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 *AMICUS CURIAE* PROFESSOR RICHARD L. HASEN IN SUPPORT OF PETITIONERS [*BURDICK* REASONABLE TAILORING]

ALAN R. GLICKMAN
KRISTIE BLASE
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
212-756-2466

RICHARD L. HASEN
Counsel of Record
919 Albany Street
Los Angeles, CA 90015
213-736-1466

Attorneys for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Richard L. Hasen is a law professor with a strong interest in election law and election administration issues. Hasen, the William H. Hannon Distinguished Professor of Law at Loyola Law School, has written over three dozen articles (and parts of books) on election law, is the co-author of an election law casebook, *Election Law—Cases and Materials* (3d ed. 2004), with Professor Daniel Hays Lowenstein, and is the co-editor of the peer-reviewed quarterly publication, *Election Law Journal*. Hasen's affiliations are listed for identification purposes only.

With the consent of the parties, whose letters of consent have been filed with the Clerk of the Court, *amicus* respectfully submits this brief in support of the Petitioners.[1] The brief explains that developments since the 2000 Florida election controversy have increased the need for this Court to articulate clear and fair rules to resolve election administration disputes. It suggests that the Court clarify existing standards for resolving such disputes and urges the Court to reverse the lower court under those clarified standards.

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* and his counsel contributed monetarily to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The 2000 Florida election controversy has had profound effects across the United States both in greatly increasing the amount of election law litigation and in undermining the confidence of some groups of voters in the fairness of the electoral process. Although this Court expressed the hope in *Bush v. Gore* that "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting[,]" 531 U.S. 98, 104 (2000), many recent efforts at election administration reform have become mired in partisan controversy. Generally speaking, Republican state legislators have proposed laws, such as strict voter identification laws, that they say will prevent voter fraud, and Democratic legislators have proposed laws they say will prevent voter intimidation and remove barriers to voting, such as Election Day registration.

The greatest controversy has occurred in the realm of voter identification laws. Every state legislature that has passed a voter identification law since 2000 has done so along party lines. Some Democrats believe Republicans have enacted such laws not to prevent fraud but to make it harder for poor and minority voters, who are more likely to vote for Democratic candidates, to vote. Some Republicans believe Democrats oppose such laws because they want to make it easier for ineligible voters supporting

the Democratic Party to vote, or for eligible voters to vote more than once.

Even courts that have considered recent constitutional challenges to voter identification laws have split along party lines, with Republican-elected (or -nominated) judges tending to uphold voter identification laws against constitutional challenge and Democratic-elected (or -nominated) judges voting to strike down such laws. This does not mean, and *amicus* does not suggest, that judges are attempting to benefit their political parties. Rather, judges simply appear to bring to these cases the same perspectives that others with their political affiliations have about the credibility of voter fraud and vote-suppression claims. Nonetheless, decisions rendered along party lines can engender a public perception of partisanship.

In this atmosphere, it is important for this Court to articulate clear and fair rules to resolve election administration disputes that transcend partisan politics and restore voters' faith in the integrity of the electoral process. Most lower courts considering such disputes turn to this Court's opinion in *Burdick v. Takushi*, 504 U.S 428 (1992), or other cases in this line, which articulate a flexible balancing approach to judging the constitutionality of state election laws. But the *Burdick* standard has not been correctly applied by some lower courts to cabin judicial discretion. Those courts have focused on the first part of the test: pegging the level of scrutiny to the character and magnitude of the burden the law places on some

voters. It is an uncertain endeavor, *see Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring) ("I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from" the *Burdick* line of cases), and one that has led to strongly divergent results in similar cases. Finding a severe burden, some courts strike down voter identification laws. Finding a lesser burden, some apply an exceedingly low level of scrutiny that does not require the state to provide any evidence its law is reasonably calculated to serve its interest, and uphold such laws.

That approach misreads *Burdick* and this Court's other relevant precedents and ignores a basic principle of those cases that applies even where there are no severe burdens on voters: a state's election law must be at least reasonably tailored to the interests the law purports to further.

> In passing judgment [on the constitutionality of challenged election laws], the Court must not only determine the legitimacy and strength of each of [the state's asserted] interests; *it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights*. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added). As this Court indicated in *Rosario v. Rockefeller*, the provision in question should be

"*tied to* [the] particularized legitimate purpose" articulated by the state. 410 U.S. 752, 762 (1973) (emphasis added).

This aspect of the test is crucial and should not be ignored by lower courts, especially given the post-2000 partisan atmosphere in which there is the danger that election administration rules are being chosen for partisan advantage. *See Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., joined by Breyer, J., concurring); *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). The misapplication of *Burdick* and related authorities can lead to arbitrary results in similar cases, and arbitrariness can look like political favoritism to voters already concerned about the fairness of the electoral process.

This Court should hold that lower courts, in "consider[ing] the extent to which [state] interests make it necessary to burden the plaintiff's rights," *Anderson*, 460 U.S. at 789, must require states not only to articulate an important state interest—such as preventing election fraud—to justify its challenged election law, but also to provide some credible support for the proposition that its law will further that important interest. Only if the state demonstrates a reasonable fit between its law and the state interests that are implicated is it appropriate to balance those interests with the potential disenfranchisement of voters or other voter burdens.

