NOS. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, et al.,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, et al.,
Respondents,
&
INDIANA DEMOCRATIC PARTY, et al.,
Petitioners,
v.
TODD ROKITA, INDIANA SECRETARY OF STATE, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF PETITIONERS

MICHAEL C. CAMUÑEZ
GRANT B. GELBERG
JON MONSON
DOMINIC FERULLO
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

MATTHEW M. SHORS
(Counsel of Record)
KATHRYN E. KOMP*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Wisconsin; supervised by principals of the firm.*

Attorneys for Amicus Curiae
Additional Counsel Listed on Inside Cover

JOHN TRASVIÑA
CYNTHIA VALENZUELA
NINA PERALES
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512

Additional Counsel for Amicus Curiae

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS
(continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF has represented Latino and minority interests in voting and civil rights cases in the federal courts, including before this Court in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006). MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

Voter identification schemes such as the one at issue here substantially burden the rights of minority voters, including Latino voters. MALDEF thus agrees with petitioners that Indiana's voter identification statute unconstitutionally infringes upon the fundamental right to vote. We write separately, however, to bring to the Court's attention the existence of similar voter identification schemes, especially the one currently being challenged in Arizona, which are racially motivated and which substantially burden the voting rights of minority citizens, in order to illustrate why this Court should be especially skeptical of *any* voter identification law, in-

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[1] The parties have given their written consent to the filing of this brief. In accordance with Rule 37.6, counsel for *amicus curiae* state that no counsel for either party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

cluding Indiana's scheme.

MALDEF represents the lead plaintiffs in a separate lawsuit challenging the constitutionality of the Arizona Taxpayer and Citizen Protection Act, a 2004 voter initiative known as "Proposition 200." Under Proposition 200, Arizona residents, like the Indiana residents involved in this case, are required to provide specified proof of identification before voting at the polls on Election Day. *See* Ariz. Rev. Stat. Ann. § 16-579; *see generally Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). Proposition 200 shows that the substantial voting rights burdens imposed by voter identification schemes cannot be justified by any compelling state interest and should be rejected.

SUMMARY OF ARGUMENT

As the Latino and Native American experiences under Proposition 200 show, the application of strict scrutiny is necessary to ensure that voter identification schemes ostensibly based on the need to police voting fraud are not a subterfuge for outright discrimination. Like some prior laws limiting voting rights, *see Perry*, 126 S. Ct. at 2622, Proposition 200 was enacted amidst a racially–charged debate strongly suggesting that the statute was motivated by discriminatory animus—a suggestion that has yet to be countered by evidence of actual fraud to justify the law. *See infra* at 9-14.

Aside from the animus that drove its enactment, Proposition 200 also confirms that voter identification laws disproportionately burden poor and minority communities, placing bureaucratic obstacles before many individuals who are unlikely to overcome them and increasing the cost of voting for those who can least afford it. *See infra* at 4-9. Accordingly, and

contrary to the conclusion of the court of appeals in this case, state voter identification laws impose real—indeed, substantial—burdens on the voting rights of thousands of individuals. Those burdens cannot be justified by the asserted but wholly unproven need to combat voting fraud.

The striking similarities between voter identification laws and the poll taxes this Court rejected less than half a century ago demonstrate that identification requirements are unconstitutional regardless of the level of scrutiny the Court applies. Nevertheless, voter identification requirements should be subject to the same searching scrutiny this Court historically has applied to statutes that target the franchise.

Although voter identification schemes such as the Indiana law at issue here are unconstitutional generally, Proposition 200 itself demonstrates how some of these statutes can be particularly discriminatory and burdensome. Accordingly, even if this Court upholds the Indiana scheme, it should do so narrowly in order to permit lower courts to reject the discriminatory identification and registration schemes that exist in states such as Arizona.

ARGUMENT

I. The Voter Identification Requirements Adopted By Indiana And Other States Operate As Poll Taxes Targeted At Poor And Minority Voters.

A. Voter Identification Statutes Impose Significant Burdens On The Franchise.

This Court has long recognized that the Constitu-

tion "restrains the States from fixing voter qualifications which invidiously discriminate," *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966), and that "close constitutional scrutiny," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), must apply to laws restricting the right to vote. Although the specific provisions of existing voter identification laws vary from state to state, *see* Ind. Code § 3-11-8-25.1; Act of April 22, 2005 No. 53, § 59, 2005 Ga. Laws 295; Mo. Ann. Stat. § 115.427; Ariz. Rev. Stat. Ann. § 16-579, a common thread runs through these newly-established regimes: in order to vote, a citizen must overcome a series of financial or bureaucratic obstacles before casting a ballot on Election Day. Those financial and bureaucratic burdens fall most profoundly on many individuals who are least equipped to bear them. For these individuals, who are disproportionately low income and minority citizens, voter identification laws limit access to the polls, thereby disenfranchising a substantial number of otherwise eligible voters. Accordingly, these statutes serve as modern–day poll taxes that impermissibly condition the right to vote on the payment of money or the successful navigation of "onerous procedural requirements." *Harman v. Forssenius*, 380 U.S. 528, 541 (1965) (citation omitted).

