No. 25-962

In the

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioners,

v.

BETTE EAKIN, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CENTER FOR ELECTION CONFIDENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Center for Election Confidence, Inc. (CEC), is a nonprofit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files amicus briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "*Anderson-Burdick*" doctrine is badly malfunctioning if a lower court can invoke it to conclude that Pennsylvania violated the Constitution by requiring voters to put a date on their mail ballots. The Court should take this opportunity, outside the frenzy of the election

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[1] All parties were timely informed of amicus' intent to file this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

cycle, to restore order to litigation over election regulations. One source for such order can be found in Justice Scalia's concurring opinion in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), the last merits decision considering claims that election procedures violate the Constitution.

As Justice Scalia demonstrated, the "*Anderson-Burdick*" label itself is a misnomer. Whereas *Anderson v. Celebrezze*, 460 U.S. 780 (1983), put judges at the center of the action by concluding there was simply "'no substitute'" for their "'judgments'" in these cases, *id.* at 789–90, Justice Scalia posited that *Burdick v. Takushi*, 504 U.S. 428 (1992), charted a different course by "forg[ing] *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule." *Crawford*, 553 U.S. at 205 (Scalia, J., joined by Thomas and Alito, JJ., concurring). He stressed the importance of "objective, uniform standard[s]" that would allow States greater certainty that their ordinary voting rules would not be thrown out in federal court. *Id.* at 208. "This is an area where the dos and don'ts need to be known in advance of the election," and "detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States." *Id.*

Yet "detailed judicial supervision" is exactly where we have landed, largely because the lower courts have ignored Justice Scalia's warnings and committed the very errors he warned against. This case is a poster child for the perils of preserving judges' power to conduct interest-balancing, no matter how slight the burden. Here, as in too many cases, the lower courts analyzed the "burden"

imposed by the date requirement by focusing on the "disenfranchising" impact on an individual plaintiff, rather than considering the burden objectively and generally. Put simply, nondiscriminatory rules that do not impose a "significant increase [to] the usual burdens of voting" are not "severe" and should be upheld in a system where the Framers assigned the role of managing elections to the States, not federal judges. *Id.* at 209.

This case is an ideal vehicle for imposing administrable standards in this politically fraught species of litigation. The dysfunction here is similar to, if not worse than, the misguided efforts to apply § 2 of the Voting Rights Act to ordinary election rules in so-called "vote denial" claims. The Court properly corrected this abuse in *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021). In particular, the Court emphasized that "the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'" *Id.* at 669 (citing *Crawford*, 553 U.S. at 198). The "*Anderson-Burdick*" regime is overdue for similar oversight.

Removing federal courts from the policy debate over whether particular rules are justified will not only restore their proper place in the constitutional structure, it will also bolster voters' trust in their elections systems. Voter confidence in the integrity of mail voting—the practice at issue here—is particularly fragile, which further underscores why this case is a good vehicle. The Constitution does not prohibit a date requirement on a mail ballot, and pretending that federal courts have the authority to say so undermines voters' confidence. Judicial meddling in

State election procedures only further erodes public confidence in the electoral process.

The petition should be granted.

ARGUMENT

I. The So-Called *Anderson-Burdick* Test Must Be Revisited, Or The Lower Courts Need Clearer Instruction On How To Apply It.

In the 18 years since *Crawford* failed to produce a majority opinion, this framework has foundered in the lower courts as the number of cases has multiplied. It is time to restore order so that States can finally know the "dos and don'ts … in advance of the election" and election rules are no longer subject to "constant litigation." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring). The first step is revisiting the *Anderson-Burdick* label itself.

A. As Justice Scalia Explained In *Crawford*, The Courts Need More *Burdick* and Less *Anderson* When Evaluating Claims That Election Regulations Unconstitutionally Burden The Right To Vote.

