

**Hamline University**

---

**From the Selected Works of David A Schultz**

---

2008

# Lies, Damn Lies, and Voter IDs: The Fraud of Voter Fraud

David A Schultz, *Hamline University*



Available at: [https://works.bepress.com/david\\_schultz/10/](https://works.bepress.com/david_schultz/10/)

## **Lies, Damn Lies, and Voter IDs: The Fraud of Voter Fraud**

David Schultz\*

Claims of voter fraud effect a partisan divide, with Republicans generally supporting voter ID laws and Democrats opposing them.<sup>1</sup> The United States Supreme Court has heard argument in two photo ID cases,<sup>2</sup> and will likely resolve the constitutionality of such laws before the 2008 elections.<sup>3</sup> A decision upholding these laws could encourage even more states to adopt such laws, potentially disenfranchising millions.<sup>4</sup>

Lower courts have also issued voter ID decisions, with four upholding ID requirements<sup>5</sup> and two rejecting them.<sup>6</sup> In the four cases upholding voter IDs, the courts failed correctly to examine the evidence on voter fraud and adjudicate the constitutional issues. This Article examines the available evidence of voter fraud, contending that it is not admissible and that the courts have generally failed to perform their duty to exclude this faulty evidence. The Article then summarizes the photo ID cases already litigated, offering recommendations on how to argue against these requirements. It challenges the test articulated in *Burdick v. Takushi*<sup>7</sup> treating the franchise as less than a fundamental right, thereby permitting the adoption of some regulations that adversely impact voting rights.

### **I. The Right to Vote**

Although the United States Constitution does not contain an explicit declaration of the right to vote, the Supreme Court has held that Article I, Section 2 secures the right to vote for representatives in the House of Representatives<sup>8</sup> and in state legislatures<sup>9</sup> as fundamental.<sup>10</sup> In *Harper v. Virginia State Board of Elections*, the Supreme Court ruled that the right to vote in state elections was a fundamental right.<sup>11</sup> The right to vote must be subject to strict scrutiny, and only if a compelling governmental interest is

---

\* Professor, Graduate School of Management, Department of Criminal Justice and Forensic Science, and Director, Doctorate in Public Administration Program, Hamline University; Visiting Professor of Law and Senior Fellow, Institute on Law and Politics, University of Minnesota.

<sup>1</sup> Adam Liptak, *Fear but Few Facts in Debate on Voter I.D.'s*, N.Y. TIMES, Sept. 24, 2007, at A12.

<sup>2</sup> *Indiana Democratic Party v. Rokita*, 128 S.Ct. 34 (2007) (granting certiorari and consolidating); *Crawford v. Marion County Election Bd.*, 128 S.Ct. 33 (2007) (same).

<sup>3</sup> Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. TIMES, Sept. 26, 2007, at A24.

<sup>4</sup> Timothy Vercellotti and David Anderson, *Protecting the Franchise or Restricting It?: The Effect of Voter Identification Laws on Turnout* 13 (2006) (unpublished manuscript, on file with the author).

<sup>5</sup> *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007); *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007).

<sup>6</sup> *League of Women Voters v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007); *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

<sup>7</sup> 504 U.S. 428 (1992).

<sup>8</sup> *United States v. Classic*, 313 U.S. 299, 314–15 (1941).

<sup>9</sup> *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

<sup>10</sup> *Id.* at 561.

<sup>11</sup> 383 U.S. 663, 664, 670 (1966).

demonstrated may it be limited.<sup>12</sup> Yet the Court has created some confusion here with its holding in *Burdick v. Takushi*.<sup>13</sup>

In *Burdick*, a Hawaii law prohibited write-in voting.<sup>14</sup> Rejecting First and Fourteenth Amendment challenges,<sup>15</sup> the Supreme Court described its approach to regulations impacting voting rights: "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute."<sup>16</sup> Because states need to structure elections to promote fairness and honesty, not all regulations need to be subject to strict scrutiny solely because they impose some burdens on voters.<sup>17</sup> The Court announced a different test and upheld Hawaii's law.<sup>18</sup> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.<sup>19</sup>

