No. 23-125084-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

Plaintiffs-Appellants

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

DEFENDANTS' RESPONSE TO *AMICUS CURIAE* BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF KANSAS

Appeal from the Kansas Court of Appeals Opinion
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

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I. – Introduction

The first third of the ACLU's amicus brief essentially amounts to a recitation of the general importance of voting rights, an issue on which there is no dispute and no need to belabor in this response. Much like Plaintiffs, the ACLU erects a series of strawmen in a pointless effort to counter arguments that Defendants have never made.

The ACLU further claims, however, that numerous other states have adopted the radical position advanced by both the Plaintiffs and the Court of Appeals that *any law impacting the right to vote, regardless of degree*, must be subjected to strict scrutiny. It is here where the ACLU's brief goes off the rails. Although Defendants are confident that this Court will actually read the cited cases and not simply rely on the organization's often inaccurate representations of their holdings, suffice to say that the state of the jurisprudence on this issue is *not* what the ACLU claims it to be.

Obviously, this Court is not bound by the decisions of any other state supreme court. But as Defendants explained in their Petition for Review (at page 5, n.3), and as further demonstrated below, *no state* reflexively applies strict scrutiny to every voting regulation irrespective of the severity of the burden. The ACLU's suggestion to the contrary is flatly untrue. In its attempt to strand Kansas on a never-inhabited and largely inhospitable island on this issue, the ACLU either ignores or misreads the referenced jurisdictions' case law that refute its arguments. The ACLU's brief likewise greatly exaggerates the uniqueness of Kansas' constitutional provisions governing the right to vote and misunderstands what those sections mean. The Court should read the amicus brief from this increasingly partisan organization with great caution.

II. -- Argument

A. Illinois, Washington, and Wyoming do not hold that strict scrutiny is always applied in election law challenges.

The ACLU wrongly claims that Illinois, Washington, and Wyoming apply strict scrutiny to all challenges to election regulations. ACLU Br. at 8. False. With respect to Illinois, *Tully v. Edgar*, 664 N.E.2d 43, 48-49 (Ill. 1996), applied strict scrutiny to a law that "nullified" the result of votes cast in an election and thus impaired the fundamental right to vote. But *Tully*'s holding is not nearly as broad as the ACLU suggests. Subsequent Illinois appellate court decisions clarify that not every law impacting the right to vote must survive strict scrutiny because the legislature must have authority to regulate elections. *See Puffer-Hefty Sch. Dist. No. 69 v. Du Page Reg'l Bd. of Sch. Trs. of Due Page Cnty.*, 789 N.E.2d 800, 808-10 (Ill. App. Ct. 2003) (holding that although voting is a fundamental right under the Illinois Constitution, "it is equally well established that the legislature has the right to reasonably regulate the time, place and manner in which the citizens exercise their right to vote," and such laws are subject to "rational basis scrutiny"); *Orr v. Edgar*, 698 N.E.2d 560, 564-65 (Ill. App. 1998) (same); *Gercone v. Cook Cnty. Officers Electoral Bd.*, No. 1-22-0724, 2022 WL 2072225, at *14 (Ill. App. June 8, 2022) (drawing distinction between laws that "impinge on the right to vote," which are subject to strict scrutiny, and laws that "merely affect the right to vote," which are subject to rational basis scrutiny).

As for Washington and Wyoming, those states have never held that strict scrutiny automatically applies to every voting regulation under their state constitutions, particularly the kind of time, place, or manner election laws at issue here. Indeed, neither cited case

from those two states address the proper level of scrutiny to be applied to statutes regulating the time, place, or manner for holding elections. *See Madison v. State*, 163 P.3d 757 (Wash. 2007); *Shumway v. Worthey*, 37 P.3d 361 (Wyo. 2001). *Madison* dealt with a facial attack on the State's disenfranchisement of convicted felons, while *Shumway* involved a dispute over the method for electing city council members.

