No. 2016-2017

IN THE SUPREME COURT OF THE UNITED STATES

The Hon. Billie Jean DeNolf
Petitioner

v.

State of Olympus
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Petitioner has standing to bring suit in accordance with the case and controversy requirements of Article III of the United States 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 Constitution, 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

Constitutional Provisions:

U.S. CONST. art. III, § 2, cl. 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. CONST. amend. 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. CONST. amend. XIV, § 1:
"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."

Statutory Provisions:

Olympus Voter-Identification and Anti-Voter Fraud Act (2010):

…

§ 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. […]"

…

§ 11: "All voters may vote in 'early election' within 14-30 days prior to the primary or election provided they meet the criteria above."

…

§ 13: "Each county shall issue a photographic voter identification card, free of charge, to all persons who qualify as indigent. […]"

STATEMENT OF THE CASE

The parties to this case have stipulated to the accuracy of the following facts. On March 17, 2010, the Olympus General Assembly passed the Voter-Identification and Anti-Voter Fraud Act on a largely party-line vote (with all Republicans supporting the Act and most Democrats opposing it). *The Record*, 2. This was followed shortly thereafter by the Republican governor signing the Act into law. *Id.*, at 2. The Act requires all voters to present one of four enumerated forms of photo identification to prove their identity before casting a ballot. *Id.*, at 23. The Act creates an early voting period starting 30 days prior to the election and closing 14 days prior to the election. *Id.*, at 24. The Act also creates a provisional balloting period lasting for 72 hours after the close of the polls. *Id.*, at 23. Individuals who do not possess valid photo identification due to religious objection or natural disaster may cast a provisional ballot and sign an affidavit to have their votes counted. *Id.*, at 24.

Prior to the passage of the Act, Olympus did not require photo identification – voters were only required to present their voter registration certificate. *Id.*, at 6. Olympus also stopped providing free nonphotographic identification cards through the Secretary of State's Office, because these cards are no longer valid under the Act. *Id.*, at 6-7. Instead, the Act requires that each county in Olympus provide free photographic identification cards to indigent voters. *Id.*, at 24. Since the passage of the Act, Olympus has consolidated all driver license and photo identification card issuance into two centers, which can be up to 200 miles away from citizens. *Id.*, at 7. Indigent voters can obtain their free identification cards within their own county without traveling that distance. *Id.*, at 24.

From 1990 to 2000, there were 8 successful prosecutions for voter fraud in Olympus, which doubled to 16 between 2000 and 2010. *Id.*, at 3. Likewise, the total number of election

fraud prosecutions doubled from 16 to 32 during the same periods. *Id.* No studies have been introduced into the record to evaluate the impact of the Act on voter fraud levels in Olympus. *Id.* Approximately 5% of eligible voters do not have a driver license, which is similar to the national average. *Id.*, at 10. The record does not indicate how many of these 5% possess some other acceptable form of identification, such as a United States passport or an Olympus non-driver photo identification card.

Petitioner Billie Jean DeNolf was a registered Democrat and an incumbent superior court judge in the 15th District in Sisyphus County, Olympus. *Id.*, at 7. The record contains no indication that Petitioner is a low-income individual or that she is a member of a racial or ethnic minority. In January 2012, Petitioner became engaged to be married on July 5, 2012, two days before the primary election. *Id.*, at 8. After being married on July 5, she filed a request to change the name on her Olympus driver license on July 6. *Id.* The Olympus Department of Motor Vehicles typically takes 10-14 days to process name change requests for driver licenses, so she had not received her new license by the day of the primary election. *Id.*

On July 7, Petitioner attempted to vote in the primary election. When she was asked to show photo identification, Petitioner presented her marriage license, informed the poll worker that her driver license was no longer valid because of her name change, and argued that a voter registration certificate had been sufficient identification in the past. *Id.* When she was asked to show valid proof of identity, Petitioner argued that the law was discriminatory. *Id.* She began to argue loudly with the poll worker until another poll worker threatened to call local law enforcement to break up the argument. *Id.*, at 9. Petitioner then left, and did not request a provisional ballot. *Id.* Petitioner won the primary election, but went on to lose the general election. *Id.*

After losing the general election, Petitioner filed a lawsuit in federal district court alleging that the Act violated her right to vote under the First Amendment and her rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* She claimed that she suffered harm because she was personally denied her right to vote and because her supporters were also prevented from voting. *Id.* Petitioner specifically claimed that low-income individuals, women who had recently changed their names, and those without photo identification (such as the nuns at the Sisters of Divine Providence) were prohibited from voting for her, and that these groups were likely to support her. *Id.* Therefore, she claimed to have suffered harm through the loss of their support in the election. *Id.* Petitioner does not claim to be unaware of the requirements of the Act, nor does she claim that she had insufficient notice of the Act to be able to comply with its provisions. *Id.*, at 11.

