I. Extensive Excerpts from the Supreme Court's 2008 Foray into Voter ID Laws

Supreme Court of the United States

William **CRAWFORD** et al., Petitioners,
v.
MARION COUNTY ELECTION BOARD et al.
Indiana Democratic Party, et al., Petitioners,
v.
Todd Rokita, Indiana Secretary of State, et al.

Decided April 28, 2008.

Justice STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice KENNEDY join. *[NOTE from Professor Smith: The "judgment of the Court" is the majority's disposition of the case – i.e., who wins and who loses. Here, the majority votes to reject the challenge to Indiana's law. But, there is no majority on the theory behind that result. Justice Stevens' opinion (joined by Chief Justice Roberts and Justice Kennedy) only reflects three justices. The three other members of the minority take the different approach reflected in Justice Scalia's concurring opinion (joined by Justices Thomas and Alito). Three others (Justices Souter, Ginsburg & Breyer) dissent. Consistent with last week's practice, the names of the justices are shown in Red (if appointed by a Republican president) and Blue (if appointed by a Democratic president).]*

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

Referred to as either the "Voter ID Law" or "SEA 483," [FN1] the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee***186** ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit court clerk's office within 10 days. No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and

identity. FN4.

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

The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification.

After discovery, District Judge [Sarah Evans] Barker *[appointed in 1984 by Republican President Reagan]* prepared a comprehensive 70–page opinion explaining her decision to grant defendants' motion for summary judgment. 458 F.Supp.2d 775 (S.D.Ind.2006). She found that petitioners had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements." She rejected "as utterly incredible and unreliable" an expert's report that up to 989,000 registered voters in Indiana did not possess either a driver's license or other acceptable photo identification. She estimated that as of 2005, when the statute was enacted, ***188** around 43,000 Indiana residents lacked a state-issued driver's license or identification card.

A divided panel of the Court of Appeals affirmed. 472 F.3d 949 (C.A.7 2007). The majority *[composed of Judge Richard Posner, a White male appointed in 1981 by Republican President Reagan, and Judge Diane Sykes, a White female appointed in 2004 by Republican President George W. Bush]* first held that the Democrats had standing to bring a facial challenge to the constitutionality of SEA 483. Next, noting the absence of any plaintiffs who claimed that the law would deter them from voting, the Court of Appeals inferred that "the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls." It rejected the argument that the law should be judged by the same strict standard applicable to a poll tax because the burden on voters was offset by the benefit of reducing the risk of fraud. The dissenting judge *[Judge Terrence Evans, an African-American judge appointed in 1995 by Democratic President Bill Clinton]*, viewing the justification for the law as "hollow"—more precisely as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic"—would have applied a stricter standard, something he described as "close to 'strict scrutiny light.' " In his view, the "law imposes an undue burden on a recognizable segment of potential eligible voters" and therefore violates their rights under the First and Fourteenth Amendments to the Constitution.

Four judges *[in addition to Judge Evans, who dissented from the initial panel opinion, these include three women judges (two white and one African-American), two of whom were appointed by Democratic President Bill Clinton and one of whom was appointed by George H.W. Bush]* voted to grant a petition for rehearing en banc. Because

we agreed with their assessment of the importance of these cases, we granted certiorari. We are, however, ***189** persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm.[FN7]

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

I

In *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of $1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. Applying a stricter standard, we concluded that a State "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." ….Although the State's justification for the tax was rational, it was inv[alid] because it was irrelevant to the voter's qualifications.

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

In later election cases we have followed *Anderson* 's balancing approach. Thus, in *Norman v. Reed* (1992), after identifying the burden Illinois imposed on a political party's access to the ballot, we "called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation," and concluded that the "severe restriction" was not justified by a narrowly drawn state interest of compelling importance. Later, in *Burdick v. Takushi,* we applied *Anderson* 's standard for " 'reasonable, nondiscriminatory restrictions,' " and upheld Hawaii's prohibition on write-in voting despite the fact that it prevented a significant number of "voters from participating in Hawaii elections in a meaningful manner." We reaffirmed *Anderson* 's requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the " 'precise interests put forward by the State as justifications for the burden imposed by its rule.' "[FN8]

> FN8. Contrary to Justice SCALIA's suggestion, see *post,* at 1624 – 1625 (opinion concurring in judgment), our approach remains faithful to *Anderson* and *Burdick*. The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson,* and repeatedly

> cited *Anderson.* To be sure, *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote; but in its place, the Court applied the "flexible standard" set forth in *Anderson*. *Burdick* surely did not create a novel "deferential 'important regulatory interests' standard."