While the courts routinely label the governing standard in these cases the "*Anderson-Burdick* test," Justice Scalia posited that the real test is the one set forth in *Burdick*, and not in *Anderson*. *Crawford*, 553 U.S. at 204 (Scalia, J., concurring). He rejected the *Crawford* plurality's contention that *Burdick* "simply adopt[ed] 'the balancing approach'" of *Anderson*. *Id.*

Rather, "[a]lthough *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson*'s amorphous 'flexible

standard' into something resembling an administrable rule." *Id.* at 204–05. He also elaborated on the guidelines provided in *Burdick* and intervening decisions for determining whether a regulation constitutes a "severe" burden. *Id.* at 204–208 (discussing development of doctrine from *Burdick* to *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and *Clingman v. Beaver*, 544 U.S. 581 (2005)). Contrary to *Anderson*'s elevation of the judicial role in the process, Justice Scalia insisted that the Court's decisions following *Burdick* called for courts to apply a more "objective, uniform standard" that would allow States to determine whether their rules are "too severe" and thus likely to be enjoined. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring).

These points are worth emphasizing, because Justice Scalia anticipated the doctrinal mistakes that have led to shocking results like the one in this case.

1. *Anderson* Celebrated That The Judge's Discretion Controlled The Outcome Of Its Balancing Test.

Justice Stevens wrote for the five-to-four majority in *Anderson*. Eschewing a "litmus-paper test" for constitutional challenges to election regulations, his opinion introduces the formulation of a balancing test with the curious assertion that "a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." 460 U.S. at 789. Under *Anderson*, the reviewing court's personal evaluations are baked into each step of the test, even before the judge gets to "balance" the factors:

- The reviewing court "must first consider the character and magnitude of the asserted injury to the rights … 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."
- And "[i]n 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."

Id. at 789.

"*Only after weighing all these factors* is the reviewing court in a position to determine whether the challenged provision is constitutional." *Id.* (emphasis added). Yet the opinion went light on offering guidelines—other than the reviewing court's personal judgment—for determining the "magnitude of the asserted injury," how to "evaluate" the State's interests, or how to determine the "legitimacy" or "strength" of the competing interests. Rather, in a no-litmus-test setting such as this, the majority concluded that relying on the judge's personal evaluation is simply unavoidable: "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Id.* at 789–90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Indeed, the passage quoted from *Storer* acknowledges how much uncertainty results when judicial discretion is

controlling. Since a "[d]ecision in this context … is very much a 'matter of degree,'" no one, including the States crafting the rules, can predict whether the rules will survive: "What the result of this process will be in any specific case may be very difficult to predict with great assurance." 415 U.S. at 730 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972)).[2] The *Storer* majority offered an odd double-negative assurance to emphasize the point: "It is very unlikely that all or even a large portion of the state elections laws would fail to pass muster under our cases[.]" *Id.*

Justice Scalia appropriately rejected this judge-empowering approach in favor of an objective, rules-based approach that allows States—to whom the Framers assigned the duty to set election law and to administer federal elections—to structure their election rules with more certainty that they will not be nullified by a federal court.

2. Justice Scalia Demonstrated That, In Order To Have An Administrable Rule That Respects States' Constitutional Role, Federal Courts Need "Objective, Uniform Standards."

In *Crawford*, Justice Scalia warned that "[a] case-by-case approach" to claims that election rules violate the Constitution "naturally encourages constant litigation." 553 U.S. at 208. Such a result, he stressed, is incompatible

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[2] To be sure, *Storer* arose in the heyday of the "I know it when I see it" era. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

with the Framers' constitutional design because it introduces uncertainty into a system where States were trusted with designing their election systems:

> [D]etailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States. *See* Art. I, § 4. It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. **Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante,* whether the burden they impose is too severe.**

553 U.S. at 208 (emphasis added).

To the concurring Justices, the critical objective standards were supplied by *Burdick* and reaffirmed by *Timmons* and *Clingman*. *Crawford*, 553 U.S. at 206 (Scalia, J., concurring).

First, under *Burdick*, the burden inquiry must focus on whether the regulation imposes discriminatory classifications. 504 U.S. at 438–39. When burdens are nondiscriminatory and generally applicable, the burden should be examined by its impact on voters generally, not through its impact on a single plaintiff or a group of plaintiffs. *See Crawford*, 553 U.S. at 206–07 (Scalia, J., concurring) (noting that *Storer*, 415 U.S. at 742, asked whether "a reasonably diligent candidate" could satisfy an election regulation, rather than a particular plaintiff); *Burdick*,

504 U.S. at 436–37 (rejecting a characterization of a burden based on particular parties who failed to comply with the law). A "voter-by-voter examination of the burdens of voting regulations would prove especially disruptive" by inciting endless litigation. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring). In a system designed to bring order to a complicated process, repeated challenges based on niche individual impacts would instead present widespread chaos. *See Storer*, 415 U.S. at 730.

