No. 23-125084-S

IN THE SUPREME COURT 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.

AMICUS BRIEF OF RESTORING INTEGRITY AND TRUST IN ELECTIONS

Appeal from the Kansas Court of Appeals Opinion
dated March 17, 2023

Appeal from the District Court of Shawnee County
Honorable Teresa Watson, District Judge
District Court Case No. 2021-CV-299

George Lewis (#28785)
GRAVES GARRETT LLC
1100 Main St., Ste. 2700
Kansas City, MO 64105
T: (816) 256-4144
F: (816) 256-5958
glewis@gravesgarrett.com

Emmett E. Robinson (*pro hac vice*)
ROBINSON LAW FIRM LLC
6600 Lorain Avenue #731
Cleveland, OH 44102
T: (216) 505-6900
F: (216) 649-0508
erobinson@robinsonlegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE

Restoring Integrity and Trust in Elections ("RITE") is a non-profit, non-partisan, public-interest organization dedicated to protecting elections as the democratic voice of the people. RITE seeks to defend the democratic process from measures that risk sowing distrust in outcomes and thus discouraging voter participation and engagement. Accordingly, RITE is dedicated to supporting policies that promote election security and enhance voter confidence.

RITE has a significant interest in this case, as it bears directly upon legislators' authority to oversee elections and set rules ensuring their fair and orderly administration. In drafting this brief, RITE has drawn upon its expertise and national perspective on voting and election law, as well as its extensive experience in the interpretation of state-constitution voting-rights provisions and with the consequences flowing therefrom. RITE trusts that this brief will, among other things, assist the Court in identifying the proper standard of review applicable to voting and election legislation, thereby promoting the reliability and integrity of Kansas's voting system while, at the same time, ensuring that the franchise remains open and easily accessible to all eligible Kansans.

BACKGROUND

In 2021, the Kansas Legislature passed House Bill 2183 ("H.B. 2183" or the "Act"). As relevant to this appeal, H.B. 2183 does two things.

First, it contains a signature-verification requirement. Specifically, the Act states that, before counting an advance ballot, an election official must match the advance voter's ballot-envelope signature with the one already on file for her "in the county voter registration records." Kan. Stat. § 25-1124(h). If the signatures do not match, then the official must give her an opportunity to cure the deficiency. *Id.* § 25-1124(b). "[D]isabl[ed]" advance voters unable to (1) sign the ballot envelope or (2) maintain a signature consistent with that on file with the county are exempt from the signature-verification rule. *Id.* § 25-1124(h).

Second, H.B. 2183 states that "[n]o person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election." *Id.* § 25-2437(c).

Plaintiffs-Appellants—three individuals and several activist groups—sued, contending that the signature-verification and ballot-collection rules violate the constitutional right to vote. The State Defendants moved to dismiss, and the district court granted the motion.

The court of appeals reversed and, in so doing, made a surprising, sweeping pronouncement out of step with this Court's precedents and the law in virtually every other jurisdiction in this country, state and federal: All statutes "burdening" voting are subject to strict-scrutiny review.[1] In other words, the court of appeals held that all voting rules are unconstitutional unless the State shows that the rule (1) advances a compelling government interest and (2) is narrowly tailored to do so. No Kansas court has ever before reached this conclusion, and every court of last resort that has weighed in on the issue has rejected this approach.

ARGUMENT

By adopting a pure-strict-scrutiny approach, the court of appeals 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 (rather than, *e.g.*, via the postal mail). That is, all Kansans have these "rights" unless the State can prove that the rules restricting them are essential to advancing a compelling state interest—an almost impossible task. This rigid and unyielding strict-scrutiny approach is foreign to this Court's precedents, which take a flexible, dual-track approach to reviewing the constitutionality of voting-related enactments.

[1] The court of appeals additionally said that "[e]very voting rule imposes a burden of some sort." *League of Women Voters of Kan. v. Schwab*, 63 Kan. App. 2d 187, 207, 525 P.3d 803 (2023) (citing *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021)). Thus, every voting rule is, per the court of appeals, subject to strict scrutiny.

