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REIFYING *ANDERSON-BURDICK*: VOTER PROTECTION IN THE TIME OF PANDEMIC AND BEYOND

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I. INTRODUCTION

During the Fall of 2020, the COVID-19 pandemic continued to affect the world in unrelenting waves, with the United States leading the way in both infections and deaths.[1] As Election Day[2] approached, the pandemic showed no sign of abating, triggering a series of lawsuits concerning state election laws.[3] These cases arose first with ballot initiative challenges, where potential candidates and voters claimed that state laws mandating the number and type of signatures required for ballot initiatives placed a severe burden on citizens' First Amendment rights in light of the COVID-imposed lockdowns, stay-at-home orders, social distancing mandates and a generalized fear of the virus. Relatedly, the virus's disproportionate impact on people of color, the elderly, and low-income citizens became apparent, raising claims that state voter registration laws have a discriminatory impact.[4]

An important issue at the heart of many of these election law cases is what level of scrutiny a court should apply to challenges to state election laws. *Little v. Reclaim Idaho*[5] was one of many ballot initiative cases working its way through the trial courts in the midst of the COVID-19 pandemic. Writing for the concurrence on July 30, 2020, United States Supreme Court Chief Justice Roberts identified a circuit split regarding the proper analysis for ballot initiative cases challenged on First Amendment grounds.[6] The split involves the Sixth and Ninth circuits on one side and the Seventh, Tenth, and Eleventh on the other.[7] The circuit split hinges on balancing the state's interests with the First Amendment rights of its citizens. The First, Sixth, and Ninth Circuits require some degree of scrutiny anytime a regulation burdens a person's ability to place an initiative on the ballot.[8] The other circuits have held that no First

1. John Elfein, *Coronavirus (COVID-19) in the U.S. – Statistics & Facts*, STATISA (Oct. 12, 2020), https://www.statista.com/topics/6084/coronavirus-covid-19-in-the-us/.

2. November 3, 2020.

3. As of Oct. 23, there were 414 lawsuits pending. *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/cases.

4. For a list of cases by state, *see Voting Rights Litigation 2020*, BRENNAN CENTER FOR JUSTICE (July 28, 2020), https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020.

5. Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020).

6. *Id*.

7. *Id*.

8. *Id*.

Amendment burden exists, and therefore no analysis of the state's interest is required so long as the state law in question does not limit political discussion or petition circulation.[9]

This Comment examines the evolution of that circuit split and concludes that the analyses used by the First, Sixth, and Ninth circuits (the "*Anderson-Burdick"* test or variations thereof) are more faithful to the Constitution, closely follow Supreme Court precedent, and when applied correctly, are structured in a way that avoids sweeping too broadly. This Comment will show how *Anderson-Burdick*, while initially developed in the context of ballot initiative cases, could provide extra protections for voters in cases where state election laws are being challenged on the ground that they have a discriminatory impact due to COVID-19. These protections could be especially important as the Roberts' Court continues to engage in what seems to be a "crusade" to roll back protections for voters' rights.[10]

Section II of this Comment traces the development of *Anderson-Burdick*, as well as ways the courts have struggled to apply it. Section II(B) analyzes the circuit split Chief Justice Roberts identified in his majority opinion in *Reclaim Idaho*, revealing that the cases he used to illustrate the circuit split were inapposite, and actually supported the use of the framework as applied by the First, Sixth, and Ninth Circuits. Section II(C) also reviews COVID-19's disparate impact on racial and other minorities and explains how courts are using *Anderson-Burdick* to resolve cases arising as a result of the disparity. Finally, Section III demonstrates how the test's shortcomings are proving to be strengths, particularly when it is combined with other analyses in context of the Voting Rights Act. Section III argues that *Anderson-Burdick* should be adopted by all the circuits in order to ensure robust voter protections and avoid mass disenfranchisement.

II. BACKGROUND

This Section begins by tracing the development and application of *Anderson-Burdick* in the context of First Amendment challenges to ballot

9. *Id*.

10. Ian Millhiser, *Chief Justice Roberts's Lifelong Crusade Against Voting Rights, Explained*, VOX, (Sep. 18, 2020), https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020; *see also* Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016); Lydia Hardy, *Voter Suppression Post-Shelby: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857 (2020).

initiative laws. Section II(B) illustrates how the circuit split developed. Section II(C) includes an analysis of the Supreme Court's decision in *Crawford v. Marion County*, the most recent case in which the Court addressed *Anderson-Burdick*.[11] Section II(D) discusses the circuit split regarding the application of *Anderson-Burdick* in ballot initiative cases arising specifically as a result of the COVID-19 pandemic and acknowledged by Chief Justice Roberts in *Reclaim Idaho.* Section II(E) concludes with a discussion of the disparate impact COVID-19 is having on racial minorities, voters with disabilities, the elderly, and low-income Americans and how these disparities are amplifying existing barriers to voting for these citizens.

A. Developing the Framework

In ballot initiative cases, the First, Sixth, and Ninth circuits have adopted the Supreme Court's *Anderson-Burdick* balancing test to determine whether or not a state's professed interest outweighs the burden it imposes on voters' First Amendment rights. [12] The Supreme Court recognized that state regulation of ballot initiatives potentially burdens free speech when the regulations "limit political expression"[13] or "significantly inhibit communication with voters about proposed political change."[14] *Anderson-Burdick* applies a sliding scale analysis to ballot initiative laws based on the degree of burden the laws place on voters' First Amendment rights. The test developed from two Supreme Court cases where state ballot initiative laws were challenged under the First Amendment.[15]

The first part of *Anderson-Burdick* developed from a case challenging Ohio's early filing deadline for independent candidates.[16] In *Anderson v. Celebreeze*, the Supreme Court determined that state laws placing a burden on voters' constitutional rights must withstand strict scrutiny.[17] The Court held that an Ohio statute that required an independent presidential candidate to file a statement of candidacy and supporting nominating petition five months prior to the general election unconstitutionally burdened the voting and associational rights of that

11. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

12. The Ninth Circuit refers to the same test as the *Angle v. Miller* test, but there is no substantive difference between the tests. For purposes of this Comment, "Anderson-Burdick" test will encompass the Ninth Circuit as well.

13. Meyer v. Grant, 489 U.S. 414, 417 (1988).

14. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999).

15. Anderson v. Celebreeze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992).

16. *Celebreeze*, 460 U.S. 780.

