

No. 2016-2017

IN THE SUPREME COURT OF THE UNITED STATES

HONORABLE BILLIE JEAN DENOLF,

Petitioner – Appellant

v.

STATE OF OLYMPUS,

Respondent – Appellee

*On writ of certiorari to the
United States Court of Appeals
for the Fourteenth Circuit*

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BRIEF FOR PETITIONER
—————

QUESTIONS PRESENTED FOR REVIEW

- 1) Whether Petitioner has standing to bring suit in accordance with the case and controversy requirement of Article III of the Constitution?
- 2) Whether the Voter-Identification and Anti-Voter Fraud Act violates the political speech and voting rights protected by the First Amendment of the United States, as applied to the states through the Due Process Clause?
- 3) Whether the Voter-Identification and Anti-Voter Fraud Act violates the Equal Protection Clause of the Fourteenth Amendment?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article III, Section 2, Clause 1:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Amendment XIV:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Olympus Voter-Identification and Anti-Voter Fraud Act

The State of Olympus does hereby make the following findings:

FINDING: Voter fraud is a serious issue that strikes at the very heart of our great democracy. A voter identification law that requires that eligible voters present a valid photographic identification will reduce voter fraud and will raise voter confidence in the American political electoral system.

The State of Olympus does hereby enact the following public act:

- Section 1: DEFINITIONS. In this act the following terms are employed:
- (A) Valid Photo Identification Card: A publicly issued document that bears the photograph, current name, and current address of the person to whom it was issued and has an expiration date which has not been exceeded.
 - (B) Eligible Voter: A citizen of the United States and the State of Olympus eligible to vote under federal and state law.

- (C) Official public election officials: Elected or appointed state or county personnel responsible under state or county law for organizing and supervising public elections (both primary and general).
- (D) Indigent means to be below the most current annual national poverty threshold as issued by the United States Census Bureau.

Section 2: Prior to casting a ballot in-person in any public election held in the State of Olympus, all eligible voters must present to state election officials a valid photo identification card bearing the photograph and current name and address of the person to whom it was issued and containing an expiration date. No voter shall be required to produce more than one valid photo identification card bearing the voter's photograph as well as his or her legal name. No person seeking to register to vote will be required to provide photo identification. Valid photo identification cards shall be limited to:

- (i) an Olympus driver license;
- (ii) a United States Passport;
- (iii) an Olympus-issued identification card for those who do not drive; and/or
- (iv) an Olympus Concealed Carry license.

Section 3: Official public election officials shall ask for valid photo identification and shall inspect identifications presented to them to ensure that they are valid under this law. Official public election officials will not seize any identification cards except if directed by a law enforcement official who is present.

Section 4: If an intended voter lacks a valid photo identification card, he or she may cast a provisional ballot. For this ballot to be counted he or she must within 72 hours personally submit a valid photo identification to the State Election Commissioner or to the Election Commissioner of his or her County within 72 hours. At the time of casting a provisional ballot, the voter must sign an affidavit that either swears that he/she cannot produce his/her valid photo identification but that he/she has such identification, or that he/she is the person he/she claims to be. Public election officials shall inform voters wishing to swear to the aforementioned affidavit that if found guilty of swearing falsely they are subject to fine and/or imprisonment.

Section 5: Olympus will no longer issue or accept free non-photographic voter identification cards.

Section 6: A birth certificate will be required for an Olympus driver license or an Olympus- issued photographic non driver license.

- Section 7: Olympus will establish the cost of the identifications listed in Section 2 of this Act with the exception of a United States Passport.
- Section 8: The Secretary of State for the State of Olympus will ensure that the provisions mandated by this Act will be publicized on the state's websites, in county clerk's offices, in county election commission offices, and posted in voting locations with website links providing information on how to receive a government-issued/state approved valid voter photo identification. There will also be links to websites of the Government of the United States regarding how to lawfully obtain a passport.
- Section 9: Violating this Act is felony. Any person violating or seeking to violate any section of this Act or seeking to assist or assisting any person to violate any section of this Act shall be subject to a fine not to exceed \$1,000.00 OR imprisonment not to exceed 90 days in a state correctional institution to be designated by the State Secretary of Corrections. Any person convicted under this law on three or more occasions shall be subject to fine AND/OR imprisonment of no more than \$5,000 AND not less than \$2,500 AND/OR imprisonment not to exceed 180 days in a state correctional institution to be designated by the State Secretary of Corrections.
- Section 10: The provisions of this Act do not apply to absentee ballots submitted by mail by active members of the United States armed forces or to ballots cast by persons living in a state licensed skilled-needs facility such as a nursing home. All other absentee ballots must be accompanied by a copy of the voter's valid photo identification document.
- Section 11: All voters may vote in "early election" within 14-30 days prior to the primary or election provided they meet the criteria above.
- Section 12: Voters who have a religious objection to being photographed or do not have photo identification due a natural disaster, may cast a provisional ballot and sign an affidavit in the voter registrar's office within 72 hours of the election in order to ensure their vote is counted.
- Section 13: Each county shall issue a photographic voter identification card, free of charge, to all persons who qualify as indigent. To qualify as indigent a voter must submit a certified copy of his/her state tax income tax returns and swear an oath that he/she does not have an acceptable form of identification; and that he/she is eligible to vote in Olympus.
- Section 14: This Act will take effect January 1, 2012.