The federal courts do the same, as does *every other state supreme court* that has weighed in.

There is good reason why this Court and so many others have shunned the court of appeals' approach. Pure strict scrutiny is antithetical to Kansas history and the Kansas Constitution. Moreover, it would produce absurd results and arrogate to the judiciary powers constitutionally assigned to the Legislature. The appropriate, dual-track approach is, by contrast, easily understood and administered, while keeping the courthouse doors open to legitimate claims of voter disenfranchisement.

A. The Superior Dual-Track System of Review Is Consistent with this Court's Precedent and with the Precedent of Courts Across the Country.

In *Burdick v. Takushi*, the U.S. Supreme Court adopted a two-track system for reviewing laws alleged to infringe upon the constitutional right to vote. It defined the two tracks—and set the respective standards of review—as follows: "[1] when [voting] rights are subjected to 'severe' restrictions, the [enactment] must be 'narrowly drawn to advance a state interest of compelling importance.' [2] But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions, . . . the State's important regulatory interests are generally sufficient to justify' the restrictions." 504 U.S. 428, 434, 112 S. Ct. 2059 (1992) (citations omitted). Per *Burdick*, then, only "severe" restrictions on the right to vote merit strict scrutiny; other, nondiscriminatory rules are upheld if they are "reasonable"—that is, if there is a rational basis for their enactment. *Id.*

The U.S. Supreme Court was 75 years behind this Court. Kansas case law shows that, for more than 100 years, this Court has steered clear of the court of appeals' strict-scrutiny-or-bust method in favor of a dual-track approach that recognizes a distinction between legislation that actually narrows or abridges the right to vote and legislation that is an exercise of the Legislature's broad regulatory power over voting and elections.

In *State ex rel. Brewster v. Doane*, this Court first articulated its own version of the dual-track system. *Doane* distinguished between voting "regulations," on the one hand, and "restrictions" of the "constitutional right to vote," on the other. 98 Kan. 435, 440, 158 P. 38 (1916). Statutes that regulate elections—including voter-registration laws that (necessarily) impose some kind of burden on voting—are, this Court said, "mere exercise[s] of the police power to regulate and preserve the purity of elections" and thus "are usually upheld." *Id.* But "statutes restricting the right to vote are invariably void." *Id.* In colloquial usage, the boundary between "regulation" and "restriction" might not be obvious in every situation. But in *Doane*, this Court established that the term "restriction" applies only to provisions that prohibit an otherwise-eligible group of individuals from voting.[2] Any such "restriction" is "invariably void," while other election-related enactments—*i.e.*, voting "regulations"—are "usually upheld." *Id.* at 440.

Twenty years later, in *Lemons v. Noller*, this Court reaffirmed that it subjects voting regulations—*i.e.*, legislation that does not remove the franchise from a segment of the electorate—to "reasonableness"[3] review, not to a more exacting level of scrutiny. 144 Kan. 813, 827, 63 P.2d 177 (1936). "'The legislature,'" this Court said, "'may adopt such reasonable regulations . . . for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery,

---

[2] *Doane* identified three examples of "restrictions." First, the Court said a Missouri law barring those who did not pay taxes from voting on a certain issue was a "restriction." *Doane*, 98 Kan. at 440. Second, a Kansas law barring those who did not own property from voting in drainage-district elections was a "restrict[ion]." *Id.* at 439 (citing *State ex rel. Gilson v. Monahan*, 72 Kan. 492, 495, 84 P. 130 (1905)). And, finally, the statute at issue in *Doane* itself was an unconstitutional "restriction" because it barred city dwellers from voting for their county's school superintendent, even though the superintendent had countywide jurisdiction. *Id.* at 436, 441.

