IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
SITTING EN BANC
APPEAL NO. WS1-NY-4/3

EDWIN "Duke" SNIDER, in his official capacity as Governor of the State of Alston; and THOMAS LaSORDA, in his official capacity as the Chair of the Alston Election Commission **Defendants – Appellants,** **v.** **CLEMENT W. LABINE, DONALD W. ZIMMER, and ROGER L. CRAIG, et al.** **Plaintiffs – Appellees.**	**Appeal from the United States District Court, District of Alston, Sitting at Ebbetts, Flatbush Division** **Koufax, District Judge**

Opinion of the Court

Judge HODGES, with whom Judges CAMPANELLA, GILLIAM and ROBINSON joined, delivered the opinion of the Court:

Alston's Statehouse, located in downtown Ebbetts (the state capitol), is a fractious and contentious place. We may never see its like or kind again. This litigation is the result of a partisan legislative disagreement that has tumbled out of the legislative chambers and into the courts, much like a bench-clearing brawl from a brushback pitch that brings the bullpen pitchers on to the field. Plaintiffs became engaged in this dispute in mid-season, so to speak, while it was still being debated by the Alston House of Delegates.

I. INTRODUCTION

This case is an action to have the photo identification ("Photo ID") requirement set forth in Alston Senate Enrolled Act 1955 ("The 2006 Photo ID Act" or "ASEA 1955"), declared unconstitutional both on its face and as applied, and to enjoin its enforcement on the ground that it imposes an unauthorized, unnecessary, and undue burden on the fundamental right to vote of hundreds of thousands of registered Alston state voters.

Plaintiffs mounted a facial challenge to the validity of ASEA 1955, raising a variety of related issues about the Voter ID Law, including that it substantially burdens the fundamental right to vote, impermissibly discriminates between and among different classes of voters, disproportionately affects disadvantaged voters, is unconstitutionally vague, imposes a new and material requirement for voting, and was not justified by existing circumstances or evidence. Defendants deny all of these criticisms, defending the enactment of ASEA 1955 as being justified by legitimate legislative concern for in-person voting fraud and a reasonable exercise of the State's constitutional power to regulate the time, place, and manner of elections.

The District Court sided with the Plaintiffs and entered an injunction prohibiting enforcement of the law. We determined, pursuant to Circuit Court Rules, to hear the case *en banc* in the first instance. We reverse the District Court.

II. ALSTON'S VOTER IDENTIFICATION LAW

The Voter ID Law requires citizens voting in-person at precinct polling places on election day, or casting an absentee ballot in person at a county clerk's office prior to election day, to present election officials with some form of valid photo identification, issued by the United States or the State of Alston. Alston Code § 3-11-8-25.1. This photo identification card must contain the following information and meet the following conditions:

> (1) A photograph of the individual to whom the "proof of identification" was issued;
>
> (2) The name of the individual to whom the document was issued, which "conforms to the name in the individual's voter registration record";
>
> (3) An expiration date;

(4) The identification must be current or have expired after the date of the most recent general election; and

(5) The "proof of identification" must have been "issued by the United States or the state of Alston."

Alston Code § 3-5-2-40.5.

Pursuant to ASEA 1955, Alston voters are required to produce acceptable photo identification before signing the poll book. Alston Code § 3-11-8-25.1(c). ASEA 1955 applies to voting at both primary and general elections. Alston Code §§ 3-10-1-7.2; 3-11-8-25.1. ASEA 1955 does not apply, however, to receiving and to casting an absentee ballot sent by the county to the voter through the U.S. mail (hereinafter the "absentee ballot exception" or the "absentee exception"); or to "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides" (hereinafter the "nursing home exception"). Alston Code §§ 3-10-1-7.2(e), 3-11-8-25.1(f); 3-11-10-1.2. If a voter falls within either of these exceptions, the voter is not required to provide any proof of identification in order to vote in-person and to have his vote counted. If a voter does not produce acceptable photo identification at the polls, a member of the precinct election board "shall challenge the voter." Alston Code § 3-11-8-25.1(d) (2).