STATEMENT OF THE CASE

The following facts have been stipulated by both parties in the Record. Petitioner and citizen of Olympus Billie Jean DeNolf was a superior court judge in the State of Olympus. She was unable to vote on July 7, 2012, the day of the primary election in Olympus.

The Olympus Voter-Identification and Anti-Voter Fraud Act of 2010 (the Act) was sponsored by Olympus State Senator Ryan Manners (R) and Delegate Kari Lyles (D), but passed 60 to 40 with all 58 of the Republicans and 2 Democrats voting “aye.” *Record 2*, n.1. It was passed in order to lower the rates of voter fraud in Olympus and increase public confidence in election results. *Id.* 2. The Act was enacted on January 1, 2012. *Id.* 8. Voter identification laws in Olympus prior to the Act were considered to be non-strict, now they are some of the strictest laws in the nation. Under the old law, photographic identification was not required in order to vote; all a citizen needed was a voter registration certificate. *Id.* 6.

In the U.S. the evidence of voter fraud is a statistical anomaly. *Id.* 3. The U.S. Department of Justice found that from 2000 to 2005 there were only 40 voters indicted for fraud and of that, only 26 were convicted of federal voter fraud. *Id.* 3. In Olympus from 1990 to 2010, 0.000001% (35 prosecutions) of 35 million votes cast were convicted of fraud. *Id.* 3. Thirty-four of the fifty-one states in the U.S. require some form of identification – 18 of these states require in person voters to provide photographic identification and 16 states accept non-photographic identifications. *Id.* 4. Prior to the passage of the Act, the State of Olympus provided free voter identification cards, but because of the Act, the state no longer issues them. *Id.* 6, n. 10. The Act now requires that in order to vote in person, one of four forms of photographic identification is required: 1) Olympus driver license; 2) U.S. Passport; 3) Olympus-issued photo identification for non-drivers; 4) Olympus Concealed Carry license. *Id.* 6. The requirements to obtain an Olympus-

issue photographic identification for voting are the same as the non-photographic identification the old law provided, as well as a \$25 fee for 5 years. The Act required that changes to the voter identification laws were to be publicized on the state's websites, county clerk offices, county election commission offices, and posted in voting locations with links to the website for obtaining a state approved voter photo identification if a voter does not have an approved photographic identification. *Id.* 7.

Judge DeNolf married in a religious ceremony on July 5, 2012. *Id.* 8. After the ceremony took place Judge DeNolf signed a marriage license with her new married name with the proper certification and official signatures. Because of her deeply held religious beliefs Judge DeNolf believed that her name changed from her maiden name "King" to her married name "DeNolf" as soon as she was married and signed her marriage license. *Id.* 8. On July 6, 2012, at the first possible date that she could, Judge DeNolf went in person to the DMV to file the legal paperwork to obtain a new license with her updated name in it. *Id.* 8. In the State of Olympus, obtaining a license with a name change take ten to fourteen calendar days to receive and because of this Judge DeNolf did not have her new license on July 7, 2012. *Id.* 8.

Judge DeNolf went to the polling place the day of the primary election and presented the poll worker with her old voter identification card. She lacked the proper photographic identification because the delay in processing her request for a name change. *Id.* 8. When asked for photographic identification, she showed the poll worker her marriage license and told them that her driver's license no longer had her correct name on it. *Id.* 8. The voter rolls had her name listed with her maiden name as Billie Jean King, but since the poll workers saw her marriage license, they told her without the proper photographic identification she would be unable to vote. *Id.* 8.

Poll worker Wendell Davis lectured Judge DeNolf that she should have voted early when her name matched that on the voter rolls and told her the Olympus law was a reasonable regulation. *Id.* 9. Mr. Davis told Judge DeNolf that it was her fault she did not get a valid identification before the election. *Id.* 9. The argument between the two began to get heated and Judge DeNolf left the polling place because she knew that she did not have the proper identification to cast a meaningful provisional ballot. *Id.* 9.

Judge DeNolf's inability to vote was recorded by a reporter and uploaded to YouTube and the opposing campaign used the video that served as proof she could not even cast a ballot on her own behalf. *Id.* 9. Judge DeNolf won the primary election with 37% of the vote, however she lost the general election with Ms. Sommerville garnering 53% of the vote. *Id.* 9.

Judge DeNolf filed suit in the U.S. District Court for the Central District of Olympus. She alleged that the Act arbitrarily violated her right to engage in political speech and to vote as protected by the First Amendment, as incorporated to the states through the Due Process Clause of the Fourteenth Amendment. She also alleged that her right to equal protection under the Fourteenth Amendment was violated. *Id.* 9. Olympus contends that Judge DeNolf does not have standing to bring this suit because she has not been denied her right to vote nor is there a threat that the right to vote will be infringed upon. *Id.* 9. The District Court ruled in favor of Olympus and ruled against Petitioner in the issue of standing. *Id.* 10. Judge DeNolf appealed to the Court of Appeals for the Fourteenth Circuit. The Fourteenth Circuit Court ruled in favor of the State of Olympus and ruled against Judge DeNolf. Petitioner DeNolf appealed and the Supreme Court granted certiorari.

Summary of the Argument

In *Burdick v. Takushi*, the Court held that “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” Voting is the heart of the democratic process; without it, democracy falls. The Olympus Voter Identification and Anti-Voter Fraud Act dismantles the pillars of the democratic process and the pride of our great nation. The Act prevents registered voters from making their voices heard in an election by preventing voters without one of four photo identifications from voting. The Act violates the First and Fourteenth Amendments and is therefore unconstitutional.