[3] This Court, unsurprisingly, has stated that "reasonable" basis review is the same thing as "rational" basis review. *Kansas v. Risjord*, 249 Kan. 497, 501, 819 P.2d 638, 642 (1991) (discussing "the 'rational' or 'reasonable' basis test").

and fraud . . . .'" *Id.* at 829 (quoting *Taylor v. Bleakley*, 55 Kan. 1, 15, 39 P. 1045 (1895)).[4]

Finally in this vein, dual-track review is consistent with this Court's recent decision in *Hodes & Nauser v. Schmidt*, 309 Kan. 610, 613, 440 P.3d 461 (2019). In its opinion, the court of appeals relied on *Hodes* for the proposition that strict scrutiny applies whenever "a fundamental right is implicated." *League of Women Voters*, 63 Kan. App. 2d at 206 (quoting *Hodes*, 309 Kan. at 663). The court of appeals then reasoned that, as "[t]he right to vote is a fundamental right," per *Hodes* "strict scrutiny applies here," because H.B. 2183 affects voting. *Id.* at 208.

---

[4] This Court, in *Lemons*, went on to make many additional statements directly applicable to this case—and directly contradicting the court of appeals's decision to apply strict scrutiny. This Court noted, for example, that, when it comes to regulation of voting and elections, "the constitutional convention left much to the discretion of the legislature . . . ." *Id.* at 825. It also opined that voter-registration laws are constitutional in Kansas, notwithstanding the fact that the Kansas Constitution makes no mention of them and "even though [such laws] require the voter to do some acts to establish his right to vote, and though [such laws] frequently operate to deprive a legal voter of his vote" because of his failure to register. *Id.* at 817.

The Court continued discussing registration laws in language foreshadowing the present case, noting that such laws are constitutional even though "[i]t is true [that] isolated instances may occur where a party[,] through absence or sickness[,] is unable to register, and so loses his vote . . . ." *Id.* at 825 (citation and internal quotation marks omitted). And it went on to note—in terms even more squarely applicable to this case—that "the legislature has the right to require proof of a man's qualification" to vote, that "it has a right to say when such proof shall be furnished, and before what tribunal," *id.*, and that this is so despite the fact that such rules may make voting marginally more difficult for some and may even—in light of what the U.S. Supreme Court has referred to as "[b]urdens . . . arising from life's vagaries," *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197, 128 S. Ct. 1610 (2008) (Stevens, J., lead opinion)—in some instances prevent the hapless elector from casting his or her ballot. That is, laws specifying methods of proof of eligibility are constitutional even though, for example, "[a] naturalized foreigner may lose his naturalization papers, and the court where he was naturalized may be at the very extreme of the land, and so, for lack of the legal evidence [required], he may lose his vote" in a given election. *Lemons* at 825 (citation and internal quotation marks omitted). *Cf. Crawford*, 553 U.S. at 197 (Stevens, J., lead opinion) (Indiana's photo ID requirement was constitutional under *Anderson/Burdick* even though "impose[d] some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo on the identification because he recently grew a beard.").

But the court of appeals ***completely ignored*** all of this. It cited *Lemons* only once, for an innocuous, unrelated proposition. *League of Women Voters*, 63 Kan. App. 2d at 210.

Hodes, however, does nothing to undermine, and indeed supports, the long-standing dual-track approach. *Hodes* did say that strict scrutiny review applies to any "infringement—regardless of degree" of the constitutional right to abortion access established by the Court. *Hodes*, 309 Kan. at 669. But this is akin to the Court's pronouncement in *Doane* that legislation "restrict[ing]" the constitutional right to vote (*i.e.,* legislation that affirmatively removes the franchise from a constitutionally qualified voter) is "invariably void," though the *Doane* standard is even stricter. *Doane*, 98 Kan. at 440. And *Hodes* was also careful to note that, *before* a court applies strict scrutiny to a statute, "it must be sure the action actually impairs the [fundamental] right" at issue. *Hodes*, 309 Kan. at 672. That is, except in cases of obvious, direct infringement, courts first "need to assess . . . whether the action only *appears* to contravene a protected right . . . ." *Id.* (emphasis added). Only if such an infringement is directly present does strict scrutiny apply. *See id.* at 671-72. As will be shown in part B, below, regulations like the signature-verification and ballot-collection measures at issue here do *not* "contravene" the constitutional right to vote and, thus, per *Hodes*, are not subject to strict scrutiny.

