No. 23-125084

IN THE SUPREME COURT OF THE STATE 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-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

AMICI CURIAE BRIEF OF PROFESSORS RICHARD E. LEVY AND STEPHEN R. McALLISTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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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INTEREST OF *AMICI CURIAE*

Richard E. Levy is the J.B. Smith Distinguished Professor of Constitutional Law at the University of Kansas School of Law. Stephen R. McAllister is the E.S. & Tom W. Hampton Distinguished Professor of Law at the University of Kansas School of Law, the former Solicitor General for the State of Kansas, and the former U.S. Attorney for the U.S. District of Kansas.[1] *Amici* are teachers and scholars of state constitutional law and the law of democracy. They have researched and published leading works in these areas of law, *see, e.g.,* Richard E. Levy, *Constitutional Rights in Kansas After Hodes & Nauser,* 68 Kan. L. Rev. 743 (2020); Stephen R. McAllister, *State Constitutional Law: The Modern Experience* (4th ed. Thompson-West 2022) (casebook) (with Jeffrey S. Sutton, Randy J. Holland, and Jeffrey M. Shaman), and they have a professional interest in promoting a proper understanding of the constitutional and democratic principles at issue in this case.

INTRODUCTION

The Kansas Constitution calls for strict scrutiny of laws that burden the fundamental right to vote. This conclusion follows from the Constitution's text and structure and from this Court's precedents. It is also consistent with state court decisions around the country.

This Court has long applied strict scrutiny to laws that impair the exercise of a fundamental right. And it has long recognized that the right to vote is fundamental. The Kansas Constitution guarantees that right in express terms, and the Constitution's structure confirms the right's paramount importance. The ability of Kansans to govern themselves

[1] Institutional affiliations are provided for identification purposes only.

and to safeguard their other rights and interests hinges on their ability to vote. Laws that encumber the right to vote threaten to subvert core principles of self-government and political accountability recognized in the Kansas Constitution by stifling individual participation. Strict scrutiny is thus a vital safeguard of the state constitutional right to vote. Only by reviewing restrictive voting laws rigorously may Kansas courts play their indispensable role in upholding the people's Constitution.

Defendants-Appellees' arguments for adopting a "deferential" form of federal *Anderson-Burdick* review are unavailing. This is not a vote-dilution case, in contrast to *Rivera v. Schwab*, 315 Kan. 877, 512 P.3d 168, 178-80 (2022), where this Court applied federal equal protection doctrine to a partisan gerrymandering claim rooted in the Kansas Constitution's equal protection provision. Here, the claim is that the laws restrict the actual right to vote, not the weight or meaningfulness accorded to some votes. The signature matching requirement at issue would disenfranchise eligible voters based on the standardless subjective judgments of election officials. And the ballot harvesting provision seriously and needlessly impairs the ability of many voters to cast and return their ballots. Further, Defendants-Appellees' arguments ignore the Kansas Constitution's strong explicit protections of the right to vote. Insofar as the federal Constitution lacks parallel right-to-vote provisions, it makes no sense for Kansas courts to be in lockstep with federal law.

Applying strict scrutiny to laws that restrict the fundamental right to vote also accords with mainstream understandings of state constitutional voting guarantees. Consistent with the robust voting rights and democratic commitments spelled out in state constitutions, state courts commonly apply strict scrutiny or other elevated forms of review

to laws restricting suffrage. State courts adopting a weakened, "deferential" form of the federal *Anderson-Burdick* standard to assess state constitutional challenges to voting restrictions are the exception, not the norm.

