RE-EXAMINING INDIANA'S VOTER ID LAW IN LIGHT OF RECENT FEDERAL COURT CASES: WHERE DOES IT GO FROM HERE AND WHAT'S NEXT FOR INDIANA ELECTION LAW

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INTRODUCTION

The contentious debate over voter ID laws has reached a fever pitch in recent months, with regular headlines detailing the debate in all branches and at all levels of government.[1] Currently, thirty-four states have adopted some form of voter ID law.[2] In recent years, strict voter ID laws (those mandating a voter without ID vote a provisional ballot and take further action after the election to verify their identity) have sparked heated debates and court battles about the motives behind the laws.[3] The 2008 landmark U.S. Supreme Court case upholding Indiana's voter ID law, *Crawford v. Marion County Election Board*, opened the door to states seeking to enact their own laws, but recent federal court decisions have revealed less-than-noble motivations for subsequent laws in other states.[4] As a result, challenges claiming the laws are unconstitutional or violate Section 2 of the Voting Rights Act (VRA) have bubbled up through the federal circuits.[5] Faced with different facts and legal claims, the circuits have split in upholding or striking down all or parts of state voter ID laws, providing all sides

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1. Ken Thomas & Erica Werner, *AP Report: Trump advances false claim that 3-5 Million voted illegally*, PBS NEWSHOUR: THE RUNDOWN (Jan. 23, 2017, 10:59 PM), http://www.pbs.org/newshour/rundown/ap-report-trump-advances-false-claim-3-5-million-voted-illegally/ [https://perma.cc/6MSA-M8TH].

2. Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 26, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/G2JK-YUV2].

3. Mark Walsh, *Appeals courts are dismantling stricter voter ID laws*, A.B.A. J. (Nov. 2016), http://www.abajournal.com/magazine/article/voter_id_laws [https://perma.cc/MNU3-9B2D]; *see* The Observer Editorial Bd., *The bigger threat to NC election integrity? So far, it's McCrory*, CHARLOTTE OBSERVER (Nov. 21, 2016, 4:36 PM), http://www.charlotteobserver.com/opinion/editorials/article116266773.html [https://perma.cc/3XJH-Z3YV] (urging former Gov. Pat McCrory to provide evidence of his claims of widespread voter fraud, or else step aside and allow county officials to finish their work).

4. 553 U.S. 181, 199 (2008).

5. *See generally* Walsh, *supra* note 3.

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of the debate a case on which to hinge their hopes of complete validation, should the U.S. Supreme Court rule on any one of the cases.[6]

Critics of voter ID laws will point to the Fourth and Fifth Circuit's invalidation of North Carolina's and Texas's voter ID laws, respectively, as indications the tide is turning against strict ID laws.[7] Similarly, victories in North Dakota and Wisconsin federal district courts provided critics with sharply-worded opinions critical of perceived motives behind such laws.[8] Appeals in these cases are pending before the Eighth and Seventh Circuits, respectively, and will either blunt the momentum of those seeking to repeal voter ID laws or thrust their arguments further toward a showdown with those other circuits upholding ID laws.[9]

Proponents of voter ID laws will point to the Fourth Circuit decision upholding Virginia's voter ID law.[10] Similar in many respects to Indiana's approach, the court noted that, "From in-person voting, to an absentee option, to provisional ballots with the ability to cure, and the provision of free voter IDs, Virginia has provided all of its citizens with an equal opportunity to participate in the electoral process."[11] Similarly, the Sixth Circuit largely upheld Ohio's voter ID law against multiple challenges.[12]

Amid the varying challenges and decisions remains one constant variable: allegations of fraud, including in Indiana.[13] As of the writing of this Note, President Donald J. Trump continues to claim millions of people voted illegally in the 2016 election.[14] He has gone so far as to establish a commission on election integrity, which drew a concerted rebuke from forty-four states represented by Secretaries of State from both major political parties.[15] The President has raised

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6. *Id.*

7. *See generally* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

8. *See generally* Brakebill v. Jaeger, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) (order granting plaintiff's motion for preliminary injunction); One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896 (W.D. Wis. 2016).

9. *Id.*

10. *See generally* Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016).

11. Lee v. Va. State Bd. of Elections, 188 F.Supp.3d 577, 610 (E.D. Va. 2016).

12. *See generally* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016); Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016).

13. Mary Perren, *Secretary of State's Office Reports Potential Voter Registration Fraud*, WKVI (Oct. 19, 2016), http://www.wkvi.com/2016/10/secretary-states-office-reports-potential-voter-registration-fraud/ [https://perma.cc/L3KN-QN48]; *Indiana election official clarifies registration fraud probe*, INDIANAPOLIS BUS. J. (Oct. 19, 2016), http://www.ibj.com/articles/60892 [https://perma.cc/U2YB-BW8A].

14. Thomas & Werner, *supra* note 1.

15. Liz Stark & Grace Hauck, *Forty-four states and DC have refused to give certain voter information to Trump commission*, CNN (July 5, 2017, 5:49 AM), http://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html [https://perma.cc/9TBR-ERP9].

doubts about the integrity of the system, which critics claim provides the necessary doubt and insecurity amongst voters for supporters of voter ID laws to capitalize on and promote stricter laws.[16]

In 2017, new laws pointing to *Crawford* were signed into law in West Virginia, Iowa, and Missouri.[17] Such deference might suggest Indiana's law has reached a point of infallibility, but far removed from the unsuccessful facial challenge in *Crawford*, voter ID cases decided over the last year suggest specific provisions of Indiana's law remain vulnerable to an as-applied challenge.[18] *Crawford* may have opened the door for other states to enact voter ID laws, but a tug-of-war over its legacy is playing out in challenges across the country.[19]

This Note will discuss evidence recent federal court decisions provide that suggests an as-applied constitutional challenge could succeed against Indiana's provisional ballot and post-election verification requirements.[20] In addition, this Note will argue that other provisions of Indiana election law may face successful challenges based on the decisions discussed.[21] As a result, the decision upholding *Crawford* may have the effect of invalidating other provisions of Indiana's election law.[22]

Part I of this Note gives a brief history of Indiana's voter ID law and the arguments on both sides of the debate. Part II discusses *Crawford's* path to the U.S. Supreme Court, including the Court's *Anderson-Burdick* analysis. Part III outlines decisions in election law cases handed down in 2016 and 2017 that cited *Crawford* but exposed a circuit split. Part IV reexamines *Crawford* and Indiana's voter ID law in light of the cases discussed. Finally, Part V briefly highlights related provisions in Indiana's election code which could be challenged given the recent decisions. Appendix A is a reference for readers that lays out the tests used by courts in analyzing claims on constitutional grounds and Section 2 of the VRA.

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16. Brian Beutler, *Trump's "Rigged Election" Argument Comes Straight from the GOP Playbook*, NEW REPUBLIC (Aug. 4, 2016), https://newrepublic.com/article/135807/trumps-rigged-election-argument-comes-straight-gop-playbook [https://perma.cc/S5M4-Q8EH].

17. Nathan Takitch & Jatara McGee, *Voter ID bill passes the legislature*, WSAZ NEWS CHANNEL (Mar. 13, 2016, 11:02 PM), http://www.wsaz.com/content/news/West-Virginia-House-to-vote-on-voter-ID-bill--369422621.html [https://perma.cc/FK8R-LUAQ]; Brianne Pfannenstiel, *Branstad signs controversial voter ID bill into law*, DES MOINES REG. (May 5, 2017, 1:15 PM), http://www.desmoinesregister.com/story/news/politics/2017/05/05/branstad-signs-controversial-voter-id-bill-into-law/311568001/ [https://perma.cc/XCD8-FUST]; *New Missouri voter ID law goes into effect Thursday*, FOX2NOW ST. LOUIS (June 1, 2017, 6:50 AM), http://fox2now.com/2017/06/01/new-missouri-voter-id-law-goes-into-effect-Thursday/ [https://perma.cc/8LD2-QYFX].

18. *See infra* Part IV.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part V.

I. HISTORY OF INDIANA'S VOTER ID LAW

After campaigning on the issue of election reform in 2002, then-Secretary of State Todd Rokita was provided the right environment to enact those reforms following the next election.[23] In the 2004 election, Republicans gained control of both chambers in the statehouse and the Governor's office, ending a sixteen-year run of Democratic governors and eight years of a House Democratic majority.[24] The wave that swept in new majorities followed on the heels of the controversial 2003 Democratic Primary in the East Chicago mayor's race.[25] In that race, the Indiana Supreme Court would order a special election after a trial court determined over 150 mail-in absentees were cast fraudulently.[26] Secretary Rokita pointed to the East Chicago election to promote voter ID and absentee reforms he believed were necessary to restore confidence in the system.[27] Along a party-line vote (no Democrats voting in favor), Indiana's voter ID law was enacted.[28] Voters were now required to present state-issued proof of identification that displays their photo, name, and an expiration date.[29] Exemptions were provided for individuals with a religious objection to being photographed, individuals living in a state-licensed facility, and indigent voters.[30]

Critics at the time claimed the law was a "power grab" by the new

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23. Josh Siegel, *After Voter ID Defeats, Lessons from Indiana's Law that 'Has Stood Test of Time,'* DAILY SIGNAL (Aug. 7, 2016), http://dailysignal.com/2016/08/07/after-voter-id-defeats-lessons-from-indianas-law-that-has-stood-test-of-time/ [https://perma.cc/J5AS-AEUS]; William R. Groth, *Litigating the Indiana Photo-ID Law: Lessons in Judicial Dissonance and Abdication*, 42 PS: POL. SCI. & POL. 97 (2009).