Proposition 200, in particular, imposes a substantial burden on the rights of Arizonans to vote. The initiative was adopted in November 2004 based on assertions "that illegal immigration is causing economic hardship to th[e] state" and that "illegal immigrants have been given a safe haven in [Arizona]" in conflict with "federal immigration policy." Arizona 2004 Ballot Propositions: Proposition 200,

available at http://www.azsos.gov/election/2004/info/PubPamphlet/Sun_Sounds/english/prop200.htm. It requires individuals (1) to present "satisfactory evidence of United States' citizenship" in order to *register* to vote, and (2) to present specified forms of identification in order to vote at the polls. Arizona 2004 Ballot Propositions: Proposition 200 §§ 4, 5; *see* Ariz. Rev. Stat. Ann. §§ 16-166(F); 16-579(A); 46-140.01(A), (B). With respect to the latter requirement, Arizona electors must present one form of identification (typically an unexpired Arizona driver's license) that includes the elector's photograph, name, and address, or two "secondary" documents that bear the elector's name and address (but need not include a photograph), such as a utility bill and a bank statement. Ariz. Rev. Stat. Ann. § 16-579(A); Office of the Sec'y of State, Ariz. Sec'y of State Election Procedures Manual 113 ("Election Manual"), *available at* http://www.azsos.gov/election/Electronic_Voting_System/.[2]

In several important respects, Proposition 200 is even more restrictive than the Indiana law at issue here. First, unlike Indiana law, Arizona law does not exempt from coverage residents of nursing

[2] Acceptable secondary documents include: (1) a utility bill of the elector (for electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television), dated within ninety days of the date of the election; (2) a bank or credit union statement that is dated within ninety days of the date of the election; (3) a valid Arizona Vehicle Registration; (4) an Indian census card; (5) a property tax statement of the elector's residence; (6) a Tribal enrollment card or other form of tribal identification; (7) a vehicle insurance card; (8) a Recorder's Certificate; (9) a valid United States federal, state, or local government issued identification, including a voter registration card issued by the county recorder. Election Manual at 113–14.

homes or indigent electors—two segments of the population for whom the identification requirements are likely to be particularly burdensome. *Compare* Ariz. Rev. Stat. § 16-579(A); Election Manual at 113 (no exceptions to identification requirement), *with* Ind. Code §§ 3-10-1-7.2(e); 3-11-8-25.1(e) (dispensing with identification requirement for those who live and vote at a state-licensed care facility) *and* Ind. Code. §§ 3-10-1-7.2(d), 3-11-8-25.1(d), 3-11.7-5-2.5(c)(1) through (2) (allowing a voter to cast a provisional ballot and then return to execute an affidavit swearing that he is unable to obtain proof of identification due to indigence).

Second, although both Arizona and Indiana allow electors to cast provisional ballots and later return with identification, the Arizona scheme provides a significantly shorter grace period. *Compare* Ind. Code § 3-11.7-5-2.5(a) (giving voters ten days in which to appear before the circuit court clerk or county election board to present photo identification or execute affidavit explaining inability to do so on grounds of indigence or religious objection) *with* Election Manual at 120 (providing as little as three days to present approved identification to county recorder).[3] That distinction has important conse-

[3] Citing Ariz. Rev. Stat. Ann. § 16-584, the *Crawford* petitioners state that, if an Arizona voter lacks acceptable identification, she may cast a conditional provisional ballot and "it is the county recorder who is tasked with the duty of verifying the voter's eligibility by comparing his or her signature to the signature on the voter rolls, and no further action is therefore required of the voter." Brief of Petitioner William Crawford at 31-32 n.15. Eligibility review pursuant to § 16-584 occurs, however, only after the elector has provided the requisite identification. Ariz. Rev. Stat. Ann. § 16-579(A); Election Manual

quences for the voting rights of certain minority citizens. *See* The Eagleton Institute of Politics et al., *Report to the U.S. Election Assistance Commission on Best Practices to Improve Provisional Voting Pursuant to the Help America Vote Act of 2002, Public Law 107-252* 7 (June 28, 2006) ("States that provided more time to evaluate provisional ballots counted a greater proportion of those ballots.").

Indeed, Proposition 200 has already taken an immediate and substantial toll on voting rights in Arizona. For example, fourteen of the fifteen Arizona counties reported after the 2006 election that approximately 2,500 individuals went to polling stations but left without voting. David Kravets, *Judges Debate Arizona Voter ID Rule*, Associated Press, San Francisco (Jan. 8, 2007).[4] These results are unsurprising, given the tedious process residents must undertake to vote under Proposition 200. First, individuals who lack the requisite identification documents in advance of Election Day must pay anywhere from $10 to $380 to obtain them, depending on whether they seek a driver's license ($10-$25), a non-operating identification license ($12), *see* Ariz. Dep't of Transp., Frequently Asked Questions, http://www.azdot.gov/mvd/faqs/scripts/faqs.asp?secti

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at 115, 120. Accordingly, if the elector does not return after the election with identification, her conditional provisional ballot will not be counted. *Id.*

