Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PROFESSOR ERWIN CHEMERINSKY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY [Applicable Legal Standard]

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INTEREST OF *AMICUS*[1]

Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Professor of Political Science at Duke University School of Law. Professor Chemerinsky joined the Duke faculty in July 2004 after twenty-one years at the University of Southern California Law School, where he was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. Professor Chemerinsky has been appointed the founding Dean of the University of California-Irvine Donald Bren School of Law, which will welcome its first class in 2009.

As a scholar and teacher in the fields of constitutional law and political science, Professor Chemerinsky has an interest in clarifying the doctrinal confusion that has arisen in the lower courts—including in the court below in this case—over the correct legal standard to be applied by the courts in analyzing challenges to state election laws that are alleged to deny directly and completely certain citizens their fundamental right to vote. Professor Chemerinsky's interest relates to the legal standard to be used in the case and the needed clarification of that standard that can be established in this case, and not in the particular outcome once the correct legal standard is applied.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

It is well established that the right to vote is a uniquely precious constitutional right that is "protective of all fundamental rights and privileges". *Evans v. Cornman*, 398 U.S. 419, 422 (1970). As a result, the Court has a long line of precedents, best represented by *Dunn v. Blumstein*, 405 U.S. 330 (1972), holding that state election laws that are alleged to deny completely a citizen or group of citizens the right to vote must be analyzed under close constitutional scrutiny, requiring that the state law in question be narrowly tailored such that it is necessary to serve a compelling state interest. More recently, however, in a line of cases best represented by *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court has applied a sliding scale balancing test where the state election law at issue is alleged to have an indirect or derivative effect on the right to vote, such as restrictions on which candidates' names appear on the ballot.

Because of certain language in *Burdick* and its progeny, there is now confusion in the lower courts—as reflected by the various opinions below in this case—as to whether the *Dunn* line of cases still applies in cases, such as this one, where the challenged state election law is alleged to deny completely the right to vote to certain citizens. *Amicus* respectfully suggests that the Court should use this case as a vehicle to clarify that doctrinal confusion and to reaffirm the applicability of the *Dunn* close constitutional scrutiny test to cases such as this one where a complete denial of the right to vote is alleged.

ARGUMENT

I. THE COURT SHOULD REAFFIRM ITS CLEAR PRECEDENTS HOLDING THAT STATE ELECTION REGULATIONS THAT COMPLETELY DENY CERTAIN CITIZENS THE RIGHT TO VOTE ARE SUBJECT TO CLOSE CONSTITUTIONAL SCRUTINY.

A. The Court Has Repeatedly Held that the Right to Vote Is Fundamental and that State Laws that Would Deny that Right to Certain Citizens Are Subject to Close Scrutiny.

It is well settled that the right to vote is a uniquely precious constitutional right that is "protective of all fundamental rights and privileges". *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *accord Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "No 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. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. Unjustified limitations placed on who may exercise this right to vote compromise the very foundation of our democracy. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative

government."); *see also Harper*, 383 U.S. at 667 ("[T]he right of suffrage is a fundamental matter in a free and democratic society.") (quoting *Reynolds*, 377 U.S. at 561-62); *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) ("[T]he right to choose a representative is every man's portion of sovereign power.") (quoting *Luther v. Borden*, 48 U.S. 1, 30 (1849)).

Because the right to vote is of supreme importance, the Court has repeatedly held that state election laws that threaten to bar certain citizens from voting are subject to close constitutional scrutiny. *See, e.g.*, *Dunn*, 405 U.S. at 336-37 (holding that where a state election law denies the right to vote to a certain group of otherwise qualified citizens, but grants the right to others, "the purpose of the [state law's] restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny") (quoting *Evans*, 398 U.S. at 422); *Evans*, 398 U.S. at 422 (applying a standard of "close constitutional scrutiny" to the purpose of the restriction and the interests of the state before striking down a Maryland statute that denied the right to vote to individuals living on the grounds of a federal enclave); *Harper*, 383 U.S. at 667 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

A state election law cannot satisfy "close constitutional scrutiny" if the state does not have a "substantial and compelling reason" for the restriction imposed by the law. *Dunn*, 405 U.S. at

335. However, the mere showing of a "substantial and compelling reason" is not itself sufficient. In *Dunn*, a case frequently cited as an exemplar in this area of law, the Court explained:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' and must be 'tailored' to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

Dunn, 405 U.S. at 343 (internal citations omitted).