If so challenged, the voter may sign an affidavit attesting to the voter's right to vote in that precinct, whereupon the voter may then sign the poll book and cast a provisional ballot. Alston Code § 3-11-8-25.1(e). In order to have the provisional ballot counted, the voter who is challenged for failure to provide acceptable photo identification and casts a provisional ballot must appear before the circuit court clerk or the county election board by noon on the second Monday following the election to prove the voter's identity. Alston Code § 3-11-7.5-2.5(a). If at that point the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot on election day, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. Alston Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

The provisional ballot of a voter who is challenged for failing to show acceptable photo identification at the polls on election day may also be opened and processed if, by noon on the second Monday following election day, the voter appears before the county clerk of courts or the

county election board and executes an affidavit that the person is the same as the person who cast the provisional ballot and either (1) the person is indigent and is "unable to obtain proof of identification without payment of a fee" (hereinafter the "indigent exception" or the "indigency exception"); or (2) has a religious objection to being photographed. Alston Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c). The indigency and religious objection affidavits are not available for voters to sign at the polls; they are available only at election board offices after Election Day.

If, notwithstanding a voter's attempt to validate a provisional ballot using one of these methods, the election board determines that the voter's provisional ballot is not valid, the voter may file a petition for judicial review in the local Superior or Circuit court. Ultimately, therefore, the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Alston Supreme Court.

III. ANALYSIS OF THE VOTER ID LAW

We have two closely related issues before us. They might fairly be described as opposite sides of the same coin. One is the standard of review or inquiry that we are to apply; the other is the result of that standard of review, i.e., whether the law is constitutional. They are not, however, the same question. Rather, the first question is something akin to asking how big and how bright the spotlight is that we are to shine on this law and whether we are to examine every single nook and cranny unflinchingly and without deference to the Alston legislature's determinations. The second question is, no matter what spotlight we shine, whether the law passes constitutional muster.

A. Standard of Review or Inquiry

It is no surprise in the least that the Plaintiffs argue that this Court should apply a standard of review or inquiry at the highest, most searching and least deferential level – the "strict scrutiny" test. Their argument springs from the importance of voting rights in a democratic society; it's arguably the most important civic act in American life. The Defendants argue – also no surprise here – that we should apply a much more diffuse (and perhaps attractive)

under as intense a judicial microscope as strict scrutiny, say Defendants. Rather, they contend, we should accept Alston's proffered rationale of preventing voter fraud and call the law, in today's parlance, "good to go."

The Supreme Court has recently reiterated this basic democratic principle: "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takuski*, 504 U.S. 428, 433 (1992) (*quoting Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). That said, there is no absolute constitutional right to vote in any specific manner an individual may desire nor is there an absolute right to associate, without restriction, for political purposes through the ballot, *id.* (*citing Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)). The United States Constitution grants "to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). The Constitution itself plainly "compels the conclusion that government must play an active role in structuring elections;" since "'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.'" *Burdick v. Takuski*, 504 U.S. 428, 433 (1992) (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)); *Tashjian*, 479 U.S. at 217; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (holding "that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder."). Pursuant to Art. I, § 4, 7 cl. 1, "state legislatures may, without transgressing the Constitution, impose extensive restrictions on voting. *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). A state's broad authority to regulate elections, however, is tempered by the aforementioned provisions of the Constitution which protect individual citizens' rights; specifically, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . .or . . . the freedom of political association." *Tashjian*, 479 U.S. at 217 (internal citation omitted).

In balancing these potentially conflicting constitutional principles: 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." *Burdick*, 504 U.S. at 434 (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *citing Tashjian*, 479 U.S. at 213-14). "Regulations imposing severe burdens on plaintiffs rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' " *Timmons*, 520 U.S. at 358-59, *quoting Burdick*, 504 U.S. at 434; Anderson, 460 U.S. at 788; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Unfortunately, "no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 520 U.S. at 359 (internal citation omitted).

We begin by noting that Plaintiffs' arguments proceed from the oft-criticized, but nonetheless frequently invoked, "erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick*, 504 U.S. 428, 432 (1992). As the Supreme Court explained in *Burdick*:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "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." Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.
> Id. at 433.