For this reason, the Court in *Burdick* asked how Hawaii's lack of write-in voting limited voters' general access to the political system, not whether the plaintiff whose preferred candidate had not filed nominating papers was particularly impacted. 504 U.S. at 430, 438–39. Likewise, in *Timmons*, the Court looked to the general burden imposed by Minnesota's anti-fusion voting law, rather than its specific impact on the political party plaintiff. 520 U.S. at 363. And the Court held in *Clingman* that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights" without looking at whether any *particular* voter suffered a *particular* impact to those rights. 544 U.S. at 592. Through it all, the Court "considered the laws and their reasonably foreseeable effect on *voters generally*." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring).

Second, Justice Scalia reiterated the principle that "[o]rdinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) (quoting and citing *Clingman*, 544 U.S. at 591, 593–97). As such, requirements that do not materially add to "the usual bur-

dens of voting" are not severe. *Id.* at 209. Election deadlines, as Justice Kavanaugh has reminded us, are an ordinary and necessary part of an orderly election and therefore do not substantially burden the right to vote. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). To deem such generalized burdens "severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman*, 544 U.S. at 593. Thankfully, "[t]he Constitution does not require that result." *Id.*

Third, Justice Scalia stressed that generally applicable election rules that impose disparate impact are not constitutionally suspect unless there is discriminatory *intent* (which is not the case with ordinary voting rules). *Crawford*, 553 U.S. at 207 (Scalia, J., concurring). "The Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class." *Id.* (emphasis omitted). State election regulations are replete with various requirements that require voters to take certain steps in order to cast their ballots or "have the effect of channeling expressive activity at the polls." *Burdick*, 504 U.S. at 438. But just because one person or group might be particularly impacted by a rule that is "merely inconvenient" to most voters, does not transform that rule into a Constitutional violation. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring).

With these rules in mind, for the vast majority of ordinary, uniform voting regulations, there should be no need

to "balance" anything. *See id.* at 209 (Scalia, J., concurring) (concluding that the state satisfied its "minimal burden" when its reasonable and universal requirement did not significantly increase "the usual burdens of voting"); *cf. Wis. State Legislature*, 141 S. Ct. at 35 (Kavanaugh, J., concurring) (rejecting "open-ended balancing" under *Anderson-Burdick* for challenge to absentee ballot deadline). Most rules are simply a product of the State playing its role in our constitutional structure, ensuring that elections remain fair, honest, and orderly. *Burdick*, 504 U.S. at 433. The States' political judgment in these instances "must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring). When faced with nondiscriminatory, generally applicable election laws it is not for federal courts to second-guess the decisions of State legislatures and "rewrite state electoral codes." *Clingman*, 544 U.S. at 593.

B. In Recent Years, *Anderson*'s Allowance For Broad Balancing Has Degenerated Into A "Federal Judges Know Best" Test.

The Court has not issued a merits opinion since *Crawford* touching on the proper standard (under *Anderson*, *Burdick*, or otherwise) for evaluating claims that election procedures violate the Constitution. In the meantime, election law litigation has exploded, due in no small part to lower courts ignoring Justice Scalia's instructions.

Ahead of the 2020 election, Justice Kavanaugh observed that the Court had "stayed numerous federal dis-

trict court injunctions that second-guessed state legislative judgments about whether to keep or make changes to election rules during the pandemic." *Wis. State Legislature*, 141 S. Ct. at 32 (Kavanaugh, J., concurring). Against this backdrop, he explained that a flexible *Anderson-Burdick* standard gives a "de facto green light to federal courts to rewrite dozens of state election laws around the country." *Id.* at 35.

