No. 20-109

IN THE
Supreme Court of the United States

SCOTT SCHWAB, SECRETARY OF STATE OF KANSAS,
Petitioner,

v.

STEVEN WAYNE FISH, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* HONEST ELECTIONS PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

STATEMENT OF *AMICUS CURIAE* INTEREST[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters and their elected representatives put in place to protect the integrity of the voting process. The Project supports common-sense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Kansas law requires people registering to vote in Kansas to provide one of 13 types of documentary proof of United States citizenship. Kan. Stat. Ann. §25-2309(*l*)(1)-(13). While the law was in effect from January 2013 to May 2016, 88 percent of applicants have complied with it with no apparent trouble. Pet. App. 44a. But the Tenth Circuit still struck it down under the balancing test from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The court found Kansas's law unconstitutional under *Anderson-Burdick* after holding that it imposed a "significant" burden on

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[1] In accordance with this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to prepare or submit this brief. All parties received timely notice of this filing and consented to it.

voting rights because it precluded 31,089 applicants from registering—even though the record contained no evidence about how many of those applicants actually lacked the requisite documentary proof or could not obtain it. Pet App. 43a-50a.

The Tenth Circuit's application of the *Anderson-Burdick* test cannot be reconciled with *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). *Crawford* upheld Indiana's voter-identification law for in-person voters—even though, "when the statute was enacted, around 43,000 Indiana residents lacked a state-issued driver's license or identification card" *id.* at 188—because no evidence in the record made it "possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified," *id.* at 200 (op. of Stevens, J.). So too here.

Just as important, Kansas's law imposes only a neutral, nondiscriminatory requirement on all Kansas voters. As a result, any "individual impacts" on unique voters are not "relevant to determining the severity of the burden it imposes." *Id.* at 205 (Scalia, J., concurring in the judgment). Allowing the Tenth Circuit's invalidation of Kansas law to stand would depart from this Court's election and equal-protection precedents. And it will encourage litigation based on individual-specific burdens in other states—producing a case-by-case approach to election regulation that deprives states of the certainty they need to ensure fair and honest elections.

ARGUMENT

I. The Court should grant the petition to confirm that *Anderson-Burdick* balancing does not hinge on a state voting law's unique impact on individual voters.

More than a decade has passed since this Court last delved into the test for constitutional challenges to state election laws. *See Crawford,* 553 U.S. at 181. Since then, vagaries in that splintered decision—two three-Justice plurality opinions made a majority holding—have produced the very harms Justice Scalia predicted there. Now, a seemingly endless string of election litigation begs federal (and sometimes state) judges to displace state legislatures as the Constitution's appointed default arbiters of election rules. U.S. Const., art. I, §4. That should not be. The Court should grant the petition and reverse the Tenth Circuit's judgment to reduce unnecessary election litigation and reconfirm the state legislatures' primacy over state election laws.

A. Under *Anderson-Burdick*, states may adopt neutral rules to ensure fair and orderly elections.

It's easiest to see *Crawford*'s vagaries in the context of the election-law precedent preceding it. For decades, this Court has had to reconcile the tensions inevitable when states regulate elections. The Court has recognized—quite properly—that our democracy is strongest when every qualified, eligible voter votes. Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who

make the laws under which, as good citizens, we must live." *Wesbury v. Sanders*, 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.*

At the same time, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433. In fact, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

But every election law "invariably impose[s] some burden upon individual voters." *Burdick,* 504 U.S. at 433. For "[e]ach provision of a code, 'whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson*, 460 U.S. at 788).

