

The Pandora’s Box of “Voter Fraud”

Rachel Appel*

The proliferation of misinformation surrounding the 2020 election came to a violent head on January 6th, 2021, when our nation experienced an assault on our Capitol, deemed by many an insurrection. The rioters attempted to, for the first time in history, overturn the results of a presidential election based on the lie the election was “stolen.” The misinformation that led to the insurrection did not come out of nowhere—states have promoted this misinformation and courts have fanned the flames. Despite undeniable and incontrovertible evidence that voter fraud is virtually nonexistent, states are creating a frenzy of allegations of “voter fraud,” and then enacting voter suppression laws purporting to fight a threat that they manufactured. Courts have upheld these suppressive voting statutes despite lacking any rational basis connecting them to the infinitesimal amount of voter fraud that does occur. Events since the 2020 election illustrate the defects and dangers of the prevailing legal standard for assessing constitutional challenges to voting statutes, known as the Anderson-Burdick balancing test. Current application of the test is too deferential to state interests, does not consider how misinformation plays a role in our elections, and threatens our democracy. While some argue for abandoning the Anderson-Burdick balancing test and others argue it is problematically applied, this Note proposes a novel way of applying the Anderson-Burdick balancing test, using the court response to tort claims based on phobia of and misinformation surrounding HIV/AIDS in the 1980s and ‘90s. When considering state regulatory interests, courts should not ask if the state interest is reasonable, but if the state interest should be reasonable.

DOI: <https://doi.org/10.15779/Z38RP1M>

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* Berkeley Law, J.D. 2023. A special thanks to Professor Abhay Aneja, Amelia Smith, Valencia Richardson, and Jonathan Diaz for providing excellent feedback and asking thoughtful questions to shape this Note.

There is a historical and sound legal basis in the body of tort law that courts can use to step in to prevent the fictions of misinformation from becoming legal realities. The success of a tort law claim previously required proving the average person would feel similarly in the plaintiff's shoes. But because what the average person thinks can be factually wrong or based on misinformation, courts have adopted a reasonable person standard to prevent false claims from succeeding. In the same way courts limited tort law, courts should limit suppressive voting laws when misinformation is rampant. Using voter ID laws as a case study, this Note demonstrates how the Anderson-Burdick balancing test is being misapplied and proves most voter ID laws are unconstitutional.

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INTRODUCTION

On January 6th, 2021, alt-right extremists bearing war paint and weapons infiltrated the Capitol. The extremists climbed walls, shattered windows, breached offices, and threatened the lives of members of Congress.¹ Tear gas

1. *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC NEWS (Aug. 2, 2023), <https://www.bbc.com/news/world-us-canada-56004916> [<https://perma.cc/U2NF-9AED>]; see also Chris Marquette, *Jan. 6 Panel Shows Man from Loudermilk Tour Threatening Lawmakers Near Capitol on*

was released in the Capitol to attempt to halt the infiltrators while Congressional members evacuated wearing protective masks.² Some police officers were seriously injured while attempting to stop the attack and protect the members and staffers, and four officers committed suicide in the aftermath.³ "Stop the Steal," a series of rallies centered around false accusations that the 2020 presidential election had been stolen (what has been called, "The Big Lie"⁴) culminated in an insurrection on our nation's capital to prevent the peaceful transfer of power.⁵

Around the same time as the insurrection, former President Trump and his supporters filed numerous lawsuits alleging fraud in an attempt to overturn the 2020 election results.⁶ The unfounded claims of a stolen election did not stop there but proliferated, influencing hundreds of municipal and state elections after 2020. By one count, 199 of the 552 Republican nominees running for Congressional or statewide office in the 2022 midterm election denied the legitimacy of the 2020 election, either by making statements that the election was stolen from Trump or by taking legal action to overturn the 2020 election results.⁷ Many of these candidates ran for Secretary of State—a position

Day of Riot, ROLL CALL (June 15, 2022), <https://rollcall.com/2022/06/15/jan-6-panel-shows-man-from-loudermilk-tour-threatening-lawmakers-near-capitol-on-day-of-riot/> [<https://perma.cc/QK8S-9NWJ>] (describing an individual who threatened members of Congress receiving a tour of the Capitol the day before the January 6th Capitol riot and taking photos of the hallways, staircases, and security checkpoints).

2. H. SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 601 (2022) [hereinafter SELECT COMM. FINAL REPORT].

3. Jan Wolfe, *Four Officers Who Responded to U.S. Capitol Attack Have Died by Suicide*, REUTERS (Aug. 2, 2021), <https://web.archive.org/web/20231010154343/https://www.reuters.com/world/us/officer-who-responded-us-capitol-attack-is-third-die-by-suicide-2021-08-02/>.

4. Zachary B. Wolf, *The 5 Key Elements of Trump's Big Lie and How it Came to Be*, CNN (May 19, 2021), <https://www.cnn.com/2021/05/19/politics/donald-trump-big-lie-explainer> [<https://perma.cc/A2U9-YADZ>].

5. *Before, During, After the Attack*, WASH. POST (Oct. 31, 2021), <https://web.archive.org/web/20211031173156/https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/>. After over a year of investigation, the House Select Committee concluded that the insurrection was instigated by the lie that the election was rigged and tainted with widespread fraud. See SELECT COMM. FINAL REPORT, *supra* note 2, at ix.

6. William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/VXD6-8WGW>].

7. FiveThirtyEight Staff, *60 Percent of Americans Will Have an Election Denier on the Ballot This Fall*, FIVETHIRTYEIGHT (Nov. 8, 2022), <https://projects.fivethirtyeight.com/republicans-trump-election-fraud/>. The Washington Post calculates the total election denier candidates at 291 and the Brookings Institution even higher at 345. See Adrian Blanco & Amy Gardner, *Where Republican Election Deniers Are on the Ballot Near You*, WASH. POST (Oct. 6, 2022), <https://www.washingtonpost.com/elections/interactive/2022/election-deniers-running-for-office-elections-2022/> [<https://perma.cc/GFY6-UYJX>]; Elaine Kamarck & Norman Eisen, *Democracy on the Ballot—How Many Election Deniers Are on the Ballot in November and What Is Their Likelihood of Success?*, BROOKINGS INST. (Oct. 7, 2022), <https://www.brookings.edu/articles/democracy-on-the-ballot-how-many-election-deniers-are-on-the-ballot-in-november-and-what-is-their-likelihood-of-success/> [<https://perma.cc/53SV-8CBM>].

responsible for administering elections.⁸ In what was the first of other instances to come, the Otero County Commission in New Mexico refused to certify the June 2022 primary election results due to baseless claims of election fraud.⁹ As of February 2024, twenty-five government officials holding statewide office in nineteen states were “Election Deniers.”¹⁰ While preventing fraud and protecting the integrity of our elections is crucial to the administration of free and fair elections, the runaway myth that voter fraud has actually infected our election process has damaged our institutions and threatened the functioning of our democracy.

In order to safeguard our democracy, we must ask, how did we get here? We must consider the role that courts have played by increasingly allowing states to enact restrictive voting measures in the alleged interests of protecting election integrity, combatting voter fraud, and safeguarding public confidence in elections.¹¹ For example, in 2000, fewer than fifteen states required an ID to vote.¹² By 2024, despite court challenges, thirty-seven states required some form of voter ID.¹³ Since the inception of these laws, researchers and advocates have been concerned with the suppressive and discriminatory impact of voter ID laws on communities of color. For instance, as many as 13 percent of eligible African American voters lack a government-issued photo ID compared to 5 percent of eligible White voters.¹⁴ Additionally, researchers found that poll workers more frequently question voters of color than White voters about their ID when

8. FIFTYEIGHT, *supra* note 7.

9. *GOP Commission Refuses to Certify New Mexico Primary Vote*, POLITICO (June 15, 2022), <https://www.politico.com/news/2022/06/15/gop-commission-refuses-to-certify-new-mexico-primary-vote-00039771>. Counties in Arizona and Pennsylvania refused to certify the 2022 Midterm elections due to baseless claims of voter fraud, prompting lawsuits. Zach Montellaro, *Lawsuits Likely After Handful of Counties Refuse to Certify Midterm Results*, POLITICO (Nov. 28, 2022), <https://www.politico.com/news/2022/11/28/lawsuits-certifying-midterm-election-results-2022-00070992>.

10. *The Landscape of Election Denial in America*, STATES UNITED ACTION (Oct. 16, 2023), <https://electiondeniers.org/> [<https://perma.cc/LG6X-3CRH>]. These officials include seven governors, five secretaries of state, and eleven attorneys general. *Id.*

11. *See generally* Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321 (2021). While these restrictive voting measures are enacted in the name of election integrity and combatting voter fraud, they are likely intended to suppress the vote of communities of color or for partisan gains. For example, in 2021, Georgia and Texas proposed eliminating Sunday voting which would disproportionately affect voters of color. For more examples *see The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [<https://perma.cc/KH8R-JXE5>]. Outside of the discriminatory impact, “Republicans have sought to restrict vote-by-mail due to its popularity among Democrats.” Ryan Teague Beckwith & Bill Allison, *Five US States Will Decide If the 2024 Election Can Be Stolen*, BLOOMBERG (Aug. 7, 2022), <https://www.bloomberg.com/graphics/us-election-risk-index/about/#xj4y7vzkg> [<https://perma.cc/TH7Z-MYMX>].

12. *Voter ID Chronology*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 29, 2021) [hereinafter *Voter ID Chronology*], <https://www.ncsl.org/research/elections-and-campaigns/voter-id-chronology> [<https://perma.cc/JZG5-VCAS>].

13. *Id.*

14. *Oppose Voter ID Legislation—Fact Sheet*, AM. C.L. UNION (July 21, 2011), <https://www.aclu.org/documents/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/7YKG-CYVZ>].

voting.¹⁵ According to a study by the University of Wisconsin, almost 17,000 eligible voters and about a quarter of Black Wisconsinites were deterred from voting in the 2016 election due to Wisconsin's strict voter ID law.¹⁶ As a final example, Texas's strict voter ID law disproportionately burdened Black and Latino voters.¹⁷ Despite this wealth of research on the discriminatory impact of voter ID laws on communities of color,¹⁸ numerous court challenges for infringing on the right to vote,¹⁹ the nonexistence of voter fraud, and public confidence in elections without strict voter ID,²⁰ states have continued to pass stricter voter ID laws and courts have continued to uphold them.

By enacting and then upholding unnecessarily strict election laws, rather than fostering public confidence, states and courts are sowing mistrust in our election system and cultivating violence. "Stop the Steal," the January 6th Insurrection, election denier candidates, election administrators that refused to certify election results, threats against elected and election officials, and voter intimidation all occurred despite clear and convincing evidence there has not been any election fraud.²¹ It is clear that legislating in the name of fraud without a guiding limit to rationality threatens the most fundamental lever of our democracy. These issues necessitate a reexamination of whether the proffered state interest of preventing voter fraud should be "generally sufficient to justify" voting restrictions under the prevailing legal standard for assessing constitutional challenges to voting statutes, the *Anderson-Burdick* balancing test.²² As discussed in more detail in Part II, under the *Anderson-Burdick* balancing test,

15. *Id.*

16. Michael Wines, *Wisconsin Strict ID Law Discouraged Voters, Study Finds*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/wisconsin-voters.html> [<https://perma.cc/2UHG-P2PR>]; see also Ari Berman, *Wisconsin's Voter-ID Law Suppressed 200,000 Votes in 2016 (Trump Won by 22,748)*, NATION (May 9, 2017), <https://www.thenation.com/article/archive/wisconsins-voter-id-law-suppressed-200000-votes-trump-won-by-23000/> [<https://perma.cc/V8R4-VQZ2>].

17. Bernard L. Fraga & Michael G. Miller, *Who Does Voter ID Keep from Voting? 15–16* (Jan. 1, 2021) (unpublished manuscript) https://static1.squarespace.com/static/5fac72852ca67743c720d6a1/t/6095436bfd2d517916dacce9/1620394863800/FragaMiller_2021.pdf [<https://perma.cc/8XPD-6FSZ>].

18. For a recent report, see Jillian Andres Rothschild, et al., *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge*, CENTER FOR DEMOCRACY AND CIVIC ENGAGEMENT UNIV. OF MARYLAND (Jan. 2024), [https://cdce.umd.edu/sites/cdce.umd.edu/files/pubs/Voter%20ID%202023%20survey%20Key%20Results%20Jan%202024%20\(1\).pdf](https://cdce.umd.edu/sites/cdce.umd.edu/files/pubs/Voter%20ID%202023%20survey%20Key%20Results%20Jan%202024%20(1).pdf) [<https://perma.cc/55SV-ZJEE>].

19. *Infra* Part III.

20. See generally Glenn Kessler, *The Truth About Election Fraud: It's Rare*, WASH. POST (Nov. 1, 2022), <https://www.washingtonpost.com/politics/2022/11/01/truth-about-election-fraud-its-rare/> [<https://perma.cc/52TX-JQHN>]; CNN Staff, *Five Baseless 2022 Election Conspiracy Theories, Fact-Checked*, CNN (Nov. 9, 2022), <https://www.cnn.com/2022/11/08/politics/fact-check-election-voter-fraud-conspiracies> [<https://perma.cc/ZAF9-UYPX>]; see also Chuck Todd, Mark Murray & Ben Kamisar, *Baseless GOP Claims About Election Fraud Remain Dangerous for a Democracy*, NBC NEWS (Sept. 14, 2021), <https://www.nbcnews.com/politics/meet-the-press/baseless-gop-claims-about-election-fraud-remain-dangerous-democracy-n1279124> [<https://perma.cc/XPJ3-N4H5>].

