I was a big fan of voter ID until the federal government declared my mother Aimee dead. . . . [¶] I found there was no way of proving her alive. Invalid 91 year olds do not have driver's licenses, passports, employment badges, gun permits & etc. Since I'm taking care of her in my home she has no bills with her name and address. I can't even get her a birth certificate since she lacks the ID necessary for a notary to verify. Under HB 218 my mother, who is a registered voter in Austin, cannot vote in Texas. Anyone who says all legal voters under this bill can vote doesn't know what he is talking about. And anyone who says that a lack of IDs won't discriminate against otherwise legal minority voters is lying.⁷⁵

Agnes Cowan and her husband lost many of their personal documents in a fire, including her husband's veterans' ID card.⁷⁶ At 81 in 2008, and confined to a wheelchair, Ms. Cowan said that it was virtually impossible for her to cobble together replacement documentation in order to get a government-issued photo ID before Georgia's 2008 primary election, making it the first major election that Ms. Cowan had missed in 63 years.

In 2006, Eva Steele was an Arizona resident; her son was an Army reservist deployed in Iraq. Her disabilities left her in a wheelchair and unable to drive. "I don't have a driver's license," she said. "I don't get utility bills. I've never had a passport. I don't have property tax statements. All I did was raise my children and teach them to be good citizens and to vote. And now I'm the one who's on the outside looking in."⁷⁷

Birdie Owen was displaced from Louisiana after Hurricane Katrina, where her birth certificate was lost in the storm. Without a birth certificate, she found herself unable to get a state-issued photo identification card in Missouri.⁷⁸

The stories above represent just a selection of the reports of individuals—real American citizens—without government-issued photo identification. The reliable statistics cited above indicate that there are many others.

C. The Lack of Justification for Restrictive Identification Rules

⁷⁵ Posting of Peggy Fikac to Texas Politics, *A Republican, His Mother, and Voter ID*, <http://blog.chron.com/texaspolitics/2007/04/a-republican-his-mother-and-voter-id/> (Apr. 24, 2007, 17:16 CT).

⁷⁶ Denise Dillon, *Elderly Couple Loses ID in Fire, Fear They Can't Vote*, FOX 5 ATLANTA, July 14, 2008, available at http://electionlawblog.org/wp-content/uploads/20080714-GA_cowan.pdf.

⁷⁷ E.J. Montini, *A Soldier's Mother is Denied Her Right to Vote and to Speak*, ARIZ. REPUBLIC, Aug. 13, 2006; Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES, Sept. 26, 2006.

⁷⁸ Robin Carnahan, *Elections Can't Really be Fair, Free and Accurate if Eligible Voters Can't Vote*, HUFFINGTON POST, May 9, 2008, http://www.huffingtonpost.com/robin-carnahan/elections-cant-really-be_b_101030.html.

As with the other restrictions discussed earlier in this piece, the heavy costs on Mrs. Gordon and other eligible American citizens are not justified by any substantial benefit. Requirements to present certain identification documents at the polls are often justified by the need to prevent election fraud. And there are, indeed, prevalent concerns about malfeasance—fraud or coercion using absentee ballots,⁷⁹ registration fraud,⁸⁰ vote buying,⁸¹ and schemes involving coopted officials.⁸² These are real, legitimate concerns, and should be both prevented and punished, where doing so does not exact an even greater cost to the system and to legitimate electors therein. But not one of these despicable acts could possibly be curbed by limiting the ways in which pollworkers ask voters to prove their identity.

Identification rules provide even theoretical protection against only one form of malfeasance: someone who arrives at the polls and pretends to be someone else. As I have previously described,⁸³ the available evidence demonstrates that the incidence of any fraud that identification rules could prevent is extraordinarily rare.⁸⁴ Though it does occur, there are only a handful of recent accounts. During this same period, hundreds of millions of ballots have been cast. The most notable significance of the incidents that have surfaced is how rare they appear to be.