When do state election laws cross the line separating constitutionally necessary election-structuring to impermissible vote-undermining? Of late, this Court has answered that question by applying a balancing test from *Anderson* and *Burdick*. Under that test, courts assess "the extent to which [the] challenged regulation burden[s]" a voter's First or Fourteenth Amendment rights. *Id.* at 434. An election law that "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and

Fourteenth Amendment rights of voters" is "'generally'" justified by "'the State's important regulatory interests.'" *Id.* (quoting *Anderson*, 460 U.S. at 788). After all, there is no constitutional right to be free from "the usual burdens of voting." *Crawford*, 553 U.S. at 198. Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny and assess whether the law "'is narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). "Burdens are severe if they go beyond the merely inconvenient"—if they establish a condition "virtually impossible to satisfy." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment) (internal quotation marks omitted).

Unfortunately, the *Anderson-Burdick* balancing test is as easy to state as it can be difficult to apply. It has repeatedly befuddled scholars, judges, and litigants alike. Scholars have called the test "troublesome," "malleabl[e]," "indeterminate," "amorphous," Edward B. Foley, *Voting Rules & Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013), and even "flabby," Derek T. Muller, *The Fundamental Weakness of Flabby Balancing Tests in Federal Election Law Litigation*, Excess of Democracy (Apr. 20, 2020), bit.ly/34C8MwX. And judges have warned that it is "a dangerous tool" that "leaves much to a judge's subjective determination." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment).

B. *Crawford*'s two-plurality majority raises questions about *Anderson-Burdick*'s burden inquiry.

Enter *Crawford*. Its two-pluralities-make-one-holding outcome could be read to compound those *Anderson-Burdick* problems. *Crawford* held that an Indiana law requiring in-person voters to show identification before voting did not facially violate the Constitution. But its failure to garner a majority for the reasons for that holding sowed the seeds of uncertainty that yielded the decision below.

Justice Stevens's lead plurality opinion recited the *Anderson-Burdick* test, *see* 553 U.S. at 189–91, and analyzed both Indiana's asserted interests in its voter ID law, *id.* at 191–97, and the burdens that law placed on voters, *id.* at 197–200. It then declined "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute." *Id.* at 200. Justice Stevens thought "the evidence in the record" made it impossible "to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* In the end, Justice Stevens's opinion "consider[ed] only the statute's broad application to all Indiana voters" and "conclude[d] that it 'imposes only a limited burden on voters' rights." *Id.* at 202–03 (quoting *Burdick*, 504 U.S. at 439).

Writing for himself and two other Justices, however, Justice Scalia concluded that whether the law's challengers had "assembled evidence to show that" the law puts a "'special burden on' some voters"

"is irrelevant." *Id.* at 204 (Scalia, J., concurring in the judgment). He reached that conclusion for two reasons.

First, Justice Scalia read this Court's election precedents "to refute the view that individual impacts are relevant to determining the severity of the burden" that a challenged law "imposes." *Id.* at 205. Instead, when "grappl[ing] with the magnitude of burdens," this Court has done "so categorically and did not consider the peculiar circumstances of individual voters or candidates." *Id.* at 206. "What mattered was the general assessment of the burden." *Id.* at 207. Indeed, a contrary approach—"weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters"—"would effectively turn back decades of equal-protection jurisprudence." *Id.* "A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)). "The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens fall disproportionately on a protected class. A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected." *Id.*

Second, even if the Court's precedent "did not foreclose adopting an individual-focused approach," Justice Scalia would have "reject[ed] it as an original matter." *Id.* at 208. States need to know "the dos and don'ts" of election law well "in advance of the election," but "voter-by-voter examination of the burdens of

voting regulation" would produce an "especially disruptive," "case-by-case approach" that "naturally encourages constant litigation." *Id.* "Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless." *Id.* So too for "some laws already on the books"; "one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting." *Id.*

C. Allowing courts to consider individual impacts in *Anderson-Burdick* balancing would contravene this Court's election and equal-protection precedents.

The Nation needs this Court's guidance on how, if at all, *Crawford* changed the *Anderson-Burdick* test.