21. *Id.*

22. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

courts are supposed to balance the state's responsibility to maintain orderly elections with a citizen's right to vote.²³

Because of issues with the *Anderson-Burdick* balancing test, many have argued that courts should apply other legal tests when considering equal protection challenges regarding laws that infringe on the fundamental right to vote.²⁴ However, courts have yet to stray from the balancing test and still apply what amounts to rational basis review for what they deem minimal burdens on the right to vote. This Note argues that there needs to be a limit on courts' *de facto* deference towards states when deciding whether states' regulatory interests are "generally sufficient to justify voting restrictions" under the *Anderson-Burdick* balancing test.²⁵ Using theories from tort law and events since the 2020 election, this Note argues that there is an inherent limit to what voting regulations states can validly and rationally enact in the name of election integrity, voter fraud, and safeguarding public confidence. This Note focuses on states' adoption and courts' analyses of voter ID laws²⁶ to demonstrate the hazards of the *Anderson-Burdick* balancing test and suggest a way courts can apply the test to protect state interests and preserve the fundamental right to vote.²⁷ By incorporating the prescriptive objective test from tort law into the *Anderson-Burdick* balancing test, states would only be able to impose voting restrictions after proving the regulation's soundness.

Part I discusses what voter and election fraud is, how often it occurs, and how voter ID laws do not prevent the type of voter fraud that does very rarely occur. Part II provides an overview of the type of claims individuals have brought to challenge voter ID laws and the precedent for constitutional

23. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

24. See, e.g., Lindsay M. Sorin, *Precedent Misapplied: Crawford v. Marion County Election Board: A Compelling Case Study in the Importance of Both Identifying Appropriate and Relevant Case Law and Establishing A Uniform Methodology of Judicial Review*, 40 SETON HALL L. REV. 341, 349 (2010) ("Defining the Indiana law as merely affecting the voting machinery or requiring only nominal efforts for compliance instead of denying or threatening to deny the actual exercise of the voting franchise, the Court in *Crawford* misapplied the *Anderson-Burdick* standard and employed a standard of review actually established for election laws that only indirectly or derivatively impact the right to vote."); see also Danika Elizabeth Watson, *Free and Fair: Judicial Intervention in Elections Beyond the Purcell Principle and Anderson-Burdick Balancing*, 90 FORDHAM L. REV. 991, 1017–20 (2021) (describing different proposed frameworks to supplant the *Anderson-Burdick* test: return to strict scrutiny, the democracy canon, the political outcome test, and the *Carolene Products* test).

25. *Burdick*, 504 U.S. at 434. Some have argued that courts, wrongly, perceive deference as mandatory. See Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 60 (2021).

26. Many scholars have critiqued how voter ID laws increase disenfranchisement and disproportionately impact communities of color; this Note will not regurgitate those arguments but use voter ID laws as a case study to illustrate that states are not enacting laws rational to their interests. See generally Will Hyland, *Voter ID: Combating Voter Fraud or Disenfranchising? A Comprehensive Analysis of Voter ID Laws, Native American Disenfranchisement, and Their Intersection*, 29 U. MIA. INT'L & COMPAR. L. REV. 283 (2021).

27. Although I question whether any voting regulations should be subject to something less than strict scrutiny because of the foundational nature of the right to vote, given that the current Court is unlikely to overrule *Anderson-Burdick*, I focus instead on correcting application of the test.

challenges to such laws. Part III examines the prescriptive objective test from tort law, which allows courts to prescribe what is reasonable in the face of misinformation, and argues that the circumstances for which the prescriptive objective test has been applied are analogous to the circumstances present today: public policy harms resulting from unreasonable and false but widely held beliefs. Finally, Part IV incorporates the prescriptive objective test into the *Anderson-Burdick* balancing test to prove that strict voter ID laws are unconstitutional.

I.

VOTER FRAUD IS AN OVERSTATED CONCERN

Voter fraud is exceedingly rare and often conflated with other forms of election misconduct or election irregularities like voting machines recording inaccurate tallies, honest mistakes by election officials or voters, or fraud/intentional misconduct by third parties.²⁸ There is no precise or single legal definition of voter fraud,²⁹ but it is considered a subcategory of election fraud.³⁰ One definition by the Department of Justice defines election fraud as “conduct that corrupts the process by which ballots are obtained, marked, or tabulated; the process by which election results are canvassed and certified; or the process by which voters are registered.”³¹ Therefore, voter fraud can be defined as when someone intentionally casts a ballot despite knowing they are ineligible to vote to affect election results.³² There are different kinds of potential voter fraud including, but not limited to, double voting, voting by noncitizens, or voter impersonation.³³ For instance, during the 2020 election, former President Trump encouraged voters to vote both by mail and in person in the same jurisdiction—this is illegal double voting.³⁴ The State Board of Elections in North Carolina had to issue a press release, change its website, and give media interviews to

28. JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD* 4–5 (2007), <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud> [https://perma.cc/DZ3Q-GYJR].

29. LORRAINE C. MINNITE, PROJECT VOTE, *THE POLITICS OF VOTER FRAUD* 6 (2007), http://www.projectvote.org/wp-content/uploads/2007/03/Politics_of_Voter_Fraud_Final.pdf [https://perma.cc/2Y LX-GSWU].

30. *Id.*

31. *Id.*

32. LEVITT, *supra* note 28, at 4. An alternate definition is “intentional corruption of the electoral process by the voter.” See MINNITE, *supra* note 29, at 6. Only “people who knowingly abrogate eligibility rules commit voter fraud.” Brief of Amicus Curiae Professor Lorraine Minnite, Ph.D. in Support of Appellants at 13, *Mo. State Conf. of the NAACP v. Missouri*, No. 20AC-CC00169 (Mo. June 8, 2020) [hereinafter Minnite Amicus Brief].

33. LEVITT, *supra* note 28, at 12–22.

34. BRENNAN CTR. FOR JUST. & BIPARTISAN POL’Y CTR., *ELECTION OFFICIALS UNDER ATTACK: HOW TO PROTECT ADMINISTRATORS AND SAFEGUARD DEMOCRACY* 10 (2021), <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack> [https://perma.cc/3LB2-EPRJ]; *Double Voting*, NCSL, <https://www.ncsl.org/elections-and-campaigns/double-voting>.

correct the misinformation.³⁵ Usually what appears to be voter fraud is actually a clerical error, as even election officials have difficulty navigating voting laws.³⁶

A common state response to combatting voter fraud is enacting voter ID laws.³⁷ Yet as the Brennan Center for Justice (Brennan Center) notes, “photo ID laws are effective only in preventing individuals from impersonating other voters at the polls—an occurrence more rare than getting struck by lightning.”³⁸ The Brennan Center analyzed the impact of voter ID laws in preventing voter fraud and found that they did not prevent the incredibly infinitesimal instances of voting by ineligible voters.³⁹ For example, in Missouri during the 2000 election, there were four voters who cast double votes,⁴⁰ a “voter fraud” rate of 0.0003 percent, and photo ID at polling places could not have prevented these instances of double voting.⁴¹ Similarly, in New Jersey for the 2005 election, eight voters voted twice, a “voter fraud” rate of .0004 percent, which photo ID also would not have prevented.⁴² Likewise in Wisconsin during the 2004 election, seven individuals with felony convictions who were ineligible to vote cast a ballot, resulting in a “voter fraud” rate of .0002 percent, and, once again, requiring a photo ID would not have prevented them from voting.⁴³ In all of these case studies, it was unclear whether the ineligible voters intentionally cast a ballot to

35. *Id.*

36. LEVITT, *supra* note 28, at 7, 11.

37. For example, in 2021, Texas enacted an omnibus election law that contained voter ID provisions to prevent voter fraud and Wyoming enacted its first photo ID law. *See* General Appropriations Act, S.B. 1, 87th Leg. (Tex. 2021); Voter Identification, HB0075, 66th Leg. (Wyo. 2021). During the 2022 election cycle, Arizona voters considered Proposition 309 which would have created stricter voter identification requirements out of concern for fraud (discussed in more detail in Part IV). *See Yes On 309*, ARIZONANS FOR VOTER ID, <https://web.archive.org/web/20220130091208/https://azvoterid.com/>. Since then, Nebraska voters passed a constitutional amendment establishing a photo ID requirement for the first time in its history, and Ohio and Missouri enacted stricter identification requirements. Margery A. Beck, *Nebraska Voter ID Bill Passes, Despite Filibuster by Lawmaker*, AP NEWS (June 1, 2023), <https://apnews.com/article/nebraska-voter-photo-id-bill-df896c3d8349cc6cea4d1d7d907d3e51> [<https://perma.cc/V2YZ-U6ND>]; Rudi Keller, *Challenge to Missouri Voter ID Law Focuses on Barriers Faced by the Elderly, Disabled*, MO. INDEP. (Nov. 15, 2023), <https://missouriindependent.com/2023/11/15/challenge-to-missouri-voter-id-law-focuses-on-barriers-faced-by-the-elderly-disabled/> [<https://perma.cc/CYL6-8R9X>]; Susan Tebben, *Changes to Ohio Voter ID Law Will Impact August 8 Election. Here’s How*, OHIO CAPITAL J. (July 19, 2023), <https://ohiocapitaljournal.com/2023/07/19/changes-to-ohio-voter-id-law-will-impact-august-8-election-heres-how/> [<https://perma.cc/93S9-U7CX>].

38. LEVITT, *supra* note 28, at 6. Dr. Minnite, an expert on voter fraud who teaches at Rutgers University, spent nearly ten years collecting and analyzing data and evidence using a wide variety of social science methods to evaluate how often voter fraud occurs in U.S. elections for her book, *The Myth of Voter Fraud*. She found that fraud committed by voters, including absentee ballot fraud, is exceedingly rare. *See* Minnite Amicus Brief, *supra* note 32, at 16.

39. LEVITT, *supra* note 28, at 52.

40. The definition of double voting is voting more than once in the same election. NAT’L CONF. OF STATE LEGISLATURES, DOUBLE VOTING (2022), <https://www.ncsl.org/research/elections-and-campaigns/double-voting.aspx> [<https://perma.cc/Y9W9-68ZZ>].

41. LEVITT, *supra* note 28, at 23.

42. *Id.*

43. *Id.*

defraud the election (voter fraud), were unaware of their ineligibility (not voter fraud), or honestly forgot they had already voted by mail when they tried to vote in person (not voter fraud).

More recently, a 2014 study estimated that “at most only 1 in 4,000 votes cast in 2012 were double votes” with clerical errors “possibly explaining a significant portion, if not all, of [the possible double voting].”⁴⁴ In 2022, Florida dedicated numerous resources to finding voter fraud and was only able to detect instances of twenty individuals who were formerly incarcerated and voted.⁴⁵ These individuals received voter registration cards or were told by government officials they could vote, but in fact, they had not had their rights restored (again, voter ID would not have prevented them from voting).⁴⁶ Prosecutors declined to press charges because the voters were not intentionally voting despite their ineligibility. In other words, the voters’ actions were not fraudulent. “Each appear[ed] to have been encouraged to vote by various mailings and misinformation. Each were given voter registration cards which would lead one to believe they could legally vote in the election.”⁴⁷

While there are a small number of instances of election fraud or misconduct,⁴⁸ most current voter ID laws are not designed to stop fraud via absentee ballots, vote buying, coercion, fake registration forms, voting from the wrong address, or ballot box stuffing by officials. “In the 243-page document that Mississippi State Sen. Chris McDaniel filed . . . with evidence of allegedly illegal votes in the Mississippi Republican primary, there were no allegations of the kind of fraud that ID can stop.”⁴⁹ In what became the seminal voter ID case, *Crawford v. Marion County Election Board*, discussed in more detail *infra*,

44. Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. ASS’N 456, 467 (2020).

45. Michael Waldman, *DeSantis’s Voting Stunt Goes Bad*, BRENNAN CTR. FOR JUST. (Feb. 21, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/desantis-voting-stunt-goes-bad> [<https://perma.cc/E47L-6UTN>].

46. *Id.*

47. *Id.*

48. For example, in 2022, a former U.S. Congressperson pleaded guilty to a conspiracy of ballot box stuffing in Philadelphia. Press Release, U.S. Att’y’s Off. for the E. Dist. of Pa., Former U.S. Congressman and Philadelphia Political Operative Pleads Guilty to Election Fraud Charges (June 6, 2022), <https://www.justice.gov/usao-edpa/pr/former-us-congressman-and-philadelphia-political-operative-pleads-guilty-election-fraud> [<https://perma.cc/75M3-48X5>].

49. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [<https://perma.cc/95U9-87YA>]. Professor Gilbert at the University of Virginia has concisely summarized the voter ID debate, “the common narrative is that voter ID laws either deter fraud or depress lawful votes. That narrative is probably wrong because voter ID laws probably do both: They deter some fraud, however little, and they simultaneously depress some lawful votes, however few. The sophisticated narrative is that voter ID laws have both effects, meaning there is a tradeoff. Is preventing 1 fraudulent vote worth 10 lawful votes? What about 1,000 or 10,000 lawful votes?” Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 752 (2015).

