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

REPLY BRIEF OF APPELLANT

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Summary of the Argument

Twenty-five years ago, Brian Valenti was convicted of a sex offense that now prevents him from voting with his community on election day. This is because Indiana enacted a law that prohibits certain sex offenders from entering school property, and the only polling place located in Mr. Valenti's town is located in a high school. The U.S. Supreme Court has held that the right to vote protects "more than the initial allocation of the franchise" and applies to "the manner of its exercise" as well. *Bush v. Gore*, 531 U.S. 98, 104 (2000). Mr. Valenti, like many voters, views voting with his community on election day as a celebration of democracy, and a unique opportunity to meet and discuss politics with local candidates and his neighbors. While his ability to vote is not completely lost—the State offers alternatives for casting a ballot—none of these alternatives provide an opportunity to commune with his neighbors and local candidates while voting on election day.

The "flexible standard" established under *Burdick v. Takushi* requires courts to weigh "the character and magnitude" of any burden on the right to vote against "the precise interest put forward by the State." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotations and citations omitted). And "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 (the "unlawful entry statute") burdens Mr. Valenti's right to vote by completely barring him from the only

polling place in his town where people may vote on election day. This burden is significant, and must be justified by equally weighty governmental concerns. It is not.

The State, legitimately concerned with child safety, has adopted a law that simply sweeps too broadly. Mr. Valenti was convicted of a sex offense 25 years ago, has since committed no other sex offenses, and the state does not suggest, let alone demonstrate that he poses an ongoing threat to children. Moreover, the polling place and the high school are highly regulated environments where police and other government officials are likely to be on alert. Any residual risk is properly dealt with by criminal laws already on the books that prohibit illicit communication with children. These laws "must be the State's first resort to ward off the serious harm that sexual crimes inflict." *Packingham v. North Carolina*, -- U.S. --, 137 S. Ct. 1730, 1737 (2017). In this as applied challenge, where the risk posed by Mr. Valenti is minimal, if not non-existent, the State's interest in child safety does not justify barring Mr. Valenti from his only community-polling place, and the unlawful entry statute fails the *Burdick* balancing test. For these reasons, the district court's decision should be reversed, and the defendants should be enjoined from enforcing Indiana's unlawful entry statute against Mr. Valenti while he votes at his polling place on election day.

Argument

I. Mr. Valenti's right to vote is significantly burdened by the State's refusal to allow him to vote at the Blackford County High School

Mr. Valenti wishes to vote at the Blackford County High School because it is the only place where he can vote on election day with his neighbors. Like many voters, Mr. Valenti considers voting on election day to be a celebration of democracy, and one that should be shared with his community.[1] Contrary to the State's contention, nothing about wanting to vote with one's community is idiosyncratic to Mr. Valenti.[2] Indeed, case law repeatedly supports this proposition. *See, e.g.*, *Disabled in Action v. Board of Elections in City of New York*, 752 F.3d 189, 198-99 (2d

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[1] The State implies that Mr. Valenti does not really want to vote at all, stating "[f]or the first time in his life, Valenti registered to vote in Blackford County in 2014" and that "[p]rior to registering in Indiana, Blackford [sic] had never voted in-person in any election nor had he been registered to vote." (Appellee Br. 2.) Mr. Valenti only just moved to Indiana in 2014. (Docket [Dkt.] 64-3 at 12.) Prior to that he lived in California where, at least during the time he lived there, as an ex-felon he could not register to vote. (*Id.* at 19.) If anything, the fact that he was unable to vote previously under California law might be expected to heighten his appreciation of the franchise and, in fact, he made the effort to vote in 2016 despite being incarcerated for a physical dispute with his brother, charges that have since been dropped. (Dkt. 64-3 at 22-23; Dkt. 66-1 at 1-2 ¶ 9.)

