IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 17-3207

BRIAN VALENTI, Plaintiff/Appellant, v. CONNIE LAWSON, Indiana Secretary of State, in her official capacity, et al. Defendants/Appellee	Appeal from the United States District Court for the Southern District of Indiana Cause No. 1:15-cv-1304-WTL-MPB The Honorable William T. Lawrence, Judge

BRIEF OF APPELLANTS AND REQUIRED SHORT APPENDIX

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-3207

Short Caption: Valenti v. Indiana Secretary of State, 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 government party, must furnish a disclosure statement providing 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.**

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Brian Valenti

(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:

ACLU of Indiana

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

i) Identify all its parent corporations, if any; and

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Attorney's Signature: s/ Jan P. Mensz Date: December 13, 2017

Attorney's Printed Name: Jan P. Mensz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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N/A

Attorney's Signature: s/ Gavin M. Rose Date: November 7, 2017

Attorney's Printed Name: Gavin M. Rose

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Jurisdictional Statement

The district court had original jurisdiction of this case pursuant to 28 U.S.C. §§ 1331 and 1343 as the complaint alleged that the defendants violated the First and Fourteenth Amendments to the United States Constitution. The district court entered final judgment in the defendants favor on September 28, 2017. The appellant Brian Valenti filed his Notice of Appeal on October 24, 2017. The Court of Appeals has jurisdiction of this appeal from a final judgment of the district court pursuant to 28 U.S.C. § 1391.

No motion for a new trial or alteration of the judgment or any other motion tolling the time within which to appeal was filed in this matter and there are no prior or related appellate proceedings. This is not an appeal from a decision of a magistrate judge.

All of the defendants appear in their official capacity. Although only named by their offices pursuant to the Federal Rules of Civil Procedure Rule 17(d), current occupants are: Connie Lawson, Indiana Secretary of State; Bryce H. Bennett, Jr., Member of the Indiana Election Commission; S. Anthony Long, Member of the Indiana Election Commission; Suzannah Wilson Overholt, Member of the Indiana Election Commission; Zachary E. Klutz, Member of the Indiana Election Commission; Douglas G. Carter, Superintendent of the Indiana State Police; and Kevin Basey, Blackford County Prosecutor.

Statement of the Issues

Brian Valenti is a resident of Hartford City, Indiana. He would like to vote at the only polling place in his town, located at the Blackford County High School, but cannot because nearly 25 years ago he was convicted of a sex offense, and Indiana Code § 35-42-4-14 prohibits people convicted of certain sex offenses from going on school property for any reason. Although Mr. Valenti has alternatives for casting his vote, including traveling to a vote center in another town, he, as do many voters, views voting on election day with his fellow residents as more than simply checking a box; he views it as a public celebration of his fundamental rights as a United States citizen, as well as a unique opportunity to meet with local candidates, electioneers, and other concerned citizens from his community to discuss local issues that affect him and his family. The issue on appeal is: does Indiana Code § 35-42-4-14 unduly burden Mr. Valenti's fundamental right to vote by prohibiting him from voting in person with his community on election day?

Statement of the Case

1. *Brian Valenti*

Brian Valenti is an adult resident of Hartford City, located in Blackford County, Indiana. (Docket [Dkt.] 66-1 at 1 ¶ 1[1]). Mr. Valenti moved to Blackford County in 2014 to be closer to his family. (*Id.* at 1 ¶ 2.) He currently owns a home in Hartford City, where he lives with his wife and daughter. (*Id.* at 1 ¶ 3.)

[1] All pages cited are to the page numbers provided by the district court's electronic filing system.

In 1993, Mr. Valenti was convicted of the California offense of "Lewd or Lascivious Acts with Child Under 14 Years." (*Id.* ¶ 6; *see* Cal. Penal Code § 288.) He has not been convicted of any other sex offenses either before or after that time. (Dkt. 66-1 at 1 ¶ 7.)

2. *The Unlawful Entry statute*

Effective July 1, 2015, a new section was added to the Indiana Code as Indiana Code § 35-42-4-14(b), which provides, "A serious sex offender who knowingly or intentionally enters school property commits unlawful entry by a serious sex offender, a Level 6 felony." A "serious sex offender" is defined as a registered sex offender who is convicted of certain Indiana crimes against children, and for the equivalent crimes in other states. Ind. Code § 35-42-4-14(a). The new law also provides that those designated as "serious sex offenders" are entitled to vote absentee by mail. Ind. Code § 3-11-10-24(a)(12).

Because he is required to register, and because the crime he was convicted of qualifies him as a "serious sex offender," Mr. Valenti is subject to Indiana Code § 35-42-4-14's prohibition on entering school property. (Dkt. 66-1 at 1-2 ¶¶ 8, 15.)

3. *Mr. Valenti's desire to vote in person with his community on election day*

Mr. Valenti is registered to vote, and he intends to vote in future elections. (*Id.* at 1-2 ¶¶ 9-10.) Mr. Valenti views voting as an opportunity to "assert [his] voice in such a . . . major process." (Dkt. 64-3 at 26.) But voting to Mr. Valenti encompasses far more than submitting a ballot. Mr. Valenti views voting on election day as a celebration of his right to vote and as something that should be shared publicly with

his community. (Dkt. 66-1 at 2 ¶ 11.) Voting on election day is an opportunity to "be more active in the community" (Dkt. 64-3 at 35) and a unique opportunity to gain information about local politics. (Dkt. 66-1 at 2 ¶¶ 11-13.) In the past, local candidates and electioneers have been present outside of the Blackford County High School on election day, greeting voters and handing out literature. (*Id.* at 2 ¶ 12.) Mr. Valenti would like to meet the candidates and electioneers, and talk with them about local issues that affect him and his family. (*Id.*) Mr. Valenti also values being able to talk to other voters from his community. (*Id.* at 2 ¶ 13.) He wants to "talk to [his] neighbors and find out their views, since they've lived here their whole life, and be able to get a sense of what other Christians in my community where I live . . . feel is [ ] going on in our community." (Dkt. 64-3 at 36.) For example, Mr. Valenti has a daughter in the local elementary school, and he has concerns about the curriculum and the school administration. (Dkt. 66-1 at 2 ¶ 14.) He would like to talk to other parents and candidates on election day to get their perspectives on these issues. (*Id.*)

Because of his conviction nearly a quarter of a century ago, however, he cannot vote at the only polling place in his community, the Blackford County High School Auxiliary Gym ("High School"). (*Id.* at 1-2 ¶¶ 9-10.)

4. *Mr. Valenti's voting alternatives*

Blackford County has adopted a "vote center model" whereby residents may vote on election day at either of the two designated County vote centers, located in Hartford City and Montpelier. (*See* Dkt. 64-1 at 2.) The Hartford City vote center, located at the High School, is approximately three miles from Mr. Valenti's home

while the Montpelier vote center is approximately 12 miles away. (Dkt. 66-1 at 3-4 ¶¶ 18, 25.) Mr. Valenti would like to vote with his community on election day at the only polling place in his town, but cannot because it is located in a gym on High School property, where he is prohibited from going. (*Id.* at 2 ¶¶ 10, 15.)