*Burdick* is confusing. The Court distinguished two types of voting regulations—those imposing "severe" burdens and those imposing "reasonable burdens."<sup>20</sup> The former are examined under the strict scrutiny standard; they must be "narrowly drawn to advance a state interest of compelling importance."<sup>21</sup> But a new standard will be used "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters." Then, "the State's important regulatory interests are generally sufficient to justify the restrictions."<sup>22</sup> But the Court failed to describe the distinction between severe burdens and reasonable burdens, setting the stage for the enactment of the current voter ID laws.

## II. Documenting Voter Fraud

There is dispute concerning what constitutes voter fraud,<sup>23</sup> and no peer-reviewed studies of the topic exist,<sup>24</sup> but most stories about fraud are just that—anecdotal tidbits

---

<sup>12</sup> See Steven E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917 (1988) for a general discussion of the interplay between fundamental rights and compelling governmental interests.

<sup>13</sup> 504 U.S. 428 (1992).

<sup>14</sup> *Id.* at 430.

<sup>15</sup> *Id.* at 430–31.

<sup>16</sup> *Id.* at 433 (citations and internal quotation marks omitted).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 434.

<sup>19</sup> *Id.* (citations and internal quotation marks omitted).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (citations and internal quotation marks omitted).

<sup>23</sup> LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* 6 (2007),

[http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf).

<sup>24</sup> UNITED STATES ELECTIONS ASSISTANCE COMMISSION, *ELECTION CRIMES: AN INITIAL REVIEW AND*

of information that are neither well corroborated nor systematically studied.

The three most persistent claims of voter fraud come from the *Wall Street Journal's* John Fund, the Senate Republican Policy Committee, and the Carter-Baker Report. Fund's *Stealing Elections: How Voter Fraud Threatens Our Democracy*<sup>25</sup> calls for mandatory photo identification because of widespread voter fraud. Yet Fund offers little evidence that voter fraud is rampant. *Stealing Elections* claims that droves of dead people, illegal immigrants, vote brokers, and ex-felons are cheating their ways into the voting booths, stealing elections from Republicans, and diluting the votes of red, white, and blue Americans. But when the smoke of his allegations is cleared there is little fire of voter fraud.

Fund alleges that the Florida 2000 presidential election demonstrated the "sloppiness that makes fraud and foul-ups in election counts possible."<sup>26</sup> Even if one accepts all of his claims as true, the sloppiness he alleges is not voter fraud. The problems were with election officials. He alleges that the "lax standards for registration encouraged by the Motor Voter Law have left the voter rolls in a shambles in many states."<sup>27</sup> Fund does not document which states, what shambles means, how the problems affect voting, or whether those problems constitute voter fraud.

A report by the Senate Republican Policy Committee, *Putting an End to Voter Fraud*, claims that "voter fraud continues to plague our nation's federal elections."<sup>28</sup> The basis of its allegations rests in assertions that the National Voter Registration Act of 1993<sup>29</sup> has made it difficult to maintain accurate lists to keep people from voting illegally, that non-citizens are voting illegally, and that there may be risks associated with early and absentee voting.<sup>30</sup> Its evidence of voter fraud includes claims of illegal voting in the 2004 Wisconsin presidential elections,<sup>31</sup> but it provides no firm numbers to show if the allegations were true or significant.

*Building Confidence in U.S. Elections*,<sup>32</sup> the report of the Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker (Carter-Baker Commission), is cited by those who argue that there is widespread voter fraud, necessitating voter IDs to combat it.<sup>33</sup> The report asserts

---

RECOMMENDATIONS FOR FUTURE STUDY, 20 (2006), *available at* [http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment\\_download/file](http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file).

<sup>25</sup> JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004).

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 24.

<sup>28</sup> SENATE REPUBLICAN POLICY COMMITTEE, *PUTTING AN END TO VOTER FRAUD* 1 (Feb. 15, 2005).