24. *See generally* Groth, *supra* note 23.

25. Sufiya Abdur-Rahman, *Indiana election probe launched*, CHI. TRIB. (Sept. 24, 2003), http://articles.chicagotribune.com/2003-09-24/news/0309240144_1_absentee-ballot-vote-fraud-mayoral-race [https://perma.cc/3NHU-888Y].

26. *Id.*

27. *Rokita Applauds Senate Passage of Election Integrity Bill*, SEC'Y OF STATE (Feb. 5, 2004), http://www.in.gov/sos/elections/3060.htm [https://perma.cc/HY62-NEDL]; *Protecting Elections with Voter ID*, SEC'Y OF STATE (May 19, 2005), http://www.in.gov/sos/elections/3130.htm [https://perma.cc/BXU4-FUXV] ("By addressing fraud both at the polls and through the absentee process, our legislators have created laws to see to it that every legally registered Hoosier's vote counts the same come election time.").

28. Groth, *supra* note 23, at 97. Rokita would tout the passage of Indiana's voter ID law in announcing his support for the President's voter fraud commission. Press Release, Rep. Todd Rokita, Rokita Supports New Commission on Election Integrity (May 11, 2017), *available at* https://rokita.house.gov/press-release/release-rokita-supports-new-commission-election-integrity [https://perma.cc/HH9V-VTVW].

29. *Photo ID Law*, IND. ELECTION DIV., http://www.in.gov/sos/elections/2401.htm [https://perma.cc/G2JN-888S] (last visited Mar. 16, 2017).

30. *Exemptions*, IND. ELECTION DIV., http://www.in.gov/sos/elections/2624.htm [https://perma.cc/MK5R-EKTC] (last visited Dec. 22, 2017).

Republican majorities to maintain their control.[31] Dissenting in the Seventh Circuit's decision upholding the trial court's dismissal of the plaintiffs' challenge, Judge Terence Evans boldly stated, "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[32] Similar charges continue today against similar voter ID laws, but such claims are increasingly supported by a growing body of evidence of disenfranchisement of racial minorities, who statistically skew more Democratic, resulting in Republican electoral gains.[33]

Reflecting on *Crawford*, Judge Richard Posner wrote, "I plead guilty to having written the majority opinion (affirmed by the Supreme Court) upholding Indiana's requirement that prospective voters prove their identity with a photo ID—a type of law now widely regarded as a means of voter suppression rather than of fraud prevention."[34] In response to the attention his comments garnered, Judge Posner qualified his statement, noting the record in *Crawford* was unreliable, filled with flaws, and provided "empirical uncertainty," which made the court "reluctant to invalidate the law in the name of the Constitution."[35] Still, Posner took to the other side of the argument in the Seventh Circuit's decision upholding Wisconsin's voter ID law, arguing in dissent, "There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens."[36] He would go further, suggesting an analysis revealed the list of states with strict ID laws "highly correlated with a state's having a Republican governor and Republican control of the legislature and appear to be aimed at limiting voting by minorities, particularly blacks."[37]

Similarly, when asked about the majority opinion he authored in *Crawford*,

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31. Brendan O'Shaughnessy, *Indiana's proposed voter ID law strictest in nation*, NWI.COM (Mar. 28, 2005), http://www.nwitimes.com/news/local/indiana-s-proposed-voter-id-law-strictest-in-nation/article_02aa295f-7c17-5324-85e6-f365bd665b33.html [https://perma.cc/J8JB-BS67].

32. Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

33. Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC (Mar. 16, 2012), https://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/ [https://perma.cc/3Z8J-79NT].

34. Richard A. Posner, *I Did Not 'Recant' on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013), https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id [https://perma.cc/E95F-BGTT].

35. *Id.*

36. Frank v. Walker, 773 F.3d 783, 796 (Posner, J., dissenting). Judge Posner was joined in dissent by Judge Diane Wood, who authored the dissent in the Seventh Circuit's denial of an *en banc* review of *Crawford*. *See* Crawford v. Marion Cty. Election Bd., 533 U.S. 181 (2008). The Seventh Circuit would split in deciding to review *Frank*, resulting in a denial of *en banc* review. *Frank*, 773 F.3d 783.

37. *Id.* at 792.

Justice John Paul Stevens recalled his decision to confine himself to the record rather than his own outside research, leading to what he called "a fairly unfortunate decision."[38] Justice Stevens was responding to a question posed by his successor on the high court, Justice Elena Kagan, who followed up by asking if Stevens would vote the same again today.[39] Stevens responded, "I think I would. That's a tough question. I really don't know for sure."[40]

In the intervening years since *Crawford*, the availability of data has called into question whether *Crawford* would be decided differently today. Regardless, the decisions put forward by Posner and Stevens still guide many courts' analyses of election law challenges.[41]

II. CRAWFORD'S PATH TO THE U.S. SUPREME COURT

Two days following Indiana's enactment of SEA 483, challengers filed a Fourteenth Amendment facial challenge in the Marion County Superior Court and the federal district court in Indianapolis, claiming the law imposed an undue burden on voting.[42] In choosing to bring a facial challenge, the plaintiffs saddled themselves with the heavy burden of showing harm when no injury had yet to occur.[43] In denying the plaintiffs' challenge, Judge Sarah Evans Barker criticized the lack of evidence that any individuals would be unable to vote or face "appreciable" burdens.[44]

Plaintiffs provided testimony from numerous voters, many of them African American, who detailed the burden the new law would place on them.[45] In addition, plaintiffs provided reports on the costs of obtaining an ID, surveys regarding the number of potential voters who lacked sufficient ID, and testimony of experts who claimed the law would have a severe impact on those with disabilities, the poor, the homeless, and racial minorities.[46] They also submitted evidence referred to as the Brace Report, an analysis claiming as many as 51,000 potential voters in Marion County and 989,000 potential voters statewide lacked

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38. Robert Barnes, *Stevens says Supreme Court decision on voter ID was correct, but maybe not right*, WASH. POST (May 15, 2016), https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html?utm_term=.96a2e2c48f98 [https://perma.cc/8FPJ-F5VN].

39. *Id.*

40. *Id.*

41. *See infra* Part III.

42. Groth, *supra* note 23 at 97.

43. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 199-200 (2008).

44. Ind. Democratic Party v. Rokita, 458 F.Supp.2d 775, 822 (S.D. Ind. 2006).

45. *Crawford v. Marion County Election Board,* ELECTION LAW @ MORITZ (Sept. 10, 2010, 1:39 PM), http://moritzlaw.osu.edu/electionlaw/litigation/indy-dems.php [https://perma.cc/7QXK-H86W] (compiling all affidavits and exhibits provided by the plaintiffs).

46. *See Rokita*, 458 F.Supp.2d at 794-96.

sufficient ID.[47] Further, the report used census block data on income and found that individuals making less than $15,000 were less likely to have a sufficient ID.[48] The trial court gave little weight to the Brace Report, finding it did not satisfy the Federal Rules of Evidence, contained "numerous flaws" and had "significant failings."[49]

The court held that plaintiffs "totally failed to adduce evidence establishing that any actual voters [would] be adversely impacted by SEA 483."[50] The decision to bring a facial challenge, without convincing evidence of actual injury, would prove fatal.[51] Affirming the trial court's decision, the Seventh Circuit found the plaintiffs did not meet their burden of proof in demonstrating that the law discriminated against a particular set of voters.[52] Persuaded by Judge Wood's dissent in the Seventh Circuit's *en banc* review of the case, the U.S. Supreme Court granted cert, but any hope this may have provided petitioners would soon fade.[53] Justice Stevens and Judge Posner acknowledged the difficulty in directly claiming they were wrong in their decisions in *Crawford* given the record that was presented to them.[54]

In a plurality decision, the Supreme Court reiterated the lack of concrete data provided by the plaintiffs and held that the State's justification was sound and that the law was neutral and indiscriminately applied.[55] To reach their conclusion, the Supreme Court looked to *Anderson v. Celebrezze* and *Burdick v. Takushi*, which had combined to create the *Anderson-Burdick* test to measure the effects of an election law on voters against the justifications provided by the State.[56]

A. Anderson v. Celebrezze

In determining that Ohio's law regarding the qualifications for Independent candidates to make the ballot violated plaintiff's equal protection right under the Fourteenth Amendment, the Supreme Court established a balancing test that is still used to guide election law cases today:

> *[A court] must first consider the character and magnitude of the asserted injury* to the rights protected by the First and Fourteenth Amendments

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47. *Id.* at 803.

48. *Id.* at 808.

49. *Id.* at 803, 809.

50. *Id.* at 820.

51. *Id.*

52. Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007).

53. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 199-200 (2008) (quoting Crawford v. Marion Cty. Election Bd., 484 F.3d 436, 437 (7th Cir. 2008) (Wood, J., dissenting) ("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.")).

54. *See generally* Posner, *supra* note 34; *see generally* Barnes, *supra* note 38.

55. *See Crawford*, 553 U.S. at 200 (2008).

56. *Id.* at 189-91.