Similarly, strict scrutiny of an election law is not warranted merely because it may prevent some otherwise eligible voters from exercising that right. As the Seventh Circuit observed: "Any [election] restriction is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (*citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997); *Burdick*, 504 U.S. 428, 438-42; *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004); *Libertarian Party v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997); *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir. 1996)).

Strict scrutiny means "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman,* 504 U.S. 191, 198 (1992) (*quoting Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983); *citing Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S. 171, 177 (1983)).

In arguing that ASEA 1955 should be subject to strict scrutiny, Plaintiffs face enormous hurdles based on the evidence we have...or, more accurately, do not have. The Plaintiffs in this case have not submitted: (1) evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote. Instead, they have concentrated their evidence and arguments on the burdens of obtaining a driver's license or identification card from the BMV, which matter is ultimately irrelevant in this case because of (1) and (2) above. Accordingly, Plaintiffs have not demonstrated that ASEA 1955 will impose severe burdens on the rights of voters, thereby rendering strict scrutiny unwarranted. We now address each of these points:

Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have no hard evidence of any identifiable registered voter who would be prevented from voting pursuant to ASEA 1955 because of his or her inability to obtain the necessary photo identification. Similarly, Plaintiffs have failed to produce any evidence of any individual, registered or unregistered, who would have to obtain photo identification in order to vote, let alone anyone who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote. In contrast to any reliable, specific evidence, nearly all of the Plaintiffs asserted that they know of people (or know of people who know of people) who claim they will not be able to vote as a result of ASEA 1955. But, none of these allegedly affected individuals has been identified by name, let alone submitted an affidavit. One Plaintiff did put forth the names of several individuals who they claim would be unable to vote as a result of ASEA 1955; however, each and every one of the individuals identified is either eligible to vote absentee, already had acceptable photo identification or could obtain acceptable photo identification if needed.

Plaintiffs' inability to provide the names or otherwise identify any particular affected individuals persists despite various polls and surveys that were conducted for the specific purpose of discovering such individuals. Their failure in this regard is particularly acute in light of their assertion that nearly one million of Alston's registered voters do not posses an Alston driver's license or photo identification.

We do not doubt that such individuals exist somewhere, even though Plaintiffs were unable to locate them.[1] However, it is a testament to the law's minimal burden and narrow crafting that Plaintiffs have been unable to uncover anyone who can attest to the fact that he/she will be prevented from voting despite the concerted efforts of the political party and numerous interested groups who arguably represent the most severely affected candidates and communities. Lacking any such individuals who claim they will be prevented from voting, we are hard pressed to rule that ASEA 1955 imposes a severe burden. There is no evidence that voting absentee would be a burden or hardship for any of these individuals; indeed, several Plaintiffs disclosed they had voted absentee in past elections. Several of the Plaintiffs apparently do not wish to vote absentee; however, this abrogation of their personal preferences is not a cognizable injury or hardship on the right to vote. To the contrary, we conclude that Plaintiffs' lack of evidence confirms that ASEA 1955 is narrowly tailored because every hypothetical individual who Plaintiffs assert would be adversely affected by the law actually benefits from one of its exceptions.

Plaintiffs have not presented statistical evidence of any groups who will be severely or disproportionately burdened. Plaintiffs' efforts to introduce statistical data about the number of affected individuals is similarly unavailing. Even the Plaintiffs' own evidence on this point is that the vast majority, which is to say up to 99%, of Alston's registered voters already possess an Alston driver's license or an identification card. Plaintiffs have submitted the results of polls and

[1] No doubt there are at least a few such people in Alston, but the inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests 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. In any event, the fewer the people who will actually disfranchise themselves rather than go to the bother and, if they are not

surveys, some of them admittedly very informal and unscientific, which purport to establish the impact of ASEA 1955 on various groups, such as the homeless, low-income, elderly and disabled. However, none of these polls or surveys actually indicates that ASEA 1955 imposes a severe burden on the rights of the voters in these groups. At best, the Plaintiffs' information reveals that several groups which are not required under ASEA 1955 to obtain photo identification in order to vote would be burdened to some extent if they were required to do so. Plaintiffs, therefore, have not provided the Court with any evidentiary basis on which to conclude that the rights of Alston voters, let alone any particular disadvantaged segment of the population, will be severely burdened by the requirements.

