No. 17-3207

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIAN VALENTI,
Plaintiff-Appellant,

v.

CONNIE LAWSON,
Indiana Secretary of State, in her official capacity, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 1:15-cv-1304-WTL-MPB,
The Honorable William T. Lawrence, Judge.

BRIEF OF STATE APPELLEES

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JURISDICTIONAL STATEMENT

The Jurisdictional Summary in the Brief of Appellant is complete and correct.

STATEMENT OF THE ISSUE

Whether the district court correctly granted summary judgment in favor of the State defendants by finding that the State of Indiana's interest in protecting children and promoting public safety by prohibiting serious sex offenders from entering school property, even for the purpose of voting, did not substantially burden Valenti's right to vote because of the myriad of other accessible and reasonable methods available to him.

STATEMENT OF THE CASE

In 1993, Plaintiff-Appellant Brian Valenti was convicted of a "Lewd or Lascivious Act with Child Under 14 Years" in California, for which he was incarcerated for 10 years in a California prison (Dkt. 64-1 at 11 ¶¶ 1-23, 38; 65-1, at ¶ 21). In 2014, Valenti moved to Indiana and became a resident of Hartford City in Blackford County (Dkt. 64-1 at 16 ¶¶ 7-9; 65-1, at ¶ 10). As a result of his prior conviction in California, Valenti was required to register as a sex offender upon his move into Indiana (Dkt. 65-1, at ¶ 23-24).

Under Indiana Code Section 35-42-4-14(a), Valenti was considered a "serious sex offender." The Indiana General Assembly also included as part of the serious sex offender statute the following provision: "A serious sex offender who knowingly or intentionally enters school property commits unlawful entry by a serious sex offender, a Level 6 felony." Ind. Code § 35-42-4-14(b).

For the first time in his life, Valenti registered to vote in Blackford County in 2014 (Dkt. 64-1 at 18-20). Prior to registering in Indiana, Blackford had never voted in-person in any election nor had he been registered to vote (*Id.*). As a serious sex offender, Valenti is automatically entitled to vote by absentee ballot in any election. Ind. Code § 3-11-10-24(a)(12). Valenti did cast an absentee ballot from jail after registering in Indiana (Dkt. 64-3 at 22-23). On Election Day, Valenti argues he should be permitted to vote at a nearby vote center that is inside of a high school (Dkt. 64-1 at 2). However, Valenti is prohibited from doing so as a serious sex offender (*Id.*).

Generally, Blackford County has two vote centers where any registered voter may vote on Election Day: Blackford County High School Auxiliary Gym and Montpelier Civic Center (Dkt. 64-1 at 2). The High School is located at 2392 N. SR 3 in Hartford City (Dkt. 64-3 at 3). The Montpelier Civic Center is located at 339 S. Main Street in Montpelier (*Id.*). Blackford County High School is approximately three miles away from Valenti's home, and the Montpelier Civic Center is approximately twelve miles away (Dkt. 64-1 at 3-4 ¶¶ 18, 25). Valenti would not be prohibited from voting at the civic center.

In addition to the two Election Day centers, any voter may vote up to four weeks prior at the Blackford County Courthouse, which is about 500 yards from Valenti's home (Dkt. 64-2, 64-3 at 21). Voters may also vote early on a specified day at the Montpelier Civic Center, which functions as a satellite office in addition to

the Courthouse (Dkt. 64-1 at ¶¶ 28, 33-35, 64-3 at 40). Valenti would not be prohibited from voting early at either the courthouse or the civic center.

Valenti raises several allegations for why voting absentee, early, or at the civic center are not optimal for him (Dkt. 66-1 at 3 ¶¶ 21-23). Valenti argued in his deposition that voting by absentee ballot "really doesn't get the niche for the type of person [he] is" (Dkt. 64-3 at 22). Likewise, Valenti claimed that there was no reason he cannot go to the courthouse other than his "inherent dislike for courts and law enforcement, in general." (Dkt. 64-3 at 21). In regard to the voting options at the Montpelier Civic Center, Valenti initially claimed he did not have suitable transportation (Dkt. 66-1 at 3 ¶¶ 21-23). However, he conceded that he has two vehicles and can drive to Montpelier to vote (Dkt. 64-3 at 23, 30-33; Appellant's Br. 10).