17. *Id*.

candidate's supporters.[18] The Court articulated the legal standard for challenges to a state's election laws:

> [A] court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments…then evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.[19]

The Court held Ohio's filing deadline burdened the associational rights of non-party voters and candidates.[20] In addition, it "place[d] a significant state-imposed restriction" on the national election because the President and Vice President necessarily represented all voters, and therefore votes cast in one state impacted citizens in all states because those votes affected the outcome of the federal elections.[21] The Court noted that the deadline disproportionately limited political participation by an identifiable political group, which made it difficult for the State to support its early filing law.[22]

Ohio asserted three interests in reply: (1) an interest in allowing voters sufficient time to educate themselves about the candidate; (2) an interest in equal treatment for party candidates and independents; and (3) an interest in political stability.[23] The Court rejected these arguments as justification for the significant burdens the law placed on candidates and voters. The Court reasoned that "if the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."[24] In other words, a state law that burdens constitutional rights must be narrowly-tailored to serve the state's compelling interest; it must withstand strict scrutiny.

The second half of *Anderson-Burdick*, set forth in *Burdick v. Takushi*, refined the strict scrutiny analysis from *Anderson* by adding a balancing test to determine the degree of scrutiny required.[25] In *Burdick*, the Supreme Court considered whether Hawaii's prohibition on write-in votes violated the First and Fourteenth Amendments.[26] The case began with a

18. *Id*.
19. *Id*.
20. *Id*. at 781.
21. *Id*.
22. *Id*. at 792-93.
23. *Id*. at 781.
24. *Id*. at 806 (quoting Kusper v. Pontikes, 414 U.S. 51, 59 (1973)).
25. *See* Burdick v. Takushi, 504 U.S. 428 (1992).
26. *Id*.

challenge to Hawaii election laws that prohibited write-in voting. Upon certification of questions by the district court regarding the constitutionality of write-in votes, the Hawaii Supreme Court held that write-in votes were barred by Hawaii laws and these laws were consistent with its Constitution.[27]

The district court then granted the petitioner's motion for summary judgment and injunctive relief but stayed the orders pending appeal.[28] On appeal, the Ninth Circuit held that the burden imposed by the prohibition on write-in votes was justified, because the state provided other procedures that ensured easy access to the ballot and alternative ways for the petitioner to express his political beliefs.[29] The court expressly declined to follow the lead of the Fourth Circuit, which held that fundamental rights were implicated by the casting and counting of write-in votes, and therefore any state laws burdening those rights were unconstitutional if they could not withstand strict scrutiny.[30] The Supreme Court thus granted certiorari to resolve a circuit split on this issue between the Ninth and Fourth Circuit.[31]

The Court rejected the argument that *any* law that burdens the right to vote must be subject to strict scrutiny.[32] Instead, the Court explained that laws governing elections "invariably impose some burden upon individual voters" and held that requiring every regulation to survive strict scrutiny would "tie the hands of the States" and prevent them from regulating fair and disciplined elections.[33] The Court introduced a new element to the standard set forth in *Anderson*, holding that courts should first determine *the degree* of burden on First and Fourteenth Amendment rights and then apply the proportionate amount of scrutiny to the attendant state laws.[34] Applying this analysis, the Court held that the state's law prohibiting write-in votes imposed "only a limited burden" on voters' First Amendment rights and Hawaii's interest in protecting the integrity of its elections provided adequate justification for the law.[35]

Thus, *Anderson* and *Burdick* combine to create a balancing test which "weighs the burdens' on voters rights by a particular voting law or practice against asserted state interests; the heavier the burden on voters' rights recognized by the court, the stricter the judicial scrutiny."[36]

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27. Burdick v. Takushi, 776 P.2d 824 (1989).
28. *Burdick*, 504 U.S. at 431.
29. *Id*.
30. Dixon v. Maryland State Admin. Bd. of Election L., 878 F.2d 776 (4th Cir. 1989).
31. *Burdick*, 504 U.S. at 432.
32. *Id*.
33. *Id*. at 433.
34. *Id*. at 434.
35. *Id*. at 439.
36. Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-*

B. To Apply or Not to Apply

Since *Burdick*, some circuits have applied *Anderson-Burdick* to cases challenging ballot initiative laws generally.[37] By contrast, other circuits dispense with any sort of review, arguing that as long as the election law in question does not directly limit political discussion or petition circulation, the First Amendment is not implicated.[38] This Section examines cases from the First and Tenth Circuits that illustrate the difference.

The First Circuit has established a standard for determining what level of scrutiny to apply when faced with First Amendment challenges to ballot initiative laws.[39] In *Wirzburger v. Galvin*, the court held that laws having only incidental effects on speech did not implicate the First Amendment and must withstand only rational basis review, but laws prohibiting ballot initiatives on a particular subject constituted a restriction on speech sufficient to trigger intermediate scrutiny.[40] *Wirzburger* concerned an effort by parents to amend the Massachusetts Constitution via popular initiative.[41] Because the initiative proposed to eliminate a prohibition on state funding for private schools with religious affiliations, it was excluded from the initiative process by a provision of the Massachusetts Constitution which prohibited petitions that explicitly related to "religious institutions."[42] The parents argued that this exclusion violated their First Amendment rights because it was a "content-based restriction on core political speech," and thus should be subject to strict scrutiny.[43]

Applying *Anderson-Burdick*,[44] the First Circuit initially considered the burden the state law placed on the First Amendment.[45] The court determined the use of the initiative process constituted expressive conduct and involved core political speech, thus implicating the First Amendment.[46] As the court explained, ballot initiatives "provide[] a

19 Pandemic, and How to Treat and Cure Them, 19 ELECTION L.J. 263, 272 (2020).

37. *See e.g.*, Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012), Wirzburger v. Galvin, 412 F.3d 271, 278 (1st Cir. 2005); SawariMedia, LLC v. Whitmer, 963 F.3d 595 (6th Cir. 2020).

38. *See e.g.*, Jones v. Markiewicz-Qualkinbush, 892 F.3d 935 (7th Cir.); *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1085 (10th Cir. 2006); Dobrovolny v. Moore, 126 F.3d 1111 (8th Cir. 1997).

39. Wirzburger v. Galvin, 412 F.3d 271, 278 (1st Cir. 2005).

40. *Id*.

41. *Id*.

42. *Id*. at 275.

43. *Id*.

44. The court does not explicitly reference *Anderson-Burdick* by name but applies each element of the framework.

45. *Wirzburger*, 412 F.3d at 276.