Yet the "federal-judges-know-best vision of election administration," *id.*, has hardly been confined to litigation during COVID. Since *Crawford*, district and circuit courts have used the *Anderson-Burdick* framework to invalidate mainstream election regulations. This typically follows a pattern foreshadowed by Justice Scalia. At the threshold burden inquiry, judges elevate "ordinary and widespread burdens" into severe ones by focusing on a voting law's individual impact rather than how it effects voters in general. This opens the door for courts to balance away the States' affirmative power to impose time, place, and manner rules. As one scholar has explained, by zeroing in on specific challenges facing particular voters rather than considering a law's generally applicable burden, "almost any law can be undue." Kate Hardiman Rhodes, *Restoring the Proper Role of the Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine*, 20 Geo. J.L. & Pub. Pol'y 755, 763 (2022).

The Tenth Circuit's decision in *Fish v. Schwab* illustrates this pattern. 957 F.3d 1105 (10th Cir. 2020). The court deployed *Anderson-Burdick* to invalidate Kansas' requirement that individuals supply documentary proof of citizenship (DPOC) to register to vote. *Id.* at 1112, 1136.

It first held that the burden imposed by the DPOC requirement was "significant." *Id.* at 1128. In doing so, the court rejected the State's more generalized characterization of the burden imposed by this law—that gathering documents proving citizenship and supplying them to the state was akin to the "limited" burden imposed by the administrative process of getting a photo ID in *Crawford*. *Id.* at 1130. The Tenth Circuit ignored the law's uniform application to all persons registering to vote, as well as the lack of any evidence of discriminatory intent. *Cf. Crawford*, 553 U.S. at 205–07 (Scalia, J., concurring). Instead, the *Fish* court focused on the numbers and testimony of individual voters who were "disenfranchised" by failing to provide proof of citizenship. 957 F.3d at 1130–31. By shifting its field of view from the law's generally applicable *burden* to the particularized *impacts* of that burden, *see Crawford*, 553 U.S. at 205 (2008) (Scalia, J., concurring), the Tenth Circuit mis-identified the burden and triggered strict scrutiny. *Fish*, 957 F.3d at 1132.

From there, the court balanced away the State's interests in the DPOC requirement. The panel acknowledged that, under *Crawford*, "'[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.'" *Id.* at 1132 (citation omitted). But it proceeded to question Kansas' *particular* interest in that very thing by pointing to a lack of actual "evidence that the integrity of Kansas's electoral process had been threatened, that the registration of ineligible voters had caused voter rolls to be inaccurate, or that voter fraud had occurred." *Id.* at 1134. Never mind that

the lack of documented evidence of voter fraud in *Crawford* failed to undermine Indiana's interest in fighting fraud there. 553 U.S. at 196 (plurality opinion).

In *Obama for America v. Husted*, the Sixth Circuit took a similar path when affirming a preliminary injunction of an Ohio law allowing military, but not non-military, voters to cast in-person early ballots during the three days before election day. 697 F.3d 423, 426–27, 437 (6th Cir. 2012). The panel applied the "flexible" *Anderson-Burdick* standard to "make the 'hard judgment' that our adversary system demands." *Id.* at 429 (quoting *Crawford*, 553 U.S. at 190 (plurality opinion)). Examining the level of the law's burden, the court relied on statistical studies regarding individual voters who would have chosen to vote during the three-day period before election day. *Id.* at 431. It then upheld the district court's conclusion that the law represented a "particularly high" burden on the organizational plaintiffs because "their members, supporters, and constituents represent a large percentage of those who participated in early voting in past elections." *Id.* On the other side of the ledger, the Sixth Circuit considered Ohio's "vague interest in the smooth function of local boards of elections" and "accommodating the unique situation of members of the military," which, the panel concluded, were not "sufficiently weighty" to justify the regulation. *Id.* at 434, 436.

A Wisconsin district court similarly applied a "flexible" version of the *Anderson-Burdick* standard that focused on particular impacts of a series of Wisconsin voter ID, voting deadline, and other laws "on eligible voters who cannot comply with the new requirement[s]." *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 930 (W.D. Wis.

