Nos. 07-21, 07-25

In the
SUPREME COURT OF THE UNITED STATES

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No. 07-21
WILLIAM CRAWFORD, *et al.*,
Petitioners
v.
MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

_____

No. 07-25
INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,
v.
TODD ROKITA, *et. al.*,
Respondents.

_____

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

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded by former Reagan White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may be politically correct or advance a particular ideology. We want to ensure, in this case in particular, that the voting rights of legitimate voters not be infringed by voter fraud.

All parties have consented to the filing of this brief under blanket consents filed with the Court.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

In 2005, the Indiana General Assembly passed legislation, signed by the Governor, to counter voter fraud by generally requiring those voting in person at the polls to identify themselves with a government issued photo ID, such as a driver's license or a passport. The Indiana state Democratic Party, the Marion County Democratic Party, two elected Democrat officials, and several political interest groups filed suit alleging that this Indiana Voter ID law is unconstitutional because requiring such an ID imposes a severe burden on the right to vote.

The District Court consolidated the cases brought by the above parties and upheld the law, holding that requiring such ID at the polls was not a severe burden on the right to vote. The Seventh Circuit affirmed on appeal, finding that any burden on voting was slight and that the plaintiffs had not produced one person who could not vote because of the new law. This granted the requested writ of certiorari.

SUMMARY OF ARGUMENT

No one has been denied the right to vote by the Indiana Voter ID Law. The record clearly establishes without challenge that 99% of the Voting Age Population in Indiana already has the required ID, in the form of driver's licenses, passports, or other identification.

Of the remaining 1%, senior citizens and the disabled are automatically eligible to vote by absentee ballot, and such absentee voting is exempt from the Voter ID Law. Ind. Code Sects. 3-11-10-24a; 3-10-1-7.2(e);3-11-8-25.1(f);3-11-10-1.2. Members of these groups are the most likely not to have driver's licenses or passports, and they most likely account for the great majority of that remaining 1%.

Under Indiana law, the poor can obtain a voter ID for free from the Bureau of Motor Vehicles. Ind, Code Sections 9-24-16-10(b); 9-24-16-10(a). Those who do not have the necessary documentation, such as a birth certificate, and are too poor to pay any fee to obtain it, are also exempt from the voter ID requirement. They can cast a provisional ballot on Election Day and within 10 days sign an affidavit that they are indigent and cannot obtain proof of identification without payment of a fee. Ind. Code Sects. 3-11.7-5-2.5;3-11.7-5-1; 3-11.7-5-2.5(c).

Of the remaining fraction of 1%, those not registered cannot vote anyway, so they are not burdened by the requirements of the Voter ID Law either. Those who choose not to vote are also not burdened by the law. In recent elections, 25% to 40% of the voting age population did not vote, even before any effects of the Voter ID Law.

This explains why the Petitioners could not come up with one person in the proceedings below who has been denied the right to vote under the new law.

The Petitioners' claim that the requirements of the Voter ID Law constitute a "severe burden" on the right to vote amounts to nothing more than an argument that the fraction of 1% who do not already have the required ID, are not exempt from the law, and are registered to vote, cannot be bothered to deal with the paperwork to acquire an ID. This is so even though that paperwork burden is no greater than the burden imposed to obtain a driver's license.

But as the Seventh Circuit wisely noted below, "the right to vote is on both sides of the ledger" in this case. Pet. App. 6. That is because legitimate legal voters also have a constitutional voting right not to have their votes canceled out by voter fraud. In this context, the slight burden of additional paperwork for a fraction of 1%, to show who they are and

thereby prove their eligibility to vote, cannot come close to outweighing the interests of all legitimate legal voters in maintaining their effective vote. In any event, there is no "severe burden" on the right to vote as no one is denied the right to vote because of the Voter ID Law.

Moreover, precisely because no one is denied the right to vote under the voter ID law, the law does not impose a discriminatorily severe burden on senior citizens, the disabled, or the poor. Indeed, these very groups are exempt from the voter ID requirements of the law. And if there is no discrimination against these groups, then there is no discrimination against African-Americans or other minorities, which is presumed by the Petitioners because of the supposed higher representation of these minorities among the poor in particular.