In order to bring suit in the federal courts, the plaintiff must prove that they have standing under the Case or Controversy clause of Article III of the U.S. Constitution. The Court in *Lujan v. Defenders of Wildlife*, sets up a three-part test in order to determine whether a plaintiff has satisfied Article III standing. The first part of that test is injury in fact, or an invasion of a legally protected interest. The Act arbitrarily prevented the Petitioner from casting a meaningful ballot on Election Day because she had been married two days prior and could not get a valid photo identification in time. In *United States v. Students Challenging Regulatory Agency Procedures* as cited in *Common Cause/Georgia v. Billups*, the Court held that all that was needed to satisfy injury in fact was an identifiable trifle. The injury suffered by Judge DeNolf satisfies this standard. Even though there was a presence of an alternate channel, early voting, the Petitioner’s injury in fact is not diminished. The Petitioner is similarly situated to MHDC in *Arlington Heights v. Metropolitan Housing Development Corporation* and the Court found in that case that alternate channels do not negate an injury in fact. The second element required for standing is causality between the plaintiff’s contended injury and the defendant’s

actions. Since the petitioner could have voted but for the law, causality between her injury in fact and the Act can be established. Since both parties already agreed upon the last element of standing, redressability, only the first two must be established to confer standing. Since the Petitioner has satisfied the elements required for standing, she can advance her First and Fourteenth Amendment claims.

The Court in *Texas v. Johnson*, cited in *Voting for America v. Steen*, found that for conduct to be protected under the First Amendment, it has to be expressive. The conduct has to have the intent to convey a message and there must be a great likelihood that someone will understand that message. Voting satisfies this because when a voter casts a vote it is to voice their political opinions in the ultimate way. Furthermore, the law is so vague it is unclear what conduct is made criminal and in *Babbitt v. United Farm Workers National Union*, the Court found that if the average person cannot understand what conduct is made criminal, it should be found as unconstitutionally vague. Because voting is expressive conduct, the Olympus voter identification law is preventing people from expressing political opinions and should be reviewed under strict scrutiny. Although the state has a compelling state interest in preventing voter fraud, the Act is not doing so using the least restrictive means. If the act accommodated those who needed to renew/replace/receive a new identification to vote through an extended provisional ballot period, then the law would be constitutional under the First Amendment. Since it only allows for a 72-hour period to submit identification with a provisional ballot, that does not in any way promote the state's interest in preventing voter fraud, it is unconstitutional. The law does not pass under strict scrutiny, so it is unconstitutional under the First Amendment.

Being able to take part in the democratic process has been the bedrock of our nation from the very beginning. The Fourteenth Amendment makes sure that no state takes away

constitutionally protected rights of citizens without due process, while also guaranteeing equal protection of the law. The Voter-Identification and Anti-Voter Fraud Act cracks the heart of our nation, by arbitrarily preventing voters from deciding who governs us. This law infringes upon one of Americans most basic political rights by requiring voters to pay to access to the ballot for those who do not drive, do not travel, and or do not own a gun. Not only has the State of Olympus restricted access to the ballot, but they also have severely restricted the kinds of photo identifications that are permissible and limited where you can get an identification. Due to the severe burdens imposed by this law a fortiori, strict scrutiny applies. The most recent voter identification landmark case, *Crawford v. Marion Cty. Election Bd.*, did not use strict scrutiny. This is because there were no severe burdens found in that case since the State of Indiana gave out free voter identification cards. However, with the case at bar, the many severe burdens, under the totality of the circumstances, does not pass constitutional muster. Not only does the law not reduce voter fraud but, it also does not increase voter confidence when it invidiously discriminates against women. In this election there was a 12.5 percent drop in female voters after the law passed. This law does not further any government interest.

Argument

D) THE CASE THAT THE PETITIONER BRINGS TO THE COURT SATISFIES THE ARTICLE III, CASE OR CONTROVERSY REQUIREMENT OF THE U.S. CONSTITUTION. THE PETITIONER HAS STANDING TO BRING THIS CASE BEFORE THE SUPREME COURT.

Article III states that “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority... to Controversies to which the United States shall be a Party.” U.S. Const. art. III, § 2, cl. 1. This Court uses the tripartite test set forth in *Lujan v. Defenders of Wildlife* to determine if standing is granted to the party bringing suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Standing must be met in order to keep “activities [that] are appropriate to legislatures,” in the legislative branch, and those meant for the courts, in the court. *Lujan*, 504 U.S. at 560. First, an injury in fact is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent [and] not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). The second requirement is that “there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party before the court.’” *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976) as cited in *Lujan*, 504 U.S. at 560-561. The final element requires that an injury “must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Simon*, 426 U.S. 26, 38, 43 (1976) as cited in *Lujan*, 504 U.S. at 561. “[T]he burden of establishing these elements” falls upon “[t]he party invoking federal jurisdiction” and they must meet all three elements in order to confer standing. *Lujan*, 504 U.S. at 561. Both parties have stipulated that

only the first two prongs of the Lujan test, injury in fact and causality, are the only elements that Petitioner bears the burden of satisfying. *Record 11*.

A. The Petitioner was denied the right to vote, in person, on Election Day, and consequently suffered a concrete and particularized injury in fact.