[4] As noted in *amicus*' statement of interest, litigation over Proposition 200 is ongoing, and, as a consequence, a record detailing the history and impact of that initiative is still being developed. As explained *infra*, Section III, therefore, *amicus* respectfully requests that this Court leave room for lower courts to invalidate the Arizona scheme, even if it concludes the Indiana scheme is constitutional.

on=dl#4 (last visited Nov. 9, 2007), or also require a birth certificate ($10), *see* Ariz. Dep't of Health Servs., *Birth Certificates: Applying for a Certified Copy of a Birth Certificate in Person*, http://www.azdhs.gov/vitalrcd/apply_birth_in_person.htm (last visited Nov. 9, 2007), a passport ($97), *see* U.S. Dep't of State, *Passport Fees*, http://travel.state.gov/passport/get/fees/fees_837.html (last visited Nov. 9, 2007), or a replacement naturalization certification (now $380), *see* U.S. Citizenship & Immigration Serv., Form N-565, *available at* www.uscis.gov/files/form/N-565.pdf, necessary to prove identity in order to obtain the license itself. As explained in greater detail below, such costs are both substantial and particularly burdensome on minorities, including Latino and Native American voters, who are among the poorest citizens in the state.

Second, the cost of these documents alone says nothing of the time and effort it takes to obtain them. To purchase a driver's license, one must travel to an office of the Arizona Motor Vehicle Division—a trip that can take several hours for those who live in one of Arizona's larger, rural counties, and may take an entire day for those who live within an Indian reservation. The statutory requirements are especially taxing on Arizona's Native American population, many of whom were born at home, do not drive, do not travel internationally, and, as a consequence, lack any driver's license or the birth certificate or passport which may be necessary to obtain one. *See* Ariz. Dep't of Transp., *Identification Requirements, Form 96-0155 R08/07*, *available at* http://mvd.azdot.gov/mvd/FormsandPub/mvd.asp (Search for "96-0155" in the "Form Number" search

box).

There is thus no serious question that the process of obtaining and paying for the required documentation "necessarily entails . . . a significant degree of advance planning by the voter before the election," placing a substantial burden on the right to vote. *Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes*, 506 F. Supp. 2d 598, 637 (D.N.M. 2007) (invalidating voter identification requirement adopted by City of Albuquerque); *cf. Harman*, 380 U.S. at 541 (outlawing "cumbersome procedure" individuals were required to navigate six months before the election). Moreover, the difficulties of obtaining and paying for those required documents are shouldered disproportionately by minority voters.

B. Voter Identification Laws Often Arise In The Context Of Racially-Charged Debates.

Whatever considerations may have motivated enactment of the Indiana statute at issue in this case, it is clear that other voter identification statutes have been unquestionably motivated by overt and impermissible racial animus. In Arizona, for example, although Proposition 200 was ostensibly designed to curb and penalize undocumented immigration, debate over the initiative revealed a broader, anti-Latino sentiment that drove its enactment. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (finding it "difficult to believe" that appellants had "seriously advanced" argument that popular initiative had no racial overtones where, "despite its facial neutrality[,] there [wa]s little doubt that the initiative was effectively drawn for racial purposes"). The statements made and actions

taken by the individuals who led the charge for Proposition 200, the corresponding racism of a concurrent congressional campaign, and the response of the Arizona public, as detailed in the local media, make clear that it was not anti-undocumented-immigrant, but rather anti-Latino, animus that drove the law. *See Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-197 (2003) ("[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative."); *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 268 (1977) (describing as "highly relevant" to the question of discriminatory intent the "legislative or administrative history" of an action, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports"). That animus is confirmed by the failure of states like Arizona to offer any evidence of the fraud claimed to justify such a significant burden on voting rights.

1. The Leaders Of Proposition 200 Exhibited Discriminatory Animus.

Illustrative of the discriminatory intent that has motivated many voting restrictions, *see Harman*, 380 U.S. at 543, the group that initiated and spearheaded the campaign to place Proposition 200 on the ballot, Protect Arizona Now ("PAN"), chose as its national adviser a self-described "separatist" who, upon her selection, explained to the Arizona media her belief that "each ethnic group is often happier with his own kind." *See* Ignacio Ibarra, *Prop. 200's Potential*

Impact Clear — As Mud, Arizona Daily Star (Oct. 17, 2004) *available at* http://www.amren.com/mtnews/archives/2004/10/prop_200as_pote.php; Yvonne Wingett, *Protect Arizona Now Adviser Denies Racism Charge*, The Arizona Republic (Aug. 7, 2004) *available at* http://www.azcentral.com/news/election/ballot/articles/0807protect-arizona07.html. PAN's in-state leaders did nothing to shy away from that sentiment. If anything, they embraced it. Chairman Kathy McKee, for example, publicly stated that it "ma[d]e [her] crazy" that "the election office spends [money] to print voter registration cards and ballots in Spanish." Horizonte Transcript, Interview by José Cárdenas with Ricardo Pimentel, Editorial Columnist for the Arizona Republic, in Phoenix Ariz. (Dec. 18, 2003), *available at* http://www.azpbs.org/horizonte/transcripts/2003/december/dec18_2003.html. In it its early stages, the PAN website suggested that the initiative was intended to prevent the destruction of American culture. *Id.*