In support of its explanation, the *Dunn* Court quoted, *inter alia*, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), a case that helps to further elucidate the concept of close constitutional scrutiny:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in

> the light of less drastic means for achieving the same basic purpose."

Where close constitutional scrutiny applies, state election laws must be tailored sufficiently narrowly such that the law is deemed to be "necessary to promote a compelling state interest". *Dunn*, 405 U.S. at 337 (quotations and citations omitted); *see also, e.g., Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) ("[I]f a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.") (quoting *Kramer*, 395 U.S. at 627); *Wesberry*, 376 U.S. at 17-18 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

B. In Contrast, the Level of Scrutiny To Be Applied to State Statutes that Only Indirectly or Derivatively Impose Some Burden Upon the Right to Vote Is Determined by the Balancing Test in *Burdick* and *Anderson*.

The Court has held that those state election laws that indirectly or derivatively impose a burden upon the right to vote are not automatically subject to the same exacting review that has been imposed upon state statutes that wholly abrogate a citizen's right to vote. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 143-44 (1972) (comparing laws that "place a condition on the exercise of the right to vote", which

have been held to be subject to a heightened level of scrutiny, to laws that create "barriers" to candidates who wish to appear on the ballot and thereby have "at least some theoretical, correlative effect on voters", "not [all of which are] subject to a stringent standard of review").

The most influential cases in this area of law are *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), both of which reviewed state laws that worked actually or effectively to narrow the field of candidates for whom a voter could vote. In *Anderson*, the early filing deadline that Ohio required independent candidates to meet in order to appear on the ballot "[did] not create a restriction 'denying the franchise to citizens,' such as those faced by the Court in *Kramer v. Union School District*, 395 U.S. 621, 626 (1969) (emphasis omitted), *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam), *Evans v. Cornman*, 398 U.S. 419 (1970), *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and *Dunn v. Blumstein*, 405 U.S. 330 (1972)." *Anderson*, 460 U.S. at 812 (Rehnquist, J., dissenting). While the filing deadline and other ballot access laws did not threaten to disenfranchise voters completely, the *Anderson* Court found such laws had "at least some theoretical, correlative effect on voters", *Anderson*, 460 U.S. at 786, and "affect[ed]—at least to some degree—the individual's right to vote and his right to associate with others for political ends", *id.* at 788.

Because the Ohio law before the Court in *Anderson* did not threaten to disenfranchise voters completely, as had the laws considered in earlier cases such as *Dunn*, the Court was not compelled to

apply the close constitutional scrutiny required by *Dunn* and its progeny. Instead, the *Anderson* Court undertook an "analytical process" that involved "consider[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" on the one hand, and "identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed by its rule" on the other hand. *Id.* at 789.

In *Burdick*, the Court considered a challenge to a Hawaii law that prohibited write-in voting. Like the Ohio filing deadline considered in *Anderson*, the Hawaii law at issue in *Burdick* did not threaten to bar any group of citizens from casting a ballot, but rather narrowed the field of potential candidates for whom a vote could be cast. Accordingly, the Court applied the *Anderson* balancing test to determine the level of scrutiny to apply to the Hawaii law. *Burdick*, 504 U.S. at 438 ("The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*."). The Court found that the law "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote". *Id.* at 439. Because the burden that Hawaii's law imposed upon voters was found to be "slight", the Court determined that "the State need not establish a compelling interest to tip the constitutional scales in its direction". *Id.* The Court found that ballot access laws such as Hawaii's ban on write-in voting will be "presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally

will be counterbalanced by the very state interests supporting the ballot access scheme". *Id.* at 441.

Since the Court decided *Burdick*, it has continued to apply the balancing test in *Burdick* and *Anderson* to evaluate state election regulations that impose some indirect burden upon, but do not absolutely deny, citizens' right to vote. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (applying *Burdick* to evaluate a Minnesota antifusion law that prohibited candidates from appearing on the ballot as the candidate of more than one party).