Judge Posner—who wrote the Seventh Circuit opinion in the case upholding Indiana’s voter ID law—now regrets his vote, acknowledging that the “law [is] now widely regarded as a means of voter suppression rather than of fraud prevention.”⁵⁰ Even Justice Stevens, who wrote the controlling opinion upholding that same law at the Supreme Court, similarly later regretted his decision, saying voter ID laws were neither necessary nor a good idea.⁵¹

Instead, voter ID laws disenfranchise legitimate voters and are enacted for partisan gains.⁵² As one GOP consultant put it,

“Of course it’s political. Why else would you do it?” . . . explaining that Republicans, like any political party, want to protect their majority. While GOP lawmakers might have passed the law to suppress some voters, Wrenn said, that does not mean it was racist. “Look, if African Americans voted overwhelmingly Republican, they would have kept early voting right where it was,” Wrenn said. “It wasn’t about discriminating against African Americans. They just ended up in the middle of it because they vote Democrat.”⁵³

However, the justification that these laws are solely political, rather than racially discriminatory, is questionable given that these restrictive voting laws do not have a discriminatory impact on White Democratic voters, but Democratic voters of color.⁵⁴ Regardless of the actual motive, these case studies

50. John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html> [https://perma.cc/Y5NE-BGE6].

51. FORA.tv, *John Paul Stevens Regrets Marijuana & Voter IDs Rulings*, YOUTUBE, at 1:52, 2:18 (May 2, 2014), <https://www.youtube.com/watch?v=fPfApKU7KbY> [https://perma.cc/G326-UPE5].

52. Republicans have repeatedly implied or explicitly stated that stricter voter ID laws impact democratic voters more than republican voters. For example, the Pennsylvania House Majority Leader in 2012 said, “Voter ID, which is going to allow Governor Romney to win the state of Pennsylvania: done.” Aaron Blake, *Republicans Keep Admitting That Voter ID Helps Them Win, For Some Reason*, WASH. POST (Apr. 7, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/> [https://perma.cc/7GG9-NW2H]; see also AM. C.L. UNION, *supra* note 14.

53. German Lopez, *A New Study Finds Voter ID Laws Don’t Reduce Voter Fraud—Or Voter Turnout*, VOX (Feb. 21, 2019), <https://www.vox.com/policy-and-politics/2019/2/21/18230009/voter-id-laws-fraud-turnout-study-research> [https://perma.cc/QD5Y-DLY3].

54. Regardless, even if these laws are purely partisan maneuvering, the politicization and partisanship of voting rights merit inquiry by courts, not deference, into newly enacted voting regulations. Otherwise, the court risks entrenching those in power. “Partisanship, however, is not a valid justification for rules about how our elections operate. Election laws should be neutral, enacted without an attempt to achieve political advantage. Indeed, the Court has said that states may not seek to affect election outcomes through their election regulations. These kinds of rules derogate the foundation of our democratic structure, as they call into question the validity of electoral results and create the appearance of bias or unfairness. The Court should respond by more rigorously and broadly testing the constitutionality of state voting regulations, especially when states can muster only generic justifications for the rules.” Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 595 (2015). Additionally, see generally Andrew Vazquez, *Updating Anderson-Burdick to Evaluate Partisan Election Manipulation*, 1 FORDHAM VOTING RTS. & DEMOCRACY F. 44 (2022) for a discussion of the

and the disenfranchisement of eligible voters illustrate the importance of enacting a voting regulation that has evidentiary support for the purported state regulatory interest. Compelling states to provide evidence their regulation actually furthers their stated interest will also help states achieve their regulatory interests. Protecting the integrity of our elections is an important and legitimate state interest.⁵⁵ The prescriptive object test from tort law can help states achieve that laudable goal.

II.

VOTER ID LAWS IN THE COURTS

The National Conference of State Legislatures (NCSL) divides state voter ID laws into four categories: strict voter ID, non-strict photo ID, photo ID requested, and ID requested but photo not required.⁵⁶ Strict voter ID states require voters without the appropriate identification to vote using a provisional ballot and take additional steps after Election Day to verify their identity to ensure their vote is counted.⁵⁷ Non-strict photo ID states allow some voters without the required identification to vote on Election Day without taking additional action to have their vote counted.⁵⁸ States that request a photo ID each have varying procedures for voters who do not have an acceptable ID.⁵⁹ For example, in Idaho, if a voter does not present a photo ID on Election Day, the voter has to sign an affidavit with their name and address.⁶⁰ Similarly, in non-photo ID requested states, there are varying procedures if the voter does not present accepted identification.⁶¹ In Utah, for instance, the county clerk can verify the voter's identity through other means.⁶² Of the thirty-seven states that require some form of identification at the polls, the NCSL considers ten states to be strict voter ID states: Arkansas, Georgia, Indiana, Kansas, Mississippi, Missouri, North Carolina, Ohio, Tennessee, and Wisconsin.⁶³ Three states are non-strict photo ID states: Arizona, North Dakota, and Wyoming.⁶⁴ Eleven states request a photo ID, and thirteen states request an ID but a photo is not required.⁶⁵

political motives behind election laws and an argument for reworking the *Anderson-Burdick* balancing test to account for partisan manipulation.

55. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008).

56. *Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 18, 2022) [hereinafter *Voter ID Laws*], <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [https://perma.cc/TW7B-KB4B].

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* After the 2022 midterm elections, Nebraska voters approved a ballot initiative requiring photo ID to vote. Previously, they did not require any form of identification to vote. *Id.*

For many years, all of these states either did not require voters to present a form of ID or allowed for non-photo identification to vote.⁶⁶ Voter ID laws first emerged on the national scene in 2002 as part of a bipartisan compromise to pass the Help America Vote Act (HAVA).⁶⁷ HAVA created stronger identification requirements for first-time voters.⁶⁸ For over a decade, only Republican legislatures introduced voter ID laws, and the sponsors of such bills were affiliated with the conservative group American Legislative Exchange Council (ALEC).⁶⁹ After the Supreme Court upheld Indiana's strict voter ID law in *Crawford* and struck down the preclearance regime of the Voting Rights Act (VRA) in *Shelby County v. Holder*, states were emboldened to pass stricter voter ID laws.⁷⁰

Regardless of the state, challengers to voter ID laws have relied on several theories, arguing that they violate the Equal Protection Clause of the Fourteenth Amendment, the Twenty-Fourth Amendment, Section 2 of the Voting Rights Act of 1965 (VRA), or various state constitutional provisions.⁷¹ Some scholars have suggested voter ID laws implicate the First Amendment.⁷² Yet the Supreme Court has considered a constitutional argument against voter ID laws only once. In *Crawford*, a plurality of the Court denied a facial challenge to Indiana's voter ID law by applying the *Anderson-Burdick* balancing test to Plaintiffs' claims that the law infringed on the right to vote under the Fourteenth Amendment.⁷³ The

66. See *Voter ID Chronology*, *supra* note 12. Arkansas implemented a strict photo ID requirement in 2021; Georgia in 2008; Indiana in 2008; Kansas in 2012; Missouri in 2022; Tennessee in 2012, and Wisconsin in 2016. Arizona implemented its strict non-photo ID in 2008; North Dakota in 2014; Ohio in 2006; and Wyoming in 2021.

67. *Voter Identification*, MIT ELECTION DATA + SCI. LAB (June 10, 2021), <https://electionlab.mit.edu/research/voter-identification> [<https://perma.cc/8NXC-NEHU>].

68. *Id.*

69. Suevon Lee & Sarah Smith, *Everything You've Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Mar. 9, 2016), <https://www.propublica.org/article/everything-you've-ever-wanted-to-know-about-voter-id-laws> [<https://perma.cc/JEP9-JM9C>]; Ethan Magoc, *Flurry of Photo ID Laws Tied to Conservative Washington Group*, NEWS21 (Aug. 12, 2012), <https://votingrights.news21.com/article/movement/> [<https://perma.cc/JEP9-JM9C>]. ALEC is a policy organization that drafts and disseminates model legislation to be passed in state legislatures that is supportive of conservative corporate interests. See Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS INST. (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/> [<https://perma.cc/76QD-BDAS>]; see also *ALEC Exposed*, CTR. FOR MEDIA & DEMOCRACY, https://www.alecexposed.org/wiki/ALEC_Exposed [<https://perma.cc/KX49-C2JK>].

70. *Voter Identification*, *supra* note 67.

71. See generally Elizabeth Lauzon, *Constitutionality of Requiring Presentation of Photographic Identification in Order to Vote*, 27 A.L.R.6th 541 (originally published in 2007); Laura Hunter Dietz, *Voter Identification Requirements as Denying or Abridging Right to Vote on Account of Race or Color Under § 2 of Voting Rights Act*, 12 A.L.R. Fed. 3d Art. 4 (originally published in 2016).

72. Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 288–89 (2014) (discussing the argument that voting restrictions should be considered viewpoint discrimination under the First Amendment).

73. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). The constitutional test for laws that infringe on the right to vote has evolved over time. Under the standard set out in *Harper v.*

Court found the law imposed a minimal burden on the right to vote and that the state's regulatory interest in preventing voter fraud and safeguarding voter confidence justified the burden.⁷⁴ After *Crawford*, all but one court that considered Equal Protection challenges to a voter ID law denied the plaintiffs' claims by applying the *Anderson-Burdick* test.⁷⁵ Litigation under Section 2 of the VRA has been more successful, but plaintiffs have still achieved mixed results.⁷⁶ Challenges under state constitutional provisions have similarly

Virginia Board of Elections, states could not impose a restriction, even with a rational justification, if the restriction was irrelevant to the voter's qualifications. 383 U.S. 663 (1966) (deciding Virginia could not condition the right to vote on the payment of a poll tax). What has become the *Anderson-Burdick* balancing test is a result of a combination of cases that decided that every law that infringes on the right to vote need not be subject to strict scrutiny—only laws that sufficiently burden the franchise. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (considering a challenge to the voting rights of a political candidate's supporters based on Ohio's early filing deadline); *Norman v. Reed*, 502 U.S. 279, 280 (1992) (deciding that a state can limit a political party's access to the ballot only to the extent that a sufficiently weighty state interest justifies the restriction and a severe restriction is subject to strict scrutiny); *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (upholding Hawaii's prohibition on write-in voting). Part II.A describes the balancing test in more detail.

74. *Crawford*, 553 U.S. at 191. Justice Stevens wrote the controlling opinion and "observed that [the voter ID] would not be a barrier to voting for most citizens, but at most an inconvenience that could not be considered unconstitutional. As to the unknown number of citizens for whom obtaining the documentation necessary for a state-issued photo ID (like a birth certificate) would be prohibitive—Indiana provided the photo ID at no charge, but not the underlying documentation—Stevens was not prepared to invalidate the entire statute on its face based on the evidentiary record that the plaintiffs had presented. Stevens, however, indicated that the court would be open to as-applied challenges to protect specific individual voters from being unconstitutionally disenfranchised by an excessively burdensome and insufficiently justified obligation to either pay for a birth certificate they could not afford or make an unnecessary separate trip to a government office to attest to their indigency." *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, <https://www.scotusblog.com/educational-resources/the-anderson-burdick-doctrinebalancing-the-benefits-and-burdens-of-voting-restrictions/> [<https://perma.cc/LF43-52YD>].

75. This does not include Equal Protection challenges of discriminatory intent analyzed under the *Arlington Heights* framework. *See, e.g., Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1322 (11th Cir. 2021). *Arlington Heights* claims have also had mixed success. *Compare Greater Birmingham Ministries*, 992 F.3d at 1322 (denying claim because the plaintiffs failed to prove the law was enacted with discriminatory intent), with *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (enjoining voter ID provision because the law was enacted with discriminatory intent). Only *People First of Alabama v. Merrill* found a voter ID law imposed a substantial burden on the right to vote and held there was an equal protection violation under *Anderson-Burdick*. 491 F. Supp. 3d 1076, 1152 (N.D. Ala. 2020). Every other court found the challenged voter ID law imposed a minimal burden on the right to vote, that the state's interests justified the burden, and therefore denied the plaintiffs' claims. *See ACLU of N.M. v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *Fla. State Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237 (N.D. Fla. 2008); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019); *DCCC v. Ziriaux*, 487 F. Supp. 3d 1207 (N.D. Okla. 2020).

76. *Compare Veasey v. Abbott*, 830 F.3d 216, 264–65, 269–72 (5th Cir. 2016) (*en banc*) (holding that voter ID law was facially discriminatory), and *McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) (holding that voter ID law was enacted with discriminatory intent towards African American voters), with *Greater Birmingham Ministries*, 992 F.3d at 1328 (deciding that voter ID law did not have a discriminatory impact on African American voters), and *Gonzalez v.*

received mixed results.⁷⁷ This Note only discusses the application of the *Anderson-Burdick* balancing test under Equal Protection challenges.

A. *The Anderson-Burdick Balancing Test*

The right to vote is a fundamental right guaranteed by the Equal Protection Clause of the Fourteenth Amendment.⁷⁸ While most laws that burden fundamental rights undergo strict scrutiny, laws that burden the right to vote undergo a different test to account for states' powers to set voter qualifications and regulate the election process.⁷⁹ Courts generally apply the *Anderson-Burdick* balancing test when considering challenges to state election procedures for infringing on the right to vote in violation of the First or Fourteenth Amendment. The first step of the balancing test is to determine the level of burden the challenged provision places on eligible voters who cannot comply with the new requirements.⁸⁰ Second, courts consider the state regulatory interest put forward as justification for the imposed burden.⁸¹ Finally, courts weigh the burden against the state regulatory interest.⁸²

Arizona, 677 F.3d 383, 407 (9th Cir. 2012), *aff'd sub nom.* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013) (holding that there was no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes resulted in less opportunity to participate in the political process).

