UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN VALENTI, on his own behalf and on behalf of a class of those similarly situated, Plaintiffs, v. INDIANA SECRETARY OF STATE, in her official capacity; THE INDIVIDUAL MEMBERS of the INDIANA ELECTION COMMISSION, in their official capacities; THE SUPERINTENDENT of the INDIANA STATE POLICE, in his official capacity; THE BLACKFORD COUNTY PROSECUTOR, in his official capacity, Defendants.	)	No. 1:15-cv-1304-WTL-TAB

Memorandum in Support of Motion for Preliminary Junction

Introduction

Indiana Code § 35-42-4-14 (effective July 1, 2015) provides that certain sex offenders, defined by the statute as "serious sex offenders," are prohibited from entering school property. One of the consequences of this is that these persons will be prohibited from voting at their designated precinct polling place if it is located on school property. Although Indiana Code § 3-11-10-24 allows such persons to vote absentee by mail, the procedure for voting absentee is complex, prone to error, and lacks many of the expressive and associational aspects that come with voting in person. Brian Valenti is a resident of Blackford County who committed a qualifying sex offense in California more than a quarter of a century ago. He is registered to vote and would like to vote in the November 3, 2015 election. The polling place in his precinct, however, is located on school property. Because Mr. Valenti is subject to Indiana Code § 35-42-

4-14, he is unable to vote in person at his precinct polling place. Indiana Code § 35-42-4-14 imposes a severe burden on Mr. Valenti's right to vote, and he seeks a preliminary and permanent injunction against the statute, on his own behalf, and on behalf of those similarly situated. All the requirements for the grant of a preliminary injunction are met in this case and one should issue to prevent the law from severely burdening fundamental voting rights at the general election in November 2015.

Facts

The following facts will be presented in support of the preliminary injunction request.[1]

The new "serious sex offender" statute

Effective July 1, 2015, a new section has been added to the Indiana Code as Indiana Code § 35-42-4-14 provides:

> (a) As used in this section, "serious sex offender" means a person required to register as a sex offender under IC 11-8-8 who is:
>
> (1) found to be a sexually violent predator under IC 35-38-1-7.5; or
>
> (2) convicted of one (1) or more of the following offenses:
>
> (A) Child molesting (IC 35-42-4-3).
>
> (B) Child exploitation (IC 35-42-4-4(b)).
>
> (C) Possession of child pornography (IC 35-42-4-4(c)).
>
> (D) Vicarious sexual gratification (IC 35-42-4-5(a) and IC 35-42-4-5(b)).
>
> (E) Performing sexual conduct in the presence of a minor (IC 35-42-4-5(c)).
>
> (F) Child solicitation (IC 35-42-4-6).

[1] Inasmuch as no discovery has yet been conducted in this case, the plaintiff reserves the right to supplement the following facts as additional information becomes known.

> (G) Child seduction (IC 35-42-4-7).
>
> (H) Sexual misconduct with a minor (IC 35-42-4-9).
>
> (I) A conspiracy or an attempt to commit an offense described in clauses (A) through (H).
>
> (J) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (I)."
>
> (b) A serious sex offender who knowingly or intentionally enters school property commits unlawful entry by a serious sex offender, a Level 6 felony.

A level six felony, as defined by Indiana Code § 35-50-2-7, carries with it a fixed term between six months and two and one half years in prison and a fine of up to $10,000. Effective July 1, 2015, those designated as "serious sex offenders" are also entitled to vote absentee by mail. Indiana Code § 3-11-10-24(a)(12) provides in part:

> (a) Except as provided in subsection (b), a voter who satisfies any of the following is entitled to vote by mail:
>
> * * * *
>
> (12) The voter is a serious sex offender (as defined in IC 35-42-4-14(a)).

The named plaintiff

Brian Valenti is an adult resident of Blackford County, Indiana. Affidavit of Brian Valenti ¶ 1, attached hereto as Exhibit 1. In 1988, Mr. Valenti, then living in California, committed, and in 1993 he was convicted of, the California offense of "Lewd or Lascivious Acts with Child Under 14 Years." *Id.* ¶ 2; *see* Cal. Penal Code § 288. He has not been convicted of any other sex offenses against children either before or after that time. *Id.* ¶ 3. He has served his sentence in full and is not on any kind of supervised release. *Id.* ¶ 4.