In adopting a dual-track approach, this Court and the U.S. Supreme Court by no means stand alone. To the contrary, state courts across the country have consistently adopted dual-track systems subjecting "severe" restrictions on the core of the franchise to strict scrutiny, while examining other voting-related rules under the rational-basis test or a similarly deferential standard. In fact, so far as RITE has been able to determine, every state supreme court to have weighed in on the issue has rejected the rigid strict-scrutiny approach advanced by the court of appeals. Courts in at least 34 states have either explicitly adopted the *Burdick* dual-track approach (also termed the "*Anderson/Burdick*" approach, in reference to U.S. Supreme Court precedent predating, and referenced by, *Burdick*) or adopted a similar dual-track system that subjects the vast majority of

non-severe voting enactments to a rational-basis or other relaxed level of scrutiny.[5] Again, so far as RITE can tell, *no* State has adopted the pure-strict-scrutiny approach used by the court of appeals.[6] In other words, the court of appeals's decision in this case is a national aberration.

The States (and federal courts) stand united on this issue for good reason. The dual-track system recognizes both the eligible citizen's fundamental right to vote as well as the State's constitutional prerogative to regulate the voting process. It protects the former by subjecting laws that severely restrict the right to cast one's vote to strict scrutiny and protects the latter by providing that all other non-discriminatory election laws—those the State deems necessary or useful for election administration, security, accuracy, reliability, voter confidence, and the like—are subject to ordinary, deferential review.

The right to vote, after all, is unlike many other core constitutional rights Americans

---

[5] In addition to the 25 States and cases cited in Defendants-Appellants' Petition for Review, *see Blevins v. Chapman*, 47 So. 3d 227, 231 (Ala. 2010) ("[A]lthough the right to vote is itself a fundamental right, not every law that affects this right is subject to strict-scrutiny analysis."); *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 346, 121 P.3d 843 (Ct. App. 2005) (applying *Burdick*); *Fay v. Merrill*, 338 Conn. 1, 52, 256 A.3d 622 (2021) (applying "defer[ential]" standard of review to challenged voting regulation); *Orr v. Edgar*, 298 Ill. App. 3d 432, 438, 232 Ill. Dec. 469, 698 N.E.2d 560 (1998) ("[I]t is . . . 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."); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 766 (Ind. 2010) (upholding voting regulation based on "reasonableness and uniformity" review); *Election Integrity Project of Nev. v. Eighth Judicial Dist. Court of Nev.*, 473 P.3d 1021, 2020 Nev. Unpub. LEXIS 962, *2 (Nev. 2020) (citing *Burdick* and upholding voting regulation after applying rational-basis test); *Fisher v. Hargett*, 604 S.W.3d 381, 405 (Tenn. 2020) (upholding voting regulations that created a "moderate" burden because the state's interests in "the efficacy and integrity of the elections process" justified that burden); *Carlson v. San Juan County*, 183 Wash. App. 354, 376, 333 P.3d 511 (2014) (applying dual-track *Burdick* system); *State ex rel. Blankenship v. Warner*, 241 W. Va. 362, 372, 825 S.E.2d 309 (2018) (same).

[6] The lone possible exception only proves the rule. In 2022, a Montana trial court issued an opinion that would "broadly apply[] strict scrutiny review to all laws affecting the fundamental right to vote." *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 46, 410 Mont. 114, 140, 518 P.3d 58. The Montana Supreme Court is presently reviewing that overbroad decision on the merits. *See* Docket, *Montana Democratic Party v. Jacobsen*, Mont. Sup. Ct. Case No. DA 22-0667.