Moreover, the statements about strict scrutiny in those cases relied heavily on U.S. Supreme Court precedent. *See Madison*, 163 P.3d at 766-77 (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)); *Shumway*, 37 P.3d at 366 (citing cases that trace back to *Brimme v. Thompson*, 521 P.2d 574, 578 (Wyo. 1974), which in turn relied on U.S. Supreme Court precedent for the proposition that "[t]he right to vote is a fundamental right entitled to the strict protection of the courts[.]"). Yet all parties agree that the federal judiciary does *not* require strict scrutiny for all election law challenges. In fact, Wyoming elsewhere has acknowledged that the U.S. Supreme Court has "consistently allowed the states to impose reasonable restrictions" on the fundamental right to vote. *Murphy v. State Canvassing Bd.*, 12 P.3d 677, 680 (Wyo. 2000).[1]

[1] In contrast to the ACLU's approach, Defendants omitted cases from their Petition where the applicability of *Anderson-Burdick* (or some similar balancing approach) was not settled. For example, Tennessee has implied that *Anderson-Burdick* is the proper test, but has not definitively so held. *See Fisher v. Hargett*, 604 S.W.3d 381, 399-405 (Tenn. 2020) (assuming that *Anderson-Burdick* applied to challenge involving right to vote under Tennessee Constitution and applied it).

B. California, North Carolina, Colorado, Florida, Nebraska, and Hawaii apply Anderson-Burdick to voting regulations.

ACLU's next attempts to downplay Defendants' citations by claiming that six states did not address a specific "right-to-vote" claim, but instead addressed other fundamental rights like free speech, free association, and equal protection, albeit in the context of voting regulations. ACLU Br. at 8. Three problems exist with this argument. First, the ACLU moves the goalpost. The Court of Appeals held that *all* laws impacting fundamental rights, "regardless of degree," require application of strict scrutiny. Op. at 28. Yet the cases cited by the ACLU address "fundamental rights" and do *not* apply strict scrutiny. Furthermore, *nothing* in those opinions suggests that *Anderson-Burdick* would not be followed in a right to vote claim. *See, e.g., Lorenz v. State*, 928 P.2d 1274 (Colo. 1996) (addressing a right to "political participation"). Just the opposite; every one of the referenced cases relied on the *Anderson-Burdick* framework in reaching their holdings.

Second, the ACLU's concession that these states invoked the *Anderson-Burdick* test in evaluating fundamental rights challenges reinforces Defendants' point that legal attacks on election regulations, on the basis that a fundamental right is burdened, are *not* always subject to strict scrutiny. The severity of the burden and the legislature's role in regulating elections must be taken into account.

Third, the ACLU misconstrues much of the law in these jurisdictions. Many of these cases equate the fundamental right at issue to the right to vote or include a discussion about the right to vote in their analysis. *See, e.g., Lorenz*, 928 P.2d at 1277 (claiming the statute violated, *inter alia*, the "fundamental right to vote" protected by the Colorado Equal

Protection and Due Process Clauses); *id.* at 1278 n.5 (recognizing that all the fundamental rights at issue in the case were "related," causing the court to refer to them "collectively as the right to vote"); *Pick v. Nelson*, 528 N.W.2d 309, 317 (Neb. 1995) (challenge brought under plaintiff's "rights as a candidate" and "rights as a voter"); *Hustace v. Doi*, 588 P.2d 915, 919-20 (Haw. 1978) (relying on explanation in *Storer v. Brown*, 415 U.S. 724 (1974), to hold that not every "restriction on the right to vote" requires strict scrutiny and acknowledging that, if strict scrutiny always applied, it would be "very unlikely that all or even a large portion of the state election laws" would survive); *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) (applying *Anderson-Burdick* to write-in voting ban where the court repeatedly noted that it was addressing the fundamental "right to vote").[2]

C. *Maine and Georgia apply Anderson-Burdick or a similar test to "independent state constitutional" election related claims.*

The ACLU additionally contends that Defendants "misguidedly cite [cases that] involve claims where no independent state constitutional claim was decided." ACLU Br. at 9 (citing decisions from Georgia and Maine). The ACLU should read the opinions more carefully.

With respect to Maine, the question was whether the challenged provisions "violate the United States *and Maine* Constitutions." *Alliance for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 48 (Me. 2020) (emphasis added). While noting that "the Maine Constitution

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[2] Although *Canaan* was overruled by *Edelstein v. City and County of San Francisco*, 56 P.3d 1029, 1038-1041 (Cal. 2002), *Edelstein* made clear that *Canaan* properly invoked *Anderson-Burdick* but simply wrongly decided the issue in the case. *Id.* at 1031. The ACLU suggests that *Canaan* involved only free speech, but a review of the opinion shows that it was also addressing the "right to vote." *Id.* at 1036-38.

affords specific protection to the right to vote by absentee ballot," *id.* at 49, the court nevertheless held that the appropriate standard for "whether a particular ballot regulation, such as Maine's absentee ballot deadline, passes constitutional muster is not necessarily strict scrutiny," but is instead the *Anderson-Burdick* framework. *Id.* at 52. Furthermore, the Supreme Judicial Court of Maine acknowledged that "[e]lection laws will invariably impose some burden upon individual voters," but the law at issue did not impose a severe burden. *Id.* at 53.