<sup>29</sup> 42 U.S.C. § 1973 *et seq.* ("Motor Voter Act"); *see also* Johnathan E. Davis, *The National Voter Registration Act of 1993: Debunking States' Rights Resistance and the Pretense of Voter Fraud*, 6 TEMP. POL. & CIV. RTS. L. REV. 117 (1997); UNITED STATES ELECTIONS ASSISTANCE COMMISSION, *THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT* (2007) (dismissing allegations of fraud associated with the Motor Voter Act).

<sup>30</sup> *PUTTING AN END TO VOTER FRAUD*, *supra* note 28, at 5–8.

<sup>31</sup> *Id.* at 7.

<sup>32</sup> COMMISSION ON FEDERAL ELECTION REFORM, *BUILDING CONFIDENCE IN U.S. ELECTIONS* (2005), *available at* [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf).

<sup>33</sup> *Id.* at 18 (calling for voter IDs when voting).

that, “[w]hile election fraud occurs, it is difficult to measure,”<sup>34</sup> and it supports this claim by citation to 180 Department of Justice investigations that resulted in the convictions of 52 individuals between October 2002 until the release of the report.<sup>35</sup> While the Carter-Baker Commission called for photo IDs, it also noted that “[t]here is no evidence of extensive fraud in U.S. elections, or of multiple voting, but both occur, and it could affect the outcome of a close election.”<sup>36</sup> As with other studies, absentee voting is singled out as the place where fraud is most likely to occur, followed by registration drives by third parties.<sup>37</sup> The empirical evidence supporting the Carter-Baker Commission’s findings are scant. It concludes that fraud is not extensive, but when it does cite support for its claims, it references newspaper articles and other accounts that are not corroborated or subject to critical analysis.<sup>38</sup> As the Brennan Center stated in its analysis and response to the Carter-Baker call for photo ID laws, “[t]he Report attempts to support its burdensome identification requirements on four specific examples of purported fraud or potential fraud. None of the Report’s cited examples of fraud stand up under closer scrutiny.”<sup>39</sup>

### III. State Photo ID Litigation

The harmful impact and lack of evidentiary support notwithstanding, several states have recently enacted photo ID requirements for voting. These laws have been challenged in six lawsuits. Several common threads run through the four cases upholding the voter ID laws. These four cases, as well as the two rejecting voter ID laws, point both to fundamental problems in how the *Burdick* test has been applied and, more importantly, to the problems inherent in the test itself.

While courts have upheld voter ID laws by reading *Burdick* to require rational basis review, this is not an appropriate reading of that decision. Instead, the flexible test suggested by *Burdick* demands at least some form of intermediate scrutiny.

In four of the six jurisdictions where voter ID laws have been upheld, the courts have applied the flexible standard test articulated in *Burdick* and ruled that the ID requirement is not a severe burden on voting rights, therefore precluding the use of strict scrutiny.<sup>40</sup> After invoking the lower standard of review, all four of the cases gave more weight to the state’s interest in controlling voter fraud than the burdens on voting

---

<sup>34</sup> *Id.* at 45.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Id.* at 46.

<sup>38</sup> See, e.g., *Id.* at 4 n.4 (citing Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, CHI. TRIB., Dec. 4, 2004, at 13).

<sup>39</sup> THE BRENNAN CENTER FOR JUSTICE, SPENCER OVERTON, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 9 (2005) (emphasis removed).

<sup>40</sup> *Gonzalez v. Arizona*, 485 F.3d 1041, 1049–50 (9th Cir. 2007); *Crawford v. Marion County Election Board*, 472 F.3d 949, 952 (7th Cir. 2007); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1376–78 (N.D. Ga. 2007); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 820–25 (S.D. Ind. 2006); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 456–57 (Mich. 2007).

that were caused by the photo ID requirement.<sup>41</sup> Two courts allowed the states to assert their interests without evidentiary support, instead allowing them broad leeway to enact preventative measures.<sup>42</sup> The courts that looked for evidence to support the states' interests relied upon sources of questionable value, such as *Stealing Elections*, or permitted accounts of fraud that were not directly tied to in-person voting to suffice as acceptable proof.<sup>43</sup>