The district court granted the state's motion to dismiss under Fed. R. Civ. P. 12(b)(1) on standing grounds after the close of Plaintiff's (now Petitioner's) case in chief and before the start of the state's case in chief. *Id.*, at 10. The Fourteenth Circuit affirmed the district court's grant of the motion to dismiss and also ruled against Petitioner on the merits of her First and Fourteenth Amendment claims. *Id.* The petition for a writ of certiorari was timely filed. All issues raised before this Court are questions of law, not of fact.

SUMMARY OF ARGUMENTS

Petitioner does not have standing to bring this suit. Petitioner's novel candidate-based theory of standing seeks to raise claims on behalf of individuals who are not party to this litigation and whose claims to injury remain unexamined. Petitioner does not have standing to assert the rights of third parties not before the Court. *Warth v. Seldin*, as cited in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* Petitioner also assumes that the persons she claims are harmed by the Act would have voted for her in order to reach the speculative and hypothetical harm to her own chances of being elected. This speculation is far less than what is necessary to prove that Petitioner has suffered an injury.

Petitioner also lacks standing to bring this suit based on the injury she claims to have suffered, because she fails the injury in fact and causality prongs of the test for standing set forth in *Lujan v. Defenders of Wildlife*. Because Petitioner could have voted during the early voting period when her identification was still valid, her claim is ultimately reducible to a claim that she was unable to vote at the exact date and time of her choosing, and she has not suffered an injury in fact under *Lujan*. The burden of casting a ballot on a different day due to an impending name change is not a constitutionally significant burden. *See Crawford v. Marion County Election Board*. Petitioner also fails the causality prong of the *Lujan* test, because her own choices are the ultimate reason that she was unable to vote on the day of the primary election. She was eligible to vote during the early voting period, but chose not to do so.

The proper locus for the right to vote is not in the First Amendment. Only conduct that is inherently expressive is entitled to First Amendment protection. *Rumsfeld v. Forum for Academic and Institutional Rights*, as cited in *Voting for America v. Steen* (5th Cir.). Conduct that is not inherently expressive cannot be combined with speech to create protected expressive

conduct. *Clark v. Community for Creative Non-Violence*, as cited in *Steen*. Because voting does not have a generalized expressive function, *Storer v. Brown*, as cited in *Burdick v. Takushi*, it does not necessarily fall within the scope of the First Amendment's protection.

Not every procedural limit on the process of voting implicates First Amendment interests. *Steen*. Instead, the pattern that can be seen is that the Court applies the First Amendment when advocacy is burdened. In this case, the Act places no burden on advocacy, because Petitioner retains the unhindered ability to advocate for her own election. Because advocacy remains unburdened, the Act does not burden First Amendment interests.

Even if the Court were to apply First Amendment analysis, the proper test is rational basis review. Because the Act does not impose a severe burden on the right to vote, the state's important regulatory interests are usually sufficient to prevail under *Anderson v. Celebrezze*, as cited in *Burdick*. As in *Crawford*, there is no severe burden imposed on the right to vote, so strict scrutiny is not warranted. However, even if this Court were to apply strict scrutiny, the Act still survives. Olympus has a compelling interest in preventing voter fraud, *Purcell v. Gonzalez*, as cited in *Steen*, and the Act is narrowly tailored to achieve this interest. The early voting period, the provisional balloting period, and the availability of free photo identifications for indigent voters all speak to the fact that the Act is the least restrictive means by which the state can advance its interests.

Generally applicable laws with disparate impact are not presumptively unconstitutional. Rather, those challenging a statute must prove that it was enacted with discriminatory intent. Even if Petitioner were to prove that the Act was passed with discriminatory legislative intent, the statute still survives if the state can point to valid and neutral justifications for it. *Crawford*. Even if the Act imposes an unjustified burden on a small number of voters, that burden does not

justify wholesale invalidation of the statute. *Id.* The Act does not constitute invidious discrimination against the narrow class of persons who decide to change their names 10 or fewer days before an election. The Act is related to voter qualifications, which insulates it from being invidious under the standard set forth in *Harper v. Virginia State Board of Elections*, as cited in *Crawford*. Likewise, it does not constitute discrimination on the basis of either political affiliation or gender. Further, the Act does not have discriminatory effects, as evidenced by the mechanisms the state created to allow individuals in Petitioner's situation to still cast ballots. The Act seeks to prevent voter fraud, and it is carefully crafted to advance that state interest while simultaneously allowing those in unique circumstances to be able to exercise their right to vote.