The Petitioner satisfies the first element of the Lujan Test because she has suffered a concrete and particularized injury in fact. Judge DeNolf being denied the right to vote far supersedes this Court's low threshold set for what constitutes an injury in fact. It was held in the 11th Circuit Court case, *Common Cause/Georgia NAACP v. Billups*, citing the Supreme Court Case *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, that an injury does not have to be "significant" in order to be granted standing, only an "identifiable trifle." *U.S. v. SCRAP*, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973); as cited in *Common Cause/Georgia v. Billups* 554 F.3d 1340, 1351. The Petitioner's contended injury is that she was denied her right to franchise, in person, on Election Day. In *Common Cause Georgia*, the 11th Circuit Court found litigants Young and Taylor's injury, being required to obtain an identification in order to vote, although a slight inconvenience, was still sufficient to satisfy the injury in fact requirement. Furthermore, the court found standing is granted even when "the complainant is able to overcome the challenged barrier." *Common Cause/Georgia*, 554 F.3d at 1351. Judge DeNolf's contended injury is that she was unable to take part in one of the most basic democratic processes, even though she had applied for a new identification before the election. She had gone through the necessary steps to obtain a new identification with her married name on it before the election, however was still unable to cast a meaningful ballot. This meets and exceeds this court's requirement of the presence of an

“identifiable trifle.” *SCRAP*, 412 U.S. 669, 689, as cited in *Common Cause/Georgia*, 554 F.3d at 1351.

To say the Petitioner should have voted early, when her legal name matched the one on her identification, does not diminish Petitioner’s injury in fact. This Court found that the mere presence of an alternate channel does not diminish injury in fact. The Metropolitan Housing Development Corporation (MHDC) could have built their affordable housing development, Lincoln Green, on another property, but the city of Arlington Height’s denial to rezone that specific plot of land was enough to constitute an injury in fact. The fact that they “expended thousands of dollars on the plans for Lincoln Green” for the specific plot of land is enough. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 262 (1977). Judge DeNolf went through all of the necessary steps to obtain an updated identification so that she could vote on Election Day. In the record it states that it costs \$50 for a new driver’s license. *Record* 6, n. 9. The Petitioner expended the money for a new identification, so that she could vote, but her efforts were wasted because of the Olympus Voter Identification and Anti Voter Fraud Act did not allow her sufficient time to submit a copy of her valid photo identification. In accordance with Section 4 of the Act, a voter without proper photo identification can cast a provisional ballot and “within 72 hours personally submit a valid photo identification to the State Election Commissioner or to the Election Commissioner of his or her County.” *Record* 23. The Petitioner filed the proper paperwork at the DMV the day after she was married, July 6, 2012, to obtain a new license with her married name on it so she could vote in the election. *Record* 8. Judge DeNolf did not have a valid photo identification by July 7, 2012 “because it takes ten to fourteen calendar days to obtain a new license with a name change.” *Record* 8. Voting early is a viable option for some voters, however Judge DeNolf did not have to

utilize all channels in order to have suffered an injury. The fact that she was denied in person, on Election Day is sufficient to fulfil the requirement that there has been an injury in fact.

Additionally, if the Petitioner were to have attempted to vote with her old driver's license, she could have been subject to a felony charge, which would have been detrimental to her career as an elected official in Olympus. The name on Judge DeNolf's old license, "Billie Jean King," matched the name on the voter rolls, "Billie Jean King." *Record* 8. Section 9 of the Act states that "Violating this Act is felony" and by using a photo identification that does not meet the requirements of Section 1 and Section 2 of the Act, the Petitioner would be in violation of the Act. *Record* 23, 24. Section 1 defines a Valid Photo Identification Card as one with "the photograph, current name, and current address of the person to whom it was issued" and Section 2 states the only valid photo identification cards are an Olympus driver's license, a United States passport, an Olympus-issued identification card for non-drivers, and an Olympus Concealed Carry license. *Record* 23. Her driver's license, because she had been married and already filed paperwork for a new identification, no longer satisfied the Act's strict requirements. This Court has found that a person "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough" *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923); as cited in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979). The Petitioner did not have to subject herself to a felony charge in order to suffer an injury in fact. Using her old identification would ensure that she violated the Act and in doing so subjecting herself to another injury.

The Petitioner was denied the right to vote on Election Day and because of this she has suffered a concrete injury in fact that is concrete and particularized, actual, and is not conjectural or hypothetical.

B. A causal connection between the Olympus Voter Identification and Anti Voter Fraud Act exists because the Petitioner could have voted but for the law.

Causality between the Olympus Voter Identification and Anti Voter Fraud Act and the Petitioner's injury in fact exists because the Petitioner could have voted but for the law. It is clear that under the old Olympus statute the Petitioner could have cast a meaningful ballot in the primary election. She would have had the correct paperwork/identification in order to vote. Under the old law, all that was required to vote was a voter registration certificate. *Record 6*. If a voter could not produce this certificate, they had the option to sign an affidavit and present a photo identification or a personal document "such as a bank statement, utility bill, or government document" with the voter's name on it within six days of the election and their vote would be counted. *Record 6*. The Petitioner had her marriage certificate, a government document that identified both her previous and her new last names as well as her old voter identification card. *Record 8*. The Petitioner's injury in fact is directly traceable to the Act because without the Act in place, she could have voted. The causal connection between the new voter identification law and the Petitioner's inability to cast a meaningful ballot satisfies the second requirement of the Lujan test for standing. It is because the Petitioner satisfies the requirements of the Lujan test, that this Court should grant Judge DeNolf standing.