Because the burden imposed by the Voter ID law is not severe, we therefore conclude that strict scrutiny is not appropriate. Rather, consistent with *Burdick* and *Timmons*, we review Alston's lesser burden on the exercise of the right to vote to determine if it contains reasonable and non-discriminatory restrictions.

B. Alston's Law Passes Constitutional Muster

In this case, the right to vote is on both sides of the ledger. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam); *cf. Burson v. Freeman*, 504 U.S. 191, 198, 206, 211 (1992). The Alston law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest in defraying the cost of elections or in limiting the franchise to people who really care about voting or in excluding poor people or in discouraging people who are black. The purpose of the Alston law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes— dilution being recognized to be an impairment of the right to vote. *Purcell v. Gonzalez, supra*, 127 S. Ct. at 7; *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Siegel v. LePore*, 234 F.3d 1163, 1199 (11th Cir. 2000). On one side of the balance in this case is the effect of requiring a photo ID in inducing eligible voters to disfranchise themselves. That effect, so far as the record reveals, is slight.

On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at the polls claiming to be someone else—someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little if any chance

of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature. The plaintiffs point out that voting fraud is a crime, see, e.g., Alston Code 3-14-2-12, and they argue that the penalty (six months to three years in prison plus a fine of up to $10,000, Alston Code § 35-50-2-7) should suffice to deter the crime.

They further note that as far as anyone knows, no one in Alston, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter.

But the absence of prosecutions is explained by the endemic under-enforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator. He enters the polling place, gives a name that is not his own, votes, and leaves. If later it is discovered that the name he gave is that of a dead person, no one at the polling place will remember the face of the person who gave that name, and if someone did remember it, what would he do with the information? The impersonator and the person impersonated (if living) might show up at the polls at the same time and a confrontation might ensue that might lead to a citizen arrest or a call to the police who would arrive before the impersonator had fled, and arrest him. A more likely sequence would be for the impersonated person to have voted already when the impersonator arrived and tried to vote in his name. But in either case an arrest would be most unlikely (and likewise if the impersonation were discovered or suspected by comparing signatures, when that is done), as the resulting commotion would disrupt the voting. And anyway the impersonated voter is likely to be dead or in another district or precinct or to be acting in cahoots with the impersonator, rather than to be a neighbor (precincts are small, sometimes a single apartment house).

One response, which has a parallel to littering, another crime the perpetrators of which are almost impossible to catch, would be to impose a very severe criminal penalty for voting fraud. Another, however, is to take preventive action, as Alston has done by requiring a photo ID.

The plaintiffs argue that while vote fraud by impersonation may be a problem in other states, it is not in Alston, because there are no reports of such fraud in that state. But that lacuna may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate. Some voter impersonation has been found (though not much, for remember that it is difficult to detect) in the states that have been studied, and those states do not

appear to be on average more "dishonest" than Alston; for besides the notorious examples of Florida and Illinois, they include Michigan, Missouri, and Washington (state). Indirect evidence of such fraud, or at least of an acute danger of such fraud, in Alston is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote. The defendants' expert estimated that the registration rolls contained 1.3 million more names than the eligible voters in Alston. This seems too high, but the plaintiffs' expert acknowledged that the rolls are inflated. How many impersonations there are we do not know, but the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting.

The plaintiffs point out that the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a) (4), requires all states to purge their registration rolls of ineligible voters. See also the Help American Vote Act, 42 U.S.C. § 15301, particularly § 15483(a) (4) (B). The purge has not yet been completed in Alston. One thing that is slowing it down is that removing a name from the voter registration roll requires notice to a registered voter whose address appears from postal records to have changed, and only if a voter fails to respond to the notice and fails to vote in two successive federal elections can the state remove him from the rolls. 42 U.S.C. §§ U.S.C. §1973gg-6(c), (d). And when the purge is completed, it is likely to eliminate many more eligible voters than the new Alston law will do, cf. Jeffrey A. Blomberg, "Note: Protecting the Right Not to Vote From Voter Purge Statutes," 64 Fordham L. Rev. 1015, 1016-17 (1995), yet provide only a short-term solution, since as soon as the purge is complete the inflation of the registration rolls will recommence.