ARGUMENTS

This case is before the Court because Petitioner has elected to challenge the state at the height of its power to impose neutral regulations to protect the integrity of the voting process. Petitioner has failed to identify a single individual who would be unable to cast a ballot during the early voting and provisional balloting periods designed to mitigate the Act's impact. The Court rejected just such a challenge in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and Petitioner can provide no reason for the Court to reverse course here.

I. PETITIONER DOES NOT HAVE STANDING TO BRING SUIT UNDER THE CASE AND CONTROVERSY REQUIREMENT OF ARTICLE III.

Petitioner raises two distinct claims to attempt to establish her standing to bring this suit. First, she raises a claim on the basis of a novel candidate-based theory of standing, wherein she argues that she suffered harm because her supporters were prevented from voting on election day. *The Record*, 9. Second, she argues that she suffered harm because she personally was prevented from voting on Election Day. *Id*. Because she cannot prevail on either theory, this Court should reject her suit.

A. Petitioner does not have standing to raise claims through a candidate-based theory of standing.

1. Petitioner raises claims based on the rights of individuals not party to this litigation.

Petitioner raises her claim to candidate standing based on the Act's impact on women in Sisyphus County who have characteristics not shared by Petitioner herself. Particularly, she points to nuns at Sisters of Divine Providence, who largely supported Petitioner in the past. *Id.*, at 7. Most of the nuns do not possess photo identification, because they have no need for any such identification and have chosen not to seek one. *Id.*, at 7-8. Petitioner also points to low-income residents who are financially unable to obtain proper identification. *Id.*, at 9.

2. Standing is only conferred upon parties on the basis of the actual injury they personally have suffered.

Parties do not have standing to assert the rights of third persons not before a court. *Warth v. Seldin*, 422 U.S. 490, 499 (1975), as cited in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977). Instead, Petitioner bears the burden of demonstrating that she personally was injured by the challenged action. *Arlington Heights*, at 261. There is no evidence in the record that Petitioner is a nun without proper identification or an economically disadvantaged person who cannot afford identification. Petitioner's novel theory of standing must be rejected, as standing is not "an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973), as cited in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992). Petitioner's assumption that all the individuals she claims were unable to vote would have voted for her is highly speculative and assumes that she owns their votes. She has failed to identify a single individual who would be unable to cast a ballot during the provisional balloting or early voting periods as an alternative to voting on Election Day. Petitioner relies on injuries suffered by individuals not party to this litigation, but does not have standing to raise their claims.

B. Petitioner does not have standing to raise claims through a voter-based theory of standing.

To prove standing based on the injury that she claims to have personally suffered through her inability to cast a ballot on Election Day, Petitioner must prevail under the test set forth for standing in *Lujan v. Defenders of Wildlife*. The *Lujan* test has three prongs which must be met for a plaintiff to prove standing: 1) the plaintiff must have suffered an injury in fact; 2) the plaintiff must prove a causal connection between the injury in fact and the challenged conduct; and 3) the plaintiff must demonstrate that the injury is likely to be redressed by a favorable court decision. *Lujan*, at 560-61.

1. Petitioner has not suffered an injury in fact.

The injury Petitioner complains of does not rise to the level of an injury in fact, because it is ultimately reducible to a claim that she was not able to vote on the date and time of her choosing. While Petitioner attempts to frame the issues in this case as a wholesale denial of her right to vote, the state provided her with multiple opportunities to vote when her identification was valid. Her failure to take advantage of these narrows the scope of the injury she can claim.

Petitioner does not dispute that she could have voted during the early voting period for the election when her identification was still valid. *The Record*, 11. Section 11 of the Act creates an early voting period in which individuals can vote prior to the election for any reason. *Id.*, 24. The state created this early voting period to solve problems just like Petitioner's, when an individual finds themselves in the situation of knowing that their identification will be invalid on Election Day. Section 4 of the Act also sets up a provisional balloting period after the election to allow those who do not bring their identification to the polling place to cast a ballot. *Id.*, at 23. The burden of voting on a different day to account for an impending name change is precisely the sort of burden "arising from life's vagaries" that the *Crawford* Court found did not raise any serious questions about the constitutionality of identification requirements. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

This Court has never recognized any protected liberty interest in casting a ballot at the exact time of one's choosing. Indeed, this Court has given little weight to the interest that candidates and voters might have in making late decisions regarding election matters. *Cf. Storer v. Brown*, 415 U.S. 724, 736 (1974), as cited in *Burdick v. Takushi*, 504 U.S. 428, 437 (1992). As this Court noted in *Burdick*, "Reasonable regulation of elections… require[s] [voters] to act in a timely fashion if they wish to express their views in the voting booth." *Burdick*, at 438.