[2] As it did in the lower court, the State continues to misconstrue Mr. Valenti's deposition statement that "voting absentee and voting at the courthouse doesn't get the niche for the type of person I am." (Dkt. 64-3 at 22.) Mr. Valenti explained in his deposition and affidavit why he views voting in person with his community on election day as important. (*Id.* at 22, 35-36, 41; Dkt. 66-1 at 2 ¶¶ 11-14.) In the same exchange cited by the State, Mr. Valenti explained that he would like to "be in a crowd and confer with other people," and "I would have liked to know if the current superintendent was better suited than the superintendent for the schools here." (Dkt. 64-3 at 22.) Later he stated, "[I]f the polling location is going to be at a school, I should be able to go to a school so I could stand there and talk to my 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 have an idea of what they feel is better going on in our community." (*Id.* at 36.) Mr. Valenti's reasons for wanting to vote at his neighborhood polling place on election day are by no means unique to him, and are consistent with those of voters in the cases cited immediately below.

Cir. 2014) (citing testimony from disabled voter who "prefer[ed] to vote alongside [her] neighbors and with [her] community"); *Veasey v. Perry*, 71 F. Supp. 3d 627, 676-77 (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) (citing "substantial testimony that people want to vote in person at the polls . . . on election day," noting that "[f]or some African-Americans, it is a strong tradition—a celebration—to overcoming obstacles to the right to vote" and others who felt like "second-class citizens" by being forced to vote by mail); *Kerrigan v. Philadelphia Bd. of Election*, No. CIV. A. 07-687, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008) (finding disabled "class members have expressed their desire to vote at their local polling places because they see their neighbors at their assigned polling place; can obtain information about candidates at polls; and because they want to vote 'like normal people'"); *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"); *People of New York ex rel. Spitzer v. Cty. of Schoharie*, 82 F. Supp. 2d 19, 21 (N.D.N.Y. 2000) (plaintiffs alleging 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]). The manner in which one votes, along with the actual counting of a person's ballot, is an important component of the

constitutionally protected right of the voter "to cast their votes effectively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 192 (1986); s*ee also Bush*, 531 U.S. at 104 ("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."); *United States v. Berks County*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003) ("The meaningful right to vote extends beyond the four corners of the voting machine.").

The State admits as much, acknowledging ""the right to associate politically through the vote,"" (Appellee Br. 9 [quoting *Burdick*, 504 U.S. at 428]), but argues that Mr. Valenti does not have "the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute" (Appellee Br. 6). The State misses the point. Mr. Valenti is not asking the State to establish additional voting locations or a new procedure for voting. As the State notes, Indiana could, like the state of Oregon, eliminate in-person voting altogether, and require every voter to vote by absentee ballot. (*Id.* at 10 [citing *Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175-76 (2001)]). But given the system it has in place, the State cannot simply preclude Mr. Valenti from voting in the same manner and at the same location as every other Hartford City voter without sufficient justification. *Zessar v. Helander*, No. 05–cv–1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006) (finding that although there is no constitutional right to vote absentee, "in creating an absentee voting program" the state "alter[ed] the rights of those electors who participate in the program"); *see also One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 933 (2016), *appeal*

filed, No. 16-3083 (7th Cir.) (rejecting defendants' argument that because "there is no constitutionally protected right to cast an absentee ballot" plaintiffs could not challenge burdens placed on their ability to vote absentee once permitted by the state). There is no question that Mr. Valenti's right to vote is burdened.

The State is left to argue that the burden on Mr. Valenti is minimal, a "'mere inconvenience'" akin to obtaining a photo ID to vote. (Appellee Br. 8 (quoting *Crawford*, 533 U.S. at 205).) It notes that Mr. Valenti may vote in another town, by mail-in absentee ballot prior to election day, or by absentee ballot at the courthouse prior to election day, and that courts have recognized that voting absentee is "not an unconstitutional burden." (Appellee Br. 8-10 (citing *Griffin*, 385 F.3d at 1131; *Voting Integrity Project, Inc.*, 259 F.3d 1169; *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 813 (S.D. Ind. 2006)).) But in none of the State's cited cases was a voter legally prohibited from voting at their polling place on election day—still the most common mode of voting. In *Griffin*, for example, the plaintiff working mothers were not legally foreclosed from voting in person; they merely argued that as a practical matter, working mothers might be unable to get to the polling place during voting hours, presumably because of employment and familial constraints, and therefore required an absentee ballot to vote early. *Griffin*, 385 F.3d at 1130. This Court rejected the plaintiffs' argument in that a state is not required to make wholesale changes to its voting system by making absentee voting universal to accommodate every hardship a voter might face. *Id.* at 1131-32. Similarly, in *Rokita*, Indiana did not legally foreclose in-person voting, but made it harder for some to vote by requiring