C. There Exists Uncertainty Regarding the Extent of the Range of Election Laws to Which the Balancing Test in *Burdick* and *Anderson* Applies.

Although in recent decades the Court has heard a number of cases in which it considered statutes that were asserted to burden indirectly the right to vote, since the 1975 decision in *Hill v. Stone*, 421 U.S. 289 (1975), the Court has not reached the merits of a case in which a party asserted that a state election law threatened wholly to deny the right to vote. As a result, confusion exists regarding whether cases that consider laws that deny completely the right to vote to certain citizens continue to be controlled by the line of cases that includes *Dunn*, requiring close constitutional scrutiny, or whether such cases are now controlled by the balancing test in *Burdick* and *Anderson*. *Compare Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952-53, 954 (7th Cir. 2007) (refusing to apply strict scrutiny, instead following *Burdick* and

Anderson, applying a balancing test, and finding that "it is beyond question that States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots") (emphasis added) (quotation omitted), *with id.* at 954 (Evans, J., dissenting) (suggesting that the balancing test in *Burdick* is "something akin to 'strict scrutiny light'"), *and Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (en banc) (Woods, J., dissenting from denial of rehearing en banc) ("[T]he panel assumes that *Burdick* also means that strict scrutiny is no longer appropriate in *any* election case. As Judge Evans makes clear, however, *Burdick* holds no such thing."), *and Stewart v. Blackwell*, 444 F.3d 843, 861-62 (6th Cir. 2006) (rejecting *Burdick* in favor of strict scrutiny upon finding that Ohio voters were "disenfranchised by antiquated voting equipment") (citation omitted) (opinion later rendered moot by technological advancements in *Stewart v. Blackwell*, 473 F.3d 692, 694 (6th Cir. 2007) (en banc)). *See also Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1359-66 (N.D. Ga. 2005) (invalidating photo identification law after applying, in the alternative, both *Dunn* and *Burdick*); Br. for Pet'rs in No. 07-21 at 34 (noting that there is "some uncertainty" as to whether *Dunn* or *Burdick* is the proper standard for reviewing a state election law that imposes conditions on the right to vote).

The decisions of the Court have not clarified the confusion. On the one hand, *Burdick* instructed in broad terms that "[a] court considering a challenge to a state election law" must apply the sliding scale balancing test in *Anderson*. *Burdick*, 504 U.S. at 434.

On the other hand, the Court: (1) has never overruled *Dunn* or similar cases that plainly hold that state election laws that threaten to deny completely certain citizens the right to vote are subject to close scrutiny; (2) recently cited *Dunn* approvingly, with no citation to either *Burdick* or *Anderson*, in *Purcell v. Gonzales*, 549 U.S. __, 127 S. Ct. 5 (2006), a case that involved an Arizona measure that required voters to present proof of citizenship in order to register to vote and proof of identification in order to vote[2]; (3) has never explicitly held that state election laws that assertedly threaten to deny completely the right to vote are now subject to the balancing test in *Burdick* and *Anderson*; and (4) has never applied the balancing test in *Burdick* and *Anderson* to a state election law that assertedly threatened to deny completely the right to vote.

Amicus respectfully suggests that the Court should take this opportunity to clarify this area of law by explicitly holding that state election laws that assertedly threaten to deny completely the right to vote to certain citizens remain in the province of the line of cases that includes *Dunn*, and are therefore subject to close constitutional scrutiny, while state election laws that assertedly otherwise impose some

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[2] The issue before the Court in *Purcell* was whether the interlocutory injunction issued by a two-judge motions panel of the Ninth Circuit Court of Appeals, which enjoined application of the Arizona measure during the November 2006 elections, was proper. The Court did not reach the question of whether the Arizona measure was constitutional, nor did it determine the level of scrutiny to which the measure should be subjected.

indirect burden upon the right to vote are subject to the balancing test of *Burdick* and *Anderson*.

D. Where a State Election Law Threatens To Bar Completely Otherwise Eligible Citizens from Voting It Should Be Subjected to Close Scrutiny.