2. Petitioner's alleged injury is the result of her own actions, not the result of Olympus's implementation of the Act.

Petitioner's alleged injury was caused by her own actions, not by the Act. The state provided Petitioner with ample opportunities to cast a ballot during the Section 11 early voting period and during the Section 4 provisional balloting period. Those opportunities would have allowed Petitioner to cast a ballot prior to her name change, if she had simply availed herself of them. Petitioner has never claimed to be unaware of the Act's requirements, and there are no allegations that the state's publicity campaign that sought to inform the public about the Act's requirements was inadequate. *The Record*, 7. Thus, Petitioner's claim fails the causality prong of the *Lujan* test, so she does not have standing to bring this suit because she is the author of her own circumstances. Petitioner chose not to avail herself of the opportunities the state offered her to vote when she had valid identification. The Court should not permit her to escape the consequences of that decision by invalidating the Act.

C. If the Court were to grant Petitioner standing, the proper remedy would be to remand this case to the district court for a full trial.

While the state contests Petitioner's standing, if the Court were to rule in her favor on standing, it should not rule on the merits and should instead remand the case to the district court for a full trial. This appeal is based on the district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *The Record*, 10. This motion was made by trial counsel for the state and granted by the district judge after the close of the Plaintiff's (now Petitioner's) case in chief and before the start of the state's case in chief. *Id.* Olympus never had the opportunity to present evidence or testimony that would mitigate or refute the evidence Petitioner entered into the record. It would be highly prejudicial to the state for the Court to rule on the merits with only evidence from one party before it.

While the state prevailed on the merits before the Fourteenth Circuit despite this disadvantage, federal courts should not ordinarily rule on the merits of a dispute if they dispose of it on Article III standing grounds. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006), as cited in *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting). If the Court were to rule that Petitioner has standing to bring this suit, it should remand the case to the district court for a full trial so that the state can address the merits on level terms with Petitioner.

II. THE ACT DOES NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS.

A. The right to cast a ballot is not located in the First Amendment.

1. The proper locus of the right to vote is in other constitutional provisions.

The right to vote is a fundamental right that is protected by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the Constitution. However, the right to vote is not established by the First Amendment. Rather, the core of the right to vote is located in the Due Process Clause of the Fourteenth Amendment as a protected liberty interest, which is then protected against certain types of restrictions in other amendments. The only way in which the right to vote could stem from the First Amendment is if the mechanics of voting constituted some form of political speech or expressive conduct, as Petitioner alleges.

2. Only conduct that is inherently expressive is entitled to First Amendment protection.

Not all conduct claimed as expressive falls within the purview of the First Amendment. Only "inherently expressive" conduct is protected under the First Amendment. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006), as cited in *Voting for America, Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013). Conduct does not become protected First Amendment activity merely because the person engaging in that conduct intends to express an idea. *Id.* This Court has repeatedly rejected the idea that non-expressive conduct can be

combined with speech and transformed into expressive conduct. *See*, *e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297-98 (1984) (non-expressive conduct does not acquire First Amendment protection by being combined with activities involving speech), as cited in *Steen*, at 389. As the *Rumsfeld* Court noted, "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, at 66, as cited in *Steen*, at 389. *Storer v. Brown* notes that elections exist to enable the selection of candidates for office, not to allow individuals to give vent to their political goals. *Storer*, 415 U.S. at 735, as cited in *Burdick*, 504 U.S. at 438. The right to vote is neither core political speech nor expressive conduct.

3. The advocacy surrounding voting is distinct from the mechanics of voting.

When evaluating election law challenges, it is vital to be precise and disaggregate the right to cast a ballot from other seemingly related rights. Speech-related activities and non-speech activities "cannot be amalgamated into protected 'expressive conduct.'" *Steen*, at 390.

i. The First Amendment is applied to the right to vote only when advocacy is burdened.

Not every procedural limit on election-related conduct in general or on the right to vote in particular automatically implicates First Amendment interests. *Steen*, at 392. Instead, a law must burden advocacy by restricting political discussion or the exchange of ideas. *Id.* This pattern of evaluating the impact on advocacy to determine whether the First Amendment is applicable to a challenge to an election regulation is seen by evaluating the distinction between the cases where this Court applied the First Amendment to such challenges and those where the Court chose not to do so.

