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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

|    |                            |   |                               |
|----|----------------------------|---|-------------------------------|
| 16 | Maria M. Gonzalez, et al., | ) | CV 06-1268-PHX-ROS (Lead)     |
| 17 |                            | ) | CV 06-1362-PHX-ROS            |
| 18 | Plaintiffs,                | ) | CV 06-1575-PHX-ROS            |
| 19 | vs.                        | ) | (CONSOLIDATED)                |
| 20 | State of Arizona, et al.,  | ) | <b>ITCA PLAINTIFFS' BRIEF</b> |
| 21 |                            | ) | <b>REGARDING CRAWFORD v.</b>  |
| 22 | Defendants.                | ) | <b>MARION COUNTY ELECTION</b> |
|    |                            | ) | <b>BOARD</b>                  |

23 The Court has directed the parties to brief the impact of the Supreme Court's  
24 decision in *Crawford v. Marion County Election Board*, Nos. 07-21 and 07-25,  
25 reported at 2008 U.S. LEXIS 3846, 76 U.S.L.W. 4242 (U.S., April 28, 2008).  
26 *Crawford* was decided as a pre-enforcement facial challenge to an election-day photo-  
27 identification requirement, based upon an alleged violation of the fundamental right to  
28

1 vote under the Fourteenth Amendment: “[T]he evidence in the record is not sufficient  
2 to support a facial attack on the validity of the entire statute, and [we] thus affirm.”  
3 *Crawford*, slip op. at 5.

4 As discussed below, some constitutional issues in this case have substantial  
5 overlap with those in *Crawford*. (See ITCA Compl. ¶¶ 27-35, 40-53, 62-63.) The  
6 claims in this case that the election-day voter identification requirement places an  
7 undue burden upon the fundamental right to vote are generally comparable, although  
8 the identification requirements themselves differ in significant ways.

9 In the context of a pre-enforcement challenge the *Crawford* court was limited  
10 to considering predicted effects. On the other hand, this case is post-enforcement, and  
11 so the Court will be in the very different position of being able to examine the effects  
12 of the challenged procedures based upon the implementation of Proposition 200 in the  
13 2006 election cycle as well as in the 2008 Presidential primary and several municipal  
14 elections. Here, the Defendants have produced rejected voter registration applications  
15 for over 30,000 individuals, and over 4,000 uncounted conditional provisional ballots  
16 resulting from Proposition 200. While this Court might conclude from the record that  
17 Proposition 200 is unconstitutional on its face, it could also find Proposition 200  
18 unconstitutional as applied to particular classes of citizens. As the Court’s opinion in  
19 *Crawford* specifically noted, election identification procedures may place special  
20 burdens on certain classes of voters, such as the elderly or poor. *Crawford*, slip op. at  
21 15-16.

22 *Crawford* involved a law that imposed a new requirement for in-person voters  
23 to provide government-issued photo identification, one form of which, the Supreme  
24 Court explicitly noted, was provided free of charge. In this case, Proposition 200  
25 contains no requirement that free election-day identification be made available to  
26 anyone. Nor does Proposition 200 provide an indigency-based provisional ballot  
27 procedure, as was contained in the Indiana law. The constitutional challenge in this  
28 case also includes the proof of citizenship requirement contained in Proposition 200,

1 for which no counterpart existed in the *Crawford* case. And while the Supreme Court  
2 was presented only with claims invoking the fundamental right to vote in *Crawford*,  
3 this case includes claims under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.  
4 (See ITCA Compl. ¶¶ 75-80.)

5 For these reasons, and for the reasons discussed below, the decision in  
6 *Crawford* was significant but did not vitiate any of the Plaintiffs' claims in this case.  
7 Indeed, the *Crawford* decision will reinforce the need for the Court to recognize the  
8 burdens Proposition 200 has placed upon the right to vote in Arizona.

### 9 I. The *Crawford* Decision

10 *Crawford* was a divided opinion. The lead opinion for the Court was written  
11 by Justice Stevens, who was joined by Chief Justice Roberts and Justice Kennedy.  
12 Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment but  
13 differed markedly on the standard of review. Justice Souter, joined by Justice  
14 Ginsburg, dissented; Justice Breyer dissented separately.

15 Justice Stevens' opinion traced a line of Equal Protection cases from *Harper v.*  
16 *Virginia State Board of Elections*, 383 U.S. 663 (1966) (affluence of voter an  
17 invidious electoral standard because it was irrelevant to voter's qualifications),  
18 through *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (court must identify and  
19 evaluate the interests put forward by the State as justifications for the burden imposed  
20 by challenged rule), *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (finding  
21 unjustified severe restriction on political party's access to ballot), and *Burdick v.*  
22 *Takushi*, 504 U.S. 428 (1992) (asserted injury to the right to vote to be weighed  
23 against justifications for the burden imposed). *Crawford*, slip op. at 5-7. Justice  
24 Stevens cast the legal standard as a flexible balancing of the state's interests with the  
25 burdens imposed:

26 In neither *Norman* nor *Burdick* did we identify any litmus test for  
27 measuring the severity of a burden that a state law imposes on a political  
28 party, an individual voter, or a discrete class of voters. However slight  
that burden may appear, as *Harper* demonstrates, it must be justified by

1 relevant and legitimate state interests “sufficiently weighty to justify the  
2 limitation.”

