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ADDITIONAL DEVELOPMENTS— PRIVACY

CRAWFORD V. MARION COUNTY ELECTION BOARD

128 S. Ct. 1610 (2008)

The Supreme Court of the United States, in a 6-3 decision, affirmed the judgment of the Seventh Circuit upholding an Indiana election law (SEA 483) that requires citizens voting in person to present government issued photo identification. Justice Stevens authored the lead opinion, joined by the Chief Justice and Justice Kennedy. Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment but offered a concurring opinion.

Known as the “Voter ID Law,” SEA 483 requires citizens voting in person on election day to present photo identification issued by the government. SEA 483 applies to in-person voting in both primary and general elections, but not to absentee voting. Although the statute requires citizens voting in person to present photo identification, in-person voters without appropriate photo identification can cast provisional ballots which will only be counted if appropriate photo identification is provided or an affidavit is submitted to the circuit court clerk within ten days of the election. Concurrent with the passing of SEA 483, Indiana began providing free photo identification to individuals over the age of eighteen who do not have a driver’s license.

The petitioners, consisting of two organizations representing the Democratic Party, two elected officials, and several nonprofit organizations, alleged that SEA 483 violated the Fourteenth Amendment and should be facially invalidated because the requirement of photo identification disenfranchised and burdened voters. In support of their allegations, the petitioners presented as evidence a report detailing the number of registered voters without photo identification, along with depositions of people who experienced hardship in obtaining identification cards. The district court found the report to be unreliable, and a majority of the Supreme Court agreed.

The lead opinion applied the balancing test used in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In *Anderson*, the Court ruled that a balancing approach should be applied to voting restrictions which protect the integrity of the electoral process. As justification for the burden of SEA 483, the respondents argued that the statute reflected intentions of Congress to enhance the integrity of elections, as evidenced by the

National Voter Registration Act and the Help America Vote Act. Additionally, respondents argued that prevention of voter fraud through SEA 483 was needed to counteract the inaccuracy of Indiana's registered-voters lists. Finally, the respondents contended that the Voter ID Law would inspire greater public confidence in the integrity of the voting system, thus encouraging greater voter participation.

The lead opinion determined that SEA 483 did not impose excessively burdensome requirements on any class of voters and was justified on its face by the State's valid interest in protecting the integrity and reliability of the electoral process. Although it rejected the petitioner's broad facial attack of the statute that would invalidate its application in all situations, the lead opinion left open the door for a fact-based challenge to the statute as applied to a particular voter.

The concurring opinion agreed with the lead opinion's ultimate judgment but disagreed with its approach. In particular, the concurring opinion concluded that before applying the balancing test used in *Anderson*, it was necessary to first determine if the challenged law severely burdens the right to vote. Absent such a finding, it would be inappropriate to apply the balancing test to resolve the statute's application on a record-by-record basis. The concurring opinion found that SEA 483 is a generally applicable, nondiscriminatory voting regulation that does not severely impact the right to vote, and accordingly it is facially valid. Moreover, because the concurrence determined that the law did not impose a severe burden on voting, it determined that a voter would not have a valid equal-protection complaint based on the law's effect on the individual voter.

Both dissenting opinions agreed that the photo ID requirement imposed a disproportionate burden upon voters without valid state issued identifications. However, Justice Breyer would have invalidated the statute because less restrictive alternatives existed to the achieve the state's purpose, while Justice Souter and Justice Ginsburg would have invalidated it on the grounds that the State failed to factually show that threats to its interests outweighed the burden imposed upon the right to vote.

QUON V. ARCH WIRELESS OPERATING CO.*554 F.3d 769 (9th Cir. 2009)*

The United States Court of Appeals for the Ninth Circuit voted to deny defendants' petition for rehearing en banc of a decision in which a Ninth Circuit panel found, among other things, that the City of Ontario and the Ontario Police Department had violated the Fourth Amendment by auditing the text of pager communications made by an employee.

Jeffrey Quon was a SWAT police officer employed by the City of Ontario Police Department (Department). The Department assigned Quon an alphanumeric pager, which he used for work and personal communications. Quon repeatedly exceeded his allotted usage limit, triggering an audit by the Department. The Department obtained the full text of the messages Quon had sent and received from Arch Wireless Operating Co. (Arch) and discovered that Quon had sent a number of personal and sexually explicit messages. Quon brought an action against the Department, the City of Ontario, and the chief and sergeant of the Department, alleging violations of the Fourth Amendment and California constitutional privacy rights. Quon also brought an action against Arch alleging violations of the Stored Communications Act. A district court dismissed these claims on summary judgment and at trial. On appeal, the Ninth Circuit held that the chief of police was entitled to qualified immunity, but that Arch had violated the Stored Communications Act, and the City and Department had violated Quon's Fourth Amendment rights because he had a reasonable expectation of privacy and the search was unreasonable as a matter of law.

The Department petitioned for rehearing en banc on the Fourth Amendment issue, and the full court voted to deny the petition. Dissenting, Judge Sandra S. Ikuta denied that a reasonable expectation of privacy existed on the facts of the case and criticized the panel's decision for using, according to Judge Ikuta, a "least intrusive means" test in determining the scope of reasonable searches. Judge Ikuta argued that the leading Supreme Court case (*O'Connor v. Ortega*, 480 U.S. 709 (1987)) mandated a practical approach in which a court should consider the "operational realities of the workplace" when determining whether an expectation of privacy was reasonable. Here, because a policy existed that communications could be audited at any time, and the Department issued the pagers to Quon primarily for SWAT activities, which could be highly charged, the "operational realities" allowed no reasonable expectation of privacy. Further, in Judge Ikuta's view, the panel decision determined the scope of a reasonable search by a "least intrusive means" test, which

would require an employer to always use the least intrusive methods of performing searches, a test which has been rejected by the Supreme Court and the majority of circuits.

Criticizing the dissent as “seriously flawed,” Judge Kim McLane Wardlaw responded that the panel opinion did not depart from the *O’Connor* case-by-case approach for determining reasonable expectation of privacy, where the determination of reasonableness is made ““under all the circumstances.”” Here, an expectation of privacy was reasonable because the Department had no official policy covering the use of the pagers. Moreover, the informal policies and practices of the Department, according to which text messages would not be audited if overages were paid, and upon which Quon relied, also justified a finding of a reasonable privacy expectation. Judge Wardlaw further denied that the Ninth Circuit panel had applied a “less intrusive test” for determining the reasonable scope of a search, as Judge Ikuta claimed, but rather had applied the two prongs of *O’Connor* properly. Thus, Judge Wardlaw affirmed that the audit was reasonable “at its inception” because it was conducted for the work-related purpose of determining overages, but stated that the methods of the audit were “excessively intrusive in light of the noninvestigatory object of the search.”