On one hand, the two pluralities can be read to agree that *Crawford* brooked no change. For after declining to wade into the dispute over an alleged "special burden" on "a small number of voters," Justice Stevens's plurality "consider[ed] only the [Indiana] statute's broad application to *all Indiana voters*," and "conclude[d] that it 'imposes only a limited burden on voters' rights.'" *Id.* at 202–03 (op. of Stevens, J.) (quoting *Burdick*, 504 U.S. at 439) (emphasis added). Of course, that categorial approach comports with Justice Scalia's analysis—and might be one reason he noted that Justice Stevens's opinion "neither rejects nor embraces the rule of our precedents," *id.* at 208 (Scalia, J., concurring in the judgment), a proposition Justice Stevens never disputed. If the Court intended the opinions to be read in harmony on that point, it should grant certiorari and say so. States, litigants,

and lower courts need that confirmation that a state election law's alleged unique impact on one voter or a discrete set of voters is irrelevant under *Anderson-Burdick*.

And review is all the more urgent if that question remains open after *Crawford*. Making individual impacts relevant to *Anderson-Burdick* balancing, as the opinion below does, exacerbates the two problems Justice Scalia identified.

First, only the categorial approach comports with this Court's precedent. For example, in holding that Hawaii's ban on write-in voting "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote," the Court looked at the ban's effect on Hawaii's voters generally, rather than on the plaintiff specifically. *Burdick*, 504 U.S. at 439, 436–37. In rejecting the New Party's challenge to Minnesota's ban on fusion candidates, the Court examined the ban's effect on "minor political parties" generally, not on the New Party specifically. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361–62 (1997). And in rejecting voters' challenge to Oklahoma's semi-closed primary election, the Court emphasized that "Oklahoma's semiclosed primary system does not severely burden the associational rights of the state's citizenry" generally—irrespective of its effect on the individual plaintiffs specifically. *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Each of those precedents in fact "refute[s] the view that individual impacts are relevant to determining the severity of the burden" that "a generally applicable, nondiscriminatory voting

regulation" imposes. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment).

Just as important, the Equal Protection Clause itself compels the categorical approach. *Id.* at 207. Holding otherwise would create a marquee exclusion to "decades of equal-protection jurisprudence." *Id.* Election cases alone would tolerate equal-protection claims "without proof of discriminatory intent." *Id.* Nothing supports making election cases that lone, flashing anomaly in this Court's Equal Protection Clause jurisprudence.

Second, allowing challenges to state election laws based on individual—rather than statewide—impacts will pour gas on the Country's conflagration of election litigation. This case exemplifies the problem. Kansas's law is quintessentially neutral. It treats all voter applicants the same: each must produce one of 13 kinds of documents establishing his or her citizenship, such as a birth certificate or a valid (or expired) passport. Kan. Stat. Ann. §25-2309(*l*)(1)-(13). Because the law singles out no one for special treatment, this case should not have survived a motion to dismiss.

But it did. It proceeded—and ultimately succeeded—based on alleged burdens that Kansas's law places on discrete groups of voters. Never mind that 88 percent of applicants complied with the statute and provided documentary proof of citizenship. *See* Pet App. 44a. Instead, the courts below focused on the district court's finding that the documentary proof-of-citizenship requirement prevented 31,089 applicants from registering to vote—even though the record further failed to identify

how many of those applicants lacked the requisite documentary proof or could not obtain it. *See* Pet. App. 43a-50a.

Even so, the Tenth Circuit homed in on that group instead of assessing the law's burdens categorically on all Kansans. To be sure, the court of appeals acknowledged that it was required "to evaluate 'the statute's broad application to all ... voters' to determine the magnitude of the burden"— and even cited Justice Scalia's categorical approach in a footnote. Pet. App. 42a & n.5. Yet the court still concluded that it "may nevertheless specifically consider the 'limited number of persons' on whom '[t]he burdens' ... [are] 'somewhat heavier.'" Pet. App. 42a. But it could not even classify the burden on that distinct group as severe or nonsevere. Instead, the court landed on "significant," a burden it described as "at least somewhere in between the two poles" of "severe" and "nonsevere." Pet. App. 43a n.6. Based on that new classification, the Tenth Circuit applied exacting scrutiny and held that the burden from Kansas's one-time proof-of-citizenship requirement outweighed Kansas's "legitimate interests" in maintaining secure elections, and held that the law violated the Equal Protection Clause. Pet. App. 53a-54a.