Barred from voting at the nearest polling place to his home, and the polling place where, due to proximity, a vast majority of his town is likely to vote, Mr. Valenti has three alternatives: (1) vote 12 miles away in Montpelier; (2) vote absentee by mail prior to election day; or (3) vote at the county clerk's office prior to election day. (*See id.* at 2-3 ¶¶ 16, 18; Indiana Code § 3-11-10-24(a)(12).) Each alternative comes with significant burdens and inherent deficiencies that Mr. Valenti would not face if he were allowed to vote at the High School. (Dkt. 66-1 at 2 ¶ 16.)

Until recently, Mr. Valenti did not have a car that he could drive more than a few miles, and he rarely left Hartford City. (Dkt. 66-1 at 3 ¶¶ 21-23.)[2] He now has a car, and can drive to Montpelier to vote (Dkt. 77 at 1 ¶ 2), but that is not his community. Mr. Valenti is completely unfamiliar with Montpelier; when asked whether he knew where the Montpelier Civic Center was, Mr. Valenti responded "I couldn't tell you if my life depended on it." (Dkt. 64-3 at 23.) To Mr. Valenti, it feels like he is being banished from his community on election day by being forced to vote in another town where he knows no one. (Dkt. 66-1 at 4 ¶ 28.)

[2] Because Hartford City lacks any public buses or commercial taxi services that could take him to Montpelier, Mr. Valenti initially alleged that it would be a significant burden to travel to Montpelier to vote. (Dkt. 66-1 at 3 ¶¶ 18-24.) Prior to the district court's summary judgment decision, Mr. Valenti obtained a vehicle that he could drive to Montpelier, and informed the court of this fact. (Dkt. 77 at 1 ¶ 2.)

Voting in Montpelier would also deprive Mr. Valenti of the opportunity to meet with local candidates and learn the politics of his neighbors. (*Id.* at 4 ¶ 26.) Local Hartford City candidates have no reason to visit the vote center in Montpelier as their constituents are most likely to vote at the closest polling place, which is located in Hartford City. (*Id.* at 4 ¶ 27.) Candidates for Blackford County public office are also more likely to spend time at the polling place in Hartford City, which is the county seat for Blackford County. With a population of 6,220, Hartford City has nearly half of Blackford County's 12,766 residents. *See* U.S. Census Bureau, *American FactFinder* (available at: http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited: Dec. 11, 2017)). By contrast, Montpelier has a population of 1,805. *Id.* Similarly, with a vote center in town at the high school, Hartford City residents have little reason to make the 12-mile trip to Montpelier to vote, and therefore Mr. Valenti is unlikely to meet people from his community there. (Dkt. 66-1 at 4 ¶ 27.)

Voting absentee by mail is an alternative mode of voting provided by the challenged statute. *See* Indiana Code § 3-11-10-24(a)(12). In order to vote absentee by mail Mr. Valenti will first need to complete the application for an absentee ballot and ensure that the Blackford County Election Board *receives* his mail-in ballot application at least eight days prior to the election. (Dkt. 66-1 at 4 ¶ 30; Ind. Code §§ 3-11-4-2(a), 3-11-4-3(a)(2)(A), (a)(4)). The Election Board must then *receive* the actual absentee ballot "in time for the board to deliver the ballot to the precinct election board of the voter's precinct before the closing of the polls on election day." *Id.* § 3-11-

10-3. To vote absentee in person at the county clerk's office, an option open to all voters, Mr. Valenti would similarly need to submit his application and ballot early, before noon the day before the election. *Id.* at §§ 3-11-4-3(a)(2)(A), 3-11-10-26(f).

Because voting absentee by mail requires Mr. Valenti to vote early, he will necessarily miss out on late-breaking political news prior to the election. (Dkt. 66-1 at 4-5 ¶¶ 30-31, 39.) He wants the ability to change his mind at the "last minute." (*Id.* at 4 ¶ 32.) For Mr. Valenti, therefore, voting absentee is a poor substitute to voting at his community polling place on election day. (*Id.* at 4 ¶ 29.) Being forced to vote absentee, prior to the election, deprives Mr. Valenti of the associational, expressive, and informational aspects that come with voting in person with one's community, including the ability to learn about local political issues from his neighbors and from the candidates and electioneers who congregate outside of local polling places (*Id.* at 5 ¶¶ 36, 40.) Although his vote may be counted if he votes absentee, Mr. Valenti feels that this early and private form of voting makes him less connected with the democratic process and less able to express his political voice. (*Id.* at 5 ¶¶ 37, 41-42.)

But, of course, voting absentee by mail heightens the risk that his vote may not be counted as Mr. Valenti fears that even if he meets the requisite deadlines for voting absentee, the ballot will be rejected if he makes a mistake on the ballot or affidavit envelope. (*Id.* at 4 ¶ 33.) In order to cast a new mail-in absentee ballot, the absentee voter would have to submit a written request to the circuit court clerk and wait for the new ballot to arrive. Ind. Code § 3-11-10-1.5. The voter's request,

however, will only be accepted if "the original absentee ballot has not been delivered to the appropriate precinct" and "the absentee voter's name has not been marked on the poll list." *Id.* § 3-11-10-1.5(b). If he were to vote at his community polling place, an election judge could assist him with any questions he might have and furnish him with a new ballot if he made a mistake. (Dkt. 66-1 at 4 ¶ 34.) By voting early, Mr. Valenti also runs the risk that the ballot will change before an election day, for example, in the event that a candidate drops out of an election or if a political party fills a vacancy with a new candidate. *See* Ind. Code § 3-11-10-1.5; § 3-13-1-1 *et. seq.* Furthermore, Mr. Valenti believes that there is a greater risk that his absentee ballot will not be counted due to inadvertent error on the part of election workers. (Dkt. 66-1 at 5 ¶ 35.)

Voting absentee at the circuit court clerk's office poses some of the same deficiencies as voting absentee by mail. (*See* Ind. Code § 3-11-10-26; Dkt. 66-1 at 5 ¶ 38.) First, Mr. Valenti would have to vote no later than noon the day before election day, thereby missing important last-minute developments in the campaigns. (*See* Ind. Code § 3-11-10-26(f); Dkt. 66-1 at 5 ¶ 39.) Second, Mr. Valenti would still not have the opportunity to engage with local candidates and voters outside of his community polling place on election day. (Dkt. 66-1 at 5 ¶ 40.) Finally, for Mr. Valenti, who views voting with his community on election day as a celebration of his fundamental democratic rights, voting alone at the county court clerk's office at least a day before the election is a second-rate mode of voting. (*Id.* at 5 ¶¶ 41-42.)

Despite the alternatives available to voters, in the 2016 election, two thirds of Indiana voters cast their ballot in person on election day. *See* Indiana Secretary of State, *2016 General Election Turnout* (available at: http://www.in.gov/sos/elections/files/2016_General_Election_Turnout.pdf (last visited Dec. 11, 2017)).