ARGUMENT

I. The Kansas Constitution requires strict scrutiny of laws that impair the fundamental right to vote.

This Court has made clear that the Kansas Constitution requires strict scrutiny of state laws that implicate fundamental constitutional rights. *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 440 P.3d 461, 493 (2019). This Court has also made clear that the right to vote, which is guaranteed by the plain text of Article 5, Section 1 and by the Constitution's overall commitment to popular sovereignty and democratic governance, is one such fundamental right. *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506, 511 (1971); *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771, 776 (1963). Thus, when a state law burdens Kansans' free exercise of their right to vote, as the challenged restrictions do here, such laws must be reviewed under strict scrutiny. Any less rigorous standard is inconsistent with the Kansas Constitution's distinctive text and structure.

A. Strict scrutiny applies to laws that impair fundamental rights.

Strict scrutiny "applies when a fundamental right is implicated." *Hodes*, 440 P.3d at 493; *see also State v. Ryce*, 303 Kan. 899, 368 P.3d 342, 372 (2016); *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058, 1061-63 (1987). Indeed, in *Hodes*, this Court adopted strict scrutiny over an undue burden standard, finding that the undue burden standard "lacks the rigor demanded by the Kansas Constitution" for protecting fundamental rights. *Hodes*, 440

P.3d at 497. 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.

The strict scrutiny standard recognizes that core constitutional values and commitments require robust judicial safeguards. Broadly speaking, this constitutional core consists of rights that undergird individual and societal self-determination. *Cf. Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, 1104 (1960) ("Anglo-American law starts with the premise of thorough-going self determination."). Because the very purpose of government is to secure fundamental rights, and because individuals depend on these rights to protect their other rights and interests, it is "inherently suspect" for government to impair them. *Hodes*, 440 P.3d at 499. Accordingly, when fundamental interests are threatened, this Court "peel[s] away the protective presumption of constitutionality and adopt[s] an attitude of active and critical analysis," placing the burden on the government to prove that its actions are necessary. *Id*. (quoting *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 576 P.2d 221, 227 (1978)); *see also In re A.B.*, 313 Kan. 135, 484 P.3d 226, 235-36 (2021) (Stegall, J. concurring; Wall, J. joining) (rejecting the presumption of constitutionality altogether).

B. Voting is a fundamental Kansas right entitled to the highest protection.

As the Court of Appeals correctly recognized, there is "no question" that the right to vote is "a fundamental right protected by the Kansas Constitution." *League of Women Voters of Kansas v. Schwab* ("*LWV*"), 63 Kan.App.2d 187, 525 P.3d 803, 820 (2023). The Kansas Constitution expressly guarantees the right, providing: "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;

see also Harris, 387 P.2d at 776 ("Under the republican form of government prescribed in the Constitution of Kansas, every citizen and qualified elector is entitled to a vote.").

This Court has described the right as "fundamental," as "the bed-rock of [Kansas'] free political system", and as "pervasive of other basic civil and political rights." *Moore*, 486 P.2d at 511. The right's paramount importance derives from the very structure and purpose of the Kansas Constitution—that is, the "people's constitution," *see, e.g., Gannon v. State* ("*Gannon IV*"), 305 Kan. 850, 390 P.3d 461, 503 (2017)—which reflects a deep commitment to popular sovereignty and self-government.

Indeed, "democratic accountability wielded by voters is woven into the very fabric of our government." *Rivera*, 512 P.3d at 181. From the start, the Kansas Constitution identifies popular sovereignty and self-government as the document's animating principles. *See* Kan. Const. Bill of Rights, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority."); *see also Gannon IV*, 390 P.3d at 503 (explaining that the Kansas Constitution is "the work … of the people" and "is the supreme and paramount law, receiving its force from the express will of the people."). To facilitate self-rule, the Constitution establishes democratically accountable elected institutions. *See* Kan. Const. art. 1, § 1 (providing for the election of the governor and other executive officials); art. 2, § 2 (election of legislators); art. 3, § 5 (retention elections of justices); *see also* art. 4, § 3 (recall of executive and legislative officials). It also places the power to approve constitutional amendments and to call a constitutional convention directly in the people's hands at the ballot box. *See id*. art. 14, §§ 1-2.