2016). The court concluded that some of these laws imposed "moderate burdens" not generally justified by state interests and enjoined them. *Id.* at 934, 941, 946. The Seventh Circuit reversed and observed that the district court "[mis]understood these decisions [*Anderson* and *Burdick*] to allow the judiciary to decide whether any given election law is necessary because, if not, it is by definition an excessive burden. That allows a political question—whether a rule is beneficial, on balance—to be treated as a constitutional question and resolved by the courts rather than by legislators." *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). Recognizing the difference between *Anderson* and *Burdick*, the court said "*Burdick* forecloses that sort of substitution of judicial judgment for legislative judgment." *Id.*

To further underscore the extent of the morass left in *Crawford*'s wake, multiple circuits have actually adopted Justice's Souter's characterization of the rule in *dissent* in *Crawford*; he wrote that "we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis." 553 U.S. at 210 (Souter, J., dissenting). *See, e.g.*, *Fish*, 957 U.S. at 1124, 1125 n.4 (rejecting Justice Scalia's formulation of the standard in favor of the more "flexible, sliding scale test"); *Public Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (relying in part on Justice Souter's dissent for an individual-impact-based burden analysis); *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 137 (3d Cir. 2022) (applying *Anderson-Burdick*'s "sliding scale approach"); *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 31 (1st Cir. 2016) (same). Under this version of the test, "*Anderson-Burdick* scrutiny is required even when the burden imposed by a

… law has some relationship to voter qualifications and even when the burden imposed may appear slight." *Fish*, 957 U.S. at 1124.

The leniency with which the prevailing understanding of *Anderson-Burdick* allows judges to inject their own views into cases is so plain that Professor Muller has described the framework as:

> the kind of test where Judge Mark Walker in Florida would find that it's a "severe" burden on voting rights if the Republican candidate is listed first on the ballot when a Republican is governor; and where Justice John Paul Stevens would find a photo identification law in Indiana to be a "limited" burden on voters in a record with "no evidence of any" in-person voter "fraud actually occurring in Indiana at any time in its history."

Derek T. Muller, *The fundamental weakness of flabby balancing tests in federal election law litigation*, Excess of Democracy (Apr. 20, 2020), https://perma.cc/H6N7-4KGS. After surveying a series of Sixth Circuit cases, another scholar similarly concluded that "*Anderson-Burdick* balancing is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another." Edward B. Foley, *Voting Rules and Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013). Judge Readler of the Sixth Circuit characterized the test as a "dangerous tool" that "[i]n sensitive policy-oriented cases, … affords far too much discretion to judges in resolving the dispute before them." *Daunt v.*

Benson, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring).

In short, the lower courts need direction.

C. This Case Presents The Ideal Opportunity To Restore Order To Lower Courts' Abuse Of *Anderson* Balancing, Just As The Court Has Done In Other Contexts.

This case presents an extreme example of how far off-course things have gotten in the lower courts. The Third Circuit used an individual-impact-focused version of the *Anderson-Burdick* test to transform an ordinary and non-discriminatory burden—spending "less than five seconds" to write out the date, *Eakin v. Adams County Bd. of Elections*, 158 F.4th 185, 190 (3d Cir. 2025) (Bove, J., dissenting sur denial of rehearing en banc)—into an unjustified burden on voters' Constitutional rights, *Eakin v. Adams County Bd. of Elections*, 149 F.4th 291, 314 (3d Cir. 2025).

The panel manifestly failed to consider the dating "burden" objectively; indeed, it spent multiple pages explaining why the burden analysis "may look to a law's impacts, including the consequences of noncompliance." *Id.* at 310–12. In spite of the law's general applicability and lack of discrimination, the mere fact that voters who failed to comply with the rule would have their ballots rejected was enough to trigger balancing. *Id.* at 309–10. Then, the icing on the cake: Despite agreeing that the burden here was "minimal," *id.* at 312, the panel concluded that the State's interests, including fraud prevention, did not "bear the weight of the burden the date requirement imposes." *Id.* at 317. In short, the panel wrote, *Anderson-*

Burdick is nothing more than a "weighing test." *Id.* If any case exemplifies the lower courts' repudiation of the principles Justice Scalia summarized in *Crawford*, it is this case. Federal courts should be enforcing judicially administrable rules, not "weighing" a State's motivation for nondiscriminatory election regulations.

The current state of the lower courts' balancing in the name of *Anderson-Burdick* resembles other doctrinal fiascos that the Court has addressed in recent years. Most prominently, in *Brnovich v. Democratic National Committee*, the Court addressed efforts to challenge many States' common election procedures as violations of § 2 of the Voting Rights Act. 594 U.S. 647 (2021). In *Brnovich*, the Ninth Circuit concluded that Arizona's rules prohibiting the collection of absentee ballots and discarding "out of precinct" ballots violated § 2. Like other courts considering so-called "vote denial" claims under § 2, the Ninth Circuit found a violation after balancing multiple "Senate factors" and other factors in a two-step "totality of the circumstances" test. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012–13 (9th Cir. 2020) (citing similar approach in other circuits).