46. *Id*.

uniquely provocative method of spurring public debate" and thus constitute core political speech according to Supreme Court precedent.[47] However, the court recognized that the regulation at issue did not directly target communicative impact, but rather was "aim[ed] at preventing the act of generating…constitutional amendments about certain subjects by initiative."[48] Therefore, the court found the burden on speech was incidental to the law and strict scrutiny was not required.[49] However, because the "expression is affected by the regulations of the state initiative process," the court determined that intermediate scrutiny was warranted.[50]

Accordingly, the court moved to the second step of the analysis and examined the state's interest in regulating the ballot initiative process. The court concluded the state's interest in maintaining the proper constitutional balance between the Free Exercise Clause and the Establishment Clause was substantial.[51] The court then balanced the burden on the Plaintiff's First Amendment rights with the substantial interest of the state, holding that because the statutes were narrowly tailored, they survived intermediate scrutiny.[52]

By contrast, the Tenth Circuit rejected this analysis in *Initiative & Referendum Institute v. Walker*, even while expressly acknowledging that doing so created a circuit split.[53] In *Walker*, the Plaintiffs claimed that a Utah state law that required supermajority approval of wildlife management ballot initiatives imposed a "chilling effect" on the exercise of citizens' First Amendment rights.[54] In "respectfully disagreeing" with the First Circuit, the court held that such a provision fell short of implicating freedom of speech at all.[55]

Sitting en banc, the Tenth Circuit declined to consider the regulation's incidental effects on speech or communicative conduct.[56] Instead, the court stated that the degree of scrutiny required turned on whether the laws in question "regulate or restrict the communicative conduct of persons advocating a position in a referendum" or whether the laws simply govern the process of enacting legislation.[57] According to the court, the former trigger strict scrutiny and the latter require no

47. *Id.*
48. *Id.* at 277.
49. *Id.* at 275.
50. *Id.* at 279.
51. *Id.*
52. *Id.* at 276.
53. Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1085 (10th Cir. 2006).
54. *Id.*
55. *Id.*
56. *Id.* at 1099.
57. *Id.* at 1100.

constitutional scrutiny at all.[58] Although the court agreed that the First Amendment afforded protection to the political speech surrounding a ballot initiative, it held that it did not provide any guarantees that all points of view are "equally likely to prevail."[59] Therefore, intermediate scrutiny does not apply to laws that structure elections even when they make some outcomes harder to achieve than others.[60] The court rejected the Plaintiff's alternative argument that the legislation is not content-neutral on the same grounds; the regulation at issue in this case regulated process rather than speech.[61] Thus, according to the Tenth Circuit, First Amendment analysis was unwarranted in this case and Utah's law was upheld without review.

Judge Lucero dissented and faulted the court's decision because it "free[d] from constitutional scrutiny conduct by a majority of voters that has the potential to chill political speech on the basis of content by imposing discriminatory election requirements."[62] The dissent went on to say that states cannot "rig election laws" by applying content-based supermajority requirements without running afoul of the First Amendment.[63] Drawing a comparison between rigged election laws such as this one and partisan gerrymandering, Judge Lucero's dissent referenced the dissent in the gerrymandering case *Veith v. Jubelirer*, where Justice Kennedy stated that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views."[64] Should those circumstances arise, Justice Kennedy advised that First Amendment violations can only be alleviated if the State demonstrates a compelling interest in that law.[65] According to Judge Lucero, the *Wirzburger* court's First Amendment analysis was proper for ballot initiative cases because it allowed the State to prevail if the law in question survived intermediate scrutiny.

C. The Supreme Court's Guidance (or Lack Thereof) Concerning Anderson-Burdick

The Supreme Court has directly addressed *Anderson-Burdick* only once since the emergence of the circuit split, issuing a plurality opinion in *Crawford v. Marion County* that resulted in two conflicting

58. *Id*.
59. *Id*. at 1101.
60. *Id*. at 1099, 1102.
61. *Id*. at 1103.
62. *Id*. at 1110 (Lucero, J. dissenting).
63. *Id*.
64. *Id*. at 1112 (quoting Vieth v. Jubelirer, 541 U.S. 267, 314 (2004)) (Kennedy, J., dissenting).
65. *Id*.

interpretations of *Anderson-Burdick*.[66] Writing for the Court, Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, expressly applied *Anderson-Burdick* to an Indiana statute requiring voters to have a form of government-issued photo identification in order to vote.[67] Stevens found that Indiana's "precise interests" in preventing voter fraud and protecting the integrity of elections did not unconstitutionally burden voters.[68] Additionally, when Petitioners asked the Court to consider the burden placed on a specific subset of the voter population rather than the population as a whole, the Court conceded that such a burden may necessitate a higher degree of scrutiny and therefore a more compelling and narrowly tailored state law.[69] However, the Court held that the Petitioner failed to prove that such a burden existed and therefore did not rule on the question.[70]

Writing separately and concurring in the judgment, Justice Scalia, together with Justices Thomas and Alito, faulted the Court for reading *Anderson* together with *Burdick* to create a balancing test.[71] Instead, Justice Scalia insisted that *Burdick* distilled the *Anderson* opinion into a "two-track approach:" laws severely burdening the right to vote trigger strict scrutiny, while others receive only rational basis review.[72] Effectively, Justice Scalia's binary interpretation disclaimed the balancing component of *Anderson-Burdick* and created the divided approach to applying it at issue today.

In his concurrence, Justice Scalia elided the interim step articulated in *Burdick* and applied by many lower courts since. Insisting on the "two-track" approach, Justice Scalia failed to abide by the *Burdick* court's mandate that courts must consider the extent to which the state's interests in passing a law require the subsequent burden on voters' rights created by the law.[73]

Writing for the Court, Justice Stevens rejected that interpretation, noting that "[t]he *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*…the Court applied the 'flexible standard' set

66. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

67. *Id*. at 191.

68. *Id*. at 203.

69. *Id*. at 202.

70. *Id*.

71. *Id*. at 204 (Scalia, J., concurring).

72. *Id*. at 205.

73. The *Burdick* court explicitly stated that "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' *taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'*" *Burdick v. Takushi*, 504 U.S. 428, at 434, (1992) (emphasis added) (first quoting Anderson v. Celebreeze, 460 U.S. 780, 789 (1983): and then quoting Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 213 (1986)).

forth in *Anderson.*"[74]

Justice Souter authored a dissenting opinion, joined by Justice Ginsburg, and explicitly endorsed and applied the combined *Anderson-Burdick* framework with its sliding scale of scrutiny.[75] Thus, in the *Crawford* decision, five justices affirmed the use of *Anderson-Burdick*, three justices viewed it as a binary test only, and a single Justice evaluated the burden from a disproportionate impact perspective.[76]

Because the Supreme Court has not revisited *Anderson-Burdick* since the *Crawford* plurality opinion, lower courts continue to apply two different versions of the test—either the flexible standard set forth by Justice Stevens in the plurality and applied in a separate dissenting opinion by Justice Souter,[77] or the binary, all-or-nothing test advocated by Justice Scalia in the concurrence. The challenges created by this lack of clarity are amplified in the context of cases arising as a result of the COVID-19 pandemic.

