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 AMICI CURIAE BRIEF OF PROFESSORS RICHARD E. LEVY AND STEPHEN R. McALLISTER

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 *amici curiae* brief of Professors Richard E. Levy and Stephen R. McAllister is a testament to the dangers of oversimplification and the perniciousness of partisanship in the election law space. While characterizing themselves as "scholars of state constitutional law," Br. at 1, the professors largely ignore the history of this State and pay little to no homage to this Court's case law regarding the regulation of voting and elections. Worse still, they significantly misrepresent the jurisprudence of other jurisdictions on these issues.

Amici spills considerable ink describing the importance of the right to vote in the abstract. But it makes no sense to describe that right at the highest level of generality. The absolutism that the professors peddle is inconsistent with the way that voting rights have always been, and *must be*, enforced. Whereas most individual constitutional rights such as speech, privacy, and self-determination are predicated on minimizing governmental interference, elections by their very nature necessitate extensive government regulation. *Every* election-related statute "inevitably affects – at least to some degree – the individual's right to vote." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). To require all such laws – no matter how *de minimis* their impact on voting – to survive the crucible of strict scrutiny would hobble election administration. In no universe guided by logic or reason (outside academia, perhaps) is that rational.

Amici's proposal would also substantially curtail authority that is explicitly delegated to the legislature by the Kansas Constitution, ushering in a major transformation of the separation of powers. It would inject the judiciary into the role of micromanaging the electoral process and constantly second-guessing state and county election officials. While

adorned with fancy constitutional garb, *amici*'s attack on the challenged statutes and the Defendants' legal position is ultimately just a dispute over policy, and that is a role for which the judiciary is ill equipped. Absent a substantial infringement on the right to vote, this Court should properly defer to its coordinate branch in such matters.

Amici devote much of their brief to arguing that a balancing test like the *Anderson-Burdick* framework employed by both the federal judiciary and nearly every other state is inappropriate. Their insistence that strict scrutiny is a more suitable fit in Kansas is devoid of merit for all the reasons that Defendants have articulated in the mountain of briefing in this case. There is no need to reiterate that discussion here other than to say that *amici*'s approach is *guaranteed* to produce chaos and erode public confidence in the integrity of the electoral process. If this Court is concerned about the lack of certainty in balancing tests in general, or the *Anderson-Burdick* test in particular, the only viable alternative is Justice Scalia's binary test elucidated in his concurrence in *Crawford v. Marion County Election Board*, 553 U.S. 181, 204-08 (2008) (i.e., *severe burdens* on voting are subjected to strict scrutiny, while all other regulations are judged on a rational basis standard).

Like the ACLU, *amici* additionally claim that most other state courts reflexively subject all election-related statutes to heightened scrutiny. Just as was true of the ACLU's *amicus* brief, the professors' *amici* brief is categorically wrong on that point. *Amici* have misstated the holdings in those cases and/or omitted opinions that put the cited decisions in proper context. It is this part of the brief that Defendants will focus on in their response. And once again, we urge the Court to read *amici*'s brief with caution.

II. – Argument

Amici assert that other states "frequently protect voting rights more vigorously than do federal courts." Br. at 11. This claim is unsupported by precedent.

Amici first maintain that six states (Mississippi, Idaho, New Mexico, Illinois, Washington, and Wyoming) apply "strict scrutiny as the proper standard for assessing challenges to voting restrictions." *Id.* Not true. The New Mexico Supreme Court *explicitly* applied *Anderson-Burdick* in a state constitutional challenge addressing the burden of an election regulation on the right to vote. *See Crum v. Duran*, 390 P.3d 971, 973-77 (N.M. 2017).[1] Similarly, Illinois and Idaho do *not* apply strict scrutiny to all election law challenges but instead evaluate the nature of the law before determining the level of scrutiny. *See* Defs.' Resp. to ACLU's *Amicus* Br. ("Defs.' ACLU Resp.") at 2-3; *Van Valkenburg v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000) (stating that "time, place or manner voting restriction[s]" are entitled to "a more deferential standard of review"); *see also Babe Vote v. McGrane*, No. CV01-23-04534 (Ada Cnty., Idaho Oct. 2, 2023) (explaining Idaho's approach) (attached to Defs.' Rule 6.09 Letter on Oct. 5, 2023).

As for Mississippi, Washington, and Wyoming, *amici* merely pluck language from state court cases that quote the U.S. Supreme Court's general proposition that the right to vote is fundamental, and thereby imply that the standard of scrutiny over challenges to laws

[1] *Amici* seek to distinguish *Crum* by arguing that it was a "challenge to a state's closed primary system" and thus somehow inapposite. Br. at 13, n.10. The fundamental point, however, is that the New Mexico Supreme Court clearly stated that, "[a]lthough state legislatures cannot unduly infringe on a voter's right to vote . . . legislatures may reasonably regulate elections[.]" *Crum*, 390 P.3d at 974 (citations omitted). The court then adopted the *Anderson-Burdick* test for "challenge[s] to a state election law." *Id.*

affecting voting in those states must be settled. That is non-sequitur and Defendants previously addressed the error in such reasoning. Defs.' ACLU Resp. at 2-3.

Endeavoring to muddy the waters with other states' precedent, *amici* invoke odd distinctions. For example, with respect to Hawaii and North Dakota, they posit that these states recognize voting as a "fundamental right," but have not "link[ed] the two principles in a decision." Br. at 12. Regarding Hawaii, *amici* are simply wrong. *See 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).[2] As for North Dakota, the law in that state is essentially the same as Mississippi, Wyoming, and Washington. *See, e.g., Poochigian v. City of Grand Forks*, 912 N.W.2d 344, 349 (N.D. 2018) (citing *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 579 (N.D. 1983), which merely references broad statements from the U.S. Supreme Court about the "right to vote" being fundamental)).

