

No. 23-125084-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTER, ET AL.,
Plaintiffs-Appellants,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, ET AL.,
Defendants-Appellees

On Appeal from the Kansas Court of Appeals,
Decision Dated March 17, 2023

Appeal from the District Court of
Shawnee County, Kansas
Honorable Teresa Watson, District Judge
District Court Case No. 2021-CV-000299

**BRIEF OF AMICI CURIAE BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT
OF APPELLEES**

GRAVES GARRETT LLC
/s/ Edward D. Greim
Edward D. Greim, No. 21077
Graves Garrett LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
Tel: 816-256-3181
FDGreim@gravesgarrett.com
Attorney for Amicus Curiae

TABLE OF CONTENTS

Statement of Interest.....	1
<i>Graham v. Adams</i> , Nos. 2022-SC-0522, 2023-SC-0139 (Ky. S. Ct. 2023).....	1
<i>Teigen v. Wis. Elections Commission</i> , No. 2022AP0091 (Wis. S. Ct. 2022).....	1
<i>VoteAmerica v. Schwab</i> , Nos. 23-3100 (10th Cir. 2023).....	1
U.S. Const. art. I, §4.....	1, 7
U.S. Const. art. II, §1.....	1, 7
Summary of the Argument.....	1
<i>Abramowitz v. Kimmelman</i> , 495 A.2d 1362 (N.J. App. Div. 1985).....	4
<i>Ariz. Democratic Party v. Hobbs</i> , 18 F.4th 1179 (9th Cir. 2021).....	2, 10, 11
<i>Busefink v. State</i> , 286 P.3d 599 (Nev. 2012).....	4
<i>Carlson v. San Juan Cnty.</i> , 333 P.3d 511, 522 (Wash. 2014).....	4
<i>Choudhry v. Free</i> , 552 P.2d 438, 440 (Cal. 1976).....	3
<i>Crawford v. Marion Cnty. Election Bd.</i> , 553 U.S. 181 (2008).....	5, 7, 9, 12, 13, 14
<i>Grossman v. Sec’y of the Commonwealth</i> , 151 N.E.3d 429, 438 (Mass. 2020).....	3
<i>In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71</i> , 740 N.W.2d 444, 463 (Mich. 2007).....	3
<i>Ind. Gaming Comm’n v. Moseley</i> , 643 N.E.2d 296, 304 (Ind. 1994).....	3
Kansas Secretary of State, <i>Application for Advance Ballot by Mail</i> , https://perma.cc/9NJW-SS7W	2
Kansas Secretary of State, <i>Ballots Cast by Type</i> , https://perma.cc/SXX2-KHUP	5
<i>Lamone v. Lewin</i> , 190 A.3d 376, 391 (Md. 2018).....	3
<i>League of United Latin Am. Citizens of Iowa v. Pate</i> , 950 N.W.2d 204 (Iowa 2020).....	3, 9
<i>Milwaukee Branch of NAACP v. Walker</i> , 851 N.W.2d 262, 279 (Wis. 2014).....	4
<i>Minn. Voters All. v. City of Minneapolis</i> , 766 N.W.2d 683, 689 (Minn. 2009).....	4

Nat'l Conf. of State Legislatures, <i>Table 14: How States Verify Voted Absentee Mail Ballots</i> (Mar. 15, 2022), https://penma.co/IVC7-9XJH	2
<i>Richardson v. Tex. Sec'y of State</i> , 978 F.3d 220, 236 (5th Cir. 2020)	5, 8, 9, 10, 13, 14
<i>State ex rel. Johnson v. Gale</i> , 734 N.W.2d 290, 299 (Neb. 2007)	4
<i>Weinschenk v. State</i> , 203 S.W.3d 201, 215-16 (Mo. 2006)	4
K.S.A. 25-1124(b)	2, 10
K.S.A. 25-3104	2
Argument	6
I. Strict scrutiny does not apply	6
<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 788, (1983)	6, 7
<i>Burdick v. Takushi</i> , 504 U.S. 428, 432 (1992)	6, 7, 8, 9
<i>Ill. Bd. of Elections v. Socialist Workers Party</i> , 440 U.S. 173, 184 (1979)	6
<i>Moore v. Harper</i> , 600 U.S. 1, 26-27 (2023)	7
<i>Sawyer v. Chapman</i> , 729 P.2d 1220, 1224 (Kan. 1986)	8, 13
<i>Storer v. Brown</i> , 415 U.S. 724, 730 (1974)	6
Okla. Const. art. III, §5	8
S.D. Const. art. VII, §1	8
Wash. Const. art. I, §19	8
Wy. Const. art. I, §27	8
II. Verifying signatures does not burden the right to vote	8
<i>Cf. United States v. Hasting</i> , 461 U.S. 499, 508-09 (1983)	11
<i>Green Party of State of N.Y. v. Weiner</i> , 216 F. Supp. 2d 176 (S.D.N.Y. 2002)	11
<i>Harris v. Ariz. Indep. Redistricting Comm'n</i> , 578 U.S. 253, 258 (2016)	11