Brnovich has important implications here, where plaintiffs assert that an open-ended balancing test governs claims that election procedures impermissibly burden First and Fourteenth Amendment rights. The Court stressed that "the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'" 594 U.S. at 669 (citing *Crawford*, 553 U.S. at 198); *see id.* at 678. As an integral part of a fair election system, pre-

venting fraud is a "strong and entirely legitimate state interest" for voting rules. *Id.* at 672. And "the degree to which a voting rule departs" from historically standard practice is an important consideration for courts. *Id.* at 669. These principles echo the points Justice Scalia made in *Crawford*, and they are well worth reiterating in support of clarifying the state of the law here.

Lower courts relying on *Anderson-Burdick* as cover to seize broad power over state election machinery also resembles the rampant interest-balancing that took hold in Second Amendment cases in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008). Just as the lower courts have followed Justice Souter's call for a "sliding-scale" test in his *Crawford* dissent, the lower court resistance to *Heller* almost uniformly applied the interest-balancing test advocated by Justice Breyer's *Heller* dissent. 554 U.S. at 689 (2008) (Breyer, J., dissenting); *see* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 757 (2012) (although lower courts could not cite Justice Breyer's dissent, it "capture[s] quite well the flavor of the … precedent being generated by the lower courts"). What emerged was a two-step test that closely tracked the prevailing *Anderson-Burdick* formulation. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 18–19 (2022) (describing how lower courts examined the burden on the "core" Second Amendment right and subsequently applied either intermediate or strict scrutiny). In the years that followed, judges used this "entirely made up" "sliding scale" test to subject the Second Amendment right to "judges' assessments of its usefulness." *Rogers v. Grewal*, 590 U.S. 996, 999 (2020)

(Thomas, J., dissenting from the denial of certiorari). The Court rightly put an end to the lower courts' unfounded interest balancing. *See Bruen*, 597 U.S. at 19. The same goes here.

The Court should step in and put an end to this mischief. This is the rare case involving a challenge to an election procedure that does not arise in the frenzy surrounding election day. The Court has plenty of time to consider the issues and correct the malfunctioning *Anderson-Burdick* test.

II. Restoring Order To Election Litigation Would Also Help Bolster Confidence In The Election System Generally.

Allowing States to administer orderly federal elections, without interference from federal district courts, serves to "giv[e] citizens … confidence in the fairness of the election." *Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). On the other hand, when federal courts upset "carefully considered and democratically enacted state election rules," *id.*, it only spreads confusion and distrust among voters.

As this Court observed in *Purcell v. Gonzalez*:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

549 U.S. 1, 4 (2006) (per curiam).

Recent data backs this up. In a 2025 report, States United found that "[p]eople who expressed higher levels of confidence that their vote would be counted as intended were more likely to vote." States United, *When Americans Trust Elections, They Are More Likely to Vote* (July 12, 2025), https://perma.cc/YZ4S-EDH6. The report concluded that "[i]f Americans felt more confident about the security of the 2024 election, turnout could have increased by 3.0–3.7 percentage points." *Id.* That translates to 4.7–5.7 million voters who may have voted but for a sense of disenfranchisement caused by a lack of confidence in the electoral process. *Id.* Distrust of election security therefore does not just impact individual voters—its aggregate effects could sway the outcomes of major elections.

To inspire the confidence necessary to build more robust electoral participation, States need "safeguards … to deter or detect fraud or to confirm the identity of voters." *Crawford*, 553 U.S. at 197 (plurality opinion) (citation omitted). Reasonable, nondiscriminatory rules that secure election integrity create stability that voters can count on. Trust in the American electoral system is undermined when federal courts nullify ordinary rules as insufficiently "weighty."