cherish. The right to freedom of speech, the right to freedom of religion, and the right to privacy, for example, are largely rights to be free from government interference. By contrast, the right to vote is meaningless *without* government "interference." That is, without government administration and regulation, elections would not occur. Moreover, it is insufficient to endow legislatures only the power necessary to "regulate" the electoral process into existence. Rather, these democratically elected policymakers also must have the power to enact reasonable and nondiscriminatory regulations that they determine to be useful to ensuring those elections are fair, open, secure, orderly, accurate, and confidence-inducing. "Fair, honest, and orderly elections do not just happen. Substantial state regulation is a prophylactic that keeps the democratic process from disintegrating into chaos. Consequently, there is a strong state interest in regulating all phases of the electoral process . . . ." *Perez-Guzman v. Gracia*, 346 F.3d 229, 238 (1st Cir. 2003). The need for robust regulation is especially acute when mail-in voting is at issue, for, as this Court has said, "it must be conceded that voting by mail increases the . . . opportunity for fraud." *Sawyer v. Chapman*, 240 Kan. 409, 414, 729 P.2d 1220 (1986).

B. Applying the Dual-Track Approach to this Case Is Consistent with the Text and History of the Kansas Constitution.

A dual-track approach to the review of voting legislation is not only in line with this Court's own precedent, federal precedent, and the precedent of state courts of last resort across the country—it is also consistent with constitutional text and history. In *Hodes*, this Court reiterated its long-established method for interpreting constitutional provisions. First, text is preeminent:

> "[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing."

Id. at 622-23 (quoting *Wright v. Noell*, 16 Kan. 601, 607 (1876)). Second, "[w]hen the words themselves do not make the drafters' intent clear, courts look to the historical record[.]" *Id.* at 623.

The core portion of the Kansas Constitution establishing a constitutional right to vote is simple and straightforward: "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 Constitution accordingly (with exceptions not relevant here[7]) extends to all adult citizens who reside in the Kansas "voting area" in which an election is to be held the right to serve as an elector. No one so qualified may be barred from voting. Thus, any law that attempts to do so falls squarely onto the strict track of the dual-track review system and, as this Court said in *Doane*, is "invariably void." *Doane*, 98 Kan. at 440.

But in addition to establishing this right to vote, the Kansas Constitution also states that "[t]he legislature *shall* provide by law for proper proofs of the right of suffrage." Kan. Const. art. 5, § 4 (emphasis). Keeping in mind that "'in written constitutions, . . . it is but reasonable to presume that every word has been carefully weighed,'" *Hodes*, 309 Kan. at 622-23 (quoting *Wright*, 16 Kan. at 607), the use of the word "shall" here means that the Constitution not only permits, but *mandates*, that the Legislature require would-be voters to provide "proper proofs" of eligibility to vote, Kan. Const. art. 5, § 4. Further, the Constitution is silent as to what these "proper proofs" might look like, and, just as this Court has endorsed the notion that courts interpreting the Kansas Constitution should expect that "every word has been carefully weighed," so also has it stated that proper interpretation assumes that no words have been "omitted [from the Constitution] without a design for so doing." *Id.* at 623 (quoting *Wright*, 16 Kan. at 607). Pursuant to these canons, then,

[7] Felons who have not been "restored to [their] civil rights" and individuals committed "to a jail or penal institution" are exceptions to the right. Kan. Const. art. 5, § 2.

the Kansas Constitution makes clear that the Legislature has a free hand to prescribe what proofs it reasonably deems necessary. Thus, rational-basis review is the correct standard to apply to all proofs-related legislation, including the signature-verification measure challenged here, so long as the measure does not remove the franchise from a group of otherwise-eligible Kansans.[8]

A similar rationale applies to measures establishing the proper methods for returning advance ballots, including the challenged ballot-collection regulation. The ballot-collection regulation does not exclude any group of Kansans—protected class or otherwise—from serving as electors. Moreover, the Kansas Constitution is entirely silent on the subjects of absentee and advance voting. And pursuant to *Hodes* and basic principles of interpretation, this silence refutes the notion of a constitutional right to vote via absentee or advance ballot. *A fortiori*, the Kansas Constitution certainly does not protect a "right" to use a large-scale ballot collector. Therefore, rational-basis review applies to the ballot-collector cap too.