At the heart of Valenti's claims is that he believes most Hartford City voters vote at the high school and he wants to discuss public issues prior to voting (Dkt. 66-1 at 4 ¶ 28). Valenti essentially claims that any of the various alternative methods are inferior to voting at the high school because (1) he would be deprived of information in the late stages of an election campaign, (2) he cannot engage with local candidates, and (3) that voting by mail is prone to error and subject to risks that a voter's ballot may not be counted (Dkt. 66-1 at 4-5 ¶¶ 30-33, 39-42). Despite these claims, Valenti acknowledged that local candidates have campaigned on his street and visited him at his own home (Dkt. 64-3 at 41).

On November 25, 2015, Valenti filed an amended complaint against the Indiana Secretary of State, members of the Indiana Election Commission, the Superintendent of the Indiana State Police, and the Blackford County Prosecutor in their official capacities (Dkt. 28 at 2-3 ¶¶ 6-9). Valenti sought injuctive and declaratory relief to allow him to vote at the high school under the First and Fourteenth Amendments (*Id*. at 13-14).

On December 22, 2016, the state defendants filed a motion for summary judgment (Dkt. 64-1). The next day, Valenti filed a cross-motion for summary judgement (Dkt. 66-1). The district court granted the state defendants' motion on September 28, 2017 (App. 1). In applying the flexible *Burdick v. Takushi*, 504 U.S. 428 (1992) standard, the district court found the burdens on Valenti to be "minimal" and that the State's legitimate interests in promoting public safety and protecting children were reasonable and justified the restriction from entering school property (App. 4-5). Thus, the district court entered final judgement in favor of the state's defendants (App. 1).

SUMMARY OF THE ARGUMENT

Indiana's law that prohibits sex offenders from entering school property does not significantly burden Valenti's right to vote. While Valenti was prohibited from voting at a high school gymnasium two miles from his home on Election Day, he was left with a myriad of other methods to cast his ballot—including mail-in absentee ballot, early voting, and in person voting at a second vote center within his county. As such Valenti cannot show that the burden on his right to vote was

anything more than a mere inconvenience. Valenti also provides no support for his narrow belief that his right to association narrowly extends to the place, time, and people of his choosing on Election Day. As conceded by Valenti below, he had opportunity to engage candidates and their campaigns and to associate with his fellow citizens. He simply felt that those were not good enough, but that inconvenience does not equate to a constitutional violation.

The State's interest in protecting its children from sex offenders is also substantial. While Valenti claims there is nothing that raises dangers to children, he ignores the fact that children would have been present on Election Day. Further, the hours within which he could have voted would have overlapped with times in which children were coming and going from the school and would have been more vulnerable. This reasonable restriction to protect children from the enhanced and real dangers posed by convicted sex offenders was a proper exercise of legitimate State power. It is also similar to laws and restrictions upon sex offenders that have been repeatedly been upheld by this Court. And when considering the State's interest in protecting children with Valenti's minimal burden of having to use one of the other myriad means of voting, it is clear that the State's interest prevails.

ARGUMENT

Standard of Review

The parties filed cross-motions for summary judgment on the sole issue whether Indiana's prohibition of serious sex offenders from entering school property violated Valenti's First and Fourteenth Amendment rights. This Court reviews "*de*

novo the district court's decision on the parties' cross-motions for summary judgment, construing all facts and drawing all reasonable inferences in favor of the party against whom the motion under consideration was filed." *Hess v. Board of Trustees of Southern Illinois University*, 839 F.3d 668, 673 (7th Cir. 2016).

I.
Valenti's right to vote is not significantly burdened by Indiana's law prohibiting serious sex offenders from entering school property.

Valenti argues that his voting rights have been significantly burdened and curtailed because he cannot vote on Election Day in his preferred vote center, which is inside of a high school. However, Valenti too narrowly construes his right to vote to one of extraordinary specificity—particularly in regard to the other ample methods of voting available to him. Indiana Code § 35-42-4-14 prohibits serious sex offenders, such as Valenti, from entering upon school property. The statute makes no special dispensation for schools that happen to serve as vote centers on Election Day. However, Valenti may vote absentee; early and in-person at a satellite center, or on Election Day at the other vote center within the county. In light of the State's significant interest in protecting children from sex offenders and promoting public safety, Valenti's claim that his right to vote is unduly burdened must fail.