Even fewer of these allegations stand up to real scrutiny. Indeed, careful investigation has more often than not debunked, not confirmed, allegations of impersonation fraud at the polls. Reports of “dead voters,” often based on matching voter lists to other data sources, are the most common . . . and the most flawed.⁸⁵ Death records contain errors, listing people as dead who are actually alive. Voter records contain errors, reflecting data entry mistakes and legitimate voters signing the pollbooks on the wrong line. Voters with the same names and dates of birth as deceased individuals are—falsely—

⁷⁹ See, e.g., Pabey v. Pastrick, 816 N.E.2d 1138, 1144-46 (Ind. 2004); Anastasia Hendrix, *City Workers: We Were Told To Vote, Work for Newsom*, S.F. CHRONICLE, Jan. 15, 2004, at A1; Matthew Purdy, *5 Bronx School Officials Are Indicted in Absentee Ballot Fraud*, N.Y. TIMES, Apr. 25, 1996.

⁸⁰ Such reports often involve rogue workers hoping to cheat nonprofits out of an honest effort to register real citizens. See, e.g., Todd C. Frankel, *Eight Are Accused in Alleged Voter Scam*, ST. LOUIS POST-DISPATCH, Dec. 22, 2007; Keith Ervin, *Felony Charges Filed Against 7 in State's Biggest Case of Voter-Registration Fraud*, SEATTLE TIMES, July 26, 2007. These forms are usually subject to the safeguards of HAVA, 42 U.S.C. § 15483(b) (2006), which flags potentially invalid registration forms for further security measures before a corresponding ballot can be cast. I am aware of no recent substantiated case in which such registration fraud has resulted in a fraudulent vote.

⁸¹ See, e.g., Beth Musgrave, *Three Sentenced in Bath Vote Fraud*, LEXINGTON HERALD-LEADER, Sept. 25, 2007; Nicklaus Lovelady, *Investigation Into Vote Fraud in Benton County Nets 14th Arrest*, MISS. CLARION-LEDGER, Aug. 31, 2007; Tom Searls, *Six To Learn Fate in Lincoln Vote Buying Case*, CHARLESTON GAZETTE (W.Va.), May 3, 2006, at 1C.

⁸² See, e.g., Eva Ruth Moravec, *Woman, 81, Jailed in Vote-Fraud Case*, SAN ANTONIO EXPRESS-NEWS, Oct. 5, 2010; United States v. Brown, 494 F. Supp. 2d 440, 486 n.73 (S.D. Miss. 2007), *aff'd*, 2009 WL 485709 (5th Cir. 2009); Michael Cass, *Poll Worker Indicted in Vote Probe*, THE TENNESSEAN, Dec. 20, 2007; Manny Garcia & Tom Dubucq, *Unregistered Voters Cast Ballots in Dade: Dead Man's Vote, Scores of Others Were Allowed Illegally, Herald Finds*, MIAMI HERALD, Dec. 24, 2000; Grand Jury Report, In the Matter of Confidential Investigation R84-11 (N.Y. Sup. Ct., Kings County, 1984), available at http://electionlawblog.org/wp-content/uploads/1984_grand_jury_report-r84-11.pdf.

⁸³ See, e.g., JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD (2007), available at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>; *In Person Voter Fraud: Myth and Trigger for Disenfranchisement?: Hearing Before the S. Comm. on Rules & Admin.*, 110th Cong. (Mar. 12, 2008) (statement of Justin Levitt), available at http://brennan.3cdn.net/02f93775d26a119ad0_dam6iyw3s.pdf; *Hearing on S.B. 14 Before the H. Select Comm. on Voter Identification and Voter Fraud*, 2011 Leg., 82nd Sess. (Tex. Mar. 1, 2011); *Hearing on S.B. 362 Before the H. Comm. on Elections*, 2009 Leg., 81st Sess. (Tex. Apr. 6, 2009); *Hearing Before the H. Comm. on Elections*, 2008 Leg., 80th Sess. (Tex. Jan. 25, 2008).

⁸⁴ Other scholars have confirmed these conclusions. See, e.g., LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD (2010).