<i>Kansas Secretary of State, Advance Voting</i> , https://perma.cc/VZL8-RXV8	9, 10, 12
<i>League of Women Voters of Ohio v. LaRose</i> , 489 F. Supp. 3d 719, 735-36 (S.D. Ohio 2020).....	10
<i>Memphis A. Philip Randolph Inst. v. Hargett</i> , 978 F.3d 378, 388 (6th Cir. 2020).....	10
<i>Ne. Ohio Coal. for the Homeless v. Husted</i> , 837 F.3d 612, 635 (6th Cir. 2016).....	10
<i>Stewart v. Blackwell</i> , 444 F.3d 843, 876 (6th Cir. 2006).....	11
<i>Tully v. Okeson</i> , 977 F.3d 608, 617 (7th Cir. 2020).....	9, 10
<i>Vote.Org v. Callanen</i> , 39 F.4th 297, 306 (5th Cir. 2022).....	10, 11
K.S.A. 25-1124(h).....	9
K.S.A. 25-2908.....	8
III. Verifying signatures furthers Kansas’s strong interests in election integrity.....	11
<i>Burson v. Freeman</i> , 504 U.S. 191, 208 (1992) (plurality op.).....	14
<i>Democratic Nat’l Comm.</i> , 141 S. Ct. at 34 (Kavanaugh, J., concurral).....	12
<i>Doe v. Reed</i> , 561 U.S. 186, 197 (2010).....	13
<i>Fu v. S.F. Cnty. Democratic Cent. Comm.</i> , 489 U.S. 214, 231 (1989).....	12
<i>Fl. Democratic Party v. Detzner</i> , No. 4:16-cv-607, 2016 WL 6090943, at *7 (N.D. Fla. 2016).....	14
<i>Griffin v. Roupas</i> , 385 F.3d 1128, 1130-31 (7th Cir. 2004).....	14, 15
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189, 195 (1986).....	13, 14
<i>Purcell v. Gonzalez</i> , 549 U.S. 1, 4-5 (2006).....	12, 13
Conclusion.....	15

STATEMENT OF INTEREST

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public interest litigation, HEP defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. HEP supports commonsense voting rules and opposes efforts to reshape elections for partisan gain.

HEP has filed numerous amicus briefs in recent federal and state election cases across the country. *See, e.g.*, Brief of Amicus Curiae Honest Elections Project, *Graham v. Adams*, Nos. 2022-SC-0522, 2023-SC-0139 (Ky. S. Ct. July 12, 2023); Brief of Amicus Curiae Honest Elections Project, *VoteAmerica v. Schwab*, Nos. 23-3100 (10th Cir. Aug. 1, 2023); Non-Party Brief of Honest Elections Project, *Teigen v. Wis. Elections Commission*, No. 2022AP0091 (Wis. S. Ct. Mar. 22, 2022).

HEP has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections. Since the Founding, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" have been "prescribed in each State by the Legislature thereof." U.S. Const. art. I, §4. And "Each State" has been required to appoint presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, §1. Constitutional text, history, and tradition play an indispensable role in examining the proper function of state legislatures in setting the rules that govern elections.

SUMMARY OF THE ARGUMENT

Since 1996, Kansas has allowed all registered voters to vote by mail before election day. Kansas voters do not need an excuse to vote by mail. They don't need to provide photo ID. They simply submit a one-page application to their county election official at least one week before the

election.¹ After receiving their ballot in the mail, voters complete the ballot, insert the ballot in the return envelope, and fill out the information on the return envelope. Voters can then mail their ballot, deposit it in a designated drop box, or deliver it in person on or before election day. The process is easy and accommodating.