In a case extremely similar to this matter, the Court in *Crawford* upheld Indiana's voter identification law against a challenge based on the First and Fourteenth Amendments. At first

glance, it might seem that the Court's assumption that the First Amendment was applicable suggests that the right to vote can flow from the First Amendment, but one key detail proves this false: *Crawford* involved analysis of burdens imposed on organizational plaintiffs. *Crawford*, 553 U.S. at 188. Likewise, the Eleventh Circuit in *Common Cause/Georgia v. Billups* addressed a challenge by organizational plaintiffs, and examined in detail precisely how their advocacy would be burdened. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009). A law that burdens the advocacy of organizational plaintiffs implicates First Amendment interests, so the state must justify that burden.

Two other election-related cases saw the Court apply the First Amendment after engaging in fact-specific analysis of how advocacy was burdened. *Meyer v. Grant* examined restrictions on who could engage in political speech by circulating petitions, which directly regulated advocacy, so the statute implicated First Amendment interests. *Meyer v. Grant*, 496 U.S. 414, 422-23 (1988), as cited in *Steen*, 732 F.3d at 390. In *Buckley v. American Constitutional Law Foundation*, the Court held that restrictions similar to those at issue in *Meyer* implicated First Amendment interests because of the burden they imposed on advocacy. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 204-05 (1999), as cited in *Steen*, at 391.

ii. The Act does not burden advocacy, so it does not implicate First Amendment interests.

The Act presently before the Court imposes no such burdens on advocacy. Unlike *Crawford* and *Common Cause*, no organizational plaintiffs are present to demonstrate burdens on advocacy. This case is distinguishable from *Meyer* and *Buckley* because there is no burden placed on Petitioner's ability to advocate for her own election, so the Act does not have "the inevitable effect of reducing the total quantum of speech." *Meyer*, at 422-23, as quoted in *Steen*, at 390. Instead, this case is more like cases where advocacy was unburdened and the Court

declined to apply the First Amendment. *See generally Rumsfeld*, 547 U.S. 47, as cited in *Steen*, at 388; *Clark*, 468 U.S. 288, as cited in *Steen*, at 389. Petitioner's ability to urge voters to support her has not been burdened, and she is free to campaign without restriction.

The Fifth, Eighth, Tenth, and Eleventh Circuits have examined burdens on advocacy to reject challenges to election-related laws. In *Steen*, the Fifth Circuit analyzed the decisions of its sister circuits that election-related laws which do not burden advocacy do not implicate the First Amendment. *Steen*, at 392, citing *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), and *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996). The precedents of this Court and multiple federal circuits are clear: When advocacy remains unburdened, a challenged statute does not burden First Amendment interests.

B. Even if the Court were to apply First Amendment analysis, the Act survives review under the balancing approach.

1. Because the Act does not impose a severe burden on Petitioner's voting rights, rational basis review is the proper test.

Every election law will necessarily impose some burden on individual voters. *Burdick*, 504 U.S. at 433. *Anderson v. Celebrezze* set forth a flexible standard for evaluating challenges to state election regulations by weighing "the character and magnitude of the asserted injury" against the interests claimed by the state as the justification for the burden. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), as cited in *Burdick*, at 434. The *Anderson* balancing test calls for the application of strict scrutiny when the regulation in question imposes a severe burden on voting rights. *Burdick*, at 434. However, if the restriction is reasonable and nondiscriminatory, the state's regulatory interests are generally sufficient to prevail. *Anderson*, at 788-89, as cited in *Burdick*, at 434.

While there is no litmus test for determining whether a burden is severe, *Crawford*, 533 U.S. at 191, there is strong evidence from this Court's precedents that any burden imposed by the Act is not severe. *Crawford* held that the impact of a comparable voter identification law on all Indiana voters was only a limited burden, and thus refused to apply strict scrutiny. *Id.*, at 203. Indeed, the burden placed on voters in Olympus is arguably less than that imposed in *Crawford*, because the statute at issue had only a provisional balloting period. *Id.*, at 199-200. The Act in question today has both provisional balloting and early voting periods, which makes it even easier for voters to cast a ballot, so the Act does not impose a severe burden. *The Record*, 23-24.

2. Olympus has regulatory interests that justify the Act, so it survives rational basis review.

Any system of voting that relies on the use of registration, precincts, or districts will necessarily require some means of determining a voter's identity. Thus, the Act's requirement that voters produce a photo identification is rationally related to the state's interest in preserving the integrity of the electoral process. *Crawford*, at 189-90. The state's interests in orderly administration and accurate recordkeeping provide further justification for the Act. *See id.*, at 196. The Act imposes facially neutral restrictions that advance its important regulatory interests, so it survives rational basis review.