In addition, what the Constitution actually requires in this case is deference to the determination of the Indiana legislature on the balance of interests at stake. The Indiana legislature has determined that the slight additional paperwork burden on a fraction of 1% to show who they are and thereby prove their eligibility to vote does not outweigh the constitutional interest of all legitimate legal voters in maintaining their right to vote in an election where their vote will not be nullified by voter fraud. Under the Elections Clause of the Constitution, Art. I, Section 4, clause 1, the power to make this determination in the first instance belongs to the states. When the resulting law does not by its own terms deny anyone the right to vote, there is no basis for this Court to step in and overturn that determination.

Petitioners' excessively repetitious briefs repeat over and over that no one has ever been prosecuted for voter fraud in Indiana. But the legislature does not have to wait until voter fraud makes a mockery of the state's elections to determine the balance of interests as discussed above.

Moreover, the Guarantee Clause of Article IV, Section 4, guaranteeing citizens a Republican form of government, should be recognized by this Court as establishing a Constitutional Principle of Federalism. Under that principle, the Federal courts would show deference to the balances struck by elected state legislatures, absent a sufficiently clear showing of a violation of Federal Constitutional rights. Where no one is actually denied the vote by the Voter ID law, there is no such showing of such a constitutional violation.

Finally, Judge Evans in dissent below states, "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election day turnout by certain folks believed to skew Democratic." Pet. App. 11. An equally partisan, non-judicial rejoinder would be: Let's not beat around the bush, opposition to the Indiana voter photo ID law is a not-too-thinly-veiled attempt to maintain the opportunity for voter fraud.

ARGUMENT

I. NO ONE IS DENIED THE RIGHT TO VOTE UNDER THE INDIANA VOTER ID LAW.

It was Plaintiffs' own expert witness, Kimball Brace, who established that 99% of the voting age population in Indiana already has the ID required by the Indiana law. Pet. App. 61, 69. This is not challenged by Petitioners.

Of this 1%, all those who are over age 65, or disabled, are exempt from the Voter ID requirements. That is because these voters are all entitled to vote by absentee ballot under Indiana law, and the Voter ID requirements do not apply to absentee ballots. . Ind. Code Sects. 3-11-10-24a; 3-10-1-7.2(e);3-11-8-25.1(f);3-11-10-1.2. Those over 65 and the

disabled are more likely than the general population to be physically unable to drive, and so are more likely not to have driver's licenses. As a result, they are likely to constitute a higher proportion of this 1% than of the general population.

Of the remaining fraction of the 1%, those who are poor can get a government ID for free from the Bureau of Motor Vehicles. Ind, Code Sections 9-24-16-10(b); 9-24-16-10(a). Those who do not have the necessary documentation for such a free ID, such as a birth certificate, and are too poor to pay any fee to obtain it, are also exempt from the voter ID requirement. They can cast a provisional ballot on Election Day and within 10 days sign an affidavit that they are indigent and cannot obtain proof of identification without payment of a fee. Ind. Code Sects. 3-11.7-5-2.5;3-11.7-5-1; 3-11.7-5-2.5(c). The poor, consequently, are not prevented from voting under the Voter ID Law either.

Of the remaining, those not registered cannot vote anyway, so they are not burdened by the requirements of the Voter ID Law either. Those who choose not to vote are also not burdened by the law. In recent elections, 25% to 40% of the voting age population did not vote, even before any effects of the Voter ID Law. C.A.7 State App. 63; J.A. 177.

So who would be suffering a "severe burden" on the right to vote due to the Voter ID Law?

No wonder the Petitioners were not able to identify a single citizen who was denied the right to vote by the Indiana Voter ID Law. And no wonder that scientific studies show no effect of the Voter ID Law in suppressing voter turnout. Jeffrey Milyo, Inst. of Pub. Policy, Report No. 10-2007, *The Effects of Photographic Identification On Voter Turnout in Indiana: A County-Level Analysis* (Nov. 2007); John R. Lott, Jr., *Evidence of Voter Fraud & the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates,* (August

18, 2006)("It does not appear that there is anything systematic about being African-American, female or elderly that causes one to be adversely impacted by Photo IDs" Id. at 12). Indeed, some find an adverse impact on white but not black or Hispanic turnout. Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It?: The Effects of Voter Identification Laws on Turnout,* Presentation to Am. Political Science Ass'n (Sept. 2006); R. Michael Alvarez *et al*,. *The Effect of Voter Identification Laws on Turnout* (Cal. Inst. of Tech,. Social Science Working Paper No. 1267, Oct. 2007)("no evidence that voter identification requirements are racially discriminatory" Id. at 19,)

A few of the 1% that don't already have sufficient ID may have to get birth certificates from a faraway state. But with modern communication by phone, fax and internet, that should not be too difficult. They need to focus on that issue in advance and get the paperwork done. Once they get the certificate, it is permanent proof of their identity that they can keep in a safe place. They are going to have to get that birth certificate anyway if they are ever going to get a driver's license or a passport.