5. *Procedural history*

Mr. Valenti filed his amended complaint against the Secretary of State, the individual members of the Indiana Election Commission, the Superintendent of the Indiana State Police, and the Blackford County Prosecutor, all in their official capacities, on November 25, 2015. (Dkt. 28 at 2-3 ¶¶ 6-9.) Mr. Valenti's claims were under the First and Fourteenth Amendment. (*Id.* at 13 ¶ 63.) He sought injunctive and declaratory relief to allow him to vote at the High School during an election. (*Id.* at 14 ¶¶ 4-5.)

The defendants filed for summary judgment on December 22, 2016 (Dkt. 64), and Mr. Valenti filed a cross-motion for summary judgment December 23, 2016 (Dkt. 66). On September 28, 2017, the district court entered final judgment for the defendants. (A.A. at 1.)

In its Entry on Cross Motions for Summary Judgment the district court applied the "'flexible' *Burdick* standard . . . to analyze[ ] the Plaintiff's challenge to the application of Indiana Code section 35-42-4-14 to his ability to vote at the High School," (A.A. at 3), whereby the court must weigh the burdens of the law on the voter against the "precise interests put forward by the State as justifications for the

burden" (*id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). The district court questioned whether the "associational and expressive aspects of voting" alleged to be burdened were constitutionally protected at all, but, in any event found the burden to be "very narrow." (*Id.* at 5.) "In light of the minimal burden on the Plaintiff," the court found "the State's legitimate interests in promoting public safety and protecting children are reasonable and sufficient to justify the restriction under the circumstances of this case." (*Id.* at 4.) The district court thus entered final judgment in favor of the defendants. (A.A. at 1.)

Summary of the Argument

Under *Burdick v. Takushi*, a challenge to a state law burdening the right to vote is reviewed under a "flexible standard," weighing "'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 interest 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.'" 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). "However slight [the] burden [on voting rights] may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion) (internal citation and quotation omitted).

Indiana Code § 35-42-4-14 violates Mr. Valenti's right to vote by completely barring him, without reason, from the only polling place in his town where he may

vote on election day. Although he may still exercise the franchise, either by voting in a town twelve miles away, by submitting an absentee ballot early by mail, or by submitting an absentee ballot in person, Mr. Valenti has been denied the opportunity to vote with his community. His desire to join his neighbors to vote and commune on election days is by no means idiosyncratic. A vast majority of voters in Indiana continue to vote on election day during the workweek, despite the option of voting early and, for some, by mail. This is because, like Mr. Valenti, voters view election day as a celebration of their sometimes hard fought right to vote, and an expression of faith in the democratic process. Courts in a variety of contexts have recognized important differences in modes of voting, and the value voters place on voting in person on election day. *See, e.g.*, *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004); *Disabled in Action v. Board of Elections in City of New York*, 752 F.3d 189, 198-99 (2d Cir. 2014). Far from being a "very narrow" burden, the State's complete ban of Mr. Valenti from entering the only polling place in his town eviscerates the associational and expressive aspects that are part of his constitutionally protected right to vote. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The district court erroneously construed the fundamental right to vote narrowly, and thereby gave little weight to Mr. Valenti's burden.

Against the significant burden on Mr. Valenti's right to vote, the district court accepted at face value the state's general interests "in promoting public safety and protecting children" with no discussion as to how those interests are furthered by the restriction at issue here. In other contexts, Courts have rejected such generalized

justifications for sex offender restrictions as irrational. *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied* (Oct. 2, 2017). But under *Burdick*, even minimal burdens on voters must be justified by "precise interests" put forth by the State. Here, preventing Mr. Valenti from entering a restricted area of Blackford County High School, where by law children are not permitted unless accompanied by an adult voter, for the singular purpose of voting on election day, does nothing to promote public safety. Because the State has offered nothing to demonstrate that child or public safety will be affected by prohibiting sex offenders from voting on school property, it fails the *Burdick* test as there is nothing against which to weigh the voter's burdens. But even if this Court were to find a legitimate risk to children, the State's complete ban of Mr. Valenti from his polling place on school property is "excessively burdensome" in light of any potential risk of illicit conduct. *Crawford*, 553 U.S. at 202 (quoting *Storer v. Brown*, 415 U.S. 724 (1974)). Indiana laws already prohibit child solicitation and sexual communication with minors, and nothing in the record indicates that these laws are ineffective in this context. Given this, and contrary to the conclusion of the district court, the defendants have violated Mr. Valenti's First and Fourteenth Amendment rights, and he must be permitted to vote at the High School on election day along with the rest of his community.

Argument

I. Standard of Review

The district court denied Mr. Valenti's requested relief on a cross-motion for summary judgment. This Court "review[s] a district court's grant of summary judgment *de novo*." *Tripp v. Scholz*, 872 F.3d 857, 862 (7th Cir. 2017). Summary judgment is appropriate "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 772 (7th Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). "Where, as here, the parties file cross-motions for summary judgment, all reasonable inferences are drawn in favor of the party against whom the motion at issue was made." *Tripp*, 872 F.3d at 862.

II. A State may not burden a citizen's fundamental right to vote without sufficient justification

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote, therefore, is fundamental and cannot be unduly burdened or abridged. *Burdick*, 504 U.S. at 433; *see also Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Although the right to vote is fundamental, courts do not necessarily apply strict scrutiny every time the right is impinged upon. Rather, courts apply a "more flexible standard" when considering a challenge to state laws that burden the right to vote, weighing:

> "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 interest 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."

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). On the one hand, when the law "severely burdens the First and Fourteenth Amendment rights of voters, the regulation 'must be narrowly drawn to advance a state interest of compelling importance.'" *Common Cause Indiana v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (quoting *Burdick*, 504 U.S. at 434). On the other, when the law "imposes only reasonable, nondiscriminatory restrictions upon the rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quoting *Burdick*, 504 U.S. at 434) (internal quotations omitted). But where there are legitimate interests on both sides, the Supreme Court has "avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue. And whatever the claim, the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and the State's reasons for imposing those precise burdens." *Crawford*, 553 U.S. at 210 (Scalia, J., concurring).

III. The burdens on Mr. Valenti's right to vote are significant

Mr. Valenti, banned completely from his neighborhood polling place, is forced to cast his vote in another town 12-miles away, or vote early by absentee ballot, either by mail or at the county clerk's office. The burden Indiana Code § 35-42-4-14 imposes on Mr. Valenti is significant. The constitutional right to vote goes beyond merely

casting a ballot. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) *("*The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."). The Supreme Court has long recognized "rights of qualified voters to cast their votes *effectively*," *Munro v. Socialist Workers Party*, 479 U.S. 189, 192 (1986) (emphasis added), recognizing the associational and expressive aspects that come with the entire voting process, including forming political parties and accessing the ballot, *see, e.g.*, *Norman v. Cook Cty. Officers Electoral Bd.*, 502 U.S. 279, 288 (1992) ("The right [to create and develop new political parties] derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.").