Kansas recently joined the majority of States in adopting signature verification for mail-in ballots.² In fact, in 2021, “[t]hirty-one states rel[ie]d primarily on signature verification.” *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1185 (9th Cir. 2021). Among those States, the processes for curing unsigned ballots vary: Fifteen States “do not require election officials to contact voters when they encounter a missing signature, effectively disallowing correction of a missing signature on any date.” *Id.* Only four States “require officials to contact voters and permit correction through election day,” and twelve “require officials to contact voters and permit correction for varying durations beyond election day.” *Id.* Kansas falls in that last category. In Kansas, election officials must allow voters “the opportunity to correct [any] deficiency before the commencement of the final county canvass.” K.S.A. 25-1124(b). And the canvass doesn’t begin until *at least* “the Monday next following any election held on a Tuesday.” K.S.A. 25-3104.

The court of appeals thought those procedures are insufficient. Applying strict scrutiny, the court struck down Kansas’s signature verification procedures, holding they violate the fundamental right to vote under the Kansas Constitution. That decision is wrong for at least three reasons.

First, strict scrutiny does not apply. Breaking from federal precedent, the court of appeals ruled that every law affecting the right to vote is subject to strict scrutiny, “regardless of [the]

¹ See Kansas Secretary of State, *Application for Advance Ballot by Mail*, <https://perma.cc/9N1W-S87W>.

² See Nat’l Conf. of State Legislatures, *Table 14: How States Verify Voted Absentee Mail Ballots* (Mar. 15, 2022), <https://perma.cc/JVC7-9XJH>.

degree” of the burden on voters. Op. at 28. The court believed that the Kansas Constitution requires a heightened standard—a position that neither this Court nor the high court of any other State has accepted. Indeed, many state courts applying their own States’ constitutions have explicitly rejected the notion that strict scrutiny applies to every law affecting the right to vote:

- **California.** “Although not every classification created by an election law is subject to strict scrutiny, the ‘compelling interest’ measure must be applied if a classification has a ‘real and appreciable impact’ upon the equality, fairness and integrity of the electoral process.” *Choudhry v. Free*, 552 P.2d 438, 440 (Cal. 1976).
- **Indiana.** “[W]hile voting is a fundamental right, not all restrictions trigger such strict scrutiny.” *Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 304 (Ind. 1994).
- **Iowa.** “[S]trict scrutiny—the most rigorous test and the one the plaintiffs ask us to apply here—is reserved for laws that create ‘severe’ restrictions on the right to vote.” *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 209 (Iowa 2020).
- **Maryland.** “Because the burden imposed upon voters by these provisions is relatively minimal, we apply rational basis review.” *Lamone v. Lewin*, 190 A.3d 376, 391 (Md. 2018).
- **Massachusetts.** “[T]he September 1 deadline established under the act for the receipt of mail-in and all other ballots does not significantly interfere with the fundamental right to vote under the Massachusetts Constitution so as to require the application of strict scrutiny. Therefore, we apply the rational basis test to determine its reasonableness.” *Grossman v. Sec’y of the Commonwealth*, 151 N.E.3d 429, 438 (Mass. 2020).
- **Michigan.** “[T]he Michigan Constitution does not compel that every election regulation be reviewed under strict scrutiny.” *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (Mich. 2007).

- **Minnesota.** “If a statute imposes only modest burdens, then ‘the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions’ on election procedures.” *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 689 (Minn. 2009).
- **Missouri.** “So long as [election] regulations do not impose a heavy burden on the right to vote, they will be upheld provided they are rationally related to a legitimate state interest.” *Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. 2006).
- **Nebraska.** “Strict scrutiny of an election law is appropriate only if the burden on voters’ associational rights is severe.” *State ex rel. Johnson v. Gale*, 734 N.W.2d 290, 299 (Neb. 2007).
- **Nevada.** “Where a state election law imposes a ‘lesser burden,’ that law is subject to a less exacting review, and a state’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’” *Busefink v. State*, 286 P.3d 599, 603 (Nev. 2012).
- **New Jersey.** “A law that merely affects voting, without actually denying the right to vote or depriving voters of equal representation, is usually not subject to strict scrutiny.” *Abramowitz v. Kimmelman*, 495 A.2d 1362, 1365 (N.J. App. Div. 1985).
- **Washington.** “Where non-severe, lesser burdens on voting are at stake, we apply less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Carlson v. San Juan Cnty.*, 333 P.3d 511, 522 (Wash. 2014) (cleaned up).
- **Wisconsin.** “[I]t is erroneous to assume that a law that regulates voting must be subject to strict scrutiny.” *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 279 (Wis. 2014).