In 2014, Mr. Valenti moved to Blackford County to be closer to his family. *Id.* ¶ 5. Because he has been required to register as a sex offender in Indiana, he is subject to Indiana Code § 35-42-4-14's prohibition on entering school property. *Id.* ¶¶ 6, 9.

Mr. Valenti is registered to vote and intends to vote in future elections, including the upcoming municipal election on November 3, 2015. *Id.* ¶ 7. The polling place for Mr. Valenti's voting precinct, however, is located at the Blackford County High School Auxiliary Gym. *Id.* ¶ 8. Because he cannot enter school property without violating Indiana Code § 35-42-4-14, Mr. Valenti cannot vote with his community at the designated polling place for his precinct. *Id.* ¶¶ 9-10.

To Mr. Valenti, absentee voting by mail is an inadequate substitute to voting in person. *Id.* ¶ 11. First, in addition to registering to vote, Mr. Valenti will need to complete the application for an absentee ballot and ensure that the Blackford County Election Board receives his ballot application at least eight days prior to the election. *Id.* ¶ 12. Second, Mr. Valenti fears that even if he meets the requisite deadlines for submitting an application for an absentee ballot and submitting an absentee ballot, the ballot will be rejected if he makes a mistake on the ballot or affidavit envelope. *Id.* ¶ 15. If he were to vote in person, an election judge could assist him with any questions he might have and furnish him with a new ballot if he made a mistake. *Id.* ¶ 16. Third, Mr. Valenti believes that there is a greater risk that his absentee ballot will not be counted due to inadvertent error on the part of election workers. *Id.* ¶ 17. Fourth, Mr. Valenti would benefit from receiving information about the candidates and issues on the ballot up until he votes. *Id.* ¶ 13. For example, Mr. Valenti would like to talk to people, including electioneers and candidates, outside of polling places. *Id.* ¶ 20. He wants the right to change his mind at the "last minute" in this and all future elections. *Id.* ¶ 14.

Finally, the in-person act of voting is something that Mr. Valenti feels is valuable in and of itself. *Id.* ¶¶ 18-19, 22. He views voting in person on election day as a celebration of his right to vote and is something that should be shared publicly with his community. *Id.* ¶ 19. Although his vote may be counted if he votes absentee, Mr. Valenti feels that this early and private form of voting makes him less connected with the democratic process and less able to express his political voice. *Id.* ¶ 22.

Preliminary injunction standard

In order to obtain a preliminary injunction Mr. Valenti and the putative class must demonstrate that absent the injunction they will suffer irreparable harm for which there is no adequate remedy at law and that they have "some likelihood of succeeding on the merits." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). Once this is shown, the plaintiff must further demonstrate that the balance of harms favors the grant of a preliminary injunction. In assessing this showing, "the court employs a sliding scale approach: '[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.'" *Id.* (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). Finally, the court must consider the public interest. *Id.* A consideration of all these factors demonstrates that a preliminary injunction should be granted here.

Argument

I. Mr. Valenti will prevail on the merits of his claim that the challenged statute violates his right to vote under the First and Fourteenth Amendments

The U.S. Supreme Court has stated clearly that voting is a fundamental right that cannot be unduly burdened or abridged. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The

fundamental nature of that right is well established:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 562 (1964). *See also, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Wesberry v. Sanders*, 376 U.S. 1 (1964). This right is implicit in various constitutional provisions including the equal protection clause of the Fourteenth Amendment and the First Amendment. *Hall v. Simcox*, 766 F.2d 1171, 1173 (7th Cir. 1985); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (finding that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" are protected by the First Amendment); *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (holding that "because of the overriding importance of voting rights, classifications which might invade or restrain them must be closely scrutinized and carefully confined where those rights are asserted under the Equal Protection Clause") (internal quotations omitted).

Although the right to vote is fundamental, courts do not necessarily apply strict scrutiny when the right is impinged upon. Rather, the Supreme Court applies a "more flexible standard" when considering a challenge to state laws that burden the right to vote, weighing:

> "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 interest put forward by the State as justification 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, 789 (1983)). When the law "severely burdens the First and Fourteenth Amendment rights of voters, the regulation 'must

be narrowly drawn to advance a state interest of compelling importance.'" *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, No. 14-3300, -- F.3d --, 2015 WL 5234614, at *4 (7th Cir. Sep. 9, 2015) (quoting *Burdick*, 504 U.S. at 434). When the law "imposes only reasonable, nondiscriminatory restrictions upon the rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quoting *Burdick*, 504 U.S. at 434) (internal quotations omitted).