Enforcing this Court's requirement that the state show that its law is at least *reasonably tailored* to further important state interests *and nondiscriminatory* will invalidate the most partisan of election administration laws that are passed with only the pretext of being motivated to serve an important state interest. The reasonable tailoring requirement is not as strict as the "narrow tailoring" of strict scrutiny and will not undermine the results in this Court's *Burdick* cases—such as those in involving ballot access or the question of who gets to vote in a party primary—which have recognized that "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 processes." *Storer v. Brown*, 415 U.S. 724, 729 (1974); *see also id*. at 730 ("It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under [this Court's] cases").

Under the appropriate application of the *Burdick* standard, the lower court decision cannot stand. Though preventing election fraud is indeed a compelling interest that justifies any number of state election laws, it cannot justify Indiana's strict photographic identification requirements.

First, the law does impose a severe burden on some voters. Even assuming election fraud prevention justifies a fairly applied voter identification requirement, it cannot justify Indiana's requirement, the strictest approach in the nation, which would

require an indigent voter lacking identification to make *two trips* to government offices (some as far as 30 minutes or more away from the voter's residence) within 10 days at the voter's own expense to cast a ballot that would count.

Second, there was no credible evidence in or outside of the record that impersonation voter fraud is a serious problem today in this country. Indiana itself conceded it had never prosecuted a case of impersonation voter fraud that a voter identification law would be likely to prevent. If the state were really concerned about voter fraud, it would have taken steps to make absentee voter fraud more difficult, given the documented history of that type of voter fraud.

Because Indiana failed to present any evidence that the provision at issue is reasonably tied to the purpose of addressing election fraud, the law should be struck down as a violation of the Equal Protection Clause and the First Amendment right of association whether or not the court concludes the burden the law imposes on voters is "severe."

Finally, this Court should clarify the confusion with *Burdick* balancing that has emerged from *dicta* in this Court's recent opinion in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (*per curiam*). The lower court read *Purcell* as requiring a court to balance the *actual* disenfranchisement costs of voter identification laws with *feelings* of disenfranchisement that could come from voter perception of voter fraud. This Court

should clarify that lower courts should engage in such balancing only if the state can come forward with evidence that voter turnout is in fact being depressed by real or imagined voter fraud.

ARGUMENT

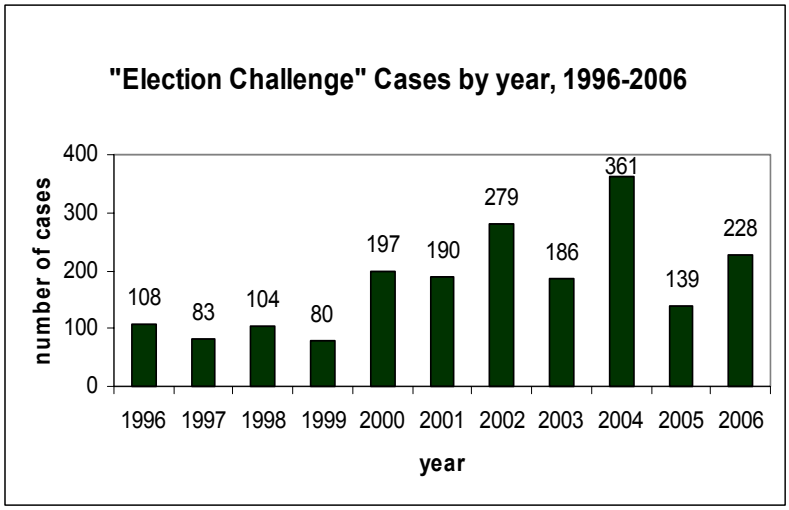
I. THIS COURT SHOULD ARTICULATE CLEAR AND FAIR STANDARDS TO RESOLVE ELECTION ADMINISTRATION DISPUTES.

A. Since the 2000 Florida Election Controversy, There Has Been a Dramatic Rise in the Amount of Election Law Litigation.

While the reasons are unclear, there has been a dramatic increase in the number of election-related cases in the lower courts since the election controversy over the counting of ballots to determine Florida's electoral votes in the 2000 presidential election. There were an average of 96 "election challenge" cases[2] per year in the 1996-99 period, compared to an average of 254 such cases in the 2001-04 period. Richard L. Hasen, *Beyond the Margin of Litigation:*

[2] This count is based upon a Lexis search of state and federal court databases using a year restriction and "election w/p challenge," culling out cases that obviously are inapplicable. The cases are cited and briefly described in two Excel spreadsheets posted at http://electionlawblog.org/archives/washlee%20appendix.xls (1996-2004) and http://electionlawblog.org/archives/stanford.xls (2005-2006).