Many of these courts have adopted the federal *Anderson Burdick* test, or some version of it. None has gone as far as the court of appeals did here, subjecting every election regulation to strict scrutiny, “regardless of [the] degree” of the burden on voters. Op. at 28. Every other court that’s considered this issue has recognized the folly of that reasoning, and this Court should too.

Second, verifying signatures does not burden the right to vote. Signing a name requires no prior documentation. It imposes no costs. It demands minimal time. And though a small subset of voters might have trouble signing their name, that does not mean “the burden on ‘most voters?’” is severe. *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 236 (5th Cir. 2020) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op.)). Even if signature verification were a burden, voters have many options to avoid it. Voters with disabilities can opt out of the signature requirement entirely. All voters can bypass the signature requirement by voting in person—indeed in Kansas, most will.³ Even voters who forget to sign their mail-in ballots or whose signatures are flagged as a mismatch are given the opportunity to cure their ballots. And if they are still concerned about their ballots not being accepted, they can always cast a provisional ballot in person. The court of appeals did not account for these accommodations, all of which minimize the burden on voters.

Third, verifying signatures furthers Kansas’s strong interests in election integrity. The court of appeals erroneously thought that preventing election fraud was the State’s only interest. But States have an equally important interest in preserving public confidence in elections—confidence that is promoted by signature verification, and impaired by judicial invalidation of democratically enacted election laws. The court also required evidence of voter fraud, even though the history of fraud is well-established and States can act prophylactically to prevent fraud from occurring. In

³ Kansas Secretary of State, *Ballots Cast by Type*, <https://perma.cc/SXX2-KIITP>.

short, by supplanting the legislature's judgment, the court of appeals flouted decades of federal and state election law. This Court should reverse.

ARGUMENT

I. Strict scrutiny does not apply.

The court of appeals' holding "proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). The U.S. Supreme Court and the high courts of many States have rejected the reasoning that the court of appeals adopted. To be sure, this Court has an independent obligation to interpret the Kansas Constitution. But deviating from those reasoned cases threatens to turn Kansas judges into election administrators.

The court of appeals began with the principle that the right to vote is fundamental. The U.S. Supreme Court starts there, too. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Id.* at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). "It does not follow, however, that the right to vote in any manner" is "absolute." *Id.* "Although these rights of voters are fundamental, not all restrictions imposed by the States ... impose constitutionally-suspect burdens on voters' rights." *Anderson v. Celebrezze*, 460 U.S. 780, 788, (1983). The court of appeals thought that had to do with "the concept of comity," *Op.* at 27-28, but that appears nowhere in the Supreme Court's opinions. Rather, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433.

Start with common sense. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). "There is no doubt" that Kansas's signature verification procedures, "like all election regulations, have an

impact on the right to vote.” *Burdick*, 504 U.S. 428, 434. But that truism does not mean strict scrutiny applies to every election regulation. “States have enacted comprehensive and sometimes complex election codes” that set rules governing ballot deadlines, residency requirements, precinct designations, polling place hours, and a plethora of more complicated procedures. *Anderson*, 460 U.S. at 788. Each of these regulations “inevitably affects—at least to some degree—the individual’s right to vote.” *Id.* So “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 433.

The Constitution confirms these common-sense principles. Article I vests the “the Legislature” of each State with the power to set the “Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. Art. I, §4. And Article II gives “the Legislature” of each State the power to determine the “Manner” of choosing presidential electors. U.S. Const. art. II, §1. That “the Elections Clause expressly vests power to carry out its provisions in ‘the Legislature’ of each State” is “a deliberate choice” that courts “must respect.” *Moore v. Harper*, 600 U.S. 1, 26-27 (2023). Hence, “state courts do not have free rein” over election regulations, even when applying state law. *Id.* at 26. Instead, our constitutional structure “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.” *Crawford*, 553 U.S. at 204 (Scalia, J., concurring in the judgment) (quoting *Burdick*, 504 U.S. at 433-34). When state courts go too far, they violate the Elections Clause by “arrogat[ing] to themselves the power vested in state *legislatures* to regulate federal elections.” *Moore*, 600 U.S. at 29 (emphasis added).