77. Compare *Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013) (ruling that Tennessee's voter ID law was narrowly tailored to the state's compelling interest of maintaining the integrity of its election), with *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *26 (Pa. Commw. Ct. Jan. 17, 2014) (striking down Pennsylvania's voter ID law because the photo ID law was not narrowly tailored to the interest of protecting the integrity of the state's election). In 2023, the North Carolina Supreme Court struck down a voter ID law as enacted because of its discriminatory intent to disproportionately disenfranchise and burden African American voters. *Holmes v. Moore*, 881 S.E.2d 486, *reh'g granted*, No. 342PA19-2, 2023 WL 1769462 (N.C. Feb. 3, 2023). But after the 2022 midterm elections, the North Carolina Supreme Court switched to a conservative majority, and the Court agreed to rehear the case only two months later and reversed the decision. *Holmes v. Moore*, 384 N.C. 426 (2023). In the decision ordering a rehearing, Justice Earles dissented noting, "Not only does today's display of raw partisanship call into question the impartiality of the courts, but it erodes the notion that the judicial branch has the institutional capacity to be a principled check on legislation that violates constitutional and human rights." *Harper v. Hall*, 882 S.E.2d 548, 551 (N.C. 2023) (Earles, J., dissenting).

78. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); see also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

79. *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."); see also *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (striking down Tennessee's durational residency requirement for infringing on Tennessee citizens' right to vote).

80. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 930 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), *aff'd in part, vacated in part, rev'd in part sub nom.* Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

81. *Id.*

82. *Id.*

Under this test, a challenged provision only faces strict scrutiny if the state election law places a severe burden on the right to vote.⁸³ When a state election law provision imposes “reasonable, nondiscriminatory restrictions” (or what has been called a minimal burden⁸⁴) upon the Fourteenth Amendment right of voters,⁸⁵ “the State’s important regulatory interests are *generally sufficient* to justify” the restrictions.⁸⁶ If the burden is not severe, courts are supposed to apply something like intermediate scrutiny, but in reality apply a standard akin to rational basis review because of the incredible deference to state interests.⁸⁷

Generally, the Supreme Court supports its deference to the legislature under rational basis review because the “Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”⁸⁸ While deferential rational basis review is arguably appropriate to apply when scrutinizing some legislation, such as economic regulations,⁸⁹ the justification for rational basis review does not apply when considering voting regulations. *A voting regulation cannot be fixed through the democratic process when the regulation being challenged affects the very ability to affect the democratic process.* There must be a backstop to deference, especially when considering voting regulations. Additionally, true balancing, i.e., equal evidentiary demands on the burden for voters and state regulatory interests, is appropriate because voting is not only a fundamental right but “preservative of all [other] rights.”⁹⁰ Indeed, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we

83. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (recognizing that a “regulation must be ‘narrowly drawn to advance a state interest of compelling importance’” only when it subjects the voters’ rights to “severe” restrictions).

84. *See, e.g., Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021).

85. *See Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (“[T]he States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action.”).

86. *Burdick*, 504 U.S. at 434 (emphasis added).

87. *See* Emily Vincent Cox, *A Most Precious Right: Equal Protection, Voter Identification, and the Battle Brewing in Texas*, 51 GA. L. REV. 235, 237 (2016) (describing the *Anderson-Burdick* test as an intermediate scrutiny standard); *see also* Douglas, *supra* note 25, at 59 (“[W]hen a law does not create a severe burden on voters but still impacts the right to vote, courts must apply intermediate-level scrutiny.”); *cf.* Christopher S. Elmendorf, *Structuring Judicial Review of Election Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 330 (2007) (“[T]he Supreme Court typically applies something like rational basis review in nonsevere-burden cases.”). Notably, courts have almost never found a burden somewhere between “severe” or “minimal.” *Id.*

88. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

89. Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 44 GEO. J.L. & PUB. POL’Y 401, 407 (2016).

90. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *See* Douglas, *supra* note 25, at 79–84, for a discussion of how this inappropriate deference is a dangerous infringement of the fundamental right.

must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁹¹

In practice, the *Anderson-Burdick* standard has effectively become rational basis review because there is no inquiry into the state’s purported regulatory interest. Some courts have even acknowledged they have applied rational basis review when considering a minimal burden under the balancing test. For example, the Sixth Circuit has repeatedly said, “[A]t least with respect to a minimally burdensome regulation triggering *rational-basis review*, we accept a justification’s sufficiency as a ‘legislative fact’ and defer to the findings of Ohio’s legislature so long as its findings are reasonable.”⁹² Indeed, application of the *Anderson-Burdick* balancing test is “deeply flawed . . . because the evidentiary demands on each element of the balancing test are not similarly rigorous. While burdens on voters must be proven with substantial empirical evidence, the state’s interest in maintaining an election law can be supported with little more than a citation.”⁹³

Under rational basis review—not intermediate scrutiny—courts are deferential to governmental interests. In *Crawford*, Justice Stevens affirmed that *Anderson-Burdick* was a “flexible” standard, but not rational basis review.⁹⁴ It was Justice Scalia, dissenting, who argued that the balancing test “calls for application of a *deferential* ‘important regulatory interests’ standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.”⁹⁵ While most courts in *Crawford*-controlling cases claim to apply Justice Stevens’ test rather than Justice Scalia’s, and despite the fact that Justice Stevens suggested that with a different record, voter ID laws could be unconstitutional, only one court since *Crawford* has struck down a voter ID law under an equal protection challenge that did not allege discriminatory intent.⁹⁶ That court, the Northern District of Alabama, struck down the voter ID

91. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

92. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 632 (6th Cir. 2016) (considering an equal protection challenge to Ohio’s early voting scheme) (emphasis added); *see also* *Ohio Council 8 Am. Fed’n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (upholding Ohio’s law prohibiting party affiliation for judicial candidates).

93. Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 141 (2021). Under intermediate scrutiny, the government—not the plaintiff—bears the burden of proof to show the law it has enacted is substantially related to an important government purpose. Similarly, Professor Douglas articulates, “the Court had essentially failed to require states to offer ‘precise interests’ to justify a restrictive voting rule or explain why ‘those interests make it necessary to burden’ the right to vote. The problem has only become worse as a renewed, undue deference doctrine has emerged. The Court has not explicitly overruled the *Anderson-Burdick* test, but its jurisprudence and the case law from the circuit courts of appeals in 2020 demonstrates that there is little federal judicial protection for the constitutional right to vote.” *See* Douglas, *supra* note 25, at 60.

94. *Crawford*, *supra* note 55, at 190 n.8.

95. *Id.* at 204.

96. *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1152 (N.D. Ala. 2020), *appeal dismissed sub nom.* *People First of Ala. v. Secretary of State for Ala.*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), *appeal dismissed sub nom.* *People First of Ala. v. Secretary of State for Ala.*, No. 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020).

law because it found the identification requirement on elderly and disabled voters only a substantial burden during the COVID-19 pandemic.⁹⁷ Every other court to consider an equal protection challenge to a voter ID law found the burden imposed on voters minimal and that the state interest in protecting against voter fraud or safeguarding public confidence in the election—without any inquiry into how or whether the law actually prevented voter fraud or safeguarded public confidence—was sufficient.⁹⁸ These decisions demonstrate that courts are misapplying *Anderson-Burdick* by applying rational basis review. But even under that standard, courts are finding state justifications pass rational basis review when they are in fact irrational.

Wisconsin's voter ID litigation saga illustrates how the current application of the *Anderson-Burdick* balancing test is unduly deferential to state interests and harms rather than protects voters. Wisconsin's strict voter ID law was upheld because the Seventh Circuit found it was not materially different than the law considered in *Crawford*.⁹⁹ However, one of the district court judges that upheld Wisconsin's law remarked, "Wisconsin's strict implementation of its voter ID law has disenfranchised more citizens than have ever been shown to have committed impersonation fraud" and "suffice it to say that the court agrees that the IDPP is a wretched failure: it has disenfranchised a number of citizens who are unquestionably qualified to vote, and these disenfranchised citizens are overwhelmingly African American and Latino . . . Based on the evidence presented at trial, the court has some misgivings about whether the law actually promotes confidence and integrity. But precedent is precedent, and so the court will deny plaintiffs' request to invalidate the entire voter ID regime."¹⁰⁰ The district court further noted, "in theory, the well-designed and easy-to-use registration and voting system imagined in *Crawford* . . . facilitates public confidence without eroding participation in elections. But in practice, Wisconsin's system bears little resemblance to that ideal."¹⁰¹

Despite the fundamental nature of the right to vote, if courts find a state election law imposes a minimal burden on the right to vote, courts never interrogate whether the restriction actually furthers the state's regulatory interest. Courts should not give deference to the legislature blindly. Courts should require evidence showing *how* the voting restriction furthers the purported regulatory interest and assess whether the law actually achieves the government's alleged

97. *Id.*

98. In the following cases, the court upheld the state's voter ID law applying a standard akin to rational basis review: *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *Florida State Conference of NAACP v. Browning*, 569 F. Supp. 2d 1237 (N.D. Fla. 2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *North Carolina State Conference of the NAACP v. McCrory*, 156 F. Supp. 3d 683 (M.D. N.C. 2016); *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016); *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019); and *DCCC v. Ziriox*, 487 F. Supp. 3d 1207 (N.D. Okla. 2020).

99. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 911 (W.D. Wis. 2016).

100. *Id.* at 913, 917.

101. *Id.* at 913.

purpose. Further, if existing laws already achieve the government's purported regulatory interest (i.e., because of the lack of voter fraud), courts should require evidence of fraud when deciding whether a more restrictive voting law is necessary given the infringement on this most important right, especially if the law has a discriminatory impact.

III.

LEGISLATING AND LITIGATING IN THE ERA OF MISINFORMATION

To prevent disenfranchisement and maintain faith in the integrity of our election systems, courts should apply something akin to the "prescriptive objective test" from tort law when considering a less than severe burden on the right to vote and applying the *Anderson-Burdick* balancing test. Tort law has already recognized the issues of deeming something "reasonable" without any evidentiary support and created a test to prevent irrationality and falsehoods from being injected into our legal system.¹⁰² The disparate burdens on communities of color, corrosion of trust in our democratic systems, and violence inflicted on elected and election officials demonstrate the dangers of allowing what amounts to *de facto* deference to the legislature in the name of voter fraud.

A. Tort Law's Answer: The Prescriptive Objective Test

Fearmongering and misinformation are not new to our legal system. Beginning in the 1980s and continuing into the 1990s, the United States experienced what has been called the "AIDS Epidemic."¹⁰³ The spread of the Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS), and its lethality without a known treatment, caused widespread hysteria of danger and fear among the American public so pervasive that the Center for Disease Control launched an unprecedented national

102. Tort law's prescriptive objective test is a positive development in the recognition of issues with the traditional "reasonableness" and "reasonable person" standards which are often "a means of perpetuating a politics of racial/ethnic exclusion of the 'Other,' i.e., a non-white racial/ethnic subject. The Other is required to comport themselves as a reasonable person that bears very little resemblance to their lived reality. This results in the 'Other' being constrained within a concept that excludes them by imposing the worldview, norms, values, etc., of a rendition of the reasonable person that is not reflective of their world." Scott Astrada & Marvin L. Astrada, *The Enduring Problem of the Race-Blind Reasonable Person*, AM. CONST. SOC'Y (May 11, 2020), <https://www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person/> [<https://perma.cc/W93E-ZX46>].

103. *The AIDS Epidemic in the United States, 1981–Early 1990s*, CTRS. FOR DISEASE CONTROL & PREVENTION [hereinafter *AIDS Epidemic*], <https://www.cdc.gov/museum/online/story-of-cdc/aids/index.html> [<https://perma.cc/J7VL-CR5D>]. During the 1980s, "AIDS emerged as a leading cause of death among young adults in the United States. By 1988 . . . [it was] the third leading cause of death among men 25–44 years of age and, by 1989, was estimated to be second, surpassing heart disease, cancer, suicide, and homicide." Ctrs. for Disease Control & Prevention, *Current Trends Mortality Attributable to HIV Infection/AIDS—United States, 1981–1990*, 40 MORBIDITY & MORTALITY WKLY. REP. 41, 41–44 (1991) [hereinafter *Current Trends*], <https://www.cdc.gov/mmwr/preview/mmwrhtml/00001880.htm> [<https://perma.cc/UL3G-N738>].

campaign to educate the public on HIV/AIDS and dispel widespread myths.¹⁰⁴ Congress convened hearings to respond to the public health and information crisis.¹⁰⁵ There was intense stigmatization and ostracization of those infected with HIV/AIDS. Media and personal testimony from that time describe people with AIDS and those suspected of having the disease as "being evicted from their homes, fired from their jobs, and shunned by family and friends."¹⁰⁶ Even public schools were reluctant to allow HIV infected children into the classroom.¹⁰⁷ Throughout the epidemic, the public became increasingly misinformed about how HIV/AIDS is transmitted, thinking it could happen through casual social contact or by donating blood.¹⁰⁸ This misinformation about the spread of HIV/AIDS led to a not-insignificant amount of tort litigation by persons who had social contact with a person infected with HIV/AIDS for claims of battery or intentional infliction of emotional distress.¹⁰⁹ Because the misinformed beliefs were so widespread but much of the contact scientifically could not put someone at risk for infection, courts were confronted with the difficult question of how to respond to these claims.