The statute here severely burdens Mr. Valenti's right to vote by prohibiting him from voting in person at his polling place and the Defendants ("State") cannot meet the heightened scrutiny demanded by *Burdick*. Even if a more deferential standard were applied, the statute is still unconstitutional as it lacks even a rational justification.

A. The statute, as applied to Mr. Valenti, severely burdens his right to vote and fails heightened scrutiny

Mr. Valenti and the putative class cannot legally vote in person with their community at their precinct polling places. Indiana Code § 35-42-4-14 prohibits Mr. Valenti from entering school property for any reason and because Mr. Valenti's precinct polling place is located in a school, he will not be able to vote there on election day. Although the statute allows Mr. Valenti to vote absentee by mail, it is an inherently inferior process and does not relieve the burden the statute places on his fundamental right to vote.

As Mr. Valenti notes in his Affidavit, voting in person is superior to voting by absentee ballot for a number of reasons: (1) when voting in person, poll workers are available to answer any procedural questions, thus increasing the likelihood that the ballot will be completed correctly and ultimately counted; (2) the onerous procedures and deadlines of voting absentee increase the likelihood that the ballot will be rejected; (3) because voting absentee requires voters

to cast their ballots early, they will miss out on last minute campaign developments; (4) voting in person on election day is viewed by many as a celebration of one's right to vote and is something that should be shared publicly with the community; and (5) in-person voters have the benefit of meeting and interacting with candidates and electioneers who are often present outside of polling places on election day. *See* Valenti Aff. ¶¶ 12-22.

Not surprisingly, courts have also emphasized the value of voting in person and, in particular, the inadequacy of absentee voting as a substitute. In *Griffin v. Roupas*, the Seventh Circuit stressed:

> [A]bsentee voting is to voting in person as a take-home exam is to a proctored one. Absentee voters also are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot. And because absentee voters vote before election day, often weeks before, they are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign.

Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004) (internal citations omitted). Echoing the same concerns with absentee voting, the court in *Common Cause/Georgia v. Billups*, rejected defendants' argument that the state's photo identification requirement for in-person voting was not a severe burden on plaintiffs' voting rights in part because they could vote absentee without producing a photo ID. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1364 (N.D. Ga. 2005). The court cited several reasons why "absentee voting simply is not a realistic alternative to voting in person" and therefore "does not relieve the burden on the right to vote": (1) in order for the vote to count, it must be *received* (not merely post marked) by the registrar in the voter's district before 7:00 pm on election day; (2) the absentee voter must plan sufficiently enough ahead to request an absentee ballot and receive it in time; (3) the absentee voter must

complete the ballot correctly; and (4) the voter must know in advance that voting absentee is even an option, something that was not publicized at all by the state. *Id.* at 1364-65.[2]

Here, Indiana Code § 35-42-4-14 completely bars Mr. Valenti from voting in person at his polling place. The regulations for voting absentee in Indiana suffer from the same inherent defects identified in *Griffin* and the procedural burdens recognized in *Common Cause/Georgia*, making it a constitutionally deficient substitute.

First, an absentee voter must submit an absentee ballot application. Ind. Code § 3-11-4-2(a). The application must be received by the county election board before midnight on the eighth day before election day if the application is mailed. *Id.* § 3-11-4-3(a)(4). If the absentee ballot application is received prior to the deadline, the county election board will mail an absentee ballot to the address stated in the application. *Id.* § 3-11-4-18(a). The county election board may, however, send the ballot with a request for additional documentation if, for example, the absentee voter has not previously voted in Indiana. *See id.*; Ind. Code § 3-7-33-4.5(a)(2)(A).

The absentee voter may then send an absentee ballot to the county election board, but, just as in *Common Cause/Georgia*, it must be *received* "in time for the board to deliver the ballot to the precinct election board of the voter's precinct before the closing of the polls on election day." *Id.* § 3-11-10-3. In the 2015 municipal primary in Marion County, for example, the election board had to receive absentee ballots by noon on election day. The Official Website of

[2] After the court granted a preliminary injunction, the Georgia legislature passed a new version of its photo ID voting law which was upheld by the court after a bench trial was held and the court concluded that the photo ID law did not in fact pose an undue burden on voters. *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007), *order vacated on other grounds and reentered*, 554 F.3d 1340 (11th Cir. 2009). In the interim, the Supreme Court in *Crawford v. Marion County Election Board* similarly found that Indiana's photo identification requirement was not a severe burden on in-person voting. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). Neither decision, however contradicts the basic point made in *Common Cause/Georgia* that absentee voting does not relieve a severe burden on in-person voting; the Court in *Crawford* simply found that the photo ID requirement at issue in that case was not a severe burden on in-person voting. *Id.* at 198-200 (plurality decision). Unlike *Crawford or Common Cause/Georgia*, the State here is completely prohibiting Mr. Valenti, who is otherwise able, from voting in person, which brings the distinctions between absentee and in-person voting to the forefront.

