IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 22-125084-S

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE HUELSMANN, and PATRICIA LEWTER,

Plaintiffs-Appellants-Respondents,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and KRIS KOBACH, in his official capacity as Kansas Attorney General,

Defendants-Appellees-Petitioners.

PLAINTIFFS' CONSOLIDATED RESPONSE TO BRIEFS OF *AMICI CURIAE*

Appeal from the Kansas Court of Appeals
Case No. 22-125084-A
Appeal from the District Court of Shawnee County
Honorable Teresa Watson, Judge
District Court Case No. 2021-CV-000299

Jason Zavadil (#26808)
IRIGONEGARAY, TURNEY, & REVENAUGH LLP
1535 S.W. 29th Street
Topeka, KS 66611
Telephone: (785) 267-6115
Facsimile: (785) 267-9458
jason@itrlaw.com
Counsel for Plaintiffs

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INTRODUCTION

Although they bill themselves as "non-partisan" and "public interest" organizations, amici curiae Judicial Watch, Allied Educational Foundation, Honest Elections Project ("HEP"), Public Interest Law Foundation ("PILF"), Lawyers Democracy Fund (the "LD Fund"), and Restoring Integrity and Trust in Elections ("RITE") have a history of taking positions that advocate for making voting harder, even for lawful, eligible voters.[1] Consistent with that policy preference, they propose a variety of ways in which this Court could weaken the protection that the Kansas Constitution affords the right to vote. Relying on (repeatedly incorrect) characterizations of the approach of federal courts and extraneous "evidence" that is not properly before this Court at this stage of the proceedings, Opposition Amici argue that the best way to secure the right of Kansans to choose their representatives is by allowing those representatives free reign to determine the rules under which they are chosen—even when it makes voting more difficult or makes it more likely that the votes of qualified voters will not be counted.

Regardless of whether other courts interpreting other constitutions have accepted this dubious proposition (and as amici Professors Levy and McAllister correctly point out, many have not), the Kansas Constitution requires more: under this Court's precedent, laws that burden fundamental rights are not entitled to deference. Instead, Kansas courts "adopt

[1] Unlike other amici that have filed in this case – namely, the ACLU of Kansas and Professors Richard E. Levy and Stephen McAllister—none of the amici to whom this brief responds claim any connection to Kansas, nor do any assert any Kansas-specific focus. And while the Kansas-based amici argue for affirmance of the Court of Appeals' decision, each of the out-of-state amici advocates for reversal. For ease of reference, Plaintiffs refer to this group of out-of-state amici as the "Opposition Amici."

an attitude of active and critical analysis," putting the burden on the defendants to prove that compelling state interests justify the burdens on the fundamental right, and that the law is narrowly tailored to actually advance those interests. *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 673, 440 P. 3d 461, 499 (2019) (quoting *State ex rel Schneider v. Liggett*, 223 Kan. 610, 576 P.2d 221, 227 (1978)); *see also* Levy & McAllister Br. 8 ("True threats to election integrity are of legitimate concern, but not fanciful notions and arguments that serve partisan desires with no basis in fact or experience."). Opposition Amici ignore the explicit protections required by the Kansas Constitution and this Court's precedent, pursuing a hyper-deferential government-first approach that prioritizes legislative *ipse dixit* over the people's ability to exercise their fundamental rights. This is at odds with this Court's historic rights-first approach, which is properly grounded in the unique provisions found in the Kansas Constitution. The arguments raised by Opposition Amici should be rejected and the Court of Appeals should be affirmed.

ARGUMENT

I. Opposition Amici are anti-voting activists and do not contribute information or argument useful to deciding this appeal.

Opposition Amici's approach here reflects their history of trying to make it harder for eligible individuals to vote or have their ballots counted. As discussed below, Opposition Amici improperly attempt to introduce new arguments that the State wisely left on the cutting room floor and "evidence" that is not only outside the record but also mischaracterized. This Court does not ordinarily consider arguments made for the first time by amici, nor is it proper for amici to offer evidence that was not presented to the district

court. *See State ex rel. Six v. Kan. Lottery*, 286 Kan. 557, 561, 186 P.3d 183, 188 (2008). Because here the appeal is from decisions addressing the State's motion to dismiss, the well-established standard requires the Court to accept as true Plaintiffs' well-pleaded facts and draw any reasonable inferences from them in Plaintiffs' favor, *see Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330, 338 (2019), rendering contrary "facts" offered by amici doubly misplaced. And, in addition to being improper, Opposition Amici's positions are at times inconsistent with their own arguments in other cases.

For example, here Judicial Watch argues that the U.S. Constitution confers plenary authority to the legislature to enact election laws, Judicial Watch Br. 4-5, but that apparently only applies when legislatures make voting harder. Elsewhere Judicial Watch has argued that legislative enactments that would make it *easier* to vote are invalid. For example, in 2020, 21 states — including Kansas — had laws allowing for the counting of absentee ballots that arrived after Election Day but were postmarked before. That same year, the pandemic drove voters to mail-in voting and also contributed to widespread postal delays that caused many ballots to be delivered late. Postmark deadlines were crucial to protecting voting rights for hundreds of thousands of voters across the country. Nevertheless, Judicial Watch sent White House aides a proposed statement for President Trump declaring victory based on "ballots counted by Election Day" and asserting that "[c]ounting ballots that arrive after Election Day is unfair and shows contempt for the will of the people."[2] Judicial Watch

[2] Email from Tom Fitton, President, Judicial Watch, to Molly Michael and Dan Scavino, Exec. Off. of the President, https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTR1.0000085313/pdf/GPO-J6-DOC-CTR1.0000085313.pdf (last visited Oct. 9, 2023).

subsequently issued a press statement days after television networks called the election, claiming that "Joe Biden is not 'president elect,'" and arguing that "President Trump had the votes to win the presidency" before "unprecedented and extraordinary counting *after* Election Day."[3] Never mind that the votes were counted pursuant to duly-enacted state laws: *those* legislative judgments protected voters' right to exercise the franchise, and Judicial Watch consequently deemed them invalid.