Turning to Georgia, the ACLU lifts one quote from *Rhoden v. Athens-Clarke Cnty. Bd. of Elections*, 850 S.E.2d 141 (Ga. 2020), that it believes supports its argument but then ignores the prior sentence. ACLU Br. at 9. In the conspicuously omitted sentence, the court explained that Georgia's Equal Protection Clause "is generally coextensive with and substantially equivalent to the Equal Protection Clause of the Fourteenth Amendment, and we apply them as one." *Id.* at 152 (citation omitted). Thus, there was no need to argue for a separate state constitutional protection because Georgia courts hold that the state and federal protections are coterminous on this issue.

The ACLU also neglects to mention that just nine years prior to *Rhoden*, the Georgia Supreme Court did precisely what the ACLU claims *Rhoden* did not. In *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011), the plaintiff averred that the challenged law "impose[d] an unauthorized condition and qualification on the *fundamental right of registered Georgia voters to vote*" and that such restriction "denie[d] equal protection of the law under [the Georgia Constitution] by *unduly burdening the right to vote*."

Id. at 71 (emphasis added). The state supreme court held that *Anderson-Burdick* applied and upheld the challenged law under its flexible standard. *Id.* at 72-75.

D. Alaska, Delaware, Massachusetts and Missouri do not apply "more exacting standards" than Anderson-Burdick.

Finally, the ACLU claims that four states – Alaska, Delaware, Massachusetts, and Missouri – apply "more exacting standards" than *Anderson-Burdick*. ACLU Br. at 9-10. Once again, not true. Each state applies either the sliding-scale *Anderson-Burdick* test or Justice Scalia's binary test from his concurrence in *Crawford v. Marion County Election Board*, 553 U.S. 181, 204-05 (2008) (Scalia, J., concurring). Alaska, Delaware, and Massachusetts apply the sliding scale test. *Kohlhaas v. State*, 518 P.3d 1095, 1104-05 (Alaska 2022) (holding that "substantial burdens" require narrowly tailored compelling interest whereas "modest or minimal burdens" are subject only to rational basis review); *League of Women Voters of Del., Inc. v. Dep't. of Elections*, 250 A.3d 922, 936 (Del. Ch. 2020) ("the *Burdick* analysis is an appropriate framework to analyze whether a particular restriction works an impermissible burden on voting"); *Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth*, 100 N.E.3d 326, 333 (Mass. 2018) (noting that the "'sliding scale' analytical framework is appropriate for cases that involve voting rights under the Massachusetts Constitution because that framework reflects both our Constitution's numerous provisions granting qualified citizens the fundamental right to vote and its grant of police power to the Legislature . . . to regulate that right"). Missouri, while noting that the right to vote is fundamental, effectively adopted Justice Scalia's preferred approach, applying strict scrutiny to severe burdens on the right to vote and rational basis to laws that do "not

impose a heavy burden on the right to vote." *Priorities USA v. Missouri*, 591 S.W.3d 448, 452-53 (Mo. 2020).

The ACLU's "more exacting" scrutiny theory is based on the unremarkable truism that state constitutions generally *can* protect rights more robustly than the federal constitution. ACLU Br. at 9. But this certainly does not mean that a state must do so. It is all a matter of context and circumstances. Even assuming the challenged laws in this case impose some burden on the right to vote, the burden is emphatically not severe.

E. The ACLU overstates the uniqueness of the Kansas Constitution's right to vote.

The ACLU's overarching theme is that Kansas' "right to vote" protection is unique and conferred by the language of the Kansas Constitution, whereas the U.S. Constitution does not contain the same language. ACLU Br. at 3, 11. But the textual provision the ACLU cites is merely Kansas' Qualified Elector clause:

> § 1. Qualifications of electors. Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector.

Kan. Const. art. 5, § 1. The ACLU claims that Sections 1 and 2 of the Kansas Bill of Rights "buttress" this right. ACLU Br. at 4.