Whether someone receives a remedy in tort law often revolves around what is "reasonable" or what a "reasonable" person would think or feel. "Reasonableness" is measured in multiple ways. Usually, courts apply the descriptive objective test, which asks what the average person in the plaintiff's shoes would feel. For example, in a claim for battery, the court would ask whether the average person in those circumstances would feel their personal dignity was invaded.¹¹⁰ But during the AIDS epidemic, given the misinformation around HIV/AIDS, courts applied a new test: the prescriptive objective test. This test asks what *should* be found reasonable. The rationale behind the prescriptive objective test is to limit what can be a justifiable social norm, recognizing that to a certain extent, social norms should be prescribed in the face of misinformation.

104. *Id.*

105. Lisa Cisneros, *40 Years of AIDS: A Timeline of the Epidemic*, U.C. S.F. (June 4, 2021), <https://www.ucsf.edu/news/2021/06/420686/40-years-aids-timeline-epidemic> [<https://perma.cc/667Y-7K9K>].

106. Gregory M. Herek, *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J.L. MED. & ETHICS 594, 595–96 (2002). Researchers have suggested that the intense stigmatization and lack of a robust governmental response was due to the fact that HIV/AIDS mostly affected already marginalized groups such as homosexuals, people of color, those in poverty, or drug users. See PANEL ON MONITORING THE SOCIAL IMPACT OF THE AIDS EPIDEMIC, NAT'L RSCH. COUNCIL, THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES 7 (1993); *Current Trends*, *supra* note 103.

107. Leonard Orland & Sue L. Wise, *The AIDS Epidemic: A Constitutional Conundrum*, 14 HOFSTRA L. REV. 137, 149 (1985).

108. Herek, *supra* note 106, at 599–600.

109. See Kimberly C. Simmons, *Recovery for Emotional Distress Based on Fear of Contracting HIV or AIDS*, 59 A.L.R.5th 535 (originally published in 1998).

110. Restatement (Second) of Torts § 19 (1965) ("In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.")

The Third Restatement of Torts says, “for special reasons of policy or principle, courts have justifiably created categorical rules specifying what does or does not constitute ‘offensive to the other’s reasonable sense of personal dignity.’”¹¹¹

To demonstrate, in the case of *Brzoska v. Olson*, a dentist who was HIV-positive performed dental work on patients and some of his patients later sued his estate for battery based on offensive contact.¹¹² The court had to consider “the overall reasonableness of the plaintiffs’ fear in contracting [AIDS] to determine whether the contact or touching was offensive.”¹¹³ Even though the average person would have feared transmission of AIDS from the dentist’s touching based on misinformation at the time of HIV/AIDS—meeting the elements for the test for battery—the court denied the claim.¹¹⁴ The court said,

Such fear is based on *uninformed apprehension*, not reality . . . AIDS is a disease that spawns *widespread public misperception* based upon the dearth of knowledge concerning HIV transmission. Indeed, plaintiffs *rely* upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to *contribute to the phobia*. Were we to recognize a claim for the fear of contracting AIDS based upon a mere allegation that one may have been exposed to HIV, totally unsupported by any medical evidence or factual proof, we would open a *Pandora’s Box of ‘AIDS-phobia’* claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects. Such plaintiffs would recover for their fear of AIDS, no matter how irrational.¹¹⁵

The court found the plaintiffs’ fear was *per se* unreasonable.¹¹⁶ Contact could only be offensive if it actually resulted in exposure to HIV.¹¹⁷ Plaintiffs had to prove actual harm or actual risk of contracting AIDS.¹¹⁸

Nearly every other jurisdiction followed a similar line of reasoning that *actual* exposure to HIV is necessary to reasonably fear contracting HIV or AIDS.¹¹⁹ Courts routinely held that evidence was required to substantiate

111. Restatement (Third) of Torts: Inten. Torts to Persons § 3 TD No 4 (2019). Because of the AIDS Phobia cases of the 1990s, the Third Restatement modified what could be considered offensive contact. *Id.*

112. *Brzoska v. Olson*, 668 A.2d 1355, 1357, 1360–61 (Del. 1995).

113. *Id.* at 1362.

114. *Id.* at 1363.

115. *Id.* (emphasis added).

116. *Id.*

117. *Id.* at 1364.

118. *Id.*

119. *See, e.g.*, *Hare v. State*, 173 A.D.2d 523 (N.Y. App. Div. 1991); *Pendergist v. Pendergrass*, 961 S.W.2d 919 (Mo. Ct. App. 1998); *Vogelsang v. Yeh*, No. C-940793 1995 WL 675991 (Ohio Ct. App. 1995); *Drury v. Baptist Memorial Hosp. System*, 933 S.W.2d 668 (Tex. Ct. App. 1996); *Bishop v. Mount Sinai Med. Ctr.*, 247 A.D.2d 329 (N.Y. App. Div. 1998). During the height of the AIDS phobia litigation, only Maryland and New Jersey recognized a claim even if the plaintiff couldn’t prove

exposure. For example, in *Bain v. Wells*, the court found the patient could not recover on an emotional distress claim absent evidence that he was actually exposed to HIV.¹²⁰ The court said, "a plaintiff must show some reasonable connection between the act or omission of a defendant and the injury which the plaintiff has suffered . . . [and] proof of actual exposure is necessary to establish that reasonable connection."¹²¹ Proof of actual exposure has meant, "a scientifically accepted method, or channel, of transmission and the presence of the HIV virus."¹²² More specifically, in *Kenyon v. Cheshire County Jail Administrator*, the court held the plaintiffs were required to allege a specific incident of possible exposure that could lead to a reasonable fear of developing AIDS.¹²³ To summarize, the legal test for fear of AIDS claims requires a few elements:

- (1) evidence of a scientifically accepted method or channel of transmission of HIV, i.e., sexual contact, exposure to infected blood or blood components, or perinatally from mother to infant;¹²⁴
- (2) that the person or blood who could have caused the infection actually had HIV/AIDS;¹²⁵ and
- (3) a distinct event or specific point in time when the exposure occurred.¹²⁶

Courts recognized that the widespread fear of HIV transmission was irrational and that HIV patients' interest in not being stigmatized and being allowed to participate in public life was more important than protecting bodily autonomy based on fear, noting "public policy imposes no legal duty to protect

evidence of actual exposure. Jill Trachtenberg, *Living in Fear: Recovering Negligent Infliction of Emotional Distress Damages Based on the Fear of Contracting AIDS*, 2 DEPAUL J. HEALTH CARE L. 529, 554 (1999). Since that time however, Maryland has overruled that precedent, holding that recovery for a fear of disease requires actual exposure. See *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 60 (Md. 2013). Moreover, even though New Jersey did not require evidence of actual exposure, it adopted a heightened reasonable person standard that the fear of contracting AIDS had to be based on the "level of knowledge of the disease that is then-current, accurate, and generally available to the public," noting "a reasonableness standard that requires only common knowledge about AIDS, however, does not address adequately concerns about the prevalence of misinformation and ignorance . . . and thus serves indirectly to encourage hysteria as well as prejudice and discrimination against people living with HIV." *Williamson v. Waldman*, 696 A.2d 14, 21–22 (N.J. 1997). While not requiring evidence of actual exposure, both states required "genuineness," i.e., the mode of possible transmission of HIV/AIDS had to be scientifically valid. Trachtenberg, at 554.

120. *Bain v. Wells*, 936 S.W.2d 618, 624–25 (Tenn. 1997) (housing HIV-positive medical patients in the same room as non-HIV positive patients was not a scientifically valid mode of transmitting HIV).

121. *Id.* at 624.

122. Pendergist, *supra* note 119, at 926; see *Bain*, 936 S.W.2d at 625.

123. *Kenyon v. Cheshire Cnty. Jail Adm'r*, No. CIV. 92–515–M, 1994 WL 529925, at *4–5 (D. N.H. 1994).

124. Pendergist, *supra* note 119, at 922, 926.

125. Trachtenberg, *supra* note 119, at 543.

126. *Kenyon*, 1994 WL 529925, at *4–5.

against the fear of contracting AIDS.”¹²⁷ Courts accepted that “to contain the spread of AIDS effectively,” they had “a responsibility to ensure the accurate circulation of information about the disease.”¹²⁸

When considering election laws, what is a “reasonable restriction” should be guided or limited by what is *per se* reasonable. And what is *per se* reasonable should require evidence and a burden of proof that is scientifically valid, or in the election law context, based in reality and not fearmongering. There is a limit of what is justifiable in the name of voter fraud and election integrity. Moreover, because of the foundational nature of the right to vote in protecting other rights, as well as the inapplicability of the justification for rational basis review for voting laws (ignoring the fact that *Anderson-Burdick* is supposed to be something more like intermediate scrutiny), voting restrictions should be somewhat prescribed.

B. Without a Prescriptive Objective Test in Election Law, Misinformation Corrodes our Elections and Infringes on the Right to Vote

Like the AIDS phobia of the 1980s and ‘90s, distortions and conspiracy theories regarding “voter fraud” result in decisions that harm vulnerable populations. But, unlike the AIDS phobia cases, courts are not recognizing that “public policy imposes no legal duty to protect against”¹²⁹ the irrational fear of voter fraud, nor are they taking “responsibility to ensure the accurate circulation of information”¹³⁰ about voter fraud. The AIDS and voter fraud misinformation epidemics have parallel public causes and responses, and without a similar court response, the voter fraud misinformation epidemic will continue to spiral.¹³¹

1. Uninformed Apprehension and Widespread Public Misperception

Just as many of the plaintiffs in the AIDS phobia cases had scientifically false beliefs that HIV could be transmitted casually, there is a large swath of the electorate that has been persuaded that voter fraud is rampant despite its patent nonexistence. As of Fall 2022, “nearly a third of Americans—including six-in-10 Republicans—continue[d] to hold the debunked belief that President Joe

127. *Bain v. Wells*, 936 S.W.2d 617, 625 (Tenn. 1997). Relatedly, the California Supreme Court has weighed public policy considerations in “fear of cancer” claims and the potential detrimental effects of such claims without a court-imposed standard. *See generally* *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965 (1993).

128. *Williamson v. Waldman*, 696 A.2d 14, 24–25 (N.J. 1997).

129. *Bain*, 936 S.W.2d at 625.

130. *Williamson*, 696 A.2d at 24–25.

131. Trump is laying the foundation to blame voter fraud if he loses the 2024 election. Nicholas Riccardi & Ali Swenson, *Trump Leans into Voter Fraud Playbook, Preparing to Cry Foul if He Loses Expected Biden Rematch*, AP NEWS (Jan. 24, 2024), <https://apnews.com/article/trump-2024-election-lies-voter-fraud-biden-f3f3691c2ea0667ad694e3bee577d802> [<https://perma.cc/EPL7-Y6DS>].

Biden didn't win the 2020 presidential election legitimately."¹³² The conspiracies continued into the 2022 midterms as only one in three Americans believed the midterms would be free of fraud, "an indication of how pervasive disinformation about the 2020 election has spread and how much trust in democracy has eroded in just two years."¹³³ Protesters even stood outside the elections office in Maricopa County, Arizona trying to prevent election officials from "stealing" the election.¹³⁴

In damning discovery in Dominion Voting's defamation lawsuit against Fox News, it is apparent that third parties intentionally and knowingly spread false information about the election and generated widespread public misperception.¹³⁵ Texts and emails between Fox's hosts and executives showed that they "knew the claims being peddled by then-president Donald Trump's lawyers Rudy Giuliani and Sidney Powell weren't true—some employees privately described them as 'ludicrous' and 'mind blowingly nuts'—but Fox kept airing them to keep its audience from changing channels."¹³⁶

In 2021, the House Oversight Committee and the Committee on House Administration investigated misinformation and disinformation surrounding our election administration and found, "[T]he greatest current threat to democratic legitimacy now comes from lies by domestic actors who seek to convince Americans that their election systems are fraudulent, corrupt, or insecure."¹³⁷ The President of the Florida Supervisors of Elections stated that new election laws enacted in the name of election integrity perpetuate the myth that our elections are not secure.¹³⁸ Specifically, "the dialogue of the legislative debates over election laws, as well as the passage of the bills, has magnified the belief in

132. Mark Murray, *Poll: 61% of Republicans Still Believe Biden Didn't Win Fair and Square in 2020*, NBC NEWS (Sept. 27, 2022), <https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-61-republicans-still-believe-biden-didnt-win-fair-square-2020-rcna49630> [<https://perma.cc/NX5Q-JWUE>]; see also Evan Perez & Devan Cole, *William Barr Says There Is No Evidence of Widespread Fraud in Presidential Election*, CNN (Dec. 1, 2020), <https://www.cnn.com/2020/12/01/politics/william-barr-election-2020/index.html> [<https://perma.cc/ZR7L-T38B>].

133. Noah Pransky, *Half of America Expecting Fraud in Midterm Elections, Poll Finds*, NBC WASH. (Oct. 20, 2022), <https://www.nbcwashington.com/news/politics/half-of-america-expecting-fraud-in-midterm-elections-poll-finds/3186528/> [<https://perma.cc/BCJ4-9CG9>].