PILF similarly has repeatedly argued in favor of erecting barriers to the franchise, purportedly to stop a scourge of illegal voting (the "evidence" of which falls apart upon review), without concern to how those barriers impede the ability of lawful, qualified voters to participate in the process and have their ballots counted. In fact, PILF was sued in federal court after publishing purported "exposés" that included the names, home address, telephone numbers, and other personal identifying information of voters and falsely accused them of committing felony voter fraud. After discovery showed that PILF had been *told* that they were making false representations, PILF agreed to a settlement that included a written apology.[4]

RTTE and the LD Fund, meanwhile, recently submitted comments on Arizona's Elections Procedures Manual urging the Secretary of State to limit the comparator signatures that election workers can use to verify mail ballots—a change that would not

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[3] Judicial Watch Statement on the Disputed Presidential Election, JUDICIAL WATCH (Nov. 9, 2020), https://www.judicialwatch.org/statement-presidential-election/.
[4] Allison Riggs, "Voters Strike Back and Win Settlement and Apology in Challenge to Voter Intimidation in Virginia," S. COAL. FOR SOC. J., https://southerncoalition.org/voters-strike-back-and-win-settlement-in-virginia/ (accessed Oct. 10, 2023).

make signature verification any more likely to detect fraud, but would lead to more rejected ballots. As the evidence submitted in support of Plaintiffs' motion for a temporary injunction demonstrated, signature matching is extraordinarily difficult to do accurately, but even when done by experts under the best of circumstances, those experts require *more* exemplars, not fewer. *See* (R. III, 224). The draft manual by the Arizona Secretary would allow election workers to compare the signature on the ballot affidavit against the signature on the voter registration form, as well as "consult[ing] additional known signatures from other official election documents in the voter's registration record."[5] RTTE and the LD Fund illogically argue that certain of these additional known signatures should be disregarded. That does not evince an interest in election security or integrity; it advocates for the State to put its thumb on the scale to make it harder for legitimate ballots to survive the gauntlet of signature matching and makes it less likely that the results of the election actually reflect the will of the people.

Opposition Amici's briefs reflect this same anti-voter sentiment, apparently excising from their definition of "election integrity" ensuring that the outcome of elections are not skewed by unjustifiable barriers to the franchise or the rejection of ballots cast by qualified voters. Moreover, as discussed further below, the legal arguments that they make are at odds not only with the text of the Kansas Constitution and this Court's precedent, but

[5] Letter from Kory Langhoffer, Restoring Integrity and Trust in Elections and Lawyers Democracy Fund, to Ariz. Sec'y of State Adrian Fontes, (Aug. 5, 2023), https://lawyersdemocracyfund.org/wp-content/uploads/2023/08/Public-Comments-on-July-2023-EPM.pdf ("Re: Public Comments on July 2023 Draft of the Arizona Elections Procedures Manual").

repeatedly misconstrue or are even foreclosed by the out-of-state precedent or "evidence" upon which they rely.

II. The Legislature's power to regulate elections must be exercised in accordance with the Kansas Constitution; neither the Elections Clause of the U.S. Constitution nor *Moore v. Harper* requires otherwise.

Among the most prominent arguments in the Opposition Amici's briefs is one that was squarely rejected by the U.S. Supreme Court just three months ago: that the Elections Clause of the U.S. Constitution grants legislatures plenary power over elections "subject only to Congress' ability to preempt those regulations." Judicial Watch Br. 4; *see also* HEP Br. 7; LD Fund Br. 3-4; PILF Br. 2. The North Carolina legislature made this exact argument in *Moore v. Harper*, asserting that "because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power." 143 S. Ct. 2065, 2083 (2023).

In rejecting this argument, the U.S. Supreme Court found that it "simply ignores the precedent" and "does not account for the Framers' understanding that when legislatures make laws, they are bound by the provisions of the very documents that give them life." *Id.* Rather than exercising a special function that requires state court deference, "when state legislatures act pursuant to their Elections Clause authority, they engage in lawmaking subject to the typical constraints on the exercise of such power." *Id.* at 2084-85. In Kansas, one such constraint is that laws that infringe on fundamental rights must survive strict scrutiny. *See* Order ("Op.") at 24-25, No. 125,084 (Mar. 17, 2023); *see also* Resp. to Defs.-Appellees' Suppl. Br. ("Resp.") at 5; Levy & McAllister Br. 1, 3-8. The Elections Clause does not require this Court to apply a lesser standard.

Judicial Watch briefly acknowledges *Moore v. Harper*, but instead of engaging with its holding it misrepresents it by suggesting that the *Moore* Court agreed that the Elections Clause requires state court deference. The only "deference" discussed in *Moore* is "the usual deference . . . afford[ed] state court interpretations of state law." 143 S. Ct. at 2089; *see also id.* at 2090 (Kavanaugh, J., concurring) ("Federal court review of a state court's interpretation of state law in a federal election case should be deferential . . ."). The Supreme Court did not order state courts to generally defer to state legislatures; it recognized that "[s]tate courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause." *Id.* at 2089. The Supreme Court cautioned state courts against "transgress[ing] the ordinary bounds of judicial review," *id.*, but nothing about the Court of Appeals' decision comes close to the outer bounds of permissible review. Quite to the contrary. It is a state court decision interpreting the text and history of the state constitution consistent with this state's long history of protecting fundamental rights guaranteed by the Kansas Constitution using strict scrutiny, and this Court's long precedent of recognizing that the right to vote is one of those fundamental rights. *See, e.g.*, Resp. 5-7; Levy & McAllister Br. 4.

