

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 06-2218:

WILLIAM CRAWFORD, <i>et al.</i>,	)	Appeal from the United States
	)	District Court for the Southern
Plaintiffs-Appellants,	)	District of Indiana, Indianapolis
	)	Division
v.)	
	)	Cause below: No. 1:05-cv-634
MARION COUNTY ELECTION)	
BOARD,)	
)	
Defendant-Appellee.	)	Hon. Sarah Evans Barker, Judge

No. 06-2317:

INDIANA DEMOCRATIC PARTY,	)	Appeal from the United States
<i>et al.</i>,	)	District Court for the Southern
	)	District of Indiana, Indianapolis
Plaintiffs-Appellants,)	
	)	Cause below: No. 1:05-cv-634
v.)	
)	
TODD ROKITA, <i>et al.</i> ,)	
)	
Defendants-Appellees.	)	Hon. Sarah Evans Barker, Judge

**APPELLANTS' PETITION FOR REHEARING, WITH SUGGESTION FOR
REHEARING EN BANC**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 06-2218

Short Caption Crawford v. Marion County Election Board

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with [Circuit Rule 26.1](#) and [Fed. R. App. P. 26.1](#) . The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

William Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Joseph Simpson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Kenneth J. Falk, ACLU of Indiana, 1031 E. Washington Street, Indianapolis, IN , 46202

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and The Indianapolis Branch of the NAACP is part of the national NAACP. The other corporations are not-for-profits incorporated in Indiana.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: The corporate parties do not issue stock

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 06-2317

Short Caption Indiana Democratic Party v. Rokita, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a governmental party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3);

Indiana Democratic Party and Marion County Democratic Central Committee

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- i) Identify all its parent corporations, if any; and
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Petition for Rehearing, With Suggestion for Rehearing En Banc

Basis of En Banc Request

The majority’s opinion in this case conflicts with decisions of the United States Supreme Court, *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In violation of these decisions, the majority opinion fails to subject Indiana’s voter identification (“Voter ID”) law to any meaningful scrutiny, despite the fact that the opinion acknowledges, and the evidence demonstrates, that there are some persons in Indiana who will have their right to voter deterred by the law. Consideration by the full Court is therefore necessary.

Argument

- I. Indiana’s voter identification law will deter or prevent some persons from voting

The challenged law in this case requires that in order for most, but not all, Indiana residents to vote in-person, they must produce a particular form of photo identification.¹ It is agreed that the most common form of acceptable photo

¹ A voter “who votes in person at a precinct polling place that is located at a state licensed facility where the voter resides” is not required to produce photo-identification as a condition of voting. Ind. Code § 3-11-8-25.1(e).

The identification must be a document that satisfies the following:

- (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
- (2) The document shows a photograph of the individual to whom the document was issued.

identification will be licenses or identification cards issued by the Indiana Bureau of Motor Vehicles. If the identification is not produced, or is deemed to be inadequate, the voter will be allowed only to cast a provisional ballot and if steps are not taken by the voter within ten (10) days to obtain the identification and personally appear before a separate government office, or to at least appear before the government office and attest to the fact that the person is indigent or has a religious objection to being photographed, the vote will not count. Ind. Code § 3-11.7-5-2.5.

Although the majority in the panel decision in this case noted that none of the plaintiffs was deterred from voting because of the law, it did acknowledge that there were “[n]o doubt . . . at least a few such people.” (Slip op. at 5). In fact, the evidence is uncontested that, among other things:

- The Bureau of Motor Vehicles is aware that there are persons in Indiana of voting age who do not have licenses or identification cards and the documentation demanded by the Bureau to obtain licenses or identification cards is so onerous that fully 60% of persons seen by one Bureau employee each week who are attempting to obtain identification cannot because they do not have the required documentation. (Entry at 19, Appendix of Appellants in No. 06-2218 at A-211 ; Record Document [“R.Doc.”] 86, State’s Ex. 55 8-9, 28-29, 37)
- Homeless persons frequently have no identification at all and therefore do not have the underlying information necessary to procure a birth certificate that

(3) The document includes an expiration date, and the document:

(A) is not expired; or

(B) expired after the date of the most recent general election.

(4) The document was issued by the United States or the state of Indiana.