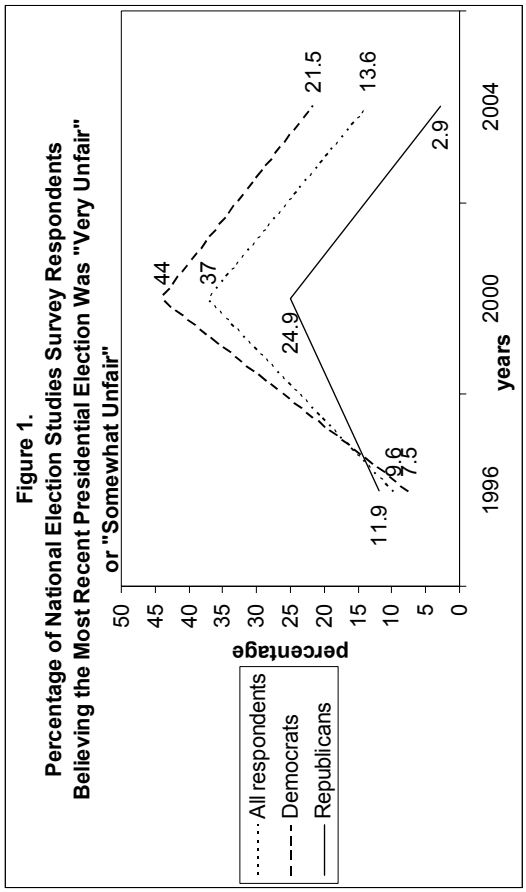
Reforming U.S. Election Administration to Avoid Electoral Meltdown, 62 WASH. & LEE L. REV. 937, 957-58 (2005) [hereinafter, Hasen, *Beyond the Margin*]. The litigation increase over the pre-2000 period has continued in 2005 and 2006 as shown in the figure below, reprinted from Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 29 (2007) [hereinafter, Hasen, *Untimely Death*].



A similar pattern of increased litigation appears when looking only at challenges related to presidential elections. *See* Charles Anthony Smith and Christopher Shortell, *The Suits that Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 253, 262-64 (2007) (finding a large increase in presidential election litigation since 2000, especially in the 2004 period).

B. Some Voters Have Lost Confidence in the Fairness of the Electoral Process, and Public Opinion Polling Shows a Troubling Partisan and Racial Divide.

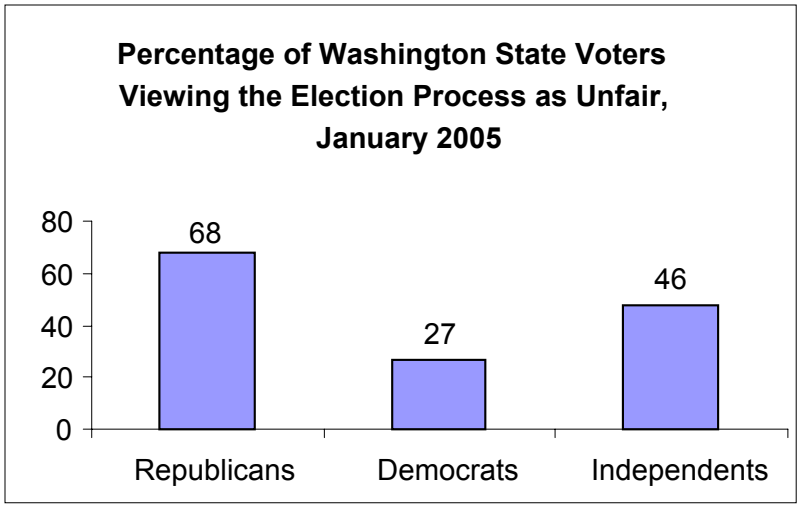
Since 2000, a growing party and racial divide in public confidence in the fairness of the electoral process has emerged. In 2004, four years after the Florida controversy, 21.5% of Democrats thought the means of conducting the most recent presidential election were "somewhat unfair" or "very unfair," compared to 2.9% of Republicans. Hasen, *Beyond the Margin*, at 943. In that same election only one-third of African-Americans called the vote "accurate and fair." *Id.* at 942. The following figure, from the American National Election Studies as reported at *id*. at 944, shows voter confidence by party in the 1996, 2000, and 2004 elections:



No doubt, some of the disparity in voter confidence is due to the fact that Democrats were on the losing end of the 2000 and 2004 presidential elections, and winners tend to have more confidence in election outcomes than losers. Moreover, judicial involvement in resolving electoral disputes can undermine voter confidence for those on the losing end of litigation:

> Consider voter attitudes toward the fairness of the Washington State gubernatorial election in 2004. After a series of recounts and court battles, a Democrat was declared the winner. In a January 2005 Elway Poll of Washington voters, 68% of Republicans thought the state election process was unfair, compared to 27% of Democrats and 46% of Independents.

Id. at 944. The figure below, graphically displays the levels of voter confidence.



But the gap in confidence between winners and losers may not fully explain the patterns of public opinion on voter confidence. Just before the 2006 election, when it already appeared that Democrats were likely to do well in the midterm Congressional elections, the gap between Republican and Democratic views persisted. *See* Hasen, *Untimely Death*, at 25-26. Even more troubling, the percentage of

African-American voters who were "not too confident" or "not at all confident" that their votes would be fairly counted *nearly doubled* from 15% in 2004 to 29% in 2006. News Release, Pew Research Center for the People & the Press, *Democrats Hold Enthusiasm, Engagement Advantage* 6 (Oct. 11, 2006) (http://people-press.org/reports/pdf/291.pdf). In October 2006, Pew's figures on confidence in the vote tally were as follows, *id.*:

Wide Gaps in Confidence about Accurate Vote Tally

	Confident your vote will be accurately conted?			
	Very	Somewhat	Not too/ Not at all	DK
	%	%	%	%
Total	58	29	12	1=100
White	63	28	8	1=100
Black	30	37	29	4=100
Men	63	24	12	1=100
Women	53	33	12	2=100
18-29	49	36	15	0=100
30-49	61	26	11	2=10
50-64	60	29	11	*=100
65+	55	30	11	4=100
Republican	79	17	3	1=100
Democrat	45	36	16	3=100
Independent	52	32	15	1=100

Based on registered voters

C. Election Reform Efforts in the States Have Taken on a Partisan Cast, and Courts Too Have Divided Along Partisan Lines.