⁸⁵ See, e.g., Posting of Justin Levitt to Election Law Blog, New Report of Potential “Dead Voters” in South Carolina . . . And It’s Not Even Halloween, <http://electionlawblog.org/?p=27864> (Jan. 12, 2012, 15:46 PT).

assumed to be one and the same.⁸⁶ When researchers expend the effort to follow through, these errors become clear. A 2008 investigation of 48 purported “dead voters” in Dallas, for example, revealed only clerical error, voter mistake, and confusion; of all the cases investigated, “none involved a fraudulently cast vote.”⁸⁷ A 2007 investigation of approximately 100 “dead voters” in Missouri revealed that every single purported case was properly attributed either to a matching error, a problem in the underlying data, or a clerical error by elections officials or voters.⁸⁸ A 1999 Hawaii investigation, after reviewing precinct pollbooks and calling allegedly deceased citizens, similarly found that not one of 170 potential “dead voters” actually reflected fraud.⁸⁹

The most prominent recent examination of voter fraud—the evidence presented to the Supreme Court in *Crawford v. Marion County Election Board*⁹⁰—precisely fits the overall pattern described above. There were many claims of wrongdoing and irregularity, but few that even alleged the sort of fraud that in-person identification rules could possibly prevent, and a tiny portion, if any, that substantiated the allegations.

Because the Supreme Court represented such a high-profile forum, it provided the most prominent focal event to date for supporters of an identification law to justify their support by showing their rationale to be real. *Crawford* was a national stage for those who believe in-person impersonation fraud to be a legitimate concern to present their proof. In the case, the lower courts cited several media accounts that, the courts claimed, reflected reports of in-person impersonation fraud.⁹¹ In the Supreme Court, respondents and *amici* supporting respondents added citations to more than 250 reports, encompassing decades of elections.

I thoroughly examined every one of these citations.⁹² The evidence of in-person impersonation fraud was strikingly sparse. Most cited reports reflected allegations that could not possibly be related to in-person impersonation fraud and which an ID law could not possibly fix (*e.g.*, absentee ballot

⁸⁶ Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111 (2008).

⁸⁷ Rudolph Bush, *Vote Fraud Review Comes Up Empty*, DALLAS MORNING NEWS, Dec. 14, 2008.

⁸⁸ Steve Chamraz, “The Dead List” Backstory . . . , News 4 Daily Briefing, May 7, 2007, available at http://dev.beloblog.com/KMOV_Blogs/n4idailybriefing/2007/05/the_dead_list_backstory.html; see also SECRETARY OF STATE CATHY COX, THE 2000 ELECTION: A WAKE-UP CALL FOR REFORM AND CHANGE 11 n.3 (2001), available at http://sos.georgia.gov/acrobat/elections/2000_election_report.pdf.

⁸⁹ Waite David, *Review Turns Up No Signs of Fraud*, HONOLULU ADVERTISER, Mar. 16, 1999, at A1.

⁹⁰ 553 U.S. 181 (2008). The *Crawford* case is often said to have validated laws requiring photo identification at the polls. It did no such thing. In *Crawford*, the fractured court rejected the plaintiffs’ challenge to the law as overbroad, in light of the limited evidence in the record on the extent of the law’s burdens. *Id.* at 188-89, 200-03 (Stevens, J.). Part of the difficulty is that the case was a pre-enforcement challenge, brought before Indiana’s law was put into effect and therefore without direct evidence of past harm. See generally Justin Levitt, *Crawford—More Rhetorical Bark than Legal Bite?*, BRENNAN CENTER FOR JUSTICE, May 2, 2008, http://www.brennancenter.org/blog/archives/crawford_more_rhetorical_bark_than_legal_bite/.

That is, without solid proof of burden in the record, Indiana’s asserted justifications were deemed legally sufficient to sustain the law against the particular facial challenge that was lodged. The Court did not issue a blanket statement declaring restrictive identification laws to be legal. Indeed, six Justices recognized that restrictive ID laws might unduly burden some voters, particularly poor and elderly citizens. *Crawford*, 553 U.S. at 199 (Stevens, J.); *id.* at 209-22 (Souter, J., dissenting); *id.* at 237-39 (Breyer, J., dissenting).

⁹¹ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006); see also *id.* at 793-94; *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007).