134. Ctr. on Extremism, *2022 Midterm Elections: Unpacking False and Misleading Narratives*, ANTI-DEFAMATION LEAGUE (Nov. 18, 2022), <https://www.adl.org/resources/blog/2022-midterm-elections-unpacking-false-and-misleading-narratives> [<https://perma.cc/BCJ4-9CG9>].

135. Paul Farhi, Jeremy Barr & Sarah Ellison, "Incredibly Damning": *Fox News Documents Stun Some Legal Experts*, WASH. POST (Feb. 23, 2023), <https://www.washingtonpost.com/media/2023/02/23/fox-news-dominion-lawsuit-legal-analysis/> [<https://perma.cc/G8HG-VNGY>].

136. *Id.*

137. U.S. HOUSE OF REPRESENTATIVES, MAJORITY STAFF COMM. ON OVERSIGHT & REFORM, "EXHAUSTING AND DANGEROUS": THE DIRE PROBLEM OF ELECTION MISINFORMATION AND DISINFORMATION 2 (2022).

138. *Id.* at 4. Former Attorney General Bill Barr has even recognized that many of Trump's false voter fraud claims were effective at swaying the public, "Barr explained . . . there was 'absolutely zero basis for the allegations,' which were being 'made in such a sensational way that they obviously were influencing a lot of people, members of the public.'" SELECT COMM. FINAL REPORT, *supra* note 2, at 375–76.

the MDM (mis-, dis, and malinformation) and made the task of restoring voter trust in the elections process much more difficult for Florida Supervisors of Elections.”¹³⁹ States United Democracy Center authored a report that “over 200 state-level bills inspired by the Big Lie have been introduced that politicize, criminalize, or otherwise interfere with nonpartisan election administration [and] these laws not only undermine the proper functioning of election systems, but also fuel the disinformation cycle by giving credence to conspiracy theories, signaling that there must have previously been something amiss with the state’s election systems to warrant such changes.”¹⁴⁰

Relatedly, in the same way that the plaintiffs in *Brzoska* relied on public misperception to substantiate their battery claims, states are relying on public misperception to enact restrictive voting measures. Fifteen of sixteen states that had both 2020 litigation claims to overturn the election results and 2021 legislation restricting voting access had “at least one provision in a new restrictive voting bill [that] can be directly traced to a specific false claim made in a 2020 election lawsuit in that State.”¹⁴¹

2. *Lack of Evidentiary Support*

By enacting laws based on public misperception of voter fraud rather than evidence, states reinforce that same public misperception and create real incidents of disenfranchisement. When analyzing fear of AIDS claims, contact could only reasonably be found offensive if it actually resulted in exposure to HIV and “proof of actual exposure [was] necessary to establish that reasonable connection.”¹⁴² Similarly, here, states’ voting measures should be considered reasonable only if they are actually related to election integrity¹⁴³ and there is evidence that they will combat voter fraud.¹⁴⁴ Instead, courts are currently finding voting restrictions “reasonable” based on a voter fraud phobia without any evidence or factual proof either of the existence of voter fraud or that the measures put in place will actually combat voter fraud. Moreover, multiple

139. *The Rise in Political Violence in the United States and Damage to Our Democracy: Hearing Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. 11 (2022) (statement of Rachel Kleinfeld, Senior Fellow, Carnegie Endowment for Int’l Peace) [hereinafter *Rise in Political Violence*].

140. *Id.* at 12.

141. *Hearing Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. 4 (2022) (statement of Wendy Weiser, Vice President for Democracy, Brennan Ctr. for Just.).

142. *Bain v. Wells*, 936 S.W.2d 618, 624 (Tenn. 1997).

143. Professor Gilbert argues that judges should incorporate his Election Integrity Ratio into their analysis to determine whether a voter ID law would actually improve election integrity because under his statistical analysis, voter ID laws only improve election integrity in one of four circumstances. *See* Gilbert, *supra* note 49, at 773.

144. *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995); *Bain*, 936 S.W.2d at 624.

studies have found that accusations of voter fraud are eroding public confidence in our democracy.¹⁴⁵

In 2023, twenty-two states proposed fifty-one bills requiring new or more stringent voter ID requirements for voter registration or in-person voting in efforts to curb "voter fraud."¹⁴⁶ Seven of those bills were enacted.¹⁴⁷ However, across the country, there were no prosecutions in any state for voter impersonation between 2000 and 2014 by the DOJ or a U.S. Attorney's Office.¹⁴⁸ In fact, out of one billion votes cast between 2000 and 2014, there were only thirty-one credible *allegations* of voter impersonation,¹⁴⁹ and no evidence has been produced of voter fraud in the 2020 election.¹⁵⁰ Since 2014, there have been no comprehensive studies compiling voter impersonation cases. Taking information from online sources, the A-Mark Foundation found only two voter impersonation convictions between 2016 and 2020.¹⁵¹ The fact that there have been no prosecutions for voter impersonation in any state by the DOJ or a U.S.

145. See Gabriel R. Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public's Confidence in Democracy*, BROOKINGS INST. (July 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/> [<https://perma.cc/48QZ-CVEA>]; see also Nicolas Berlinski, Margaret Doyle, Andrew M. Guess, Gabrielle Levy, Benjamin Lyons, Jacob M. Montgomery, Brendan Nyhan & Jason Reifler, *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, 10 J. EXPERIMENTAL POL. SCI. 34, 36 (2023) (finding "that exposure to unsubstantiated claims of voter fraud from prominent Republicans reduces confidence in elections, especially among Republicans and individuals who approve of Donald Trump's performance in office. Worryingly, exposure to fact-checks that show these claims to be unfounded does not measurably reduce the damage from these accusations. The results suggest that unsubstantiated claims of voter fraud undermine the public's confidence in elections, particularly when the claims are politically congenial, and that these effects cannot easily be ameliorated by fact-checks or counter-messaging").

146. *Voting Laws Roundup: February 2023*, BRENNAN CTR. FOR JUST. (Feb. 22, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023> [<https://perma.cc/K55V-BHCL>].

147. *Voting Laws Roundup: June 2023*, BRENNAN CTR. FOR JUST. (June 14, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023> [<https://perma.cc/Y2C4-K8S9>]; *Voting Laws Roundup: October 2023*, BRENNAN CTR. FOR JUST. (Oct. 19, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2023> [<https://perma.cc/JYC2-2YZU>].

148. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 70 (2014).

149. Levitt, *supra* note 49.

150. Katie Benner & Adam Goldman, *Federal Prosecutors Push Back on Barr Memo on Voter Fraud Claims*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/politics/justice-department-voter-fraud.html> [<https://perma.cc/BU6K-A4QY>]; see also Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, AP NEWS (June 28, 2022), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d> [<https://perma.cc/NCL9-LACU>].

151. *Voter Fraud Convictions in Texas, 2016–2020*, A-MARK FOUND., <https://the2020election.org/voter-fraud-convictions-since-2016/texas/> [<https://perma.cc/XC3X-UT2T>]; *Voter Fraud Convictions in Wisconsin, 2016–2020*, A-MARK FOUND., <https://the2020election.org/voter-fraud-convictions-since-2016/wisconsin> [<https://perma.cc/3N6X-G44V>]; see also Press Release, Ken Paxton, Tex. Att'y Gen., AG Paxton's Election Fraud Unit Obtains Jail Sentence, Deportation for Non-Citizen Charged with Voter Impersonation and Voter Fraud (Sept. 13, 2018), <https://www.texasattorneygeneral.gov/news/releases/ag-paxtons-election-fraud-unit-obtains-jail-sentence-deportation-non-citizen-charged-voter> [<https://perma.cc/7J5X-LXZV>].

Attorney's Office, and a *possible* impersonation rate of .000000031%, regardless of having a strict photo ID law or non-strict, non-photo ID requirement, suggests that strict photo ID is not necessary. States that do not have such a requirement see imperceptible instances of voter impersonation or voter fraud generally. Therefore, there is no basis for passing stricter voter ID laws—the existing statutory identification schemes are working.

As one judge aptly put it when considering Wisconsin's voter ID law, “the evidence in this case casts doubt on the notion that voter ID laws foster integrity and confidence. The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities.”¹⁵² In Wisconsin, African Americans and Latinos are a disproportionate share of the voters that need an alternative state-sponsored ID because they do not have one that complies with Wisconsin's strict voter ID law.¹⁵³ “African Americans accounted for 35.6 percent of free IDs, whereas they make up only 5.6 percent of the citizen voting age population. Latinos accounted for 8.3 percent of the free IDs, against only 3.3 percent of the citizen voting age population.”¹⁵⁴ In 2016, minorities were only 11 percent of Wisconsin's citizen voting age population, but they accounted for 55 percent of the voters who needed the alternative state-sponsored IDs to vote.¹⁵⁵ In sum, the *One Wisconsin Institute* court said, “to put it bluntly, Wisconsin's strict version of voter ID law is a cure worse than the disease.”¹⁵⁶

Wisconsin is not an aberration. In 2022, a Montana state court struck down three restrictive Montana voting laws, passed in the name of voter fraud, which would have eliminated Election Day registration, limited voters' ability to use student IDs as eligible voter IDs, and restricted methods of ballot assistance, for violating Montana's State Constitution.¹⁵⁷ In that opinion, the trial judge highlighted that Montana's Secretary of State presented no evidence that the laws would address voter fraud or improve public confidence in the security and legitimacy of the election.¹⁵⁸ Further, the judge cited that voter fraud was “vanishingly rare” in Montana¹⁵⁹ and noted how the law would burden the right

152. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 903 (W.D. Wis. 2016).

153. *Id.* at 918.

154. *Id.*

155. *Id.*

156. *Id.* at 903.

157. Matthew Brown, *Montana Judge Knocks Down Republicans' Tighter Voting Laws*, AP NEWS (Oct. 3, 2022), <https://apnews.com/article/elections-voting-native-americans-voter-registration-montana-2799e5f423a015a4bd1ec264e7154939> [<https://perma.cc/UC8Q-MTFV>]. The judge struck down the law based on state constitutional grounds and applied strict scrutiny. See *Mont. Democratic Party v. Jacobsen*, 518 P.3d 58, 65 (Mont. 2022) (affirming the trial court's use of strict scrutiny).

158. *Mont. Democratic Party v. Jacobsen*, No. DV 21-0451, 2022 WL 16735253, ¶ 137 (Mont. Jud. Dist. Ct. Sept. 30, 2022).

159. *Id.* ¶ 466.

to vote for those already disproportionately disenfranchised.¹⁶⁰ In fact, the Montana Court applied an approach similar to a combined prescriptive objective test/*Anderson-Burdick* balancing test.

Voter ID laws are not the only restrictive laws states have passed that lack evidentiary support. Since 2020, states have introduced laws that threaten the integrity of our elections while claiming to do the opposite. For example, some laws contain provisions that allow any citizen to initiate or conduct biased election audits, impose new criminal or civil penalties on election officials who make unintentional errors, and permit partisan actors to remove election officials from office or overturn election results.¹⁶¹ Further, sufficient financing is crucial to the administration of free and fair elections, but many state legislatures have begun blocking private funding for election administration while also not supplanting that funding.¹⁶² Additionally, as of October 2023, nine Republican-led states withdrew from the Electronic Registration Information Center (ERIC).¹⁶³ ERIC is a bipartisan information sharing partnership between states across the country to ensure accuracy of the voter rolls and prevent voter fraud.¹⁶⁴ Ohio's Secretary of State Frank La Rose even said it was one of the best tools to fight fraud before he withdrew from ERIC.¹⁶⁵ The push for removal from ERIC is linked to a far-right conspiracy that the system is funded by George Soros to help Democrats win elections.¹⁶⁶ Since withdrawal, documents have shown that government officials in many of these states knew the pejorative statements about ERIC were "lies."¹⁶⁷ The introduction of bills that threaten election integrity and the withdrawal from an actual fraud-fighting tool demonstrate the need for inquiry, not deference by courts when reviewing restrictive voting statutes. Further, these moves show the need for accurate circulation of information and a prescription of what is rational to protect our election systems.

160. *Id.* ¶¶ 12, 256–60, 82, 566–67.

161. Weiser, *supra* note 141; see also *Voting Laws Roundup: February 2023*, *supra* note 146. Additionally, political actors have pushed for partisan audits undermining independent election administration procedures. See Gowri Ramachandran, *A Year Later—Sham Election Reviews Continue to Undermine Democracy*, AM. CONST. SOC'Y (Jan. 5, 2022), <https://www.acslaw.org/expertforum/a-year-later-sham-election-reviews-continue-to-undermine-democracy/> [<https://perma.cc/NWF9-RJH6>].

162. ELECTION OFFICIALS UNDER ATTACK, *supra* note 34, at 16.

163. Miles Parks, *Republican States Swore Off a Voting Tool. Now They're Scrambling to Recreate It*, NPR (Oct. 20, 2023), <https://www.npr.org/2023/10/20/1207142433/eric-investigation-follow-up-voter-data-election-integrity> [<https://perma.cc/W7QT-JTT9>].

164. *Id.*

165. Steve Inskeep & Miles Parks, *Examining How the Far Right Tore Apart One of the Best Tools to Fight Voter Fraud*, NPR (June 5, 2023), <https://www.npr.org/2023/06/05/1180089475/examining-how-the-far-right-tore-apart-one-of-the-best-tools-to-fight-voter-fraud> [<https://perma.cc/W94D-RPVJ>].