Mr. Valenti, as do many other voters, views voting in person on election day as a celebration of the right to vote and as something that should be shared publicly with the community. Voting at his neighborhood polling place also provides him with the opportunity to talk with local candidates and electioneers who congregate around polling places on election day; to commune with fellow voters who share his political views; and to debate with those who oppose his views. Because of the Unlawful Entry statute, Mr. Valenti is completely foreclosed from these opportunities.

Courts have recognized the importance of voting in person with one's community on election day. In *Veasey v. Perry*, 71 F. Supp. 3d 627, 632 (S.D. Tex. 2014), *vacated in part on other grounds, and rev'd in part on other grounds sub nom.*

Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (*en banc*) , *cert. denied*, 137 S. Ct. 612 (2017), for example, the plaintiffs challenged Texas's voter photo identification law as, among other things, an unconstitutional burden on voting and a violation of Section 2 of the Voting Rights Act. In arguing that the burden on voters was minimal, the state pointed to voting by mail as an alternative method of voting that did not require a photo identification. *Id.* at 676. Recognizing the insufficiency of mail-in voting as a substitute for in person voting, the court cited "substantial testimony that people want to vote in person at the polls, not even in early voting, but on election day" and, for example, that "[f]or some African-Americans, it is a strong tradition—a celebration—to overcoming obstacles to the right to vote. Reverend Johnson considers appearing at the polls part of his freedom of expression, freedom of association, and freedom of speech." *Id.* at 676-77. Another plaintiff who voted by mail "felt as though he was being treated like 'a second-class citizen.'" *Id.* at 677.[3]

In disabilities discrimination decisions, courts have similarly emphasized the importance of the ability to vote with one's own community on election day. In *Disabled in Action v. Board of Elections in City of New York*, for example, the plaintiff

[3] A majority of the Fifth Circuit, siting *en banc*, affirmed the district court's holding that the law had a discriminatory effect in violation of Section 2 of the Voting Rights Act, reversed and remanded to reweigh the evidence on the issue of discriminatory purpose under the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act, and reversed the district court's holdings that the law amounted to a poll tax in violation of the Fourteenth and Twenty-Fourth Amendments. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (*en banc*). Citing the doctrine of constitutional avoidance, the court vacated and dismissed the district court's opinion with regard to the unconstitutional burden on voting claim. *Id.* at 265. Nothing in the Fifth Circuit's decision contradicts the district court's findings cited here with regard to the value voters place on voting in person, and as stated *infra* pp. 23-24, the Fifth Circuit affirmed the district court's holding that mail-in absentee voting is not an adequate substitute for in-person voting.

alleged that the defendant had discriminated against voters with visual and mobility impairments who could not access or vote privately at their "assigned polling places" in violation of the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA"). 752 F.3d 189, 198-99 (2d Cir. 2014). Under the ADA and RA, "[a] public entity discriminates against a qualified individual with a disability when it fails to provide meaningful access to its benefits programs, or services." *Id.* at 197 (internal quotation and citation omitted). The defendants argued that voters with disabilities were not being denied "meaningful access" to the City's voting program because voters who could not access their assigned sites could still vote absentee or at an "alternative, accessible polling place." *Id.* at 192, 198-99. The Second Circuit rejected defendants' argument, holding that that the opportunity to participate in a voting program "includes the option to cast a private ballot on election days" and not "merely the opportunity to vote at some time and in some way." *Id.* at 199. The court cited the testimony of one voter who, after experiencing physical barriers at her assigned polling place, was "afraid to go back to try and vote at her assigned polling place during subsequent elections," and therefore "decided it would be safer for [her] to use an absentee ballot" even though she would "prefer to vote alongside [her] neighbors and with [her] community." *Id.* at 200 (internal citations and quotations omitted).

In *Kerrigan v. Philadelphia Bd. of Election*, No. CIV. A. 07-687, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008), plaintiffs similarly alleged that persons with mobility impairments could not vote at their assigned polling places near their homes and the defendants thereby "violated the ADA and RA by excluding them from

participation in, or denying them the benefits of, their program of voting in the manner that is available to non-disabled people, and by failing to afford them with equal opportunity to participate in the voting process." *Id.* at *13. The defendants argued that because voters had voting alternatives, including voting early by absentee ballot and in person on election day at city hall, "the City's entire program of voting is meaningfully open to voters with disabilities." *Id.* at *15. In rejecting the City's motion for summary judgment, the court held:

> There is no question that Philadelphia residents who vote in their local polling places may have the opportunity to talk with their neighbors and local party officials, election officials, and poll workers, and obtain candidate information. Moreover, class members have expressed the desire to vote at their local polling places because they see their neighbors at their assigned polling place; they can obtain information about candidates at the polls; and because they want to vote "like normal people." "The right to vote encompasses more than the right to gain physical access to a voting booth, to mark a ballot or pull a lever. Persons must have the opportunity to comprehend the registration and election forms and the ballot itself to cast an informed and effective vote. The meaningful right to vote extends beyond the four corners of the voting machine." *United States v. Berks County*, 277 F.Supp.2d 570, 579 (E.D.Pa.2003) (citation omitted). Consequently, we find that, in the City of Philadelphia the program of voting includes the opportunity to vote in one's local, assigned, polling place, where the voter can take advantage of the opportunities to meet election judges, see their neighbors, and obtain information from candidates' representatives.

Id. at *17. *See also Westchester Disabled on the Move, Inc. v. County of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y.2004) ("Failing to ensure that disabled individuals are able to vote in person and at their assigned polling places—presumably the most commonly used method of voting—could not reasonably be construed as consistent with providing 'meaningful access' to the voting process . . . ."); *People of New York ex rel. Spitzer v. Cty. of Schoharie*, 82 F. Supp. 2d 19, 21 (N.D.N.Y. 2000) (granting

preliminary injunction where plaintiffs alleged that defendants "ha[d] prevented individuals with physical disabilities . . . from participating in the American tradition of voting at their public places, in an integrated setting, along with their friends, neighbors, and colleagues." (internal quotations omitted)); *Nat'l Org. on Disability v. Tartaglione*, No. CIV. A. 01-1923, 2001 WL 1231717, at *3 (E.D. Pa. Oct. 11, 2001) (holding plaintiff had stated a claim for discrimination under the ADA where "voters with mobility impairments cannot vote where their neighbors vote and are forced to vote by absentee ballot or by alternative ballot.").

Barred from the High School, Mr. Valenti is deprived these associational and expressive opportunities that come with voting with one's community. *See Williams*, 393 U.S. at 30. The district court erred by giving little weight to these aspects of Mr. Valenti's voting rights, ultimately concluding that any burden is mitigated by voting alternatives that still allow Mr. Valenti to cast his vote. (Dkt. 78 at 4-5). They are not. Prohibited from voting at his community polling place, Mr. Valenti is faced with three alternatives: (1) vote 12 miles away at the Montpelier Civic Center; (2) vote early by absentee by mail; or (3) vote in person prior to election day at his county court clerk's office. But none of these alternatives provides Mr. Valenti the expressive, associational, and informational aspects that come with voting at the High School, and each alternative comes with its own particular set of burdens.