D. COVID-19 and the Current Circuit Split

In 2020, the COVID-19 pandemic strained the American election system in unprecedented ways. Beginning in mid-March, local and state governments imposed various restrictions on citizens, ranging from mandatory stay-at-home orders to limits on the number of people permitted to gather outdoors.[78] By the end of March, more than ninety percent of the U.S. was under some sort of stay-at-home order.[79] The severity and tenacity of the outbreak in the U.S. led the Centers for Disease Control to issue special guidance for June's election polling locations, encouraging states to expand the number of voting options, extend the amount of time available for voting, and take additional measures to protect those at increased risk for severe illness.[80]

74. Crawford v. Marion Cty. Election B., 553 U.S. 191, n. 8 (2008).

75. *Id*. at 209 (Souter, J., dissenting).

76. Justice Stevens, Chief Justice Roberts, and Justices Kennedy, Souter, and Ginsburg all apply the sliding scale balancing test as understood in *Anderson* combined with *Burdick*; Justices Scalia, Thomas, and Alito apply the binary test. *Id*.

77. "Given the legitimacy of interests on both sides, we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue." *Id*. at 210 (Souter, J., dissenting).

78. Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, CENTERS FOR DISEASE CONTROL MORBIDITY AND MORTALITY WEEKLY REP. (Sep. 4, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm.

79. Elfein, *supra* note 1.

80. *Considerations for Election Polling Locations: Interim Guidance to Prevent Spread of Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

With the election cycle ramping up amid the pandemic, courts were soon faced with legal challenges to state election laws.[81] The increasing burden on the courts makes it even more imperative that they have a clear test under which to evaluate challenges to states' voting laws, but the cases on either side of the circuit split identified by Chief Justice Roberts in *Reclaim Idaho* reveal that the confusion created by the Supreme Court's plurality opinion in *Crawford* remains.

In *Reclaim Idaho*, the State sought a stay pending appeal from a district court order requiring Idaho to certify a ballot initiative with less than the required number of signatures or to allow the initiative more time and leeway to gather digital signatures online in order to reach the requisite number in light of the challenges presented by the pandemic.[82] The Supreme Court granted the stay. In his concurrence, Chief Justice Roberts noted that the Court would likely grant certiorari in the case, were it requested, in order to resolve a circuit split regarding the proper analysis to apply to election administration laws challenged under the First Amendment.[83]

A brief review of the cases mentioned by the Chief Justice in *Reclaim Idaho* provides a useful overview into the application of *Anderson-Burdick* during the pandemic. Contrary to Chief Justice Roberts' opinion, the circuits are not split on *when* the test is applicable, but rather on *how* to apply it.

The Sixth Circuit applied *Anderson-Burdick* in two separate pandemic-related cases.[84] The first case challenged Michigan's signature requirement during the COVID-19 lockdown.[85] In *SawariMedia LLC. v. Whitmer*, the Sixth Circuit denied the government's motion to stay a preliminary injunction imposed by the district court that enjoined the state from enforcing its signature requirement for ballot initiatives.[86] The State argued that the district court erred in applying *Anderson-Burdick* to find a severe burden on the Plaintiff's First Amendment rights and further argued that the court abused its discretion by declining to accept the State's proposed extension to the petition deadline.[87] The court disagreed on both counts. The court upheld the lower court's application of *Anderson-Burdick*, which found that the combination of Michigan's stay-

81. Pam Fessler, *Coronavirus Likely to Supercharge Election-Year Lawsuits Over Voting Rights*, NPR (Apr. 17, 2020), https://www.npr.org/2020/04/17/836671427/coronavirus-likely-to-supercharge-election-year-lawsuits-over-voting-rights.

82. Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020).

83. *Id*.

84. SawariMedia, LLC v. Whitmer, 963 F.3d 595 (6th Cir. 2020); Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020).

85. *SawariMedia*, 963 F.3d at 595.

86. Id.

87. *Id*. at 596- 97.

at-home order and the state's signature requirement for ballot initiatives violated the First Amendment by creating a severe restriction on SawariMedia's access to the ballot.[88] Further, the court noted that the State proffered no evidence that the district court was obliged to accept its remedy, and thus the State did not meet its burden of proof that it was entitled to a stay.[89] Finally, the court noted, and the State conceded, that current Sixth Circuit precedent favored applying *Anderson-Burdick* to ballot initiative cases.[90]

Shortly after *SawariMedia* was decided, the Sixth Circuit heard *Thompson v. DeWine*, where a similar challenge to ballot initiative laws yielded a different result. Like in *Sawari*, the plaintiffs filed a First Amendment action claiming that the combination of Ohio's ballot initiative laws and the Governor's stay-at-home orders presented an unconstitutional burden on the First Amendment rights of individuals seeking to include an initiative on the ballot.[91] The court applied *Anderson-Burdick* and found that because the State included an exemption to the stay-at-home order for people gathering for First Amendment reasons, the burden on voters' rights was only intermediate.[92] The court found that the State's interest in preventing election fraud justified the burden on the plaintiff's First Amendment rights and thus the state was likely to prevail on the merits of its claim.[93] Therefore, the court reversed the lower court's granting of the plaintiff's preliminary injunction.[94]

The *Thompson* court's analysis closely parallels the Eighth Circuit's decision in *Miller v. Thurston*—Chief Justice Roberts contrasted this case with *SawariMedia* to illustrate the circuit split regarding how to apply *Anderson-Burdick*.[95] The plaintiffs in *Miller* alleged that the combination of state laws requiring ballot initiative petitions to be signed by in-person witnesses and notarized together with government restrictions limiting in-person contact in response to the pandemic resulted in an unconstitutional burden on the plaintiff's First Amendment rights.[96] The district court expressly applied *Anderson-Burdick* and determined that the plaintiffs

88. *Id*. at 596.

89. *Id*. at 597.

90. *Id*.

91. Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020).

92. *Id*. at 811.

93. *Id*.; *but see* Richard Hasen, *Direct Democracy Denied: The Right to Initiative During a Pandemic*, U. CHI. L. REV. BLOG (June 26, 2020), https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-initiative-hasen/ (criticizing the Court's reasoning and arguing in support of upholding the district court decision).

94. *Thompson*, 959 F. 3d at 811.