Although states have not been held to a rigid standard of proof, plaintiffs have. They have been asked to show with particularity how the new photo ID burdened their ability to vote, and courts have generally minimized the time and effort required to obtain the ID that is needed to vote.<sup>44</sup> The courts have emphasized that some voting identification cards are free, that there is an indigent bypass process, or that there are provisional voting processes that get around the ID requirement, at least enough to escape claims that the new laws constitute a poll tax.<sup>45</sup> Given the way these courts have allocated the burden of proof and the broad leeway they have granted the states, the test they are applying appears to be rational basis review. Weighing an almost unquestioned state interest against a highly skeptical treatment of the burdens that state interest imposes on the right to vote, it is no surprise that these courts have upheld the ID laws. *Burdick* requires more than this rational basis review. Moreover, even if rational basis review is sufficient under *Burdick*, the test itself is incoherent and should be revised. Examples of these two critiques are found in the t

he Missouri and New Mexico cases rejecting voter ID laws.

In *Weinschenk*, the Supreme Court of Missouri rejected the *Burdick* framework and applied strict scrutiny under state constitutional law.<sup>46</sup> In *Santillanes*, the court read the *Burdick* test to require intermediate scrutiny.<sup>47</sup> In both cases, the courts found that the evidence supporting the state's asserted interest was insufficient. Additionally, the plaintiffs in *Weinschenk* documented the real costs and burdens imposed upon them by the photo ID law. The court pointed out that this case was different from *Crawford*, for example, because the plaintiffs could point to real burdens that they had suffered.<sup>48</sup>

Rather than arguing that state law or the burden on voting rights implicated strict

---

<sup>41</sup> Gonzalez, 485 F.3d at 1049-50; Crawford, 472 F.3d at 952; Common Cause/Georgia, 504 F. Supp. 2d at 1376-78; Rokita, 458 F. Supp. 2d at 820-21; In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d at 456-57; *Common Cause/Georgia*, 504 F.Supp.2d at 1376-78; Gonzalez, 485 F. 3d at 1049-50.

<sup>42</sup> Common Cause/Georgia, 504 F. Supp. 2d at 1381 (refusing to require evidence); In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d at 458 (same); *Common Cause/Georgia*, 504 F.Supp.2d at 1381 (same).

<sup>43</sup> Crawford, 472 F.3d at 953 (explaining away the lack of evidence by referring to "the vagaries of journalists' and other investigators' choice of scandals to investigate"); Rokita, 458 F. Supp. 2d at 792-94 (citing newspaper reports and out-of-state accounts of voter fraud).

<sup>44</sup> Gonzalez, 485 F.3d at 1049-50; Crawford, 472 F.3d at 952-53; Common Cause/Georgia, 504 F. Supp. 2d at 1377-80; Rokita, 458 F. Supp. 2d at 822-25; In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d at 456-57.

<sup>45</sup> Gonzalez, 485 F.3d at 1048-49; Crawford, 472 F.3d at 952; In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d at 463-66.

<sup>46</sup> *Weinschenk v. Missouri*, 203 S.W.3d 201, 215-17 (Mo. 2006).

<sup>47</sup> *League of Women Voters v. Santillanes*, 506 F. Supp. 2d 598, 628-30 (D.N.M. 2007).

<sup>48</sup> *Weinschenk*, 203 S.W.3d at 214.

scrutiny, *Santillanes* took seriously the flexible standard test of *Burdick* and compared the burdens that had been placed on the state and on the citizen.<sup>49</sup> *Santillanes* also took seriously the ideas that a government cannot assert an interest without providing evidence for it, and that the interest must then be assessed in light of the burdens it places on the exercise of constitutional rights. Finally, *Santillanes* demonstrated a way to handle facial challenges to voter ID laws. Although burdens on a plaintiff's ability to vote might be severe enough to require strict scrutiny under *Burdick*, if the burdens have not yet come to rest on a particular plaintiff, an intermediate level of scrutiny is an appropriate way to protect the fundamental right to vote.