First, voting in another town twelve miles away does nothing to relieve the burdens imposed on Mr. Valenti's voting rights. Not only does this likely add more than a half an hour to voting, likely during work hours on election day, but for many

voters the distance itself may prove insurmountable. For instance, until recently, Mr. Valenti lacked reliable transportation; and, while he obtained a vehicle during the course of this litigation, in a town that lacks any public transportation, there is no guarantee he will be able to access Montpelier in the future. Second, voting in Montpelier would deprive Mr. Valenti of the opportunity to celebrate election day with his community, talk to other voters about local issues, and meet with Harford City candidates who are unlikely to go to Montpelier. Mr. Valenti is completely unfamiliar with Montpelier, and could not even say whether it was in Blackford County. (Dkt. 64-3 at 23) As Mr. Valenti stated in his affidavit, "[p]sychologically, it feels like I am being banished from my community on election day by being forced to vote in another town where I know no one." (Dkt. 66-1 at 4 ¶ 28.) Sending Mr. Valenti to an unfamiliar town to vote simply does not provide him with the same benefits that come with voting with his community. *Cf. Westchester Disabled On the Move, Inc.*, 346 F. Supp. 2d at 477 (finding irreparable harm "if voters are required to vote at alternative locations or by absentee ballots").

Second, this Court and others have found voting absentee, while convenient for some, to be an inadequate substitute for those who wish to vote in person on election day. In *Griffin v. Roupas*, this Court stressed:

> [A]bsentee voting is to voting in person as a take-home exam is to a proctored one. Absentee voters also are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot. And because absentee voters vote before election day, often weeks before, they are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign.

Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004) (internal citations omitted). The Fifth Circuit similarly concluded that voting absentee by mail "is not the equivalent of in-person voting for those who are able and want to vote in person." *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016). Concluding that voting absentee by mail did not relieve the burdens imposed by a new voter identification law for in-person voting, the court noted: (1) the complex process in applying for and obtaining an absentee ballot; (2) the need to vote early to ensure "the proper state party *receives* the ballot on or before election day;" (3) the fact that voting by mail "deprives voters of the help they would normally receive in filling out ballots at the polls"; the fear of "increased risk of fraud" that voters associate with voting by mail; and (4) the fact that "voters lose the ability to account for last-minute developments like candidates dropping out of a primary race, or targeted mailers and other information disseminated right before the election." *Id.* at 255-56 (emphasis in original). Although the court reviewed voter burdens in the context of a Voting Rights Act discriminatory effects claim, these findings are equally applicable here. *See also Kerrigan*, 2008 WL 250522, at *5 (finding ADA claim where plaintiffs alleged "requiring voting in advance of election day, or requiring voters to travel to City Hall to submit their alternative ballots . . . is not as effective as or equivalent to voting in one's assigned neighborhood polling place"); *Westchester Disabled On the Move, Inc.*, 346 F. Supp. 2d at 478 (finding "[a]bsentee ballots . . . an inadequate substitute for voting in person. For absentee voters to have their votes counted, they may have to vote well in advance of election day, thereby denying them as much time as other

voters to consider their choice."); *Selph v. Council of City of Los Angeles*, 390 F. Supp. 58, 60 (C.D. Cal. 1975) (citing testimony that "many voters either change their minds as to the manner in which they will vote on candidates and issues in the two or three days preceding Election Day or wait until that period to seriously concentrate on the ballot decisions they must make").

The regulations for voting absentee in Indiana suffer from the same inherent defects identified in *Griffin* and *Veasey*, namely that an absentee voter must vote early, thereby missing late-breaking political developments, and comply with additional procedural burdens, including submitting an additional application, which, particularly when voting by mail, increase the risk of voter error, and having the vote not count.[4] By voting absentee, the voter will also miss out on the expressive, associational, and informational benefits that come with voting with one's community. Given the deficiencies of voting absentee, it is therefore not surprising that a vast majority of Indiana voters continue to vote in person on election day,

[4] According to a 2014 U.S. Election Assistance Commission report, over a quarter of a million absentee ballots were rejected nationwide, and in Indiana at least 2.5% of domestic absentee ballots were rejected. U.S. Election Commission, 2014 Election Administration and Voting Survey Comprehensive, 12, 214, 225 (available at: https://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf) (last visited Dec. 22, 2016). The number one reason that an absentee ballot was rejected was that it was not returned to election officials in time, but other reasons included voters not signing the ballot envelope; voters sending the envelope back, but forgetting to include the ballot; voters using the wrong envelope; and voter signatures on the envelope not matching the one on file. *Id.* at 12. These risks of error are all present when voting absentee in Indiana. *See* Ind. Code § 3-11-10-17 (detailing grounds for rejecting absentee ballots). Although the voter is the source of many of these errors, as this Court emphasized, absentee voters "are more prone to casting invalid ballots" in part because they are deprived of the election judges, who are present at their polling place to assist with any questions the voter might have in correctly marking the ballot. *Griffin*, 385 F.3d at 1131.

despite the option to vote absentee. *See* Indiana Secretary of State, *2016 General Election Turnout* (available at: http://www.in.gov/sos/elections/files/2016_General_Election_Turnout.pdf) (last visited Dec. 11, 2017)) Neither voting absentee in person nor by mail relieves the significant burden imposed on Mr. Valenti's fundamental right to vote. (*Id.* ¶ 30.)

IV. The statute does not advance any legitimate governmental interest

As detailed above, the burdens on Mr. Valenti's fundamental right to vote are substantial and must therefore be justified by an equally weighty state interest. Under *Burdick*'s sliding-scale approach "[h]owever slight [the] burden [on voting rights] may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *See Crawford*, 553 U.S. at 191. Although it stated the proper test under *Burdick*, the district court erred by applying rational basis scrutiny in accepting at face value "the State's legitimate interests in promoting public safety and protecting children" (A.A. at 5), while failing to identify any rational threat to child safety from sex offenders who vote in school-based polling places.[5]

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[5] In rejecting rational basis review for even "minor" burdens on voting rights, the Second Circuit in *Price v. New York State Board of Elections* recognized that "[u]nder *Burdick*'s 'flexible standard'" where "the court must actually 'weigh' the burdens imposed on the plaintiff against 'the precise interests put forward 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.'" 540 F.3d 101, 108 (2d Cir. 2008) (quoting *Burdick*, 504 U.S. at 424). "By contrast, under rational basis review, the plaintiff must 'negative every conceivable basis which might support' the challenged law, even if some of those bases have absolutely no foundation in the record." *Id.* at 109. Here, the record demonstrates that the risk to children posed by persons convicted of sex offenses voting in highly regulated polling places that happen to be on school property is virtually non-existent, and there is no foundation in the record for the State's proffered justifications.