95. Miller v. Thurston, 967 F.3d 727 (8th Cir. 2020).

96. Miller v. Thurston, 462 F.Supp. 3d 930 (W.D. Ark.), *rev'd*, 967 F.3d 727 (8th Cir. 2020).

established a likelihood of success on the merits of their claims. The court found that the government's interest in preventing fraud in the election process was compelling, but the witness and signature requirements were not narrowly tailored to achieve that interest.[97] Accordingly, the district court granted the plaintiffs' motion for preliminary injunction.[98]

On appeal, the Eighth Circuit reversed the trial court, but not for applying *Anderson-Burdick*. Instead, the court of appeals determined that only the in-person signature requirement applied in the context of COVID-19 sufficiently burdened the First Amendment to trigger strict scrutiny.[99] Relying on circuit precedent, the court applied *Anderson-Burdick*'s "sliding standard of review."[100] Therefore, the court found *Anderson-Burdick*'s application to the case was appropriate but reversed the lower court's determination that the burden on the plaintiffs was severe.[101] Rather, the Eighth Circuit found that the State's interest in protecting the integrity of its initiative processes paired with safe alternatives for satisfying the witness and signature requirements did not unduly burden the plaintiffs and therefore survived intermediate scrutiny.[102]

In all three cases, the lower courts applied *Anderson-Burdick* and the appellate courts endorsed its application, establishing *Anderson-Burdick* as the applicable analytical test. The circuit split was based not on whether to apply *Anderson-Burdick*; the courts divided only in their evaluations of the states' interests in passing election laws and the attendant burdens they placed on voters.

E. COVID-19's Disparate Impact on Some Voters

The COVID-19 pandemic interacts with voting laws in ways that directly impact the burden courts must evaluate in election law cases. Racial minorities, voters with disabilities, the elderly, and low-income Americans already face barriers to voting based on structural inequities and racism in the United States election system.[103] These disparities are

97. *Id*. at 942.

98. *Id*. at 948.

99. *Miller*, 967 F.3d at 738.

100. *Id*. at 739.

101. *Id*. at 741.

102. *Id*.

103. Samantha Artiga et al., *Racial Disparities in COVID-19: Key Findings from Available Data and Analysis*, KAISER FAMILY FOUNDATION (Aug. 17, 2020) https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-covid-19-key-findings-available-data-analysis/; Lilian Aluri, *COVID-19 and the Disability Vote*, AMERICAN ASSOC. OF PEOPLE WITH DISABILITIES (Sep. 2020), https://www.aapd.com/wp-content/uploads/2020/09/COVID-19-and-the-Disability-Vote.pdf.

amplified by the COVID-19 pandemic.[104]

Research reveals that people with disabilities are more susceptible to contracting COVID-19 and frequently endure comorbidities resulting in complications and higher instances of death.[105] Data collected in New York state found that people with disabilities are 2.5 times more likely to die of COVID-19.[106] When combined with accessibility challenges and other barriers to voting that many people with disabilities experience in election years, COVID-19 is requiring these voters to "make an impossible decision this election—between protecting [their] health, and even [their] live[s], and participating in democracy."[107]

Similar barriers exist for Black and other minority voters. In particular, a recent study showed that Blacks who contract COVID-19 are two times more likely to require hospitalization and three times more likely to die from the disease than other racial and ethnic groups.[108] Hispanics and other Latinos are also experiencing higher rates of infection and deaths than white people in states around the country.[109] Like people with disabilities, Black and other racial minorities already suffer from systemic voter suppression and disenfranchisement in part by way of fewer convenient polling locations and longer wait times at the polls.[110]

COVID-19 amplifies minority voters' disadvantages. For example, during Wisconsin's April primary election, measures undertaken by the State in response to the pandemic reduced the number of available polling locations across the state.[111] Milwaukee, whose population is 57.6 percent Black, Hispanic, or Latino, had only five polling stations to serve its population of 592,000—down from the 175 stations it would normally have.[112] Not only did this decision compound the risks for Black and

104. *What Democracy Looks Like: Protecting Voting Rights in the US during the COVID-19 Pandemic*, HUMAN RIGHTS WATCH (Sep. 22, 2020) https://www.hrw.org/report/2020/09/22/what-democracy-looks/protecting-voting-rights-us-during-covid-19-pandemic#.

105. Artiga, *supra* note 104 at 1.

106. *Id*. at 11.

107. *Id*. at 22.

108. Sharon E. Moore et. al., *Six Feet Apart of Six Feet Under: The Impact of COVID-19 on the Black Community*, DEATH STUD. (July 2020), https://www.tandfonline.com/doi/full/10.1080/07481187.2020.1785053.

109. Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist — And In Some Cases Worsen*, NPR (Sep. 23, 2020), https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen.

110. M. Keith Chen et.al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, NAT'L BUREAU OF ECON. RSCH., Working Paper 26487 (Nov. 2019), https://www.nber.org/papers/w26487; *see also Social Equity and COVID-19: The Case of African Americans*, 80 PUB. ADMIN. REV. 5, 820-26 (2020).

111. John Curiel & Angelo Dagonel, *Election Administration Challenges and Effects in Wisconsin*, LAWFARE (Sep. 25, 2020), https://www.lawfareblog.com/election-administration-challenges-and-effects-wisconsin.

112. *Quick Facts: Milwaukee, Wisconsin*, UNITED STATES CENSUS BUREAU,

minority voters at disproportionate rates, but it resulted in a demonstrable increase in COVID-19 cases. According to the Bureau of Economic Research, "a 10% increase in in-person voters per polling location [was] associated with an 18.4% increase in the COVID-19 positive test rate two to three weeks later."[113]

Similar burdens on voting during the pandemic exist for other distinct groups of Americans. Elderly voters are at exceptionally high risk of contracting the virus and may face additional challenges regarding access to transportation, technology, and other resources needed to participate in the election process.[114] Similarly, COVID-19 has had a disparate impact on low-income Americans who experience many of the same burdens as, and often intersect with, the distinct subsets of voters mentioned above.[115] Taken as a whole, when courts fail to protect the rights of these voters, they run the risk of "massive disenfranchisement" and force voters to "brave the polls, endangering their own and others' safety… or lose their right to vote, through no fault of their own."[116]

The district court in *Thompson* recognized the importance of rigorous voter protections during the pandemic:

> [T]hese are not normal times. So, the question is whether the COVID-19 pandemic and Ohio's stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights. We must answer this question from the perspective of the people and organizations affected by Ohio's ballot initiative restrictions and considering all opportunities these parties had to exercise their rights.[117]

Because of its burden-specific focus, *Anderson-Burdick*, including the rigorous interrogation of the state's proffered interests, provides the courts with a means of addressing these issues.