While voting has "fundamental significance," the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citations omitted). "A state election law, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least

to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564 (1983)). Thus, "[r]equiring states to narrowly tailor their election regulations to advance only compelling interests 'would tie the hands of States seeking to assure that elections are operated equitably and efficiently.'" *One Wisc. Institute, Inc. v. Thomsen*, 198 F.Supp.3d 896, 930 (W.D. Wis. 2016) (quoting *Burdick*, 504 U.S. at 433). This Court therefore applies the *Burdick* "flexible standard" when reviewing challenges upon the right to vote. *Common Cause*, 800 F.3d at 917.

Under the flexible *Burdick* standard, "the rigorousness of [the] 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 434. If a law severely burdens voters' constitutional rights, then that law must be narrowly drawn to advance a compelling state interest. *Id*. at 433-34. But 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.* at 434 (internal citation omitted). Regulations that fall within the continuum of this analysis are evaluated by weighing the burden on the voters with the state's interest and the means it has chosen to advance that interest. *Harlan v. Scholz*, 866 F.3d 754, 760 (7th Cit. 2017). As a result, this Court applies a three-step analysis to questions of voting regulation: (1) determine the nature and

severity of the burden the law places on the right to vote; (2) determine the state's interests in enacting the law; and (3) weigh the burdens imposed by the law against the state's interest in enacting the law. *See Crawford v. Marion Cty,* 553 U.S. 181, 190 (2008).

A. There is minimal burden on Valenti's ability to vote and any restriction is reasonable.

Valenti has a myriad of voting options available to him, and a law's ancillary effects that happen to limit one vote center on one particular day does not significantly impinge on Valenti's right to vote. Typically a burden on voting is only considered severe if it goes beyond a mere inconvenience. *See Crawford*, 533 U.S. at 205. In *Crawford*, the United States Supreme Court held that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. As such any burden imposed by the state must go beyond "mere inconvenience." *Crawford,* 553 U.S. at 205 (Scalia, J. concurring).

Valenti's status as a serious sex offender only limits one of the choices he has to exercise his right to vote. The only prohibition on Valenti is that he cannot enter the grounds of the high school. However, he has several other ways of voting, any one of which does not pose any significant burden on Valenti. *See, e.g., Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (holding that there is no right to vote by absentee ballot); *Voting Integrity Project, Inc. v. Keisling,* 259 F.3d 1169, 1175

(9th Cir. 2001) (holding no inherent right to in-person voting and that Oregon's scheme that only permits voting by absentee ballot is constitutional). Indiana law specifically provides for serious sex offenders to vote by absentee ballot. Ind. Code § 3-11-10-24(a)(12); *see, e.g., Indiana Democratic Party v. Rokita,* 458 F.Supp.2d 775, 813 (S.D. Ind. 2006) ("Voting by absentee ballot instead of in person, does not, by itself, constitute an injury in fact since there is no established constitutional right to vote in person." (citing *Griffin*, 385 F.3d at 1131-32). In addition to voting by absentee ballot through the mail, Valenti can choose from one of two satellite offices in which he can vote prior to the election—the courthouse or the Montpelier Civic Center. The courthouse provides access for early voting up to eight weeks prior to the election, until eight days prior to the election. It was shown that the courthouse was also, by far, the closest place for him to vote because it was merely 500 yards away (Dkt. 64-2, 64-3 at 21). As a result, Valenti cannot show that any of these options impose a significant burden or even *a* burden as they are less burdensome than visiting the DMV, which the Supreme Court in *Crawford* explicitly found to be insubstantial. *See Crawford*, 553 U.S. at 198.

Valenti misconstrues his right to associate on Election Day as being too narrow. In *Burdick*, when the Supreme Court spoke of the right to associate, they specifically noted that it was the right "to associate politically through the vote," but not of a right to bind the government to vote in a particular manner or place one wishes. *Burdick*, 504 U.S. at 428; *see also Voting Integrity Project, Inc.,* 259 F.3d at 1175-76 (holding that the definition of "election" is the consummation of the

combined act of voters and officials to make a final selection of an officeholder). In fact, the Court explicitly noted that "the right to vote in any manner and the right to associate for political purposes through the ballot" are not absolute. *Burdick*, 504 U.S. at 433.