Such a generalized statement of a state's interest does not meet the requirement under *Burdick* that the State put forward "precise interests" to justify the specific burdens on a voter's rights. *Burdick*, 504 U.S. at 434. As applied to Mr. Valenti, the statute is fundamentally irrational because it is unreasonable to believe that a person previously convicted of a sex offense who is voting will use that as an opportunity to endanger children. *Cf. Valenti v. Hartford City, Indiana*, No. 1:15-CV-63-TLS, 2016 WL 7013871, at *8 (N.D. Ind. Dec. 1, 2016) (in case where Mr. Valenti challenged on state *ex post facto* grounds a local ordinance prohibiting him from entering child safety zones, finding "no reasonable person would think" allowing Mr. Valenti entry into his daughter's school to meet with teachers would "create a threat to children or to public safety").

A polling place is a restricted area where only certain individuals are allowed to enter. *See* Indiana Code § 3-11-8-15(a).[6] School children are not allowed in polling

[6] Indiana Code § 3-11-8-15(a) reads:

> Only the following persons are permitted in the polls during an election:
> (1) Members of a precinct election board.
> (2) Poll clerks and assistant poll clerks.
> (3) Election sheriffs.
> (4) Deputy election commissioners.
> (5) Pollbook holders and challengers.
> (6) Watchers.
> (7) Voters for the purposes of voting.
> (8) Minor children accompanying voters as provided under IC 3-11-11-8.
> (9) An assistant to a precinct election officer appointed under IC 3-6-6-39.
> (10) An individual authorized to assist a voter in accordance with IC 3-11-9.
> (11) A member of a county election board, acting on behalf of the board.
> (12) A mechanic authorized to act on behalf of a county election board to repair a voting system (if the mechanic bears credentials signed by each member of the board).
> (13) Either of the following who have been issued credentials signed by the members of the county election board:
> (A) The county chairman of a political party.

places unless they are accompanying adult voters, which is true regardless of where a polling place is located. *Id.* § 3-11-8-15(a)(8). In terms of incidental proximity to children, a polling place is therefore safer for children than a grocery store or a mall, where children are frequently unaccompanied by adults.

Courts have regularly rejected such generalized justifications for sex offender restrictions, without more in the record, as irrational. In *Does #1-5 v. Snyder*, the Sixth Circuit questioned the underlying rationale behind most sex offender registration requirements, namely that "recidivism rates of sex offenders . . . are 'frighteningly high'" and therefore they need to be readily identifiable and kept away from children. 834 F.3d at 704. The court held that "[i]ntuitive as some may find this, the record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals." *Id.* In fact the evidence presented to that court "suggests that sex offenders . . . are actually *less* likely to recidivate than other sorts of criminals," and that "laws such as SORA actually *increase* the risk of recidivism" by making it harder for "registrants to get and keep a job, find housing, and reintegrate into their communities." *Id.* at 704-05 (and studies cited therein) (emphasis in original). The court ultimately found that Michigan's sex offender registration law violated the *ex post facto* clause of the U.S. Constitution. *Id* at 706. *See also McGuire v. Strange*, 83 F. Supp. 3d 1231, 1268-69 (M.D. Ala. 2015), *appeal*

(B) The county vice chairman of a political party.

. . . .

(14) The secretary of state, as chief election officer of the state, unless the individual serving as secretary of state is a candidate for nomination or election to an office at the election.

filed (finding that requiring sex offenders to register with two agencies weekly and to complete two identical travel permit applications prior to traveling outside of their residential county were instances of "highly diminished returns coupled with substantially increased burdens" and were therefore not "reasonable in light of the [state's] nonpunitive objective"); *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (finding that state law prohibiting paroled sex offenders from residing within 2,000 feet of a school or park failed rational basis review where it hindered efforts to monitor sex offenders by rendering many of them homeless and therefore bore "no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators"); *State v. Small*, 833 N.E.2d 774, 782 (Oh. Ct. App. 2005), *dismissed*, 832 N.E.2d 731, 782-83 (Ohio 2005) (finding "no rational basis" to subject a defendant who plead guilty to kidnapping a child to sex offender registration); *Raines v. State*, 805 So.2d 999, 1003 (Fla. Ct. App. 2001) (finding no rational basis for subjecting a defendant convicted of false imprisonment to a sex offender registry). Here, it is similarly unreasonable to exclude persons previously convicted of sex offenses from highly regulated polling places just because they happen to be located in a school.

Even if this Court found a legitimate risk to public and child safety here, the State's complete ban of Mr. Valenti from voting at his polling place on school property is "excessively burdensome" in light of any potential risk, *Crawford*, 553 U.S. at 202 (quoting *Storer*, 415 U.S. at 738), and it certainly is not "necessary to burden" Mr. Valenti's voting rights to protect children, *see Common Cause Ind.*, 800 F.3d at 921.

See also Tripp v. Scholz, 872 F.3d 857, 870 (7th Cir. 2017) ("[T]he existence of a less restrictive alternative may be relevant to an assessment of reasonableness; one way in which a requirement may be unreasonable is that it is unnecessary in light of another requirement that could be imposed instead." (quoting *Hall v. Simox*, 766 F.2d 1171, 117 (7th Cir. 1985))).

Therefore, no matter how "slight the burden," the statute here is unconstitutional as there are no "relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191. However, as noted above, the burden on Mr. Valenti's right to vote cannot be described as slight. He is denied the ability to vote with his community and partake of the beneficial association that this entails. The statute therefore demands rigorous scrutiny. Indeed, in *Does I-IV v. City of Indianapolis*, the court weighed the state's interest in protecting children from sex offenders against a sex offender's right to vote in person, using the rigorous scrutiny demanded by *Burdick*'s when a substantial burden is imposed on voting rights. *Does I-IV v. City of Indianapolis,* No. 1:06-cv-865-RLY-WTL, 2006 WL 2927598 (S.D. Ind. Oct. 5, 2006). At issue in *Does I-IV* was an ordinance prohibiting certain sex offenders from being within 1,000 feet of public playgrounds and other recreation areas when children are present unless accompanied by a non-sex offending adult. *Id.* at *1. Because one of the plaintiffs lived in a precinct where his polling place was located in a public school with recreation areas, the ordinance effectively barred him from voting in person. *Id.* at *9-10. Although in theory he could still vote in person if he was accompanied by a qualified adult and if children

were not present at the polling place, the court still found that the ordinance severely restricted the plaintiff's right to vote, despite his ability to vote absentee, and that the statute was not narrowly tailored. *Id.* at *10 ("Preventing persons from voting in-person is not narrowly tailored to advance the City of Indianapolis' interest in protecting persons, particularly children in the areas identified by the Ordinance.").