them to obtain a photo ID. *Rokita*, 458 F. Supp. 2d at 783-84. The court, balancing competing concerns about voter fraud, ultimately held that the burdens were not severe enough to render the law unconstitutional. *Id.* at 826-27. In *Voting Integrity Project*, the plaintiffs sought an interpretation of the federal requirement that elections occur on a specified date, which, the plaintiffs argued, would foreclose Oregon's system of early absentee voting. *Voting Integrity Project*, 259 F.3d at 1170. The case did not address whether the system imposed an unconstitutional burden on anyone, and ultimately held that Oregon's system conformed to federal law because the election process was not "consummated" until the end of the federal election day. *Id.* at 1175.

In fact, this court's reliance on *Griffin* is particularly curious. In *Griffin*, this Court only addressed whether limiting access to absentee voting unconstitutionally burdened working mothers "who contend that it is a hardship for them to vote on election day." *Griffin*, 385 F.3d at 1129. The question here is quite the opposite: whether permitting absentee voting can relieve significant burdens on a person's ability to vote in person on election day. While the Court did not directly address this question, it noted many of the shortcomings of absentee voting that might cause a voter to favor voting in person on election day—shortcomings that could constitute unconstitutional burdens, as they do here (*e.g.*, the absence of election judges who could provide voters with assistance, and the fact that absentee ballots have to be cast prior to election day, and would therefore miss out on late political developments). *See id.* at 1131.

But here, Mr. Valenti is completely foreclosed from voting on election day at the polling place where his community votes. Neither absentee voting, whether in-person or at the courthouse, or voting in Montpelier would allow him to do so.[3] This is a significant burden on his constitutional right to vote.

The State also argues that the significant burden is somehow lessened because Mr. Valenti had the opportunity to "engage candidates and their campaigns and to associate with his fellow citizens," prior to election day and this should be "good enough." (Appellee Br. 5, 11.) First, Mr. Valenti's testimony on which the State relies is that one local candidate knocked on his door once (*Id.* at 11 (citing Dkt. 64-3 at 41)), and clearly any occasional opportunities for this type of interaction are not on par with election day, either in frequency or in scope, for Mr. Valenti to discuss local politics with his neighbors and with candidates who frequently greet voters at the local polling place. But even if these were somehow compatible, the value that Mr. Valenti places on engaging in political speech and association on election day at his polling place, a value that is shared by many other voters, should be given substantial deference. As in the free speech context, "[o]ne is not to have the exercise of his liberty

[3] The State points out that the courthouse where Mr. Valenti could vote absentee prior to election day is only 500 yards from his home, and that driving twelve miles to Montpelier would not impose a significant burden, and are "less burdensome" than driving to the DMV to get a voter ID. (Appellee Br. 9, 11.) The significant burden on Mr. Valenti's right to vote, however, is not due only to the relative distances he must travel to vote, but rather the fact that Hartford City voters are far less likely to vote in Montpelier, or on any particular day prior to election day at the courthouse, and therefore, Mr. Valenti will be separated from his neighbors and local candidates that are likely to congregate at the High School on election day. Because the constitutional right to vote encompasses the ability to converse and associate through the election process, the State's prohibition casts a substantial burden on that right.

of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997). Because the State has prohibited him from voting at his only community polling place on election day, it has placed a substantial burden on Mr. Valenti's right to vote.

