

Supreme Court of the United States

CRAWFORD

v.

MARION COUNTY ELECTION BOARD

April 28, 2008

Argued Jan. 9, 2008

Decided April 28, 2008

Justice STEVENS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and Justice KENNEDY join.

At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

Referred to as either the “Voter ID Law” or “SEA 483,” the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility such as a nursing home. A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk's office within 10 days. No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and identity.

* * *

The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification.

After discovery, District Judge Barker prepared a comprehensive 70-page opinion explaining her decision to grant defendants' motion for summary judgment. She found that petitioners had “not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements.” . . .

A divided panel of the Court of Appeals affirmed. . . . Next, noting the absence of any plaintiffs who claimed that the law would deter them from voting, the Court of Appeals inferred that “the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the

polls.” It rejected the argument that the law should be judged by the same strict standard applicable to a poll tax because the burden on voters was offset by the benefit of reducing the risk of fraud. . . .

. . . We are, however, persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute, and thus affirm.

I

In *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of \$1.50. We rejected the dissenters' argument that the interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting provided a rational basis for the tax. Applying a stricter standard, we concluded that a State “violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” We used the term “invidiously discriminate” to describe conduct prohibited under that standard, noting that we had previously held that while a State may obviously impose “reasonable residence restrictions on the availability of the ballot,” it “may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services.” Although the State's justification for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications.

Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), however, we confirmed the general rule that “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are not invidious and satisfy the standard set forth in *Harper*. Rather than applying any “litmus test” that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the “hard judgment” that our adversary system demands.

In later election cases we have followed *Anderson*'s balancing approach. . . . We reaffirmed *Anderson*'s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the “precise interests put forward by the State as justifications for the burden imposed by its rule.”

. . . However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests “sufficiently weighty to justify the limitation.” We therefore begin our analysis of the constitutionality of Indiana's statute by focusing on those interests.

II

The State has identified several state interests that arguably justify the burdens that SEA 483 imposes on voters and potential voters. While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State's interests and the magnitude of any real threat to those interests, they do not question the legitimacy of the interests the State has identified. . . .

The first is the interest in deterring and detecting voter fraud. . . .

Election Modernization

* * *

Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology. That conclusion is also supported by a report issued shortly after the enactment of SEA 483 by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases. . . .

Voter Fraud

The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor--though perpetrated using absentee ballots and not in-person fraud--demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

* * *

In its brief, the State argues that the inflation of its voter rolls provides further support for its enactment of SEA 483. The record contains a November 5, 2000, newspaper article asserting that as a result of NVRA and "sloppy record keeping," Indiana's lists of registered voters included the names of thousands of persons who had either moved, died, or were not eligible to vote because they had been convicted of felonies. . . .

Safeguarding Voter Confidence

. . . While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. . . .

III

* * *

The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483. The fact that most voters already possess a valid driver's license, or

some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, 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.

Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out-of-state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

IV

Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion. . . .

. . . But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

First, the evidence in the record does not provide us with the number of registered voters without photo identification

Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification. . . .

* * *

The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed. . . .

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. . . .

Finally we note that petitioners have not demonstrated that the proper remedy-even assuming an unjustified burden on some voters-would be to invalidate the entire statute. . . .

In their briefs, petitioners stress the fact that all of the Republicans in the General Assembly voted in favor of SEA 483 and the Democrats were unanimous in opposing it. . . .

But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. . . .

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

. . . I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.

To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi*, 504 U.S. 428 (1992). This calls for application of a deferential “important regulatory interests” standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. . . .

Of course, we have to identify a burden before we can weigh it. The Indiana law affects different voters differently, but what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. . . .

. . . In the course of concluding that the Hawaii laws at issue in *Burdick* “impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote,” we considered the laws and their reasonably foreseeable effect on *voters generally*. . . .

Not all of our decisions predating *Burdick* addressed whether a challenged voting regulation severely burdened the right to vote, but when we began to grapple with the magnitude of burdens, we did so categorically and did not consider the peculiar circumstances of individual voters or candidates. . . .

. . . The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.

* * *

. . . It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. . . .

* * *

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

. . . The statute is unconstitutional under the balancing standard of *Burdick v. Takushi*, 504 U.S. 428 (1992): a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried. . . .

I

Voting-rights cases raise two competing interests, the one side being the fundamental right to vote. . . .

As against the unfettered right, however, lies the “[c]ommon sense, as well as constitutional law . . . that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’”

Given the legitimacy of interests on both sides, we have avoided pre-set 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 of the State's reasons for imposing those precise burdens. . . .

The lead opinion does not disavow these basic principles. But I think it does not insist enough on the hard facts that our standard of review demands.

II

Under *Burdick*, “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights,” and an estimate of the number of voters likely to be affected.

A

The first set of burdens shown in these cases is the travel costs and fees necessary to get one of the limited variety of federal or state photo identifications needed to cast a regular ballot under the Voter ID Law. . . .

The burden of traveling to a more distant BMV office rather than a conveniently located polling place is probably serious for many of the individuals who lack photo identification. . . .