The Tenth Circuit's analysis cannot be reconciled with this Court's unbroken practice of analyzing alleged burdens categorically upon all voters, or with traditional equal-protection principles. *See supra* 9–10. Had the court of appeals followed that precedent, it would have recognized that a law with which 88 percent of applicants readily complied could not have

imposed a severe burden. At most, it creates a "mere[] inconvenien[ce]"—and burdens must "go beyond" that to raise constitutional questions. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). After all, no one has a constitutional right to be free from "the usual burdens of voting." *Id.* at 198 (op. of Stevens, J.).

In short, Kansas's documentary proof-of-citizenship requirement does not unduly burden Respondents' Fourteenth Amendment rights. It epitomizes "a generally applicable, nondiscriminatory voting regulation." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). If it imposes any burden at all, that burden is "[o]rdinary and widespread, ... requiring 'nominal effort' of everyone." *Id.* (quoting *Clingman*, 544 U.S. at 591). Any idiosyncratic effects it might have on particular voters thus "are not severe," *id.*, or even "significant", Pet. App. 43a, and are amply justified by the state's important interests of ensuring that non-citizens do not unlawfully register and vote in elections.

And this case is just one manifestation of these problems. Within the last year, litigants in states throughout the Country have asked federal and state courts to overturn neutral, democratically enacted election laws based on alleged unique burdens upon discrete groups of people. Indeed, those cases have made Justice Scalia's *Crawford* opinion prophetic—they have, in fact, "demand[ed] that a State … expand absentee voting." *Id.* at 208. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020); *Merrill v. People First of Ala.*, No. 19A1063, — S. Ct. —, 2020 WL 3604049 (S. Ct. Aug. 7, 2020). Still

other cases have challenged different types of neutral, nondiscriminatory election laws. *See, e.g.*, *Clarno v. People Not Politicians*, No. 20A21, — S. Ct. —, 2020 WL 4589742 (S. Ct. Aug. 11, 2020); *Little v. Reclaim Idaho*, No. 20A18, — S. Ct. —, 2020 WL 4360897 (S. Ct. July 30, 2020). Had the lower courts properly applied *Crawford*, not one of those cases would have reached this Court. Each should have been resolved by holding that the challenged laws were neutral and nondiscriminatory, and thus created no severe burdens on the states' voters as a whole.

Courts are not the only entities that will benefit from clarifying *Crawford*. It bears emphasizing: every one of these cases requires taxpayer dollars for a state attorney general's office to defend, and every one of these cases impinges on the states' "'considerable leeway'" to regulate elections. *Little*, No. 20A18, — S. Ct. —, 2020 WL 4360897, at *1 (Roberts, C.J., concurring in the grant of stay) (quoting *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 191 (1999)). All "States depend on clear and administrable guidelines from the courts" on these critical issues. *Id. Crawford* defeats that goal, compounding uncertainty that gives states no "advance understanding of the legal rules to be applied" and making it harder for them to "govern accordingly." *Daunt*, 956 F.3d at 425 (Readler, J., concurring in the judgment).

* * * * *

At best, the *Crawford* plurality's reading of the *Anderson-Burdick* balancing test is "troublesome." Foley, *supra* at 1859. At worst, it "is arguably no test at all." *Id.* If the test can bear the Tenth Circuit's

application here, "the federal constitutional law that is supposed to supervise the operation of a state's electoral process has little objectivity or predictability." *Id.* The Court should grant the petition and confirm that even after *Crawford*, *Anderson-Burdick* balancing requires courts (and legislatures) to analyze a voting law's burdens categorically on all voters.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted.

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