That animus was by no means PAN's alone. On the contrary, the climate of the 2004 election was permeated by an anti-Latino sentiment. Joseph Sweeney, the 2004 congressional nominee for a major political party, campaigned for office by handing out fliers that called for the end of "cheap 'wetback' labor"—and the party did not officially respond to the slur. C.J. Karamargin, *County GOP Neutral on Sweeney, His Message*, Arizona Daily Star (Sept. 24, 2004). Local columnists who opposed Proposition 200 received hate mail using terms that "ma[de] clear that the hate is aimed at all people of Mexican descent, including native Arizonans whose roots . . .

go back many generations." Salomon R. Baldenegro, *Hispanic-Hating Sweeney Puts GOP in a Bind*, Tucson Citizen (Oct. 2, 2004) (describing mail referring to Mexican-Americans as "cockroaches" and criticizing "Hispanicks" [sic] for trying to "pass off the USA as a Hispanick [sic] . . . creation").[5]

Perhaps equally telling is that supporters of voter identification requirements, in Arizona and elsewhere, offered little else to justify such a drastic change in the law. In Arizona's official 2004 General Election Publicity Pamphlet, supporters of Proposition 200 claimed that the "initiative . . . strengthens the integrity of [Arizona's] election system by requiring proof of identification to vote." Ariz. Sec'y of State, *Ballot Propositions & Judicial Performance Review for the November 2, 2004, General Election* 46 ("Publicity Pamphlet"); *see* Ariz. Rev. Stat. Ann. § 19-123(A)(3). But the Proposition itself made no findings to that effect.

Likewise, although supporters of the Arizona initiative claimed that "[t]here is evidence of thousands of unverified names on [Arizona's] voter rolls," Publicity Pamphlet at 44, they identified no studies or other facts to support that allegation or other claims of fraud. This is most likely because there was sim-

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[5] A similar bias apparently motivated the chief sponsor of Georgia's voter identification law, who told the United States Department of Justice ("DOJ") that, if African Americans in her district "are not paid to vote, they don't go to the polls," and, if fewer African Americans voted as a result of the statute, it was only because the law would eliminate such fraud. Bob Kemper & Sonji Jacobs, *Voter ID Memo Stirs Tension: Sponsor of Disputed Georgia Legislation Told Feds That Blacks in Her District Only Vote if They Are Paid To Do So*, Atl. J. Const., Nov. 18, 2005, at A1.

ply no evidence to support the claim. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1361-62 and 1366 (N.D. Ga. 2005) (finding no evidence of fraud for in-person voting); *Weinschenk v. State*, 203 S.W.3d 201, 204-05 and 217 (Mo. banc 2006) (same); *Santillanes*, 506 F. Supp. 2d at 637 ("[T]here is no admissible evidence in the record that such voter impersonation fraud has occurred with any frequency in past municipal elections.").

Instead, the majority of statements made in support of Proposition 200 related to claimed negative effects of undocumented immigrants in Arizona. *See* Arizona 2004 Ballot Propositions: Proposition 200 § 2 ("This state further finds that illegal immigrants have been given a safe haven in this state . . . and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship."). Read most favorably, then, the Publicity Pamphlet indicates that supporters of the initiative sought to enact sweeping changes to Arizona's voting and registration requirements in an effort to remedy a non-existent problem.[6]

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[6] Indeed, if the architects of Proposition 200 truly were concerned with preventing fraud, it is strangely suspicious that they left untouched other statutory provisions that are even more vulnerable to supposed voter fraud. For example, Arizona law still allows any elector to submit her ballot at a polling place on Election Day without any identification so long as she (1) requested the ballot before the Saturday preceding the election; (2) provided with the request her date and state or county of birth, or "information that if compared to the voter registration information on file would confirm the identify of the elector," Ariz. Rev. Stat. Ann. § 16-542(A); and (3) attached a specified affidavit to her ballot. *See id.* §§ 16-541, 16-542(A), 16-

Although bad policy does not usually require invalidation of a state law, the absence of any evidence that Proposition 200 was needed to advance a state interest suggests that courts should look carefully at the proffered rationale for such a law. That is especially true given the backdrop of the inflammatory debate that surrounded Proposition 200; the focus of the initiative on immigrants who (in Arizona, at least) are overwhelmingly Latino; Arizona's long history of discrimination against Latino voters, *infra* at 14-17; and the disparate impact the adopted initiative is likely to cause, *see infra* at 17-22. As this Court has explained, when results are "very difficult to explain on nonracial grounds," a serious disparate impact may "for all practical purposes demonstrate unconstitutionality." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

2. Voter Identification Requirements Are The Latest In A Long Line of Discriminatory Measures That Have Been Adopted To Limit The Minority Vote.