The plaintiffs complain that the new Alston law is under inclusive because it fails to require absentee voters to present photo IDs. But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo. *Cf. Griffin v. Roupas, supra*, 385 F.3d at 1130-31. Perhaps the Alston law can be improved—what can't be?—but the details for regulating elections must be left to the states, pursuant to Article I, section 4, of the Constitution, which provides that "the times, places and manner of holding elections for Senators

and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." "To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.' " *Clingman v. Beaver*, 544 U.S. 581, 593 (2005), quoting the *Timmons* case cited earlier; *see also Anderson v. Celebrezze*, *supra,* 460 U.S. at 788; *Griffin v. Roupas, supra*, 385 F.3d at 1130-31.

IV. CONCLUSION

Having determined that a lower standard of review applies, we hold the Alston Voter ID law has a rational basis and therefore passes constitutional challenge. Consequently, we REVERSE the District Court and remand the case for entry of judgment in favor of Defendants.

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Dissenting Opinion

PODRES, with whom Judges ERSKINE and NEWCOMBE join, dissenting:

I dissent from the majority's opinion on both issues and vote to affirm the District Court.

ISSUE 1

WHAT IS THE STANDARD OF INQUIRY FOR THIS CASE?

The majority opinion correctly notes that the Supreme Court's decision in *Burdick v. Takuski*, 504 U.S. 428 (1992), recognizes that strict scrutiny is not required for the assessment of every last election regulation, no matter how trivial the rule or how light the burden on voting, but the panel assumes that *Burdick* also means that strict scrutiny is no longer appropriate in any election case. *Burdick* holds no such thing. To the contrary, *Burdick* simply established a

threshold inquiry that a court must perform before it decides what level of scrutiny is required for the particular case before it. As I explain briefly below, when there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny. Only this exacting approach will suffice to ensure that state law is not being used to deny these citizens their fundamental right to vote.

The *Burdick* Court held that "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." 504 U.S. at 434. If those rights are subjected to "severe" restrictions, the Court reaffirmed that "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id., quoting Norman v. Reed*, 502 U.S. 279, 289 (1992). If, on the other hand, the state law provision "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." 504 U.S. at 434, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). To sort election laws into one category or the other, *Burdick* calls for the court to "weigh the character and magnitude of the asserted injury" that the plaintiff is asserting "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." 504 U.S. at 434 (internal quotation marks and citations omitted).

In this case, the Plaintiffs assert that the state voter identification law is causing the wholesale disenfranchisement of some eligible voters. To the extent that it operates to turn them away from the polls, it is just as insidious as the poll taxes and literacy tests that were repudiated long ago. Anecdotal evidence suggests that the kind of close look that would take place if we

dismisses these facts by concluding that "[t]he fewer people harmed by a law, the less total harm there is to balance against [state interests]." (See ante, footnote 1). Recent national election history tells us, to the contrary, that disenfranchising even a tiny percentage of voters can be enough to swing election outcomes. Christine Gregoire captured the gubernatorial race in Washington State in 2004 with a margin of only 129 votes.[2] Representative Vern Buchanan of Florida's 13th Congressional District won by only 329 votes.[3] Senator Jon Tester of Montana won his seat by a slightly larger margin—2,847 votes—but hardly a gap that implies that small numbers do not matter.[4] And surely no adult now living in the United States needs to be reminded of how close the 2000 Presidential race was.

Putting aside these examples, as a matter of law the Supreme Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters. Voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. Even if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a "severe" injury for that particular individual. On the other hand, some laws that place a minor obstacle to voting in the way of many citizens—perhaps one that prevents any person from voting who is not registered to vote 28 days in advance of the election—are rightly seen as "reasonable [and] nondiscriminatory."

The state's justification for the new voting requirement is voter fraud—specifically, the problem of fraud on the part of people who show up in person at the polling place. Yet the record shows that the existence of this problem is disputed, and, as I discuss below, actually favors the Plaintiffs. This is also a crucial question for the inquiry that *Burdick* demands, because if the burden on voting is great and the benefit for the asserted state interest is small as an empirical matter, the law cannot stand. In fact, it appears that no one has ever, in Alston's history, been charged with voter fraud. *Burdick* requires an inquiry into the "precise interests put forward by the State as justifications for the burden imposed," but in this case, the "facts" asserted by the

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[2] See http://en.wikipedia.org/wiki/Washington_gubernatorial_election,_2004 (visited March 22, 2007).