⁹² LEVITT, *supra* note 47; Justin Levitt, *Crawford—Just the Facts*, BRENNAN CENTER FOR JUSTICE, Apr. 30, 2008, http://www.brennancenter.org/blog/archives/just_the_facts/.

problems, vote-buying schemes, or ballot tampering), or allegations that did not mention whether the alleged wrongdoing was committed in-person or through more susceptible absentee ballots.⁹³ Two reports involved single votes that were the product of official pollworker misconduct or forged documentation, which also could not be prevented by laws requiring pollworkers to examine documentation.⁹⁴ Two reports involved unsuccessful attempts to vote in the name of another.⁹⁵

That left, since 2000, nine allegations of votes that might have involved ballots cast by impersonators, which ID rules might have prevented. There is also an alternative explanation for each of the nine votes: either pollworker error or voter confusion might have caused a different, legitimate elector to sign the wrong line of the pollbook, or a data entry error might have caused an elector's voter record to register a vote for an election when no corresponding voter ever signed in at the polls.⁹⁶ There are plentiful reports of similar mistakes, with fathers confused for sons, and vice versa.⁹⁷ Investigation of the pollbooks themselves could distinguish fraud from error, but in my research to date, I have not been able to find any evidence that the necessary investigation was undertaken.

This evidence is remarkable. There have been credible allegations of impersonation at the polls. But they are notable for their rarity. In the most prominent forum to date for collecting such allegations, proponents of these rules cited nine votes since 2000 that were caused either by fraud that in-person identification rules could possibly stop . . . or by innocent mistake. During the same period, 400 million votes were cast, in general elections alone.⁹⁸ Even assuming that each of the nine votes were fraudulent, that amounts to a relevant fraud rate of 0.000002 percent. Americans are struck and killed by lightning more often.⁹⁹ And every year, there are far more reports of UFO sightings.¹⁰⁰

Some have claimed that the incidence of alleged in-person impersonation fraud is low because this fraud is difficult to detect.¹⁰¹ This is distinct from the issue of whether the fraud is difficult to prosecute: littering clearly exists, but is difficult to address through the criminal justice system, because the wrongdoer is not easily identified. Here, not only are there virtually no prosecutions of in-person impersonation fraud, but there are even strikingly few reports of potential impersonation. It is as if individuals were complaining about littering, but could find no garbage in the street.

⁹³ LEVITT, *supra* note 47, at 2.

⁹⁴ Cass, *supra* note 82 (discussing one incident in Tennessee in 2007); Garcia & Dubucq, *supra* note 82 (discussing one incident in Florida in 2000).

⁹⁵ Madeline Friedman, *Anatomy of Voter Fraud*, HOBOKEN REPORTER, July 1, 2007 (discussing one attempt in New Jersey in 2007); LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS* 292 & n.70 (1996) (discussing one attempt in California in 1994).

⁹⁶ LEVITT, *supra* note 47, at 2.

⁹⁷ See, e.g., Will Garvey, *My Opportunity for Voter Fraud*, LINCOLN TRIBUNE, July 20, 2011 (revealing that a vote ostensibly cast in the name of Will Garvey IV was actually cast by his father, Will Garvey III); Michael Mayo, *Determined Voters Tackle the Obstacles and Triumph*, FT. LAUDERDALE SUN-SENTINEL, Nov. 5, 2008 (revealing that a vote ostensibly cast in the name of Michael Curry was actually cast by his son, Michael Curry, Jr.).

⁹⁸ McDonald, *supra* note 53.

⁹⁹ Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Service, *Lightning Safety: Medical Aspects of Lightning*, <http://www.lightningsafety.noaa.gov/medical.htm> (last visited May 1, 2012); Ron Holle, *Lightning Fatalities by State, 2001-2010* (2011), available at http://www.lightningsafety.noaa.gov/stats/01-10_deaths_by_state.pdf.

¹⁰⁰ See, e.g., UFO Casebook, *Breaking UFO News Reports*, <http://www.ufocasebook.com/> (last visited May 1, 2012).

¹⁰¹ See, e.g., Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007).

For those believing in impersonation at the polls, the answer is that this sort of fraud is simply difficult to detect. In truth, there are multiple means to discover in-person impersonation fraud, all of which should yield many more reports of such fraud if it actually occurred with any frequency. An individual seeking to commit in-person impersonation fraud must, at a minimum, present himself at a polling place, sign a pollbook, and swear to his identity and eligibility. There will be eyewitnesses: pollworkers and members of the community, any one of whom may personally know the individual impersonated, and recognize that the would-be voter is someone else.¹⁰² There will be documentary evidence: the pollbook signature can be compared, either at the time of an election or after an election, to the signature of the real voter on a registration form, and the real voter can be contacted to confirm or disavow a signature in the event of a question.¹⁰³ There may be a victim: if the voter impersonated is alive but later arrives to vote, the impersonator's attempt will be discovered by the voter. If the impersonation is conducted in an attempt to influence the results of an election, it will have to be orchestrated many times over, increasing the likelihood of detection.