Further, to the extent this Court might conclude that the text of the Kansas Constitution itself "do[es] not make [this] intent clear," a look at the "historical record," *Hodes*, 309 Kan. at 623, removes all doubt as to whether the Kansas Constitution creates a right to advance (*i.e.*, no-excuse absentee) balloting, to say nothing of a constitutional right to submit such a ballot without "proper proofs," Kan. Const. art. 5, § 4, or via a large-scale, third-party ballot collector. The governing section of the Kansas Constitution—article 5, section 1—was included in the original

[8] Incidentally, a finding that signature-verification is not rational would be aberrational indeed, considering that, from New York to California, many states—in fact, *most* states—require absentee-ballot signature verification. *See* National Conference of State Legislatures, *How States Verify Voted Absentee/Mail Ballots*, https://tinyurl.com/2ehn56vf (visited Sept. 25, 2023) (27 states require absentee-ballot signature verification). *See also* N.Y. Election Law § 9-209(2)(c) ("[T]he central board of canvassers shall compare the signature . . . on each ballot envelope with the signature on file" to determine if the signatures "correspond[.]"); Cal. Election Code § 3019(a)(1) ("Upon receiving a vote by mail ballot, the elections official shall compare the signature on the identification envelope with" the signature on file.).

Wyandotte Constitution and was last amended in the early 1970s. But Kansas law did not even permit advance voting until 1995.[9] *See* S.B. 232 (1995). And, in fact, no state in the country permitted no-excuse absentee voting prior to the beginning of the 1980s, when California first took that step. *E.g.*, MIT Election Data and Science Lab, *Voting by Mail and Absentee Voting*, https://tinyurl.com/45bn5rky (visited Sept. 25, 2023) ("In the 1980s, California became the first state to allow eligible voters to request absentee ballots for any reasons at all . . . ."). History thus supplements the constitutional text to show that neither the drafters of the Wyandotte Constitution nor the authors of later amendments could have possibly intended to constitutionalize a right to advance voting. *A fortiori*, there is no right to avoid verifying one's identity or to have one's completed advance ballot delivered by an individual who gathers such ballots *en masse*. Accordingly, H.B. 2183 does not "actually impair[] the [constitutional] right" to vote. *Hodes*, 309 Kan. at 672. Rational-basis review is appropriate. Strict scrutiny is not.

C. The Court of Appeals' Unworkable Strict-Scrutiny Test Would Produce Irrational Results and Arrogate to the Judiciary the Legislature's Authority to Regulate Elections.

The pure-strict-scrutiny approach is not only inconsistent with the Kansas Constitution, this Court's precedent, and the precedent of the federal courts and every state court of last resort to weigh in on the issue: It is also ill-advised because it would produce irrational and norm-defying results, as well as a substantial transfer of power from the Legislature to the judiciary.

The pure-strict-scrutiny rule, if allowed to stand, will mean that any new enactment diluting voting and election safeguards would be exempt from searching review because it would not "burden" the voting process, while all other voting and election enactments, however mundane or

[9] Note that application of the court of appeals's pure-strict-scrutiny approach to voting law could lead to the absurd conclusion that this 1995 legislation was constitutionally *mandatory*.

ministerial, would be subject to strict scrutiny. Under such a system, Kansas courts would readily bless new enactments that, *e.g.*, permitted voting by app, enfranchised minors, or expanded the early-voting period by orders of magnitude (think months-long, hyper-individualized elections rather than a reasonable period of early voting followed by an election *day* of state-wide, collective decision making), while any statute strengthening election security or reducing voting hours, locations, or methods would not survive without satisfying the rigorous, nearly impossible demands of strict scrutiny. Thus, if the Legislature enacted a law expanding the early-voting period by five days, that "broadening" statute would be exempt from strict-scrutiny review. But if, the following year, the Legislature reduced the early-voting period by two days (for a net gain of three days over the two-year period), that change would be subject to strict scrutiny, as the year-over-year reduction would constitute a comparative "burden" upon the right to vote. The end result of such a system would be a one-way ratchet of continually loosened voting standards. Courts, not the Legislature, would set election-law policy in Kansas.