The franchise is the linchpin of the people's Constitution. It ensures that the people truly choose their representatives and provides them opportunities to express their collective will. The Constitution includes additional safeguards, such as guaranteeing electors the ability to vote absentee when their residence changes shortly before an election, *id.* art. 4, § 1; art. 5, § 1, and privileging electors from arrest while voting, *id*. art. 5, § 7. The Constitution also limits the legislature to enacting "proper" proofs of the right of suffrage, further protecting the right to vote and inviting judicial scrutiny of the legislature's measures. *Id*. art. 5, § 4; *see also State v. Butts*, 31 Kan. 537, 2 P. 618, 621 (1884) (contrasting "mere rules of evidence" that readily permit voters to establish their eligibility with laws that "in fact, overthrow constitutional provisions" by effectively "imposing additional qualifications" on voters). Provisions of the Bill of Rights further support and sustain the right to vote. *See, e.g.*, Kan. Const. Bill of Rights § 3 (protecting the rights to assembly and to petition the government); *id*. (recognizing the people's right to "instruct their representatives," which presupposes that they are able to vote); *id*. § 11 (protecting freedom of speech and the press); *cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021) (detailing the "democracy principle" that undergirds state constitutions). These provisions leave no doubt that the Kansas Constitution explicitly and steadfastly protects the right to vote and treats it as foundational.

This added protection is essential because laws that encumber the right to vote "strike[] at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore*, 486 P.2d at 511. Indeed, the justifications for strict

scrutiny apply with special force to the franchise. When a law creates a new barrier to voting, it serves to stifle and exclude some voices, risking election outcomes that do not genuinely reflect the popular will. Experience has demonstrated that those in power may be tempted to restrict the vote for precisely this reason: doing so can insulate them from accountability and permit them to achieve ends that diverge from the people's preferences.

Nothing could be more contrary to the Kansas Constitution's longstanding commitment to popular sovereignty and democratic governance. And the point remains salient today, as the state's recent wrangling over abortion vividly illustrates. Shortly after Kansas voters decisively rejected a ballot measure that would have authorized restrictive abortion laws, Kansas legislators pressed ahead and enacted such restrictions anyway. *See* Jason Alatidd, *Kansas Lawmakers Override Anti-Abortion Vetoes Months After Voters Spurned Value Them Both*, Topeka Capital-Journal (Apr. 27, 2023), https://perma.cc/R93H-VUE7. Kansans cannot hold lawmakers accountable for disregarding their preferences unless they can freely exercise their right to vote.

Strict scrutiny is essential to protect the franchise and the people's Constitution. The proper constitutional role of lawmakers is to facilitate open and fair elections that will faithfully translate the popular will into representation and policy. This means taking care to enable all eligible Kansans to express their preferences at the ballot box.

Legislators have no license or legitimate authority to skew the constitutional process by which they are chosen in order to serve their own interests. When a law makes the act of voting more difficult or makes it more likely that the votes of qualified electors will not be counted, the onus must be on the legislature to demonstrate a compelling governmental

interest to justify such restrictions, and the restrictions must be narrowly tailored to achieve that interest. 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. The Constitution requires the judiciary to perform its solemn duty as ultimate guardian of the people's Constitution. *Gannon IV*, 390 P.3d at 503 ("[A]ccording to the people's constitution, the judiciary has the sole authority to determine whether an act of the legislature conforms to their supreme will, *i.e.,* is constitutional."). In this case, that means applying strict scrutiny to laws that make it more difficult for some Kansans to vote.

II. The Kansas Constitution's strong protections for the fundamental right to vote are inconsistent with the federal *Anderson-Burdick* balancing framework.

Defendants-Appellees do not appear to dispute that laws impairing fundamental rights are subject to strict scrutiny; nor do they deny that the Kansas Constitution expressly protects voting as a fundamental right. Yet they essentially urge this Court to hold that one plus one does not equal two. Rather than strict scrutiny, they argue for the "deferential" *Anderson-Burdick* framework that federal courts use to analyze laws that impact federal voting rights. For multiple reasons, that federal standard is inapplicable here.

