
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218

WILLIAM CRAWFORD, *et al.*,
Plaintiffs/Appellants,
v.
MARION COUNTY ELECTION BOARD,
Defendant/Appellee.

No. 06-2317

INDIANA DEMOCRATIC PARTY, *et al.*,
Plaintiffs/Appellants,
v.
TODD ROKITA, *et al.*,
Defendants/Appellees.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:05-cv-00634-SEB-VSS
The Honorable Sarah Evans Barker, Judge

**ANSWER OF APPELLEES ROKITA, KING, AND POTESTA
AND INTERVENOR/APPELLEE THE STATE OF INDIANA IN OPPOSITION TO THE
PETITION FOR REHEARING AND REHEARING EN BANC**

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SUMMARY¹

The Indiana Voter ID Law, *see* Ind. Pub. L. No. 109-2005 (codified in scattered sections of Ind. Code title 3), requires voters to do nothing more than show valid state or federal photo identification when voting in-person at the polls. In other words, voters must show identification that they already must have to drive a car, board an airplane, rent a movie, cash a check, and even obtain access to this Court. *See* Dem. App. at 112; *see also* Slip Op. at 3. Unsurprisingly, nearly 99% of the voting-age population already possesses requisite photo identification.² *See* Dem. App. at 51. Equally unsurprising, no plaintiff in this case could identify even one actual person who would be unable to vote because of the Voter ID Law.³ *See* Dem. App. at 81-83; *see also* Slip Op. at 5.

Each of these facts is a testament to how minimal the burden of the Voter ID Law really is. Not even the dissenting judge took seriously the idea that the Law should be subject to strict scrutiny—he had to conjure up an entirely new standard, which he called “something close to strict scrutiny light.” *See* Slip Op. at 15 (Evans, J., dissenting). In fact, the rationale for the dissent appears not to have been a concern for established constitutional norms so much as suspicion that raw political motivations lay behind enactment of the Law. *See id.* at 11 (Evans, J., dissenting) (“The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage

¹ Pursuant to Federal Rule of Appellate Procedure 43 and Circuit Rule 43, as of January 26, 2007, Pamela Potesta has replaced Kristi Robertson as Co-Director of the Indiana Election Division and therefore also as a co-defendant in this action.

² Indiana issues free photo identification to voters who need it. *See* Ind. Code § 9-24-16-10(b).

³ For this reason, standing in this case is highly questionable. *See* Docket No. 75, at 23-36; Docket No. 80, at 18; Docket No. 111, at 2-14; Docket No. 112, at 3 n.1; MCEB Br. at 13-38; State Defendants’ Br. at 4 (thoroughly briefing numerous standing issues). Accordingly, rehearing *en banc* would be a highly cumbersome task, and one of dubious value with no potential for a serious jurisprudential advancement in the offing.

election-day turnout by certain folks believed to skew Democratic.”). Accordingly, there is no serious “question of exceptional importance,” Fed. R. App. P. 35(a)(2), or any other reason for the *en banc* Court to review the Indiana Voter ID Law.

I. Strict Scrutiny Does Not Apply Because the Voter ID Law is Not a Severe Burden on the Right to Vote and Actually Protects the Right to Vote

Judge Posner’s majority opinion observed that strict scrutiny “would be especially inappropriate” in this case because “the right to vote is on both sides of the ledger.” Slip Op. at 6. This is so because the “purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes.” *Id.* Ignoring this beneficial impact of the Voter ID Law on the right to vote, plaintiffs assert that strict scrutiny should apply both because the law imposes a severe burden and because the *Anderson/Burdick* balancing test is limited to “ballot-access cases.” Pet. for Rehearing at 4 n.3.

