

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   WILLIAM CRAWFORD, ET AL.,                                 :

4                                 Petitioners                                 :

5                                 v.   :   No. 07-21

6   MARION COUNTY ELECTION   :

7   BOARD, ET AL.;   :

8   and   :

9   INDIANA DEMOCRATIC PARTY,   :

10   ET AL.,   :

11                                 Petitioners                                 :

12                                 v.   :   No. 07-25

13   TODD ROKITA, INDIANA   :

14   SECRETARY OF STATE, ET AL.   :

15   - - - - - x

16   Washington, D.C.

17   Wednesday, January 9, 2008

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

21   APPEARANCES:

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

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

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

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1 P R O C E E D I N G S

2 (10:04 a.m.)

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

7 Mr. Smith.

8 ORAL ARGUMENT OF PAUL M. SMITH

9 ON BEHALF OF THE PETITIONERS

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

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

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

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

7 JUSTICE SCALIA: Courts below are sometimes  
8 wrong.

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

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

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

1 associational standing.

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

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

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

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

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

1 Democratic Party their representative?

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

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

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

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

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

1 unconstitutional statute in that case as well.

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

4 MR. SMITH: Well, Your Honor --

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 JUSTICE GINSBURG: Mr. Smith --

13 JUSTICE KENNEDY: Your answer is no.

14 MR. SMITH: Yes, Your Honor.

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

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

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

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

6                 MR. SMITH: Yes, Your Honor.

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

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

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

18                MR. SMITH: Excuse me, Your Honor?

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Mr. Smith.

9 MR. SMITH: So sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. SMITH: The question is --

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

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

22 JUSTICE SCALIA: I'd say likely.

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

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

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

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

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

21 MR. SMITH: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

25 CHIEF JUSTICE ROBERTS: They help you get

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SMITH: It is obviously for each person

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

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

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

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

20 MR. SMITH: Right.

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

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

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

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

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

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

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

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

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

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

16                   Mr. Fisher.

17                   ORAL ARGUMENT OF THOMAS M. FISHER

18                   ON BEHALF OF THE RESPONDENTS

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

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

25                   JUSTICE SOUTER: I take it you accept the

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: You agree that if you're

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

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

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

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

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

17 MR. FISHER: Right.

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

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

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

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

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

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

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

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

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

14 MR. FISHER: Right.

15 JUSTICE SOUTER: Okay.

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

18 MR. FISHER: No.

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

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

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

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

6 MR. FISHER: I should hope not.

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

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

11 MR. FISHER: That's right.

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

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

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

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

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

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

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

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

22 MR. FISHER: I'm sorry.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE STEVENS: Is it the policy to have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. FISHER: Well --

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

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

1     what we have ended up with.

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

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

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

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

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

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

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

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

25                  JUSTICE SOUTER: It's not a legitimate

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

5 MR. FISHER: No, not at all.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

22           (Laughter.)

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

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

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

15 MR. FISHER: Thank you.

16 CHIEF JUSTICE ROBERTS: General Clement.

17 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

18 ON BEHALF OF THE UNITED STATES,

19 AS AMICUS CURIAE,

20 SUPPORTING THE RESPONDENTS

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

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

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

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

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

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

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

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

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

7 JUSTICE GINSBURG: But I'm --

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

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

12 GENERAL CLEMENT: Sure.

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

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

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

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

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

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

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

6 JUSTICE SOUTER: That would be a --

7 GENERAL CLEMENT: -- because --

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

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

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

17 GENERAL CLEMENT: What's that?

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

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

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



1 -- wherever the county office is and --

2 GENERAL CLEMENT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 GENERAL CLEMENT: You know, it may be,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 REBUTTAL ARGUMENT OF PAUL M. SMITH

21 ON BEHALF OF THE PETITIONERS

22 MR. SMITH: Thank you, Your Honor.

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

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

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

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

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

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

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

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

7                   MR. SMITH:   Well, Your Honor --

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

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

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

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



1 election overall.

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

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

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

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

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

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

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

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

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

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

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

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

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

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<b>A</b>				
<b>ab</b> 55:18	<b>addition</b> 10:4	35:9,25	41:5	<b>arguments</b> 23:3
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