First, this Court's decision in *Rivera v. Schwab*, 315 Kan. 877, 512 P.3d 168 (2022), does not support adoption of the *Anderson-Burdick* framework. *Rivera* held that partisan gerrymandering claims sound in equal protection and that Kansas' equal protection guarantee is coextensive with the federal Equal Protection Clause. *Id*. at 178-80. The claims

here, in contrast, are that the challenged laws violate the right to vote guaranteed by Article 5, § 1 of the Kansas Constitution—a provision with no federal constitutional analog.[2]

The claims here, moreover, are not vote *dilution* claims as in *Rivera*, but rather vote *denial* claims. *Rivera* hinged in part on this Court's conclusion that, while a redistricting plan may affect the relative value of an individual's vote, it "does not infringe on the stand-alone right to vote." *Id*. at 179. Critically, *Rivera* emphasized that Article 5, § 1 and other constitutional provisions "do not provide an independent basis *for challenging the drawing of district lines*." *Id.* at 178 (emphasis added). Vote *denial* claims are fundamentally different from gerrymandering claims and directly implicate the fundamental right to vote, as the Court of Appeals correctly recognized. *LVW*, 525 P.3d at 822-24.

Second, and more broadly, Defendants-Appellees' argument ignores the distinctive nature and provisions of the Kansas Constitution. The Kansas Constitution protects the franchise explicitly, unlike the federal Constitution, which does not even contain an express right to vote. A proper interpretation of the Kansas Constitution must account for this vital difference, especially because the federal courts developed the *Anderson-Burdick* framework in the context of federalism and have acknowledged the federal Constitution's deference to state authority in determining voting qualifications and conducting elections.

[2] Plaintiffs-Appellants did raise an equal protection claim below, but the Court of Appeals declined to rule on its merits, explaining that new briefing and evidence on the claim was needed after the state issued an amended version of the regulation at issue following the District Court's decision. *LWV*, 525 P.3d at 827-28. Plaintiffs-Appellants also allege a violation of the Kansas Constitution's freedom of speech and association guarantees on grounds that are entwined with their right-to-vote claim.

Cf. Shelby County v. Holder, 570 U.S. 529, 543 (2013) (discussing the "broad autonomy" of states over matters of democratic structure).

Thus, the U.S. Supreme Court has made decisions against a very different constitutional background than this Court does when interpreting the Kansas Constitution's right to vote. Reflexively adopting the federal standard, particularly in the relatively toothless form that Defendants-Appellees advocate, would require the court to ignore the Kansas Constitution's unique text and structure. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 121-29 (2014) (detailing the reasons to reject a lockstep approach for voting rights); *cf. State v. Lawson*, 296 Kan. 1084, 1091-92, 297 P.3d 1164 (2013) ("[A]llowing the federal courts to interpret the Kansas Constitution seems inconsistent with the notion of state sovereignty.").

Finally, the *Anderson-Burdick* framework has often been criticized for its indeterminacy, which is yet another reason it is unsuitable for the Kansas Constitution.[3] The *Anderson-Burdick* balancing analysis is akin to, and at least as hazy, as the federal "undue burden test" for abortion litigation that this Court rejected in *Hodes*.[4] Like the

[3] *See, e.g.*, Edward B. Foley, *Voting Rules and Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013) ("*Anderson-Burdick* balancing is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another. A test this indeterminate is arguably no test at all, and thus the federal constitutional law that is supposed to supervise the operation of a state's electoral process has little objectivity or predictability.").