II) THE VOTER-IDENTIFICATION AND ANTI-VOTER FRAUD ACT VIOLATES THE POLITICAL SPEECH AND VOTING RIGHTS PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES BECAUSE IT UNCONSTITUTIONALLY CHILLS SPEECH.

This Court found that the only conduct protected by the First Amendment is conduct that is "inherently expressive." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297 (2006); as cited in *Voting for America v. Steen*, 732 F.3d 382, 388 (2013). To separate normal conduct from expressive conduct the Court looks for two "communicative

elements” established in *Texas v. Johnson*, 491 U.S. 397 (1989); as cited in *Steen*, 732 F.3d at 388. The first element is there must be “an intent to convey a particular message.” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989); as cited in *Steen*, 732 F.3d at 388. The second element required for conduct to be considered expressive is whether “the likelihood was great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342; as cited in *Steen*, 732 F.3d at 388.

In order for the Act to be found as constitutional under the First Amendment, the state must show there is “compelling state interest and is narrowly drawn to achieve that end” utilizing the least restrictive means. *Ark. Writers’ Project Inc. v. Ragland*, 481 U.S. 221, 231, 107 S.Ct. 1722; as cited in *Time Warner Cable Inc. v. Hudson*, 667 F.3d 630 (2012). If one of these elements in not present, the Act will not survive.

A. Voting is inherently expressive and is therefore protected by the First Amendment of the United States Constitution.

Voting is expressive conduct and warrants First Amendment protection. Judge DeNolf, a registered voter and citizen of Olympus, was prevented from voting because of an arbitrary voter identification law that is in violation of the First Amendment. The act of voting satisfies both of elements required for conduct to be considered expressive. First, when a voter completes their ballot, they are selecting the candidates they wish to represent them in office and in doing so are conveying the message that they support that specific candidate. Second, the likelihood that someone will understand the message is great because when the vote is counted, the person counting the vote understands that a vote for a specific candidate, is a vote for that candidate and not the other candidates on the ballot. If there was not a message to be understood on the ballot, it would be impossible to count which votes went to each candidate. The vote may be a simple

“yay” or “nay,” however, the simple presence of a yay or nay is enough to warrant First Amendment protection, there does not need to be enthusiasm behind it.

The 14th Circuit Court erred in saying that because voting is done anonymously, it does not warrant “First Amendment rights.” *Record* 12. Although voting is done anonymously, it is still protected under the First Amendment. The protection of anonymous speech is crucial to the protection of speech that is perceived as unpopular.

1. Voting is associational and is protected under the First Amendment.

This Court holds the freedom “to associate with others for the advancement of common beliefs is protected by the First and Fourteenth Amendments.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); as cited in *Steen*, 732, F.3d at 404 (Davis, dissenting). In an election, voters cast their individual ballots in order to support a candidate. However, when the votes are counted each individual vote comes together with other votes to associate themselves with a specific candidate. This allows voters to associate together to promote their political preferences.

B. The Act is unconstitutionally vague because it is so vague it chills speech.

In order for a statute to be considered unconstitutionally vague it must meet the requirements set in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1977). In order for a law to be unconstitutionally vague there must be no way to clearly know what conduct is made criminal and if it is so unclear that a man of common intelligence can only guess at its meaning. *Babbitt*, 442 U.S. at 307. It is unclear if Judge DeNolf would have voted with her driver’s license with her maiden name on it if she would have committed a felony act. She knew of the law, but even so did not know if voting with her old identification, or even showing it to the poll worker would be breaking the law. *Record* 11. It is also unclear what would happen if

she would have signed the affidavit in Section 4 of the law, allowing her to cast a provisional ballot, and not provided valid identification to the election commissioner within 72 hours. The Petitioner is a superior court judge in the State of Olympus, and even as as a person of above average intelligence, and she could not understand the law. It is reasonable to conclude that a person of average intelligence would not know what conduct is made criminal under the Act. Because of this the Olympus voter identification law is chilling speech because normal voters are afraid of committing a crime.

C. Strict scrutiny is the appropriate level of review because the Act is in violation of the First Amendment protection of political speech and voting rights.

The courts have previously used rational basis in regards to voting laws, however in this case strict scrutiny should be applied. In *Burdick v. Takushi*, 504 U.S. 428 (1992), the court used rational basis because the claim that the Burdick brought to the court dealt with the content of the ballot. The Court found that “Hawaii’s write in vote prohibition imposes a very limited burden upon a voter’s right to associate” with a candidate. *Burdick v. Takushi*, 504 U.S. 428. The case at bar deals with access to the ballot so that a candidate can express their association, rather than the content of the ballot. Since the Act is preventing registered voters from even accessing their right to associate and political speech, this Court should use a higher level of review to determine whether the Olympus Act is constitutional.