Unfortunately, the anti-Latino animus that drove Proposition 200 is consistent with a pattern of dis-

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547(C); Election Manual at 118. Although these early voting procedures impose a somewhat more "cumbersome procedure," *Harman*, 380 U.S. at 542, that many citizens, including non-English speaking Latino citizens, will be unable to navigate, they plainly enable anyone intent enough upon influencing the election as to commit criminal fraud to do so. In short, the continued availability of early voting, which is unlikely to aid the average citizen, suggests that the individuals who spearheaded the initiative were not intent upon eliminating opportunities for fraud but upon burdening the right to vote.

crimination against Latinos and other racial minorities that has characterized Arizona politics since the 1870s, *see* David Berman, *Arizona Politics and Government: The Question for Autonomy, Democracy, and Development* 35 (University of Nebraska Press 1998) ("Arizona Politics"), and is by no means unfamiliar to other states. *See, e.g.*, *Perry*, 126 S. Ct. at 2621-22 (discussing discrimination in Texas); Sam Spital, Book Note, 39 Harv. C.R.-C.L. L. Rev. 287, 287 (2004) (reviewing Laughlin McDonald, (2003)) (discussing the use of poll taxes, "character" exams, and a "literacy" test, selectively enforced, to exclude African Americans from the polls in Georgia).[7]

In 1912, the first Arizona Legislature adopted a law requiring that each voter be literate in English—limiting what was referred to as "'the ignorant Mexican vote.'" Arizona Politics at 14, 67 & n.90 (quoting Letter from M. M. Kelly, editor and publisher of *The Copper Era*, to Reese Ling (Aug. 3, 1912) (on file in the Reese Ling Collection)). "[R]egistrars applied the test to reduce the ability of blacks, Indians, and Hispanics to register to vote" well into the 1960s. *Id.* at 67.

During the mid-to-late 1960s, "[i]ntimidation of Hispanic, Native American, and African American voters at the polls was common in Arizona," Adela de la Torre, *Arizona Redistricting: Issues Surround-*

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[7] Arizona's history of discrimination is evidenced by the fact that it is only one of nine jurisdictions where the entire state, as opposed to specific counties, is covered by Section 5 of the Voting Rights Act. U.S. Department of Justice, Civil Rights Division, Voting Rights Section, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Nov. 9, 2007); *see* 42 U.S.C. § 1973c.

ing Hispanic Voter Representation, 6 Tex. Hisp. J.L. & Pol'y 163, 166 (2001). Congress found in 1969 that only two of eight Arizona counties "with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (citing *Hearing on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 409 (1969-1970)).

Since the adoption of the Arizona Constitution, Arizona lawmakers have also attempted in many cases to draw voting districts that limit the impact of the minority vote. *See* Berman, *supra*, at 93 (noting that the framers of the State constitution initially apportioned seats based on each county's total vote, not total population, which resulted in substantial dilution in counties with larger non-voting populations, such as Native Americans and Latinos). That gerrymandering has continued in recent years. Since 1980, the United States Department of Justice ("DOJ") has objected to four of Arizona's redistricting plans on the ground that they would have had a discriminatory impact on minority voters. *See* James Thomas Tucker & Rodolfo Espino, *Voting Rights in Arizona 1982-2006* 4 (March 2006) (describing one plan in the 1980s, two in the 1990s, and one in 2002) ("*Voting Rights in Arizona*"); *see* Letter from John R. Dunne, U.S. Assistant Attorney General, Civil Rights Division, to Lisa T. Hauser, Assistant Attorney General, Phoenix, Arizona (Aug. 12, 1992) (quoted in de la Torre, *supra*, at 166-67) (objecting to the State's proposed redistricting plan on the ground that "[t]he state ha[d] failed . . . [to] show[] that the

plan was not motivated, in part, by a purpose of diluting minority strength in southern Arizona")).

Since 1982, the DOJ has interposed objections to voting changes proposed by seven of Arizona's fifteen counties. *Voting Rights in Arizona* at 4. In 1985, for example, the Attorney General interposed a Section 5 objection to proposed voting changes in Apache County that eliminated polling places on reservation land and denied absentee voting opportunities to Native American voters, recognizing that the voting changes had a "clear discriminatory purpose and effect." *Id.* at 45; *see* 42 U.S.C. § 1973c. As recently as 2002, moreover, the DOJ "identified significant deficiencies in the availability and quality of language assistance offered to American Indian voters in Apache County." *Voting Rights in Arizona* at 17.

3. Voter Identification Statutes Like Proposition 200 Have A Disparate Impact On Low Income And Latino Communities.

Although not dispositive alone, the disparate impact that Proposition 200 has already had on the Latino community is further evidence of the discriminatory animus that motivates voter identification statutes like the initiative. *See Washington*, 426 U.S. at 253 (Stewart, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.").

For example, a recent study found that, among Indiana registered voters, a six–point gap exists in the percentage of White residents, compared to Afri-

can American residents, who have access to valid identification. Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 10 (Wash. Inst. for the Study of Ethnicity and Race, Working Paper), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf. When considering the entire eligible voting population in Indiana, the spread swelled to 11.5%. *Id.* at 10-11. In addition, the study reported that more than 25% of registered voters in Indiana who make less than $40,000 annually lack a driver's license. *Id.* at 17.