> that the plaintiff seeks to vindicate. It *then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed* by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; *it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights*. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[57]

The balancing test set forth in *Anderson* remains the initial step for courts evaluating constitutional claims brought against election laws.[58] The test requires courts to exact from the record the true justification of a law and the magnitude of the injury claimed, and to balance these two against each other.[59]

B. Burdick v. Takushi

The Supreme Court expanded on the *Anderson* balancing test in *Burdick v. Takushi*, introducing two tiers of scrutiny: a "severe restriction" that required the State to prove the law was "narrowly drawn to advance a state interest of compelling importance," and a "reasonable, nondiscriminatory restriction[]" that required only an "important regulatory interest[]."[60] The court held that because relatively easy alternative avenues existed for voters to nominate and elect candidates that reflect their views, a Hawaii state law prohibiting write-in votes did not severely burden a voter's First and Fourteenth Amendment rights.[61]

C. Applying the Anderson-Burdick *Test to Crawford*

The Supreme Court applied *Anderson* and *Burdick* in *Crawford* and examined first the State's justifications for the law.[62] The State provided three justifications: (1) deterring and detecting voter fraud, (2) maintenance of its inflated voter rolls, and (3) safeguarding voter confidence in elections.[63] The court acknowledged the federal government's role in the State's second reason for its ID law, resulting from increased registrations through the bureau of motor vehicles and restrictions on removing names from voter rolls.[64] The court admitted the defendants provided no evidence of the type of fraud the ID sought to address—in-person voter impersonation—but claimed that previous credible reports of fraud in other parts of the country, as well as the 2003 East Chicago

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57. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)) (emphasis added).

58. *See generally* One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896 (W.D. Wis. 2016).

59. *Id.* at 928.

60. 504 U.S. 428, 432-34 (1992).

61. *Id.* at 443, 450.

62. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190-91 (2008).

63. *Id.* at 191.

64. *Id.* at 192.

Mayor's race, "demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election."[65] Finally, the Court accepted the State's third argument that increased voter confidence in elections "encourages citizen participation in the democratic process."[66]

The Court turned next to the plaintiffs, who requested the court "perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity."[67] Further, the plaintiffs argued the law "substantially burden[ed] the right to vote" and would "arbitrarily disfranchise qualified voters."[68]

The Court held that Indiana's voter ID law placed only a "limited burden on voters' rights" and this burden did not overcome what the court determined was a "neutral, nondiscriminatory regulation" enacted in the name of election protection.[69] Again, the plaintiffs would be plagued by a lack of evidence.[70]

Almost ten years since *Crawford*, cases decided in 2016 and 2017 have methodically revisited *Crawford* and demonstrated the evolving approach by the courts in election law cases.[71] In particular, the cursory consideration given to partisan motives in *Crawford* is becoming part of courts' *Anderson-Burdick-Crawford* analysis.[72]

III. CIRCUIT SPLIT: CHALLENGES AND DECISIONS IN 2016 THAT SUGGEST A GROWING DISCONTENT WITH *CRAWFORD* AND AN IMPENDING SHOWDOWN OVER ITS LEGACY

Due in large measure to the overt racism the cases revealed, and the sharp rebukes from the courts, cases decided in North Carolina, Texas, and Wisconsin garnered the lion's share of attention in 2016.[73] No doubt these decisions energized opponents of strict voter ID laws, but decisions upholding election and ID laws in Ohio and Virginia countered any claims of unfettered momentum away from *Crawford*.[74] Further still, the Supreme Court's elimination of

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65. *Id.* at 194-96.

66. *Id.* at 197.

67. *Id.* at 191, 200.

68. *Id.* at 187.

69. *Id.* at 202-03.

70. *Id.* at 201.

71. *See generally* Walsh, *supra* note 3.

72. *Id.*; N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

73. *See generally* Walsh, *supra* note 3.

74. Richard Wolf, *Supreme Court upholds Ohio voting restrictions*, USA TODAY (Sept. 13, 2016, 12:18 PM), http://www.usatoday.com/story/news/politics/2016/09/13/supreme-court-upholds-ohio-voting-restrictions/90303338/ [https://perma.cc/XVL8-B9J3]; *Virginia voter ID law upheld by federal court after Democratic challenge*, GUARDIAN (Dec. 13, 2016, 4:24 PM), https://www.theguardian.com/us-news/2016/dec/13/virginia-voter-id-law-upheld-federal-court

preclearance under Section 5 of the VRA in *Shelby County v. Holder* likely means these challenges will not be the last.[75] This Note will provide in relevant part the thrust of the arguments and decisions in cases decided in 2016 and carrying over into 2017 that may impact the future of other voter ID laws, including Indiana's, and provide new precedent for challenges against other provisions within Indiana election law.

A. Decisions Striking Down State Voter ID Laws and Election Reforms

1. North Carolina – Fourth Circuit.—Challengers to a 2013 North Carolina election reform law claimed it was passed with discriminatory intent, violating the Fourteenth and Fifteenth Amendments, and had discriminatory results, violating Section 2.[76] They argued the law targeted African Americans by limiting the forms of IDs that could be used and by limiting in-person absentee voting and preregistration, which were shown to be frequently used by African Americans in their "Souls to the Polls" programs and youth civic engagement campaigns.[77] Finding in favor of the challengers, the Fourth Circuit claimed the overhaul to the state election code targeted minorities with "surgical precision."[78]

One day after the Supreme Court's decision in *Shelby County*, the North Carolina Senate Rules Committee chairman announced that HB 589, legislation establishing North Carolina's voter ID law, would move forward.[79] Introduced two months prior, the original sixteen-page bill enjoyed bipartisan support at the time.[80] One month later, a revised HB 589 would be released—fifty-seven pages long, including new language restricting absentee in-person voting and voter registration policies—and three days later it would become law.[81] The new bill eliminated same-day voter registration, preregistration for sixteen- and seventeen-year-old residents and out-of-precinct provisional ballot voting, in addition to reducing the number of days for in-person absentee voting from seventeen days to ten.[82] One hearing was held on the bill, in which only ten public comments

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[https://perma.cc/XZ3W-PYZV].

75. 133 S. Ct. 2612 (2013). Before *Shelby County*, the VRA required certain states, including South Carolina, to receive approval for any new election reforms from the Department of Justice or a federal court. *Id.* at 2615.

76. *McCrory*, 831 F.3d at 217-19.

77. *Id.*

78. William Wan, *Inside the Republican creation of the North Carolina voting bill dubbed the 'monster' law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html [https://perma.cc/XU53-CY2Q].

79. *See McCrory*, 831 F.3d at 216-18.

80. *Id.* at 227.

81. *Id.*

82. *Id.* at 216-18.

were allowed, and the House voted on passage two hours after the Senate.[83]

The State did itself no favors in presenting its case, clumsily providing partisan justifications that masked racial implications and demonstrated either incredible hubris or blissful ignorance.[84] Justifying the law's in-person absentee reforms, the State revealed what the court referred to as the closest thing to a "smoking gun as we are likely to see in modern times" when it admitted their concerns centered on additional weekend voting hours provided in counties that were disproportionately African American.[85] Further sinking the State's case, emails showed legislators specifically requesting data about the use of certain voting tools by racial minorities.[86] Combined, the court claimed the evidence "reveal[ed] the powerful undercurrents influencing North Carolina politics."[87]

The Fourth Circuit made clear the trial court had erred in using the *Anderson-Burdick* test to determine whether the law imposed an undue burden on voters enough to sustain a Section 2 challenge.[88] The court instead looked to the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp*. to determine if "circumstantial and direct evidence of intent" proved race was a "motivating factor," not just the "sole or . . . primary motive."[89] *Arlington Heights* provided a non-exhaustive list of factors the Fourth Circuit considered in determining whether racial intent was a motivating factor.[90] The rushed legislative process outlined above, combined with North Carolina's history of racially-motivated legislative actions and comments by legislators, was enough for the court to hold a racial intent existed.[91]

Next, the court examined the trial court's use of the Supreme Court's decision in *Thornburg v. Gingles* to evaluate the two prongs of the Section 2 test: (1) proving a discriminatory impact existed and (2) proving collective official policies were the cause.[92] *Gingles* also provided a non-exhaustive list to guide a court's review, which the Fourth Circuit used to hold that North Carolina's voter ID and certain other provisions violated Section 2.[93]

Finally, the court examined whether a difference truly existed between politically partisan intentions and racial discrimination when a law is facially

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83. *Id.* at 228.

84. *Id.*

85. *Id.* at 226.

86. *Id.* at 214-17, 219, 230.

87. *Id.* at 226.

88. *Id.* at 243.

89. *Id.* at 220-21, 223, 227-33 (citing 97 S. Ct. 555 (1977)).

90. *Id.* at 220-21. The nine factors are listed in Appendix A. Relevant in *McCrory* was the pace and process of the legislative actions, North Carolina's history of racially-motivated legislation, and comments made by legislators while debating the legislation.

91. *Id.* at 224-27.

92. *Id.* at 224-25, 234-35.

93. *See generally id.* These factors are also listed in Appendix A, but the Fourth Circuit pointed again to the comments by legislators and North Carolina's history with racially-motivated laws, including *Gingles* itself.

neutral, or if such laws erected what Justice Ginsburg referred to as "second-generation barriers."[94] The court found the legislation was not an "innocuous back-and-forth of routine partisan struggle" but rather a response to "unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting."[95] Ultimately, the court enjoined the challenged provisions of the law, including the changes to the voter ID law, holding that these provisions should be invalidated.[96]

2. Texas – Fifth Circuit.—As of the drafting of this Note, a second attempt in 2017 by Texas state lawmakers to enact voter ID legislation has been rejected in federal court, inching toward closure of a fight that is entering its sixth year.[97] In 2011, Texas enacted election reforms that required voters to present one of seven specific forms of identification when voting.[98] The new law allowed voters to obtain a free Election Identification Certificate (EIC) if they were unable to obtain one of the other approved forms of identification, but the case revealed that obtaining an EIC was not free for some voters.[99]

Plaintiffs claimed the law violated the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments and Section 2 of the VRA, arguing it created an undue burden and was racially motivated.[100] The State argued the new law would increase confidence in the election system and prevent in-person voter fraud.[101] The Fifth Circuit employed the *Gingles* factors to evaluate evidence of past and present racial discrimination in Texas and concluded a discriminatory impact, violating Section 2.[102] The Court remanded the case, highlighting examples it concluded should be given more weight and may help the lower court better determine whether a discriminatory intent in passing the law existed.[103] The lower court has since determined a discriminatory intent did in fact exist.[104]

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94. *See id.* at 220-21; Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting).