Though this Court expressed the hope in *Bush v. Gore* that "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting[,]" 531 U.S. at 104, many recent efforts at election administration reform have become mired in partisan controversy. Generally speaking, Republican state legislators have proposed laws that they say will prevent voter fraud, and Democratic legislators have proposed laws they say will prevent voter intimidation and remove barriers to voting. The fear of each party is that the other side is proposing reforms not to further the important interests in fair and open elections, but to gain partisan advantage.

The greatest controversy has occurred in the realm of voter identification laws.

> With the exception of Arizona, which enacted its voter identification law through a voter initiative (aimed more broadly at issues of benefits for illegal immigrants), every state that has enacted or tightened its requirements for voters to show identification at the polls has done so through the support of a Republican-dominated legislature. Democrats have uniformly opposed the efforts to impose new voter identification requirements, as in Pennsylvania, where the Democratic governor vetoed a new voter identification law passed

> by the Republican-dominated legislature, and in Missouri, where the newly-elected Democratic Secretary of State has opposed voter identification laws and argued against them in a report on the 2006 election.

Hasen, *Untimely Death*, at 19 (footnotes omitted).

Perhaps most disconcerting is that a split has developed along party lines among *judges* deciding challenges to voter identification laws. In Michigan, for example, the five Republican judges on the state's highest court voted to uphold the state's voter identification law, and the two Democrats voted to strike it down. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, ___ N.W.2d ___ (Mich. July 18, 2007); Hasen, *Untimely Death*, at 42 n.201. In the case at bar, the Court of Appeals split along similar lines: the two judges in the majority of the Court of Appeals in this case were appointed by Republican presidents while the dissenting judge was appointed by a Democratic president, and (with one exception) the vote denying *en banc* rehearing split along party lines as well. Hasen, *Untimely Death*, at 42. This does not mean, and *amicus* does not suggest, that judges are seeking to benefit their political parties. Rather, judges simply appear to come to these cases with the same perspectives that others with their political affiliations have about the credibility of voter fraud and vote-suppression claims. Nonetheless, decisions rendered along party lines can engender a public perception of partisanship.

* * *

The rise in election law litigation shows that political parties and others increasingly are using election law as a political strategy to advance their ends. This puts courts squarely in the political thicket, with voter confidence in the electoral process (not to mention the judiciary) at stake. Under the circumstances, lower courts need further guidance. It is important for this Court to articulate clear and fair rules to resolve election administration disputes that transcend partisan politics.

II. *BURDICK* REQUIRES SOME EVIDENCE THAT AN ELECTION ADMINISTRATION LAW IS AT LEAST REASONABLY TAILORED TO FURTHER THE GOVERNMENT'S INTERESTS AND IS NONDISCRIMINATORY.

This Court's *Burdick* line of cases already provides the appropriate rule to address the problems described above, though lower courts—as in this case—have not properly applied it. The reasonable tailoring requirement articulated in *Burdick* for cases of non-severe burdens will lead to the invalidation of partisan electoral rules serving no valid purpose, but leave standing the vast majority of state and local election administration laws. However, the misapplication of *Burdick* can lead to arbitrary results in similar cases, and arbitrariness can look like political favoritism by judges to voters already concerned about the fairness of the electoral process and judicial supervision of it.

In *Burdick*, this Court explained the proper standard to govern the constitutionality of challenged election laws as follows:

> 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.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. [W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only *reasonable, nondiscriminatory restrictions* upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Burdick, 504 U.S. at 434 (internal quotations and citations omitted; emphases added).

The basic principle articulated in *Burdick* dates back to at least this Court's opinion in *Storer v.*

Brown, which recognized that there is "no litmus-paper test" for resolving these cases and "no substitute for the hard judgments that must be made." 415 U.S. at 730.

Unfortunately, some lower courts have applied something of a caricature of the *Burdick* test. They focus only on the question whether a burden is severe or slight, applying strict scrutiny for "severe" burdens and rational basis review otherwise. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. ___ (2007) (*draft available at* http://ssrn.com/abstract=980079) (citing numerous lower court cases demonstrating that "[i]f the plaintiff establishes to the court's satisfaction that the challenged law will substantially impact electoral participation, especially by disadvantaged voters, the court will characterize the burden as severe and apply strict scrutiny." However, if "the plaintiff fails to make this showing, the court will treat the burden as insignificant or unproven and apply lax scrutiny.") (draft at 7-8, footnotes omitted). The problem is that a binary severe/slight burden test is difficult to apply in close cases. *See Buckley*, 525 U.S. at 208 (Thomas, J. concurring) ("I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from" the *Burdick* line of cases).

It is true that in cases in which plaintiff can demonstrate a severe burden, a court reviewing a challenged election law must apply strict scrutiny.

But for those cases involving something less than a severe burden, rational basis review is not in order. A close reading of *Burdick* shows that even in the case of less severe burdens, it is necessary for courts to consider the question of *tailoring.* Even if a burden on voters is not "severe," the court must examine "the extent to which those interests make it necessary to burden the plaintiff's rights," and whether the law has imposed only "reasonable, non-discriminatory" restrictions on First and Fourteenth Amendment rights of voters. *Burdick*, 504 U.S. at 434; *see also id.* at 438 ("we have repeatedly upheld *reasonable politically neutral* regulations that have the effect of channeling expressive activity at the polls") (emphasis added); *Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of [the state's asserted] interests; *it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights*. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.") (emphasis added).