A few born overseas in a country that doesn't keep good records may suffer the lack of a birth certificate. But they will have immigration documents such as a certificate of immigration to prove who they are.

Even for the homeless, a voter registration card constitutes proof of address. 140 Ind. Admin. Code, Sect. 7-4-3(e)(7). Any registered homeless individual can use that card for proof of residence to obtain a free ID. Or he can swear out an affidavit claiming indigency.

As the District Court below held, "despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any

identifiable registered voter who would be prevented from voting" by the Voter ID Law. Pet.App. 101. That's because the law by its own terms does not deny the right to vote to anyone.

II. UNDER THE WELL-ESTABLISHED PRECEDENTS OF THIS COURT, THE INDIANA VOTER ID LAW IS CLEARLY CONSTITUTIONAL.

The legal standard that applies to this case was established in *Anderson v. Celebreeze,* 460 U.S, 780 (1983) and *Burdick v. Takushi,* 504 U.S. 428, 432 (1992). In general, the constitutionality of a state's procedural requirements for voting is determined by a balancing test, weighing the burden on the right to vote against the state interests behind the procedural requirements. But where a "severe burden" is imposed on the right to vote, strict scrutiny is applied. To pass strict scrutiny, the procedural requirement must serve a compelling state interest, and must be narrowly tailored to be the least restrictive requirement necessary to serve that interest. .

This legal standard was further explained in *Burdick*, where the Court noted that it has long rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Rather, as the Court said in *Clingman v. Beaver,* 544 U.S. 581, 583 (2005),

> "To deem ordinary and widespread burdens…severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of states to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question 'that states may, and inevitably must, enact reasonable regulations of parties, elections, and

> ballots to reduce election and campaign-related disorder ”

Precisely because no one is denied the right to vote by the Indiana Voter ID Law, as discussed in Section I above, that law does not impose a severe burden on the right to vote. The law requires at most a slight paperwork burden on the fraction of 1% of the state's voting age population that does not already have the required ID, are not exempt from the law, and are registered to vote. **That paperwork burden is no greater than the burden imposed to obtain a driver's license.**

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the Court upheld a law imposing a deadline for enrollment as a member of a party before voting in the party's primary, with the deadline well in advance of the primary date. Regarding those who failed to meet the deadline and were consequently excluded from voting in the primary, the Court said, "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by the law, but by their own failure to take timely steps to effect their enrollment." Id. at 758.

Similarly, in the present case, the Indiana Voter ID Law by its own terms does not exclude anyone from voting. All can vote if they just follow the law's procedural requirements. The law requires documentation of the identity of the voter, with broad exceptions anywhere that the burden of such documentation becomes at all substantial, such as for the elderly, the disabled, and the poor. Again, 99% of the voting age population already has the required documentation, and so is not affected by any burden from the law. Because of the broad exceptions and other factors discussed in Section 1, most of the rest are not affected either. For those that are affected, again, the burden is no greater than the paperwork burden required to obtain a driver's license. As in *Rosario*, voting will be affected only for those

few who fail to follow the law's reasonable and modest requirements.

As the Seventh Circuit noted below, on the other side of the ledger in this case, the state interest behind the Voter ID Law, is also the constitutional right to vote. The Court said,

> "The purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote."

Pet. App. 6.

The Court went on to balance the interests by stating the burden on voting imposed by the Voter ID Law "so far as the record reveals, is slight." Pet. App. 7. The Court went on to say,

> "On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at the polls claiming to be someone else—someone who has left the District, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature."

Pet. App. 7.