C. Even if the Court were to apply an increased level of scrutiny, the Act survives strict scrutiny.

Even if the Court were to break with its clear precedent in *Crawford* and find that photo identification laws impose a severe burden on voting rights, the Act still survives strict scrutiny.

1. Olympus has compelling interests that justify the Act.

Olympus "indisputably has a compelling interest in preserving the integrity of its election process" by combating the risk of voter fraud. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), as cited

in *Steen*, 554 F.3d at 1353. As *Crawford* makes clear, "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, at 196. *Crawford* upheld Indiana's interest in combating voter fraud, even absent any evidence that voter fraud was occurring in Indiana. *Id.*, at 195-96. Thus, Olympus need not prove that voter fraud has occurred to trigger this interest – though the state has seen a significant increase in the number of voter fraud prosecutions in recent years. *The Record*, 3. Olympus has an additional interest in orderly and efficient administration of elections to allow for election results to be recorded and reported quickly and accurately. *Crawford*, at 196. Another distinct interest is the state's interest in preserving public confidence in the integrity of the electoral system, which is significant because it encourages citizen participation in the electoral system. *Id.*, at 197.

2. The Act is narrowly tailored to achieve these ends.

Like the statute at issue in *Crawford*, the Act is designed to advance the state's interests by requiring voters to show proof of identity to make voter fraud more difficult. By allowing voters to use any of four different types of photo identification cards, the Act goes no further than necessary to advance the state's interest in verifying that prospective voters at the polls are who they claim to be and are registered voters. Requiring voters to produce identification is the minimum possible requirement Olympus could implement to combat voter impersonation fraud. The regulations contained within the Act are all narrowly tailored to achieve the state's interests.

3. The Act is the least restrictive means of advancing the state's interests.

The Act goes to great lengths to provide opportunities for individuals to be able to cast a ballot even if they face extenuating circumstances, such as their desire to change their name the day before an election. Section 11 of the Act allows voters such as Petitioner to vote while their identification is still valid. *The Record*, 24. Petitioner's identification was valid during the

entirety of the early voting period, and she was aware that she would be changing her name the day before Election Day. This extended opportunity to cast a ballot demonstrates the measures the state has taken to minimize the impact of the Act, but Petitioner chose not to avail herself of that opportunity. Further, Section 4 of the Act sets up a provisional balloting period for the 72 hours following the election to allow those who may have forgotten to bring their identification to the polls to still cast a ballot. *Id.*, at 23. Finally, Section 13 of the Act allows indigent voters to obtain a free photographic identification card from their own county, so they can avoid the cost and long travel distance associated with other types of identification. *Id.*, at 24.

III. THE ACT DOES NOT VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION.

A. Generally applicable laws with disparate impact are not presumptively unconstitutional.

1. Disparate impact claims require proof of discriminatory intent to invalidate state statutes.

In his concurrence to *Crawford,* Justice Scalia cited *Washington v. Davis* and noted, "Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, … weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *Crawford*, at 207 (Scalia, J., concurring) (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)). Without intent to discriminate, there is no violation of the Equal Protection Clause. *Arlington Heights*, 429 U.S. at 266. Even if Petitioner could prove that the General Assembly adopted the Act out of

discriminatory intent, the state need merely show that a valid, neutral justification for the challenged statute exists to save its constitutionality. *Crawford*, at 204.

2. The Act creates a narrow classification based on valid factors.

The class impacted by the Act falls squarely within the *Davis* nondiscriminatory voting law standard. It is based not on gender, but on a generally applicable standard of timing of name changes. The only individuals affected in the way Petitioner was affected are those who change their name ten or fewer days prior to the election. Those who change their names earlier will have ample time to receive new identification prior to the election. *The Record*, 8. As *Crawford* notes, "Even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation." *Crawford*, at 199-200. Even if an excessive burden is imposed on a small number of voters, that burden does not justify wholesale invalidation of the Act.

3. Even if the Act imposed an unjustified burden on a small number of voters, its general applicability is sufficient to save its constitutionality.