In recent First Amendment cases, courts have similarly found blanket restrictions on expressive conduct overly broad. In *Packingham v. North Carolina*, the U.S. Supreme Court struck down a law prohibiting sex offenders from accessing social networking sites like Facebook, LinkedIn, and Twitter. 137 S. Ct. 1730, 1737 (2017). Applying intermediate scrutiny, the Court held the law to be overly broad in prohibiting sex offenders "from engaging in the legitimate exercise of First Amendment Rights." *Id* In rejecting the State's argument that "the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims," the court noted that "narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor," would likely pass First Amendment scrutiny. *Id.* at 1737. But "[s]pecific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict." *Id.* Recognizing that "the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people," and that "[t]he government, of course, need not simply stand by and allow these evils to occur," the Court nonetheless held the assertion of a valid governmental interest cannot, in every

context, be insulated from all constitutional protections."[7] *See also Doe v. Prosecutor, Marion County, Indiana*, 705 F.3d 694, 695, 699 (7th Cir. 2013)(finding Indiana law prohibiting certain sex offenders from using social networking sites and other on-line methods of communications as overly broad because "Indiana has other methods to combat unwanted and inappropriate communication between minors and sex offenders," including laws prohibiting communication with children concerning sexual activity); *Doe v. Harris*, 772 F.3d 563, 568, 582 (9th Cir. 2014) (finding internet restrictions were not sufficiently tailored where the restriction was "applied in an across-the-board fashion . . . to all registered sex offenders, regardless of their offense, their history of recidivism (or lack thereof), or any other relevant circumstance").

The statute in this case is aimed at essentially the same evil in *Does I-IV* and *Packingham*, namely preventing illicit contact by a person convicted of a sex offense with a child, and it is similarly poorly tailored to that end because it is both over- and under-inclusive. The statute is over-inclusive because it "captures considerable conduct that has nothing to do with minors," specifically, it prohibits Mr. Valenti from exercising his constitutional right to vote in person at his community polling place.

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[7] Recognizing the proliferation of increasingly burdensome sex offender restrictions, Justice Kennedy writing for the majority noted parenthetically "the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system, " but held that the issue was not currently before the Court. *Packingham*, 137 S. Ct. at 1737. The Court, echoing the Sixth Circuit's reasoning in *Snyder*, *supra* at pp. 25-26, also recognized that laws that seek to isolate sex offenders can actually be counter-productive to their stated purpose of public safety by cutting off convicted criminals who might particularly benefit from "means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Id.* Here, by prohibiting Mr. Valenti from engaging with his community through the electoral process, the State has similarly cut him off from important civic and potentially rehabilitative activities.

Doe v. Prosecutor, 705 F.3d at 699 (internal quotations omitted). The statute is under-inclusive because it leaves unaddressed polling places not located on school property, such as libraries and community centers, where plaintiffs would have just as much, if not more incidental contact with children. *See, e.g.*, Marion County Elections Board, *2016 Presidential Election Polling Location List* (available at: http://www.indy.gov/eGov/county/clerk/election/pages/home.aspx) (last visited: Dec. 11, 2017) (listing 43 precincts in Indianapolis with polling places located either in a library or community center). In fact, any children that might be in a polling place are under greater supervision than in other public places because they are only permitted to be there if they are accompanying an adult. *See* Ind. Code § 3-11-8-15(a)(8). As in *Doe v. Prosecutor*, Indiana's laws on child solicitation (Indiana Code § 35-42-4-6) and communication with minors concerning sexual activity (Indiana Code § 35-42-4-13) serve to demonstrate the statute's lack of tailoring by showing that there are better and more targeted laws already on the books to address the State's interest in child safety. But Indiana Code § 35-42-4-14's blanket prohibition serves only to further isolate Mr. Valenti from his community and civic life, and as the Supreme Court noted in *Packingham*, by hindering rehabilitation, such laws may actually undermine public safety. The burden on Mr. Valenti's voting right cannot be justified, and the statute is unconstitutional. *Burdick*, 504 U.S. at 434.

Conclusion

The district court therefore erred. Indiana Code § 35-42-4-14 is unconstitutional as applied to Mr. Valenti because it imposes significant burdens on

his fundamental right to vote while failing to promote any rational state interest in protecting the public. Regardless of the scrutiny applied under *Burdick*, the fact remains that the law, as it applies to sex offenders voting at school-based polling locations, will do little or nothing to protect children while keeping people like Mr. Valenti from engaging in the expressive, associational, and informative aspects that come with voting in person with one's community on election day. The district court's decision must be reversed and judgment must be entered for Mr. Valenti.

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s/ Jan P. Mensz
Jan P. Mensz
Attorney at Law

Certificate of Service

I hereby certify that on the 13th day of December, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Service will be made on the following ECF-registered counsel by operation of the Court's electronic system.

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s/ Jan P. Mensz
Jan P. Mensz
Attorney at Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN VALENTI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 1:15-cv-1304-WTL-MPB**
	)	
INDIANA SECRETARY OF STATE in her official capacity, *et al.*,	)	
	)	
	)	
Defendants.	)	

JUDGMENT

The Court having granted the Defendants' motion for summary judgment and denied the Plaintiff's motion for summary judgment, judgment is hereby **ENTERED** in favor of the Defendants and against the Plaintiff on all of the Plaintiff's claims against the Defendants.

SO ORDERED: 9/28/17

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Laura Briggs, Clerk

BY: _____
Deputy Clerk, U.S. District Court

Copies to all counsel of record via electronic notification

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN VALENTI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 1:15-cv-1304-WTL-MPB**
	)	
INDIANA SECRETARY OF STATE in her official capacity, *et al.*,	)	
	)	
	)	
Defendants.	)	

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This cause is before the Court on the Defendants' motion for summary judgment (Dkt. No. 64) and the Plaintiff's cross-motion for summary judgment (Dkt. No. 66). The motions are fully briefed, and the Court, being duly advised, now **GRANTS** the Defendants' motion and **DENIES** the Plaintiff's motion for the reasons set forth below.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The parties agree that the material facts in this case are undisputed. *See* Dkt. Nos. 67 at 2, 8; 73 at 2.[1] In ruling on a motion for summary judgment, the admissible evidence presented by the non-moving party must be believed, and all reasonable inferences must be drawn in the non-movant's favor. *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th

[1] The Court notes that the Plaintiff had argued that it was difficult for him to get to the Montpelier Civic Center because he did not have reliable transportation. "[The] Defendants contest[ed] [the] Plaintiff's allegation that his Chevy Cavalier is inoperable and cannot be driven a distance of 12 miles." Dkt. No. 73 at 2. That fact, however, is no longer in dispute. The Plaintiff notified the Court on May 4, 2017, that he now has a reliable vehicle. Dkt. No. 77. Plaintiff's counsel informed defense counsel of this fact. *Id.*

Cir. 2009) ("We view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor."). When the Court reviews cross-motions for summary judgment, as is the case here, "we construe all inferences in favor of the party against whom the motion under consideration is made." *Speciale v. Blue Cross & Blue Shield Ass'n*, 538 F.3d 615, 621 (7th Cir. 2008) (quotation omitted).