A voter qualification clause, however, is not unique to Kansas. Similar clauses are found in many state constitutions. *See, e.g.* Georgia Const. art. 2, § 1; Iowa Const. art. 2, § 1; Minn. Const. art. 7, § 1; N.M. Const. art. 7, § 1. These same clauses are used to define who may vote in federal elections for Congress. U.S. Const. art. 1, § 2, cl. 1; U.S. Const. amend. XVII. In fact, many state constitutions have specific provisions addressing suffrage that the Kansas Constitution does not. *See, e.g.*, Md. Const. Decl. of Rights, art. 7 ("every

citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage"); Minn. Const. art. 1, § 2 ("No member of this state shall be disfranchised . . . unless by the law of the land or the judgment of his peers"); N.M. Const. art. 2, § 8 ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). Yet, these jurisdictions do not apply strict scrutiny to every election regulation that burdens the fundamental right to vote. *See, e.g.*, *Democratic Party of Georgia*, 707 S.E.2d at 72-73; *DSCC v. Pate*, 950 N.W.2d 1, 6-9 (Iowa 2020); *Burruss v. Bd. of Cnty. Comm'rs*, 46 A.3d 1182, 1194-1204 (Md. 2012); *DSCC v. Simon*, 950 N.W.2d 280, 291-94 (Minn. 2020); *Crum v. Duran*, 390 P.3d 971, 972-77 (N.M. 2017).

Nor has any state suggested that applying *Anderson-Burdick* might rendered its state qualification clause "superfluous." ACLU Br. at 11. On the contrary, the courts uniformly recognize that the legislature must play a role in regulating elections. *Crum*, 390 P.3d at 974; *DSCC*, 950 N.W.2d at 292. The Kansas Constitution recognizes this reality as well. Kan. Const. art. 4, § 1; art. 5, § 4. (Such recognition, of course, is dictated in large part by the U.S. Constitution's Elections Clause in Article I, Section 4.)

Like Plaintiffs, the ACLU ignores Article 4, Section 1 of the Kansas Constitution. Unlike Plaintiffs, the ACLU at least provides lip service to Article 5, Section 4. ACLU Br, at 12-13. The organization's attempt to wish this clause away, however, is unavailing. The benign regulations at issue here are in no way akin to "overthrow|ing| constitutional provisions." *Id.* at 12. They are likewise a far cry from laws that "impos[e] additional qualifications" like the hypothetical raised in *State v. Butts*, 31 Kan. 537, 554, 2 P. 618 (1884)

(hypothesizing that requiring voters to register in person, every year at the State Capitol would be problematic). Yet, this is the comparison the ACLU makes.

This Court has already held that the legislature can constitutionally require voters to include a notarized affidavit when returning absentee ballots and require voters' signatures on returned ballots. *Sawyer v. Chapman*, 240 Kan. 409, 413, 729 P.2d 1220 (1986); *Lemons v. Noeller*, 144 Kan. 813, 828-29, 63 P.2d 177 (1936). Indeed, this Court has long stressed the discretion the Kansas Constitution leaves to the legislature in such matters. Defs.' Supp. Br. at 9. It strains credulity to argue that the legislature must walk a virtual tightrope in determining how ballots are returned or in requiring proof that the voter who submitted a completed ballot is the same voter to whom the blank ballot was sent. These provisions are commonsense protections that are far less restrictive than similar laws upheld in both Kansas and other jurisdictions. *See Simon*, 950 N.W.2d 280; Defs.' Supp. Br. at 8.

In summary, no one disputes that the right to vote is, generally speaking, a fundamental right. But contrary to what the ACLU demands, the constitutional scrutiny inquiry does not end at that point. Instead, the proper inquiry acknowledges that there must be substantial regulation of elections if they are to be fairly administered and free of fraud. It is hardly a surprise, therefore, that the Kansas Constitution expressly delegates authority to the Kansas legislature to regulate elections and mandate proof of voter eligibility. That this framework has been maintained for more than 150 years without the kind of dramatic change advocated by Plaintiffs here ever being embraced is strong evidence that the current methodology is what our State founders intended and what our State Constitution demands.

See NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) ("[T]he longstanding practice of the government can inform our determination of what the law is.") (citations omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 11, 2023, I electronically filed the foregoing document with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above will be e-mailed to the following individuals:

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