Although making voters travel farther than what is convenient for most and possible for some does not amount to a “severe” burden under *Burdick*, that is no reason to ignore the burden altogether. It translates into an obvious economic cost (whether in work time lost, or getting and paying for transportation) that an Indiana voter must bear to obtain an ID.

For those voters who can afford the roundtrip, a second financial hurdle appears: in order to get photo identification for the first time, they need to present “‘a birth certificate, a certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.’” As the lead opinion says, the two most common of these documents come at a price .

. . .

B

To be sure, Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers “indigent” as well as those with religious objections to being photographed, and this sort of exception could in theory provide a way around the costs of procuring an ID. But Indiana's chosen exception does not amount to much relief.

The law allows these voters who lack the necessary ID to sign the poll book and cast a provisional ballot. As the lead opinion recognizes, though, that is only the first step; to have the provisional ballot counted, a voter must then appear in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed (or to present an ID at that point). . . .

That the need to travel to the county seat each election amounts to a high hurdle is shown in the results of the 2007 municipal elections in Marion County, to which Indiana's Voter ID Law applied. . . .

* * *

C

Indiana's Voter ID Law thus threatens to impose serious burdens on the voting right, even if not “severe” ones, and the next question under *Burdick* is whether the number of individuals likely to be affected is significant as well. Record evidence and facts open to judicial notice answer yes.

Although the District Court found that petitioners failed to offer any reliable empirical study of numbers of voters affected, we may accept that court's rough calculation that 43,000 voting-age residents lack the kind of identification card required by Indiana's law. . . .

* * *

The upshot is this. Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically. The Voter ID Law places hurdles in the way of either getting an ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting.

. . . While of course it would greatly aid a plaintiff to establish his claims beyond mathematical doubt, he does enough to show that serious burdens are likely.

Thus, petitioners' case is clearly strong enough to prompt more than a cursory examination of the State's asserted interests.

III

Because the lead opinion finds only “limited” burdens on the right to vote, it avoids a hard look at the State's claimed interests. But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of “‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ [and] ‘the extent to which those interests make it necessary to burden the plaintiff's rights.’”

* * *

As the lead opinion sees it, the State has offered four related concerns that suffice to justify the Voter ID Law: modernizing election procedures, combating voter fraud, addressing the consequences of the State's bloated voter rolls, and protecting public confidence in the integrity of the electoral process. On closer look, however, it appears that the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case.

A

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1

* * *

To begin with, requiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. . . .

And even the State's interest in deterring a voter from showing up at the polls and claiming to be someone he is not must, in turn, be discounted for the fact that the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history. . . .

* * *

. . . It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few who may commit it. If an imposter gets caught, he is subject to severe criminal penalties. And even if he succeeds, the imposter gains nothing more than one additional vote for his candidate. . . .

* * *

2

* * *

For that matter, the deterrence argument can do only so much work, since photo identification is itself hardly a failsafe against impersonation. Indiana knows this

. . . Weight is owed to the legislative judgment as such. But the ultimate valuation of the particular interest a State asserts has to take account of evidence against it as well as legislative judgments for it (certainly when the law is one of the most restrictive of its kind, and on this record it would be unreasonable to accord this assumed state interest more than very modest significance.

. . . Two points deserve attention, the first being that the State has not even tried to justify its decision to implement the photo identification requirement immediately on passage of the new law. A phase-in period would have given the State time to distribute its newly designed licenses, and to make a genuine effort to get them to individuals in need, and a period for transition is exactly what the Commission on Federal Election Reform, headed by former President Carter and former Secretary of State Baker, recommended in its report. . . .

* * *

. . . Nothing about the State's interest in fighting voter fraud justifies this requirement of a post-election trip to the county seat instead of some verification process at the polling places.

* * *

B

* * *

. . . The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating

The State's final justification, its interest in safeguarding voter confidence, similarly collapses. The problem with claiming this interest lies in its connection to the bloated voter rolls; the State has come up with nothing to suggest that its citizens doubt the integrity of the State's electoral process, except its own failure to maintain its rolls. The answer to this problem is not to burden the right to vote, but to end the official negligence.

* * *

Justice BREYER, dissenting.

. . . In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking “whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).” Applying this standard, I believe the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.

* * *

I cannot agree, however, with Justice STEVENS' or Justice SCALIA's assessment of the burdens imposed by the statute. The Carter-Baker Commission *conditioned* its recommendation upon the States' willingness to ensure that the requisite photo IDs “be easily available and issued free of charge” and that the requirement be “phased in” over two federal election cycles, to ease the transition. And as described in Part II of Justice SOUTER's dissenting opinion, see *ante*, at 1614 - 1621, Indiana's law fails to satisfy these aspects of the Commission's recommendation.

For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to \$12 for a copy of a birth certificate; up to \$100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of \$1.50 (less than \$10 today, inflation-adjusted). Further, Indiana's exception for voters who cannot afford this cost imposes its own burden: a postelection trip to the county clerk or county election board to sign an indigency affidavit *after each election*.

By way of contrast, two other States-Florida and Georgia-have put into practice photo ID requirements significantly less restrictive than Indiana's. . . .

* * *

The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter-Baker Commission recommended nationwide. . . .

* * *