A. Taking the latter point first, this Court has already held that the *Anderson/Burdick* balancing test applies to voting regulations other than ballot-access restrictions. *See Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (applying the test to restrictions on mail-in voting and rejecting the argument that a voting regulation is automatically subject to strict scrutiny simply because in operation it prevents some legitimate voters from voting). Equally significant, other courts have done the same, and this Court would create a circuit conflict were it to hold that *Anderson/Burdick* balancing applies only to ballot-access cases. *See Wexler v. Andersen*, 452 F.3d 1226, 1232-33 (11th Cir. 2006), *cert. denied*, ___ S. Ct. ___, 2007 WL 36501 (Jan. 8, 2007) (applying balancing test to voting-machine technology equal-protection challenge); *Weber v. Shelley*, 347 F.3d 1101, 1106-07 (9th Cir. 2003) (same); *see also ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 144-49 (D. Conn. 2005) (employing *Anderson/Burdick* balancing to Connecticut’s requirement that voters register at least seven days in advance of election day); *Bay County*

Democratic Party v. Land, 347 F. Supp. 2d 404, 435 (E.D. Mich. 2004) (applying balancing test to HAVA-identification requirements); *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) (same).

B. Plaintiffs argue that there is a “severe burden” on the right to vote any time a voting regulation prevents even a single voter from voting. *See* Pet. for Rehearing at 4 (arguing that “there are some potential voters in Indiana who will be harmed by the Voter ID law” and that, therefore, the Voter ID Law is subject to strict scrutiny). They say that “[t]he 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.” *Id.* at 6. On the record of this case, however, the plaintiffs are doomed under even that test because they have failed to identify even a single voter who will be unable to vote due to the Indiana Voter ID Law. *See* Slip Op. at 5.

Regardless, this Court rejected this exact argument in *Griffin* when it said that Illinois may limit absentee voting to those actually absent from the county on election day and to those unable to vote in person due to physical incapacity, religious observation, attendance at college, or the performance of specified official duties. *See Griffin*, 385 F.3d at 1129. *Griffin* held that “state legislatures may without transgressing the Constitution impose extensive restrictions on voting.” *Id.* at 1130. Even more important, *Griffin* said that it was constitutionally inconsequential that some voters, such as working mothers, might be unable to vote because Illinois law required them to vote at the polls. *See id.* at 1130-32. In arriving at that conclusion, the Court specifically observed that “[a]ny such restriction is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Id.* at 1130. Under

that test, the Court said that the Illinois absentee-voting law was reasonable because it promoted the state's interest in deterring voter fraud. *See id.* at 1130-32.

The test that the plaintiffs propose in this case would have required the *Griffin* Court to examine the burden on each individual working mother. Because some working mothers would not have been able to vote, the Court would then have had to conclude that the in-person voting requirement imposed a severe burden warranting strict scrutiny. Indeed, under plaintiffs' radical "even one person prevented from voting" standard, strict scrutiny would be applied to traditional voter-registration requirements, ballot-handling requirements, polling-hour requirements, non-photo-identification requirements, and countless other ordinary voting regulations that happen to prevent one or more legitimate voters from voting.

In support of this standard, plaintiffs cite *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), and *Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999), but those cases in no way support the notion that strict scrutiny applies if even one legitimate voter would be prevented from voting. While the Court in *Williams* invalidated Ohio's ballot-access laws under the Equal Protection Clause, in so doing, it considered the *entire class of voters* "disadvantaged by the classification" (those who could not vote for their preferred candidates), not the impact on any *individual* voters. *See Williams*, 393 U.S. at 30. In *Mixon*, the Sixth Circuit applied *rational basis* scrutiny to uphold an Ohio law permitting mayors to appoint municipal school boards that govern some citizens not allowed to vote for the appointing mayor. *See Mixon*, 193 F.3d at 402-06. The *Mixon* court considered the law's impact on ineligible voters as a class, not its impact on individual voters. *See id.* at 402.