Reading *Moore v. Harper* as written rather than as imagined by Opposition Amici makes clear that there is no conflict between the U.S. Constitution and this Court's precedent for protecting fundamental rights such as the right to vote through the application of strict scrutiny.

III. Strict scrutiny protects Kansans' rights better than a balancing test.

Opposition Amici repackage Defendants' arguments inviting this Court to adopt the

Anderson-Burdick standard (or something that they call *Anderson-Burdick*) and similarly argue that it would be a catastrophe for Kansas if the Legislature were subject to meaningful judicial scrutiny when it passes laws that needlessly make voting more difficult or make it more likely that the votes of qualified voters will not be counted. Plaintiffs already have explained how the *Anderson-Burdick* framework is at odds with this Court's precedent as well as the views of the concurring and dissenting justices in *Hodes*, *see* Resp. 7-8, 17-18, and Professors Levy and McAllister further explain why it is irreconcilable with the distinctive nature and provisions of the Kansas Constitution, Levy & McAllister Br. 8-11 & nn. 3 & 4; *see also id.* at 4 ("The deferential form of the *Anderson-Burdick* test advanced by the state is even less rigorous than the undue burden test that *Hodes* rejected as inadequate.").[6] Plaintiffs likewise have elsewhere addressed the fantastical claim that the application of strict scrutiny would lead to extensive invalidation of the election code. *See* Resp. 10. Rather than making election law unworkable, strict scrutiny ensures that Kansans' bedrock right to vote is not lightly infringed. *See, e.g.*, Levy & McAllister Br. 4. And, indeed, it is consistent with how this Court has previously viewed legislation related to the franchise as evidenced by the very cases upon which Opposition Amici rely to make their argument.

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[6] Like Plaintiffs, Professors Levy and McAllister also note that the "*Anderson-Burdick*" test pressed by the State (as well as the Opposition Amici) is not even as demanding as the federal version of that test. *See* Levy & McAllister Br. 3 (describing test advocated for by the State as "a weakened, 'deferential' form of the federal *Anderson-Burdick* standard"); *see also* Resp. 17-18. That the test can shapeshift so dramatically depending on who is describing it is further reason to conclude that it is simply inconsistent with this Court's repeated emphasis that balancing tests are disfavored, particularly where fundamental rights are involved. *See Hodes*, 309 Kan. at 670.

A. *Anderson-Burdick* is not right for Kansas.

Outside of the district court's ill-conceived opinion below, the *Anderson-Burdick* balancing test has not once been applied by a Kansas court, for good reason. That test was developed by federal courts and reflects concerns of federalism that are simply not present when a state court considers whether its own laws violate provisions of its own state constitution. *See* Resp. 13-14; Levy & McAllister Br. 9-10. And while Kansas courts have sometimes interpreted certain state constitutional provisions in lockstep with corresponding federal provisions, there is *no* corresponding federal provision for the Kansas Constitution's strong and explicit protections for the right to vote, which are far more robust than those that exist in the federal Constitution. *See* Appellants Br. 38-39; Levy & McAllister Br. 9; Kansas ACLU Br. 11-12.

Kansas courts have been clear that they "have the authority to interpret Kansas constitutional provisions independently of the manner in which federal courts interpret similar or corresponding provisions of the United States Constitution," that this "can result in the Kansas Constitution protecting the rights of Kansans more robustly than would the United States Constitution," and that the suggestion that Kansas courts should blindly follow federal precedent "seems inconsistent with the notion of state sovereignty." *Hodes*, 309 Kan. at 621. This is particularly true where, as here, the text of the Kansas Constitution is so strikingly different from the federal constitution.

Referencing *Rivera*, the LD Fund argues that the robust protections for fundamental rights in the Kansas Constitution and this Court's precedent should be ignored because this Court "has looked to federal jurisprudence as guidance in interpreting the Kansas

Constitution" in other instances. LD Fund Br. 12 (discussing *Rivera v. Schwab*, 315 Kan. 877, 898, 512 P. 3d 168 (2022)). But *Rivera* differs from this case in several important respects. Most importantly, *Rivera* dealt with an equal protection challenge, whereas here the Court is considering burdens on the fundamental right to vote. *Rivera*, 315 Kan. at 891; *see also* Levy & McAllister Br. 9 (distinguishing the vote dilution claims in *Rivera* from the vote denial claims here).

RITE goes further than even *Anderson-Burdick*, urging this Court to adopt the view that only laws that "affirmatively" "remove the franchise from a segment of the electorate" constitute severe burdens subject to strict scrutiny and that all other election-related laws be subject to rational basis review. RITE Br. 4-6. To support this extreme interpretation, RITE claims that all federal courts and state supreme courts that have weighed in have adopted this erroneous, narrow application of the *Anderson-Burdick* test. *Id.* at 6-7. That is false.[7] Rather, if this Court were to adopt RITE's dual-track system and apply strict scrutiny

[7] As Professors Levy and McAllister explain, this does not accurately characterize what other courts have done. Levy & McAllister Br. 11-14. Not surprisingly, the cases RITE cites for the proposition that other courts have adopted its perverted version of the *Anderson-Burdick* test, or a similar dual-track system to analyze "severe" versus "non-severe" voting laws are inapposite. *See Blevins v. Chapman*, 47 So. 3d 227, 229-30 (Ala. 2010) (equal protection case concerning challenge to residency requirement for judicial office); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 345, 121 P.3d 843 (Ct. App. 2005) (redistricting case involving an equal protection challenge); *Fay v. Merrill*, 338 Conn. 1, 52, 256 A.3d 622 (2021) (deferring to legislature where the legislature "[saw] fit to *expand* absentee voting in response to the COVID-19 pandemic"); *Orr v. Edgar*, 298 Ill. App. 3d 432, 438, 232 Ill. Dec. 469, 698 N.E.2d 560 (1998) (noting that "legislation that infringes upon the right to vote is subject to strict scrutiny," but applying rational basis to an act that prohibited "one-punch" straight-party voting because it only "affect[ed] the manner in which citizens exercise their right to vote" and "[d]id not prohibit voters from voting a straight-party ballot"); *League of Women*

only to laws that "affirmatively" remove the right to vote from eligible Kansans, it would have among the least-protective legal regimes for voting rights in the nation.