The Act prevents registered and qualified voters, like Judge DeNolf, from accessing the ultimate way to express political speech, voting in an election. Because of this, the appropriate level of review is strict scrutiny. Under strict scrutiny the Act does not prevail. Although there is a compelling state interest in preventing voter fraud in Olympus, the Act does not utilize the least restrictive means. Section 4 of the Olympus voter identification law only allows for 72 hours to submit a provisional ballot if a voter does not have a valid photo identification with them on

Election Day. *Record* 23. The 72-hour period that Olympus allows for provisional ballots is arbitrary and in no way furthers the states interest in preventing voter fraud. For the Act to utilize least restrictive means, it would have to accommodate the “ten to fourteen calendar days” necessary to receive a new driver’s license in Olympus. *Record* 8. In *Crawford v. Marion County Board of Elections*, a case similar to the one at bar, the Court found the voter identification law in Indiana was constitutional because they offered a ten-day period to submit proper identification to the Election Commissioner. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). Olympus has failed to fulfil all the requirements of strict scrutiny and because of this the law should be found as unconstitutional.

III) THE VOTER-IDENTIFICATION AND ANTI-VOTER FRAUD ACT VIOLATES THE POLITICAL SPEECH AND VOTING RIGHTS PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES BECAUSE IT UNCONSTITUTIONALLY CHILLS SPEECH.

The Burdick Balancing test is used to determine what kind of level of scrutiny is applicable to the case at bar. The Burdick Balancing test states that the “courts must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights”. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); as cited in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (internal quotation marks omitted). The Fourteenth Amendment it states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S Const. amend. XIV, § 1. A severe burden is deemed when there are additional requirements that are unrelated

to voter qualifications. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). We ask that this court reverse the Fourteenth Circuit’s ruling and find the law unconstitutional for three key reasons. First, the act imposes severe burdens on the Petitioner and others similarly situated. Second, strict scrutiny should be applied because of the severe burdens. Third, the act invidiously discriminates against women in the State of Olympus.

A. The Voter-Identification and Anti-Voter Fraud Act infringes upon the right to vote, and because of this, violates the Fourteenth Amendment.

One of the severe burdens that the Petitioner takes an issue with is the limited forms of identification accepted by the state. The forms of identification that are accepted are: “(1) an Olympus driver; license; (2) a United States Passport; (3) an Olympus-issued identification card for those who do not drive; and (4) an Olympus Concealed Carry license.” *Record 23*. The problem with only accepting these four forms of identification at the polls is not everyone drives, not everyone travels, and not everyone owns a gun. Student identifications and government identifications are two forms of identification are left out that are accessible to many voters. The State of Olympus does not accept these identifications “to promote administrative efficiency by streamlining the voting process, and making it easier for poll workers to verify a precise number and form of identifications to cut down on fraud.” *Record 6*. Administrative efficiency is not a compelling enough interest to place such severe burdens on voters. In the 11th Circuit Court case, *Common Cause/Georgia v. Billups*, the state allowed for six forms of identification: “a driver’s license, a voter identification card, a U.S. passport, a government employee identification card, a U.S. military identification card, or a tribal identification card.” *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009). If the State of Olympus allowed more forms of identification, it would no longer be a severe burden on voters.

Another severe burden is the fee associated with one of the four voter identification cards. The voter identification card can be found in Section 2 in Appendix I of the Voter-Identification and Anti-Voter Fraud Act. It is called the “Olympus-issued identification card for those who do not drive.” *Record 23*. However, in Section 13 of Appendix I, it is called “a photographic voter identification card.” *Record 24*. The identification card cost \$25 dollars for 5 years. *Record 6*. This constitutes as a severe burden because voters essentially have to pay to have access to the ballot. The fact that the Petitioner was able pay the fee for the correct form of identification the day before the election does not lessen the burden imposed by the law. Not only does this Court need to take into account the Petitioner, but those who this law affects the most, citizens in the State of Olympus. In *Crawford v. Marion County Election Board*, the Court found “any identification that has a fee attached to it that its sole purpose is voting is unconstitutional”. *Harpers v. Virginia Board Elections*, 383 U. S. 663 (1966); as cited in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). The fee attached to voter identification is unrelated to the requirements needed to vote in an election. In the case, *Harpers v. Virginia Board of Elections*, the state of Virginia was dealing with a poll tax, and comparing the two, the fee in the case at bar appears to be akin to a poll tax. The \$25 fee is a poll tax masquerading as a fee. The requirements to vote are found in Section 1 in Appendix I, which states an eligible voter is “A citizen of the United States, and in the State of Olympus, eligible to vote under federal, and state law.” *Record 23*. An individual’s financial status, rich or poor, should not restrict them from practicing their fundamental right to vote, and is completely unrelated to the voter qualifications stated above. This voter identification was created specifically for the law since, the previous free non-photographic voter identification was discontinued with the Act was passed. In the 11th Circuit Court case, *Common Cause Georgia v. Billups*, the state gave out “free of charge, a photo

identification card to any registered voter.” *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009). Similarly in, *Crawford v. Marion County Election Bd.*, the State of Indiana gave free voter identification cards and “because Indiana’s cards are free, the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters’ right to vote, or represent a significant increase over the usual burdens of voting.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). When the Burdick Balancing test is applied to the laws stated above, there is no severe burden in those cases. When applying the Burdick Balancing test to the case at bar the severe burdens are not outweighed by the states purported interest in curbing voter fraud and improving confidence in elections.

