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Opinion No. 11-34

Constitutionality of requiring voter photo identification

QUESTIONS

1. Whether House Bill 0007/Senate Bill 0016 requiring a voter to present a qualified photo identification before voting is constitutional under both the Tennessee and the United States Constitutions.

2. Given that not every county in Tennessee issues a photo identification card, would the inconvenience of traveling out of one's county of residence to obtain a photo identification card, and having to pay for a photo identification card, be a substantial burden on voters' rights that would be outweighed by any legitimate governmental interest.

3. Under present law, does the state have the burden of producing actual evidence of the existence of voter fraud, as opposed to relying on abstract harms, before imposing a photo identification card requirement to vote in person.

OPINIONS

1. A court would likely find that HB0007/SB0016's requirement that an otherwise eligible voter present a photo identification card in order to vote in person, without the state also providing the ability to obtain a free photo identification card, unduly burdens the right to vote and constitutes a poll tax in violation of the Twenty-Fourth Amendment with respect to federal elections and the Equal Protection Clause with respect to state and local elections. Additionally, because the Tennessee Supreme Court has held that Article XI, Section 8, of the Tennessee Constitution confers "essentially the same protection" as the Equal Protection Clause of the United States Constitution, State v. Tester, 879 S.W.2d 823, 827-28 (Tenn. 1994), a court would necessarily find that the failure to provide for a free photo identification card also violates the Tennessee Constitution.

2. Based upon the Supreme Court's ruling in Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008), inconveniences such as travel involved in obtaining a photo identification under HB0007/SB00016 would impose only a limited burden on voters' rights, and the State's interests in preventing fraud and protecting the integrity and fairness of the election process would be sufficient to overcome a facial challenge to the bill based on such

inconveniences. For the reasons stated in response to the first question, a court would likely find that the state's failure to provide voters with a photo identification card free of charge would violate the federal and state constitutions.

3. Current law does not require any evidentiary showing of specific instances of in-person voter fraud or burden of proof be satisfied by the state before enacting legislation intended to serve the state's interests in preventing such fraud.

ANALYSIS

House Bill 0007/Senate Bill 0016, as amended by the House State and Local Government Committee, proposes to revise current state law regarding voting procedures. The bill would require that a voter present adequate identification bearing the voter's name and photograph before being allowed to vote. The bill further specifies that the following forms of identification would be adequate: (1) a Tennessee driver license; (2) a valid photo identification card issued by the State of Tennessee, any other state, or the United States; (3) a valid photo identification license issued by the Tennessee Department of Safety; (4) a valid United States passport; (5) a valid employee photo identification card issued by the State of Tennessee, any other state, or the United States; or (6) a valid United States military photo identification card. If a voter is unable to present an adequate photo identification, then the bill provides that the voter will be allowed to vote by provisional ballot; however, the provisional ballot will only be counted if the voter provides an adequate photo identification to the administrator of elections or the administrator's designee by the close of business on the second business day after the election.

The bill provides that if a voter is indigent and unable to obtain a photo identification without payment of a fee or has a religious objection to being photographed, he or she must execute an affidavit of identity on a form provided by the county election commission in order to vote. Such affidavit must state that the person executing the affidavit is the same individual who is casting the ballot and that the affiant is indigent and unable to obtain proof of identification without paying a fee or has a religious objection to being photographed.

The requirements of this bill would not apply to a voter voting by emergency absentee ballot or to a full-time resident of a licensed nursing home, home for the aged, or similar institution who is voting by absentee ballot attested by two absentee voting deputies at the institution pursuant to present law.

You have asked whether HB0007/SB0016 is constitutional under both the Tennessee and the United States constitutions. The facial constitutionality of a voter photo identification law in Indiana ("SEA 483") was upheld by the United States Supreme Court in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008). Like HB0007, the Indiana statute applies only to in-person voting and not to absentee ballots submitted by mail or to persons living and voting in a state-licensed facility such as a nursing home. Ind. Code Ann. § 3-11-8-25.1(e) (West.Supp. 2007). The Indiana statute also provides that a voter who is indigent or has a religious objection

to being photographed could cast a provisional ballot that would be counted only if the voter executes an appropriate affidavit before the circuit court clerk within 10 days following the election. Ind. Code Ann. §§ 3-11.7-5-1, 3-11.7-5-2.5(c) (West 2006). Additionally, a voter who cannot present a photo identification on election day can vote a provisional ballot that will be counted if the voter presented the photo identification to the circuit court clerk within 10 days of the election. Ind. Code Ann. § 3-11.7-5-2.5(b). Finally, no photo identification is required in order to register to vote, and the State of Indiana offers free photo identification to qualified voters able to establish their residence and identity. Ind. Code Ann. § 9-24-16-10(b) (West Supp. 2007).[1]

In addressing the facial constitutionality of SEA 483, the Supreme Court first noted that, under the standard applied in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the Court would consider rational restrictions on the right to vote to be invidious if they are unrelated to voter qualifications. *Crawford*, 128 S.Ct. at 1616. The Court further noted, however, that evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the standard set forth in *Harper*. *Id*. (citing *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)). Accordingly, in evaluating a constitutional challenge to an election regulation, the Court held that a balancing test should be applied wherein the asserted injury to the right to vote is weighed against the precise interests put forward by the State as justifications for the burden imposed by its rule. *Id*. (citations omitted).