City of Indianapolis and Marion County, *Absentee Voting By Mail* (available at: http://www.indy.gov/eGov/County/Clerk/Election/Voter_Info/beforeed/Pages/Mail.aspx) (last visited Sep. 14, 2015).

Because of the strict deadlines for absentee ballots, there is a strong incentive to cast an absentee ballot early. But, as the Seventh Circuit emphasized in *Griffin*, by voting early, absentee voters are "deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign." *Griffin*, 385 F.3d at 1131. By voting early, the voter also runs the risk that the ballot will change before election day, for example, in the event that a candidate drops out of an election or if a political party fills a vacancy with a new candidate. *See* Ind. Code § 3-11-10-1.5; § 3-13-1-1, *et. seq*. In order to cast a new ballot, the absentee voter would have to submit a written request to the circuit court clerk and wait for the new ballot to arrive. *Id.* The voter's request, however, will only be accepted if "the original absentee ballot has not been delivered to the appropriate precinct" and "the absentee voter's name has not been marked on the poll list." *Id.* § 3-11-10-1.5(b). Far from being a mere inconvenience, voting early puts Mr. Valenti at an informational disadvantage as compared to in-person voters. He also faces the real risk that by voting early he may vote for a candidate who is no longer in the running and that his vote will therefore be irrelevant.

Mailing in an absentee ballot close to the deadline, on the other hand, runs the risk that the ballot will be delayed by the mail carrier or lost altogether, with no time left for the voter to obtain a replacement ballot. The absentee voter is therefore faced with deciding whether to submit an absentee ballot early or late, both of which run risks that the in-person voter does not face.

Assuming the absentee voter receives and submits his ballot on time, the voter faces the real risk that his vote will still not be counted. As the Seventh Circuit emphasized, absentee voters "are more prone to casting invalid ballots" because they are deprived of the election judges, who are present at their polling place to assist with any questions the voter might have in correctly marking the ballot. *Griffin*, 385 F.3d at 1131. If an absentee voter receives a defective ballot, makes a mistake, damages the ballot, or loses it, the voter must make a written request for another ballot from the circuit court clerk and wait for a new one to arrive before starting the process over again. *See* Ind. Code § 3-11-4-17.7; 3-11-10-1.5. Even if the absentee voter completes the ballot correctly, there are numerous reasons why an absentee ballot will be rejected—hurdles not faced by in-person voters. Grounds include:

- The absentee ballot affidavit is insufficient or it has not been endorsed by two officials from either the circuit court clerk's office or the county election board.
- The signature on the affidavit does not correspond to the voter's signature furnished to the precinct election board, or there is no signature.
- The completed absentee ballot was sent to the wrong precinct.
- The absentee ballot envelope is open or was opened and resealed.
- The ballot is challenged and the absentee ballot application cannot be found.

See id. § 3-11-10-17.

The various temporal and procedural hurdles that a voter must go through to vote absentee places a burden on the right to vote that simply is not there with in-person voting. But the severity of the burden imposed when a person is relegated to voting only absentee stems also from the fact that the act of voting in person has powerful expressive value in and of itself, which cuts to the heart of the constitutional right to vote. After all, the right to vote implicates the right to associate. *Williams*, 393 U.S. at 30. Mr. Valenti, as do many other voters, views voting in

person on election day as a celebration of his right to vote and as something that should be shared publicly with his community. *See* Valenti Aff. ¶ 19. Voters often express their act of voting publicly throughout election day; whether it be the indelible image of an Afghan voter displaying a finger stained with identifying ink as a badge of pride (*see* http://www.bbc.com/news/world-asia-26908464) (last visited Sep. 14, 2015) or an American voter wearing an "I voted" sticker given to him at his polling place, the very act of in-person voting is very much an expressive and associational activity—aspects of voting that are denied to Mr. Valenti who is relegated to an early and private form of absentee voting.