The danger of the multiple voting the Court discusses here is particularly acute since the voter registration rolls in Indiana are overinflated by more than 40%, among the

highest in the country, with ineligible names, invalid registrations and double counting. J.A. 177-78; 184. But another potential source of illegal voting is the 12 to 30 million illegal aliens across the country. Interestingly, the alternatives to the Voter ID Law advanced by Petitioners are all vulnerable to voting by illegal aliens. Signature comparisons are to no avail if the same illegal alien signed in both places. Moreover, illegal aliens get utility bills and bank statements as well, so using such documents for ID would not preclude illegal aliens from voting. Only government issued IDs such as driver's licenses and passports would exclude voting by illegal aliens.

The bottom line on the balancing test is that the slight burden of additional paperwork for a fraction of 1% of the Voting Age Population, to show who they are and thereby prove their eligibility to vote, cannot come close to outweighing the constitutional interests of all legitimate, legal voters in maintaining their right to vote in an election where their vote will not be nullified by voter fraud. That is all the more so when that paperwork burden is no greater than the burden imposed to obtain a driver's license.

Petitioners argue repeatedly that there has been no instance of voter fraud ever prosecuted in Indiana. But, besides the difficulties in discovering voter fraud discussed by Judge Posner above, the state does not have to wait until voter fraud makes a mockery of its elections before taking action. As this Court said in *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986), the Constitution does not "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." Rather, "[l]egislatures…should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutional rights." Id.

Finally, Petitioners embark on a fantastic adventure with their last ditch effort to justify strict scrutiny by claiming that the Voter ID Law has a discriminatory impact on voting. They have tried to argue that the law discriminates against the elderly, the disabled, and the poor. They have then tried to argue that blacks, other minorities, and Democrats are more heavily represented among these groups, and so the law discriminates against them as well.

But, again, the law exempts precisely the elderly, the disabled, and the poor from its voter ID requirements. So the whole house of cards collapses on this point. How can the law discriminate against those to whom it doesn't apply?

That is why scientific studies again show no discriminatory impact, as discussed above. Even the study by the Petitioners' own expert failed to show discrimination, and was thrown out by the district court for its intellectual weaknesses, with the expert saying on the witness stand, "Basically, we could not conclude one way or the other in terms of the distinction in terms of racial categories." J.A. 279.

III. THE CONSTITUTION REQUIRES DEFERENCE TO THE BALANCE STRUCK BY THE ELECTED INDIANA OFFICIALS.

The Elections Clause of the U.S. Constitution is found in Article I, Section 4, Clause 1, which states,

> "the times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such

> regulations, except as to the places of choosing Senators."

This Clause grants the power to make the decisions regarding regulation of elections, including the issues in this case, to the states in the first instance. Moreover, Congress retains the power to step in and change policies it deems inappropriate in regard to Federal elections.

Because this Clause explicitly grants such power to the states, this Court should show deference to the decisions and balance of interests determined by the states. Deference does not mean abdication. If a state's election regulations clearly violate constitutional rights, then the courts retain the power to correct that violation.

But where, as in this case, the challenged state law does not by its own terms deny anyone the right to vote, there is no basis for this Court to step in and overturn the balance of interests determined by the state legislature in the challenged law. For example, for this Court to decide that not enough election fraud has been found in Indiana for the state to take the step of requiring government issued IDs, such as driver's licenses, to stop that fraud would not be showing deference. Petitioners can always return to the state legislature to argue for relief, or, in the case of Federal elections, to Congress, where the Democratic Party represented by at least two of the Petitioners holds the majority.

This injunction for deference is reinforced by the Constitution's Guarantee Clause in Article IV, Section 4. That Clause guarantees American citizens "a Republican Form of government" which means a form of government based on popular sovereignty in which decisions are made by elected officials. One such decision is the Indiana Voter ID Law challenged in this case.

The Court should recognize the Guarantee Clause as embodying a Constitutional principle of Federalism, or deference to decisions made by elected officials in the states. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988). This deference would, again, not be unlimited. Where a state's actions or laws clearly violate constitutional rights, this Court must, of course, continue to step in and correct those violations. But short of such constitutional violations, the Court should at least start with the determinations of elected state officials and uphold them where possible.

Unfortunately, this Guarantee Clause came before the Court in a case arising soon after the Civil War, *Georgia v. Stanton*, 74 U.S. 700 (1869). The case challenged the Reconstruction Laws imposed on the defeated states of the Confederacy, based on the Guarantee Clause. At that time, there was not much support for deference to the rebellious states which had caused a Civil War lasting 4 years resulting in the deaths of hundreds of thousands of Americans, with untold destruction. The Court held in that case that the Guarantee Clause provided only a non-justiciable political principle, not a constitutional right. The Guaranty Clause has been mostly a dead letter since that time.