C. Plaintiffs repeatedly refer to "classifications" supposedly burdened by the Voter ID Law. *See Dem. Br.* 20, 23-24. They assert that the Voter ID Law "disproportionately affects

the poor, the disabled, and elderly.” Pet. for Rehearing at 7. On the contrary, however, Indiana law expressly *relieves* these groups from the burdens of the Voter ID Law. The disabled and elderly (those over 65) may, without more, vote absentee (no identification required). *See* Ind. Code §§ 3-11-10-1.2, 3-11-10-24. The poor may cast provisional ballots at the polls and validate them within 10 days by submitting affidavits of indigency to their county election boards. *See* Ind. Code §§ 3-11-8-25.1, 3-11.7-5-2.5(c). If anything stops such voters from casting valid ballots, it is not the Voter ID Law.

In any event, the district court rejected as inadmissible the only evidence submitted on this subject, an “utterly incredible and unreliable” study by Kimball Brace. *See* Dem. App. at 43. The district court not only excluded the Brace Report, but also observed that the report (1) did not assert any disparate impacts on minorities or the elderly, and (2) showed only “a small potential disparate impact based on income level,” though even that conclusion was highly suspect. *See* Dem. App. at 52-54.

* * * *

The plaintiffs have provided no neutral principle supporting the conclusion that the Indiana Voter ID Law imposes a “severe burden” on the right to vote, and all evidence is to the contrary. The best that Judge Evans could manage in dissent was to say that the law “tips far too far in the wrong direction” and imposes an “undue burden” on the right to vote. Slip Op. at 14, 15 (Evans, J., dissenting). And, as Judge Evans candidly realized, strict scrutiny cannot apply under these circumstances. *See id.* at 15 (Evans, J., dissenting). So the disagreement is solely about *which* test, short of strict scrutiny, is to be applied: Judge Evans’ newly minted “undue burden” or “strict scrutiny light” test, or the well-established *Anderson/Burdick* standard. With

respect, there is no support for Judge Evans' concededly new proposal and thus no serious dispute that *Anderson/Burdick* applies.

II. Particularly in Light of Indiana's Inflated Voter-Registration Rolls, the Court Properly Applied the *Anderson/Burdick* Balancing Test

A. Plaintiffs argue that the Court erred by applying "rational basis scrutiny" and by "crediting the State's claim that the Voter ID law was necessary to prevent fraud, despite the fact there is not a shred of evidence that the evil the Law is purportedly designed to correct, voter impersonation, has ever occurred in Indiana." Pet. for Rehearing at 7. At the same time, plaintiffs concede that the proper test is, in fact, "whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Id.* (quoting *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)).

Preventing election fraud is an incontrovertibly compelling government interest. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (observing that even appearances of election corruption "directly implicate the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process") (internal quotations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted."). The objective of preventing election fraud is more than sufficient to justify a modest requirement that voters present the same photo identification that 99% of them already possess anyway. *See* Dem. App. at 51.

B. Plaintiffs do not—and cannot—cite any cases for the proposition that a state must wait until it has proof of rampant voter fraud before enacting measures to shore up weak points in the fraud-prevention scheme that already exists. To the contrary, the Supreme Court has been

quite clear that legislatures may enact measures to deter and detect election fraud—and the appearance of fraud—even without evidence that fraud exists. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (holding that the Constitution does not “necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action” and that legislatures “should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights”); *Nat’l Right to Work Comm.*, 459 U.S. at 210 (“Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”).

As Judge Posner’s majority opinion observed, the dearth of evidence showing the incidence of impostor voting in Indiana is unsurprising because in-person voter fraud is difficult to detect. *See Slip Op.* at 7-8. Furthermore, detection of such fraud is subject to “the vagaries of journalists’ and other investigators’ choice of scandals to investigate.” *Id.* at 8. Indeed, as the Court observed, there is record evidence of voter impersonation in *other* states and no reason to suppose that Indiana is different. *See id.*; *see also* Defendants’ Joint Supp. App. at 13 (Report of the Commission on Federal Election Reform (the Baker-Carter Commission) supporting a voter photo-identification requirement because “there is no doubt that [voting fraud] occurs”). States are entitled to rely on the experiences of other jurisdictions when deciding issues of public policy. *See Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 396 (2000) (relying on evidence establishing the impact of unrestricted campaign contributions from another case); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