II. The unlawful entry statute, as applied to Mr. Valenti, does not further the State's interest in protecting children and the public, and it is far outweighed by the significant burden on his right to vote

Undoubtedly, the State has enacted this law because of its interest in protecting children, an interest that in general terms is clearly compelling. But as applied to Mr. Valenti, who was convicted of a sex offense a quarter century ago, and has not been arrested or convicted of a sex crime since, the State's interest is minute. This is particularly so in a highly regulated polling place. The Supreme Court has cautioned that no matter how legitimate the state's interest in preventing the sexual abuse of children, "the assertion of a valid governmental interest cannot, in every context, be insulated from all constitutional protections." *Packingham*, 137 S. Ct. at 1737 (internal citation and quotation omitted).[4] And in this case, important constitutional rights are at stake. Nonetheless, the State asserts the general claim that "sex offenders are far more likely to be recidivists." (Appellee Br. 13.) The State also asserts that Blackford County High School students would be vulnerable to recidivist sex offenders outside of the school because voting occurs when they are

[4] The Court in *Packingham* applied intermediate scrutiny in reviewing a restriction on internet speech under the First Amendment, 137 S. Ct. at 1736 (requiring that the statute be "narrowly tailored to serve a significant governmental interest"), which, of course, is different than the *Burdick* balancing test at issue here. But the government's rationale for the law—preventing illicit contact between convicted sex offenders and children—is the same, and therefore the Court's critique of that reasoning is relevant.

"coming and going" from school, and even within the school because sex offenders "would necessarily have access to [the school property at large] if permitted to enter the area surrounding the high school gymnasium." (*Id.* at 13-14.) This is despite the fact that the State has not cited a single instance where a voter has ever used his presence at the polls as subterfuge for engaging in predatory behavior. The reality is that the risk is minimal at best, and is far outweighed by the significant burden the law places on Mr. Valenti's right to vote.

First, Mr. Valenti was convicted of a sex offense 25 years ago and has not been convicted of any sex offenses either before or after that time, putting him at a particularly low risk for recidivism. (Dkt. 66-1 at 1 ¶¶ 6-7.) Mr. Valenti is on the sex offender registry solely because of his California conviction, the State makes no assessment of any on-going threat that Mr. Valenti, in particular, poses to children, and the record in this case indicates that if such an assessment were made, it would be exceedingly low.[5] *See State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009) (holding Indiana's residency restriction on sex offenders violated Indiana Constitution's *ex post facto* clause where it failed to consider whether a particular offender is a danger

[5] In fact, had Mr. Valenti been convicted of a sex offense in Indiana, he would not be required to register at all, and therefore, would not be subject to the unlawful entry statute, due to the Indiana Supreme Court's decision in *Wallace v. State*, which held that the 1994 registry law violated the Indiana Constitution's *ex post facto clause*, and did not apply to individuals convicted prior to that date. *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009). However, because Mr. Valenti's conviction flows from the fact that he was required to register in California at the time he moved to Indiana, as opposed to the fact of his conviction alone, he does not get the benefit of the *Wallace* decision. *See Tyson v. State*, 51 N.E.3d 88 (Ind. 2016); *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016). Using Mr. Valenti's registry status as a proxy for his risk of reoffending is flawed for this reason as well.

to the public and therefore exceeded its non-punitive purpose in public safety); *see also Doe v. Prosecutor, Marion Cty., Ind.*, 705 F.3d 694, 702 (7th Cir. 2013) (striking down internet restrictions on sex offenders, stating "the Indiana legislature imprecisely used the sex offender registry as a universal proxy for those likely to solicit minors. There may well be an appropriate proxy, but the state has to prove some evidence beyond conclusory assertions, to justify the regulation."); *cf. Doe v. City of Lafayette*, 377 F.3d 757, 759-60 (7th Cir. 2004) (en banc) (upholding law under rational basis review that excluded a sex offender from city parks where the individual had an extensive history of sex offenses against children and admitted he was going to the city parks "cruising" and "looking for children").[6]

Second, courts, reviewing recent literature on the issue, have cast serious doubt on the State's blanket claim that sex offenders pose a greater risk of recidivism than other offenders. *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir.