Essentially, Valenti casts away all of his other options for voting as suboptimal because they do not "get the niche for the type of person" Valenti deems himself to be (Dkt. 64-3 at 22). But "unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection." *Griffin*, 385 F.3d at 1132. As noted above, there is nothing significantly burdensome about Valenti's other options to vote. As in Oregon, a state may require every voter to vote by absentee ballot without infringing on their constitutional rights. *Id*. at 1131 (citing *Voting Integrity Project, Inc.,* 259 F.3d at 1175-76). Valenti counters by citing *Veasey v. Abbot*, 830 F.3d 216 (5th Cir. 2016), and the concerns regarding absentee voting found in *Griffin* (Appellant's Br. 25-26). However, these opinions are largely inapplicable because they do not stand strictly for the premise that Valenti claims. In *Veasey*, the Fifth Circuit dismissed the constitutional claims and refused to address them. *Veasey*, 830 F.3d at 265. Moreover, no portion of the *Veasey* opinion noted a constitutional right to be at a specific polling location or vote center to discuss issues with fellow voters. Likewise, while this Court enumerated some concerns regarding absentee ballots, it ultimately noted that the use of absentee ballots as a mechanism for exercising the ability to vote is not an unconstitutional burden. *Griffin*, 385 F.3d at

1131-32. Regardless, even if Valenti's generalized concerns regarding absentee ballots were well-founded, which they largely are not given the various problems that may occur with standard ballots, he still had the option to vote in-person, and on election day.

Valenti claims that he would like to interact with the voters of his community. But nothing in Indiana Code Section 35-42-4-14 prohibits him from doing so, and the record clearly shows that he has had those opportunities. Valenti noted that candidates have campaigned on his street and have even knocked on his door (Dkt. 64-3 at 41). Also, Valenti would have opportunities to interact with candidates leading up to Election Day. Valenti acknowledges that he is not prohibited from driving to the Montpelier Civic Center to vote there—he just does not feel as much affinity for the specific group of voters there. Valenti could also vote at the courthouse, which is within a short walk or bike ride—roughly 500 yards from his home—much closer than the high school gym (Dkt. 64-2, 64-3 at 29, 34). But he indicated that he has an "inherent dislike for courts and law enforcement, in general" (Dkt. 64-3 at 21, 66-1 at 4 ¶ 28, 77 at 1 ¶2). None of Valenti's reasons for refusal to exercise his right to vote by the other legal methods provided support his argument that there is a significant burden on his right to vote. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (noting the question is whether the burden effects a person's right to effectively case their vote).

B. The State's legitimate interest in protecting children and the public is substantial.

The severity of the burden of the law impacts the level of scrutiny a court then applies. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, 117 S.Ct. 1364 (1997). Here, the burden on Valenti does not go beyond "mere inconvenience," and is not, therefore, severe (ECF 65, pp. 11-6; ECF 73 pp. 3-13). As the burden upon Plaintiff's right to vote is less than severe, the State's interests are given more deference and do not require a narrow tailoring analysis. *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 788). When the state imposes a severe restriction on the right to vote, then "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. However, lesser burdens that impose "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters are usually justified by important regularly interest. *Id.*; *see also Anderson*, 460 U.S. at 788. There is no requirement of "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons,* 520 U.S. at 364; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196 (1986) (noting: "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").

The State's interest in safeguarding the public and protecting children from sex-offenders is legitimate and substantial. Valenti incorrectly asserts that the State's interests in protecting children from sex-offenders is not precise enough

under the *Burdick* standard (Appellant's Br. 32). In essence, Valenti merely asserts that there is no reason to believe that his presence on school property for the purposes of voting would endanger children. However, "[s]ex offenders are a serious threat." *McKune v. Lile*, 536 U.S. 24, 32 (2002). The victims of sex offenders are most often juveniles, and sex offenders are far more likely to be recidivists. *Id*. at 32-33 (noting that the risk of recidivism for sex offenders is "frighteningly high"). As a result, states have commonly passed legislation to protect children from sex offenders, and the federal government has mandated the creation of sex-offender registries. *See Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003) (noting that Connecticut has enacted statutes designed to protect communities from sex offenders); *Smith v. Doe,* 538 U.S. 84, 89-90 (2003); *see also State v. Williams,* 728 N.E.2d 342, 348 (Ohio 2000) (detailing formatting of *Megan's Law*" in New Jersey after a seven-year old girl was lured into a house by a sex offender, where she was raped and murdered).