Indiana Code § 3-5-2-40.5.

is necessary to obtain a license or identification card from the Bureau of Motor Vehicles (Ford Affidavit, R.Doc. 57, Att. 5, ¶¶11, 13, Appendix of Appellants in No. 06-2218 at A-136;

- A 2005 survey released by AARP disclosed that 3% of Indiana's registered voters over the age of 60 do not have either a valid license or identification and 30% of these are not very likely or not likely at all to obtain the required identification, even if necessary to vote. (Appellants' Joint. Separate Appendix at A-146)
- Plaintiff State Representative Crawford, representing one of the most, if not the most, economically challenged district in Indiana, has been informed by persons at town hall meetings and similar events that they do not have the required identification to vote. (Crawford deposition, R.Doc. 65, Att. 17, pp. 10-11, 22, 29-30)
- Members of plaintiff Indianapolis Branch of the NAACP have noted that the Voter ID law will prevent them from voting. (Bohannan deposition, R.Doc. 62, Att. 10, p. 18)
- It may take months to receive an original birth certificate if the prospective voter was born out of the state of Indiana (Thompson Affidavit, R.Doc. 57, Att. 6, ¶ 9).
- The unchallenged evidence from Professor Marjorie Hershey, presented by the Democratic Party plaintiffs, noted that the Voter ID law will chill the exercise of the franchise by, among others, the disabled, homeless, low-income and elderly and will further depress the already low voter turnout in Indiana relative to other states. (Appellants' Joint Separate Appendix. at A-201, A-204, A-213).

Therefore, although no individual plaintiff in this case alleged that he or she would not be able to vote, the Indiana Democratic Party, Marion County Democratic Central Committee, candidate plaintiffs and organizational plaintiffs all have supporters and/or members who are facing injury because of the voter identification law.²

² The Task Force Report accompanying the 2001 Report of the National Commission on Election Reform co-chaired by former Presidents Gerald R. Ford and

- II. Given that the panel majority agreed that there were people who would be deterred from voting, the Court ignored Supreme Court precedent by refusing to apply anything but the most deferential scrutiny to the challenged law

The panel, acknowledged, as it must, that there are some potential voters in Indiana who will be harmed by the Voter ID law. However, the majority concluded that this number was small, and the less persons disenfranchised by a law “the less of a showing the state need make to justify the law.” (Slip op. 5). Under this rationale a law that absolutely disenfranchised 100 citizens in Indiana, but allowed all other residents to vote unimpeded, would be constitutional because little justification would have to be shown given the few people who would be disenfranchised. This approach and conclusion violates clear Supreme Court precedent which simply does not allow a few to be disenfranchised by severe restrictions on the right to vote.

It is true, as the majority notes, that the Supreme Court in both *Anderson* and *Burdick* applied sliding scale scrutiny. However, the majority misapplies the tests formulated by the Supreme Court.³ As the Court noted in *Burdick*, 504 U.S.

Jimmy Carter, estimated that some “6 to 10 percent of the American electorate does not have official state identification.” *To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform*, Chapter VI- Verification of Identity, p. 4 (2001), http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf (last visited July 25, 2006).

³ Democrats continue to maintain that the *Anderson/Burdick* standard of review is limited to ballot access restrictions, *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006), or to other election laws imposing only indirect burdens on voters, such as candidate filing deadlines, but that election laws which, as this one does, directly burden voting and associational interests remain subject to the strict scrutiny analysis of *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). *E.g.*, *Ayers-Schaffner v.*

at 433, any election law “will invariably impose some burden on individual voters” and to impose strict scrutiny on every regulation of the franchise would “tie the hands of States seeking to assure that elections are operated equitably and efficiently.” The Court held that a more “flexible standard” applies where a court 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 justification 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.”

Id. at 434, quoting *Anderson*, 460 U.S. at 788-89. The Court further stressed that:

[u]nder this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” . . . But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restriction

Burdick, 504 U.S. at 434. (internal citations omitted).

It is apparent that the Court is concerned with the extent to which any individuals are burdened, even if only a few are burdened. This test does not excuse

DiStefano, 37 F.3d 726, 729-30 (1st Cir. 1994); *Republican Party of Ark. v. Faulkner County, Ark.*, 49 F.3d 1289, 1298-99 (8th Cir. 1995); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993); see also *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004) (“the ballot access cases [*Anderson* and *Burdick*] replaced strict scrutiny with a less stringent standard of review for reasonable laws regulating ballot access rather than infringing core voting rights”). However, this argument need not be addressed here inasmuch as the Voter ID law is unconstitutional even under the sliding scale scrutiny.

a severe burden on a small minority number of voters' right to vote if the majority are not similarly encumbered. The issue is not whether, in the aggregate, all voters' rights are severely burdened. The issue is whether a particular voter or potential voter, or group of voters, have had their rights severely burdened. See e.g., *Williams v. Rhodes*, 393 U.S. 23, 24, 30 (1968) (discussing the fact that state ballot access law places a burden on the "right of qualified voters . . . to cast their votes effectively" even though the voters might belong to a party "which has a very small number of members."); *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir 1999) ("If the challenged legislation grants the right to vote to some residents while denying the vote to others, then we must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest.").