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[6] The State argues that the cases Mr. Valenti cites for the proposition that sex offender registration requirements are not reliable proxies for the offender's risk to children "mostly involve individuals who may have been placed on registries for crimes not related to sexual activity with children." (Appellee Br. 14.) While it is true that in three of the five cases cited the plaintiffs were required to register, but not specifically for sex crimes against children. (*See* Appellant Br. 30-32 [citing *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (two of the four plaintiffs were convicted of sex crimes against children); *Does 1-4 v. Snyder*, 932 F. Supp. 2d 803, 807-08 (E.D. Mich. 2013) (three of the four plaintiffs had been convicted of sex crimes against children); *McGuire v. Strange*, 83 F. Supp. 3d 1231 (M.D. Ala. 2015) (plaintiff convicted of rape); *State v. Small*, 833 N.E.2d 774, 782 (Oh. Ct. App. 2005), *dismissed*, 832 N.E.2d 731, 782-83 (Ohio 2005) (plaintiff convicted of kidnapping a child); *Raines v. State*, 805 So.2d 999, 1003 (Fla. Ct. App. 2001) (plaintiff convicted of false imprisonment of a child). But all five cases struck down blanket restrictions based on registration requirements where the state had failed to make an individualized assessment of the risk the offender posed, or that the restriction was not rationally-related to any public safety concern. Here, where the franchise is at stake, both the risk and the effectiveness of the restriction must be carefully scrutinized under *Burdick*.

2016), *cert. denied* (2017) (finding evidence before the 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" (and studies cited therein)); Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495 (2015).

Finally, the specific risks the State claims sex offenders pose to children either are not addressed by this statute or are de minimis at best. The State claims that because vote centers "are open and extend before and after the typical school day," namely from 6 a.m. to 6 p.m. on election day, there is a "window where a sex offender could be present at the time that the children were coming and going," presumably because voters would be in areas around the school. (Appellee Br. 13 (citing Ind. Code § 3-11-8-8).) But the unlawful entry statute only prohibits sex offenders from entering school property, and therefore does not address the state's dubious claim that Mr. Valenti could use voting as a subterfuge for soliciting children as they are "coming and going" from school.[7] The idea that sex offenders would use their presence in the school's auxiliary gym as an opportunity to wander onto other parts of school property to solicit children is even more unlikely. A polling place is a highly regulated

[7] The State's concern about the "coming and goings" of high school students, coupled with the fact that the statute does not address other polling places, such as libraries and community centers where children are likely to be present and far less supervised than they are at school, is evidence of the under-inclusiveness of the unlawful entry statute. (*See* Appellant Br. 35.) The statute is poorly tailored in addressing the State's concerns and cannot be justified under *Burdick* in light of the constitutional right at stake.

environment where unaccompanied minors are prohibited and police officers may be present. *See* Ind. Code §§ 3-6-4.1-23, 3-6-5-33, 3-6-6-36, 3-11-8-15(a). And undoubtedly, schools have restrictions of their own that limit access.[8]

In any event, even if the State could identify some de minimis risk to child safety posed by having Mr. Valenti voting on school grounds, the State's complete ban of Mr. Valenti from his community polling place is "excessively burdensome" in light of any potential risk, *Crawford*, 553 U.S. at 202 (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)). In addition to the highly regulated environments of both the polling place and the High School, criminal laws already on the books, including laws on child solicitation (Indiana Code § 35-42-4-6) and communication with minors concerning sexual activity (Indiana Code § 35-42-4-13) already address any concern about illicit communications with minors. As the Supreme Court stated in *Packingham*, such laws "must be the State's first resort to ward off the serious harm that sexual crimes inflict." *Packingham*, 137 S. Ct. at 1737; *see also Doe v. Prosecutor, Marion County, Indiana*, 705 F.3d at 695, 699 (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

[8] For example, Blackford County High School has "building security on duty," and specifically requires all visitors to check in at the front desk and to have a visitor pass. Blackford High School Student Handbook at 10 (available at: http://bhs.bcs.k12.in.us/ by clicking on "Students" and then on "Student Handbook") (last visited Feb. 25, 2018). Therefore, an unauthorized adult would be easily identified if roaming the grounds of the school. Students are also not permitted in the halls during class periods unless they are accompanied by a teacher or have a hall pass, minimizing the likelihood that they could come into contact with such an intruder. *Id.* at 5.