National studies generally confirm that minority voters are less likely to have the identification documents required by the voter identification scheme at issue here. According to the Task Force on the Federal Election System To Assure Pride and Confidence in the Electoral Process (also known as the "Carter-Baker Commission"), an estimated 6-10% of the United States' voting population—some eleven to twenty million individuals nationwide—lack photo identification in the form of a driver's license or state-issued, non-driver's identification card. Task Force on the Fed. Election Sys., *To Assure Pride and Confidence in the Electoral Process: Task Force Reports to Accompany the Report of the National Commission on Election Reform* ch. 6 (2001), *available at* http://www.millercenter.virginia.edu/programs/natl_commisions/commisionn_final_report/task_force&uscore;report/task_force_complete.pdf. Contrary to the court of appeals' suggestion in this case, therefore, millions of Americans manage to "maneuver in today's America without [the type of] photo ID" cards

required by the voter identification laws. *See Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007).

Another study, conducted at the University of Wisconsin-Milwaukee, found that 78% of African American males in Milwaukee County lacked a valid driver's license. *See* John Pawasarat, The Driver License Status of the Voting Age Population in Wisconsin 1 (2005), *available at* http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (Driver License Study). Statewide, 55% of African American men, 49% of African American women, 46% of Latino men, and 59% of Latina women lacked valid licenses, compared to only 20% of Anglo men and 19% of Anglo women. *See id*; *see also Common Cause/Georgia*, 406 F. Supp. 2d at 1342 (finding that 17.7% of African American households in Georgia had no access to a vehicle—a proxy for possession of a license—as compared to 4.4% of Anglo households). According to a 1994 investigation by the DOJ, the discrepancy in Louisiana is even greater: Caucasian residents of that state were four to five times more likely than African American residents to have government-sanctioned photo identification. *See* Letter from David L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Sheri Marcus Morris, Louisiana Assistant Attorney General (Nov. 21, 1994).

The available evidence also shows that, in jurisdictions in which voters may sign an affidavit in lieu of presenting identification, minority citizens are far more likely to require use of an affidavit than other voters. In South Dakota, for example, voters in predominantly Native American counties were two to

eight times more likely to use an affidavit than voters statewide. *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 662 & n.154 (2007) (affidavits were used by 2% of voters statewide and by 4%-16% of voters in predominantly Native American counties); *see also* Letter from Neil Bradley, Associate Director, American Civil Liberties Union, to John Tanner, Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (April 14, 2006) (Florida study showed that African American voters in Hillsborough County were three times as likely as White non-Hispanic voters to use affidavits, in lieu of identification, to prove their identities at the precinct level and Hispanic voters were twice as likely to use affidavits).

Not only does the data demonstrate that voter identification laws disproportionately impact minority voters, it also suggests reasons why that disproportionate impact occurs. First, and most obviously, the costs associated with securing the documents required to obtain an acceptable form of identification have a disproportionate impact based on race. For example, on average, Latino Arizonans have a lower income and are more likely to live in poverty than Arizona residents generally. *See* U.S. Census 2006 Survey, table S0201, *available at* http://factfinder.census.gov/home/saff/main.html?_lang=en (Select "Arizona" from the "State" menu) (22.5% of Latino Arizonans, compared to 14.2% of the total State population, live in poverty, and per capita income for Latino Arizonans was $13,528 compared to $26,715 for the White non-Hispanic population). In fact, 8.9% of Latino Arizonans and an additional 18.1% of Native Americans in the

State live at less than 50% of the poverty line—meaning that, in 2006, approximately 157,000 Latino and 48,600 Native American Arizonans, respectively, had an income of less than $5,200. *Id.*, table S1703, *available at* http://factfinder.census.gov/servlet/STGeoSearchByListServlet?_lang=en&_ts=212894706125 (Select "Arizona" from the "State" menu); U.S. Census Bureau, Poverty Thresholds 2006, http://www.census.gov/hhes/www/poverty/threshld/thresh06.html. For these individuals, the cost of obtaining a replacement naturalization certificate (one of several forms of documentation that may be necessary to obtain a driver's license) is a significant portion of their annual income.

Second, Latinos are also less likely to have access to telephone service and, therefore, a telephone bill that might be used as secondary identification. U.S. Census 2006 Survey, table S0201 (10.6% of Latino Arizonans compared to 6.4% of the total population live in households with no telephone service). Latino Arizonans are similarly more likely to live in intergenerational or interfamilial households and therefore are less likely to have access to other utility bills in their own names. *Id.* (7.3% of Latino grandparents, compared to 3.8% of all grandparents, live with their grandchildren, and 12.0% of Latinos, as compared to 7.8% of the total population, live with relatives other than their immediate family members).