166. *Id.*

167. Jen Fifield, *Documents show Republican-led states struggling to clean voter rolls after leaving ERIC*, VOTEBEAT (Dec. 13, 2023), <https://www.votebeat.org/2023/12/13/cleaning-voter-rolls-after-eric-election-security-voter-fraud/> [<https://perma.cc/9U4C-WASK>].

3. *A Pandora's Box*

Similar to how the *Brzoska* court feared opening a “Pandora’s Box of ‘AIDS-phobia’” by recognizing a claim for fear of contracting AIDS unsupported by any medical evidence or factual proof, courts are unleashing a Pandora’s Box of voter fraud mania and opening the door to violence, distrust, and debasement of our institutions. As it stands, states can enact any restriction in the name of voter fraud without any evidence of the existence of voter fraud or evidence that the measure protects the integrity of our elections.¹⁶⁸ Events since the 2020 election are illustrative.

Violence surrounding elections—a component of authoritarian, rather than democratic, regimes—is infecting our institutions. Sixty-four percent of election officials report that misinformation of election fraud has made their job more dangerous¹⁶⁹ and that they are increasingly receiving violent death threats.¹⁷⁰ Moreover, one in three election officials feel unsafe because of their job, and almost one in five listed death threats as a job-related concern.¹⁷¹ One scholar who testified before the Select Committee to Investigate the January 6th Attack on the United States Capitol explained, “[T]he consciously propagated false narrative regarding election theft is directly linked to the growing support for violence on the right. Those who believed the election was fraudulent were twice as likely . . . to endorse a military coup and were more likely to justify armed citizen rebellion . . . 73–74% of Republicans felt that President Biden was not the rightful winner of the election [and] a separate 22,900 person poll found that almost 1 in 5 among Republican men claimed that violence was justifiable ‘right now’.”¹⁷²

This support for violence is not just theoretical. For example, in Arizona former Maricopa County Recorder Adrian Fontes “described a mob of people carrying assault rifles and screaming outside the warehouse where staff [were] tabulating ballots. In Nevada, Clark County Registrar of Voters Joe Gloria

168. *Brzoska v. Olson*, 668 A.2d 1355, 1363 (Del. 1995).

169. *Election Misinformation*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/election-misinformation> [<https://perma.cc/93A3-V38X>].

170. H. COMM. ON OVERSIGHT & ACCOUNTABILITY, *supra* note 137, at 3. Some egregious examples include: Al Schmidt, the Republican city commissioner of Philadelphia, received multiple death threats. “One text message, which mentioned his wife and children, read, ‘You lied. You a traitor. Perhaps 75cuts and 20bullets will soon arrive.’ His wife received the following threats via email the next morning: ‘ALBERT RINO SCHMIDT WILL BE FATALLY SHOT,’ and ‘HEADS ON SPIKES. TREASONOUS SCHMIDTS.’ A 24-hour security detail remained at Schmidt’s and his parents’ houses well into 2021. For their safety, his wife and children left their home after the election . . . [In Michigan,] dozens of armed individuals stood outside Secretary of State Jocelyn Benson’s home ‘shouting obscenities and chanting into bullhorns’ as she was decorating the house for Christmas with her 4-year-old child. In Washington, someone posted the state elections director’s home address, contact information, and photograph, superimposed with crosshairs, on a website describing ‘enemies of the people,’ along with the message ‘Your days are numbered’ and a timer clock.” ELECTION OFFICIALS UNDER ATTACK, *supra* note 34, at 3, 6.

171. ELECTION OFFICIALS UNDER ATTACK, *supra* note 34, at 4.

172. *Rise in Political Violence*, *supra* note 139, at 4–5.

recounted that 25–50 protesters appeared outside his office every day, some openly carrying weapons, leading him to provide meals for his staff so that they did not have to leave the building . . . [and] in March 2021, authorities found a pipe bomb in an Iowa polling place.”¹⁷³ At the national level, threats against members of Congress are ten times higher than they were five years ago—the Capitol Police investigated 902 threats in 2016 compared to 9,600 threats in 2021.¹⁷⁴

The danger surrounding voter fraud has not been limited to election officials as it is also causing individuals to participate in criminal activity by engaging in voter intimidation.¹⁷⁵ After the 2020 election, canvassers of an “election integrity” group knocked on ten thousand doors in Colorado—in mostly communities of color—to root out supposed voter fraud.¹⁷⁶ Acting on disinformation, armed volunteers in tactical gear patrolled drop boxes in Arizona to prevent “voter fraud” and were successfully sued in court.¹⁷⁷

As previously discussed, allowing states to enact restrictive voting measures in the name of preventing voter fraud and preserving election integrity has not fostered public confidence in elections. To the contrary, in a study by researchers from various universities, more voters are concerned about voter suppression than voter fraud.¹⁷⁸ By upholding measures in the name of voter fraud, courts “contribute to the phobia,” just as the *Brzoska* court warned against.¹⁷⁹ Thus, courts must halt upholding legislation under the hyperbolic use of “fraud” and “election integrity” or they will fuel the fire of misinformation and corruption of our democratic institutions.¹⁸⁰

173. ELECTION OFFICIALS UNDER ATTACK, *supra* note 34, at 8.

174. *Rise in Political Violence*, *supra* note 139, at 6.

175. Miles Parks, *The Election Denial Movement Is Now Going Door to Door*, NPR (July 21, 2022), <https://www.npr.org/2022/07/21/1107023599/colorado-canvassing-election-integrity-plan> [<https://perma.cc/656T-CF43>]. Similar intimidating activity happened in California. Ned Parker & Andy Sullivan, *In the Hunt for Voter Fraud, Republican Door Knockers Are Intimidating Residents: Officials*, REUTERS (Nov. 3, 2022), <https://www.reuters.com/legal/republican-door-knockers-intimidate-voters-while-hunting-voter-fraud-say-2022-11-03/> [<https://perma.cc/KC9U-U4DH>].

176. *Id.*

177. Rocio Fabbro, *Election Officials Combat Voter Intimidation Across U.S. as Extremist Groups Post Armed Militia at Some Polls*, CNBC (Nov. 6, 2022), <https://www.cnn.com/2022/11/06/election-officials-facing-armed-militia-presence-at-some-polls.html> [<https://perma.cc/9T3S-GABA>]. The League of Women Voters sued the Lions of Liberty for patrolling the drop boxes and the parties settled after Lions of Liberty agreed to stop. *League of Women Voters of Arizona v. Lions of Liberty LLC, et al.*, PROTECT DEMOCRACY (May 21, 2023), <https://protectdemocracy.org/work/league-of-women-voters-of-arizona-vs-lions-of-liberty-llc-et-al/> [<https://perma.cc/M462-5QXQ>].

178. Stephanie Kulke, *38% of Americans Lack Confidence in Election Fairness*, NW.NOW (Dec. 23, 2020), <https://news.northwestern.edu/stories/2020/12/38-of-americans-lack-confidence-in-election-fairness/> [<https://perma.cc/YPL7-FK9B>].

179. *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

180. In a study by researchers at Stanford analyzing interventions that could strengthen our democracy, they found that misperception interventions likely required institutional reform to prevent democratic backsliding. James N. Druckman, *Correcting Misperceptions of the Other Political Party*

4. *Voting Rights Outweigh Fear*

Finally, just as in *Brzoska* where the HIV patients' interest to live a life of dignity free from stigmatization outweighed claims based purely out of fear, here, voters' interest in exercising their fundamental right outweighs legislating out of fear. Many of these new voting restrictions are increasing disenfranchisement and predominately affecting voters of color.¹⁸¹ As the Brennan Center states, "[T]he voter fraud phantom drives policy that disenfranchises actual legitimate voters, without a corresponding actual benefit."¹⁸² For example, after the 2020 presidential election, despite the complete lack of evidence of any fraud, more restrictive voting laws were passed in Texas and Georgia resulting in increased disenfranchisement.¹⁸³ In Texas, mail-ballots for the 2022 primary election were rejected at rates between 6–22 percent compared to a 1 percent rejection rate in 2020 and similarly, in Georgia, voters were forty-five times more likely to have their mail ballot application rejected in the 2021 election than in the 2020 election.¹⁸⁴ Election law seems to be one of the few areas where courts have allowed fearmongering to dictate exercising a constitutional right as "no one would suggest that public perception of a potentially nonexistent threat would justify relaxing constitutional speech, religion, or criminal rights."¹⁸⁵ While states have the power to regulate federal elections for the sake of order and organization, voting is a fundamental right and should be treated as such.¹⁸⁶ As the Montana trial judge noted when striking down the recent suppressive voting law that would have lessened voter registration days, "It would be unconstitutional to deny Montanans the right to

Does Not Robustly Reduce Support for Undemocratic Practices or Partisan Violence, 120 PROC. NAT'L ACAD. SCI., no. 37, 2023, at 1, 2–3. A separate study by the Anti-Defamation League found that "rightwing extremists have committed about 75% of the 450 political murders that occurred in the US over the past decade. In comparison, Islamic extremists were responsible for about 20% of the murders, while leftwing extremists were blamed for 4% of the killings. Expert (sic) argue the frequency of rightwing violence compared with leftwing violence can be partly explained by Republican leaders' failure to condemn threatening rhetoric." Joan E. Greve & Lauren Gambino, *US Faces New Era of Political Violence as Threats Against Lawmakers Rise*, GUARDIAN (July 31, 2022), <https://www.theguardian.com/us-news/2022/jul/31/us-political-violence-threats-against-lawmakers> [<https://perma.cc/C8YP-HQTP>]. These studies highlight the importance of correcting the information around misperceived issues filled with baseless and incendiary rhetoric like voter fraud.

181. Druckman, *supra* note 180, at 9–10. Similar to the AIDS epidemic, these suppressive voting statutes are aimed at marginalized communities. For that reason, one scholar has suggested adoption of the Carolene Test for voting rights statutes, recognizing that underrepresented groups have difficulty engaging in the political process. *See* Watson, *supra* note 24, at 1022.

182. LEVITT, *supra* note 28, at 6.

183. Weiser, *supra* note 141, at 10.

184. *Id.*

185. Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud*, 68 STAN. L. REV. 1455, 1484 (2016).

186. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). States also have the power to create voter qualifications. U.S. Const. Art. I, § 2, cl. 1. Historically, this power was used to keep African Americans from voting. Chandler Davidson, *The Historical Context of Voter Photo-ID Laws*, 42 POL. SCI. & POL. 93 (2009).

bear arms for one and a half days . . . It would be unconstitutional to deny Montanans the right to freedom of religion for one and a half days . . . And it would be unconstitutional to deny Montanans their right of privacy for one and a half days.”¹⁸⁷ Moreover, the state interest of improving public perception of a fear they themselves have fomented should not be a basis for burdening the right to vote.¹⁸⁸ A prescriptive objective test of what reasonable measures can actually further states’ claimed interests of election integrity and preventing voter fraud would protect the right to vote while also achieving the states’ interests.

IV.

HOW COURTS COULD APPLY THE PRESCRIPTIVE OBJECTIVE TEST

Infusing the prescriptive objective test into the *Anderson-Burdick* balancing test demonstrates how states can preserve the integrity of their elections while simultaneously protecting the right to vote. During the second step of the *Anderson-Burdick* balancing test, when courts are considering the state regulatory interest put forward as justification for the imposed burden on the right to vote, courts should ask, like the prescriptive objective test asks, *should* the state interest be reasonable? Instead of allowing states to avoid showing any kind of harm and applying *de facto* deference to any proffered interest, courts should require states to provide evidentiary support of how their law achieves the state interest. An evidentiary burden will ensure that courts remain out of the political fray while maintaining their role as guardians of the Constitution. Finally, in the last step of the balancing test, courts should keep public policy harms of misinformation in mind.

A. State Interests: Voter Fraud, Public Confidence, and Integrity of Elections

States should not just be able to claim “voter fraud,” “improving public confidence,” or “election integrity” when enacting a restrictive law. For a fear of HIV/AIDS claim to be reasonable, there had to be proof or evidence of a scientifically accepted method or channel of transmission of HIV, i.e., evidence

187. Mont. Democratic Party v. Jacobsen, No. DV 21-0451, 2022 WL 16735253, ¶ 574 (Mont. Jud. Dist. Ct. Sept. 30, 2022).

188. Candidates have on the record propagated false claims. Tudor Dixon, a candidate for Governor in Michigan in 2022 said, “Steal an election then hide behind calls for unity and leftists lap it up.” Doug Mastriano, a candidate for Pennsylvania Governor claimed, “There is mounting evidence that the PA presidential election was compromised.” Kari Lake, one of Arizona’s candidates for Governor tweeted, “America knows the 2020 election was stolen. America knows President Trump was the true winner.” Adam Laxalt, a Nevada Senatorial candidate told a radio show, “There’s no question they rigged the election.” Tim Michels, a Wisconsin Gubernatorial candidate would not commit to certifying the 2024 Presidential Election if Governor, claiming, “Certainly, there was a lot of bad stuff that happened. There was certainly illegal ballots. How many? . . . I don’t know if anybody knows.” Ryan Teague Beckwith, *The Real Winner of GOP’s 2022 Primaries Was Denial of 2020 Election*, BLOOMBERG (Sept. 6, 2022), <https://www.bloomberg.com/graphics/us-election-risk-index/2022-election-denier-candidates/> [https://perma.cc/LWD3-WB5M].

of sexual contact, exposure to infected blood or blood components, or perinatal transfer from mother to infant. In election law, states should have to do the equivalent when enacting a restrictive law. First, they should have to specify exactly what type of “fraud” they are trying to prevent. Specifically, they should answer, does the law combat voter impersonation, double voting, intentionally voting when being ineligible, ballot box stuffing, vote buying, or something else? Then states should have to provide evidence of *how* the law combats the type of voter fraud they are trying to prevent. For example, if a state is trying to enact a strict voter ID law, the only possible “channel of transmission”¹⁸⁹ of fraud this type of law could prevent is voter impersonation. No other type of fraud could be a reasonable or rational justification for voter ID laws.