[3] See http://en.wikipedia.org/wiki/Florida%27s_13th_congressional_district (visited March 22, 2007).

[4] See http://en.wikipedia.org/wiki/Jon_Tester (visited March 22, 2007).

state in support of its voter fraud justification were taken as true without any examination to see if they reflected reality.

Finally, this court should not ignore this country's history. Unfortunately, voting regulations have been used in the not-so-distant past for discriminatory reasons. The law challenged in this case will harm an identifiable and often-marginalized group of voters to some undetermined degree. This court should take significant care, including satisfactorily considering the motives behind such a law, before discounting such an injury.

Let's not beat around the bush: The Alston voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny. Strict scrutiny is still appropriate in cases where the burden, as it is here, is great and the state's justification for it, again as it is here, is hollow. Applying that standard as I do below, I would conclude that Alston's law imposes an undue burden on a recognizable segment of potential eligible voters and that it therefore violates those voters' rights under the First and Fourteenth Amendments to the Constitution.

ISSUE 2

DOES THE ALSTON STATUTE PASS STRICT SCRUTINY?

A. Introduction

So, in my view, we must place the Alston statute under the brightest, and, frankly, harshest light. In so doing, let's look at the reality of voting in this country.

The percentage of eligible voters participating in elections has, for many years, been on a downward trajectory. With that being the case, one would think states should be looking for creative ways (like allowing people to vote at places they frequent and are familiar with, like shopping malls rather than basements of fire stations) to increase voter participation. Yet, the Alston law we sanction today does just the opposite. Constricting the franchise in a democratic society, when efforts should be instead undertaken to expand it, is not the way to go.

B. More on the Burden

Alston law provides that a voter shall be challenged at the poll and required to vote only by provisional ballot if: (1) "the voter is unable or declines to present the Proof of Identification

or (2) a member of the precinct election board determines that the Proof of Identification provided by the voter does not qualify as Proof of Identification under the law. "Proof of Identification" is defined as a document that satisfies all the following:

> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
> (2) The document shows a photograph of the individual to whom the document was issued.
> (3) The document includes an expiration date, and the document:
> (A) is not expired; or
> (B) expired after the date of the most recent general election.
> (4) The document was issued by the United States or the State of Alston.

The potential for mischief with this law is obvious. Does the name on the ID "conform" to the name on the voter registration list? If the last name of a newly married woman is on the ID but her maiden name is on the registration list, does it conform? If a name is misspelled on one—Schmit versus Schmitt—does it conform? If a "Terence" appears on one and a shortened "Terry" on the other, does it conform?

But these are perhaps minor concerns. The real problem is that this law will make it significantly more difficult for some eligible voters—I have no idea how many, but 4 percent is a number that has been bandied about—to vote. And this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof. I would suspect that few, if any, in this class have passports (which cost in the neighborhood of $100), and most don't have drivers licenses (who needs a drivers license if you don't drive a car?) or state-issued ID cards which require valid (certified) birth certificates. And it's not particularly easy for a poor, elderly person who lives in rural Alston, but was born in Arkansas, to get a certified copy of his birth certificate.

Now I certainly agree that it is exceedingly difficult to maneuver in today's America without a photo ID. But Alston's law mostly affects those who, for various reasons, lack any real maneuverability at all. And lest one thinks that those who have maneuverability are immune from running into trouble with this law, consider this anecdotal tidbit.

The Washington Post (Nov. 3, 2006) reported that on Indiana's primary election day, Rep. Julia Carson showed her congressional identification card in a pocket, ran out of her house

was unacceptable under a new state law that requires every voter to show proof of identity with a certain type of photo ID. But Carson, after being turned away, went home and later returned to their polling places to cast her vote. Would most people, especially those without a vested interest in the system, do the same thing? I doubt it. (Ultimately, Carson, a Democrat, won her seat with a 54-46 advantage over her Republican opponent. Mark Sanford, the Republican governor of South Carolina, was prevented from voting last month when he showed up at his polling station without the correct ID to vote.)