The fee not only impacts the Petitioner, but all citizens in the State of Olympus. This is especially true for the indigent population. The primary election took place in Sisyphus County—a rural county whose residents, regardless of their race or religion, are largely low-income. *Record 7*. For individuals who cannot afford the \$25 fee, the State of Olympus has provided an exception for them in Section 13 of Appendix I. Section 13 states, “Each county shall issue a photographic voter identification card, free of charge, to all persons who qualify as indigent. To qualify as indigent a voter must submit a certified copy of his/her state tax income tax returns and swear an oath that he or she does not have an acceptable form of identification; and that he/she is eligible to vote in Olympus.” *Record 24*. At first look this exception seems like it will help many people who would be unable to afford the identification, but in a closer look, the devil is in the details. An indigent person will have to file tax returns to the State of Olympus to show that they cannot pay the fee – in hopes of acquiring a free voter identification card. Although this is not a guarantee that an individual will qualify for a free voter identification card.

Many indigent and homeless people will not have tax returns because if a person makes below a certain income, they do not have to file tax returns, therefore a lot of these people would not have the correct information to even apply for a free voter identification card. The State of Olympus has put a smoke screen up that makes it appear like the exceptions that this law will actually help people, but it is actually doing nothing. This Court should take the totality of the circumstances into account when looking at the constitutionality of the law

A fourth severe burden is the distance to obtain a new identification. In Sisyphus County, centers to get a new identification can be up two hundred miles away and the state closed of all but two centers within the State of Olympus. The long drive to the centers coupled with the fact that after the law was passed the State of Olympus decided “to save money and reduce fraud associated with operating multiple centers that distribute identifications” they “closed all but two centers that issue driver licenses and state photo identification cards.” *Record 8*. In addition, the State of Olympus has “ten million citizens.” *Record 3*. Even though the closing of the centers and the fact that the government centers are two hundred miles away is not directly mandated within the law, it is a direct effect of it. This does not further the government interest in “decreasing voter fraud, and increasing voter confidence.” *Record 2*. If anything, the Act dissuades the people who live farther from city centers from obtaining the proper identification to vote. In *Geduldig v. Aiello*, California excluded a select group of pregnant women from a medical insurance plan to save the State of California some money. The courts found this exclusion constitutional since they were dealing with a benefit, and by including them in the insurance plan, the plan would run out of funds. *Geduldig v. Aiello*, 417 U. S. 484 (1974). When the Burdick Balancing test is applied to the Olympus state’s interest in saving money and the severe burden of reducing centers and making them very inaccessible for citizens in rural

counties, the stat's interest could never further the reduction of voter fraud or the increase in voter confidence in the electoral process. The closing of the government centers, the two hundred plus mile drive, and all other burdens mentioned above make this law unable to pass to constitutional muster.

Another severe burden is that the Petitioner and citizens of Olympus were not educated properly on the law. The law mandated in Section 8 of the law that "the provisions mandated by this Act will be publicized on the state's websites, in county clerk's offices, in county election commission offices, and posted in voting locations with website links providing information on how to receive a government-issued/state approved valid voter photo identification." *Record* 24. This is a problem when it concerns informing the general public since the State of Olympus only put in places where people would already know that they needed a new form of identification or it would be too late such as individuals going to the polls then, realizing they need a new identification. The State of Georgia in, *Common Cause Georgia v. Billups*, had a voter education program "which included distribution of letters to counties, civic groups, churches, and other groups...Georgia also resumed on radio and television broadcasts, public service announcements about the requirement of photo identification." *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1347 (11th Cir. 2009). The State of Olympus did very little to educate the public on the new law and how it would impact their elections. The State of Olympus is mostly rural so citizens who do not have access to the internet would only know that they needed a new form of identification if they went to a government office or went to vote and saw the signs about the new form of identification. The State of Olympus did not try to educate the public on the new law such as send out letters to people about the changes being made or even going to churches to inform them of the law. When a highly elected judge such as the petitioner is unable to cast a

vote on Election Day, the state cannot assume that a reasonable person would be able vote. The State of Olympus did not do everything in its power to inform and educate the citizens on the new law and how it was going to impact their right to vote a fortiori it should be unconstitutional.

B. Severe Burdens have been imposed on the Petitioner and others similarly situated, therefore strict scrutiny should be applied.

The law must be narrowly tailored to the compelling state interest with the least restrictive means to survive under strict scrutiny. The Burdick Balancing test is used to determine what kind of scrutiny should be used. “Under this flexible standard, a regulation that imposes a severe burden must be “narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. at 434, 112 S.Ct. (internal quotation marks omitted). A state must have a compelling state interest that it narrowly tailored to its goal. The State of Olympus’s compelling state interest is “to reduce voter fraud, and increase voter confidence.” Record 2. The amount of voter fraud in Olympus 0.000001%. Record 3. This is an insufficient amount of voter fraud to put in place one of the most restrictive laws in the nation. The state of seems to have created a solution looking for a problem. The State of Olympus does not increase voter confidence by having a 12.5 percent drop in women voters in an election due to the law. Record 10. These facts illustrate that the goals that the state has purported for this law have not been met. The state has failed to show that can pass strict scrutiny.

The state’s interest must be narrowly tailored to a compelling state interest. The state’s interest is not narrowly tailored because it has failed to do two key things. First, it has failed to specifically state what kind of voter fraud it is trying to reduce. Secondly, the law creates loopholes for voter fraud to continue in Olympus. In *Crawford*, the state attempted to combat voter impersonation at the polls because there is “a real risk that voter fraud could affect a close

election's outcome." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). However in, *Voting for America, Inc. v. Steen*, the state combatted registration fraud. *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013), 394. If the state is trying to target impersonation fraud at the polls, that is the lowest kind of voter fraud. Another reason why this law is not narrowly tailored to its purported goal is the absentee ballot. In Section 10 in Appendix I, it only requires "a copy of the voter's valid photo identification document attached to their absentee ballot which an individual can easily copy another person's identification and send their ballot for them without their knowledge. Record 24. This part in the law makes a loophole for voter fraud to exist in the State of Olympus which does not meet the purported goal. This law is too broad and casts a wide net over the state of Olympus in which it catches all eligible voters instead the select few committing voter fraud.