This review of the voter ID cases raises several flaws in the *Burdick* test, both in its application and in its theoretical structure. The first problem with the test is that the four courts upholding voter ID laws have let the government assert prevention of voter fraud as a compelling government interest either without requiring documentation that the interest is real, or relying on faulty or inappropriate evidence. In the decisions upholding the photo ID laws, the courts have generally done a poor job reviewing or handling evidence.<sup>50</sup> As the district court judge stated in *Billups*: "[T]he legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them."<sup>51</sup> There are several problems with this approach.

First, in election law cases the Supreme Court has not stated that a compelling interest may simply be asserted without evidentiary foundation. For example, in *Buckley v. Valeo*,<sup>52</sup> the Court first reviewed a series of proffered interests in limiting political contributions or expenditures. It rejected several, such as "equalizing the relative ability of individuals and groups to influence the outcome of elections," as illegitimate.<sup>53</sup> Once the Court did accept one interest—preventing corruption or its appearance—it demanded that some evidence be offered to support that interest.<sup>54</sup> In general, evidence is required to support the government's assertion of an interest in burdening a fundamental right,<sup>55</sup>

and the evidence must be relevant, jurisdiction specific,<sup>56</sup> and credible.<sup>57</sup> Courts

---

<sup>49</sup> See also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d at 477–80 (Cavanagh, J., dissenting) (weighing the burdens on the state and on the voter).

<sup>50</sup> See Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention and Administration*, 68 OHIO ST. L.J. 1065 (2007) (arguing a similar point).

<sup>51</sup> 504 F. Supp. 2d at 1381 (quoting *Rokita*, 458 F. Supp. 2d at 829).

<sup>52</sup> 424 U.S. 1 (1976).

<sup>53</sup> *Id.* at 48–49.

<sup>54</sup> *Id.* at 26–27.

<sup>55</sup> *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 477; see also *Fed. Election Com'n v. Wis. Right To Life, Inc.*, 127 S.Ct. 2652, 2692 (2007) (discussing the role of evidence in facial and applied challenges); *Randall v. Sorrell*, 126 S.Ct. 2479, 2514 (2006); *Nixon v. Shrink Mo. Government PAC*, 528 U.S. 377, 378 (2000); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 955–6 (1988) (discussing the importance of the reality of the government's interest being real).

<sup>56</sup> *Kruse v City of Cincinnati*, 142 F.3d. 907, 916 (6th Cir. 1998).

<sup>57</sup> David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999) (arguing a similar position on the necessity of making the evidence real and jurisdiction specific).

have enforced these requirements sporadically. *Rokita* dismissed evidence documenting the adverse impact of photo ID laws under *Federal Rule of Evidence* 702 as unreliable.<sup>58</sup> The judge in *Santillanes* repeatedly stressed the lack of admissible evidence supporting the government's interest in preventing fraud. More generally, judges should apply Rule 702 more consistently, and they should more fully accept their role under *Daubert* when deciding whether to admit evidence about election fraud.<sup>59</sup> Citations to Fund's *Stealing Elections* or the unproven assertions in the Carter-Baker Report should be inadmissible as failing Rule 702-*Daubert* standards. Some types of evidence are simply not material to determining the constitutionality of photo ID requirements. For example, *Rokita* cited survey data as evidence that the public supports photo IDs.<sup>60</sup> Public opinion polls are insufficient to justify restrictions on fundamental rights, and are tantamount to a "heckler's veto" on free speech.<sup>61</sup>

Beyond its application in these specific cases, *Burdick* itself is flawed for several reasons, most of all because it never explained what "severe" meant. There is a real circularity and inconsistency to the test. Before a court can decide which level of analysis to use, as in the case of photo IDs, it must make a prior determination to whether the burden is severe. If not, then the rational basis standard is used. The outcomes of the voter ID cases were thus in large part determined by prior subjective findings that the burdens were not severe. Once that threshold had been passed, it was almost a forgone conclusion that the regulations at issue would be upheld. The apparent flexibility of the *Burdick* test camouflages the subjectivity of this evaluation.