In an attempt to make its preferred approach palatable, RITE falsely claims that this Court has previously recognized a dual-track approach, that distinguishes between "restrictions" and "regulations," subject to different levels of scrutiny. RITE Br. 3. Specifically, RITE contends that *State v. Doane* and *Lemons v. Noller* limit "restrictions" to laws that "prohibit an otherwise-eligible group of individuals from voting" or "remove the franchise from a segment of the electorate." RITE Br. 4. Under this definition, according to RITE, the challenged laws are mere regulations. This is also false.

As a threshold matter, the Court of Appeals already properly addressed and rejected this argument. Op. 28 (citing *State v. Doane*, 98 Kan. 435, 440, 158 P. 38 (1916)). Based on its review of this Court's precedent, the Court of Appeals held that "[t]he statutes we are dealing with are not mere regulations, such as setting the opening and closing time of the polls. The statutes we are reviewing are restrictions that must be examined closely." *Id.*

Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 766 (Ind. 2010) (rejecting notion that Indiana's state court precedent "grant[ed] a blanket authorization for the legislature to enact any voting regulation it sees fit"); *Election Integrity Project of Nev. v. Eighth Judicial Dist. Court of Nev.*, 136 Nev. 804 (Nev. 2020) (upholding a law *allowing* statewide voting by mail when an emergency or disaster has been declared) (unpublished opinion); *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020) (rejecting state's contention that "under the *Anderson-Burdick* framework, only rational basis review is warranted"); *Carlson v. San Juan County*, 183 Wash. App. 354, 376, 333 P.3d 511 (2014) (challenge to authorization of residency districts of unequal population); *State ex rel. Blankenship v. Warner*, 241 W. Va. 362, 372, 825 S.E.2d 309 (2018) (action seeking to list a candidate on the general election ballot).

RITE does not address the Court of Appeals' analysis of this argument, or even attempt to explain why its conclusion was wrong.

Nor could it. The two cases that RITE cites only reinforce the conclusion that this Court has historically been protective of the franchise, carefully scrutinizing attempts to limit it, and recognizing that the primary goal of election laws should be to ensure that qualified Kansans are able to effectively access and exercise their right to vote. There is no basis for concluding that these principles only apply when restrictions on the franchise entirely preclude a section of the electorate from voting at all. Instead, these opinions evince a broad protection for voting rights entirely at odds with RITE's proposed dual-track test.

To wit, in *Doane*, the Court expanded the franchise by striking down a statute that restricted who was deemed a qualified elector based simply on where the individual resided. 98 Kan. 435, 158 P. 38, 40 (1916). Although the *Doane* Court provided some examples of "restrictions" concerning the qualification of electors, in no way did the Court write a blank check to the Legislature to pass any other election law that it desires. The *Lemons* Court also focused on expanding the right to vote, holding that a statute that *extended* the franchise through *absentee voting* was constitutional. 144 Kan. 813, 63 P.2d 177, 188 (1936). In doing so, the Court detailed the extensive history of absentee voting in Kansas, noting that the first act conferring the right to vote absentee was in 1868. *Id.* at 184. The Court emphasized that "[t]he primary object of an election law, which transcends all other objects in importance, is to *provide means for effective exercise of suffrage*." *Id.* at 188 (emphasis added).

Relatedly, as early as 1884, the Court in *State v. Butts* recognized that the Legislature cannot abridge the right to vote through election-regulation laws. The *Butts* Court acknowledged that some laws pertaining to "proper proofs" may "*under the pretext* of securing evidence of voters' qualifications . . . cast so much burden as really to be imposing additional qualifications." 31 Kan. 537, 2 P. 618, 621 (1884) (emphasis added). The *Butts* Court made clear that "[t]he legislature cannot, by, in form, legislating concerning rules of evidence, in fact, overthrow constitutional provisions." *Id.*; *see also* Op. 29-30. Yet, RITE's interpretation of "restrictions" directly conflicts with *Butts*. And although the decision was cited by the Court of Appeals, RITE ignores it, instead asserting that "the Legislature has a free hand to prescribe what proofs it reasonably deems necessary" and "rational-basis review . . . appl[ies] to all proofs-related legislation . . . so long as the measure does not remove the franchise from a group of otherwise-eligible Kansans." RITE Br. 10.

To be clear, rational basis "is a very lenient standard" under which a reviewing court must uphold a statute if it can "perceive any state of facts which rationally justifies" the law. *Injured Workers of Kan. v. Franklin*, 262 Kan. 840, 847, 942 P.2d 591 (1997) (quoting *Peden v. Kan. Dep't of Revenue*, 261 Kan. 239, 258–59, 930 P.2d 1 (1996)). There is no requirement that these facts be demonstrable, just *conceivable*. Giving the Legislature free reign to pass laws that restrict the right to vote or make it more likely that lawful ballots will be rejected on no stronger basis than that a scenario could possibly be *conceived* in which the laws are useful is letting the fox guard the hen house. And it would be directly at odds with the judiciary's responsibility to provide a check on the Legislature to ensure

that every Kansans' right to vote is protected. *See* Levy & McAllister Br. 8 (quoting *Gannon v. State*, 305 Kan. 850, 390 P.3d 461, 503 (2017)). This Court's precedent of analyzing government infringement of fundamental rights through the lens of strict scrutiny accomplishes just that.