Third, one national study has concluded that voter identification requirements disproportionately discourage from voting those individuals who lack a high school diploma—a group of voters in Arizona that disproportionately includes Latinos and other

minority voters. Timothy Vercellotti & David Andersen, *Protecting the Franchise, or Restricting it? The Effects of Voter Identification Requirements On Turnout* 11 (2006) (voters who lacked a high school diploma were 5.1% less likely to vote; the total population was 2.9% less likely to vote); *see* U.S. Census 2006 Survey, table S0201 (39.4% of Latino Arizonans, compared to 16.2% of the total population, 25 years and older, lack high school diplomas). Latinos were ten percent less likely to vote in states that required some form of non-photo identification than they were in states where voters were required only to give their names. Vercellotti at 12.[8]

For these reasons, statutes like Proposition 200 and the Indiana scheme place a real burden on millions of voting-age citizens, a burden which will be disproportionately shouldered by minority voters.[9]

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[8] Thus, there is no reason to believe that Arizona's acceptance of secondary documents diminishes the burden imposed by Proposition 200 in any noteworthy way. Aside from the obvious fact that a single name may appear on an electric bill, while multiple members of a household may be eligible to vote, Proposition 200 effectively disenfranchises electors who do not maintain a bank account or possess an Arizona vehicle registration or vehicle insurance card—the same people one might generally expect to lack a driver's license in the first place. *See* Election Manual at 113-14.

[9] In this fashion, voter identification provisions expand an already-troubling divide in the franchise between Anglos and minorities. *See* Brennan Center for Justice, on Behalf of The National Network on State Election Reform, *Response to the Report of the 2005 Commission on Federal Election Reform* 6 (2005), *available at* www.brennancenter.org/dynamic/subpages/download_file_47903.pdf (noting that minority voters are more likely than white voters to be asked to furnish identification at the polls, even when a state has no identification requirement); U.S. Comm'n on Civil Rights, *Voting Irregulari-*

II. Laws Like The Indiana Statutes And Proposition 200 Function As Poll Taxes And Should Be Subject To Strict Scrutiny.

As explained above, Proposition 200 emerged from a racially-charged debate over immigration and has already had a significant adverse impact on voting in Arizona. This Court has never sustained such a pernicious and targeted burden on the right to vote. It has held in no uncertain terms that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper*, 383 U.S. at 666. The Court has insisted that the constitutional prohibition on poll taxes prohibits any "onerous procedural requirement[] [that] effectively handicap[s] exercise of the franchise." *Harman*, 380 U.S. at 541 (internal citation omitted).

Laws like Proposition 200 and the Indiana statute at issue in this case impose just that kind of requirement. The Twenty-fourth Amendment prohibits any state from either denying or abridging an individual's right to vote "by reason of [his] failure to pay any . . . tax." U.S. Const., amend. XXIV. In *Harman*, this Court read the Amendment to prohibit

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ties in Florida During the 2000 Presidential Election (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm (noting that, in Florida in 2000, "black voters were nearly 10 times more likely than nonblack voters to have their ballots rejected" and disproportionately more likely to be incorrectly "purged" from the election lists, and "[a] large number of limited-English-speaking voters" were "denied assistance at polling places, despite federal requirements that they be aided").

a state from conditioning the vote on either payment of a fee or the filing of a "witnessed or notarized certificate" that would prove residence. *Harman*, 380 U.S. at 529. The same type of "cumbersome procedure" is in place here. *Id.* Indiana voters must, in order to avoid purchasing the requisite identification, either return to execute an affidavit before election officials at a later date, or navigate the absentee voting process (which is what is required in Arizona). Either option "amounts to the [regular] re-registration" that the Court rejected in *Harman*, 380 at 542. What is more, while the poll tax challenged in *Harman* at least had the virtue of being a "simple" system, *id.*, Indiana and states like it have imposed "onerous procedural requirements" on both the tax and the alternative. *Id.* at 541.

Even if the Indiana voter identification law, like Proposition 200, were not indistinguishable in all material respects from a poll tax, it should nevertheless be subject to strict scrutiny. This Court has recognized that the right to vote is fundamental because it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The right to vote is also the basis for the Court's oft-applied presumption that enacted statutes are constitutional because they embody the will of a government "structured so as to represent fairly all the people," not just a fortunate few. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969).[10] Because the Indiana law and Proposition

[10] Thus, laws that exclude a particular group from participating in the franchise demand strict scrutiny, even if other laws that affect administration of the ballot do not. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361

200 directly and substantially impinge on those rights, they should be subject to strict scrutiny.

Moreover, voter identification schemes may also be intended to, and may have the effect of, discriminating against minority voters. As the record of Proposition 200 demonstrates, "[p]rocedural" demands all too often mask discriminatory designs based on race, class, or politics. *See Harman*, 380 U.S. at 540 (noting that "the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of [African Americans] and applied in a discriminatory manner"). This Court has traditionally viewed with skepticism any statute that suggests a "troubling blend of politics and race." *Perry*, 126 S. Ct. at 2623 (addressing partisan redistricting); *see Guinn v. United States*, 238 U.S. 347, 365 (1915) (striking down facially-neutral "grandfather clause" because the law "in substance and effect" discriminated against African American voters); *see also Perry*, 126 S. Ct. at 2621 (recognizing the poll tax as a discriminatory device used in Texas against

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(1997) (finding it significant, in determining that challenged law did not impose a severe burden, that the state had not "excluded a particular group of citizens, or a political party, from participation in the election process" or "directly preclude[d] minor political parties from developing and organizing"); *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972) (ruling, only after determining that the challenged law "d[id] not place a condition on the exercise of the right to vote," that the ballot-access barrier challenged "d[id] not of itself compel [strict] scrutiny"); *accord Dunn*, 405 U.S. at 337 ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others," the "exclusions [must be] necessary to promote a compelling state interest.").