There are three reasons why the Court should apply the *Davis* rule to the present case. First, the law itself is clearly generally applicable. No specific group is ever named, particularly in a derogatory way or in a way which could bar its members from voting. The only 'groups' of individuals named are indigent voters (who are granted an exception to the fee for identification) and voters with religious objections (who are also granted an exception). *The Record*, 24. Second, the facts of this case suggest that Petitioner was ultimately at fault. Finally, this scenario is exceedingly rare. Consider the factors at play: Petitioner was married only two days before the election and decided to change her name the day before the election. *Id.*, at 8. Once the poll worker determined that Petitioner did not possess valid identification, he made the correct

judgement, as he would have put the integrity of the statute at risk to take it upon himself to interpret it to mean anything other than Petitioner could not vote without proper identification.

B. The Act does not create an invidious classification under any reasonable construction of the statute.

Unprotected classes are not granted invidious classification status by this Court, even when they raise equal protection claims. *See*, *e.g.*, *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Harris v. McRae*, 448 U.S. 297 (1980); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Washington v. Davis*, 426 U.S. 229 (1976), all as cited in *Crawford*, at 207-08 (Scalia, J., concurring). In Justice Scalia's words, "The Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. A fortiori it does not do so when, as here, the classes complaining of disparate impact are not even protected." *Crawford*, at 207 (Scalia, J., concurring). The class in question – voters who change their names ten or fewer days prior to an election – is not a protected class. Nonetheless, there are three remaining ways Petitioner may possibly claim this to be an invidious classification, and all of three prove fruitless upon analysis.

1. The Act does not create an invidious classification under *Harper*.

First, Petitioner may argue that the Act creates an invidious classification under *Harper v. Virginia State Board of Elections*, which held that "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), as cited in *Crawford*, at 189. The standard set forth by the Act is related to voter qualifications: It ensures that the person at the voting booth is the eligible voter. This applies to all voters equally, which satisfies the *Anderson* rule that "evenhanded restrictions that protect the reliability of the electoral process itself are not invidious and satisfy the standard set forth in *Harper*." *Anderson*, 460 U.S. at 788, n.9, as cited in *Crawford*, at 189-90.

2. The Act does not constitute political discrimination.

Next, Petitioner may raise a political discrimination claim. Such a claim would likely be based on statements from individuals during the Act's consideration \ and the largely partisan vote. *The Record*, 2-3. Two arguments should prevail over such claims. First, "[valid neutral justifications] should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." *Crawford*, at 204. Second, *Arlington Heights* notes that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Arlington Heights*, 429 U.S. at 268. This case is quite similar to *Crawford*, where the "litigation was the result of a partisan dispute that had spilled out of the state house into the courts." *Crawford*, at 203.

3. The Act does not constitute gender discrimination.

Finally, Petitioner may raise a gender discrimination claim. *Michael M. v. Superior Court, Sonoma County* is the most helpful case, in which statutory rape was defined on gendered lines. *Michael M. v. Superior Court, Sonoma County*, 450 U.S. 464 (1981). This Court upheld that statute against an equal protection challenge and considered a useful rule for gender discrimination cases. That rule, from *Parham v. Hughes*, was that there can be "[n]o overbroad generalizations based on sex which are entirely unrelated to the differences between men and women or which demean the social status of the affected class." *Parham v. Hughes*, 441 U.S. 347, 354 (1979), as cited in *Michael M.*, at 469. When applied here, the Act clearly survives. It creates no overbroad generalizations based on sex at all. The Act never uses the terms "women," "men," or any other gendered language. Nor are there demeaning effects on women's social status: Women can still vote, and most women will be entirely unaffected. A remarkably small class is affected, and the state has provided opportunities for those very few to vote early. While

there is undoubtedly a right to vote, there is no right to vote on a particular day. *Cf. Storer v. Brown*, 415 U.S. at 736, as cited in *Burdick*, 504 U.S. at 437. No class of individuals – women or men, married or unmarried – is ever prevented from voting.

C. The Act does not have discriminatory effects.

1. The Act provides mechanisms by which individuals can exercise their right to vote when their identification is still valid.

If a statute does not have discriminatory effects, it does not violate the Equal Protection Clause. Even the narrow class of persons impacted by the Act are not prevented from voting. Three factors serve as evidence of this. First, the Act allows early voting, so individuals may vote 14-30 days prior to the election. *The Record*, 24. Those who plan to change their name ten or fewer days prior to the election could simply vote during this time. Second, it is possible that state courts could interpret an identification with a person's maiden name to be valid until they receive their new identification. There is no indication from the record that any other use of such an identification would be invalid (*e.g.*, for driving). Based on the record's silence, it must be assumed that state courts have not yet had an opportunity to interpret the Act, and, absent an expansive construction of the statute from state courts, "Federal courts are required to accepting a narrowing construction of a state statute in order to preserve its constitutionality." *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988), as cited in *Steen*, at 732 F.3d at 396.