95. *See McCrory*, 831 F.3d at 226.

96. *Id.* at 239-41.

97. Jaweed Kaleem, *Federal judge tosses out Texas voter ID law supported by Trump administration*, L.A. TIMES (Aug. 23, 2017, 7:05 PM), http://www.latimes.com/nation/la-na-pol-texas-voter-id-20170823-story.html [https://perma.cc/8HA8-93XB]; Veasey v. Abbott, No. 2:13-CV-193, 2017 WL 3620639, at *1 (S.D. Tex. Aug. 23, 2017) (granting Section 2 remedies and terminating interim order). The Court ruled that recently-passed SB 5 did not completely ameliorate the effects of SB 14, the genesis of the 2011 suit. *Id.* at *7.

98. Veasey v. Abbott, 830 F.3d 216, 227 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); Alex Samuels, *Everything you need to know about voting in Texas*, TEX. TRIB. (May 12, 2017, 12:00 AM), https://www.texastribune.org/2017/05/12/everything-you-need-know-about-voting-texas/ [https://perma.cc/W82R-WCSM].

99. *Veasey*, 830 F.3d at 225-26.

100. *Id.* at 227.

101. *Id.*

102. *Id.* at 243-50.

103. *Id.* at 234-43.

104. *Veasey*, No. 2:13-CV-193, 2017 WL 3620639, at *1 (S.D. Tex. 2017) (granting Section

Comparing Texas's law to Indiana's, the Fifth Circuit noted that proponents of the Texas law "[cloaked] themselves in the mantle of following Indiana's voter ID law . . . [but they] took out all the ameliorative provisions of the Indiana law."[105] It recognized ballot integrity as a "worthy goal" but countered that the importance placed upon SB 14 by lawmakers could have been mistaken for an effort to address a "problem of great magnitude" instead of a response to two reported cases of in-person voter fraud out of twenty million votes cast.[106]

Delivering back-to-back blows to advocates of both laws, U.S. District Judge Nelva Gonzales Ramos ruled on remand from the Fifth Circuit that SB 14 was enacted with racial intent and that recently-passed SB 5 did not go far enough in ameliorating SB 14's impact on minorities.[107]

3. Wisconsin – W.D. Wis. (Seventh Circuit).—A challenge to Wisconsin's voter ID law and other provisions enacted in 2011 offered both sides of the voter ID debate helpful arguments.[108] The district court upheld Wisconsin's ID law but struck down the State's identification petition process (IDPP), which allowed voters to obtain a free ID for the purposes of voting but required a bureaucratic process the court determined imposed a "severe burden" on poor voters and racial minorities.[109] The district court sharply criticized Wisconsin's voter ID law, but acknowledged the controlling precedent set forth in *Crawford* and *Frank*.[110] The court took a hybrid approach in its analysis, using the *Anderson-Burdick* test to find some provisions unconstitutional while also finding a disparate burden existed on African Americans and Latinos via a Section 2 analysis.[111]

The plaintiffs produced data showing increased African American and Latino populations in larger cities such as Milwaukee and pointed to comments made by legislators attempting to stymie increased use of absentee in-person voting in Milwaukee.[112] The plaintiffs argued African Americans and Latinos were disproportionately impacted by the law and those burdens outweighed the State's justifications of preventing confusion, increasing fairness and uniformity, and

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2 remedies and terminating interim order).

105. *Veasey*, 830 F.3d at 239.

106. *Id.* at 238-39.

107. *Veasey*, 2017 WL 3620639, at *1-*2 (granting Section 2 remedies and terminating interim order). The Fifth Circuit held that a racially disparate impact existed but remanded the case for an examination of further evidence to determine whether the law was enacted based on racial intent. *See Veasey*, 830 F.3d at 272-73.

108. *See generally* One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896 (W.D. Wis. 2016).

109. *Id.* at 949, 960.

110. *Id.* at 903 ("To put it bluntly, Wisconsin's strict version of voter ID law is a cure worse than the disease. But I must follow *Frank* and *Crawford* and reject plaintiffs' facial challenge to the law as a whole.").

111. *Id.* at 950-52. This approach, as well as the arguments made by the challengers, provides a relevant analog to potential future claims challenging similar provisions of Indiana election law, discussed later in this Note.

112. *Id.* at 923-24.

saving counties money on administering elections.[113] The State also argued that no constitutionally-protected right existed for in-person absentee voting,[114] and the impact of racial discrimination resulting from local policies was not the State's responsibility.[115]

The court accepted the plaintiff's evidence of a racially-disparate impact of Wisconsin's one-location rule on African Americans and Latinos but held it did not violate the Fifteenth Amendment, reiterating that a "disparate impact alone is not enough to show intentional discrimination."[116] But statements made by legislators during consideration of the legislation provided enough evidence that such racial intent existed and the provision violated the First and Fourteenth Amendments and Section 2.[117] Referring to high turnout numbers during in-person absentee voting ("early voting") in Milwaukee and Madison, State Senator Grothman, a Republican, argued those cities needed to be "reined in" and "[he] want[ed] to nip [it] in the bud before too many other cities get on board."[118] Senate Majority Leader Scott Fitzgerald, also a Republican, explained the law was a direct response to constituents asking, "What is going on in Milwaukee?"[119]

Taken together, the comments by legislators plus data demonstrating a disparate impact, triggered some of the strongest criticism from the court:

> The acknowledged impetus for this law was the sight of long lines of Milwaukee citizens voting after hours. Yet instead of finding a way to provide more access to voters in small towns, the legislature responded by reining in voters in Milwaukee, the state's most populous city, where two-thirds of its African American citizens live . . . . The legislature's ultimate objective was political: Republicans sought to maintain control of the state government. But the methods that the legislature chose to achieve that result involved suppressing the votes of Milwaukee's residents, who are disproportionately African American and Latino. The legislature did not act out of pure racial animus; rather, suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve its political objective. But that, too, constitutes race discrimination.[120]

This passage connected the dots between effects and intent.[121] Wisconsin's

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113. *Id.* at 933-35.

114. *Id.* at 933.

115. *Id.* at 958 (quoting Frank v. Walker, 768 F.3d 744, 753 (2014) ("units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination.")).

116. *Id.* at 923-24 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).

117. *Id.* at 924-29.

118. *Id.* at 924.

119. *Id.*

120. *Id.* at 924-25.

121. *Id.*

law, and the Seventh Circuit's affirmation of it, further cemented the precedent of *Crawford*, but the same court has since presented some of the strongest evidence yet of the limits of *Crawford's* reach.[122]

4. North Dakota – D.N.D. (Eighth Circuit).—The North Dakota District Court charted a slightly different path when it granted injunctive relief to challengers of North Dakota's voter ID law.[123] At issue was the State's elimination of the "fail-safe" mechanism that allowed poll workers to vouch for a voter's identity, if challenged.[124] This mechanism was employed largely by Native Americans, who often lacked proper identification and the resources to obtain one, and who lived in smaller communities where poll workers were likely to recognize voters who showed up on Election Day.[125] The plaintiffs argued the law violated the Equal Protection Clause of the Fourteenth Amendment and Section 2.[126] The State argued the law was meant to raise public confidence in the electoral system and deter fraud.[127] It also argued the law was generally applicable and nondiscriminatory, a nod to *Crawford*.[128]

The court would examine the factors necessary to determine whether injunctive relief was appropriate: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."[129] The district court noted that none of the factors is dispositive on its own and must be weighed against the others.[130] Further, in cases where the government is the opposing party, the balance of the harm and the public interest are merged into one element.[131]

The court then looked to evidence provided by the plaintiffs to determine the level of burden placed on Native Americans:

- 23.5% of Native Americans currently lack valid voter ID, compared to only 12% of non-Native Americans.
- Only 78.2% of Native Americans have a North Dakota driver's license, compared to 94.4% of non-Native Americans.
- 47.7% of Native Americans who do not currently have a qualifying ID lack the underlying documents needed to obtain an acceptable

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122. *Id.* at 934-35 (providing a potential analog for a potential challenge in Indiana, discussed later in this Note).

123. *See generally* Brakebill v. Jaeger, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) (granting plaintiff's motion for preliminary injunction).

124. *Id.* at *1-2.

125. *Id.* at *7-9.

126. *Id.* at *3.

127. *Id.* at *11-13.

128. *Id.* at *4.

129. *Id.* at *3 (citing Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)).

130. *Id.* at *3 (citing Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994)).

131. *Id.* at *11 (citing Nken v. Holder, 556 U.S. 418, 435 (2009)).