Thus, in *Clingman v. Beaver*, the Libertarian Party of Oklahoma (LPO) complained about Oklahoma's primary rules, which barred voters registered with other parties from voting in LPO's primary. 544 U.S. at 584-85. Applying the *Burdick* test, this Court held that "Oklahoma's semiclosed primary system does not severely burden the associational

rights of the State's citizenry." *Id.* at 593. The characterization of the burden, however, was the beginning, not the end, of the constitutional analysis. This Court then looked to see that the law was a reasonable means of furthering the state interest at issue. The state of Oklahoma had asserted that its primary rules "preserve[ ] the political parties as viable interest groups, insuring that the results of a primary election, in a broad sense, accurately reflect the voting of the party members." *Id*. at 594. And the Court found the law tailored to achieve that purpose: "If the LPO is permitted to open its primary to all registered voters regardless of party affiliation, the candidate who emerges from the LPO primary may be unconcerned with, if not . . . hostile to the political preferences of the majority of the LPO's members." *Id*. (internal quotations omitted; alteration in original).

Moreover, the Court found the requirement tied to the state's interest in "facilitating the effective operation of a democratic government" through the classification of voters "according to political affiliations," concluding, "for that classification to mean much, Oklahoma must be allowed to limit voters' ability to roam among parties' primaries." *Id*. at 594-95. The requirement, "by retaining the importance of party affiliation, aids in the parties' electioneering and party-building efforts." *Id*. at 595. The measure also "serves th[e] interest" of preventing "party raiding," which could lead to "party splintering and excessive factionalism." *Id.* at 596. In sum, this Court held that the Oklahoma measure was constitutional

not only because the burden it imposed was not severe, but also because the measure was reasonably tailored to achieve important state interests. As the Court noted: "While the State's interest will not justify unreasonably exclusionary restrictions, we have repeatedly upheld reasonable, politically neutral regulations. . . ." *Id.* at 597 (internal quotations and citations omitted).

In other cases in which this Court has held that an election law imposed something less than a severe burden on voters, candidates, or others, it still has required the state to demonstrate that the law is reasonably tailored to the state interests and nondiscriminatory. *See Burdick*, 504 U.S. at 439-40 (holding that Hawaii's ban on write-in voting imposed only a "limited burden on voters' rights" and that the law was tailored to the state's interests in avoiding "unrestrained factionalism" and "party raiding"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363-64 (1997) (Minnesota's ban on fusion candidacies imposes a burden that was neither "trivial" nor "severe;" Court held the fusion ban was tailored to several state interests including ensuring that support for minor parties is genuine, promoting a strong two-party system, and preventing ballots that are merely "billboards for political advertising"); *Storer*, 415 U.S. at 736 (California's law requiring independent candidates to have disaffiliated from a political party at least a year before running for office was tailored to state's interest in avoiding "splintered parties and unrestrained factionalism"); *Rosario*, 410 U.S. at

761-62 (New York law requiring voters in party primary to register with party by certain deadline was "*tied to* [the] particularized legitimate purpose" of preventing party raiding) (emphasis added).[3]

[3] Of course, in cases in which this Court has held there is a severe burden imposed by an election law, the Court looks for the law to be even more tailored to the state's interests. *See, e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (striking down various Colorado laws regulating the circulation of initiative petitions on grounds that the measures imposed serious burdens on constitutional rights and were not narrowly tailored to the state's interests in administrative efficiency, fraud detection, or informing voters); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio statute requiring independent presidential candidates to file statement of candidacy and nominating petition in March to appear on November general election ballot because the law severely burdened voters' rights and was not justified by state interests in voter education, equal treatment of candidates, or political stability). *Amicus* believes that all of the cases since *Storer* in which this Court has found less than a severe burden involved ballot access issues or questions involving who may vote in partisan primaries, not voting rights issues as the case at bar.

In one of those ballot access cases, *Munro v. Socialist Workers Party*, this Court held that it would not always require proof of evidence justifying such a law, reasoning that "[s]uch a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." 479 U.S. 189, 195 (1986). "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.* *Munro*'s principle is sensibly limited to ballot access cases, *id*., in which the state's assertion of a connection between its interest in an orderly ballot process and the means chosen by the state to achieve that interest is neither novel nor implausible. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial

(Continued on following page)

Some lower courts too have recognized the need for a state to demonstrate tailoring under a *Burdick* analysis even when the burden imposed on voters is not severe. *See, e.g., Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (*en banc*); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995); *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991).

This requirement that the state show some tailoring *in all cases* burdening voters' First and Fourteenth Amendment rights is *not* the application of a strict scrutiny/compelling interest/narrow tailoring

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scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.")

Munro's analysis does not apply to this case for two reasons. First, this is a voting rights case implicating the fundamental right to cast a ballot that counts. *See Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972) (applying strict scrutiny to state durational residency requirement for voter registration); *U.S. v. Classic,* 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state *to cast their ballots and have them counted* at Congressional elections.") (emphasis added). In contrast, the ballot access cases concern the more minor harm caused when candidates without serious voter support are deprived of an opportunity to appear on the general election ballot. Second, even if *Munro* applied to voting rights cases, Indiana's assertion that a voter identification card is necessary to prevent election fraud is both novel and implausible. *See* Section III.B., *infra.* In short, using the lexicon of *Munro* itself, Indiana's law is not "reasonable" and "significantly impinge[s] on constitutionally protected rights." *Munro*, 479 U.S. at 195.

test in all election law cases. That standard would inappropriately burden every election administration provision. *See Clingman*, 544 U.S. at 593 ("To deem ordinary and widespread burdens like [the ones at issue in *Clingman*] severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes."). Indeed, when courts apply the reasonable tailoring requirement, most challenges to garden-variety state or local election laws will fail. *See Storer*, 415 U.S. at 730 ("It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases").