These principles are consistent with Kansas law. The court of appeals thought that Kansas law required a different test because “the right to vote is a fundamental right protected by the Kansas Constitution.” *Op.* at 24. But the court framed the right to vote too narrowly. The right to vote isn’t merely the right of one voter to cast a ballot. Rather, “the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” *Burdick*, 504 U.S. at 440-41. The legislature must balance the “increased participation in the election process” afforded by “mail ballot elections” with measures to ensure the security, secrecy, and safety of elections. *Sawyer v. Chapman*, 729 P.2d 1220, 1224 (Kan. 1986). Election regulations such as signature verification balance these considerations, protecting the right to vote for *all voters*. By “mistakenly focus[ing] only on the burden to the plaintiffs instead of voters as a whole,” *Richardson*, 978 F.3d at 236, the court of appeals improperly overrode the legislature’s judgment about how best to “maintain the integrity of the democratic system” for all voters, *Burdick*, 504 U.S. at 440-41.

Other States have had no trouble with this issue. Many state constitutions protect the “right of suffrage.” S.D. Const. art. VII, §1; Okla. Const. art. III, §5; Wash. Const. art. I, §19; Wy. Const. art. I, §27. And no State regards the right to vote as a less-than-fundamental right. But, recognizing the unique administrative burdens of elections, the courts of those States still defer to their legislatures in election matters. *See supra*, at 3-5. That approach protects the right to vote by allowing legislatures to decide how best to balance the many moving parts of election administration.

II. Verifying signatures does not burden the right to vote.

Strict scrutiny doesn’t apply for another reason: signature verification does not burden voters. Compare signature verification with voter ID requirements, which Kansas requires for all forms of voting. *See* K.S.A. 25-2908. “Signature-verification requirements are even less

burdensome than photo-ID requirements, as they do not require a voter to secure or to assemble any documentation.” *Richardson*, 978 F.3d at 237. Plaintiffs allege that some voters have trouble signing their name consistently. They point to a Senator who “experiences significant fluctuation in her handwriting due to metal plates in her wrist.” (R. II, 265.) Others, such as the elderly or disabled, “are particularly likely to have greater signature variability.” (R. II, 265.) But “[e]ven if some voters have trouble duplicating their signatures, that problem is ‘neither so serious nor so frequent as to raise any question about the constitutionality’ of the signature-verification requirement.” *Richardson*, 978 F.3d at 237 (quoting *Crawford*, 553 U.S. at 197-98).

In any event, Kansas provides all these voters with multiple accommodations. For one, “verification of the voter’s signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter’s registration form.” K.S.A. 25-1124(h). Signature verification simply doesn’t apply to the voters who Plaintiffs say “are especially likely” to have their signatures flagged for not matching. (R. II, 265.) For another, all voters can avoid the signature verification process by voting in person. Kansas allows in-person advance voting up to twenty days before election day, and it requires every county to offer in-person advance voting at least one week before election day.⁴ Courts “cannot assess [States’] absentee voting provisions in isolation.” *Tully v. Okeson*, 977 F.3d 608, 617 (7th Cir. 2020). Instead, “[c]ourts weigh burdens on voters against the state’s interests by looking at the whole electoral system.” *League of United Latin Am. Citizens*, 950 N.W.2d at 213 (citing *Burdick*, 504 U.S. at 439). Any voter who has difficulty signing her name can vote in person, bypassing the signature verification process entirely.

⁴ Kansas Secretary of State, *Advance Voting*, <https://perma.cc/VZL8-RXV8>.

Plaintiffs might respond that some voters may not be able to take advantage of these and other accommodations. But the analysis of the burden “is not limited to the impact that a law has on a small number of voters,” and a voting system is not unconstitutional simply because one method of voting is not the easiest method for everyone. *Richardson*, 978 F.3d at 236. “[U]nless a state’s actions make it harder to cast a ballot *at all*, the right to vote is not at stake.” *Tilly*, 977 F.3d at 611 (emphasis added). And courts have held that “[v]oters are not virtually excluded from voting because of [a State’s] signature-matching requirements.” *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 735-36 (S.D. Ohio 2020); *see also Richardson*, 978 F.3d at 236; *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir. 2016); *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1188 (9th Cir. 2021).