Next, akin to how plaintiffs in fear of HIV/AIDS claims had to show (1) that the person or blood who could have caused the infection actually had HIV/AIDS and (2) a distinct event or specific point in time when the exposure occurred, states should have to show the occurrence of the type of fraud the statute is purporting to address (voter impersonation, double voting, intentionally voting when being ineligible, ballot box stuffing, vote buying, etc.) in their own state to enact more suppressive laws. Moreover, states should have to prove the existing statutory schemes are not already working to prevent whatever specific kind of fraud they are trying to deter and, like in the tort claims, plaintiffs should be able to rebut such evidence. Evidence also ensures the state justification is based on facts and not conspiracy theories, speculation, nor what amounts to defamatory statements such as what occurred in the *Dominion* case.¹⁹⁰

States should also have to provide “factual proof”¹⁹¹ or evidence of how their restrictive law improves public confidence or the integrity of elections. As an example, since what appears to be fraud is often honest mistakes,¹⁹² a law that *educates* voters, versus penalizing them, would be the rational means to achieve the state goal of election integrity. Without such evidence, the state regulatory interest is not rational or reasonable.

B. *Weighing the Burden Against the State Interest*

Lastly, during the final step of the balancing test, when courts are weighing the burden on the right to vote against the state regulatory interest, courts should consider (1) how many voters will be disenfranchised and (2) the public policy harms. Even if a state could provide evidence of one case of voter fraud, remembering that voter fraud is only intentionally “cast[ing] ballots despite knowing that they are ineligible to vote” in order to affect election results,¹⁹³ not honest mistakes by voters or election officials, one instance should not justify

189. Pendergist v. Pendergrass, 961 S.W.2d 919, 926 (Mo. Ct. App. 1998).

190. Farhi, Barr & Ellison, *supra* note 135.

191. Brzoska v. Olson, 668 A.2d 1355, 1363 (Del. 1995).

192. LEVITT, *supra* note 28, at 7, 11.

193. *Id.* at 4.

disenfranchising hundreds or thousands of voters. Any decision to the contrary tips the balance from protecting the integrity of elections to controlling the outcome of elections.

In terms of public policy, courts need to understand that just like “to contain the spread of AIDS effectively,” they had “a responsibility to ensure the accurate circulation of information about the disease,”¹⁹⁴ to contain the runaway myth of voter fraud effectively, courts have a responsibility to ensure accurate circulation of information about voter fraud and election integrity. With the normative considerations from the prescriptive objective test in mind during the final step of the balancing test, courts should factor in that stricter (or suppressive) voting laws sow mistrust in our institutions, “uninformed apprehension,” and “widespread public misperception”¹⁹⁵ of voter fraud, and violence. This cannot be exhibited more clearly than by the hundreds of election denier voters and candidates, refusal of election administrators to certify election results, baseless election audits, and of course most starkly, the death threats against elected and election officials and the January 6th insurrection. Finally, “public policy imposes no legal duty to protect against the fear”¹⁹⁶ of a phantom fraud, and access to the franchise, as the most fundamental right, is more important than irrational phobias.

C. Arizona as a Test Case

Applying the revised *Anderson-Burdick* test to a proposed constitutional amendment in Arizona demonstrates how strict voter ID laws would be found unconstitutional. During the 2022 legislative session, the Arizona legislature approved a proposed constitutional amendment that would impose stricter voter photo ID requirements for in-person and mail voting.¹⁹⁷ The National Conference of State Legislatures already considers Arizona a “Strict Non-Photo ID” state.¹⁹⁸ The proposed changes would make Arizona a “Strict Photo ID” state. Current Arizona law requires voters to have a government-issued photo ID with their name and address, or two forms of non-photo ID that have the voter’s name and address.¹⁹⁹ If the address of the government-issued photo ID does not match the voter registration list, the voter has to bring a second form of non-photo identification.²⁰⁰ The proposed constitutional amendment would eliminate the existing alternatives to bringing a government-issued photo ID and would be

194. *Williamson v. Waldman*, 696 A.2d 14, 24–25 (N.J. 1997).

195. *Brzoska*, 668 A.2d at 1363; *infra* Part III.B.

196. *Bain v. Wells*, 936 S.W.2d 618, 625 (Tenn. 1997).

197. S. Con. Res. 1012, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

198. *Voter ID Laws*, *supra* note 56.

199. *Election Day Voting: What to Bring*, ARIZ. SEC’Y OF STATE, <https://azsos.gov/elections/voters/voting-elections/election-day-voting> [<https://perma.cc/2EP9-G88N>].

200. *Id.*

very similar to Wisconsin's strict photo voter ID law, which as documented here, is replete with issues.²⁰¹

If the constitutional amendment was challenged in court as a violation of the right to vote under the Equal Protection Clause, the court would first consider the burden of the new amendment on Arizonans' right to vote.²⁰² The law would have made voting disproportionately more difficult for "tribal voters, students, people who recently voted or rural voters without standard addresses . . . [as] [t]ribal nations, in some instances, don't have photos or addresses on their IDs."²⁰³ To establish the burden on voters, plaintiffs would need to articulate the number of voters that would be impacted by the law as well as how many voters attempted to obtain an appropriate identification but were unable to do so.²⁰⁴ However, given prior precedent that most voter ID laws impose a minimal burden (precedent that should be revisited),²⁰⁵ a court would likely find that the burden imposed by the amendment is not severe, and would therefore apply the "flexible" *Anderson-Burdick* test rather than strict scrutiny.²⁰⁶

After considering the burden on the right to vote, the court would assess Arizona's regulatory interests in passing this voter ID law. Like previous states, Arizona would likely cite preventing voter fraud, promoting election integrity, and improving public confidence in the election as its state regulatory interests. While these are legitimate state interests writ-large, the court must "determine the legitimacy and strength of each of these interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights" in each specific context.²⁰⁷ With the requirements of the prescriptive objective test, Arizona would have to specify exactly which type of fraud this constitutional amendment would prevent and prove the occurrence of this type of fraud. As a voter ID law, the only type of fraud this law would prevent would be voter impersonation.²⁰⁸

201. As of this writing, Wisconsin allows the following forms of voter ID: a Wisconsin driver's license; a Wisconsin Department of Transportation (DOT) photo ID; a receipt for a driver's license or DOT-issued photo ID (used between the time of application and the time that the ID is received); a U.S. military ID; a U.S. passport; a certificate of naturalization that is less than two years old; an ID issued by a federally recognized Native American tribe; or a qualifying ID card issued by an accredited Wisconsin college or university. Arizona's resolution would have only allowed the following: an Arizona driver's license; an Arizona non-driver's identification; a tribal enrollment card or other form of tribal identification; or U.S. federal, state, or local government-issued identification. *Voter ID Laws*, *supra* note 56.

202. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 930 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), *aff'd in part, vacated in part, rev'd in part sub nom.* Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

203. Rachel Leingang, *Arizona to Vote on Introducing More Voter ID Requirements*, *GUARDIAN* (Oct. 25, 2022), <https://www.theguardian.com/us-news/2022/oct/25/arizona-voter-id-requirements-proposition-midterms> [<https://perma.cc/UQ84-E7BT>].

204. *Brakebill v. Jaeger*, 932 F.3d 671, 679 (8th Cir. 2019).

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

206. *Id.* at 190 n.8.

207. *Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983); *see Crawford*, 553 U.S. at 181 (2008) (noting that the case depends on the factual record).

208. *Crawford*, 553 U.S. at 194.

But as of 2022, none of the crimes prosecuted by Arizona's Election Integrity Unit involved impersonation of another voter at the polls.²⁰⁹

Further, Arizona would not simply be able to assert that the law promotes election integrity or improves public confidence but would instead need to establish a factual record proving such. When rebutting the state's evidence, plaintiffs would be able to show a general lack of evidence that stricter voter ID laws foster public confidence in elections more than non-strict, non-photo identification schemes do, or foster public confidence at all.²¹⁰ Moreover, they could substantiate that there is state specific evidence that, "rather than bolster confidence in elections, the absence of massive fraud has just fueled more bogus theories and distrust" for voters in Arizona.²¹¹ To name just a few examples, plaintiffs could use evidence of the armed men patrolling drop boxes,²¹² the misperception that Arizona Election Officials were stealing the election,²¹³ threats to Arizona's election officials,²¹⁴ a County Commission failing to certify election results,²¹⁵ and baseless partisan election audits that cost taxpayers millions of dollars²¹⁶ to demonstrate that a stricter voter ID law will not achieve the state's regulatory interest. The judge should find the state has not put forward any reasonable regulatory interests for this particular law.

During the final balancing, finding that the state justifications are irrational and that voters will be disenfranchised, the evidence would weigh towards striking down the law. Tipping the scale, a court would factor in the public policy harms that such a law fuels the false idea that voter fraud is rampant, invigorates violence, and creates mistrust of our democratic systems. Finally, recognizing

209. See ARIZ. ATT'Y GEN.'S OFF., ILLEGAL VOTING & ELECTION CASE DISPOSITIONS 1-8 (2023), https://www.azag.gov/sites/default/files/docs/criminal/viu/ILLEGAL_VOTING_%26_ELECTION_CASE_DISPOSITIONS.PDF [<https://perma.cc/RUC8-JXRA>]; Beth Reinhard & Yvonne Wingett Sanchez, *As More States Create Election Integrity Units, Arizona Is a Cautionary Tale*, WASH. POST (Sept. 26, 2022), <https://www.washingtonpost.com/investigations/2022/09/26/arizona-election-integrity-unit/> [<https://perma.cc/48QZ-CVEA>].

210. Stewart, Ansolabehere & Persily, *supra* note 185, at 1479. *Crawford* allowed states to rely on voter fraud in other states to justify their voting restrictions. If states can use out-of-state data, plaintiffs should also be able to use out-of-state data regarding the repercussions of election denial and conspiracy theories.

211. *Id.*

212. Fabbro, *supra* note 177.

213. Ctr. on Extremism, *supra* note 134.

214. Press Release, U.S. Dep't of Just., Man Sentenced for Threatening Maricopa County Election Official and Then-Attorney General of Arizona (Aug. 29, 2023), <https://www.justice.gov/opa/pr/man-sentenced-threatening-maricopa-county-election-official-and-then-attorney-general> [<https://perma.cc/VW5U-8GQG>]; ELECTION OFFICIALS UNDER ATTACK, *supra* note 34, at 8.

215. Jonathan J. Cooper, *Arizona Judge Orders Cochise County Officials to Certify Election Results by End of Day*, PBS (Dec. 1, 2022), <https://www.pbs.org/newshour/politics/arizona-judge-orders-cochise-county-officials-to-certify-election-results-by-end-of-day> [<https://perma.cc/R8EX-5YD4>].

216. Robert Anglen, *Why What Happened in 2021 Arizona Election "Audit" Still Matters*, AZ CENT. (June 12, 2023), <https://www.azcentral.com/story/news/local/arizona-investigations/2023/06/12/new-cyber-ninjas-text-2021-arizona-audit/70299020007/> [<https://perma.cc/R2ZA-XPLK>].

“that even one disenfranchised voter . . . is too many,”²¹⁷ the court would hold that Arizona’s regulatory interest is not sufficient to justify the voting restriction and that the strict voter ID amendment would be unconstitutional.²¹⁸

CONCLUSION

When *Crawford v. Marion County* was decided, Justice Stevens stated that different facts could lead to a different outcome, noting that the evidentiary record for the facial challenge was lacking. Today, the facts surrounding voter ID, and voter suppression laws more generally, are different than in 2008 and we have a mountain of evidence of their negative ramifications. These laws disenfranchise voters, mislead the general public, and weaken our government. Courts must prescribe a limit on how far the right to vote can be burdened in the name of fraud, public confidence, and integrity of elections to protect our democracy. Otherwise, all our other rights will be undermined.

217. Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1321 (11th Cir. 2019).

218. Arizonans rejected the constitutional amendment. Bob Christie, *Arizona Voters Reject Effort to Enact Stricter Voter ID Law*, AP NEWS (Nov. 17, 2022), <https://apnews.com/article/2022-midterm-elections-arizona-phoenix-government-and-politics-0ce1690e02eb851f05e80691162d4290> [<https://perma.cc/6TQB-6SB6>]. But Arizona was back in court Fall 2023 after passing a law requiring documentary proof of citizenship to vote—a requirement that has been soundly rejected by the Supreme Court. Will Wilder, *Arizona Is the Epicenter of the Fight for Voting Rights Today*, BRENNAN CTR. FOR JUST. (June 2, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/arizona-epicenter-fight-voting-rights-today> [<https://perma.cc/VG9U-35HV>].