Moreover, the associational value of in-person voting stems not just from a sense of shared civic purpose. Candidates, particularly those in local elections, and their campaign workers are also permitted to, and often do, campaign immediately outside of polling places. Absentee voters, therefore, do not have the benefit of meeting candidates; communing with fellow voters who share their political views; debating with those who oppose their views; and receiving additional information or literature from electioneers that might change their views. Mr. Valenti, for example, wishes to talk to people, including electioneers and candidates, outside of his polling places. *See* Valenti Aff. ¶ 20-21. This expressive and associational aspect of voting is not limited to simply checking a box on a ballot, but continues in and around the polling place, the very focal point of democratic participation on election day.

By completely foreclosing Mr. Valenti's ability to vote in person at his community polling place, Indiana Code § 35-42-4-14 imposes a severe burden on his right to vote and is therefore subject to the highest level of scrutiny under *Burdick*.

B. The State's interests are not compelling, are not narrowly tailored, and therefore fail the heightened scrutiny mandated by *Burdick*

Under *Burdick*, if the burden on voting rights is severe, the court must next examine whether the statute is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. The purpose of the statute appears to be an effort to protect children from "serious sex offenders." While this is certainly a compelling interest, it is the State's duty to demonstrate that there is a compelling interest to protect children from "serious sex offenders" *who vote in school-based polling places*. The State will not be able to carry this burden.

A polling place is a restricted area where only certain individuals are allowed to enter. *See* Indiana Code § 3-11-8-15(a).[3] School children are not allowed in polling places unless they are accompanying adult voters, which is true regardless of where a polling place is located. *Id.* § 3-11-8-15(a)(8). In terms of incidental proximity to children, a polling place is therefore safer for children than a grocery store or a mall, where children are frequently unaccompanied by

[3] Indiana Code § 3-11-8-15(a) reads:

> Only the following persons are permitted in the polls during an election:
> (1) Members of a precinct election board.
> (2) Poll clerks and assistant poll clerks.
> (3) Election sheriffs.
> (4) Deputy election commissioners.
> (5) Pollbook holders and challengers.
> (6) Watchers.
> (7) Voters for the purposes of voting.
> (8) Minor children accompanying voters as provided under IC 3-11-11-8.
> (9) An assistant to a precinct election officer appointed under IC 3-6-6-39.
> (10) An individual authorized to assist a voter in accordance with IC 3-11-9.
> (11) A member of a county election board, acting on behalf of the board.
> (12) A mechanic authorized to act on behalf of a county election board to repair a voting system (if the mechanic bears credentials signed by each member of the board).
> (13) Either of the following who have been issued credentials signed by the members of the county election board:
> (A) The county chairman of a political party.
> (B) The county vice chairman of a political party.
> . . . .
> (14) The secretary of state, as chief election officer of the state, unless the individual serving as secretary of state is a candidate for nomination or election to an office at the election.

adults. The risk to children at a polling place is de minimis and although the state has a general interest in protecting children, in this case, it is not compelling.

Even assuming child safety at the polling place is a compelling state interest, prohibiting Mr. Valenti from voting at his polling place on school property is not narrowly tailored to meet that end. Narrow tailoring requires that the statute "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Furthermore, "the restriction cannot be overinclusive by unnecessarily circumscribing protected expression, or underinclusive by leaving appreciable damage to the government's interest unprohibited." *Cahaly v. Larosa*, -- F.3d --, Nos. 14-1651, 14-1680, 2015 WL 4646922, at *4 (4th Cir. Aug. 6, 2015) (internal quotations and citations omitted). The statute here is both over-inclusive and under-inclusive.

In a decision that is directly on point, *Does I-IV v. City of Indianapolis*, this Court weighed the state's interest in protecting children from sex offenders against a sex offender's right to vote in person, using *Burdick*'s flexible standard. *Does I-IV v. City of Indianapolis*, No. 1:06-cv-865, 2006 WL 2927598 (S.D. Ind. Oct. 5, 2006). At issue in *Does I-IV* was an ordinance prohibiting certain sex offenders from being within 1000 feet of public playgrounds and other recreation areas when children are present unless accompanied by a non-sex offending adult. *Id.* at *1. Because one of the plaintiffs lived in a precinct where his polling place was located in a public school with recreation areas, the ordinance effectively barred him from voting in person. *Id.* at *9-10. Although in theory, he could still vote in person if he was accompanied