More recently, however, this Court raised, without deciding, the possibility that the Guarantee Clause could be justiciable as a constraint on federal power to regulate the activities of the states. In *New York v. US*, 488 US 1041, New York and two of its counties filed suit against the United States challenging radioactive waste disposal laws passed by Congress, contrary to the laws of certain states, based on the Tenth Amendment and the Guaranty Clause.

This Court said, in an opinion applicable to the present case as well,

> "Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1, 63 (1936)."

Id.

The Court ruled for the Plaintiffs based on the Tenth Amendment. But in regard to the Guaranty Clause, the Court said, " More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." Id..

The principle of Federalism has deep roots in our nation's law and history. Justice Brandeis wrote the pragmatic defense of federalism in his celebrated dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). After his famous statement referring to the states as the legislative laboratories of the nation, Brandeis wrote,

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is

> arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Id.

This is an essential fact of the federal design of American governments. Within lenient bounds, the states must be free to fashion their own responses to legal problems which may be present in many states.

Exactly as the pattern now present on voter IDs, states may take diverse approaches to a problem. Some may be strict, seeing the problem as grave. Others may be lenient, seeing the problem as negligible. In the fullness of time, experience will demonstrate which state laws have been successful, and which have failed. States which are later to act can avoid the failed policies and duplicate the successful ones.

Ultimately, Congress may choose to act on this subject. It, too, will benefit from the legislative experiments at the state level.

This is a well-established pattern. Subjects as important as the Constitution itself grew from an examination of the preceding constitutions of the colonies and the states, with certain elements drawn from state constitutions – including the First Amendment from the Massachusetts Charter, and certain elements rejected – such as the Pennsylvania Council of Revision, which was given the power to strike down or amend duly passed legislation.

The *Federalist*, by James Madison, Alexander Hamilton and John Jay, provides examples throughout of how the Framers in Philadelphia examined the examples both of the states, and of various types of government throughout human history, in choosing the elements that should, and should not, appear in the document they were drafting. Although many commentators stress the political philosophies behind the discussions and decisions at Philadelphia, examination of facts – of competing examples of how to design government structures that will serve the needs and will stand the test of time – was also essential to the process. Perhaps that design was more important than the philosophy, because the US Constitution is the longest surviving written constitution among all the nations of the world.

Lesser examples include the Interstate Commerce Commission, which was drawn from prior state experiences with regulation of railroads, welfare laws, workman's compensation laws, and regulation and funding of education. These and many other issues began with fits and starts, some successful but some failures, in individual states.

The same freedom of action for states in writing their election laws is important in this case. By upholding the Indiana law, this Court will leave the door open for other states to learn from the Indiana example. If it works well, so be it, and it will spread to more states than the few who have passed photo voter ID laws to date. If it works poorly, other states will not copy it, and in time Indiana itself may drop it.

Finally, an example of the wrong approach to Federalism is provided by Judge Evans in his dissent below. At the end of his third paragraph he asks, rhetorically, "Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table?"

The image is, of course, overblown. The Indiana voter ID law is not a sledgehammer. And the entire structure of Indiana elections will not come crashing down if this law is upheld. The dangerous part of this statement lies in the first three words, "Is it wise...."

The wisdom of any piece of legislation is not the business of any federal court. Whether a given law is wise is determined first by the elected representatives who pass that law, whether state or federal. And if the voters decide that law is unwise, the corrective step is for them to defeat those representatives at the next election, and install new representatives with a different view of the wisdom of that legislation.

The fact that second-guessing legislative decisions is not the business of the courts, is shown by the *Federalist* concerning the design of the federal judiciary. In No. 78, Alexander Hamilton describes the federal judiciary as "the least dangerous branch." He writes:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the

> executive arm, even for the efficacy of its judgments. [Emphasis in the original.]

In this case, Petitioners insist that this Court should take away from the State of Indiana the "Republican Form of Government" which the Constitution guarantees. We respectfully submit that the opposite conclusion is the correct one. This Court should affirm the right of Indiana to enact election laws for its own citizens.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should affirm the decisions of the courts below.

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