

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.

RESPONSE TO DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITY

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

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Defendants filed a notice of supplemental authority attaching *League of Women Voters v. Thurston*, 2023 WL 6446015 (W.D. Ark. Sept. 29, 2023), but *Thurston* is a federal district court decision adjudicating a challenge brought under the U.S. Constitution and has nothing to say about the test to apply to Plaintiffs' claims, which are brought under the Kansas Constitution and based on its unique text, which differs significantly from the federal constitution (where the right to vote is implied, rather than explicit), as well as this Court's precedent.

As has been discussed, the balancing test applied by federal courts to claims challenging state laws under the federal constitution is shaped by concerns of comity that are not present when a state court is interpreting its own constitution and applying it to its own state's laws. The decision in *Thurston*, moreover, illustrates another reason why *Anderson-Burdick* is a bad fit for Kansas: it is not even consistently applied by the federal courts. Thus, in *Thurston*, although the court acknowledged that an "alarming" percentage of ballots were rejected because of the Arkansas law in question, it found that, under the Eighth Circuit's particularly stringent and subjective version of *Anderson-Burdick*, "the relevant question is not the number of voters disqualified, but rather the number who were unable to become qualified with reasonable effort." *Id.* at *12. It is not clear what "number" of impacted voters would be too many, nor what "reasonable effort" means, and this version of *Anderson-Burdick* appears unique to the Eighth Circuit. Indeed, the *Thurston* court recognized the case may have come out differently in a different circuit. *See id.* (citing *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019)).

In sum, if *Thurston* is useful here it is because it illustrates the malleability and

unpredictability of the *Anderson-Burdick* test, even as applied by federal courts. In addition, it was decided on summary judgment, with a full factual record. Here, the district court dismissed at the outset. Under any standard, granting the motion to dismiss was error.

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Respectfully submitted, this TK day of October, 2023.

/s/ Jason Zavadil

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