As in all law enforcement, none of these detection mechanisms are perfect. Yet in hundreds of millions of ballots cast, they have yielded only a handful of potential instances of in-person impersonation fraud, precisely during a period when investigating voter fraud was expressly deemed a federal law enforcement priority,¹⁰⁴ and when private entities were equipped and highly motivated to seek, collect, and disseminate such reports.¹⁰⁵ The phone should have been ringing off the hook, but instead there was barely a whisper.

A more logical explanation for the extraordinary rarity of reported impersonation fraud at the polls is that such fraud is extraordinarily rare. It is an extremely inefficient means to influence an election. For each act of in-person impersonation fraud in a federal election, the perpetrator risks five years in prison and a \$10,000 fine under federal law, in addition to penalties under state law.¹⁰⁶ In return, the perpetrator gains at most one incremental vote. It is understandable that few individuals believe such a trade-off worthwhile.

D. Balancing Costs and Benefits

In weighing the costs and benefits of restrictive identification rules, the limited incidence of any fraud that these rules could prevent is significant. Because most American citizens have the identification required, the number of eligible voters without ID is relatively small. But even the most conservative estimates of impact show that the “cure” of restrictive identification is—mathematically—half a million times worse than the ostensible disease. Even if only 1.2% of registered voters do not have the required identification, burdening 1.2% of the voters in order to address a 0.000002% fraud rate betrays an alarming devotion to disproportion. Put differently, burdening more than two million

¹⁰² See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 226-29 (2008) (Souter, J., dissenting).

¹⁰³ It is no answer that the individual may have submitted a fraudulent registration form in a fictitious name, presumably outside of the presence of an election official, before arriving in person to vote in that fictitious name. Federal law already contemplates this hypothetical and unlikely possibility by providing that any registrant new to the jurisdiction who submits a registration form by mail must at some point, and through a broad range of means, offer reliable proof of his identity before voting. 42 U.S.C. § 15483(b) (2006).

¹⁰⁴ See Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

¹⁰⁵ See, e.g., Republican National Committee, *You Can't Make This Up!* (July 2008), <http://web.archive.org/web/20080709002402/http://www.gop.com/ycmtu.htm>.

¹⁰⁶ 42 U.S.C. § 1973i(c) (2006).

registered voters to address nine potential fraudulent votes seems a particularly poorly tailored means to “safeguard” our most precious constitutional right.

It is true that, as with any election regulation, a photo identification rule could prove outcome-determinative in a close election.¹⁰⁷ Indeed, in at least one race—a tie vote for an Indiana school board seat in 2010 with one provisional ballot cast by a voter without the requisite identification—it already has.¹⁰⁸ Given the known facts about the incidence of the burden of such laws and the incidence of the rate of alleged fraud, it is substantially more likely that the Indiana school board election was resolved by unnecessarily excluding an eligible voter, and not by preventing a would-be fraudulent ballot.¹⁰⁹ The most restrictive identification laws erect a real barrier to millions of real citizens in order to increase existing protections against an unlikely hypothetical. It is like amputating a foot in order to prevent a potential hangnail.

Indeed, preliminary evidence indicates that restrictive identification rules may have *already* prevented more individuals from voting than any incidence of fraud to justify the impact. The evidence submitted in *Crawford* cited nine potentially fraudulent votes—nationwide and over seven years—that strict identification rules might have prevented. The individual stories above represent just some of the individual stories of citizens without government-issued photo ID, more than nine of whom have already been prevented from casting valid ballots due solely to restrictive ID laws. And there are many more. In just one Indiana county, in just one off-cycle limited-turnout election in 2007, 32 voters cast ballots that could not be counted because of Indiana’s new restrictive identification law; fourteen of these voters had previously voted in at least ten elections.¹¹⁰ In the 2008 presidential primary election, approximately 321 Indiana ballots seem to have been rejected because of the identification law;¹¹¹ in the general election, 902 Indiana ballots seem to have been rejected because of the identification law.¹¹² Similarly, in a 2007 off-cycle Georgia election, 33 voters’ ballots were rejected because of that state’s new, restrictive identification law,¹¹³ and in the 2008 presidential primary, 254 Georgian ballots were rejected because of the new law.¹¹⁴ It is impossible to know how many other voters without the proper

¹⁰⁷ See von Spakovsky, *supra* note 51.