by a qualified adult and if children were not present at the polling place, the court still found that the ordinance severely restricted the plaintiff's right to vote, despite his ability to vote absentee, and that the statute was not narrowly tailored. *Id.* at *10 ("Preventing persons from voting in-person is not narrowly tailored to advance the City of Indianapolis' interest in protecting persons, particularly children in the areas identified by the Ordinance."). Here, Mr. Valenti is completely foreclosed from entering school property to vote in person, regardless of whether or not he is accompanied by qualified adult or children are present. Similar to the plaintiff in *Does I-IV*, Mr. Valenti's ability to vote absentee does nothing to ameliorate this severe burden to his right to vote. Indiana Code § 35-42-4-14 is not narrowly tailored and when weighed against the severe burden it imposes on Mr. Valenti's right to vote, it fails the test in *Burdick* and is unconstitutional.

Similarly, in *Doe v. Prosecutor, Marion County, Indiana*, the plaintiffs challenged an Indiana law prohibiting certain sex offenders from using social networking web sites and other on-line methods of communication. *Doe v. Prosecutor, Marion Cnty., Indiana*, 705 F.3d 694, 695 (7th Cir. 2013). The court found the law unconstitutional despite the state's legitimate interest in shielding children from improper sexual communication. *Id.* at 698. Applying strict scrutiny the court found that the law "captures considerable conduct that has nothing to do with minors," and that "Indiana has other methods to combat unwanted and inappropriate communication between minors and sex offenders." *Id.* at 699. The court cited specific criminal statutes that prohibited communication with a child concerning sexual activity, as existing statutes that better advance Indiana's interest in preventing harmful interaction with children "(by going beyond social networks)" and "accomplish that end more narrowly (by refusing to burden benign Internet activity). That is, they are neither over- nor under-inclusive like the

statute at issue here." *Id.*[4]

The statute in this case is aimed at essentially the same evil in *Doe*, namely preventing illicit contact by a person convicted of a sex offense with a child, and it is similarly poorly tailored to that end because it is both over- and under-inclusive. The statute is over-inclusive because it "captures considerable conduct that has nothing to do with minors," specifically, it prohibits Mr. Valenti from exercising his constitutional right to vote in person at his community polling place. *Id.* (internal quotations omitted). The statute is under-inclusive because it leaves unaddressed polling places not located on school property, such as libraries and community centers, where plaintiffs would have just as much, if not more incidental contact with children. *See, e.g.*, *See* Marion County Elections Board, *2015 Municipal Primary Polling Location List* (available at: http://www.indy.gov/eGov/county/clerk/election/pages/home.aspx) (last visited: Sep. 14, 2015) (listing thirty-four precincts with polling places located either in a library or community center). In fact, any children that might be in a polling place are under greater supervision than in other public places because they are only permitted to be there if they are accompanying an adult. *See* Ind. Code § 3-11-8-15(a)(8). As in *Doe*, Indiana's law on child solicitation (Indiana Code § 35-42-4-6) and communication with minors concerning sexual activity (Indiana Code § 35-42-4-13) serve to demonstrate the statute's lack of tailoring by showing that there are better and more targeted laws already on the books to address the State's interest in child safety. Because Indiana Code § 35-42-4-14 is not "narrowly drawn to advance a

[4] In *Doe v. Harris*, the Ninth Circuit Court of Appeals similarly struck down internet restrictions imposed on sex offenders that, for example, required the person to report to law enforcement authorities a new internet identifier (*e.g.*, a username or handle used in internet communication) within 24-hours. *Doe v. Harris*, 772 F.3d 563, 568, 582 (9th Cir. 2014). Applying intermediate scrutiny, the court found that the 24-hour requirement was "not only onerous" but that it was not sufficiently tailored where the restriction was "applied in an across-the-board fashion . . . to all registered sex offenders, regardless of their offense, their history of recidivism (or lack thereof), or any other relevant circumstance." *Id.* at 582. Here, there is similarly no attempt to apply the prohibition on in-person voting in schools to those with relevant offenses or that pose a risk of recidivism by being on school property on election day.

state interest of compelling importance," the statute is unconstitutional. *Burdick*, 504 U.S. at 434.