II. BACKGROUND

The Plaintiff is a registered voter, living in Hartford City, Blackford County, Indiana. He challenges Indiana Code section 35-42-4-14 as it applies to his right to vote. The statute prohibits persons meeting the definition of "serious sex offender" from knowingly or intentionally entering school property. Ind. Code § 35-42-4-14. The Plaintiff, who meets the definition of "serious sex offender" under the statute, contends that his First and Fourteenth Amendment rights are violated by the law because he cannot vote on election days at the polling place closest to his home, the Blackford County High School Auxiliary Gym ("High School"). The Plaintiff may, however, vote on election days at Blackford County's other polling place, the Montpelier Civic Center, which is located nine miles farther from the Plaintiff's home than is the High School. The Plaintiff can also choose to cast an absentee ballot prior to an election day, either by mail or in person, at the Blackford County Circuit Court Clerk's office, which is 500 yards from the Plaintiff's home. The Plaintiff voted in the 2016 presidential election by voting absentee by mail.

III. DISCUSSION

The Plaintiff maintains that Indiana Code section 35-42-4-14 "unjustifiably burdens [his] right to vote," Am. Compl. ¶ 63, because he is prohibited from voting on election days at the closest polling place to his home because it is a school. "'States may prescribe [t]he Times,

Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl.1,' and the Supreme Court has recognized that States retain the power to regulate their own elections." *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 916 (7th Cir. 2015) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)) (internal quotation marks omitted). The Supreme Court also recognizes that "'voting is of the most fundamental significance under our constitutional structure.'" *Burdick*, 504 U.S. at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)).

In this case, the parties agree that the "flexible" *Burdick* standard should apply to analyzing the Plaintiff's challenge to the application of Indiana Code section 35-42-4-14 to his ability to vote at the High School. *See* Dkt. Nos. 67 at 9-10, 73 at 2-3. Therefore, the Court applies this standard. Under the *Burdick* standard, the "rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 428. The Supreme Court in *Burdick* explained as follows:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 434 (internal quotation omitted). "However slight that burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Although Indiana Code section 35-42-4-14 is not an election law, it has the effect of prohibiting serious sex offenders from voting on school properties. For the Plaintiff, this means the burden of having to drive nine miles farther to vote on election days.[2] This is the only burden that impacts the Plaintiff's right "'to cast [his] vote[] effectively.'" *Common Cause Ind.*, 800 F.3d at 917 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). This burden, however, is very minimal, particularly now that the Plaintiff has reliable transportation. The Indiana Court of Appeals has stated that "[t]here is no doubt that [Indiana Code section 35-42-4-14] has a purpose[,] . . . that being to promote public safety and to protect children." *Kirby v. State*, --- N.E.3d ----, 2017 WL 3754902, at *5 (Ind. Ct. App. Aug. 31, 2017). In light of the minimal burden on the Plaintiff, the State's legitimate interests in promoting public safety and protecting children are reasonable and sufficient to justify the restriction under the circumstances of this case. *See Burdick*, 504 U.S. at 434 ("the State's important regulatory interests are generally sufficient to justify [reasonable, nondiscriminatory] restrictions") (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Therefore, the Plaintiff's as-applied challenge to Indiana Code section 35-42-4-14 fails.

In addition to the minimal burden of driving nine miles, the Plaintiff contends that, if he must vote in Montpelier or by absentee ballot in person or by mail, he "will be deprived of the important associational and expressive aspects of voting in person on an election day at one's

[2] Alternatively, he could vote by absentee ballot in person or by mail. The Plaintiff argues that these methods of voting are inadequate substitutes for voting at the High School. Dkt. No. 67 at 6. He cites deficiencies with voting early and absentee by mail, namely, that he would "miss out on late-breaking political news prior to the election" and argues that there are greater risks that a mail-in ballot would not be counted for some reason. Dkt. No. 67 at 7. While the Seventh Circuit discussed these concerns in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), where a group of working mothers sought to require Illinois to allow them to vote by absentee ballot, they need not be examined here. The Plaintiff is not required to vote by absentee ballot. He can vote in person at a polling place on election day, thereby avoiding these risks.

community polling place." Dkt. No. 67 at 8. He states that he "view[s] voting as a celebration of [his] constitutional right, and it is something [he] think[s] should be shared publicly with [his] community." Dkt. No. 66-1 at 2. He goes on to say that "[i]t is an opportunity to express [himself] politically, beyond just having [his] vote counted, and to hear from others." *Id.* He alleges that, "[i]n the past, local candidates have been present outside of the High School greeting voters and handing out literature on election day. They are available if voters would like to ask them questions." Am. Compl. ¶ 28. He contends that "Local Hartford City candidates are less likely to visit the vote center in Montpelier because their constituents are unlikely to be in Montpelier." Am. Compl. ¶ 34. Because the Plaintiff can only vote on an election day at the Montpelier Civic Center, he "feels like he is being banished from his community on election day by being forced to vote in another town where he knows no one." Dkt. No. 67 at 6 (citing Dkt. No. 66-1 at 4).

The Plaintiff has not pointed to any case law suggesting that the First Amendment guarantees his right to associate with a certain group of people at a chosen polling place on election day. In any event, the burden on the Plaintiff's right to enjoy these specific "associational and expressive aspects of voting" is very narrow. He maintains the ability to associate with his community and discuss politics away from school property, including with those who also vote at the Montpelier polling location, to the extent association and expression are permitted there by Indiana law.[3] Additionally, the minimal burden the Plaintiff faces in these respects is outweighed by the State's interests as defined above.

[3] The Court notes that Indiana law places restrictions on political speech, and communication generally, at polling locations. Indiana Code section 3-14-3-16(b)(1) makes it illegal to electioneer within the polls and "the area or pathway that extends fifty (50) feet in length, measured from the entrance to the polls." *See* Ind. Code § 3-5-2-10 (defining the "chute"). This includes "expressing support or opposition to any candidate or political party or

IV. CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment (Dkt. No. 64) is **GRANTED**, and the Plaintiff's motion for summary judgment (Dkt. No. 66) is **DENIED**. Judgment consistent with this Entry shall now issue.

SO ORDERED: 9/28/17

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic notification.

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expressing approval or disapproval of any public question in any manner that could reasonably be expected to convey that support or opposition to another individual" and also "wearing or displaying an article of clothing, sign, button, or placard that states the name of any political party or includes the name, picture, photograph, or other likeness of any currently elected federal, state, county, or local official." Ind. Code § 3-14-3-16.

Until recently, Indiana law prohibited voters from even "convers[ing] or communcat[ing] with a person other than a member of the precinct election board while at the polls." Ind. Code § 3-11-8-18 (corresponding to P.L. 5-1986, Sec. 7). Effective July 1, 2015, this particular law is less restrictive: Although still entitled, "[v]oter not to converse with any person except precinct election board member," the law now provides only that "[a] voter or person offering to vote may not converse or communicate in a loud or disruptive manner while at the polls." Ind. Code § 3-11-8-18 (eff. July 1, 2015).

Circuit Rule 30(d) Certification

Pursuant to Circuit Rule 30(d), I hereby verify that all materials required by Circuit Rule 30(a) are included within this Appendix and that no documents exist within the scope of Circuit Rule 30(b).

/s/ *Jan P. Mensz*
Jan P. Mensz
Attorney at Law