¹⁰⁸ Christin Nance Lazerus, *School Race Hinges on Voter’s ID*, GARY POST-TRIBUNE, May 14, 2010; Bill Dolan, *Lake Ridge School Officials Asked to Break Candidate Tie*, NWL.COM, May 25, 2010, http://www.nwltimes.com/news/local/lake/article_99e4f7b7-45eb-54de-8c3b-38196a4abe43.html; Carmen M. Woodson-Wray, *Glen Johnson’s Credentials Not Good Enough for Lake Ridge School Board*, GARY CRUSADER, June 12, 2010, <http://chicagocrusader.com/news-detail.aspx?newsid=589>

¹⁰⁹ It is not possible at present to resolve the question definitively: under the Help America Vote Act, it is extremely difficult for independent researchers to further investigate the identity and eligibility of any given provisional voter. See 42 U.S.C. § 15482(a) (2006) (“Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.”); IND. CODE § 3-11.7-6-3(c) (2012) (implementing the provision in Indiana); Response to Informal Inquiry 08-INF-28 from Heather Willis Neal, Ind. Public Access Counselor, to J. Bradley King, Co-Director, Ind. Election Div., Aug. 22, 2008, <http://1.usa.gov/HLVycj> (interpreting the Indiana law); Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana’s 2008 General Election*, 225 J.L. & POL. 329, 335-37 (2009) (describing the hurdles to identifying individual provisional voters).

¹¹⁰ Brief for Respondent Marion County Election Bd. at 8-10, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25).

¹¹¹ Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475 (2008).

¹¹² Pitts & Neumann, *supra* note 109.

¹¹³ Shannon McCaffrey, *Votes of Some Who Lacked Photo ID in November Didn’t Count*, THE LEDGER-ENQUIRER (Columbus, Ga.), Jan. 29, 2008.

¹¹⁴ *In Person Voter Fraud: Myth and Trigger for Disenfranchisement?: Hearing Before the S. Comm. on Rules & Admin.*,

identification came to the polls but did not cast provisional ballots (which would not have counted without identification), or how many declined to make the trip to the polls in the first instance (which would have been futile). And though it is theoretically possible that each of the provisional ballots listed in this paragraph represented a fraudulent vote, there is no further evidence to support that conclusion.

Despite their demonstrated impact on many American citizens, some seek to justify overly restrictive ID laws by claiming that they will at least increase public confidence in the election process. On its own, this justification for a substantial burden is open to question: there is a significant danger to democratic participation in allowing the unfounded fears of the many to burden the fundamental constitutional rights of the few.¹¹⁵ Moreover, even if public confidence alone were a legitimate reason to exact regulatory cost, it is not clear, even in theory, that restrictive identification laws would have a unidirectional impact: such laws might increase the confidence of those who believe that the system is presently endangered by fraud or potential fraud, but might also decrease the confidence of those who believe that the system is presently designed to unnecessarily burden or exclude eligible voters.¹¹⁶

Finally, in addition to the negligible benefits of the laws starkly limiting valid voter ID, it is worth noting real costs of such policies, even beyond the cost to legitimate citizens who do not have the necessary identification. Indeed, as with the registration and early-vote policies reviewed above, the new ID laws may well be *counterproductive*. For example, Georgia has dramatically limited the identification that citizens may use to vote at the polls, but also offers no-excuse absentee voting without similar restrictions.¹¹⁷ While the comparative freedom of absentee voting may be seen by some to mitigate the burden on voters without government-issued photo ID,¹¹⁸ it will also predictably drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns. That is, a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently.