District courts can and do apply *Anderson-Burdick* to resolve challenges to state election laws in light of the pandemic. For example, in *People First of Alabama v. Merrill*, the plaintiffs were a group of senior citizens who also had disabilities or underlying medical conditions.[118] The

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https://www.census.gov/quickfacts/milwaukeecitywisconsin (last visited Dec. 4, 2020); *See also* Hasen, *supra* note 35 at 264.

113. Chad D. Cotti et.al., *The Relationship Between In-Person Voting and COVID-19*, NAT'L BUREAU OF ECON. RSCH., Working Paper 27187 (May 2020), https://www.nber.org/papers/w27187.

114. Abigail Abrams, *Nursing Home Residents Struggle to Vote Amid the Coronavirus Pandemic*, TIME (Oct. 10, 2020), https://time.com/5898746/elderly-covid-election-2020/.

115. Wyatt Koma, et. al., *Low-Income and Communities of Color at Higher Risk of Serious Illness if Infected with Coronavirus*, KAISER FAMILY FOUNDATION (May 7, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus/.

116. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1209, 1211 (2020), (Ginsburg, J., dissenting).

117. Thompson v. Dewine, 959 F.3d 804, 809 (6th Cir. 2020).

118. People First of Alabama v. Merrill, 467 F. Supp. 3d 1179 (N.D. Ala. 2020).

plaintiffs challenged Alabama election laws requiring witnesses to be present for absentee ballots, submission of photo ID for absentee voters, and prohibitions on curbside voting, arguing that these measures violated their fundamental right to vote in light of the pandemic.[119] Considering the severity of the burden that absentee ballot witness requirements placed on voters, the court acknowledged that the requirements imposed a "more significant burden" on voters at increased risk of COVID-19 complications because of their "age, disability,…and race."[120] The court, relying on the plurality's use of *Anderson-Burdick* in *Crawford*, closely analyzed the state's proffered interest in reducing election fraud. The court found that the desire to reduce election fraud, though reasonable, did not justify the burden that the witness requirements placed on the plaintiffs' voting rights.[121] After similar analysis, the court concluded that both the photo ID requirement and the ban on curbside voting failed intermediate scrutiny, and therefore the plaintiffs were likely to succeed on the merits.[122]

Anderson-Burdick's inherent flexibility suggests it could be used to adjudicate other election law cases, particularly those arising under § 2 of the Voting Rights Act (VRA). Currently, the Supreme Court's guidance regarding § 2 VRA claims comes from *Thornburg v. Gingles*, a vote dilution case where challenges were brought against the use of multimember districts in North Carolina's legislative apportionment. In determining whether or not plaintiffs had a valid claim under § 2 of the VRA, the Court held that a § 2 vote dilution claim exists when the voting rule or practice in question "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [B]lack and white voters."[123]

There is a significant body of scholarly commentary discussing potential challenges to § 2 of the VRA,[124] including the Court's decision in *Shelby County v. Holder*, which held that § 5 of the VRA was unconstitutional.[125] Many scholars fear that the current conservative majority on the Court will look for ways to similarly dismiss § 2 and thus

119. *Id*.

120. *Id*. at 1207.

121. *Id*. at 1213.

122. *Id*.

123. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

124. *See* Christopher Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Claw Statutes*, 160 U. PENN. L. REV. 377, 416 (2012); Janai Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 586 (2013); Hayden Johnson, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEORGETOWN L. J. 449 (2020).

125. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

significantly rollback voter protections.[126] As such, these scholars are hard at work recommending additional standards the Court could apply if it were to grant certiorari on a § 2 vote denial case.

Without a Supreme Court standard for evaluating *vote denial* cases, several district courts have crafted a two-part test that requires plaintiffs to show that (1) a disparate impact on minorities exists due to the state practice, and (2) the impact is causally linked to the interaction between the practice and social and historical conditions.[127]

Daniel Tokaji, a dean and professor of constitutional and election law at the University of Wisconsin Law School, identifies *Anderson-Burdick* as "the constitutional standard applicable to burdens on electoral participation," noting that six justices in *Crawford*[128] held that such a standard "should govern equal protection challenges to burdens on electoral participation."[129] According to Tokaji, § 2 vote denial challenges can be analyzed under two separate constitutional grounds, the right to vote and the prohibition against intentional discrimination based on race or other protected class status.[130]

Tokaji's proposed test incorporates (with some refinements) the two elements from the above-mentioned district court test and adds a third element based on *Anderson-Burdick* —defendants must "show by clear and convincing evidence" that the state's interests in passing the law outweigh the burden on voting created by it.[131] This test gives the state more room to make its case and potentially assuages any concerns the Court may have that the first two elements of the test are too easily satisfied.[132] This is important because in cases where § 2 reaches conduct that does *not* violate the Constitution, there is a higher likelihood that justices will disagree on whether or not regulating such conduct impermissibly extends Congress's enforcement power.

III. DISCUSSION

The advent of COVID-19 and the resulting burden placed on the courts by the exploding number of election law challenges calls for *Anderson-Burdick*'s continued use and expanded application. The utility of a well-known and often-applied doctrine cannot be understated when pandemic-

126. Johnson, *supra* note 125 at 493.

127. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARVARD CIV. RTS.-CIV. LIBERTIES L. REV. 439, 460 (2015).

128. *Id*. at 470. Tokaji includes Justice Breyer here, who applied a slightly different test that nonetheless balanced the burdens on voters against the benefit of the law.

129. *Id*.

130. *Id*.

131. *Id*. at 474.

132. *Id*. at 485.

related government measures collide with voting rights in the context of presidential elections. Courts need a familiar doctrine that can be applied uniformly in order to resolve as-applied challenges to state voting laws quicky and fairly. Section III(A) discusses the need for clarity regarding the proper application of *Anderson-Burdick* in order to meet this bar. Section III(B) demonstrates why some of the framework's potential shortcomings are actually strengths and how it can be applied in conjunction with other analyses to ensure robust voter protections are maintained and reinforced during election related litigation. Section III(C) establishes that when courts apply the standard diligently, the framework's inherent flexibility makes it well-suited for cases arising during the rapidly changing social conditions, whether brought on by the pandemic or other social and political factors.