I believe that most of the problems with our voting system—like deceased persons or felons on registration rolls, machines that malfunction, and confusing ballots (think butterfly)—are suggestive of mismanagement, not electoral wrongdoing. And I recognize that there is, and perhaps there may always be, a fundamental tension between claims of voter fraud and fears of disenfranchisement. But Alston's law, because it allows nothing except a passport or an Alston ID card to prove that a potential voter is who he says he is, tips far too far in the wrong direction.

C. The Offered Justification for the Burden

The fig leaf of respectability providing the motive behind this law is that it is necessary to prevent voter fraud—a person showing up at the polls pretending to be someone else. But where is the evidence of that kind of voter fraud in this record? Voting fraud is a crime (punishable by up to 3 years in prison and a fine of up to $10,000 in Alston) and, at oral argument, the defenders of this law candidly acknowledged that no one—in the history of Alston—had ever been charged with violating that law.

Nationwide, a preliminary report to the U.S. Election Assistance Commission has found little evidence of the type of polling-place fraud that photo ID laws seek to stop. If that's the case, where is the justification for this law? Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table? I think not.

Alston's stated interest is in preventing voter impersonation fraud among voters who vote in person at their polling place on election day. Alston's law only addresses the procedure for voting in person at a polling place on election day and says nothing about fraud or other irregularities in voter registration or absentee voting. Mr. LaSorda's Commission does not administer voter registration, as it relies on county officials in Alston for that function. As for those county officials? They are governed by HAVA and state law on how to register voters.

So, in my view, the Voter ID law has no discernible relationship to the goal of preventing fraud or other irregularities in voter registration or absentee voting. *See Billups*, 439 F. Supp. 2d at 1350.

With respect to the state's narrower interest in preventing people from impersonating another voter at the polls in order to steal their vote, there is no admissible evidence in the record that such voter impersonation fraud has occurred with any frequency in past elections. The state's justification also has a hollow ring to it in light of the fact that the Defendants in this case have made no showing that the State of Alston is behind in its compliance with HAVA, the State Election Code, or any other election law. Thus, in examining whether compliance with the new photo ID requirement is needed to combat the problem of deceased or non-existent voters appearing in voter-registration records, the Court cannot reasonably infer that the State of Alston and its county clerks will fail to comply with pre-existing provisions of state and federal election law that are aimed at correcting the same problem.

For these reasons, I conclude that Defendants have presented no admissible evidence that the Voter ID law actually serves to combat an existing problem with voter impersonation fraud in elections. I nevertheless examine the plausibility of the alternative argument that this amendment may have some potential effect in preventing future instances of voter impersonation fraud.

Plaintiffs argue that the Voter ID law can have no such prophylactic effect because its definition of what constitutes a current and valid photo ID is so vague, and because it contains a number of provisions or features through which persons seeking to cast a fraudulent ballot or steal another's vote may circumvent the photo ID requirement and escape detection. First and foremost among these features is the exception for absentee voting, which is still governed by the procedure contained in the state's Election Code. Under that procedure, it is still possible to steal another person's vote without the need to personally appear before election officials and present a photo ID.

As noted above, it is not necessary to show a photo ID at any time under the procedure for absentee voting. Indeed, it is not even necessary to appear in person before an election official at any time during the process of applying for, receiving, and casting an absentee ballot, as all the required documents can be mailed or delivered by a person claiming to be an immediate family member. Thus, for example, it is entirely possible for an immediate family

member to apply for, obtain, fill out, and cast an absentee ballot in the name of his or her spouse or parent. And when such a fraudulent application for an absentee ballot has been accepted by election officials, the voter listed on the application could be prevented from voting if he or she subsequently appeared at the polling place on election day, either because the voting rolls would show that his or her vote already was cast by an absentee ballot, or because the voting rolls would show that an absentee ballot had been mailed to the address listed on the fraudulent application. Under any of these scenarios, stealing or preventing someone else's vote by means of the absentee voting procedure appears much easier, and entails much less risk of getting caught, than attempting to impersonate another voter at the polls on election day.