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- Only 73.9% of Native Americans who lack a qualifying voter ID own or lease a car, compared to 88% of non-Native Americans; and 10.5% of Native Americans lack any access to a motor vehicle, compared to only 4.8% of non-Native Americans.[132]

For their part, the defendants provided no affidavits, declarations, surveys, studies, or exhibits in response to the request for injunctive relief.[133] The district court held an injunction was necessary because the public interest in protecting the right to vote for Native Americans outweighed the arguments provided by the State.[134] Further, the State had overstepped by eliminating something already exercised by Native Americans, especially when no evidence was provided that it would increase voter confidence or address voter fraud.[135]

B. Decisions Upholding State Voter ID Laws and Election Reforms

1. Virginia – Fourth Circuit.—In Virginia, challengers brought an unsuccessful facial challenge against the State's 2013 voter ID law, claiming constitutional and Section 2 violations.[136] Plaintiffs relied on expert witnesses, including an American History professor who detailed Virginia's history of racial discrimination; testimony from county officials about the difficulties contained in the voting process before and during the 2014 Election; stories from twelve voters who had difficulty voting (but were ultimately allowed to cast ballots); and Democratic Party officials who testified about the difficulty in educating certain groups of voters on the new voter ID law.[137] Another expert witness provided demographic and geospatial quantitative data to discern the actual number and make-up of voters who lacked adequate identification to vote.[138]

The Fourth Circuit acknowledged it was in a similar position as the court in *Crawford*, judging slim evidence based largely on the experiences of a handful of voters against the broad justification given by the State to protect election integrity.[139] Despite borrowing from *Crawford* to examine a claim brought under Section 2, the court held the challengers failed to establish a disparate impact.[140]

Five months after overturning North Carolina's voter ID law, the Fourth

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132. *Id.* at *4.

133. *Id.*

134. *Id.* at *10.

135. *Id.* If this holding stands, it could prove helpful to challengers in Indiana to other provisions in Indiana election code discussed later in this Note.

136. *See generally* Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016).

137. Lee v. Va. State Bd. of Elections, 188 F.Supp.3d 577, 582 (E.D. Va.), *aff'd* 843 F.3d 592 (4th Cir. 2016).

138. *Id.* at 598.

139. *Lee*, 843 F.3d at 606-07.

140. *Id.* at 600-01.

Circuit upheld Virginia's law against constitutional and Section 2 challenges.[141] The court was mindful of the inferences that might result from two contrasting decisions on the same contentious issue in the same year.[142]

First, the Fourth Circuit noted the evidence provided by plaintiffs at trial in *Lee* closely mirrored that of *Crawford*, frustrating any attempt to perform a Section 2 or constitutional *Anderson-Burdick* analysis.[143] In *McCrory*, the court acknowledged that plaintiffs provided "abundant support" for their claims, but found the arguments presented by plaintiffs in *Lee* made an "unjustified leap" from arguing "disparate inconveniences" to the denial or abridgement of the right to vote.[144]

Second, the Fourth Circuit examined, and to a certain degree accepted, arguments that Virginia's law threaded the needle between those laws found unconstitutional and those upheld by the courts.[145] Drawing a contrast to the decisions in North Carolina and Texas, the State argued Virginia's law differed in "adoption, implementation, and operation" from both states and noted that the Department of Justice led the challenges against both states' while choosing not to challenge Virginia's law.[146] In addition, the State claimed Virginia's law was "more lenient" than Indiana's—an argument the court would find convincing.[147] In upholding Virginia's law against a facial and as-applied challenge, the Fourth Circuit distinguished the law from Indiana's, finding the arguments that "support[ed] the greater burden imposed on voters in *Crawford*" sufficient to justify the "lighter burdens imposed on Virginia voters."[148]

2. Ohio – Sixth Circuit.—The Sixth Circuit currently has multiple appeals to election cases pending before it, but two cases in particular, *Ohio Democratic Party v. Husted ("ODP")* and *Northeast Ohio Homeless Coalition v. Husted ("NEOCH")*, are important to reexamining *Crawford* and assessing its longevity.[149] Spanning seven years of litigation, *NEOCH* challenged changes to Ohio's provisional and absentee ballot laws, specifically additional information and technical requirements, a reduction in the period to cure a voter's lack of ID after the election from ten days to seven, and limits on ways by which poll workers could aid a voter lacking an ID.[150] The Sixth Circuit rejected the

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141. *Id.* at 610.

142. *Id.* at 603.

143. *Id.* at 605-07.

144. Lee v. Va. State Bd. of Elections, 188 F.Supp.3d 577, 600-01 (E.D. Va. 2016), *aff'd* 843 F.3d 592 (4th Cir. 2016); *see also* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 228-31 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

145. *Lee*, 188 F.Supp.3d at 603-04, 606-07.

146. Brief of Appellees at 3-4, *Lee*, 843 F.3d 592 (No. 16-1605), 2016 WL 4204519.

147. *Id.* at 3.

148. *See Lee*, 843 F.3d Supp. at 607.

149. *See generally* Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016); *see also* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017).

150. *Husted*, 837 F.3d at 619, 654-55. The recognition of unjustified technical perfection

argument the reforms violated Section 2, pointing to a lack of evidence showing the changes had much effect at all.[151] The court did, however, find the requirements "mandating technical precision" in the address and birthday fields of the absentee ballot envelope to have a great impact on a small set of voters, outweighing the interests of the State.[152]

In *ODP*, the Sixth Circuit heard a facial challenge to a statute reducing the number of days available for in-person absentee voting in Ohio.[153] In reversing the trial court's finding for plaintiffs, the court took issue with the trial court's reliance on a vacated Sixth Circuit decision in *Ohio State Conference of the NAACP v. Husted* rather than *Crawford*.[154] In doing so, the trial court had "resuscitated reasoning at odds with the holding of *Crawford* . . . ignor[ing] a fundamental of our 'hierarchical judicial system,' which precludes a lower court from 'declar[ing] a statute unconstitutional just because [it] thinks . . . that the dissent was right and the majority wrong.'"[155] Similar to the Fourth Circuit's determination in *Lee*, the Sixth Circuit pointed to *Crawford* as providing precedential cover because the Supreme Court upheld a greater burden in that case than the burden presented in *ODP*.[156]

IV. RE-EVALUATING *CRAWFORD* AND INDIANA'S VOTER ID LAW IN LIGHT OF RECENT DECISIONS

Combined, the cases outlined in this Note show the broad deference provided to *Crawford* and Indiana's voter ID law.[157] Indiana's law provided the mold for courts to look to in examining future challenges, but the decisions discussed provide evidence that Indiana's reliance on its provisional ballot safeguard remains vulnerable to a constitutional challenge.[158] The remainder of this Note will discuss how this provision might be challenged given these recent decisions, as it combines with other provisions in Indiana election law to create a "panoply of restrictions" for many voters.[159]

The decisions in *Veasey*, *McCrory*, and *One Wisconsin* provide important, post-*Crawford* examples of the shift in application by the courts of the *Anderson-Burdick* test.[160] Substantial data provided by the plaintiffs was given more

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requirements that are outweighed by the burden they impose could be an important argument in a challenge to Indiana's current provisional ballot process.

151. *Id.* at 627-628.

152. *Id.* at 632.

153. *See generally Ohio Democratic Party*, 834 F.3d 620.

154. *Id.* at 635.

155. *Id.* (quoting Frank v. Walker, 768 F.3d 744, 750 (7th Cir. 2014)).

156. *Id.* at 630-32 ("[T]he Supreme Court in *Crawford* rejected an analogous challenge to an undeniably more burdensome law . . . .").

157. *See supra* Part III.

158. *Id.*

159. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 231 (4th Cir. 2016).

160. *See supra* Part III.

consideration in determining the level of burden on voters, shifting focus then to the states' justifications for the laws.[161] As a result, the second and third steps of the *Anderson-Burdick* test have become actual exercises of judicial review and balancing, methodically performed rather than foreclosed upon shortly after the conclusion of step one.[162] It's in these two steps that a successful as-applied constitutional challenge could be brought against Indiana's use of provisional ballots and post-election requirements.[163]

A. Indiana's Provisional Ballot Process and Post-Election Verification Requirements

In the 2016 General Election, 507 provisional ballots were cast in Marion County, which encompasses Indianapolis, but only sixty of those ballots were counted.[164] Thirty-seven provisional ballots were cast because the voter lacked a valid ID, and only five voters completed the verification process at the clerk's office and had their votes counted.[165] Justice Souter warned in *Crawford* that Indiana's provisional ballot process "[did] not amount to much relief," because it offered an "inadequate" option.[166] He concluded it imposed "nontrivial economic costs" and "a significant number of state residents will be discouraged or disabled from voting."[167]

Any number of factors could lead a poll worker to require a voter cast a provisional ballot.[168] A voter may put themselves in such a situation for any number of reasons: forgetting, losing, or having their ID stolen with no time to obtain a new one; moving to a new precinct during the twenty-nine days before an election when voter registration is closed; or deciding to participate in the opposing party's primary.[169] These reasons, which Justice Stevens termed "life's vagaries," were "neither so serious nor so frequent" as to render Indiana's voter ID law unconstitutional, adding that a provisional ballot offered recourse in such

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161. *Id.*

162. *Id.*

163. *Id.*

164. *See infra* Appendix B (containing a copy of Marion County's 2016 General Election CEB, used to provide final counts to the Indiana Election Division).

165. Email from Jenny Troutman, Deputy Dir., Marion Cty. Election Bd., to Ryan Mann, J.D. Candidate, Robert H. McKinney School of Law (Mar. 16, 2017, 4:03 PM). The Marion County Election Board noted for its records the reasons provisional ballots were cast and provided this number upon request).

166. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 216-17 (2008) (Souter, J., dissenting).

167. *Id.* at 221.