RITE also asserts that its dual-track system is preferable because it is easily administered. RITE Br. 14-15. In this way, RITE's more extreme intentional-and-total-disenfranchisement-or-nothing may be easier to apply than the highly malleable *Anderson-Burdick* standard. *See* Op. 27 (citing *Hodes*, 309 Kan. at 665-69); *see also* Levy & McAllister Br. 10-11 & nn. 3 & 4. But that easier application comes at direct and severe injury to Kansas voters, decimating the explicit guarantees protecting the fundamental right to vote in the Kansas Constitution. Under RITE's test, no election law will ever be subject to anything more rigorous than rational basis review unless it directly states that it prohibits a group of people from voting, meaning that rational basis—a standard that "'lacks the rigor demanded by the Kansas Constitution' for protecting fundamental rights"—will nearly always apply. Op. 27 (quoting *Hodes*, 309 Kan. at 670). As discussed above and in Plaintiffs' prior briefing, this Court should not adopt the *Anderson-Burdick* balancing test, let alone RITE's radical interpretation of it. Instead, it should follow its precedent and apply the standard that best protects fundamental rights—strict scrutiny. Op. 27-28.

B. Strict scrutiny is not unworkable.

Drawing primarily on a non-precedential concurrence in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and an out-of-context statement in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), Judicial Watch contends that

the entire electoral edifice would fall if the Legislature must face meaningful judicial scrutiny when it enacts laws that make it harder for voters to exercise their right to vote or have their ballots counted.[8] Other Opposition Amici make similar arguments. *See, e.g.*, RITE Br. 7-8. But neither case speaks to the issue before the Court: *Crawford* considered a challenge to a voter identification law under the federal constitution in a case in which plaintiffs proffered no evidence showing the extent to which it actually would burden voters in their exercise of the franchise, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008), and in *Brnovich* the claims were vote dilution claims brought and analyzed under Section 2 of the federal Voting Rights Act, and therefore were subject to a very different standard than applies when state courts evaluate state constitutional claims, *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021). As a result, neither case requires this Court to ignore the plain language of the Kansas Constitution and its own precedent to make good on this state's constitutional guarantee that the right to vote is fundamental and will be protected through a rights-first lens, particularly where a law is shown to unjustifiably impede on that fundamental right.

For reasons already explained, the parade of horribles that Opposition Amici envision has no basis in reality. As already discussed, RITE asserts that only laws that fall within its limited definition of "restrictions" (i.e., laws that directly prohibit qualified electors from voting) should be subject to strict scrutiny so that the government can more

[8] The passage that amici quote from *Brnovich* addressed the application of "the disparate-impact model employed in Title VII and Fair Housing Act cases," not strict scrutiny. 141 S. Ct. at 2341. The term "strict scrutiny" does not appear in that opinion.

easily enact laws to administer and regulate elections. *See* RITE Br. 7-8. Not only is RITE's government-first focus contrary to this Court's approach to reviewing laws that impair fundamental rights, but its concern that a strict scrutiny approach will inhibit the government's ability to regulate elections is unwarranted. Strict scrutiny requires that a plaintiff first show that a regulation infringes on the right to vote. If, and only if, a plaintiff makes this showing does the burden shift to the government to prove that the law is narrowly tailored to an actual and compelling interest. Op. 28; Resp. 10. Thus, for mere election-related regulations, it is unlikely that plaintiffs will be able to meet this showing to shift the burden of proof.

Moreover, when laws *do* impair the right to vote, it is not "irrational" as RITE claims to require the government to satisfy strict scrutiny. What *is* irrational is to suggest that requiring the Legislature to justify election laws that impair the right to vote or make it harder for ballots of lawful voters to be counted will somehow broadly "hamper the Legislature's ability to enact . . . public policies." RITE Br. 13. To the extent that the "public policy" in question is the desire to make it harder for qualified Kansans to vote or have their ballots counted, the Kansas Constitution demands that this be "hampered." By guaranteeing the fundamental right to vote in explicit terms that foundational document has already made the judgment that the necessity of guarding against laws that threaten this most fundamental right outweighs any concerns about the burden on the Legislature to "assemble a record" to survive strict scrutiny. *Id.* at 12. If, in fact, the state needs to restrict the right to vote to actually advance compelling state interests that are grounded in reality, affirming the Court of Appeals' decision will not prohibit it from doing so. Op. 28; Levy

& McAllister Br. 8. But in this case, which concerns a signature matching requirement that threatens to disenfranchise eligible voters based on the standardless, inexpert, subjective judgments of election officials, and an arbitrary ten-ballot limit for ballot collectors that will needlessly make it harder for voters like those in Plaintiffs Faye Huelsmann and Patricia Lewter's religious community to exercise their right to vote, the State should not be permitted to impose these impediments without showing that they are in fact necessary and narrowly tailored to further the State's compelling interests in preventing voter fraud. *See* Levy & McAllister Br. 8; *see also* Op. 28.

This is no radical proposition. It is the only one consistent with the Kansas Constitution's plain language and this Court's long-standing rights-first approach to the most fundamental of rights.

C. The Challenged Restrictions burden the right to vote.

The Court of Appeals carefully considered and followed this Court's rights-first approach, which requires Kansas courts to apply strict scrutiny once a plaintiff has shown that a law infringes on a fundamental right "regardless of [the] degree" of the infringement. Op. 28 (citing *Hodes*, 309 Kan. at 669); *id.* ("[B]efore we apply strict scrutiny, we must decide whether the government action impairs the constitutionally protected right to vote." (citing *Hodes*, 309 Kan. at 672)); *see also* Resp. 5-6. The Court of Appeals held that Plaintiffs met this showing for both challenged laws. As alleged by Plaintiffs, under the Signature Verification Requirement "election officials will erroneously determine voters' signatures are mismatched," thus disenfranchising voters who have "provided 'proper proofs'" for reasons outside of their control. Op. 30. And under the Ballot Collection

Restriction, the number of voters a ballot collector can help is limited to ten individuals, thus "prevent[ing] votes from being cast and counted." *Id.* at 32. It was only *after* finding that both laws impair the right to vote that the Court of Appeals held that the State must now show that the challenged laws are narrowly tailored to serve a compelling interest. Op. 28, 31, 34, 47.