African Americans and Latinos). Strict scrutiny is indispensable where, as in Arizona, the challenged law follows previous attempts to limit the franchise of a particular group of voters. *See Rosen v. Brown*, 970 F.2d 169, 177 (6th Cir. 1992) (applying standard set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and explaining that, "in light of the history of Ohio election laws [ruled unconstitutional], the State's claim of compelling interest should be viewed with skepticism").

The court of appeals in this case erred in suggesting that the framework set out by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), required anything less in this case. *See Dunn*, 405 U.S. at 336. Contrary to the court of appeals' suggestion, *see Crawford*, 472 F.3d at 925, "[it] makes no difference" to the analysis that the burden imposed by the voter identification statutes falls upon a limited portion of the electorate, *Burdick*, 504 U.S. at 447 (Kennedy, J., dissenting). The right to vote is "individual and personal in nature." *Reynolds*, 377 U.S. at 561; *see Burdick*, 504 U.S. at 447 (Kennedy, J., dissenting) (explaining that "[f]or those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total" and thus the analysis of the statute did not turn on "the likelihood that [a particular] candidate w[ould] be successful"). In short, the court of appeals' cavalier disregard of the individual's right to vote and its own role in reviewing discriminatory legislative enactments was erroneous, whatever the standard of review articulated in *Burdick*. *Amicus* therefore respectfully requests that this Court reverse the deci-

sion below and hold unconstitutional the onerous requirements Indiana has imposed on the fundamental, individual right to vote.

III. If This Court Upholds The Indiana Scheme, The Differences Among Voter Identification Laws Counsel A Narrow Ruling.

Amicus agrees with petitioners that the Indiana photo-identification scheme places an unconstitutional burden on the right to vote, requiring eligible voters to jump through bureaucratic hoops or spend significant sums of money in order to acquire a driver's license or a "free" voter identification card. Ind. Code. § 9-24-16-10(b); 140 Ind. Admin. Code 7-4-3-(b) through (e). Should this Court conclude on the record before it that the Indiana statutes are constitutional, however, MALDEF respectfully urges the Court to do so on narrow grounds that expressly leave room for lower courts to invalidate other, more burdensome and discriminatory schemes.

A. Arizona's Voter Identification Requirement Lacks Necessary Exceptions That Would Lighten Its Burden On The Franchise.

Although Arizona's Proposition 200 and the Indiana law challenged here are similar, they also differ in important ways. As described above, the Arizona statute, unlike the Indiana scheme, does not exempt residents of nursing homes or indigent electors and offers a dramatically shorter period for voters to return with required documentation in order to have their ballots counted. *See supra* Section I.A. These statutory differences, as well as the differences arising from the overtly discriminatory origins and dis-

parate impact of the Arizona scheme, may be constitutionally significant. Thus, even if the Court concludes that the Indiana statute passes constitutional muster, it should leave room in its decision for lower courts to consider and, where appropriate, to reject schemes like Arizona's Proposition 200.

B. Proof-of-Citizenship Requirements Impose a Burden That Cannot Be Sustained On the Same Basis As A Voter Identification Requirement.

Finally, regardless of the particular outcome in this case, the Court should reserve judgment on the validity of documentary proof-of-citizenship requirements, like those imposed by Proposition 200, *see* Ariz. Rev. Stat. Ann. § 16-166(F), until it is confronted by a case that presents that separate, albeit related, burden. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring) (explaining that, given "the importance of the constitutional issues" raised by Proposition 200, the Court was wise to allow the election to proceed under the new statute and thereby "enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation"). Application of the initiative's proof-of-citizenship requirement alone imposes a substantial burden on Arizona residents that has required counties to reject tens of thousands of applications for registration.

The initiative also provides for methods of proving citizenship that have required some naturalized immigrants to make several attempts to register and to register in person, because county officials have rejected applications including a "naturalization number" and required the certificate itself. *See* Ariz.

Rev. Stat. § 16-166(F)(4) (requiring "presentation" of immigration document to county official); Arizona Voter Registration Form, *available at* http://www.azsos.gov/election/forms/VoterRegistrationForm.pdf. This, too, suggests a "troubling blend of politics and race" of which the Court should be suspicious. *Perry*, 126 S. Ct. at 2623. In short, even apart from the voter identification requirements imposed by the initiative, the injury caused by Proposition 200's registration requirements unquestionably requires the "exacting judicial scrutiny applied [to] statutes distributing the franchise," *Kramer*, 395 U.S. at 628, and cannot withstand such review.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

MICHAEL C. CAMUÑEZ
GRANT B. GELBERG
JON MONSON
DOMINIC FERULLO
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

MATTHEW M. SHORS
(Counsel of Record)
KATHRYN E. KOMP*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Wisconsin; supervised by principals of the firm.*

JOHN TRASVIÑA
CYNTHIA VALENZUELA
NINA PERALES
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512

Attorneys for Amicus Curiae