Indiana's law accomplishes this task by banning sex offenders from school property, where they may prey on the children present. I.C. § 35-42-4-14. While Valenti argues this is unlikely, there are several factors that raise legitimate concerns. The period in which the vote centers are open extend before and after the typical school day. This would give a window where a sex offender could be present at the time that children were coming and going, making them vulnerable to close or even dangerous interactions. *See* Ind. Code § 3-11-8-8 ("The polls in each precinct open at 6 a.m. and close at 6 p.m. on election day."). Contrastingly, Valenti claims

that he is no threat to those that may be within the poll itself, but he makes no claims as to the school property at large, which he would necessarily have access to if permitted to enter the area surrounding the high school gymnasium (Appellant's Br. 29-30).

In support of his argument, Valenti relies upon cases from other jurisdictions that call into question the efficacy of sex offender registries (Appellant's Br. 31-32). However, most of the cases cited involve individuals who may have been placed on registries for crimes not related to sexual activity with children. That is not the case with Valenti (Dkt. 64-1 at 11 ¶¶ 1-23, 38; 65-1, at ¶ 21). Additionally, restricting sex offenders from school property is the type of restriction that has been repeatedly upheld as a proper exercise of state police power. *See Smith,* 538 U.S. at 93 (upholding registration requirements); *Conn. Dept. of Public Safety*, 538 U.S. at 4; *Doe v. City of Lafayette,* 377 F.3d 757, 766 n.8 (7th Cir. 2004) (it is reasonable to ban sex offenders from city parks where children may play); *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (requiring mandatory DNA samples); *see also McVey v. State,* 56 N.E.3d 674, 681 (Ind. Ct. App. 2016) (holding that sex offender who perpetuated crime against a child victim could not enter school property for the purposes of a commercial driver's license class). In light of the fact that Indiana has a significant interest in protecting its children from sex offenders—there should be no question that the indirect inconvenience placed on sex offenders who may have one of several voting centers inside of school property is justified by the state's interest.

C. The balance of the State's substantial interest in protecting children from sex offenders and Valenti's mere inconvenience in voting favors the State.

In balancing Valenti's mere inconvenience in voting against the State's legitimate interest in protecting its children from sex offenders, the state's interest far outweighs the minimal burden imposed upon Valenti. The State's interests in protecting its children are substantial. Blackford County High School was in session during Election Day on November 8, 2016, and children would have likely been present if Valenti had entered the school to cast his ballot (Dkt. 64-1 at 20). As there would have been times that Valenti, or any sex offender who might take advantage of an Election Day loophole could come into contact with the children of the school, the State's interest in prohibiting this contact is significant rationally related to the protection of children located within Indiana schools.

Further, the burden upon Valenti is minimal. Valenti had multiple options for associating with his fellow voter and voting. They included the courthouse within walking distance from his home, mail-in absentee ballot, voting early at the Montpelier Civic Center, or voting on Election Day at the civic center. Indiana's General Assembly understood that some sex offenders might be barred from entering a polling place and it is that exact reason that serious sex offenders are allowed to cast mail-in absentee ballots to alleviate this burden. See Ind. Code § 3-11-10-24(a)(12). This is in addition to all the other methods that Valenti can use to exercise his civic duty. While there are restrictions on Valenti, they are not absolute. Thus, Valenti cannot show that the burden upon his voting rights imposed

by Indiana Code Section 35-42-4-14(b) outweighs the State's justification in barring sex offenders from school property.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal the claims against the state defendants.

Respectfully submitted,

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FED. R. APP. P. 32(g) WORD COUNT CERTIFICATE

1. Pursuant to Rule 32(a)(7)(B), the undersigned counsel for the State Appellees certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) because the brief contains 4,162 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 12, Century Schoolbook typeface for the text and the footnotes. See Cir. R. 32(b).

/s/ Larry D. Allen
Larry D. Allen
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2018, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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