RITE attempts to twist the Court of Appeals' holding, stating that "it essentially held that Kansans have constitutional rights (1) to cast advance ballots free of any identity verification procedures and (2) to submit these ballots via large-scale, private ballot collectors." RITE Br. 2; *see also id.* at 10. The Court of Appeals did no such thing. Rather, it properly homed in on the crux of the matter, holding that "[t]he right at issue is really the fundamental right to have one's vote counted," otherwise "[t]he right to vote is illusory." Op. 36. Having found that the challenged laws prevent qualified Kansans from having their votes counted, the Court of Appeals correctly held that strict scrutiny applies. And RITE tellingly ignores Kansas's extended reliance on ballot collection to ensure access to the franchise, as well as the total absence of any indication it has led to fraud, not to mention the fact that Plaintiffs do not challenge the affidavit requirement that the Legislature also enacted, which thoroughly guards against RITE's purported concerns.

HEP further argues that strict scrutiny does not apply because the signature verification "does not burden voters" because of various accommodations or alternatives, but its argument is selectively based on two out-of-jurisdiction cases, neither of which actually support its argument. HEP Br. 8-9. *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 237 (5th Cir. 2020), is a motions panel decision from the Fifth Circuit Court of

Appeals, granting a motion to stay a lower court decision. Notably, because they are often decided on an expedited basis without the benefit of time to carefully consider the parties' papers and argument, motions panel decisions are not even precedential *within* the Fifth Circuit. *See Richardson*, 978 F.3d at 244 (Higgenbotham, J., concurring) ("any opinion on a motions panel is essentially written in sand with no precedential value"); *see also Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988) ("We have stated before that a motions panel decision is not binding precedent."). But even so, *Richardson* does not hold that signature verification imposes no burden at all; instead, it found that in that case the record did not support finding that the burden was "severe," and because the case arose under the federal constitution and was evaluated under *Anderson-Burdick*, the court granted the stay motion. When the matter was considered by the Fifth Circuit's motions panel, it did not reach the merits, instead finding the case should have been dismissed on sovereign immunity grounds. *Richardson v. Flores*, 28 F.4th 649, 655 (5th Cir. 2022). *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020), was similarly dismissed for lack of jurisdiction there, based on the Sixth Circuit's determination that the plaintiffs lacked standing to bring the claim to begin with. And HEP ignores a myriad of cases that expressly recognize the serious burdens imposed by signature verification laws. *See* Op. 26-27 (citing cases). Rather than providing "another reason" not to apply strict scrutiny, this argument is just another way of advocating for the *Anderson-Burdick* test, and urging the Court to abdicate its responsibility to guard against restrictions like the signature verification requirement that make it more likely that ballots cast by lawful voters will be rejected.

This argument also ignores that, as alleged and as noted by the Court of Appeals, the burden on the right to vote is that voters' ballots will be rejected due to erroneous determinations because signature matching is an extremely unreliable process, not the burden of having to sign the ballot in the first place. Op. 30. Contrary to HEP's later argument, the issue is not "that an election official might make a mistake" or "human error|| by state actors." HEP Br. 11. It is that election officials *will* make mistakes because there is no way to adequately compare and review signatures under the constraints imposed by an election. Resp. 11-12, 14; Pls.' Merits Br. 34-35 (June 9, 2022).

RITE similarly argues there is no right to vote via absentee or advance ballot. RITE Br. 10. Evidencing its lack of familiarity with the Kansas Constitution, RITE incorrectly asserts that "the Kansas Constitution is entirely silent on the subjects of absentee and advance voting" and that the "historical record . . . removes all doubt as to whether the Kansas Constitution creates a right to advance (i.e., no-excuse absentee) balloting." *Id.* In fact, article 5, section 1 of the Kansas Constitution references absentee voting. And even the Secretary of State acknowledges that absentee voting in Kansas dates back to the Civil War. Resp. 9 n.3. Moreover, Kansas has allowed advance voting for nearly 30 years. And, as the Court of Appeals explained, because a voter can have their absentee ballot rejected for reasons beyond their control and potentially receive no timely notice, the Challenged Restrictions rob voters of any ability to have their ballots counted. Op. 36; *see also* Kansas ACLU Br. 7. Thus, regardless of whether the right at issue is the right to have one's vote counted or to vote by mail, the Court of Appeals properly held that the Signature

Verification Requirement and Ballot Collection Restriction impair that right. *See* Resp. 9, 19.

IV. Opposition Amici misrepresent laws and decisions from other states with their own distinct constitutions.

Opposition Amici cite purportedly similar laws from other states and rely on out-of-context quotations from foreign courts to claim that strictly scrutinizing laws that burden the right to vote would make Kansas an outlier. *See* LD Fund Br. 2; HEP Br. 3-4. As reflected by the briefs submitted by amici Professors Levy and McAllister (at 11-15) and the ACLU of Kansas (at 8-10), this view of constitutional jurisprudence in other states is mischaracterized at best, and the take-away that both Defendants and Amici urge flatly wrong. But it also is beside the point. It fundamentally does not matter whether Kansas's Signature Verification and Ballot Collection regulations are consistent with other states' laws, or might pass muster under other state's constitutions, because this case asks whether these laws are consistent with the *Kansas* Constitution.

Nor is it remotely true that "ruling in Plaintiffs' favor would unduly call into question the legitimacy" of regulatory measures in other states. LD Fund Br. 10. This assertion reflects a profound misunderstanding of state constitutional law. To state the obvious, those states have their own constitutions that may or may not offer the same protections as the Kansas Constitution, as well as the ability and power to interpret those documents consistent with their own unique history and jurisprudence. And even if Kansas were to provide stronger protections for the fundamental right to voter than many other states, Amici do not explain why it should be considered a problem rather than a point of

pride. Nor do they provide sufficient context for this Court to determine the constitutional provisions or the state actions at issue in the cases they cite, let alone evaluate how various state courts actually analyzed those issues.