168. IND. CODE § 3-11.7-2-1 (2017).

169. *See generally id.* During my tenure at the Indiana Election Division, I fielded and responded to calls in the run up to three elections from individuals who were afraid a minor mistake or unfortunate circumstance might result in their vote not being counted. When the post-election verification process was explained, the voters often became exasperated and upset.

situations.[170]

Depending on the judgment of underpaid and undertrained election officials, a voter may be required to vote a provisional ballot.[171] The process can prove to be a labyrinth of bureaucracy more than an exercise in democracy.[172] A voter unable or unwilling to provide a photo ID is challenged using a PRE-4 Challenged Voter's Affidavit form before they are allowed to sign a poll book.[173] The information printed on the PRE-4 is then transmitted to a PRO-2 Security Envelope and initialed by a poll clerk of both major political parties.[174] The voter is then provided the PRO-9 Instructions to a Provisional Voter, which informs them they must report to the county clerk's office before the following Friday and complete a PRO-10 Affidavit of Challenged Voter Concerning Proof of Identification Requirement.[175] At that point, when the county election board meets following the election to examine provisional ballots, the voter's ballot will be counted.[176]

If a voter completes a provisional ballot, but fails to report to the clerk's office to complete a PRO-10, the process stops; the county election board will not open the security envelope and the voter's vote is not counted.[177] Indiana code allows county election boards to open the security envelope and perform due diligence to determine whether the ballot should be counted except in one circumstance: the voter's inability or refusal to provide a valid ID.[178]

B. A Potential Challenge to the Provisional Ballot Remedy of Indiana's Voter ID Law

The plaintiffs in *Crawford* were unable to accurately quantify the burden the law placed on certain voters, but elections since show the tangible results.[179]

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170. *See Crawford*, 553 U.S. at 197-98.

171. Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias,* 15 MICH. J. RACE & L. 1, 37 (2009) ("[A] poll worker makes generally unreviewable and unevaluated decisions, and rarely has the opportunity to learn from mistakes. A poll worker who decides to prevent a prospective voter from casting a ballot is unlikely to learn whether this was the correct decision.").

172. *See generally* IND. CODE § 3-11.7-2-1; IND. SEC'Y OF STATE & IND. ELECTION DIV., 2016 INDIANA ELECTION DAY HANDBOOK 18 (Apr. 2016), *available at* https://www.in.gov/sos/elections/files/2016_Election_Day_Handbook.FINAL.pdf [https://perma.cc/9QRZ-3BJQ] [hereinafter IND. ELECTION DAY HANDBOOK].

173. IND. ELECTION DAY HANDBOOK, *supra* note 172, at 18.

174. *Id.*

175. *Id.*

176. IND. CODE § 3-11.7-5-2.5(a)-(d).

177. *Id.* § 3-11.7-5-2.5(f).

178. *Id.* § 3-11.7-5-4; IND. ELECTION DAY HANDBOOK, *supra* note 172, at 18.

179. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200 (2008); *see supra* Part III; *see infra* Appendix B (containing a copy of Marion County's 2016 General Election CEB, used to provide final counts to the Indiana Election Division).

Justice Stevens held that voter fraud was real and its effects could determine the outcome of an election.[180] A challenge to Indiana's provisional ballot process could argue that restrictive measures enacted in the name of election protection resulted in the disenfranchisement of thousands of voters, potentially determining the outcome of elections, thus weakening the very system it sought to protect.[181] Under the *Anderson-Burdick* test, a challenge to Indiana's provisional ballot process brought by indigent voters, African Americans, or Latinos, could find successful playbooks in recent court decisions.[182] For instance, the "technical precision" rejected by the Sixth Circuit in Ohio's absentee and provisional ballot reforms exists in Indiana, except Indiana goes further by making such a determination subjective rather than objective.[183] The determination of whether to count a technically imperfect but otherwise valid vote rests with the inspector of a precinct.[184] Ohio sought to subject a legal voter's ability to exercise their most fundamental right as an American to a binary decision spelled out in law.[185] By contrast, Indiana subjects a similar voter's right to the discretion and determination of another voter.[186]

Further, a potential challenge to Indiana's absentee ballot law could look to *Veasey* to build a case based on examples of actual injuries and data showing the average travel times of indigent voters and racial minorities based on census tract data, public transportation schedules, and mapping technology.[187] Although the Fifth Circuit decided *Veasey* on Section 2 grounds, it determined that the evidence demonstrated an "excessive burden[]" on poor and minority voters; a burden that could be argued is equally excessive to similar voters in Marion County.[188] *McCrory* offers potential challengers a checklist of data points shown to have persuaded the Fourth Circuit to find a racially-disparate impact existed to the extent that it constituted intentional discrimination on the basis of race, violating both the Fourteenth Amendment and Section 2.[189]

If challengers prove either an "excessive" or "disparate" burden on certain voters, they shift the burden to the State to demonstrate sufficient reasons for justifying the burdens imposed.[190] The cases discussed in this Note suggest a reevaluation of Indiana's voter ID law may find Justice Scalia's concurrence

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180. *See Crawford*, 553 U.S. at 196.

181. *See generally id*.

182. *See supra* Part III.

183. Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 637 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017); *see* IND. CODE § 3-11-10-17(a).

184. IND. CODE § 3-11-10-17(a).

185. *See generally Husted*, 837 F.3d at 631-35.

186. *See* IND. CODE § 3-11-10-17(a).

187. Veasey v. Abbott, 830 F.3d 216, 250-51 (5th Cir. 2016).

188. *Id.* at 253-54.

189. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 230 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

190. *See generally Veasey*, 830 F.3d 216; *see generally McCrory*, 831 F.3d 204.

prescient and more applicable.[191] Justice Souter was unwilling to provide the same deference as the majority did to the State's argument of fraud prevention to justify a post-election process to verify a voter's identity, and chose instead to lift the curtain and scrutinize its justification.[192] Although he would ultimately acquiesce to the notion that election integrity is paramount, he concluded the State's argument "failed" because it "in no way necessitate[ed] the particular burdens."[193] He further noted that the justification backfired by recognizing that the number of voters impacted was not insignificant.[194]

The Fifth Circuit in *Veasey* acknowledged the importance of protecting the integrity of elections but clarified that such a defense had proven successful against facial challenges but had not yet been tested in an as-applied challenge.[195] In fact, the Fifth Circuit even noted that the Seventh Circuit had since recognized the burdens of indigent voters and the potential need for an exception.[196]

The Fourth Circuit took on the State's argument of fraud prevention in *McCrory* but distinguished it from *Crawford*; the former being a claim of intentional race discrimination, the latter a facial challenge claiming undue burden.[197] Instead of measuring the demonstrated burdens against the State's precise justifications, the court sought to determine whether the law would have been passed regardless of whether it had a disproportionate impact on African Americans.[198] It concluded racial discrimination was a but-for cause of the legislature's reforms, because the problem the party in control "sought to remedy was emerging support for the minority party," and chose racially-motivated means to those ends.[199]

In defense of Indiana's post-election affirmation window, proponents may point to the availability of absentee voting by mail as an alternative, but limitations on who may vote absentee by mail disqualify it as a meaningful recourse.[200] In fact, the Fifth Circuit held that voting absentee by mail "is not an acceptable substitute" for voters lacking sufficient ID, calling Texas's absentee system "complex" and unable to be performed "last minute."[201]

As noted earlier, the Seventh Circuit foreshadowed the potential for an as-applied challenge by indigent voters in Indiana, and the cases discussed provide additional precedent.[202] In short, Indiana's post-election verification process

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191. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204-08 (2008) (Scalia, J., concurring).

192. *Id.* at 225-30.

193. *Id.* at 232.

194. *Id.* at 233.

195. *Veasey*, 830 F.3d at 249.

196. *Id.* (citing Frank v. Walker, 819 F.3d 384, 385-88 (2014)).

197. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016).

198. *Id.* at 235-36.

199. *Id.* at 238.

200. *See generally* IND. CODE § 3-11-10-24 (2017).

201. *See Veasey*, 830 F.3d at 255.

202. *Id.* at 249 (citing Frank v. Walker, 819 F.3d 384, 386-87 (2014)).

places a significant burden on some voters, without much justification.[203] The process provides false hope in the form of a provisional ballot and an affirmation procedure that presents at least a moderate burden on particular voters.[204]

C. Alternative Approaches

By making a few modifications, the State could ensure its provisional ballot process is fair and does not result in disenfranchisement.

1. Recommendation: Open the Envelope.—Currently, county election boards are prohibited from opening the security envelope containing a provisional ballot that was cast because of a lack of valid ID and assessed like other provisional ballots.[205] By mandating that all envelopes containing a provisional ballot be opened and treated equally, the State could strike an appropriate balance between verifying a voter's identity and protecting against the true fraud voter ID laws seek to prevent: in-person voter impersonation.[206]

2. Recommendation: Allow Supplemental Documents to Be Used to Prove Identity.—Currently, clerks and poll workers are instructed to require a photo of each voter.[207] If supplemental documentation by a new voter who registered online or by mail can be used to verify their identity, the State should make that unequivocally clear to poll workers and election boards, and it should allow those same documents to serve in place of a valid photo ID.

3. Recommendation: Eliminate Expiration Date Requirement and Accept Additional State-Issued IDs under the Definition of "Valid Photo ID".—The State allows for two exceptions to the expiration date requirement on a valid voter ID: (1) those with IDs issued by the Departments of Defense or Veterans Affairs or (2) issued by a uniformed services branch, Merchant Marine, or Indiana National Guard.[208] Further, a voter's ID that has expired between the last general election and the next election may also be used.[209] By allowing some expired IDs, the State at least partially concedes the expiration of the ID is not determinative of a voter's identification or eligibility to vote in that election.[210] For the purposes of verifying a voter's identity and voting address, the State should allow state-issued IDs provided by Indiana's public institutions, including universities and hospitals, as well as IDs issued to state employees, to serve as a valid photo ID.