C. The statute is not rational as applied to Mr. Valenti and the putative class

Even if the court were to apply a deferential standard under *Burdick* – which it should not given the severe burden the statute places on Mr. Valenti's right to vote – the statute fails because it is not rational. When the law "imposes only reasonable, nondiscriminatory restrictions upon the rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Common Cause Indiana*, 2015 WL 5234614, at *4 (quoting *Burdick*, 504 U.S. at 434) (internal quotations omitted); *see also Griffin*, 385 F.3d at 1130 ("Any such restriction [on voting rights] 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."). But, "[h]owever slight that burden [on voting rights] may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (plurality opinion) (internal citation and quotation omitted). Here, the law fails to reach even this basic level of rationality because it is unreasonable to believe that a person previously convicted of a sex offense who is voting will use that as an opportunity to endanger children. As previously mentioned, polling places are highly regulated areas where children are allowed only if accompanying an adult; unlike the normal school day, the area is filled with government officials and sometimes law enforcement officials to ensure the security and order of the polling place; and adults are only allowed at the site for a limited purpose – to vote – meaning there will be limited ability to loiter. That a "'[state's] asserted interests are important in the abstract does not mean . . . that [its regulation] will in fact advance those interests.' The state 'must do more than

simply posit the existence of the disease sought to be cured' and 'the regulation [must] in fact alleviate these harms in a direct and material way." *Doe*, 705 F.3d at 701 (quoting *Turner*, 512 U.S. at 664) (court's alterations). Here, the statute does not protect children in a "direct and material way" and instead hinders Mr. Valenti's right to vote in a direct and material way.

Courts recognize that it is simply not enough for the state to argue that restrictions on sex offenders are necessary to protect children, without showing that the restrictions actually do that. *See In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (finding that state law prohibiting paroled sex offenders from residing within 2000 feet of a school or park failed rational basis review where it hindered efforts to monitor sex offenders by rendering many of them homeless and therefore bore "no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators"); *McGuire v. Strange*, No. 2:11-cv-1027, -- F. Supp.3d --, 2015 WL 476207, *29, *30 (M.D. Ala. Feb. 5, 2015) (finding that requiring sex offenders to register with two agencies weekly and to complete two identical travel permit applications prior to traveling outside of their residential county were instances of "highly diminished returns coupled with substantially increased burdens" and were therefore not "reasonable in light of the [state's] nonpunitive objective"); *State v. Small*, 833 N.E.2d 774, 782 (Oh. Ct. App.), *dismissed*, 832 N.E.2d 731, 782-83 (Ohio 2005) (finding "no rational basis" to subject a defendant who plead guilty to kidnapping a child to sex offender registration); *Raines v. State*, 805 So.2d 999, 1003 (Fla. Ct. App. 2001) (finding no rational basis for subjecting a defendant convicted of false imprisonment to a sex offender registry); *Doe*, 705 F.3d at 702 (in 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."). Here, it is similarly not rational to exclude persons previously convicted of sex offenses from polling places just because they happen to be in a school. The statute does not survive lower-level scrutiny.

II. The other requirements for the grant of a preliminary injunction are met

A. Mr. Valenti is faced with irreparable for which there is no adequate remedy at law

It is well-established that the denial of constitutional rights is irreparable harm in and of itself. "Courts have . . . held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); *see also, e.g.*, Cohen v. Coahoma Cnty., Miss., 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."). Denying "an individual the right to vote works serious, irreparable injury upon that individual." *Common Cause/Georgia*, 406 F. Supp. 2d at 1376 (holding photo ID requirement would irreparably harm plaintiffs despite their ability to vote absentee without one); *see also Johnson v. Darrall*, 337 F. Supp. 138, 138-39 (S.D. Ind. 1971) (finding that requiring student voters in county to execute affidavits pursuant to their registration, which were not required by other voters, would constitute "irreparable injury"); *Foster v. Kusper*, 587 F. Supp. 1191, 1194 (N.D. Ill. 1984) (finding that certifying or seating a ward committeeman while plaintiff challenged the election would cause "irreparable harm to [plaintiffs'] constitutional right to freedom of association and their corollary right to vote"). As detailed above, the burden on Mr. Valenti's fundamental right to vote is severe: come November 3, 2015, he, and the putative class, will be unable to vote in person at their polling places. Furthermore, there is no adequate remedy at law to safeguard Mr. Valenti and the putative class

against violations of their constitutional rights.

B. The balance of harms favor Mr. Valenti

Without an injunction Mr. Valenti and the putative class will be faced with an ongoing violation of their right to vote. Because Mr. Valenti has demonstrated a substantial likelihood of success on the merits of his claim "no substantial harm to others can be said to inhere in its enjoinment." *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). An injunction will only force compliance with requirements of constitutional law. Governmental entities cannot claim that requiring them to comply with the United States Constitution is harmful. The balance of harms therefore favors the issuance of equitable relief.