The line of cases that includes *Dunn* is correct in holding state election laws that threaten to deny completely an individual right as fundamental as the right to vote to an "exacting" level of scrutiny that requires that the law be tailored sufficiently narrowly such that it is deemed to be necessary to promote a compelling state interest, *Dunn*, 405 U.S. at 337, 343; *see also, e.g.*, *Cipriano*, 395 U.S. at 704 ("[I]f a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'") (quoting *Kramer*, 395 U.S. at 627). The Court should reaffirm the validity of that line of cases. The line of cases that includes *Dunn* is concerned with the complete denial of the right to vote, a right that is "the citizen's link to his laws and government [and] is protective of all fundamental rights and privileges". *Evans*, 398 U.S. at 422. On the other hand, the ballot access line of cases such as *Burdick* and *Anderson* is concerned with only an indirect effect upon the right to vote that derives from a narrowing of the field of candidates for which a vote can be cast (or cast effectively).

There is no question that the Constitution bestows upon the states the power to determine

"[t]he Times, Places and Manner of holding Elections for Senators and Representatives". U.S. Const. art. I, § 4, cl. 1. However, while a state clearly has an interest in preserving the sanctity of the ballot box, "[a] State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)); *see also Tashjian*, 479 U.S. at 217 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote."). The evaluation of a ballot access law, which the Court performed in *Burdick* and *Anderson*, is well-suited to a sliding scale balancing test that "examine[s] in a realistic light the extent and nature of [the law's] impact on voters", *Anderson*, 460 U.S. at 786, and seeks to match a level of scrutiny to the alleged harm to voters. Presumably, "laws that affect candidates" can indirectly impose countless different types of "theoretical, correlative" burdens upon voters, *see id.*; it would, therefore, be illogical to subject all laws that affect candidates in some way to an identical level of constitutional scrutiny. In sharp contrast, there is no doubt about the "nature" of the effect upon voters of laws that are found to disenfranchise completely certain voters, and no sliding scale is required to match the level of scrutiny to the type of harm at issue. The Court should continue to demand that laws that deny completely a right as fundamental as the right to

vote be narrowly tailored and necessary to promote a state interest that is indeed compelling.

Weeks before deciding *Burdick*, the Court considered *Burson v. Freeman*, 504 U.S. 191 (1992), a case that presented an issue analogous to the issue decided in *Dunn*. Both cases involved a conflict of a fundamental individual right—freedom of speech in *Burson*, the right to vote in *Dunn*—with the state's interest in administering its elections. In *Burson*, a state election law that prohibited "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place" on election day was challenged on First and Fourteenth Amendment grounds. *Id.* at 193. The Court found that the law at issue "implicate[d] three central concerns in [its] First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech". *Id.* at 196. On the other hand, the Court recognized that the state "indisputably ha[d] a compelling interest in preserving the integrity of its election process". *Id.* at 199. The *Burson* Court, much like the *Dunn* Court, held the state law "subject[ ] to exacting scrutiny [whereby the state was required to] show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end". *Id.* at 198 (internal quotations omitted).

Amicus does not suggest, however, that subjecting a law to close constitutional scrutiny should amount to a death knell. As the Court explained in *Storer v. Brown*, 415 U.S. 724 (1974):

> "It has never been suggested that the Williams-Kramer-Dunn rule automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress."

Id. at 729; *see also,* e.g., *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"); *Burson*, 504 U.S. at 193, 211 (holding that Tennessee's law prohibiting "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place" on election day survived "strict scrutiny"). *Amicus* takes no position on whether the Indiana law now before the Court should survive close constitutional scrutiny.

The Court should remain faithful to its precedents in cases such as *Dunn*, which hold that state laws that threaten to deprive citizens of the fundamental constitutional right to vote are subject to a form of close scrutiny that requires states narrowly to tailor such laws to a compelling state interest so as to minimize the deprivation of a right that is of such supreme importance. A right as fundamental as the right to vote cannot be adequately protected from direct infringement by the sliding scale balancing test applied by *Burdick* and *Anderson*. The Court has never applied that balancing test to a statute that threatened to bar certain citizens from casting a ballot at all, and it should not start now.

CONCLUSION

The Court should reaffirm its decisions in the line of cases that includes *Dunn*, and apply close constitutional scrutiny to state election laws that threaten to bar completely certain citizens from exercising their fundamental right to vote.

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Respectfully submitted,

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