Finally, all voters can cure deficient signatures. When voters can cure defects, “it is hard to conceive” that signature rules “deprive[] anyone of the right to vote.” *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022). Voters can track their ballots online or contact their local election office to check on the status of their advance ballot.⁵ If ballots are flagged for a missing or mismatched signature, election officials must “attempt to contact” those voters “and allow such voter[s] the opportunity to correct the deficiency.” K.S.A. 25-1124(b). Alternatively, those voters can vote in person by casting a provisional ballot.⁶ When voters “still have an opportunity to vote through another means,” there is no burden on the right to vote “even if an individual’s ballot is erroneously rejected as part of the signature verification process.” *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 388 (6th Cir. 2020). Some voters might subjectively view the cure process as a burden, but it is at most “a de minimis burden” that does not rise to the level of a

⁵ *Advance Voting*, *supra* note 4.

⁶ *Id.*

constitutional infringement. *Vote.Org*, 39 F.4th at 307. “Reasonable regulations require voters to act in a timely fashion if they wish to express their views in the voting booth, and the associated burden [of a cure deadline for deficient signatures] is only limited.” *Ariz. Democratic Party*, 18 F.4th at 1189-90 (cleaned up).

Finally, that an election official might make a mistake in applying the signature matching process does not make the entire process unconstitutional. Plaintiffs allege that signature verification is “error-prone” and that “[a]ccurate signature matching” is “difficult.” (R. II, 233, 265.) And the court of appeals assumed that there is some undefined error rate at which an election rule becomes unconstitutional. *See Op.* at 30. But human errors by state actors do not facially invalidate a law. *Cf. United States v. Hastings*, 461 U.S. 499, 508-09 (1983) (“[T]he Constitution does not guarantee” an “error-free, perfect trial,” “given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants.”). Even in redistricting cases, where numbers and percentages drive the analysis, courts “[do] not demand mathematical perfection.” *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 258 (2016). For the same reasons, “[p]recise mathematical formulas ... have never been a part of voting rights cases or cases involving strict judicial scrutiny. A judicially imposed mathematical formula for evaluating voting rights cases would be purely arbitrary. We simply cannot say that x% error rate raises constitutional concerns but y% error rate does not.” *Stewart v. Blackwell*, 444 F.3d 843, 876 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (2007). Courts have thus rejected claims that the Constitution requires States to adopt more efficient or less error-prone voting procedures. *E.g.*, *Green Party of State of N.Y. v. Weiner*, 216 F. Supp. 2d 176, 190 (S.D.N.Y. 2002).

III. Verifying signatures furthers Kansas’s strong interests in election integrity.

Even if strict scrutiny applied, Kansas’s signature verification procedures further compelling interests in election integrity. “A State indisputably has a compelling interest in

preserving the integrity of its election process.” *Felt v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). At a minimum, Kansas’s interests include protecting against voter fraud, avoiding voter confusion, conducting orderly elections, and enhancing public confidence in the integrity of elections. These are “weighty reasons that warrant judicial respect.” *Democratic Nat’l Comm.*, 141 S. Ct. at 34 (Kavanaugh, J., concurring). But the court of appeals found that “the *only* purpose of statutes relating to the validity of signatures is to prevent fraud.” Op. at 30 (emphasis added). That was error for two reasons.

First, Kansas’s signature verification procedures are justified by a variety of interests beyond protecting against voter fraud. For one, verifying signatures promotes confidence in Kansas elections. Looming over every election is the question, “Is it safe to cast an advance by mail ballot?”⁷ The question is so frequently asked that the Secretary of State provided an answer online: voting by mail is safe in part because voters “must sign the outside of the ballot envelope,” and the signature is “reviewed with voter registration records.”⁸ “If the signatures do not match, the signature may be challenged, and the county election office will contact the voter to verify the signature.”⁹ Although the State’s interest in public confidence “is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197 (plurality op.). But when courts issue “orders affecting elections,” particularly by invalidating democratically enacted election procedures, they necessarily interfere with legislatively enacted election rules, which can “result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5

⁷ *Advance Voting*, *supra* note 4.

⁸ *Id.*

⁹ *Id.*

(2006). And the Supreme Court has “*never* required a State to make a particularized showing of the existence of voter confusion.” *Munro*, 479 U.S. at 194 (emphasis added). “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,” *Purcell*, 549 U.S. at 4, and courts should defer to legislatures on how best to assure voters and encourage democratic participation, *see Crawford*, 553 U.S. at 196.