The importance of the right to vote means that, when a regulation burdening the right to vote is challenged, the government should bear the burden of proof to show that the regulation is not severe. To place the burden on the plaintiff is to misread *Burdick* as overturning cases finding voting to be a fundamental right.<sup>62</sup> Justice Cavanagh made a similar argument in dissent in *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA*.<sup>63</sup> He argued that strict scrutiny was required because 2005 PA 71 imposed a severe burden on voting rights.<sup>64</sup> Cavanagh contended that, because the photo ID requirement would deny some citizens the right to vote, the general presumption that statutes are constitutional should not be applicable.<sup>65</sup> The requirement would impose classifications upon those who exercise voting rights, *i.e.*, on the poor, elderly, disabled, and upon racial and ethnic populations by subjecting them to different burdens than others.<sup>66</sup> Given the presumption of unconstitutionality and this differential treatment of some groups, 2005 PA 71 must be subjected to strict scrutiny.<sup>67</sup>

---

<sup>58</sup> 458 F. Supp. 2d 775 at 803.

<sup>59</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (assigning judges the role of determining the appropriateness of allowing scientific and expert testimony into the record).

<sup>60</sup> 458 F. Supp. 2d at 794.

<sup>61</sup> See *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949), for the origin of this concept.

<sup>62</sup> See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 486 (Cavanagh, J., dissenting) (criticizing the placement of the burden on the voter-plaintiff).

<sup>63</sup> *Id.* at 469.

<sup>64</sup> *Id.* at 472.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (citing *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights



According to Cavanagh, “[t]he government cannot . . . shield itself from strict scrutiny because it provides only a purported rational basis for the requirement while simultaneously failing to provide *any* evidence to support its purported rationale.”<sup>68</sup> Finally, even if—as most courts have held—only rational basis scrutiny is required, the “restriction, in this case a photo identification requirement, must be reasonable *given the interest the restriction allegedly serves*.”<sup>69</sup> Whatever the test, real evidence is needed to support the government's assertion of its interest. Without such evidence, the restriction is unconstitutional.

Courts must seriously weigh the government's interest against the burden on plaintiffs even if they plan to use *Burdick's* lower standard of review. If one pits an unproven or unsubstantiated government interest against a demonstrated burden, the weight assigned to the interest has to be nearly zero. The four courts using *Burdick's* lower standard mistakenly assumed that, once they decide that the burden is not severe, no weighing of interests is required before they can uphold the regulation. This is not what *Burdick* demands.

Courts upholding voter ID laws have used the *Burdick* test like a light switch, either finding the burden to be severe, applying strict scrutiny, and rejecting the regulation, or finding the burden to be slight and therefore using what appears to be rational basis review. The test does not call for rational basis review if the burdens on voting rights are determined not to be severe.<sup>70</sup> The New Mexico court was correct to hold that some form of intermediate scrutiny is demanded.<sup>71</sup>

## Conclusion

Voter fraud and voter IDs are a fraud, and the stakes in *Indiana Democratic Party v. Rokita* are significant. A decision upholding the Indiana law could lead to a new round of voter ID laws that could disenfranchise millions. If voting is to remain a fundamental right, courts hearing challenges to voter ID laws must hold states accountable to prove fraud, and the *Burdick* test must be rejected as an unworkable standard.

---

and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 474 (emphasis in original).

<sup>70</sup> See Jacqueline Ricciani, *Burdick v. Takushi: the Anderson Balancing Test to Sustain Prohibitions on Write-in Voting*, 13 PACE L. REV. 949 (1994) (examining the *Burdick* test and concluding that its adoption from the ballot access cases indicate that some form of intermediate level of scrutiny is required when the burdens on voting rights are found to be less than severe).

<sup>71</sup> See also *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 956 (7th Cir. 2007) (contending that *Burdick's* lesser level of scrutiny calls for at least “strict scrutiny light”).