2. Any effect of the statute was caused by Petitioner's refusal to avail herself of these opportunities.

If individuals do not seek an updated identification after changing their names, they may find themselves similarly situated to Petitioner. But this demonstrates the third evidence that Olympus does not prevent such individuals from voting: These voters would be the cause of the

problem preventing them from voting, not the Act. Further, Petitioner's choice not to vote early was the ultimate cause for her inability to vote.

D. The Act advances the state's interest in preventing voter fraud.

1. Olympus has a particularly important interest in stopping voter fraud.

When a state has sought to prevent voter fraud, this Court has upheld the statute in every case in the record. *Crawford* upheld a statute similar to the Act because Indiana sought to prevent voter fraud, despite the lack of any examples of voter fraud in the state. *Crawford*, 553 U.S. at 204. In this case, there is even greater reason to uphold the Act. Since 1990, the state has witnessed a 100% increase in voter fraud cases. *The Record*, 3. While this may 'only' be from 8 to 16 successful prosecutions, the prosecution outcome statistics in the record suggest that as many as 1 in 14 of the nation's successfully prosecuted voter fraud cases occur in Olympus.

2. The Act advances that interest.

The Act does not seek to prevent voter fraud in an arbitrary manner – rather, it is carefully crafted so that it will prevent voter fraud by addressing the primary ways in which fraudulent voters can succeed. *Crawford* concluded that a law like Indiana's was a proper means of preventing voter fraud, and Olympus has taken a similar approach. Olympus requires voters' current name to match their identification, which allows poll workers to compare the identification against the list of eligible voters, which is linked to driver license information pursuant to federal requirements. *See Crawford*, at 192-93. This allows the state to stop individuals who attempt to commit in-person voter impersonation fraud.

3. The Act's exemptions reduce the weight of the burden for those in unique situations.

The Act provides exceptions to a reasonable degree. The early voting period exists to accommodate unusual scenarios (such as the situation in which Petitioner found herself). This

ends 14 days prior to the election – a date consistent with the 10-14 days it takes to update an ID. *The Record*, 8. The provisional balloting period exists for circumstances which were outside the voter's control or which are common problems (natural disasters, forgotten identification, or religious objections). *Id.*, 12. Olympus cannot infinitely extend early voting and provisional ballots, as doing so would create administrative difficulties and potentially prevent sufficient votes from being cast in time to report election results in a timely fashion.

CONCLUSION

Petitioner does not have standing to bring this suit under the case and controversy requirements of Article III. The novel candidate-based theory of standing should be rejected because parties do not have standing to assert the injuries suffered by individuals not party to the litigation. Petitioner's claim that she suffered injury because her supporters were not able to vote is speculative and is insufficient to confer standing. Petitioner's claims of injury that she personally suffered fail the *Lujan* test. Her claims fail the injury in fact prong, because the injury that she claims is ultimately reducible to a claim that she was not able to vote on the exact day of her choosing. Her suit fails the causality prong because she is the ultimate reason she suffered any alleged injury because of her failure to avail herself of the opportunities the state provided her to vote, such as the early voting period.

The Act is a constitutional exercise of the state's authority to protect the integrity of the electoral system and does not violate the First Amendment. Because the right to vote stems from other constitutional provision, not every limitation on election-related conduct implicates the First Amendment. When evaluating challenges to election regulations, the Court looks to whether the challenged regulation burdens advocacy to determine whether it implicates the First Amendment. The Act leaves advocacy unhindered, so it does not burden conduct protected

under the First Amendment. Even if it burdened First Amendment rights, rational basis review is the proper test, which the Act survives. Indeed, even if the Court were to apply strict scrutiny, the Act is justified by the state's compelling interest in preventing voter fraud, which the Act is narrowly tailored to achieve.

The Act is a generally applicable law that does not create invidious classifications. The Act does not demean the social status of women, and is gender-neutral in both intent and effect. Attempts to evaluate legislative decision making represent a substantial intrusion into the legislative sphere and should be taken with great caution. Even if invalid considerations served as one motivating factor for legislators, the state need only demonstrate the existence of valid justifications for the Act. The Act provides mechanisms by which individuals can exercise their right to vote despite planned name changes. The choice to refuse those mechanisms is the ultimate cause of any impact of the Act. The Act is carefully crafted to advance the state's interest in preventing voter fraud, and is narrowly tailored to achieve that end.

For these reasons, we respectfully ask this Court to affirm the ruling of the Fourteenth Circuit Court of Appeals.

Respectfully Submitted,

Counsel for Respondent