This issue is particularly important in the context of the election procedure at issue in this case—absentee voting. In *Brnovich*, this Court recognized that "[f]raud is a real risk that accompanies mail-in voting," which "has had serious consequences in [the] States." 594 U.S. at 686*; see also id.* at 685 ("'[A]bsentee balloting is vulnerable to abuse in several ways: … Citizens who vote at home, at nursing homes, at the workplace, or in church are more

susceptible to pressure, overt and subtle, or to intimidation.'" (quoting Report of the Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005)). "[E]ven many scholars who argue that [election] fraud is generally rare agree that fraud with [vote-by-mail] voting seems to be more frequent than with in-person voting." MIT Election Data & Science Lab, *Voting by Mail and Absentee Voting* (Feb. 28, 2024), https://perma.cc/4R83-NMDQ.

It is little surprise, then, that many Americans already lack confidence in the security of voting by mail. A recent survey that addressed perceived rates of occurrence for different types of voter fraud found that, among all participants, "absentee ballot fraud" was perceived as the most commonly occurring form of election fraud. Charles Stewart III, *How We Voted in 2024*, MIT Election Data + Sci. Lab 34 fig. 31, https://perma.cc/SCX5-Z7KE. A different study found that 50% of Republicans—and 20% of Democrats—distrust that mail-in ballots are counted accurately. Thad Kousser et al., *Trust in American Elections Has Declined Since 2024, Broad Concerns about ICE at Polling Places in 2026*, U.C. San Diego Yankelovich Center 4, https://perma.cc/4QPZ-PRXA.

Indeed, while 58% of Americans say they support allowing broad voting by mail, that number is down from roughly 70% in both 2020 and 2018. Steven Shepard et al., *Majority of Americans Continue to Back Expanded Early Voting, Voting by Mail, Voter ID*, Pew Research Center (Aug. 22, 2025), https://perma.cc/SA5W-JCNL; Pew Research Center, *Elections in America: Concerns over Security, Divisions over Expanding Access to Voting* 21 (Oct. 29, 2018), https://perma.cc/XNM6-HD4C. And in

spite of relatively high support for allowing absentee voting, in the 2024 election, only 29% of voters actually chose to cast their ballot by mail. *How many voters cast ballots early and by mail?*, USAFacts (Sept. 8, 2025), https://perma.cc/LNY7-AF8S. Of those who did vote absentee, the number who returned their ballot by mail decreased in 2020 and 2024 from 2016 levels, with many voters opting to deliver them personally to election offices, polling places, and drop boxes. Stewart, *supra* at 10, 11 fig. 6. In fact, in 2024, roughly 40% of absentee ballots were returned by hand. *Id.*

At the same time, support for election integrity measures like requiring photo ID are at a high point. *See Majority of Americans Continue to Back Expanded Early Voting, Voting by Mail, Voter ID*, *supra* (finding that 83% of Americans supported photo ID voting requirements in 2025, up from 76% in 2018). Americans want to know that their votes are being counted, and that those votes are not being diluted by fraudulent or illegal ones. For these reasons, States have adopted reasonable procedural requirements like the one at issue here. With the Elections Clause, the Framers imposed upon States the duty to administer elections. States, in turn, have a significant interest (and a natural incentive) in adopting procedural requirements to ensure confidence in the process.

That every State "accommodates some voters by permitting (not requiring) the casting of absentee … ballots, is an indulgence" to streamline the voting process and make voting more convenient for many Americans. *Crawford*, 553 U.S. at 209 (Scalia, J., concurring). But this convenience comes with increased risk of fraud, and for that reason, 32 States conduct signature verification. Nat'l

Conf. of State Legislatures, *Table 14: How States Verify Voted Absentee/Mail Ballots*, https://www.ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots (as of March 15, 2026). The Third Circuit's decision to upend a simple dating requirement strikes at the principles under dozens of other States' laws, causing widespread doubt about the constitutionality of commonplace absentee voting requirements.

Put simply, when voters lack confidence in the integrity of the election system, they feel disenfranchised. And particularly in areas like absentee voting, where many Americans already feel suspect, that confidence can be achieved only through stable and consistent—and nondiscriminatory—rules. The flurry of litigation under the *Anderson-Burdick* test challenging these rules undermines both States' election safeguards and voters' confidence in them. The Court should therefore take this opportunity to restore order to election litigation and give voters the confidence they need.

CONCLUSION

For the reasons set forth above and by petitioners, the Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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