C. This Act destroys voter confidence and invidiously discriminates against women in the State of Olympus.

This law invidiously discriminates against women in the State of Olympus. To show that this law does in fact invidiously discriminate against women there must be a disparate impact and a historical deviation. Both of these are found within the Act. First, the Act disproportionately impacts women. One way this law does this is because women change their names more often than men. "Approximately 70% of all women in Olympus as well as in the United States change their name when married, 10% hyphenate their maiden name and new name, and 20% keep their maiden name." *Record 10*. This adds up to a total of 80% of women who get married changing their name. Also, within the law itself, there is no exception for women who are in the process of changing their name due to the fact that it takes ten to fourteen days for a license to process. The comments made by legislators show discrimination. Delegate Rice stated that "the Act could potentially impact minority communities, married or divorced women, the elderly, and low-

income persons more heavily, although this is not certain.” *Record 3*. Also, Bobby Bronner, President of the Olympus Republican Party, said “the other side has done serious damage to the citizens of Olympus and the rule of law by inflating voting rolls and increasing the number of ignorant and ill-prepared voters, because if you are too stupid to get an ID, then you are stupid to be allowed to vote.” *Record 3*. Lastly, many women were added to the voting rolls within the past year, increasing them “by 50,000 voters between 2000 and 2008... The majority of these new voters were women”. *Record 3*, n.3. After the law was passed, “there was a 12.5% drop in the number of female voters who cast ballots in the Olympus 2012 general election. *Record 10*. This case at bar is somewhat distinguishable from, *Kirchberg v. Feenstra*, where there was a gender discrimination since men could make decisions regarding the house mortgage and women could not. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). In the case at bar the law does not explicitly state that men and women are treated differently but when the law is applied to the good citizens of the State of Olympus then individuals can see difference in how the law treats people. This law is uniquely similar to *Michael M. v. Superior Court, Sonoma City*, with the fact that on its face does it seem that it would treat men and women equal but, when applied they are not. *Michael M. v. Superior Court, Sonoma City*, 450 U.S. 464, 476, 478 (1978). This case had to deal with a rape law in which only the men were the ones criminally liable, not the women since deterring teen pregnancy was enough for women. In the case at bar, when women go to change their name, they have to take into account what else is going on because if not then they would end up just like the Petitioner, unable to vote.

There is also a huge historical deviation from the past law. Under the past law if an individual came to the polls with a correct form of registration certificate, they could show a bank document or government document. *Record 6*. The Petitioner would have been able to vote

if not but for this law. The Honorable Billie Jean DeNolf did come to the polls with a government document in hand, her marriage certificate. Unfortunately, the type of government document was not allowed. Under the new law the only types of documents that were allowed were “an Olympus driver license; a United States Passport; an Olympus-issued identification card for those who do not drive; and or an Olympus Concealed Carry license.” *Record 23*. In the case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, there was found to be no historical deviation since the Village of Arlington Heights had kept the zoning since the 1950s. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977). This law was made with discriminatory intent towards women that restricted their constitutional right to vote, a fortiori this law should be struck down since it does not further the state’s interest. This is law invidiously discriminates against women in the state of Olympus and we urge this court to review this under strict scrutiny since the invidious discrimination is connected with the fundamental right to vote.

Conclusion

The Olympus Voter Identification and Anti-Voter Fraud Act is unconstitutional under the First and Fourteenth Amendments. The Petitioner has suffered a concrete injury in fact that is directly traceable to the Olympus voter identification law. Judge DeNolf was unable to cast a meaningful ballot on Election Day under the strict regulations of the Act. Furthermore, the Act prevents voters from expressing political opinions under the First Amendment. Voting conveys a strong message that is understood when the votes are counted. Voting also allows voters to associate with one another to advance political views.

The law is so unconstitutionally vague that even a judge was unable to clearly understand what conduct is made criminal under the act effectively chilling political speech because voters

do not vote out of fear of committing a felony. Because the law chills so much speech, strict scrutiny applies. The 72-hour restriction on provisional ballots is arbitrary and does not promote the state's interest in preventing voter fraud. The law does not utilize the least restrictive means in order to promote a compelling state interest and therefore fails strict scrutiny.

The severe burdens placed on the citizens of Olympus do not outweigh the state's interest in preventing voter fraud. Using the Burdick Balancing test, the correct level of scrutiny to apply is strict scrutiny. The Voter-Identification and Anti-Voter Fraud Act is intertwined with the double helix where the First and Fourteenth Amendments are internally intertwined. At the end of the day, both the Petitioner and her husband made the same decision to get married on July 5, 2012. However, on Election Day only Mr. DeNolf was able to vote. In order to uphold the democratic process and ensure that every voter's voice is heard during an election.

We respectfully ask the Court to find the Act unconstitutional and reverse the decisions of the Fourteenth Circuit.

Respectfully Submitted,

Counsel for the Petitioner.