C. The public interest favors a preliminary injunction here

The Seventh Circuit has noted that "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d 853, 859 (7th Cir. 2006). As the Sixth Circuit has similarly held, it is "always in the public interest to prevent violation of a party's constitutional rights." *Déjà vu of Nashville*, 274 F.3d at 400 (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Thus, the public interest is served by the enforcement of Mr. Valenti's voting rights as protected by the First and Fourteenth Amendments to the United States Constitution and by the grant of a preliminary injunction.

D. The injunction should issue without bond

The issuance of a preliminary injunction will not impose any monetary injuries on the State. In the absence of such injuries, no bond should be required. *See, e.g., Doctor's Assocs.,*

Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996).

Conclusion

The challenged statute, Indiana Code § 35-42-4-14, as applied to Mr. Valenti, places a severe burdens on the right to vote by prohibiting him from voting in person at his local polling place. The State will not be able to demonstrate justifications for this burden and the law is unconstitutional. All the requirements for a preliminary injunction are met in this case and one should issue without bond. If the putative class is certified, the injunction should apply to the class as well.

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CERTIFICATE OF SERVICE

I hereby verify that on this 16th day of September 2015, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN VALENTI, on his own behalf and on behalf of a class of those similarly situated, Plaintiffs, v. INDIANA SECRETARY OF STATE, in her official capacity; THE INDIVIDUAL MEMBERS of the INDIANA ELECTION COMMISSION, in their official capacities; THE SUPERINTENDENT of the INDIANA STATE POLICE, in his official capacity; THE BLACKFORD COUNTY PROSECUTOR, in his official capacity, Defendants.	)	No. 1:15-cv-1304-WTL-TAB

AFFIDAVIT OF BRIAN VALENTI

COMES NOW Brian Valenti, being first duly sworn upon his oath, and states as follows:

1. I am an adult resident of Blackford County, Indiana.

2. In 1993, I was convicted of the California offense of "Lewd or Lascivious Acts with Child Under 14."

3. I have not been convicted of any other sex offense before or after that time.

4. I have served my sentence and am not out on any kind of supervised release.

5. In 2014, I moved to Blackford County, Indiana to be closer to my family.

6. Because of my 1993 conviction for a sex offense in California, I am required to register on the Sex and Violent Offender Registry in Indiana.

7. I registered to vote in April 2015, and I intend to vote in future elections, including the upcoming municipal election on November 3, 2015.

8. The polling place in my voter precinct is located at the Blackford County High School Auxiliary Gym.

9. Based on my conviction and the fact that I have to register as a sex offender, I am prohibited from entering school property.

10. As a result, the only way I can vote is via absentee ballot.

11. I view voting absentee as an inadequate substitute for voting in person.

12. To vote absentee, I must submit an application for an absentee ballot at least eight days prior to the election. Once I have a ballot, I have to make sure that the Blackford County Election Board receives the ballot before noon on election day.

13. To ensure I meet all of the deadlines, I have to start the process far in advance of election day. As a result, I will miss any election developments that occur in the days leading up to the election.

14. I want to be able to change my mind at the last minute in the upcoming and all future elections. I will not be able to do that if I am limited to voting absentee.

15. I am also afraid of making a mistake on my ballot and, as a result, it will not be accepted.

16. I would prefer to vote in person at my precinct polling place because the procedure is much simpler, and I can always ask the poll workers any questions I might have in filing out the ballot. If I make a mistake on my ballot at my polling place, I can fill out a new ballot and still have my vote counted.

17. Because I am prohibited from physically submitting my ballot to my precinct polling place I also worry that an election worker or mail delivery person will make a mistake that will keep my vote from being counted.

18. Even if my absentee ballot is ultimately counted, I still view voting as a poor substitute for voting in person.

19. I view voting as a celebration of my constitutional right and it is something I think should be shared publicly with my community.

20. There are often candidates and electioneers outside of the polling place who I would like to speak with and receive information from them about issues I care about.

21. I would also enjoy talking to other voters about political issues outside of the polling place.

22. I view voting in person on election day as an important public community event and an opportunity to express myself politically, beyond just having my vote counted.

VERIFICATION

I hereby verify, under penalties for perjury, that the foregoing statements are true and correct to the best of my information and belief.

9-15-15
Date

Brian Valenti
Brian Valenti, Affiant

Prepared by:
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