To explain the exception for absentee voting, Defendants assert that in-person and absentee voters are not similarly situated. Thus, Defendants claim there is no basis for comparing the two groups under an equal-protection theory. However, the imposition of restrictions on absentee voting in Alston is minimal. Consequently, to me, there is no real difference between the class of people who are eligible for absentee voting from the class of people who are eligible to vote in person at a polling place on election day. The Defendants do not seriously contend that they actually enforce any of the modest requirements for absentee ballot qualification, other than taking the putative voters' word for it. So, the only real difference between these two classes is that the absentee voters have made the choice to apply for an absentee ballot and have met the applicable deadlines for doing so.

For the above reasons, the exception for absentee voting without presenting any identification documents or personally appearing before an election official presents a significant undermining of the fraud-prevention rationale.

My conclusion that the Voter ID law lacks a plausible, close-fitting relationship to the actual prevention of voter impersonation fraud does not imply that all laws which seek to prevent fraud in the conduct of elections suffer from the same defects. In this regard, Alston law provides an example of a law that provides less restrictive alternatives for identifying voters at the polls while at the same time leaving fewer loopholes available for stealing another person's vote. Those laws include allowing voters to identify themselves by means of unique identifiers such as a date of birth and the last four digits of a Social Security number. Interestingly enough, the requirements for such unique identifiers also apply to absentee voting in statewide elections, too.

The existence and availability of such less restrictive measures is a relevant consideration in applying the *Burdick* test. In *Buckley v. Am. Const. Law Found. Inc.*, 525 U.S. 182, 197-200 (1999), for example, the Supreme Court concluded that there were existing provisions of Colorado law that provided the State with less restrictive means of meeting its need for identifying petition circulators. *See Buckley*, 525 U.S. at 195-99. Similarly, both the *Billups* court and the *Weinschenk* court concluded that there were less restrictive measures available for preventing the type of voter fraud that the photo ID requirements imposed by Georgia and Missouri law were intended to curtail. *See Common Cause/Georgia v. Billups, 439 F.Supp.2d 1294, 1345-50 (N.D. Ga. 2006)*; *Weinschenk v. State*, 203 S.W.3d 201, 212-15 (Mo. 2006).

CONCLUSION

Accordingly, I conclude that the Voter ID law at issue in the case at bar violates the Equal Protection Clause because it imposes a significant burden on the fundamental right to vote, and because that burden is not adequately tailored to meet Alston's interest in preventing voter impersonation fraud at the polls. The law is not likely to have a prophylactic effect in future elections because it contains many loopholes through which a person seeking to steal another's vote could pass. Finally, the evidence of record contains conflicting interpretations of the new law by the City's own election officials. Plaintiffs have shown that this lack of clear guidance, and the unbridled discretion it leaves to election officials at each particular polling place, will likely result in arbitrary and inconsistent treatment of similarly situated voters. *See Bush v. Gore*, 531 U.S. 98, 105-7 (2000) *(per curiam)*.

I would affirm the District Court.

IN THE UNITED STATES SUPREME COURT

CLEMENT W. LABINE, DONALD W. ZIMMER, and ROGER L. CRAIG, et al. **Petitioners (Plaintiffs and Appellees below).** **v.** **EDWIN "Duke" SNIDER, in his official capacity as Governor of the State of Alston; and THOMAS LaSORDA, in his official capacity as the Chair of the Alston Election Commission** **Respondents (Defendants and Appellants below)**	APPEAL NO. NLC-98-55 Appeal from the United States Court of Appeals, Fourteenth Circuit

ORDER GRANTING CERTIORARI

The petition of Clement W. Labine, Donald W. Zimmer, and Roger L. Craig for an order of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED. Oral argument shall be conducted on October 20, 2007, in Crawfordsville, Indiana. The argument shall be confined to the following issues:

(A) Whether the Alston voter identification law shall be analyzed under a strict scrutiny or rational basis test? And

(B) Whether the Alston voter identification law violates the United States Constitution?

Petitioner shall be entitled to open and close the argument.

FOR THE COURT

/s/ Vincent Scully

Vincent Scully, Clerk, United States Supreme Court