A brief examination of the cases they point to, moreover, demonstrates that they repeatedly did not actually involve similar guarantees of the right to vote — or even similar claims. For example, the California, Indiana, Michigan, and New Jersey cases cited by HEP involved equal protection provisions, not provisions explicitly protecting the right to vote, *see Choudhry v. Free*, 17 Cal. 3d 660, 662, 552 P.2d 438, 439 (1976) (alleging statute violated property qualification and equal protection clauses); *Ind. Gaming Comm'n v. Moseley*, 643 N.E.2d 296, 304 (Ind. 1994) ("Appellees do not complain, however, that they were denied the right to vote."); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 35, 740 N.W.2d 444, 463 (2007) (adopting test for "resolving an equal protection challenge to an election law under the Michigan Constitution"); *Abramowitz v. Kimmelman*, 203 N.J. Super. 118, 121, 495 A.2d 1362, 1363 (App. Div. 1985) ("Plaintiffs contend that the amendment is unconstitutional 'special' legislation and that it violates constitutional guarantees of equal protection."). The Missouri Supreme Court explicitly rejected the *Anderson-Burdick* test, *Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. 2006) ("Appellants' argument that this Court should not apply strict scrutiny but should apply a 'flexible' test for examining voting restrictions such as that announced by the United States Supreme Court in *Burdick v. Takushi* also is not persuasive.") (citations omitted). The Nebraska and Nevada cases addressed *federal* constitutional challenges — and indeed in Nebraska the challenge was to the state's

constitution itself. *See State ex rel. Johnson v. Gale*, 273 Neb. 889, 893, 734 N.W.2d 290, 296 (2007) (seeking "a declaration that article III, § 12, [of the Nebraska Constitution] violated their constitutional rights under the 1st and 14th Amendments to the U.S. Constitution."); *Busefink v. State*, 128 Nev. 525, 528, 286 P.3d 599, 602 (2012) ("The central issue in this case is whether NRS 293.805's prohibition on the payment of individuals based upon the number of voters registered violates the First Amendment."). And the language quoted from the Washington case comes from a discussion of substantive due process. *See Carlson v. San Juan Cnty.*, 183 Wash. App. 354, 375, 333 P.3d 511, 522 (2014). These cases offer no insight into how this Court should interpret and apply the Kansas Constitution.

HEP also points to several other state constitutions that "protect the 'right of suffrage'" and claims that "the courts of those States still defer to their legislatures in election matters." HEP Br. 8. The constitutional provisions cited use language distinct from that used in the Kansas Constitution, and amicus further neglects to provide any caselaw for three of the four identified states – potentially because they may not support the proposition that deference is required. *See* Levy & McAllister Br. 11-12 (noting recent analysis that "more than half of states have precedent that directly or indirectly supports the application of strict scrutiny to laws that impair the right to vote").

As Plaintiffs have pointed out in prior briefing, numerous federal decisions have concluded that assisting voters with obtaining or returning applications or ballots and performing other acts requisite to voting is constitutionally protected expressive activity. *See* Resp. 22. Similarly, courts across the country have found that signature matching laws

like Kansas's cause the erroneous rejection of valid ballots. *See id.* at 35, n.10. In fact, courts have held that many of the states that the LD Fund insists this Court should look to as models have signature matching laws that "ha[ve] categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time," *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016), and that "the costs associated with [ballot collection laws] are simply too high and too burdensome to remain the law." *W. Native Voice v. Stapleton*, No. DV 20-0377, 2020 WL 8970685, at *1 (Mont. Dist. Sept. 25, 2020).

In the latter case, the LD Fund actually cites the law that a Montana state court *struck down* as violating the fundamental rights to vote, free speech, and due process as *support* for its argument that states across the country "have taken a variety of steps to regulate ballot collection to ensure election integrity." LD Fund Br. 9, n.7. The LD Fund's misstatement of law aside, Plaintiffs do not challenge "steps to regulate ballot collection" such as requiring an affidavit from a ballot collector; they challenge only the arbitrary and unnecessary numeric limit. Resp. 2, 15-17; Pls.' Merits Br. 8 n.3.

V. The out-of-state "evidence" Opposition Amici present is improper at this stage of the proceedings and facially not credible.

PILF's primary contribution to these proceedings is to provide a series of citations to news articles from other states that they argue justify the Signature Verification Requirement. PILF Br. 5. As a threshold matter, this type of extraneous "evidence" is improper in an amicus brief in general, *see Ross v. Nelson*, 534 P.3d 634, 651 (Kan. Ct.

App. 2023), and is particularly so here, where the appeal comes to this Court from a district court's order on a motion to dismiss. On remand, the State will have the opportunity to present evidence and argument that the Challenged Restrictions are narrowly tailored to advance a compelling government interest.