The majority therefore misapplied and ignored binding Supreme Court precedent. Indiana's Voter ID law will severely burden some voter, *i.e.*, they will not be able to vote or will be deterred from voting.⁴ Given that, *Burdick* and *Anderson* require that the strictest scrutiny be leveled at the law. Applying this scrutiny, it is clear, as the appellants have demonstrated in their briefs, the law

⁴ To the extent that the Court believes it is relevant and necessary to determine the precise number of voters who would be deterred, discouraged, or even wholly disenfranchised by the law, a figure that obviously could not be measured in this pre-election facial challenge, the remedy is not to affirm the district court's grant of summary judgment, but instead, the remedy is to reverse the district court and remand the case so that fact-finding may be conducted as to the "scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence, and character of the fraudulent practices that allegedly justify those requirements." *Purcell v. Gonzales* –U.S.--, 127 S.Ct. 5, 8 (2006) (vacating stay decision by the Court of Appeals)(Stevens, J., concurring)

must fail. It disproportionately affects the poor, disabled and elderly and it “erect[s] real obstacle[s] to voting.” *Harman v. Forssenius*, 380 U.S. 528, 541 (1965).

III. Even assuming that the Voter ID law does not impose a severe burden, the majority’s decision ignores Supreme Court precedent that requires a more searching scrutiny than the majority utilized

Having concluded that a severe burden on the right to vote was not present, the majority proceeded to apply what is essentially a rational basis scrutiny, crediting the State’s claim that the Voter ID law was necessary to prevent fraud, despite the fact that there is not a shred of evidence that the evil the law is purportedly designed to correct, voter impersonation, has ever occurred in Indiana. And, the majority reached this conclusion despite the fact that Indiana’s legislature was content to leave unregulated by further anti-fraud requirements the one type of voting, mail-in absentee voting, where fraud has not only been reported in Indiana, but prosecuted. Once again the panel majority ignores the clear holdings of *Burdick* and *Anderson*.

As indicated above, *Burdick* and *Anderson* hold that even if a burden on the right to vote is not severe, therefore not warranting the strictest scrutiny, a court must nevertheless weigh the burden imposed against the precise interests advanced by the State and the court must take “into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434, *citing Anderson*, 460 U.S. at 789. Thus, ultimately, “the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir.

2004), *cert. denied*, 544 U.S. 923 (2005). But, the Supreme Court is clear, there must be something from the State's side demonstrating why it is necessary to burden the rights. There must be a "demonstration of a corresponding interest sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (*citing to Anderson*). Thus, even if a law only moderately burdens the right to vote, this could well fail the required "balancing test when the interests its serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215, 1221, n. 6 (4th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) ("Although the Court finds that the burden imposed on minor parties is not insurmountable, the Court determines that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed.")

Despite the Supreme Court's admonition that this Court must take into account the extent to which the State's interest in fraud prevention justifies the burdens imposed by the Voter ID law, the panel majority failed in this obligation. The majority acknowledges that there is no evidence of voter impersonation fraud in Indiana but excuses that because of what it deems to be "the extreme difficulty of apprehending a voter impersonator." (Slip op. at 7). So what the State is left with, and what the panel majority accepts, is the mere supposition that there may be fraud. This simply is not acceptable given the demands of *Burdick*. "[T]he State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a

conjectural, problem.” *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 210 (1999) (Thomas, J., concurring in the judgment) (concerning a First Amendment challenge Colorado statutes regulating the petition process in initiatives and referenda.). The strength of the interest must be identified to determine the extent to which it justifies the burden and here there is no evidence to support the supposition that there may be fraud.⁵

⁵ Nor is the risk of impersonation fraud so obvious that the State must be excused from its obligation to present some evidence to justify the burden on the right to vote imposed by the Voter ID law. A national study introduced by the State in this cause, demonstrates that “the disenfranchisement of voters through antiquated voting systems, errors, mismanagement of registration bases, and intimidation or harassment is a far bigger problem than traditional forms of election fraud.” Lorraine Minnite & David Callahan 15, *Securing the Vote: An Analysis of Election Fraud* (2003) (R.Doc. 82, Att. 3, Ex. 6). A study done by the Coalition of Homelessness and Housing in Ohio and the League of Women Voters, featuring telephone interviews with election official in every Ohio county concluded that any sort of voter fraud was an “exceedingly rare” occurrence and their was no evidence of impersonation fraud. Coalition on Homelessness and Housing in Ohio and League of Women Voters of Ohio, *Let the People Vote* 1 (2005), <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf> (last visited Jan. 11, 2007). Indeed out of 9,078,728 votes cast in two general elections, four votes were found to be ineligible or fraudulent.