Of course, the Legislature could, in theory, still enact regulations "burdening" the electoral process, so long as it was able to assemble a record proving that any such enactment was strictly "necessary" to advance a "compelling state interest" and that it was "narrowly tailored" to do just that. *League of Women Voters*, 63 Kan. App. 2d at 222. *But see Farley v. Engelken*, 241 Kan. 663, 670, 740 P.2d 1058 (1987) (in most cases, "the level of scrutiny . . . applied . . . determines the constitutionality of the statute"). But even assuming the Legislature could occasionally hurdle the strict-scrutiny bar, still much damage would be done to its prerogatives by a standard of review that makes such taxing demands of that body every time it seeks to legislate on voting and elections.

Simply put, strict scrutiny is far too heavy a burden to impose upon a Legislature charged not only with preventing elections harms before they can occur but also with allocating limited

resources and making important tradeoffs across a plethora of policy areas of high importance to Kansans. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters" and thus legislating prophylactically to prevent fraud and, separately, but relatedly, to promote "public confidence in the integrity" of elections. *Crawford*, 553 U.S. at 196 (Stevens, J., lead opinion). And "it is the indisputable prerogative of the legislature to declare the public policy of the state." *In re Casebier*, 129 Kan. 853, 856, 284 P. 611 (1930). But application of strict scrutiny to every statutory change that "burdens" the voter or the voting process, however slightly or tangentially, will strip the Legislature of much of this policymaking power and place that power instead in the hands of the judiciary.

Say, for example, that the Legislature wants to attract more and better teachers to the state through financial incentives. It reduces funding to other programs to free up money for the teacher initiative. One of the cost-saving measures it enacts is a shortening of the early-voting period from the current 20 days to two weeks. Such a decision would be a reasonable—and likely popular—one that would provide lasting benefits for Kansas families. But the reduction in the number of early-voting days might not survive strict-scrutiny, or the Legislature might give up on the plan rather than face the daunting task of surviving such scrutiny. Thus, in such a situation—and in many others—application of strict scrutiny would severely hamper the Legislature's ability to enact the public policies that the people of Kansas have tasked it with setting. It is the elected Legislature, and not appointed judicial officers, that is best situated to weigh, and allocate resources between, these competing—and often diametrically opposed—interests.

The Legislature's primacy in setting the rules governing voting and elections is not only prudent as a matter of policy and practice—it is also mandatory as a matter of constitutional law, both State and federal. The federal constitution gives the "Legislature[]" "in each State" the power

to "prescrib[e]" the "Times, Places and Manner of holding" federal elections. U.S. Const. art. I, § 4, cl. 1. The Kansas Constitution, likewise, and in greater detail, assigns to the Legislature the task of setting election law. Article 4, § 1 states that "the [L]egislature shall by law" set the modes of voting. And, after enumerating the qualifications of electors, Art. 5, § 1, the Kansas Constitution, as previously discussed, explicitly *mandates* that the Legislature "provide by law for the proper proofs of suffrage," Art. 5, § 4. The Constitution does not specify what form(s) of proof are or are not satisfactory to this task. That decision is for the Legislature. But one thing is sure: Whatever form(s) of proof the Legislature does select, "provid[ing]" those "proper proofs," Kansas Const. art 5, § 4, will constitute an affirmative "burden" on voters—a burden the Constitution requires.

The court of appeals decision stands this constitutional text on its head, transforming a constitutional command into a constitutional impediment. The signature-verification component of H.B. 2183 was enacted in compliance with the constitutional mandate for "proper proofs" legislation. But this requirement for "proper proofs" of eligibility, the court of appeals said, "burdens"[10] the constitutional right to vote by making the voting process (marginally) more difficult, and, thus, the statute must run the strict-scrutiny gauntlet. Accordingly, it is in doing exactly what the Kansas Constitution requires the Legislature to do that the signature-verification requirement, by the court of appeals's lights, runs afoul of that very document.