For example, consider a state's decision to consolidate some polling places for cost-saving reasons. The first question the court should address is whether the consolidation imposes a severe burden on voters. If it does, strict scrutiny applies. But a modest consolidation of polling places will not impose a severe burden on voters. The next question would be whether the law is reasonably tailored to achieve cost savings and is nondiscriminatory. Assuming the consolidation indeed saves the jurisdiction money and does not disproportionately burden particularly affiliated voters or groups of voters, these elements would be satisfied. Finally, the court would balance the state's interest in cost savings with the burden on voters of the moved polling places. The court would then likely uphold a modest consolidation as a reasonable, nondiscriminatory election law.

The requirement that the state show some tailoring is a necessary means of ferreting out partisan-oriented election laws passed with only the pretext of satisfying a government interest. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("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.").[4] Thus, if a state

[4] An alternative to requiring some proof of tailoring even in cases of less severe burdens is for courts to apply heightened scrutiny in the face of evidence that a legislative body has passed an election law with an intent to favor one party over that of another. This approach was favored by the Seventh Circuit judges dissenting from denial of rehearing *en banc* in the Court below. *Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing *en banc*) ("when there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny. Only this exacting approach will suffice to ensure that state law is not being used to deny these citizens their fundamental right to vote"). *See also Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., joined by Breyer, J., concurring) (stating that election laws sometimes may be enacted for partisan purposes, and if such laws burden voters severely and have discriminatory effects, courts should apply heightened scrutiny). It is also favored by some commentators. *See, e.g.,* Christopher Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PENN. L. REV. ___ (2007) (*draft available at* http://ssrn.com/abstract=980079) (draft at 69); *Recent Cases*, *Constitutional Law—Voting Rights—Seventh Circuit Upholds Voter ID Statute*, 120 HARV. L. REV. 1980, 1985-87 (2007); *cf.* Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L.

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consolidated polling places nominally for its cost savings but did so *only in Republican or Latino neighborhoods,* the law would fail *Burdick* scrutiny even if the burden on voters in those areas to travel a little farther would not be "severe." Such a law simply would not be reasonably tailored to cost savings and would be discriminatory.

Under *Burdick*, in cases in which an election law is not reasonably tailored it cannot survive challenge even if the burden on voters is not severe. Enforcing this Court's requirement that there be reasonable tailoring will separate those laws enacted for purely partisan purposes with no legitimate public purpose from laws that impose some burdens on voters but are in fact tailored to further justifiable interests of the government.

REV. 28, 137-138 (2004). Though this approach likely would lead to the same result in this case as the application of reasonable tailoring, the effort to ferret out bad legislative intent may be difficult in particular cases, making closer means-ends scrutiny a superior approach. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 877-79, 888-90 (2006).

III. THE LOWER COURT'S DECISION SHOULD BE REVERSED BECAUSE INDIANA'S LAW BURDENS POOR VOTERS AND OTHERS WITHOUT IDENTIFICATION, AND BECAUSE IT DOES NOT FURTHER THE STATE'S INTEREST IN PREVENTING ELECTION FRAUD.

The lower court's decision in this case should be reversed for two reasons. First, Indiana's voter identification law poses a severe burden on poor voters and others who lack voter identification. Second, even if the law did not impose a severe burden, there was no evidence to conclude that the voter identification law prevents election fraud, and therefore the law is not tailored to further that state interest.

A. The Indiana Voter Identification Law is Burdensome and Therefore Subject to Heightened Scrutiny.

On the first point, Indiana's voter identification law, the strictest in the nation, provides that voters who do not have identification may cast a provisional ballot at the polls. An indigent voter then would have to make a second trip sometimes as far as 30 minutes or more away at the voter's own expense to the county seat to file an affidavit of indigency. *See* Hasen, *Untimely Death*, at 24, 39 n.190. Such a requirement is a formidable barrier to voting by the

indigent.[5] The law also imposes a severe burden on poor voters who are not so poor as to qualify as indigent. First, poor voters will need to purchase the documents (such as a certified copy of a birth certificate) necessary in order to obtain the required voter identification card. Second, if such voters do not have their identification with them at the polls, they would have to make a second trip at their own expense to a county seat (as opposed to returning to the polling place) to provide proof of identity. This requirement surely will discourage voting by poor and indigent voters, not to mention others who neglect to bring their identification to the polls. Moreover, as discussed above, the cases in which this Court has found less than a severe burden involved ballot access cases or cases involving whether non-party members can vote in partisan primaries, and are not voting rights cases such as this one.

[5] The court below made much of the fact that the plaintiffs did not include Indiana voters who lack identification. But the court did have before it Professor Hershey's study regarding how many Indiana voters are likely to have problems with the identification requirement. (Joint Appendix 96-134, 292-98.) Moreover, the lower court acknowledged that the law was likely to burden Democrats more than Republicans, *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007), a concession that would make no sense if in fact no voters were burdened by the identification requirement.