Applying this balancing test, the Supreme Court noted that Indiana had identified several state interests, including the interest in deterring and detecting voter fraud, in modernizing and updating its inflated voter rolls and in protecting public confidence "in the integrity and legitimacy of representative government." *Id*. at 1617-1620. The Court then looked to the burdens imposed by SEA 483 on the voters in Indiana and, specifically, to the burdens imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483. *Id*. at 1620. The Court first noted that the fact that most voters already possess a valid driver's license or some other form of acceptable identification would not save the statute under the Court's holding in *Harper* if the state required voters to pay a tax or a fee to obtain a new photo identification card. However, because the Indiana Bureau of Motor Vehicles provided free photo identification cards, the Court found that the inconveniences involved in otherwise obtaining a free photo identification card did not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting. *Id*. at 1621.

The Supreme Court did acknowledge that, while there may be special burdens imposed on a small number of voters as a result of the application of SEA 483, based upon the evidence in the record it was not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified. The Court then noted that the petitioner had advanced a facial challenge to the constitutionality of SEA 483 and

[1]Indiana previously imposed a fee on all residents seeking a state-issued photo identification. However, at the same time that the Indiana legislature enacted SEA 483, it directed the Bureau of Motor Vehicles to remove all fees for state-issued photo identification for individuals without a driver's license who are at least 18 years old. *See Crawford*, 128 S.Ct. at 1614, n.4.

that under its reasoning in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008), such a facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Id*. at 1623 (citations omitted). Accordingly, the Court held that, based upon the evidence in the record and considering only the statute's broad application to all Indiana voters, SEA 483 imposed only a limited burden on voters' rights and that the precise interests advanced by the State were sufficient to defeat the facial challenge to the statute. *Id*.

The provisions of HB0007/SB0016 are similar to the photo identification requirements in Indiana that were upheld by the Supreme Court, with one exception. The State of Indiana provides free photo identification cards to qualified voters able to establish their residence and identity. HB0007 contains no such provision, although it does allow a voter who is indigent and unable to obtain a photo identification without payment of a fee, or who has a religious objection to being photographed, to vote if the voter executes an affidavit of identity on a form provided by the county election commission. In *Crawford*, the Supreme Court noted that if the statute had required voters to pay a tax or a fee to obtain a new photo identification card, such statute would be unconstitutional under the Court's holding in *Harper*. 128 S.Ct. at 1621. In *Harper*, the Supreme Court struck down Virginia's poll tax requirement for state elections, finding that it violated the Equal Protection Clause. In doing so, the Court stated:

> We conclude 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. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. . . .
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> [W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context – that is, as a condition of obtaining a ballot – the requirement of fee paying causes an "invidious" discrimination that runs afoul of the Equal Protection Clause.

383 U.S. at 666-668.

Under the provisions of HB0007/SB0016, voters who are otherwise qualified to vote but who are not indigent or do not have a religious objection to being photographed and who do not have an acceptable form of a photo identification card must obtain a photo identification card to

be able to vote in person at the polls; however, there is no provision for such voters to obtain a free photo identification card. Thus, requiring these voters to obtain a photo identification card for which they have no other need effectively places a cost on the right to vote. Based upon the Supreme Court's decisions in *Crawford* and *Harper*, such a requirement would appear to be in violation of the Twenty-Fourth Amendment to the federal constitution[2] for federal elections and the Equal Protection Clause for state and local elections.

In fact, in the case of *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D. Ga. 2005), enforcement of Georgia's statute requiring a photo identification card for in-person voting was enjoined on this basis. The Georgia statute, like HB0007/SB0016, did not contain any provision for a voter to obtain a free photo identification card. Instead, voters who did not already have an acceptable form of photo identification were required to obtain a photo identification card from the state Department of Driver Services by paying the applicable fee or by executing an affidavit of indigency. 406 F.Supp.2d at 1339. The District Court found that this requirement unduly burdened the right to vote and constituted a poll tax in violation of the Twenty-Fourth Amendment and the Equal Protection Clause. *Id*. at 1369. Georgia appealed this decision to the Eleventh Circuit Court of Appeals; however, during the pendency of the appeal the Georgia General Assembly repealed the statute in question and enacted a new statute that still required voters to present a photo identification before voting in person, but also provided that each county issue free of charge a "Georgia voter identification card," with a photograph of the voter, to any registered voter who does not have another acceptable form of identification. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009). The constitutionality of this new statute containing a provision for voters to obtain a free photo identification card was subsequently upheld by the Eleventh Circuit relying upon the reasoning and analysis in *Crawford*. *Id*. at 1355.