D. A Dual-Track System Is Easily Administered, Yields Logical Results, and Leaves Courthouse Doors Open to All Valid Claims of Disenfranchisement.

Finally, a dual-track system of review is superior because it is easily administered and yields predictable results that, unlike the pure-strict-scrutiny approach, are both logical and workable. Under the dual-track system, determining what sorts of enactments should be placed

[10] Recall that the court of appeals reached this specious conclusion despite the curing and disability exceptions found in the signature-verification measure.

on the more demanding track of review is simple enough: Does the enactment bar a constitutionally eligible group from participating in an election? And determining placement on the corresponding lower track of review is just as straightforward, given that the rational-basis track applies to all situations in which the question just posed in answered in the negative. Importantly, the dual-track system closes the courthouse doors to no valid claimant, as plaintiffs who effectively plead their claims will always have the opportunity to show that an enactment operates to bar a group from exercising the franchise. Application of the standards of review associated with the two tracks is nearly as uncomplicated as determining which track applies to a particular enactment, given that laws within the scope of the "upper" track will always or almost always (depending on whether this Court sticks to its "invariably void" approach articulated in *Doane*, 98 Kan. at 440, or instead adopts strict-scrutiny review) fail to pass muster, while all *reasonable* enactments will survive on the lower, more forgiving track.

Even more importantly, the dual-track system is not only easily administered and its results predictable, but those results are logical and workable. The dual-track approach, rather than freezing the State's voting system in time or constitutionalizing minutiae, robustly protects the rights of all eligible citizens to serve as electors while giving to the Legislature the policymaking room that it needs—and that the Constitution ensures it has—to regulate, and modify, the voting system so as to best strike the balance it deems appropriate between competing factors of security, ease of access, cost, and the like.

CONCLUSION

For all of these reasons, RITE urges this Court to reject the pure-strict-scrutiny approach adopted by the court of appeals and instead utilize the dual-track system of review set out in this Court's own precedents and used by courts across the country.

Dated: September 25, 2023

Respectfully Submitted,

/s/ George Lewis
George Lewis (#28785)
GRAVES GARRETT LLC
1100 Main St., Ste. 2700
Kansas City, MO 64105
T: (816) 256-4144
F: (816) 256-5958
glewis@gravesgarrett.com

Emmett E. Robinson (*pro hac vice*)
ROBINSON LAW FIRM LLC
6600 Lorain Avenue #731
Cleveland, OH 44102
T: (216) 505-6900
F: (216) 649-0508
erobinson@robinsonlegal.org

Counsel for Amicus Curiae, Restoring Integrity and Trust in Elections

CERTIFICATE OF SERVICE

I certify that on September 25, 2023, I electronically filed this brief with the Clerk of the Court in accordance with Kan. Sup. Ct. R. 1.11(b), which will send electronic notifications of the filing to all registered counsel of record. I also certify that a copy of the brief will be emailed to the following:

KRYSTLE M.S. DALKE	kdalke@hinklaw.com
MARISA A. O'GARA	mogara@elias.law
MOLLIE DIBRELL	mdibrell@elias.law
ELISABETH C. FROST	efrost@elias.law
DAVID L. ANSTAETT	danstaett@perkinscoie.com
KAYLAN PHILLIPS	kphillips@publicinterestlegal.org

BRADLEY BENBROOK	brad@benbrooklawgroup.com
STEPHEN DUVERNAY	steve@benbrooklawgroup.com
EMMETTE ROBINSON	erobmson@robmsonlegal.org
ERIC W. LEE	elee@judicialwatch.org
MICHELLE M KEMP	mkemp@perkinscoie.com
KAREN ELLEN LEVE	kleve@aclukansas.org

/s George Lewis
George Lewis

Counsel for Amicus Curiae