B. The Indiana Voter Identification Law is Not Tailored to the Interest in Preventing Election Fraud.

Even if the law did not impose a severe burden on voters, the law still fails for lack of any tailoring. There is no question that preventing election fraud is a compelling state interest. *Purcell*, 127 S.Ct. at 7. Such an interest could well justify a fairly applied voter identification law.[6] But it cannot support Indiana's strict new law. Indiana conceded it had never prosecuted a case of *impersonation* voter fraud that a voter identification law would be likely to prevent. *Crawford*, 472 F.3d at 955 (Evans, J., dissenting). Nor was there any credible evidence inside or outside the record that impersonation voter fraud is a serious problem in this country, or that requiring indigent voters to make two trips at their own expense to government offices to cast a valid ballot would serve to prevent such fraud.

The Court of Appeals wrote as follows of the failure of the state to produce any evidence of voter fraud in this case:

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[6] Such a law would have to provide easy means for voters to obtain the identification, including a provision either for a fair indigency exemption or for the state to pay the costs for indigent voters to obtain the documentation necessary to obtain the voter identification card. Such a law also would need to provide for alternative proof of identity for those who reasonably cannot produce a birth certificate. Other exemptions, such as religious exemptions, may be necessary as well for the provision to survive constitutional scrutiny.

> But that lacuna may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate. Some voter impersonation has been found (though not much, for remember that it is difficult to detect) in the states that have been studied, and those states do not appear to be on average more "dishonest" than Indiana; for besides the notorious examples of Florida and Illinois, they include Michigan, Missouri, and Washington (state). Indirect evidence of such fraud, or at least of an acute danger of such fraud, in Indiana is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote.

Crawford, 472 F.3d at 953.

The Court of Appeals provided no citations of evidence of "notorious" voter impersonation fraud in Florida, Illinois, Michigan, Missouri, or Washington State.[7] This is not surprising, given that the evidence

[7] Nor was the district court's treatment of this issue any better. The district court cited to fourteen exhibits from the state to reach the conclusion that voter fraud was a major national problem. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 793-94 (S.D. Ind. 2006). Yet virtually all of that evidence was anecdotal, unproven (and in some cases disproved), or related to a kind of fraud, such as absentee ballot fraud, that Indiana's voter identification law would do nothing to deter. *See* Brief of Brennan Center for Justice at NYU Law School as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 6-18, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir.

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2007) (No. 06-2218) (analyzing and refuting each piece of evidence cited by the district court in support of its holding on the prevalence of impersonation voter fraud).

The Seventh Circuit majority's discussion of absentee voting is equally unconvincing. The court wrote:

> The plaintiffs complain that the new Indiana law is underinclusive because it fails to require absentee voters to present photo IDs. But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo.

Crawford, 472 F.3d at 953. The court did not consider the possibility of a law requiring absentee voters to provide a copy of their state driver's license (or other state ID) number, or thumbprint with their vote, which could be compared (perhaps on a random basis in an audit) to a thumbprint on file, or some other means of verifying their identity. Moreover, the problem with absentee voter fraud is not impersonation vote fraud, but the sale of votes. *See* Hasen, *Untimely Death*, at 22; *see also* U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FURTHER STUDY App. 3, at 5 (2006) [hereinafter, U.S. EAC, ELECTION CRIMES] (*available at* http://www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf) (Indiana's assistant attorney general Douglas Webber told EAC interviewers that absentee balloting presented the greatest problem with vote fraud in the state of Indiana). Under anything stronger than rational basis review, it would be hard for the state to justify its decision to make voting more difficult in the name of fraud protection for those voters who vote with a system less prone to fraud, while leaving the system with more fraud completely alone. *Cf. Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment) ("a law cannot be regarded as protecting an interest of the

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does not exist. A *New York Times* analysis of efforts of the Justice Department over five years to find and prosecute cases of voter fraud nationally revealed only 86 successful prosecutions and no systematic evidence of the kind of impersonation voter fraud that would support the need for a voter identification law.[8] Indeed, many of the prosecutions appeared to be based upon innocent mistakes by voters, and not intentional fraud. Of the 70 successful federal prosecutions nationally from 2002 to 2005, only 26 involved voters (the rest involved election officials or party or campaign workers), and apparently none of the convictions were for illegal activities that a voter identification system likely would prevent.[9] At the

highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal quotations and citation omitted); *Republican Party of Minn. v. White*, 536 U.S. 765, 779-80 (2002) (the existence of gaping holes in regulatory scheme indicate law is not tailored to interests put forward by state).

[8] Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A3 ("A handful of convictions involved people who voted twice. More than 30 were linked to small vote-buying schemes in which candidates generally in sheriff's or judge's races paid voters for their support.").

[9] *See* Hasen, *Untimely Death*, at 22 n.109. The United States Election Assistance Commission, created by Congress in the wake of the 2000 Florida debacle and charged with providing advice on sound election administration, so far has produced nothing to substantiate claims of anything more than a trivial amount of polling place fraud. It issued a report in 2006 finding the fraud issue unsettled. U.S. EAC, ELECTION CRIMES, at 1. The U.S. EAC was criticized for not endorsing the preliminary findings of its hired consultants, which found polling place fraud was not a major problem. *See* Hasen, *Untimely Death*, at 24-25.

same time, the government has been able to find and successfully prosecute numerous instances of absentee vote fraud and vote buying, which presumably election criminals would take equal steps to cover up.[10]

Because Indiana failed to present any evidence that the provision at issue is reasonably tied to the purpose of addressing election fraud, the law should be struck down as a violation of the Equal Protection Clause and the First Amendment right of association whether or not the court concludes the burden the law imposes on voters is "severe." Moreover, that burden—severe or not—disproportionately falls on certain groups of voters for the reasons discussed above, and therefore fails to meet the nondiscriminatory requirement as well.