[4] This Court observed that the "undue burden" test had "proven difficult to understand and apply" and that "shifting and conflicting pronouncements" had left its "exact contours … murky." *Hodes*, 440 P.3d at 494-95; *cf. Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (explaining that the *Anderson-Burdick* test is used to identify "an undue burden on the right to vote").

undue burden test, the *Anderson-Burdick* framework "lacks the rigor demanded by the Kansas Constitution" for protecting fundamental rights. *See Hodes*, 440 P.3d at 497. Applying strict scrutiny here would, as in *Hodes*, offer litigants and lower courts more clarity and predictability, while better securing fundamental rights. *See id*. at 503.

III. Courts in other states commonly protect voting rights more vigorously than do federal courts.

Consistent with the distinctive nature of their constitutions, state courts frequently protect voting rights more vigorously than do federal courts. Contrary to the Defendants-Appellees' assertion that "virtually every" state court has adopted a "deferential" form of federal *Anderson-Burdick* review, Def. Supp. Br. at 3, 10,[5] most states have adopted standards, including strict scrutiny, that are more rigorous and demanding. Even when state courts have invoked *Anderson-Burdick* or other balancing standards, they commonly insist upon strong justifications and careful tailoring before they will uphold a law that nontrivially burdens the right to vote. Only a very small number of states have adopted the deferential version of *Anderson-Burdick* advanced by Defendants-Appellees.

An array of state courts applying constitutional rights to vote similar to those in the Kansas Constitution have identified strict scrutiny as the proper standard for assessing challenges to voting restrictions.[6] Other state courts have held that strict scrutiny applies to

[5] *Amicus Curiae* Restoring Integrity & Trust in Elections (RITE) makes similar assertions in its brief. RITE Br. at 2, 6-7.

[6] *See, e.g.*, *Van Valkenburg v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000) (declining to follow *Burdick* and instead applying strict scrutiny because "the right of suffrage is a fundamental right"); *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996) ("Where challenged legislation implicates a fundamental constitutional right, . . . such as the right to vote, . . . the court will examine the statute under the strict scrutiny standard."); *Wells by*

laws that burden fundamental rights and have recognized that voting is a fundamental right, but have not yet had occasion to link the two principles in a decision.[7] According to one recent tally, 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, and very few—only two—have adopted a watered-down approach. Emily Lau, *Explainer: State Constitutional Standards for Adjudicating Challenges to Restrictive Voting Laws*, State Democracy Research Initiative (Oct. 3, 2023), https://perma.cc/2ZXY-PA8B.

To the extent state courts have invoked *Anderson-Burdick*, it is most often in circumstances distinct from those present here, and frequently with a gloss that differs from the weak, deferential form that Defendants-Appellees advocate. Following in lockstep with a deferential *Anderson-Burdick* standard is the rare exception, not the rule. The bulk of the

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Wells v. Panola Cty. Bd. of Educ., 645 So.2d 883, 893 (Miss. 1994) ("A statute . . . interfering with the exercise of a fundamental right, such as voting, is subject to strict scrutiny."); *Marrujo v. New Mexico State Highway Transp. Dept.*, 887 P.2d 747, 751 (N.M. 1994) ("Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as . . . voting . . . ."). *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007) ("[B]ecause the right to vote has been recognized as fundamental for all citizens, restrictions on that right generally are subject to strict scrutiny, meaning they must be narrowly tailored to further a compelling state interest"); *Shumway v. Worthey*, 37 P.3d 361, 366 (Wyo. 2001) ("The right to vote is fundamental, and we construe statutes that confer or extend the elective franchise liberally (as opposed to those limiting the right to vote in some way, which then invokes strict scrutiny).");

[7] *See, e.g.*, *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) ("This court has applied "strict scrutiny" analysis to laws . . . impinging upon fundamental rights expressly or impliedly granted by the constitution[.]") (alterations and internal quotation marks omitted); *Akizaki v. Fong*, 461 P.2d 221, 222-23 (Haw. 1969) ("The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government."); *Wrigley v. Romanick*, 988 N.W.2d 231, 242 (N.D. 2023) ("A statute which restricts a fundamental right is subject to strict scrutiny[.]"); *Poochigian v. City of Grand Forks*, 912 N.W.2d 344, 349 (N.D. 2018) ("The right to vote is a fundamental constitutional right.").