3 *Id.* at 7 (citing *Norman*, 502 U.S. at 288-89).

4  
5 In reviewing the State’s interests in the challenged law, Justice Stevens  
6 credited Indiana with a general interest in protecting the integrity and reliability of the  
7 electoral process by means of deterring and detecting voter fraud, participating in a  
8 nationwide effort to improve and modernize election procedures (under the NVRA  
9 and HAVA), and preventing fraudulent votes from being cast in the names of  
10 numerous ineligible voters who remained on the State’s voter rolls; the State was also  
11 credited with an interest in safeguarding voter confidence. *Id.* at 7-10. The existence  
12 of a strong general interest in preventing vote fraud was clearly recognized:

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

20 *Id.* at 12.

21 In assessing the burdens, Justice Stevens began by stressing the lack of direct  
22 financial burden under the Indiana law:

23 The burdens that are relevant to the issue before us are those imposed on  
24 persons who are eligible to vote but do not possess a current photo  
25 identification that complies with the requirements of SEA 483. The fact  
26 that most voters already possess a valid driver’s license, or some other  
27 form of acceptable identification, would not save the statute under our  
28 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

1 substantial burden on the right to vote, or even represent a significant  
2 increase over the usual burdens of voting.

3 *Id.* at 14-15. Justice Stevens also recognized, however, that:

4 [A] somewhat heavier burden may be placed on a limited number of  
5 persons. They include elderly persons born out-of-state, who may have  
6 difficulty obtaining a birth certificate; persons who because of economic  
7 or other personal limitations may find it difficult either to secure a copy  
8 of their birth certificate or to assemble the other required documentation  
9 to obtain a state-issued identification; homeless persons; and persons  
10 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.

11 *Id.* at 15-16.

12 In ultimately weighing the State's interests against the prospective burdens,  
13 Justice Stevens found that "on the basis of the evidence in the record it is not possible  
14 to quantify either the magnitude of the burden on this narrow class of voters or the  
15 portion of the burden imposed on them that is fully justified." *Id.* at 17. Justice  
16 Stevens concluded that the challenged statute's broad application to all Indiana voters  
17 would impose only a limited burden, that the record did not show the challenged  
18 statute to impose excessively burdensome requirements on any class of voters, and  
19 that because a facial challenge must fail where the statute has a plainly legitimate  
20 sweep, the State's precise interests were sufficient to defeat the facial challenge  
21 before the Court. *Id.* at 17-19.

22 Justice Scalia's concurrence agreed that the Indiana law was not  
23 unconstitutional but argued that the "petitioners' premise that the voter-identification  
24 law 'may have imposed a special burden on' some voters . . . is irrelevant and that the  
25 law 'may have imposed a special burden on' some voters . . . is irrelevant and that the  
26 law 'may have imposed a special burden on' some voters . . . is irrelevant and that the  
27 law 'may have imposed a special burden on' some voters . . . is irrelevant and that the  
28 law 'may have imposed a special burden on' some voters . . . is irrelevant and that the

1 burden at issue is minimal and justified.” *Id.* at 1 (Scalia, J. concurring). Justice  
2 Scalia’s concurrence saw the prospect that the Indiana law would “affect[] different  
3 voters differently” as “no more than the different *impacts* of the single burden that the  
4 law uniformly imposes on all voters.” *Id.* at 2. Justice Scalia’s concurrence read  
5 *Burdick* as requiring a strict two-tiered analysis with “application of a deferential  
6 ‘important regulatory interests’ standard for nonsevere, nondiscriminatory  
7 restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.”  
8 *Id.* at 1-2 (citing *Burdick*, 504 U.S. at 433-34) (internal quotation marks omitted in  
9 original).

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13 Justice Souter’s dissent, joined by Justice Ginsburg, would have found the  
14 challenged law unconstitutional.

15 Indiana’s “Voter ID Law” threatens to impose nontrivial burdens on the  
16 voting right of tens of thousands of the State’s citizens, and a significant  
17 percentage of those individuals are likely to be deterred from voting.  
18 The statute is unconstitutional under the balancing standard of *Burdick*  
19 *v. Takushi*, 504 U.S. 428 (1992): a State may not burden the right to  
20 vote merely by invoking abstract interests, be they legitimate, or even  
21 compelling, but must make a particular, factual showing that threats to  
22 its interests outweigh the particular impediments it has imposed. The  
23 State has made no such justification here, and as to some aspects of its  
24 law, it has hardly even tried.

25  
26  
27 *Id.* at 1 (Souter, J. dissenting) (internal references omitted).