In light of these decisions, we think a court would likely find that HB0007/SB0016's requirement that an otherwise eligible voter provide a photo identification card in order to vote in person without providing the ability to obtain a free photo identification card unduly burdens the right to vote and constitutes a poll tax in violation of the Twenty-Fourth Amendment with respect to federal elections and the Equal Protection Clause with respect to state and local elections.[3] Additionally, because the Tennessee Supreme Court has held that Article XI, Section 8, of the Tennessee Constitution confers "essentially the same protection" as the Equal Protection Clause of the United States Constitution, *State v. Tester*, 879 S.W.2d 823, 827-28 (Tenn. 1994), a court would necessarily find that the failure to provide for a free photo identification card also violates the Tennessee Constitution.

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[2]The Twenty-Fourth Amendment provides: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

[3]It is our understanding that SB1384/HB1682 would amend Tenn. Code Ann. § 55-50-336 by providing for the issuance of a free photo identification license to any person 18 years of age or older. If this legislation were passed, then it would appear to cure any challenge to the constitutionality of HB0007/SB0016 as a poll tax. In fact, this is precisely what the Indiana legislature did when it adopted SEA 483. *See* fn. 1, *supra*.

Your next question asks whether the inconvenience of traveling to obtain a photo identification card and having to pay for a photo identification card places an impermissible burden on the right to vote. As already discussed above, the requirement that an otherwise eligible voter pay for a photo identification for the sole purpose of voting effectively requires payment of a fee in order to vote. As stated by the Supreme Court in *Harper*, "the requirement of fee paying causes an „invidious' discrimination that runs afoul of the Equal Protection Clause," as well as the Twenty-Fourth Amendment to the federal constitution. 383 U.S. at 668.

However, with respect to any inconveniences involved in obtaining a photo identification card, the Supreme Court in *Crawford* held that, for most voters, "the inconvenience of making a trip . . ., gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 128 S.Ct. at 1621. While the Court did recognize that a heavier burden may be placed on a limited number of persons (*e.g.*, voters who cannot afford or obtain a birth certificate), the evidence in the record was not sufficient to overcome the Court's finding that the statute's broad application to all Indiana voters "imposes only a limited burden on voters' rights" and that the "precise interests" advanced by the State were sufficient to defeat a facial challenge to the statute. *Id*. at 1622-23. Similarly, the inconveniences involved in obtaining a photo identification under HB0007/SB0016 would impose only a limited burden on the rights of voters generally, and the State's interests in preventing fraud and protecting the integrity and fairness of the election process[4] clearly would be sufficient to overcome a facial challenge HB0007/SB0016.[5]

Your last question asks whether the state has the burden of producing actual evidence of the existence of voter fraud, as opposed to relying on abstract harms, before imposing a photo identification card requirement to vote in person. In *Anderson v. Celebrezze*, 460 U.S. 780, 796, 103 S.Ct. 1564, 1573-74 75 L.Ed.2d (1983), the Supreme Court held that a state must identify the interests that it seeks to further by its regulation, but the Court did not require any evidentiary showing or burden of proof to be satisfied by the state government. More recent decisions of the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d (1992), and *Crawford* also do not place any sort of evidentiary burden on the state when defending a voting regulation. In fact, in *Crawford*, the record "contain[ed] no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history." 128 S.Ct. at 1619. Instead, the Supreme Court looked to the "flagrant examples of such fraud in other parts of the country [that] have been documented throughout this Nation's history by respected historians and journalists, [the] occasional examples [that] have surfaced in recent years, and . . . Indiana's own experience with" absentee voter fraud. *Id*. The Supreme Court further held that even absent specific evidence of in-person voter fraud, the general history of voter fraud and the "real" risk that in-person voter fraud "could affect the outcome of a close election" was sufficient to support the

[4]The United States Supreme Court has recognized that the state has a compelling interest in preserving the integrity of its election process. *Burson v. Freeman*, 112 S.Ct. 1846, 1852 (1992).

[5]The Supreme Court in *Crawford* addressed only the validity of a facial challenge to the Indiana voter identification statute and did not foreclose a challenge to the statute's application to any limited or special class of voters. Such an "as applied" challenge to HB0007/SB0016 would depend on particularized facts and is beyond the scope of this opinion.

interest of Indiana in deterring voter fraud. *Id*. Accordingly, present law does not require any evidentiary showing of specific instances of in-person voter fraud or burden of proof to be satisfied by the state before enacting legislation intended to serve the state's interests in preventing such fraud. *See Common Cause/Georgia v. Billups,* 554 F.3d at 1353-54.

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