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

II

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters….Each is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.

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

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

***192** *Election Modernization*

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

In the National Voter Registration Act of 1993 (NVRA), Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process. The statute requires state motor vehicle driver's license applications to serve as voter registration applications. While that requirement has increased the number of registered voters, the statute also contains a provision restricting States' ability to remove names from the lists of registered voters. These protections have been partly responsible for inflated lists of registered voters….

In the H[elp] A[merica] V[ote] A[ct], Congress required every State to create and

maintain a computerized statewide list of all registered voters. HAVA also requires the States to verify voter information contained in a voter registration application and specifies either an "applicant's driver's license number" or "the last 4 digits of the applicant's social security number" as acceptable verifications. If an individual has neither number, the State is required to assign the applicant a voter identification number.

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

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

"A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own ***194** apartment building let alone their precinct, some form of identification is needed.

"There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." Building Confidence in U.S. Elections § 2.5 (Sept.2005), App. 136–137 (Carter–Baker Report) (footnote omitted).

Voter Fraud

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonationat polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of

the Indiana Criminal Code punishing***195** such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—though perpetrated using absentee ballots and not ***196** in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

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

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

Safeguarding Voter Confidence

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

III

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of States have relied primarily on photo identification. A photo identification requirement imposes some burdens on voters that

other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to ***198** cast a provisional ballot provides an adequate remedy for problems of that character.

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

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

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

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

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

"(A) is not expired; or

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

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

FN17. To obtain a photo identification card a person must present at least one "primary" document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport. Indiana, like most States, charges a fee for obtaining a copy of one's birth certificate. This fee varies by county and is currently between $3 and $12.

***199** Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble

the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

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

> FN19. Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election. It is, however, difficult to understand why the State should require voters with a faith-based objection to being photographed to cast provisional ballots subject to later verification in every election when the BMV is able to issue these citizens special licenses that enable them to drive without any photo identification.

IV

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion….

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

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

***201** Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. The record includes depositions of two case managers at a day shelter for homeless persons and the depositions of members of the plaintiff organizations, none of whom expressed a personal inability to vote under SEA 483. A deposition from a named

plaintiff describes the difficulty the elderly woman had in obtaining an identification card, although her testimony indicated that she intended to return to the BMV since she had recently obtained her birth certificate and that she was able to pay the birth certificate fee.

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

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

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes “excessively burdensome requirements” on any class of voters. See *Storer v. Brown,* 415 U.S. 724, 738 (1974).[FN20] When we consider only the statute's broad ***203** application to all Indiana voters we conclude that it “imposes only a limited burden on voters' rights.” *Burdick,*. The “ ‘precise interests' ” advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483.

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

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

Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute….

V

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

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

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

….To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi*. This calls for application of a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. The lead opinion resists the import of *Burdick* by characterizing it as simply adopting "the balancing approach" of *Anderson v. Celebrezze,* ***205** Since *Burdick,* [however,] we have repeatedly reaffirmed the primacy of its two-track approach. "[S]trict scrutiny is appropriate only if the burden is severe." Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring "nominal effort" of eve-

ryone, are not severe. Burdens are severe if they go beyond the merely inconvenient. See *Storer v. Brown* (characterizing the law in *Williams v. Rhodes,* 393 U.S. 23 (1968), as "severe" because it was "so burdensome" as to be " 'virtually impossible' " to satisfy).

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

The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes. In the course of concluding that the Hawaii laws at issue in *Burdick* "impose[d]***206** only a limited burden on voters' rights to make free choices and to associate politically through the vote," we considered the laws and their reasonably foreseeable effect on *voters generally*. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances…. Subsequent cases have followed *Burdick* 's generalized review of nondiscriminatory election laws….

[W]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence….The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class. A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.[FN*]

> FN* A number of our early right-to-vote decisions, purporting to rely upon the Equal Protection Clause, strictly scrutinized nondiscriminatory voting laws requiring the payment of fees. [W]e have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.

Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter. This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters,

and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

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

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

***209** * * *

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

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

Indiana's "Voter ID Law" [FN1] threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens, and a significant percentage of those individuals are likely to be deterred from voting. The statute is unconstitutional under the balancing standard of *Burdick*: a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. I therefore respectfully dissent from the Court's judgment sustaining the statute.

***210** I

Voting-rights cases raise two competing interests, the one side being the fundamental right to vote. The Judiciary is obliged to train a skeptical eye on any qualification of that right….

As against the unfettered right, however, lies the "[c]ommon sense, as well as constitutional law ... that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick* ("Election laws will invariably impose some burden upon individual voters").

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

"A court considering [such] a challenge ... must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth ***211** Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Id.,* at 434 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983)).

The lead opinion does not disavow these basic principles. But I think it does not insist enough on the hard facts that our standard of review demands.

II

A

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive,[FN4] witness the fact that the BMV ***213** has far fewer license branches in each county than there are voting precincts.

> FN4....It is one thing (and a commendable thing) for the State to make absentee voting available to the elderly and disabled; but it is quite another to suggest that, because the more convenient but less reliable absentee ballot is available, the State may freely deprive the elderly and disabled of the option of voting in person.

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably ***214** serious for many of the individuals who lack photo identification. They almost certainly will not own cars, and public transportation in Indiana is fairly limited….

Although making voters travel farther than what is convenient for most and possible for some does not amount to a "severe" burden under *Burdick,* that is no reason to ig-

nore the burden altogether. It translates into an obvious economic cost (whether in worktime lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID.

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

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

B

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

The law allows these voters who lack the necessary ID to sign the pollbook and cast a provisional ballot. As the lead opinion recognizes, though, that is only the first step; to have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an ***217** ID at that point)….Forcing these people to travel to the county seat every time they try to vote is particularly onerous for the reason noted already, that most counties in Indiana either lack public transportation or offer only limited coverage.

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

C

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

[W]e may accept th[e district] court's rough calculation that 43,000 voting-age residents lack the kind of identification card required by Indiana's law. ***222** [This] is clearly strong enough to prompt more than a cursory examination of the State's asserted interests. And the fact that Indiana's photo identification requirement is one of the most restrictive in the country, FN26 makes a critical examination of the ***223** State's claims all the more in order.

> FN26. Unlike the Help America Vote Act of 2002, which generally requires proof of identification but allows for a variety of documents to qualify, Indiana accepts only limited forms of federally issued or state-issued photo identification, and does not allow individuals lacking the required identification to cast a regular ballot at the polls. Only one other State, Georgia, currently restricts voters to the narrow forms of government-issued photo identification.…All other States that require identification at the polls either allow voters to identify themselves using a variety of documents, or allow voters lacking identification to cast a regular ballot upon signing an affidavit (or providing additional identifying information).

III

Because the lead opinion finds only “limited” burdens on the right to vote, it avoids a hard look at the State's claimed interests. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment….

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

A

….1

There is no denying the abstract importance, the compelling nature, of combating voter fraud. But it takes several steps to get beyond the level of abstraction here.

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot fraud,

which (unlike in-person voter impersonation) is a documented problem in Indiana; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot stuffing, ballot miscounting, voter ***226** intimidation, or any other type of corruption on the part of officials administering elections. See Brief for Brennan Center for Justice et al. as *Amici Curiae* 7.

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. This absence of support is consistent with the experience of several veteran poll watchers in Indiana, each of whom submitted testimony in the District Court that he had never witnessed an instance of attempted voter impersonation fraud at the polls. *Ibid.* It is also consistent with the dearth of evidence of in-person voter impersonation in any other part of the country. [S]ee also Brief for Brennan Center for Justice, *supra,* at 11–25 (demonstrating that "the national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the 'problem' of voter impersonation is not a real problem at all").

The State responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to detect.***227** But this is like saying the "man who wasn't there" is hard to spot....

….It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few ***228** who may commit it. If an imposter gets caught, he is subject to severe criminal penalties….And while there may be greater incentives for organized groups to engage in broad-gauged in-person***229** voter impersonation fraud, it is also far more difficult to conceal larger enterprises of this sort. The State's argument about the difficulty of detecting the fraud lacks real force.

2

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

For that matter, the deterrence argument can do only so much work, since photo

identification is itself hardly a failsafe against impersonation….

