

I. INTRODUCTION

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,

(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 §§ 2-10-1-70, 3-11-8-25.1. ASEA

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

under as intense a judicial microscope as strict scrutiny, say Defendants. Rather, they contend,

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

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

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

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 (1982); citing *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 492 U.S. 560

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

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

driver's license or photo identification.

We do not doubt that such individuals exist somewhere even though Plaintiffs were

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

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

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 8-35-50-2-

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.

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). 11

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 roll was inflated

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 the duty of the States to provide for the election of their Representatives and Senators.”

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

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

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 — 2,947 votes — but hardly a one that implies that small

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

undetermined degree. This court should take significant care, including satisfactorily considering the motives behind such a law before discounting such an injury.

or (2) a member of the precinct election board determines that the Proof of Identification

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

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

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

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

members to enable for obtain. CU and

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[REDACTED]

The existence and availability of such less restrictive measures is a critical factor in

in applying the *Burdick* test. In *Buckley v. Am. Const. Law Found. Inc.*, 525 U.S. 182, 197-200 (2000), for example, the Supreme Court concluded that the