Indiana’s severe voter-list inflation resolves any remaining doubts about whether circumstances justify the Voter ID Law. *See Dem. App.* at 22-23. Calling voter-list inflation

“indirect evidence of fraud,” Judge Posner’s opinion for the Court observed that Indiana’s voter-registration rolls “contained 1.3 million more names than the eligible voters in Indiana.” Slip Op. at 9. The bloated rolls, combined with incidents of voter fraud around the country, provide ample justification for the Voter ID Law.

C. Plaintiffs wholly fail to acknowledge, let alone refute, the state’s second justification supporting the Voter ID Law—the compelling interest in protecting public confidence in the integrity and legitimacy of representative government. The government enjoys wide latitude in enacting measures reasonably geared toward preventing the *perception* of corrupt elections.

For example, the Hatch Act’s ban on politicking by some federal-government employees is valid, in part, because it is “critical that [Government and its employees] appear to the public to be avoiding [political favoritism], if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973). Similarly, FECA’s campaign-contribution limits are permissible based in part on “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (emphasis added); *Nat’l Right to Work Comm.*, 459 U.S. at 208 (observing “the importance of preventing . . . the eroding of public confidence in the electoral process through the appearance of corruption”).

Here, every bit as much as in the campaign-finance context, government is right to worry that confidence in the legitimacy of elections may erode based solely on “public awareness of the opportunities for abuse,” *Buckley*, 424 U.S. at 27, that are inherent in polling-place voting unaccompanied by identification checks. This is particularly true in light of the extent of voter-

list inflation that has occurred over the past decade or so in the wake of the Motor-Voter law. Regardless whether particular instances of fraud are well documented, “common sense,” *McConnell v. FEC*, 540 U.S. 93, 145 (2003), tells us that the General Assembly is entitled to be concerned that the combination of inflated voter rolls, lax security, and closely contested elections might over time erode voter confidence in election results. *See* Defendants’ Joint Supp. App. at 13 (Report of the Baker-Carter Commission observing that voter fraud might one day tip a close election).

D. Plaintiffs also continue to protest that, because “Indiana has chosen not to act at all against fraud in mail-in absentee voting,” the Voter ID Law is fatally underinclusive. *See* Pet. for Rehearing at 9 n.5. As the Court’s opinion asked of applying the Law to absentee voting, “how would that work?” Slip Op. at 9. Requiring an absentee voter to include a copy of photo identification would not only jeopardize ballot secrecy, but also would be ineffective because “there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn’t be presenting his face at the polling place for comparison with the photo.” *Id.* at 9-10. In other words, as the district court concluded, “absentee voting is an *inherently* different procedure from in-person voting,” Dem. App. at 97, and the Voter ID Law’s distinction between the two is “eminently reasonable.” Dem. App. at 98.

In any event, it is not true to say that “Indiana has chosen not to act at all,” Pet. for Rehearing at 9 n.5, to deter absentee-ballot fraud. The same year that it enacted the Voter ID Law, the General Assembly limited absentee voting to those who are truly absent on election day (in addition to the elderly and the disabled). *See* Ind. Code § 3-11-10-24. Accordingly, by law, the vast majority of voters are routed away from absentee voting and toward in-person voting at the polls where they are required to show photo identification. The General Assembly is entitled

to protect the integrity of an inherently different mode of voting through correspondingly different regulation.