There is also a substantial monetary cost associated with restrictive identification laws. As the Brennan Center has documented, courts approving restrictive ID requirements have required not only that the state offer free identification cards to eligible citizens who do not otherwise have the necessary ID, but also that the state prepare an education campaign sufficient to warn the electorate that their votes will not count absent the required ID.¹¹⁹ These requirements amount to a real fiscal impact of

110th Cong. (Mar. 12, 2008) (statement of Robert A. Simms, Ga. Deputy Sec’y of State, at 5); *see also* Shannon McCaffrey, *More Than 400 Voters Lacked Photo IDs in Feb. 5 Primary*, THE LEDGER-ENQUIRER (Columbus, Ga.), Feb. 14, 2008 (reporting 296 voters without ID casting provisional ballots that were not counted).

¹¹⁵ *See, e.g.*, *Weinschenk v. Missouri*, 203 S.W.3d 201, 218-19 (Mo. 2006) (“[I]f this Court were to approve the placement of severe restrictions on Missourians’ fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights. . . . The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.”).

¹¹⁶ Available data suggest empirical uncertainty to complement the theoretical concerns. Restrictive identification laws do not appear to make citizens feel measurably more secure about the integrity of their elections. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder*, 121 HARV. L. REV. 1737 (2008).

¹¹⁷ GA. CODE §§ 21-2-380-81, 21-2-417 (2011). In contrast, the new laws in Kansas and Wisconsin also sharply restrict the documentation that absentee voters may use to prove their identity. KAN. STAT. §§ 25-1122, 25-2908(h) (2011); WIS. STAT. §§ 5.02(6m), (16c), 6.79(2), 6.85-87 (2012).

¹¹⁸ *But see* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 23-24 (2010) (arguing that absentee ballots should not be considered substitutes for the ability to vote in person).

¹¹⁹ *See* VISHAL AGRAHARKAR ET AL., THE COST OF VOTER ID LAWS: WHAT THE COURTS SAY (2011), *available at*

millions of dollars. To produce just 168,000 identification cards in Indiana, the state estimated a \$1.3 million dollar cost, with additional revenue loss of \$2.2 million, which exceeds the Indiana Election Division's total budget for the 2009-2010 fiscal year—even before accounting for any education costs.¹²⁰ And a more comprehensive fiscal note in Missouri estimated the costs of a photo ID law at \$6 million for the first year, with about \$4 million in recurring costs.¹²¹ Moreover, increasing any restrictions at the polls—ID or otherwise—will likely lead to an increase in the number of voters needing to cast provisional ballots. These ballots must be printed, collected, and processed, all of which leads to increased cost (and increased uncertainty in the event of a close election). In tight budgetary times, these costs also weigh heavily on the ledger against unnecessarily restrictive ID requirements.

III. Conclusion

This Issue Brief reviews several new state laws impacting the voting process, and finds their assessment of costs and benefits wanting. There are other new policies of concern as well, beyond the scope of this piece—including repeals of election-day registration and repeals of practices easing the restoration of civil rights for those who have been convicted. As a theoretical matter, none of the above policies make it impossible to vote. Neither did the poll tax, when it was in place. But in practice, these barriers increase the burdens to eligible citizens of exercising the franchise, and appear to do with unequal impact. More disturbing, the restrictions are unnecessary and unjustified, and in some cases, even potentially counterproductive.

Courts are rightly loath to interfere with the enacted policies of democratically accountable bodies. When those bodies' work product increases the burdens of democratic participation, however, it renders public accountability less effective and impairs the vitality of our representative system. Such policy is only constitutionally justified when the provisions exacting burden are sufficiently tailored to achieving sufficiently weighty regulatory interests.¹²² Nor is this a standard for the courts alone: litigation may be the forum of last resort, but the constitutional mandate applies to every governmental policymaker. Only by devoting more attention to hard-nosed assessments of the costs and benefits of election regulation—and to the rationale for these regulatory decisions—can we be sure that elections are conducted with the integrity necessary to command our allegiance.

http://www.brennancenter.org/content/resource/the_cost_of_voter_id_laws_what_the_courts_say/.

¹²⁰ *Id.* at 1-2.

¹²¹ *Id.* at 1.

¹²² *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190-91 (2008) (plurality); *id.* at 209-11 (Souter, dissenting); *id.* at 237 (Breyer, dissenting).