28 Justice Breyer’s dissent argued that the legal standard should 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).” *Id.* (Breyer, J. dissenting) (internal citations omitted).  
Under this standard Justice Breyer would have found the statute unconstitutional on

1 the grounds that it imposed “a disproportionate burden upon those eligible voters who  
2 lack a driver’s license or other statutorily valid form of photo ID.” *Id.* at 1-2.

## 3 **II. Discussion**

4 *Crawford* was the Supreme Court’s most significant decision involving a  
5 challenge to election procedures under the fundamental right to vote since *Burdick*,  
6 504 U.S. 428. Three major aspects of the *Crawford* decision relate to this case: (1)  
7 the standard of review; (2) the nature of the State’s interest in preventing voter fraud;  
8 and (3) the importance of remediating measures. The Court’s discussion of standing  
9 was quite limited but does provide some important additional guidance.

10 Perhaps the most significant aspect of *Crawford* was the fact that a majority of  
11 the Court -- the three-member lead opinion by Justice Stevens and the dissent by  
12 Justices Souter and Ginsburg -- accepted a balancing analysis under *Burdick* as the  
13 applicable legal standard. Justice Breyer as well would have followed a flexible  
14 balancing analysis. Thus, six members of the Court rejected the strict two-tiered  
15 approach set out in Justice Scalia’s concurrence. *Crawford* therefore appears to have  
16 decided that election laws that “severely” burden the right to vote remain subject to  
17 strict scrutiny, while laws that place lesser general burdens on the right to vote  
18 nonetheless may be unconstitutional, particularly as they are applied to discrete  
19 groups upon whom they place a special burden.

20 This aspect of the *Crawford* decision is immediately applicable to the  
21 plaintiffs’ claims in this case that Proposition 200 violates the fundamental  
22 right to vote under the Fourteenth Amendment. In evaluating these claims,  
23 *Crawford* will require the Court to determine, if it finds that Proposition 200  
24 imposes a burden, not only whether that burden is “severe”, but also the extent  
25 to which that burden weighs more heavily on one or more groups of citizens,  
26 and whether the State has identified relevant and legitimate state interests  
27 “sufficiently weighty to justify the limitation.” *Id.* at 7 (citing *Norman*, 502  
28 U.S. at 288-89). In addition, Justice Stevens’ discussion of *Harper v. Virginia*

1 may have added importance in this case. Justice Stevens' opinion read *Harper*  
2 as holding that “[a]lthough the State’s justification for the tax was rational, it  
3 was invidious because it was irrelevant to the voter’s qualifications. . . . Thus,  
4 under the standard applied in *Harper*, even rational restrictions on the right to  
5 vote are invidious if they are unrelated to voter qualifications.” *Id.* at 5-6. If  
6 the Court finds in this case that certain requirements of Proposition 200, such  
7 as, for example, providing a driver’s license number at the time of voter  
8 registration, do not *in fact* establish citizenship, then the Court may be required  
9 to find those requirements “invidious” in nature.

10 With regard to Indiana’s interests, the *Crawford* Court recognized a broad  
11 interest in preventing voter impersonation fraud -- notwithstanding the absence of any  
12 record of it having occurred in the State -- based upon the documented occurrence of  
13 other types of fraud, and the resultant possibility that voter impersonation *might* be  
14 attempted. *Id.* at 11-12. This interest was sufficient to defeat the pre-enforcement  
15 facial challenge that was before the Court in *Crawford*, but as Justice Stevens’  
16 opinion noted, the Court’s decision was based upon the limited record before it. In  
17 any event, the *Crawford* Court’s discussion of this interest in preventing voter fraud  
18 was in essence a more developed version of the Court’s recognition in the earlier  
19 appeal of the instant case of “the State’s compelling interest in preventing voter  
20 fraud.” *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*). Thus, it does not appear  
21 to represent a fundamental change in the law of the case.

22 Conversely, the *Crawford* Court repeatedly referenced the fact that Indiana  
23 provided a no-cost photo identification. This removes any doubt that the State’s  
24 burden in this case must include justifying the failure of Proposition 200 to provide  
25 any type of no-cost alternative for either its proof of citizenship requirement or  
26 election-day identification requirement.

27 One other issue of potential importance to this case includes the Supreme  
28 Court’s decision that the Democratic Party had standing to maintain the action. In

1 finding standing, Justice Stevens appears to have accepted as sufficient to demonstrate  
2 standing the Court of Appeals' inference that the motivation for the suit was "that the  
3 law may require the Democratic Party and the other organizational plaintiffs to work  
4 harder to get every last one of their supporters to the polls." *Crawford*, slip op. at 4-5  
5 (quoting *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007)).  
6 "We also agree with the unanimous view of those [Court of Appeals] judges that the  
7 Democrats have standing to challenge the validity of SEA 483 and that there is no  
8 need to decide whether the other petitioners also have standing." *Id.* at 5 n.7. From  
9 this it is clear that groups engaged in fostering electoral participation and mobilization  
10 may have standing to challenge the adoption of new election procedures on the  
11 grounds that they will be forced to "work harder" to achieve their objectives.

12 DATED this 13th day of May, 2008.

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