A. Resolving the Circuit Split: The Need for Clarity

The circuit court cases concerning *Anderson-Burdick* reveal that the courts are not split on whether to *apply* the test to challenges related to the complexities of the pandemic, but rather on *how* to apply it based on the two interpretations offered by the Court in *Crawford*. While some like Justice Scalia have criticized *Anderson-Burdick* for its flexibility, the Supreme Court has recognized that "constitutional challenges to specific provisions of State election laws…cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."[133] Furthermore, the tiers of scrutiny implicated by *Anderson-Burdick* have a long history of judicial gravitas stemming from their use in resolving particularly intractable constitutional issues in the areas of First Amendment and Due Process jurisprudence,[134] making *Anderson-Burdick* a useful and necessary tool. Given the arguments favoring the doctrine, the question now becomes how to resolve the circuit split identified by Chief Justice Roberts in *Little v. Reclaim Idaho*. As the cases above illustrate, the split is an interpretative one that results in a varied application of the test.[135]

133. Anderson v. Celebreeze, 460 U.S. 780, 789 (1983) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

134. The tiered approach to judicial review is rooted in the Equal Protection Clause but has been expanded throughout the twentieth century as a tool for resolving tensions between "the presumed validity of government action" and the Constitutional rights of individual citizens. For an overview, *see* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

135. For further reading on the apparent trend of federal appellate courts reversing district court decisions based on differing application of *Anderson-Burdick* in COVID-related voting cases, *see* Jim Rutenberg & Rebecca R. Ruiz, *Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases*, N.Y. TIMES (Oct. 17, 2020), https://www.nytimes.com/2020/10/17/us/politics/federal-appeals-courts-trump-voting.html; Hasen, *supra* note 35.

The district court opinions in *Thompson* and *Miller* and their respective appellate opinions reveal that the differing outcomes in each case turn on how rather than when courts apply *Anderson-Burdick*. Specifically, to what extent must the courts explore the states' professed interests and how insistent must they be that those interests be precise and particularized?

For example, in *Thompson*, the Sixth Circuit disagreed with the district court's finding that the law in question placed a severe burden on the plaintiff's First Amendment rights, finding instead that the law created only an intermediate burden and thus warranted intermediate scrutiny.[136] However, in analyzing the state's interests and the attendant burden placed on voters, the court failed to conduct the "careful, ground-level appraisal both of the practical burdens on the right to vote and of the state's reasons for imposing those precise burdens."[137] Instead, the court accepted the state's interests at face value and concluded that the interests were "compelling and well-established" without any further inquiry.[138] In short, the court never required Ohio to "[put] forth the precise interests that are served by the ban."[139]As a result, the court of appeals granted the state's motion to stay the preliminary injunction issued by the district court without following *Anderson-Burdick*'s requirement to rigorously interrogate the state's interests.[140] Without robustly analyzing states' interests in passing voting laws, the courts may be unduly favoring state interests at the expense of voters' rights.

Thompson's shortcomings are evident when contrasted with the Eighth Circuit's opinion in *Miller*. In *Miller*, the court also began by analyzing the degree of scrutiny required based on the burden the contested regulations placed on the plaintiffs.[141] Like the Sixth Circuit in *Thompson*, the court of appeals found the burden imposed by the in-person signature law in *Miller* failed to rise to the level of severity necessary to trigger strict scrutiny.[142] The court then analyzed the state's interests involved. This is where the analyses of the Sixth and Eighth Circuits diverge in important and material ways regarding their application of *Anderson-Burdick*.

Unlike the *Thompson* court, the Eighth Circuit followed Supreme Court precedent,[143] engaged in a rigorous review of the specific state's interests, and detailed *why* these interests justified the burden they placed

136. Thompson v. Dewine, 959 F.3d 804, 811 (6th Cir. 2020).

137. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210 (2008) (Souter, J., dissenting).

138. *Thompson*, 959 F.3d at 811.

139. Burdick v. Takushi, 504 U.S. 428, 448 (1992).

140. *Thompson*, 959 F.3d at 804.

141. Miller v. Thurston, 967 F.3d 727, 739 (8th Cir. 2020).

142. *Id*. at 740.

143. *See e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 796-806 (1983); Buckley v. Valeo, 424 U.S. 1, 45-51 (1976); Burdick v. Takushi, 504 U.S. 428, 439-40 (1992).

on the plaintiffs.[144] In other words, the court embarked on the analysis required by the Supreme Court, "shav[ing] down…the generalities raised by the State" in order to ascertain with a high degree of specificity the "aspects of claimed interests addressed by the law at issue."[145] Here, that analysis began where the *Thompson* analysis ended, acknowledging the state's professed interest in protecting the integrity of its ballot initiative process.[146]

In *Miller*, the court explained that the state's interest went beyond simply guarding against corruption and fraud and explained how it also encompassed preventing mistakes regarding the type of signatures collected.[147] The court provided support for this argument by referencing additional state statutes that require the use of in-person canvassing to protect these interests.[148] Finally, the court noted that Arkansas had experienced actual ballot initiative fraud in the past, and therefore the state's concerns regarding fraud were substantiated rather than merely speculative.[149] Based on this concrete, particularized, and articulable analysis, the court then performed the balancing test required under *Anderson-Burdick* and found that the state's interests outweighed the burden on plaintiff's First Amendment rights.[150]

When courts follow Supreme Court guidance in their application of *Anderson-Burdick*, the degree of scrutiny applied to analyze the state's interest "is not to be made in the abstract, by asking whether [the interests] are highly significant values; but rather by asking whether the aspect of [those interests] addressed by the law at issue is highly significant."[151]

Tokaji's addition of the clear and convincing standard to the existing *Anderson-Burdick* framework seeks to quantify the rigor required of a court's inquiry into the states proffered interests in order to clarify the application of the test. Although not expressly calling for the clear and convincing standard, the Supreme Court implicitly endorsed a similar degree of rigor in *Anderson*, stating:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation…[i]t must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also

144. *Miller*, 967 F.3d at 740.

145. Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000) (emphasis deleted).

146. *Miller*, 967 F.3d at 740.

147. *Id*.

148. *Id*.

149. *Id*.

150. *Id*. at 741.

151. Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000).

> must consider the extent to which those interests make it necessary to burden the plaintiff's rights.[152]

When courts faithfully execute this type of inquiry, no matter the case, *Anderson-Burdick* becomes less amorphous and provides the courts with a useful tool, enabling them to decide cases and honor the Supreme Court's edict that "voting is of the most fundamental significance under our constitutional structure."[153]

B. Why Potential Shortcomings are Actually Strengths

As pandemic-related election law challenges continue to make their way through U.S. courts, weaknesses in the American election process are coming to the forefront. In particular, there is "deep polarization" and the potential for significant partisanship, with Republicans striving to make voting more challenging and Democrats favoring laws that lower barriers to voting and increase enfranchisement.[154] Despite being criticized as too unstructured, *Anderson-Burdick's* flexibility complements other analyses commonly used in these cases, providing courts with robust measures to resolve increasingly complex election law litigation.