IV. THIS COURT SHOULD CLARIFY CONFUSING *DICTA* IN *PURCELL V. GONZALEZ* REGARDING VOTER FEELINGS OF DISENFRANCHISEMENT RESULTING FROM ELECTION FRAUD.

Last term, this Court in *Purcell v. Gonzalez* issued a brief *per curiam* opinion in a case involving

[10] That there would be more absentee voter fraud than impersonation voter fraud is unsurprising, given the difficulties of enforcing vote buying deals for voting occurring at polling places with a secret ballot. *See* Richard L. Hasen, *Introduction, Symposium*, *Internet Voting and Democracy*, 34 LOYOLA L.A. L. REV. 979, 982 (2001) (noting that institution of the secret ballot may have reduced bribery).

Arizona's voter identification law. 127 S. Ct. 5. *Dicta* in this decision has further confused lower courts about how to engage in *Burdick* balancing. This Court should use this case as an opportunity to clarify the *dicta*.

In *Purcell*, Plaintiffs challenged the law as unconstitutional and a violation of the Voting Rights Act, and sought a stay of the law's enforcement pending a trial on the merits. *Id.* at 6. The district court denied the request for a stay, but a motions panel of the United States Court of Appeals for the Ninth Circuit reversed that order, issuing an interlocutory injunction enjoining application of the law in an impending election. *Id.* The State of Arizona then sought a stay of the Ninth Circuit's order from Justice Kennedy as Circuit Justice. *Id.* at 5. Justice Kennedy referred the motion to the Court, which treated it as a petition for *certiorari*, granted the petition, and, without full briefing or oral argument, issued an opinion on the merits. *Id.*

This Court held that the Ninth Circuit erred in failing to give deference "as a procedural matter" to the district court's discretion on the stay. *Id.* at 7. The Court of Appeals compounded its error by failing to give reasons for issuing its stay order and by changing the rules for conducting the election so close to Election Day." *Id.*

In issuing its unanimous opinion, this Court stressed that it was not deciding anything on the

merits on connection with voter identification challenges:

> We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's [October] 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and [n]o bright line separates permissible election-related regulation from unconstitutional infringements. Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.

Id. at 8 (internal quotations and citation omitted; second alteration in original). However, in *dicta* this Court also stated,

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Countering the State's compelling interest in preventing voter fraud

> is the plaintiffs' strong interest in exercising the "fundamental political right" to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (internal quotation marks omitted).

Id. at 7.

The lower court in the case at bar treated that *dicta* as requiring courts to balance the *actual* disenfranchisement costs of voter identification laws with *feelings* of disenfranchisement that could come from voter perception of voter fraud. *See Crawford*, 472 F.3d at 952 (citing *Purcell* for the proposition that "[a] strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger"); *see also Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1381 (N.D. Ga. 2007) (quoting *Purcell dicta* and implying that the state has a compelling interest in preventing *feelings* of disenfranchisement that could come from voter perception of voter fraud).

This Court should reaffirm that it did not hold in *Purcell* that lower courts must balance a feeling of disenfranchisement among voters in ruling on the constitutionality of voter identification laws. The discussion of feelings of disenfranchisement served merely to explain one of the reasons that voter fraud can be harmful *in theory*. In the case at bar, the state of Indiana did not prove that anxiety about real or imagined impersonation voter fraud exists *in fact*. To the extent that voter fraud anxiety were to be considered as a separate factor in any *Burdick* balancing analysis, the state would need to provide actual

evidence of the degree—if any—to which fear of voter fraud depressed voter turnout. No such evidence was presented here. And there surely would have to be evidence that a proposed remedy for voter fraud, whether or not it actually alleviated the fraud, served to reduce the perception of the extent of the fraud. There is no support for that in the case of voter identification provisions.[11] *See* Hasen, *Untimely Death*, at 35-36.

[11] Even if there were evidence that fears of voter fraud depressed turnout, there are strong arguments that the balance should be struck against upholding a voter identification law justified solely on the basis of preventing the *feeling* of disenfranchisement. As the Missouri Supreme Court observed in rejecting this argument:

> While the State does have an interest in combating those perceptions, where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement. Perceptions are malleable. While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.

Weinschenk v. State, 203 S.W.3d 201, 218 (Mo. 2006); *see also* Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 765 (2007) ("The Court's equation [in *Purcell*] of state denial of the right to vote with voters' *private* decisions not to participate in a process in which they lack confidence represents a breathtaking expansion of the concept of vote dilution.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand the case for entry of judgment in plaintiffs' favor.

Respectfully submitted,

RICHARD L. HASEN
Counsel of Record
919 Albany Street
Los Angeles, CA 90015
Tel: 213-736-1466
Fax: 213-380-3769
Email: rick.hasen@lls.edu

ALAN R. GLICKMAN
KRISTIE BLASE*
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
Tel: 212-756-2000
Fax: 212-593-5955
**Admission Approved*

Attorneys for Amicus Curiae