E. Plaintiffs argue that the Constitution limits Indiana to enforcing election regulations that the plaintiffs deem to be “more appropriate fraud prevention alternatives.” *See* Pet. for Rehearing at 10. The plaintiffs deem “appropriate” (1) “existing criminal statutes in Indiana that penalize impersonation fraud;” (2) efforts to purge the state’s voter-registration lists (something the Marion County Democratic Party has historically opposed, *see* Mike Corbin, *Study Turns Up 45,000 Duplicates on Voter Rolls*, available at <http://www.wishtv.com/Global/story.asp?S=2495516> (last visited Feb. 5, 2007)); and (3) the identification requirements that HAVA imposes on some first-time voters, *i.e.*, “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.” Pet. for Rehearing at 10-11 (quoting 42 U.S.C. § 15483(b)). The Constitution, however, in no way authorizes *these* fraud-prevention measures while *precluding* a photo-identification requirement. No sense could be made of a constitutional rule that, say, permitted states to require voters to present a utility bill or other HAVA documentation (which some voters may not have), but not photo identification.

The Elections Clause of the Constitution unambiguously preserves the power of the states to regulate the times, places, and manner of holding federal—and, implicitly, state—elections. *See* U.S. Const. art. I, § 4, cl. 1. That means that states, not plaintiffs or federal courts, have the power to determine which fraud-prevention alternatives are “appropriate.” The state is not relegated to enforcing criminal laws against fraudulent voting, particularly given the “extreme difficulty” in “apprehending a voter impersonator.” Slip Op. at 7. Nor is it limited to the cumbersome, federally regulated, highly imperfect, never-ending process of purging bloated

voter-registration rolls. *See* Slip Op. at 9.⁴ And, without an express congressional enactment preempting state laws on the subject, the state is certainly not limited to whatever voter-identification measures Congress has chosen to require.

F. Frustrated by their inability to find any actual injured voters, the plaintiffs suggest in a footnote that the correct disposition of the case may be to remand for extensive fact-finding to determine the precise number of affected voters. *See* Pet. for Rehearing at 6 n.4. But this is a summary-judgment case, not a preliminary-injunction case, so *Purcell v. Gonzalez*, ___ U.S. ___, 127 S. Ct. 5, 7-8 (2006) (per curiam), which merely held that an appellate court may not stay a district court’s denial of preliminary injunction before the district court enters factual findings, is entirely inapplicable. The basic function of summary judgment is to generate sufficient evidence to resolve a dispute, and the plaintiffs have already tried unsuccessfully to provide evidence that the Law injures voters (and in so doing thereby demonstrated that the Voter ID Law is so innocuous that any truly injured voters are very hard to find). They do not get a second bite at the apple.

Regardless, both the district court and this Court have assumed all along that the Voter ID Law, like every other voting regulation, will necessarily cause some voters to “disenfranchise themselves.” *See* Slip Op. at 5-6. Remanding the case to give the Democrats a second chance to prove the correctness of that assumption would serve no purpose. *See* Slip Op. at 6-7.

* * * *

⁴ It might even be that aggressively purging voter-registration lists would disqualify more legitimate voters than the Voter ID Law. *See* Slip Op. at 9. After all, registered voters arriving at the polls without proper identification may yet cast a provisional ballot and validate it within 10 days of the election. The wrongfully purged, however, may have no recourse for that election.

The Indiana Voter ID Law was, no doubt, the subject of a serious political battle. But a serious political battle does not necessarily yield a serious legal dispute. Judge Barker had it exactly right when, in granting summary judgment for the state, she said that “[t]his litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts.” See Dem. App. at 2-3. It is not just happenstance that the lead plaintiffs are the Indiana Democratic Party and a Democrat legislator. See Dem. App. at 3 & n.4 (district court observing that almost all of the plaintiffs were “engaged in this dispute while it was still being debated by the Indiana General Assembly”). What this signifies is that the case does not present a difficult legal issue (again, the dissent felt compelled to create an entirely new standard) or an opportunity to advance the law. Because *en banc* rehearing is not a forum for politics by other means, the Court should deny the petition.

CONCLUSION

The Petition for Rehearing with Suggestion for Rehearing *En Banc* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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