For example, in cases where the legislature proposes to roll back previously available options for registering and/or voting, *Anderson-Burdick* standing alone may fall short of providing sufficient clarity to fully cognize the burden on voters. However, adding a due process analysis that focuses on "partisan deviations from the norm of fair play, and the constitutionally appropriate protection of reasonable expectations from unjustifiable retrogressive unsettling of those expectations" strengthens *Anderson-Burdick* and assures voting laws are not tainted with partisanship.[155]

The same analysis could apply to cases where the legislature refuses to change voting laws in light of COVID-19. While application of *Anderson-Burdick* is likely to reveal violations of the equal protection rights of voters at high risk for complications from COVID-19, a simultaneous due process analysis may reveal partisan motivations for refusing to adapt to social conditions created by the virus. As Professor Edward Foley explained, "if one party seeks to control the electoral process to give itself an unfair advantage, that power grab is a constitutional problem independent of whether it violates the equal

152. Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983).

153. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

154. Hasen, *supra* note 35 at 268.

155. Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 746 (2017).

treatment of similarly situated voters."[156] Thus, the concurrent application of *Anderson-Burdick* and a due process analysis of the challenged law would result in stronger protection of voter rights, countering any partisan influence that may exist.

The same advantages accrue when applying *Anderson-Burdick* as part of the adjudication in vote denial claims, particularly those that arise under § 2 of the VRA. Some plaintiffs have argued that states' refusals to modify election laws for minority voters disproportionately impacted by the pandemic run afoul of § 2 of the VRA, resulting in vote denial.[157] Vote denial cases "implicate the value of participation…being able to register, vote, and have one's vote counted."[158] Therefore, when states refuse to moderate their election laws to accommodate the increased risks COVID-19 imposes on American minority voters, the state impermissibly reduces those voters' abilities to participate in elections and therefore violates § 2. Importantly, Tokaji's test for vote denial claims expressly draws on *Anderson-Burdick* as an existing constitutional doctrine, grounding it in established Supreme Court precedent in order to protect § 2 from a conservative majority that seems intent on limiting, rather than expanding, voter protections.[159]

C. Anderson-Burdick is Uniquely Suited to the Demands of COVID-Related Election Litigation

For significant subsets of American voters, voting during the pandemic presents markedly greater challenges.[160] As a result, voting regulations that limit the use of absentee ballots, ban curbside voting, or require that absentee ballots be signed by a witness are being challenged in court on the grounds that voters who are at high risk of contracting COVID-19 are being unduly burdened by these laws.[161] The *Crawford* Court recognized and endorsed the utility of *Anderson-Burdick* when analyzing special burdens that may apply to certain subsections of voters depending on the facts of a case.[162]

The comparison of the cases in this Section further validates the utility of *Anderson-Burdick* for analyzing ballot initiative cases arising in the unique legal landscape that the COVID-19 pandemic created.

156. *Id*. at 749.

157. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

158. Tokaji, *supra* note 128, at 442.

159. *Id*. at 473; *see also supra* note 10.

160. *Supra* Section II(E).

161. *See* People First of Ala. v. Merrill, 467 F. Supp. 3d 1179 (N.D. Ala. June 15, 2020); Texas Democratic Party v. Abbott, 461 F.Supp. 3d 406 (W.D. Tex. May 19, 2020), *vacated and remanded*, 978 F.3d 168 (5th Cir. 2020).

162. Crawford v. Marion Cnty. Election Board, 553 U.S. 181, 202 (2008).

Additionally, proper application of *Anderson-Burdick* to cases where the pandemic disproportionately affects certain groups of voters enables the district courts to ensure that the state "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life."[163] The fact-specific analyses required by *Anderson-Burdick* facilitate the courts' application of a nuanced, sliding scale of scrutiny under which the interest of the state in passing a voting law is balanced against the law's burden on the voter *in those specific circumstances*. This would ensure case outcomes are within the bounds of voters' First Amendment rights as well as the similarly-bestowed states' rights to "choose among many permissible options when designing elections."[164]

IV. CONCLUSION

Anderson-Burdick developed through a line of cases notable for their lack of clarity, with the Supreme Court's plurality and dissenting opinions in *Crawford* leaving the lower courts left to their own devices when determining how it should be applied. Nevertheless, the utility of *Anderson-Burdick* is evidenced by its application in a wide range of voting rights and election law cases in the lower courts. Whether voting rights are under attack from societal pressures caused by an external event like the pandemic, or political pressures such as the increasing partisan divide animating voting rights legislation and litigation, *Anderson-Burdick*'s doctrinal validity ensures that lower courts will continue to use it to resolve these cases.

Thus, rather than discarding *Anderson-Burdick*, the Court should clarify its application and insist that lower courts rigorously interrogate the government's proffered interest to determine if it truly warrants the burden the contested law imposes on voters. This would respect the principle of stare decisis, resolve the conflicting interpretations resulting from the opinion in *Crawford*, and render the amorphous test more easily applied—all without sacrificing the inherent flexibility necessary for adjudication of varied and complex election litigation, particularly arising in times of crisis. Further, courts' abilities to apply *Anderson-Burdick* in conjunction with other forms of constitutional analyses will ensure dynamic and enduring protections for voters' rights in future challenges beyond the pandemic.

The issues discussed in this Comment may soon be resolved with guidance from the Supreme Court. In October, the Court consolidated two

163. Jenness v. Fortson, 403 U.S. 431, 439 (1971).

164. Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020).

election law cases from the Ninth Circuit[165] and granted certiorari.[166] The case will review two en banc opinions from the Ninth Circuit, which found that a state law barring ballot harvesting and an Arizona policy requiring voters to vote at their assigned precinct[167] each violated § 2 of the VRA due to their disproportionate impact on minorities.[168] By granting certiorari in these cases, the Court will have an opportunity to rule on vote denial claims arising under § 2, and may also revisit *Anderson-Burdick* for the first time since *Crawford*.[169] While these cases all originated prior to the pandemic, the Court's resolution of the case is likely to grant much-needed clarity in this area of election law.

165. The cases below are Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020), *cert. granted sub nom*. Arizona Republican Party v. Democratic Nat'l Comm., 141 S. Ct. 221 (2020), and *cert. granted sub nom*. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 222 (2020).

166. Amy Howe, *Justices Add Seven New Cases to Docket, Including Major Voting Rights Dispute*, SCOTUSBLOG (Oct. 2, 2020), https://www.scotusblog.com/2020/10/justices-add-seven-new-cases-to-docket-including-major-voting-rights-dispute/.

167. Ballots of voters who vote at a precinct other than which they are assigned are destroyed.

168. Howe, *supra* note 166.

169. *Id*.