Second, the court of appeals discounted Kansas’s strong interest in protecting its elections from voter fraud. “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.” *Id.* Indeed, “[t]he State’s interest is *particularly* strong with respect to efforts to root out fraud.” *Doe v. Reed*, 561 U.S. 186, 197 (2010) (emphasis added). That’s because “[f]raud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight.” *Brnovich*, 141 S. Ct. at 2340. Signature verification is narrowly tailored to address voter fraud because it “seeks to stop voter fraud where the problem is most acute—in the context of mail-in voting.” *Richardson*, 978 F.3d at 239.

The court of appeals, however, substituted its preferred interest in voter turnout for the State’s interest in protecting against fraud. The court reasoned that the State’s “interest in increased participation in the election process” was more important than the State’s interest in preventing fraud. *Op.* at 33 (citing *Sawyer*, 729 P.2d at 1224). That flips this Court’s opinion in *Sawyer v. Chapman* on its head. *Sawyer* recognized that weighing state interests is a legislative judgment, not a judicial one. *See Sawyer*, 729 P.2d at 1224 (“The legislature weighed the added potential for fraud and loss of secrecy under mail ballot elections against the compelling state interest in increased participation in the election process and concluded the risk worth taking.”). According to the court of appeals, however, the State chose the wrong interest. So the court substituted its

preference for “increased participation in the election process” and concluded signature verification was not narrowly tailored to serve that preference. Not even strict scrutiny permits that.

The court of appeals also erred by requiring the State to produce evidence of fraud. The court observed that one unpublished federal district court opinion had “commented” on the lack of “evidence” by the State that “mismatched signature ballots were submitted fraudulently.” Op. at 34 (citing *Fl. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *7 (N.D. Fla. 2016)). But that court broke from settled federal law: state legislatures have legitimate interests in guarding against fraud even when the “record contains no evidence of any such fraud.” *Crawford*, 553 U.S. at 194. Requiring evidence of fraud “would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). “States have thus never been required to justify their prophylactic measures to decrease occasions for vote fraud.” *Richardson*, 978 F.3d at 240 (cleaned up).

In any event, courts routinely recognize as a matter of historical fact that “[v]oting fraud is a serious problem in U.S. elections generally ... and it is facilitated by absentee voting.” *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (collecting sources). The legislature is entitled to rely on “flagrant examples of such fraud in other parts of the country [that] have been documented throughout this Nation’s history.” *Crawford*, 553 U.S. at 195. And even if that evidence were insufficient, “the long, uninterrupted and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof” the court of appeals required. *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality op.). By its very nature, “election fraud [is] successful precisely because” it is “difficult to detect.” *Id.* In the end, “the striking of the balance between discouraging

fraud and other abuses and encouraging turnout is quintessentially a legislative judgment.” *Griffin*, 385 F.3d at 1131.

CONCLUSION

This Court should reverse the judgment of the Kansas Court of Appeals.

Dated: September 20, 2023

Respectfully submitted,

s. Edward D. Greim

Cameron T. Norris*
Conor D. Woodfin*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com
conor@consovoymccarthy.com

Edward D. Greim (KS Bar #21077)
GRAVES GARRETT LLC
1100 Main St., Ste. 2700
Kansas City, MO 64105
(816) 256-4144
edgreim@gravesgarrett.com

Tyler R. Green*
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
tyler@consovoymccarthy.com

* admitted *pro hac vice*

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on September 20, 2023, I electronically filed this brief with the Clerk of the Court in accordance with Kan. Sup. Ct. R. 1.11(b), which will send electronic notifications of the filing to all registered counsel of record. I also certify that a copy of the brief will be emailed to the following:

KRYSTLE M.S. DALKE	kdalke@hinklaw.com
MARISA A. O'GARA	mogara@elias.law
MOLLIE DIBRELL	mdibrell@elias.law
ELISABETH C. FROST	efrost@elias.law
DAVID L. ANSTAETT	danstaett@perkinscoie.com
KAYLAN PHILLIPS	kphillips@publicinterestlegal.org
BRADLEY BENBROOK	brad@benbrooklawgroup.com
STEPHEN DUVERNAY	steve@benbrooklawgroup.com
EMMETTE ROBINSON	erobmson@robmsonlegal.org
ERIC W. LEE	elce@judicialwatch.org
MICHELLE M KEMP	mkemp@perkinscoie.com
KAREN ELLEN LEVE	kleve@aclukansas.org

s. Edward D. Greim