Despite all this, I will readily stipulate that a State has an interest in responding to the risk (however small) of in-person voter impersonation. I reach this conclusion, like others accepted by the Court, because " '[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.' But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind), and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.[FN32]

FN32. On such flimsy evidence of fraud, it would also ignore the lessons of history to grant the State's interest more than modest weight, as the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules….

***231** 3

The antifraud rationale is open to skepticism on one further ground, what *Burdick* spoke of as an assessment of the degree of necessity for the State's particular course of action. Two points deserve attention, the first being that the State has not even tried to justify its decision to implement the photo identification requirement immediately on passage of the new law. A phase-in period would have given the State time to distribute its newly designed licenses, and to make a genuine effort to get them to individuals in need, and a period for transition is exactly what the Commission on Federal Election Reform, headed by former President Carter and former Secretary of State Baker, recommended in its report….

What is left of the State's claim must be downgraded further for one final reason: regardless of the interest the State may have in adopting a photo identification requirement as a general matter, that interest in no way necessitates the particular burdens the Voter ID Law imposes on poor people and religious objectors….Nothing about the State's interest in fighting voter fraud justifies this requirement of a postelection trip to the county seat instead of some verification process at the polling places.

B

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

***234** The lead opinion agrees with the State that "the inflation of its voter rolls provides further support for its enactment of" the Voter ID Law.

….The State is simply trying to take advantage of its own wrong: if it is true that the

State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating; it shows that the State has no justifiable need to burden the right to vote as it does, and it suggests that the State is not as serious about combating fraud as it claims to be.[FN34]

***235** The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The...State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls.

It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence. The Court has, for example, recognized that fighting perceptions of political corruption stemming from large political contributions is a legitimate and substantial state interest, underlying not only campaign finance laws, but bribery and antigratuity statutes as well. [But i]t is simply not plausible to assume here, with no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless "inherent" in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls.

***236** C

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

If more were needed to condemn this law, our own precedent would provide it, for the calculation revealed in the Indiana statute crosses a line when it targets the poor and the weak. If the Court's decision in [*Harper*] stands for anything, it is that being poor has nothing to do with being qualified to vote. The State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of ***237** every election, likewise translate into unjustified economic burdens uncomfortably close to the outright $1.50 fee we struck down 42 years ago. Like that fee, the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer

residents from exercising the franchise.

* * *

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

Justice BREYER, dissenting.

Indiana's statute requires registered voters to present photo identification at the polls. It imposes a burden upon some voters, but it does so in order to prevent fraud, to build confidence in the voting system, and thereby to maintain the integrity of the voting process. In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)." *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402 (2000) (BREYER, J., concurring). Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.

Like Justice STEVENS, I give weight to the fact that a national commission, chaired by former President Jimmy ***238** Carter and former Secretary of State James Baker, studied the issue and recommended that States should require voter photo IDs…. I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* prohibit Indiana from enacting a photo ID requirement. Were I also to believe, as Justice STEVENS believes, that the burden imposed by the Indiana statute on eligible voters who lack photo IDs is indeterminate "on the basis of the record that has been made in this litigation," or were I to believe, as Justice SCALIA believes, that the burden the statute imposes is "minimal" or "justified,", then I too would reject the petitioners' facial attack, primarily for the reasons set forth in Part II of the lead opinion.

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

For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to ***239** travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. For another, many of these individuals may be uncertain about how to obtain

the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50 (less than $10 today, inflation adjusted). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election*.

By way of contrast, two other States—Florida and Georgia—have put into practice photo ID requirements significantly less restrictive than Indiana's. Under the Florida law, the range of permissible forms of photo ID is substantially greater than in Indiana….

Georgia restricts voters to a more limited list of acceptable photo IDs than does Florida, but accepts in addition to proof of voter registration a broader range of underlying documentation***240** than does ****1645** Indiana. Moreover….[w]hile Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, in Georgia *any* voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so. Finally, neither Georgia nor Florida insists, as Indiana does, that indigent voters travel each election cycle to potentially distant places for the purposes of signing an indigency affidavit.

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter–Baker Commission recommended nationwide. Nor is there any reason to think that there are proportionately fewer such voters in Indiana than elsewhere in the country[;] I need not determine the constitutionality of Florida's or Georgia's requirements (matters not before us), in order to conclude that Indiana's requirement imposes a significantly harsher, unjustified burden.

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