unwanted and inappropriate communication between minors and sex offenders," including laws prohibiting communication with children concerning sexual activity).[9] The State has not shown that the laws currently in place are insufficient to address what is at best an extremely low risk of harm to children, and because of the significant burden the unlawful entry statute imposes on Mr. Valenti's fundamental right to vote, it fails the balancing test under *Burdick*.[10]

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[9] Although the terminology used is different, whether the law is "excessively burdensome," as it cannot be under *Burdick*, or "overly broad" as it cannot be under the intermediate scrutiny applied in *Doe v. Prosecutor*, the relevant question in both tests is how necessary the law is to address the problem at hand. As applied to Mr. Valenti, existing regulations and restrictions are more than adequate to address the minimal risk imposed by his voting in a school on election day.

[10] The State claims that "restricting sex offenders from school property is the type of restriction that has been repeatedly upheld as a proper exercise of state police power." (Appellee Br. 14 (citing *Smith v. Doe*, 538 U.S. 84, 93 (2003); *Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1 4 (2003); *Doe v. City of Lafayette*, 377 F.3d at 766 n.8; *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004); *McVey v. State*, 56 N.E.3d 674 (Ind. Ct. App. 2016)).) None of the cited cases implicate the right to vote, and therefore the constitutionality of the restriction at issue here must be considered anew in light of Mr. Valenti's minimal public safety risk and the significant burden the unlawful entry statute poses on his right to vote. Regardless, *Smith*, *Conn. Dept. of Public Safety*, and *Green* are all *ex post facto* cases that upheld sex offender reporting and registry requirements, but did not address a sex offender's movements or access to public buildings, and are therefore easily distinguishable. And *Doe v. Lafayette*, as addressed earlier, involved an individual ban on a sex offender's ability to enter public parks where the individual had an extensive record of recidivism, admitted to on-going sexual urges toward children, and went "cruising in parks in search of children." *Doe* 377 F.3d 758-59. Mr. Valenti poses no such risk. Only *McVey v. State*, 56 N.E.3d 674, 681 (Ind. Ct. App. 2016), concerning the very same provision at issue here, is remotely analogous, though voting rights were not at stake. *McVey* involved an as applied challenge to the serious sex offender statute under the Indiana Constitution's *ex post facto* clause by a sex offender who sought access to a school to attend a commercial driver's license class. *Id.* The court held that, as applied to the plaintiff, the law was non-punitive and was not an *ex post facto* law. *Id.*; *see also State v. Trisler*, 68 N.E.3d 622 (Ind. Ct. App. 2016), *trans. denied,* 80 N.E.3d 181 (Ind. 2017), *cert. denied*, 138 S. Ct. 500 (2017) (similarly rejecting sex offender's *ex post facto* challenge where he had not alleged an interest in being on school property, for example, "in order to vote," when he was arrested under the unlawful entry statute). The Indiana Supreme Court, however, has granted transfer in another *ex post facto* case challenging the statute where a father who wished to enter school property for purposes of attending his child's school-related activities, and therefore, the relevance of *McVey* to a case like this where

Conclusion

Any conceivable risk to child safety should give one pause. But the record in this case demonstrates that Mr. Valenti, with a quarter century having passed since his sole sex offense, is not a threat, and forcing him to forego the opportunity to cast his ballot effectively with his community on election day cannot be justified under *Burdick*'s balancing test. The district court should be reversed and the unlawful entry statute should be enjoined to allow Mr. Valenti to vote at the Blackford County High School.

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the plaintiff has a legitimate need to be at the school remains in doubt. *Kirby v. State*, 83 N.E.3d 1237, 1240 (Ind. Ct. App. 2017), *opinion vacated and transfer granted* (Ind. Feb. 8, 2018).

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s/ Jan P. Mensz
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s/ Jan P. Mensz
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