PILF's history with misinterpreting and misconstruing alleged fraudulent voting activity underscores the importance of ensuring that the "evidence" that they purport to offer not be taken at face value. As referenced above, in 2018, PILF found itself on the wrong side of a lawsuit by the League of United Latin American Citizens ("LULAC") and four individuals over publications PILF created and sent to the national media *Alien Invasion I* and *Alien Invasion II*—which "accused Virginia voters of 'committing multiple, separate felonies, from illegally registering to vote to casting an ineligible ballot.'" *LULAC Richmond Region Council 4614 v. PILF*, No. 1:18-cv-00423, 2018 WL 3848404, at *1 (E.D. Va. Aug. 13, 2018) (quoting complaint). PILF based its accusations on information it obtained from Virginia's voter registration data; the plaintiffs accused PILF of "drawing false conclusions from" that data and, in fact, the information that PILF published included names of properly voting citizens. *Id.*[9] The lawsuit was ultimately settled, and as part of

[9] *See, e.g.*, Jane C. Timm, *Vote Fraud Crusader J. Christian Adams Sparks Outrage*, NBC NEWS (Aug. 27, 2017, 6:13 AM), https://www.nbcnews.com/politics/donald-trump/vote-fraud-crusader-j-christian-adams-sparks-outrage-n796026 (identifying a Virginia voter who, despite being born in New Jersey, was tagged by PILF's Alien Invasion publications as a noncitizen voter).

that settlement PILF's leader, J. Christian Adams, issued an apology to several Virginia voters that PILF falsely accused of being illegal voters.[10]

Remarkably, in its amicus brief presented to this Court, PILF cites an article that J. Christian Adams published in the Daily Caller as "proof" that the challenged laws here should be beyond judicial scrutiny. *See* PILF Br. 9. Other "proof" that PILF submits to support reversal of the Court of Appeals' opinion include multiple links to PILF's own self-published articles. *Id.* at 4-5. And in other examples, even PILF's description indicates that the issue was discovered, not because of signature matching, but because of self-reporting by the voter, or other safeguards built into the system that do not similarly threaten to discard validly-voted ballots, such as when a voter sought to obtain an absentee ballot and discovered one had already been issued. *Id.* at 9.

Even setting those significant and serious issues aside, PILF's emphasis is entirely on incredibly isolated incidents among literally hundreds of millions of ballots cast in countless elections across the country, the unlikely risk of which it argues justifies provisions that demonstrably *will* disenfranchise lawful, qualified voters. Accordingly, PILF asks this Court to imagine "how one illegally cast vote can have significant consequences," PILF Br. 2, yet ignores the significant consequences of even one illegally *excluded* vote—a far more common consequence of restrictive voting laws—not to mention the considerable possibility of deterring citizens from voting in the first place by

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[10] Sam Levine, *Voter Fraud Activist Will Apologize to Citizens He Accused of Being Illegal Voters*, HUFFINGTON POST (Jul. 18, 2019, 1:21 PM), https://www.huffpost.com/entry/j-christian-adams-pilf-settlement_n_5d309002e4b0419fd3298ee6.

erecting unnecessary barriers to voting. *See* Kansas ACLU Br. 13-15. Confronted by elections in which a miniscule fraction of the eligible population actually votes, PILF has decided that the solution is to crack down on nearly non-existent fraud rather than to make voting more accessible. The Kansas Constitution does not permit this Court to do the same.

If remanded, the evidence that will be presented in this case will demonstrate that voter fraud is, by any objective measure, nearly non-existent. The Heritage Foundation database that PILF touts identifies 1,453 "proven instances of voter fraud" dating back to 1982 — a period of time in which over 1.1 *billion* votes were cast in presidential elections alone. This Court should decline PILF's invitation to adopt a jurisprudence that requires courts to defer any time the legislature makes it even more difficult to vote because of the literally one-in-a-million chance that someone might cast an unlawful ballot.

HEP similarly argues at some length that signature verification furthers Kansas's interest in election integrity, but that is a factual question that is not currently before this Court. Amicus (at 13) accuses the Court of Appeals of "substitut[ing] its preferred interest in voter turnout for the State's interest in protecting against fraud" and "reason[ing] that the State's interest in increased participation in the election process was more important than the State's interest in preventing fraud," but that is very clearly not what the Court of Appeals actually did. Instead, the Court of Appeals remanded to the district court "to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny." Op. 47. The Court of Appeals provided some guidance on relevant considerations, but it is for the district court to determine in the first instance whether the Signature Verification Requirement can survive strict scrutiny. *Id.*

CONCLUSION

There is no basis in Kansas law or its Constitution to denigrate the right to vote to a lesser-protected status than other fundamental rights protected by that Constitution. Resp. 6-7. Quite to the contrary, as this Court has long recognized, the right to vote is "the bed-rock of our free political system." *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971). Permitting the Legislature to enact voting laws that impede lawful Kansas voters' ability to exercise that fundamental right without a compelling basis can lead to the dissolution of meaningfully democratic government; as the Framers cited by amici understood, "a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?" The Federalist No. 10 (James Madison).

The possibility of an unconstrained legislature aggrandizing power to itself is far more problematic for democratic legitimacy than requiring election laws that make it harder for lawful Kansas voters to successfully participate in the democratic process to withstand judicial scrutiny. This Court should apply its precedent; affirm the Court of Appeals; and require the challenged laws to undergo strict scrutiny by remanding to the district court for expedited proceedings.

Respectfully submitted, this 10th day of October, 2023.

/s/ Jason Zavadil

Pedro L. Irigonegaray (#08079)
Nicole Revenaugh (#25482)
Jason Zavadil (#26808)
J. Bo Turney (#26375)
IRIGONEGARAY, TURNEY, & REVENAUGH LLP
1535 S.W. 29th Street Topeka, KS 66611
(785) 267-6115
pli@plilaw.com
nicole@itrlaw.com
jason@itrlaw.com
bo@itrlaw.com

Counsel for Plaintiffs

Elisabeth C. Frost*
Mollie A. DiBrell*
Marisa A. O'Gara*
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
(202) 968-4513
efrost@elias.law
mdibrell@elias.law
mogara@elias.law

Counsel for Loud Light, Kansas Appleseed Center for Law and Justice, Topeka Independent Living Resource Center, Charley Crabtree, Patricia Lewter, and Faye Huelsmann

David Anstaett*
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703
608) 663-5408
danstaett@perkinscoie.com

Counsel for League of Women Voters of Kansas

** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I certify that on October 10, 2023, I electronically filed the foregoing document which in turn caused electronic notification of such filing to be sent to all counsel of record.

s Jason A. Zavadil
Jason A. Zavadil