The fact that Indiana has chosen not to act at all against fraud in mail-in absentee balloting, where fraud has been identified as an actual problem, magnifies the need for Indiana to come up for some justification to erect the burdens it has erected concerning in-person voting. When a statute is this underinclusive, it “raises serious doubts about whether . . . [the State] is, in fact, serving, with this statute, the significant interests” raised by the County and State. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). See also, e.g., *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005). In *Weinschenk v. Missouri*, 203 S.W.2d 201, 281 n. 29 (Mo. 2006), the Missouri Supreme Court, in striking down, on state constitutional grounds, a voter identification law similar to Indiana’s, noted that the photo identification requirement “does not address any perception of voter fraud with precision, nor is it necessary to solve the existing voter fraud problems. On these facts, perceptions alone are insufficient to justify substantial burdens on fundamental rights.”

Even if Indiana can act against impersonation fraud without any evidence showing such fraud or the reasonable possibility of such fraud, *Burdick's* requirement that a court consider the extent to which the fraud concern makes it necessary to burden the right to vote means it is both appropriate and necessary for a court to consider whether there are less burdensome alternatives. The panel majority erroneously failed to recognize that more appropriate fraud prevention alternatives existed than the Voter ID law.

The panel majority rejects the value of existing criminal statutes in Indiana that penalize impersonation fraud as an alternative to the burdens of the Voter ID law. Yet, the United States Supreme Court in *Dunn*, 405 U.S. at 353, in striking down a Tennessee durational residency restriction for voting, specifically noted that the state's interest in protecting against fraud was met by the "variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared."

The majority also notes that Indiana's inflated voter rolls justify the Voter ID law's anti-fraud response. (Slip Op. at 8-9). Yet, these inflated rolls are solely the result of the State's own acknowledged failure that resulted in a lawsuit by the United States and a judgment against the State, requiring it to comply with its duties under the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, to purge ineligible voters from the rolls. It would therefore appear that purging voters from state-wide voter lists would be a less burdensome alternative than the disenfranchisement attendant to the Voter ID law. The panel majority,

however, rejects this as an alternative, claiming that this will only provide a short term solution because “as soon as the purge is complete the inflation of the registration laws will recommence.” (Slip op. at 9). But, the NVRA states that Indiana “shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant . . . “ 42 U.S.C. § 1973gg-6(a)(4). And, the Consent Decree and Order obtained by the United States against Indiana appears to require continued maintenance of the voter registration rolls. (Appellees’ Joint Sup. App. at 4-5). Surely maintaining the voter rolls as required by federal law is a more appropriate way of removing what the majority deemed to be a potential source of fraud than the Voter ID law which will disenfranchise some Indiana voters. Indiana, having failed in its statutory duties in the past under the NVRA, cannot use that failure as a justification for imposing a voter identification requirement that would not have been necessary if Indiana had complied with federal requirements.

The panel majority also ignores the fact that the federal government in the Help America Vote Act (“HAVA”), 42 U.S.C. § 15483(b), imposes identification requirements for certain first time voters. However, the federal law allows these individuals to prove their identities in a much more expansive manner than in the Voter ID law, through some form of current photo identification or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” 42 U.S.C. §

15483(b)(2)(A)(i). HAVA illustrates the fact that Indiana’s interests in voter identification can be satisfied in less restrictive ways than the Voter ID legislation. “[T]he State has a number of significantly less burdensome alternatives available to prevent in-person voting fraud.” *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1362 (N.D.Ga. 2005). The fact that the State eschewed these alternatives demonstrates that the interest in fraud prevention does not “make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 879

CONCLUSION

The Voter ID law allows the right to vote of certain Indiana residents to be severely burdened without cause and without consideration of less drastic alternatives. The decision allowing the statute to stand therefore conflicts with Supreme Court precedent. For the above reasons, the Court should grant rehearing or rehearing en banc.

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Certificate of Service

I hereby certify that a copy of the foregoing was served on the below named person(s) by first class U.S. postage, pre-paid, on this ____ day of January, 2007.

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