4. Recommendation: Allow Verification by Email or Fax.— To remedy the burden of having voters who completed a provisional ballot report to the clerk's office after the election, the State should allow voters to email or fax a copy of

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203. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 217 (2008) (Souter, J., dissenting).
204. *Id.*
205. IND. CODE § 3-11.7-5-4.
206. Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 953 (7th Cir. 2007).
207. *See* IND. ELECTION DAY HANDBOOK, *supra* note 172, at 8-13.
208. *Id.* at 8.
209. IND. CODE § 3-5-2-40.5.
210. *Id.*

their ID to the clerk's office to verify their identity.[211] Currently, absentee ballot applications and some ballots are permitted to be sent via both mediums, making it difficult to credibly argue against allowing them for identity verification.[212]

V. WHAT'S NEXT: OTHER PROVISIONS IN INDIANA ELECTION LAW VULNERABLE TO CHALLENGES AFTER 2016

In addition to Indiana's provisional ballot and post-election verification process, other provisions of Indiana's election law could face challenges given the decisions discussed, including the State's in-person and by-mail absentee processes.[213] It is important to highlight these provisions because they are presented as viable alternatives to voters lacking a valid ID, but in reality they contribute to a "panoply of restrictions [that] results in greater disenfranchisement."[214]

A. Challenging Indiana's Absentee by Mail Process

To receive an absentee ballot by mail, a voter must attest *under penalty of law* that one of the following circumstances prevents them from voting in-person on Election Day:

> [1] I have a specific, reasonable expectation of being absent from the county on election day the entire 12 hours that the polls are open[,] [2] I will be confined to my residence, a health care facility, or a hospital due to illness or injury during the entire 12 hours that the polls are open[,] [3] I will be caring for an individual confined to a private residence due to illness or injury during the entire 12 hours that the polls are open[,] [4] I am a voter with disabilities[,] [5] I am a voter at least 65 years of age[,] [6] I will have official election duties outside of my voting precinct[,] [7] I am scheduled to work at my regular place of employment during the entire 12 hours that the polls are open[,] [8] I am unable to vote at the polls in person due to observance of a religious discipline or religious holiday during the entire 12 hours the polls are open[,] [9] I am a voter eligible to vote under the "fail-safe" procedures in IC 3-10-11 or 3-10-12[,] [10] I am a member of the military or a public safety office[,] [11] I am a "serious sex offender[,]" [or] [12] I am prevented from voting due to the unavailability of transportation to the polls.[215]

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211. Lee v. Va. State Bd. of Elections, 843 F.3d 592, 594 (4th Cir. 2016).

212. IND. CODE § 3-11-4-6; § 3-11-10-1.

213. *Id.* § 3-11-10-26; § 3-11-10-24; *see also* Dave Stafford, *Common Cause, NAACP sue over Marion County early voting*, IND. LAW. (May 2, 2017), https://www.theindianalawyer.com/articles/43598-common-cause-naacp-sue-over-marion-county-early-voting [https://perma.cc/CYN2-A97B] (an as-applied challenge to Indiana's in-person absentee law on May 2, 2017, on state and federal law claims, including 14th Amendment and Section 2).

214. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 231 (4th Cir. 2016).

215. IND. CODE § 3-11-10-24 (emphasis added); *see* Application for Absentee Ballot by Mail

If a voter who wishes to vote by mail does not qualify but selects a reason anyway, the form makes clear the consequences for perjury: up to two-and-a-half years in prison, a fine of up to $10,000, or both.[216] As evidenced by the number of provisional ballots actually counted in 2016, "life's vagaries" have become so frequent that the process warrants additional scrutiny.[217] Unfortunately, a voter who cannot claim one of the permitted excuses has two options: vote absentee in-person or vote at their polling location on Election Day.[218]

The State would likely argue that voters have a month to vote absentee in person or to request an absentee ballot by mail should a permitted excuse apply, and it would likely add that it is not obligated to do more because absentee voting is a privilege, not a right.[219] Defendants in *One Wisconsin* argued there is no constitutional right to absentee voting, but the district court accepted the plaintiffs' argument that once a state chooses to provide a privilege of absentee voting, it must provide it "evenhandedly."[220] The court determined that an allegation that unequal application of a right to exercise one's right to vote implicated that voter's constitutional rights and warranted review.[221]

During the 2016 general election, some voters in Marion County were prevented from voting before 10:00 AM because an election judge did not show up to one precinct, an election inspector demanded to account for all absentee ballots cast in another precinct before allowing anyone to vote in person, and doors to another polling location were locked.[222] As a result, they were unable to vote or required to vote a provisional ballot.[223] If those voters did not meet one of the reasons allowed to vote by mail, were unable to make the trip to Marion County's one in-person absentee voting location (or were deterred by its hours-

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Only in 2016 (Form ABS-MAIL), *available at* http://in.gov/sos/elections/2402.htm [https://perma.cc/U28U-8D7M] (last visited Feb. 8, 2017) [hereinafter Form ABS-MAIL].

216. Form ABS-MAIL, *supra* note 215.

217. *General Election Turnout and Registration*, http://www.in.gov/sos/elections/files/2016_General_Election_Turnout.pdf [https://perma.cc/RY28-YAWA] (last visited Dec. 27, 2017); *see* Marion County CEB-9 Form, *infra* Appendix B*;* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197-98 (2008).

218. IND. CODE § 3-11-10-26.

219. *Id.*; *see* Blue v. State *ex rel.* Brown, 188 N.E. 583, 589 (Ind. 1934) ("It is for the Legislature to furnish a reasonable regulation under which the right to vote is to be exercised, and it is uniformly held that it may adopt registration laws if they merely regulate in a reasonable and uniform manner how the *privilege* of voting shall be exercised.") (emphasis added).

220. One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896, 933 (W.D. Wis. 2016).

221. *Id.*

222. For the 2016 General Election, I assisted the Indiana Democratic Party in its election protection efforts, which used the Democratic National Committee's voter protection software program. Reports of problems from across the state were logged by volunteers, allowing party officials and election protection volunteer attorneys to respond and provide help, when possible. Those listed here are a small sample of situations that prevented some people from voting.

223. *Id.*

long lines), they were prevented from voting through no fault of their own.[224] The bureaucratic stars had aligned against them; they had been disenfranchised.[225] Evidence detailing the frequency of such disenfranchisement creates a compelling case for a challenge to seemingly separate yet connected provisions of Indiana election law that create an undue burden resulting in the abridgement or denial of many voters' constitutional right to vote.[226]

"No-excuse" absentee voting by mail, meaning any legal voter may choose to vote by mail without providing a reason, could prevent complete disenfranchisement from occurring by allowing any voter to vote by mail, if they choose, for a full month before Election Day.[227]

B. Challenging Indiana's In-Person Absentee Voting Process

For twenty-eight days prior to an election, a voter in Indiana may cast an absentee ballot in person.[228] Counties are required to provide this opportunity at the county clerk's office and may provide additional satellite locations.[229] To the 19,482 registered voters in Adams County in 2016, one location for in-person absentee voting before the election may seem adequate, but the county provided four satellite locations in addition to the clerk's office in 2016.[230] Combined with absentee by-mail ballots, 46% of the 13,463 ballots cast in Adams County were cast before Election Day.[231] Seven total voting locations were provided in Johnson County—six satellite locations and the county clerk's office—contributing to absentee ballots comprising 56% of the 67,754 votes cast.[232] Consequently or not, turnout in Adams and Johnson Counties reached 69% and 63%, respectively.[233]

For the 699,709 registered voters in Marion County in 2016, the right to vote absentee in person remained the same as voters in other counties, but the level of access certainly did not.[234] Marion County operated just one location for in-person

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224. Robert King, *Voting early? How about a 5-hour wait?,* INDYSTAR (Nov. 5, 2016, 8:40 PM), http://www.indystar.com/story/news/politics/2016/11/05/voting-early-how-5-hour-wait/93245598/ [https://perma.cc/U952-P5R4].

225. *Id.*

226. *See* Marion County CEB-9 Form, *infra* Appendix B.

227. IND. CODE § 3-11-10-24 (2017).

228. *Id.* § 3-11-10-26(g).

229. *Id.*

230. *General Election Turnout and Registration*, *supra* note 217; Adams County Clerk, *Where to Vote: Adams County Vote Centers*, http://www.co.adams.in.us/DocumentCenter/Home/View/2368 [https://perma.cc/WJ8T-LXAX] (last visited Dec. 27, 2017).

231. *General Election Turnout and Registration*, *supra* note 217.

232. *Id.*; Johnson County Voter Registration, 2016 Johnson County Vote Center Flyer, *available at* http://www.pageafterpage.org/clientuploads/community%20info/2016-General-VC-Flyer-2.pdf [https://perma.cc/L4QC-23HH] (last visited Feb. 8, 2017).

233. *General Election Turnout and Registration*, *supra* note 217.