cases that Defendants-Appellees identified in their Petition for Review (at *5 n. 3) as evidence of *Anderson-Burdick*'s state-level adoption are simply not on point. Some involve federal claims or jointly litigated federal-state claims in which there was no real occasion for independent state constitutional analysis.[8] Others involve claims that were litigated under state equal protection or free speech/association provisions (where the analogy to *Anderson-Burdick* may arguably be stronger) rather than squarely under right-to-vote guarantees.[9] Many do not involve voting restrictions, but instead address other election matters, such as the requirements for candidates to appear on the ballot.[10] And

[8] *See, e.g.*, *Rhoden v. Athens-Clarke Cty. Bd. of Elections*, 850 S.E.2d 141, 152 (Ga. 2020) (noting that appellants "made no argument for a different application" of federal and Georgia equal protection principles); *Pick v. Nelson*, 528 N.W.2d 309, 317 (Neb. 1995) (declining to analyze federal and state free speech guarantees separately on the ground that the guarantees are "the same").

[9] *See, e.g.*, *Edelstein v. City & Cty. of San Francisco*, 56 P.3d 1029 (Cal. 2002) (addressing state free speech claim); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (2007) (addressing equal protection concerns in an advisory opinion); *Libertarian Party of N.H. v. State*, 910 A.2d 1276 (N.H. 2006) (addressing associational and equal protection claims); *Libertarian Party of Ohio v. Husted*, 97 N.E.3d 1083 (Ohio Ct. App. 2017) (intermediate appellate court addressing equal protection claim).

[10] *See, e.g.*, *Edelstein*, 56 P.3d 1029 (write-in voting—the precise issue in *Burdick*); *Lorenz v. State*, 928 P.2d 1274 (Colo. 1996) (a law prohibiting officeholders and candidates from holding an interest in gaming licenses); *Libertarian Party of Fla. v. Smith*, 687 So.2d 1292 (Fla. 1996) (political parties' receipts of partial rebates of candidates' filing fees); *Hustace v. Doi*, 588 P.2d 915 (Haw. 1978) (pre-*Anderson* challenge to minimum vote requirement for nonpartisan candidates); *Burruss v. Board of Cty. Comm'rs of Frederick Cty.*, 46 A.3d 1182 (Md. Ct. App. 2012) (signature requirement for local government board); *Libertarian Party of N.H.,* 910 A.2d 1276 (nominating methods for minor party); *Libertarian Party of N.C. v. State*, 707 S.E.2d 199 (N.C. 2011) (signature requirement for minor party ballot access); *Libertarian Party of Ohio,* 97 N.E.3d 1083 (petition requirement for minor party ballot access); *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015) (electronic voting systems); *see also Crum v. Duran*, 390 P.3d 971 (N.M. 2017) (challenge to state's closed primary system); *Moody v. N.Y. State Bd. of Elections*, 86 N.Y.S.3d 25 (N.Y. App. Div. 2018) (challenge to state's closed primary system).

some did not even apply *Anderson-Burdick*.[11]

Additionally, even in instances when state courts have used an *Anderson-Burdick*-style balancing approach, they most commonly apply it in a more voter-protective manner than Defendants-Appellees advocate.[12] State courts often ratchet up from rational basis review when laws impose nontrivial burdens, with scrutiny becoming increasingly exacting as the burden grows. If these courts find the burden less than severe, the scrutiny may not officially be "strict," but it is rigorous and searching, requiring lawmakers to prove

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[11] *See, e.g., Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. 2006) (rejecting *Anderson-Burdick* but finding that strict scrutiny would have applied under the *Anderson-Burdick* framework); *Moody*, 86 N.Y.S.3d 25 (making no mention of *Anderson-Burdick* and applying a test based on the state constitution).

[12] *See Kohlhaas v. State*, 518 P.3d 1095, 1105 (Alaska 2022) (explaining that "Alaska's constitution is more protective of rights and liberties than is the United States Constitution," and that "a law that passes muster under the U.S. Constitution may not pass muster under Alaska's"); *League of Women Voters of Delaware, Inc. v. Department of Elections*, 250 A.3d 922, 936 (Del. Ch. 2020) (explaining that "the voting rights provided for and guaranteed in the Delaware Constitution" are "more robust than those in the U.S. Constitution"); *DSCC v. Pate,* 950 N.W.2d 1 (Iowa 2020) (applying a more rigorous version of *Anderson-Burdick* than its weak, deferential form); *All. for Retired Ams., v. Sec'y of State*, 240 A.3d 45, 51-54 (Me. 2020) (applying a standard modeled after the stronger sliding-scale version of *Anderson-Burdick*); *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 333 (Mass. 2018) (noting that state constitution may apply "in a manner that 'guard[s] more jealously against the exercise of the State's police power' than the application of the framework under the Federal Constitution"); *DSCC v. Simon*, 950 N.W.2d 280, 291-93 (Minn. 2020) (applying the stronger sliding-scale version of *Anderson-Burdick*); *Weinschenk*, 203 S.W.3d at 215-16 (rejecting *Anderson-Burdick* but finding that strict scrutiny would have applied under the *Anderson-Burdick* framework); *Rutgers University Student Assembly v. Middlesex County Bd. of Elections*, 141 A.3d 335 (N.J. Super. Ct. App. Div. 2016) (applying a rigorous analysis of the evidence supporting the state's interest in advance registration even after finding the challenged provision to impose a minimal burden on the right to vote); *Gentges v. State Election Bd.*, 419 P.3d 224, 228 (Okla. 2018) (applying a balancing test that "consider[ed] whether the law was designed to protect the purity of the ballot, not as a tool or instrument to impair constitutional rights" and whether it "reflects a conscious legislative intent for electors to be deprived of their right to vote").

that weighty interests truly justify the challenged restrictions.[13]

The bottom line is that very few state courts have embraced Defendants-Appellees' preferred gloss on *Anderson-Burdick*, which would subject voting restrictions to rational basis review so long as the burdens they impose are deemed non-severe.[14] Instead, state courts commonly safeguard state constitutional voting rights by scrutinizing restrictive laws more rigorously than federal doctrine requires. Given the Kansas Constitution's strong textual and structural commitment to a system in which the people govern themselves by freely exercising the vote, it is appropriate—and well within national mainstream—for this Court to review restrictive voting laws with a highly skeptical eye.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to affirm the Court of Appeals' decision applying strict scrutiny to the voting restrictions challenged by Plaintiffs-Appellants as violating the Kansas Constitution's fundamental right to vote.

Dated this 4th day of October 2023. Respectfully submitted,

[13] *See, e.g.*, *Rhoden*, 850 S.E.2d at 147 (stating that, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden"); *Guare v. State*, 117 A.3d 731, 741 (N.H. 2015) (concluding that, under intermediate scrutiny, "even if we assume that the burden is not severe, the State has failed to advance a sufficiently weighty interest to justify the language"); *Fisher v. Hargett*, 604 S.W.3d 381, 399 (Tenn. 2020) (applying similarly elevated scrutiny).

[14] Texas and Wisconsin appear to be the only states with supreme court precedent that squarely embraces weak-form federal *Anderson-Burdick* review for adjudicating state constitutional right-to-vote challenges to restrictive voting laws. *See* Lau, *supra*.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 2023 the above and foregoing was electronically filed with the Kansas Supreme Court using this Court's electronic filing system, which will send notice to all counsel of record. The undersigned also certifies that a true and correct copy of the above will be e-mailed to the following individuals:

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