234. *Id.*

absentee voting: the one required by law.[235] The result was 68,599 votes cast by absentee ballots, or 19% of the ballots cast, and a total turnout of 53%.[236] By contrast, three total in-person absentee voting locations were provided to Marion County voters during the 2008 general election, in which 93,316 absentee ballots were cast, comprising 24% of the total vote.[237]

Marion County had only one location to serve nearly 700,000 voters because Indiana's election code requires the unanimous approval of a county's three-person election board to approve satellite in-person voting locations.[238] One member of the Marion County Election Board voted no on the resolution offered to provide two additional satellite locations in 2016.[239] By voting against allowing satellite locations—after previously supporting them—one member of the election board, a Republican, ensured Marion County would not likely reach the record participation of the 2008 election.[240]

Given the recent decisions in the cases discussed in this Note, Indiana's satellite voting location approval process could fail a constitutional or Section 2 challenge.[241] Alternatively, *Brakebill* suggests injunctive relief may provide a bridge to permanent relief for challengers who argue irreparable harm of complete disenfranchisement against a decidedly hollow defense by the State.[242] As discussed earlier, *Veasey* provides an example of how challengers can connect data points to portray the real effects restrictive election laws have on poor voters and racial minorities.[243] Similarly, *One Wisconsin* and *Brakebill* provide almost direct analogs, in which opportunities previously provided to voters were eliminated and data proved a disparate treatment of certain classes of voters compared to the general voting population.[244] To illustrate how important the disposition of *One Wisconsin* could be to a potential challenge in Indiana, Milwaukee County's population is 27.1% African American and 14.5% Hispanic or Latino.[245] Marion County's population is 28.0% African American and 10.0%

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235. Matthew Tully, *In Indy, politics gets in the way of early voting,* INDYSTAR (Nov. 2, 2016, 8:19 PM), http://www.indystar.com/story/opinion/columnists/matthew-tully/2016/11/02/tully-indy-politics-gets-way-early-voting/93165910/ [https://perma.cc/5CB4-727X].

236. *General Election Turnout and Registration*, *supra* note 217.

237. *General Election Turnout and Registration*, http://www.in.gov/sos/elections/2008_Municipal_Registration_and_Turnout.pdf [https://perma.cc/CP8X-YT35] (last visited Feb. 8, 2017).

238. IND. CODE § 3-11-10-26.3 (2017); Tully, *supra* note 235.

239. Tully, *supra* note 235.

240. *Id.*

241. *See supra* Part III.

242. *See generally* Brakebill v. Jaeger, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. 2016) (granting plaintiff's motion for preliminary injunction).

243. *See generally* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

244. One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896 (W.D. Wis. 2016); *Brakebill*, 2016 WL 7118548 (granting plaintiff's motion for preliminary injunction).

245. *Quick Facts: Milwaukee County, Wisconsin*, U.S. CENSUS BUREAU, http://www.census.

Hispanic or Latino.[246]

By requiring a unanimous vote of county election boards to approve satellite voting locations, the State has effectively required a county to only provide one location, aligning it squarely with *One Wisconsin*.[247] By couching the ability of counties to allow satellite locations in the veto authority of one person—one party—the State has exposed itself to allegations it has permitted counties to use unconstitutional, racially-discriminatory means to achieve otherwise constitutionally-permissible political ends.[248] A challenge to Indiana's satellite voting process may reveal that such a partisan safeguard constitutes the type of "second-generation barrier" Justice Ginsburg warned of in *Shelby County*.[249]

Indiana code allows county election boards to make a number of decisions by majority, including whether or not to reject a voter's provisional ballot, and the same should hold true for providing satellite voting locations.[250] Further, if a county has provided satellite locations in the past, it should be precluded from being able to decrease the number allowed without providing a reasonable justification.[251]

CONCLUSION

Indiana's reliance on provisional ballots as adequate recourse for voters could be challenged as mounting data shows the outcome-determinative frequency of its use.[252] To rectify the policy that has disenfranchised thousands of voters, the State should take action to: (1) require county election boards to open all provisional ballot envelopes and examine them regardless of the reason they were cast; (2) allow additional documentation to satisfy the ID requirement and clarify the process for election workers; (3) eliminate the expiration date as a requirement for voter IDs; and (4) allow voters to verify their identity via email and fax.[253]

Finally, to expand access to voting and prevent disenfranchisement, the State should (1) provide no-excuse absentee voting by mail and (2) allow county

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gov/quickfacts/table/RHI225215/55079 [https://perma.cc/B8JQ-798F] (last visited Feb. 8, 2017).

246. *Quick Facts: Marion County, Indiana*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/18097 [https://perma.cc/6LD4-G9UH] (last visited Feb. 8, 2017).

247. *See One Wis. Inst., Inc.*, 198 F.Supp.3d 896.

248. *See e.g.,* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) ("Even if done for partisan ends, [the law] constituted racial discrimination.").

249. Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2634-35 (2013) (Ginsburg, J., dissenting).

250. IND. CODE § 3-11.7-5-1.5 (2017).

251. *Id.* § 3-11-10-26.3.

252. *See infra* Appendix B (containing a copy of Marion County's 2016 General Election CEB, used to provide final counts to the Indiana Election Division).

253. *See supra* Part V; § 3-5-2-40.5 (proof of identification); § 3-11-4-6 (applications and ballots); § 3-11-10-1 (voter affidavit); IND. ELECTION DAY HANDBOOK, *supra* note 172.

election boards to approve additional satellite early voting locations by a majority rather than unanimous vote.[254] The cases outlined in this Note reveal the evolving approach of courts, from near complete deference to justifications of fraud prevention, to skepticism and deeper examinations of the evidence and arguments.[255] *Crawford* validated Indiana's voter ID law and has weathered many subsequent tests, but a decade removed, evidence and experience have exposed deep flaws which may prove Indiana's voter ID to be more gilded than golden.[256]

254. § 3-11-10-24.

255. *See e.g.,* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214, 233 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) ("Thus the asserted justifications cannot and do not conceal the State's true motivation . . . . Even if done for partisan ends, [the law] constituted racial discrimination.").

256. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

Appendix A

Constitutional and Section 2 VRA Tests to Voting Laws

Fourteenth Amendment Equal Protection Challenge[257]
***Anderson-Burdick* Test**

(1) Determine the extent of the burden imposed by the challenged provision
   (a) If the burden imposed is "**severe,"** then strict scrutiny will apply, requiring the law to be narrowly tailored to a compelling interest.
   (b) A burden deemed **"reasonable and nondiscriminatory"** requires the State to show only an "important regulatory interest."

(2) Evaluate the interest that the state offers to justify that burden

(3) Judge whether the interest justifies the burden

Fourteenth and Fifteenth Amendments Racially-Discriminatory Intent Challenge[258]

Arlington Heights Test

Prove whether **"invidious discriminatory purpose"** was a **"motivating factor"** based on **"*circumstantial* and direct evidence of intent."**

Factors courts may consider:
(1) The historical background of the challenged decision,
(2) The specific sequence of events leading up to the decision,
(3) Departures from normal procedural sequence
(4) The legislative history of the decision
(5) The disproportionate impact of the official action—whether it bears more heavily on one race than another.

257. *See generally id*.
258. *See generally McCrory*, 831 F.3d 204.

Section 2 Voting Rights Act Challenge[259]
Gingles Factors

The Seventh Circuit has employed a two-prong inquiry for reviewing Section 2 challenges, requiring the law to be judged under the **"totality of the circumstances."**

(1) The challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice; and
(2) That burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.
(3) The 7th Circuit cautioned that "§ 2(a) does not condemn a voting practice just because it has a disparate effect on minorities"
(4) "It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command."

Gingles factors courts may use when looking at the "totality of the circumstances" to decide each prong of the test:

(1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
(2) The extent to which voting in the elections of the state or political subdivision is racially polarized;
(3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
(4) If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
(5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
(6) Whether political campaigns have been characterized by overt or subtle racial appeals;
(7) The extent to which members of the minority group have been elected to public office in the jurisdiction.

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259. *See generally* One Wis. Inst., Inc. v. Thomsen, 198 F.Supp.3d 896 (W.D. Wis. 2016).

(8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
(9) Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Appendix B

CEB 9 Summary

Marion County

REGISTRATION AND TURNOUT:

1. Number of registered voters in **county** at close of registration for this election: 699982
2. If the election was held only in part of the county, the number of registered voters in that part of the county at close of registration for this election 0
3. Number of voters voting *in person at the polls*: 301899
4. Number of all voters voting *absentee*: 68599
5. Number of Rejected Returned, Domestic Absentee Ballots: 362
6. Total number of voters who voted in this election (should equal #3 + #4): 370498
7. The combined total number of absentee ballots sent by county to military and overseas: 1697
8. Total number of ballots in #7 returned by voters: 1300
9. Total number of ballots in #8 counted: 1300

ELECTION BUDGET AND EQUIPMENT:

10. BUDGETED cost for this election. Estimate if necessary: $2,250,000.00
11. Name the voting system vendor and model # for each system used by the county in this election. Fill in all that apply:

Voting System	System Vendor	System Model Numbers
Optical scan ballot	ES&S	DS200; DS850; ExpressVote

ENCLOSURES:

12. Describe any malfunction or other problem with your voting system during the election.
    NONE

    If you will be sending additional information on the malfunctions to IED, how will it be sent? No malfunction

13. How will Canvasser sheets (official election results by precinct) be sent to IED? Electronic Mail
14. How will you be sending the number of registered voters for each precinct in the county to IED? Electronic Mail

15. Please enter the name, title and mailing address for your county election board members and any board of voter registration officers.

Name	Title	Address & Street	City, State, & Zip
Myla A. Eldridge	EB Secretary	200 E Washington St, W144	Indianapolis, IN 46204
Keith Johnson	EB Chair	200 E Washington St, W144	Indianapolis, IN 46204
Maura Hoff	EB Vice-Chair	200 E Washington St, W144	Indianapolis, IN 46204
LaDonna Freeman	D Voter Registration Board	200 E Washington St, W131	Indianapolis, IN 46204
Cindy Mowery	R Voter Registration Board	200 E Washington, St, W131	Indianapolis, IN 46204

16. If you will be sending any sheets provided by the Election Division containing requests for additional information, how will it be sent? Electronic Mail

PROVISIONAL BALLOTS:

17. The total number of provisional ballots cast by voters in the county in this election: 507
18. Total number of provisional ballots not counted by county election board: 447