Next, *amici* insist that Georgia, Nebraska, California, Michigan, New Hampshire, Ohio, Colorado, Florida, Maryland, North Carolina, Pennsylvania, New York, and New Mexico either (i) did not separately evaluate a state constitutional claim, (ii) analyzed dif-

[2] Similar to what they attempted to do with New Mexico, *amici* subsequently cite to *Hustace* but blandly claim it is not relevant because it was a "pre-*Anderson* challenge" involving minimum vote requirements. Br. at 13, n.10. Nonsense. Amici surely know that the *Anderson-Burdick* test originated from cases like *Storer v. Brown*. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) (relying upon *Storer*); *Burdick*, 504 U.S. at 433 (same).

ferent fundamental rights like equal protection, freedom of speech, or freedom of association rather than the "right-to-vote," or (iii) scrutinized "other election matters" like ballot access. Br. at 12-13. Defendants have already addressed many of these incorrect assertions. Defs.' ACLU Resp. at 2-5. But more problematic for *amici*'s position is the concession they are making. Their argument necessarily acknowledges that in legal challenges alleging that election statutes burden fundamental rights, courts generally apply the *Anderson-Burdick* test, not strict scrutiny. Moreover, the fundamental right underlying most of these equal protection claims was still the right to vote, and the court applied *Anderson-Burdick* balancing rather than reflexive heightened scrutiny. *See, e.g., In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 452-55, 461-63 (Mich. 2007); *see also Libertarian Party N.H. v. State*, 910 A.2d 1276, 1280-81 (N.H. 2006) (rejecting the argument that "the equal right to vote and hold office," despite being fundamental rights under the New Hampshire Constitution, were subject to strict scrutiny, and instead holding that *Anderson-Burdick* applied).

Turning to Missouri and New York, while *amici* are correct that those courts did not *specifically* apply *Anderson-Burdick,* Br. at 11, both states reject the application of strict scrutiny to all election law challenges. They instead set the level of scrutiny based on the severity of the burden, just as Defendants advocate here. Defs.' ACLU Resp. at 7-8.

Amici next aver that many of the jurisdictions where *Anderson-Burdick* was adopted nevertheless apply "a more voter-protective manner," and courts in those states "ratchet up" the level of scrutiny depending on the burden. Br. at 14. But this merely describes the *Anderson-Burdick* sliding-scale test. Different factual circumstances may lead to different

results. That's hardly remarkable and certainly does not warrant heightened scrutiny in a case like this where any burden on the right to vote by Kansas' statutes is trivial to non-existent.

Finally, *amici* rely heavily on an "Explainer" prepared by a staff attorney with the State Democracy Research Initiative in Wisconsin. Br. at 12 (citing Emily Lau, *Explainer: State Constitutional Standards to Adjudicating Challenges to Restrictive Voting Laws*, State Democracy Research Initiative (Oct. 3, 2023) (*available at* https://perma.cc/2ZXY-PA8B). According to *amici*, the Explainer points out that "more than half" of the states "directly or indirectly" support applying strict scrutiny to state constitutional challenges to election-related statutes and that "only two" have adopted "a watered-down approach." *Id.* That is pure nonsense, as discussed below.

The author of this "Explainer" says that she performed a 50-state survey addressing how states treat *Anderson-Burdick* in cases evaluating alleged infringements on the right to vote. She claims her survey reveals that: (i) 27 states have "some precedent that affirmatively points toward" strict scrutiny of "restrictive voting laws"; (ii) 16 states apply, if not formal strict scrutiny, something "more stringent than weak-form federal *Anderson-Burdick*" (a term she apparently uses to describe Justice Scalia's two-track approach from his *Crawford* concurrence); (iii) five states offer "no meaningful indication" of what standard they would apply; and (iv) two states utilize Justice Scalia's binary approach.

The author's analysis is, charitably characterized, inaccurate, and simply does not match the case law that she purports to summarize. While she claims the precedent of 27 states "points to" strict scrutiny, she then remarkably qualifies her assertion by noting that

(with five exceptions – Arkansas, Kansas, Colorado, Montana, and New Mexico, all discussed below), *none of those courts have "directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision.*" Talk about the caveat completely undermining the premise.

In the five states without that qualifier – i.e., where the author suggests that judicial precedent expressly "points toward strict scrutiny" – her characterization of the case law is highly misleading. For Kansas, the author cites only the Court of Appeals decision below, which is now pending before this Court. For Arkansas, she points to a state district court decision that the Arkansas Supreme Court stayed just one week after the opinion was issued and is currently pending before the latter. *Thurston v. League of Women Voters of Ark.*, No. CV-22-190, *Order Granting Mot. to Expedite and to Stay* (Apr. 1, 2022) (attached). For Montana, the author references a decision in which the Montana Supreme Court expressly held it was *not* deciding the level of scrutiny that would apply to the challenge given the case's procedural posture. *See Driscoll v. Stapleton*, 473 P.3d 386, 393 (Mont. 2020). As for New Mexico and Colorado, the author simply ignores cases that applied *Anderson-Burdick* in election law challenges. *See Lorenz v. State*, 928 P.2d 1274, 1277-78 (Colo. 1996); *Crum*, 390 P.3d at 973-77.

With respect to the remaining cases that purportedly support applying strict scrutiny, the author reaches her conclusion by either (i) ignoring decisions from those jurisdictions that already relied upon *Anderson-Burdick* when addressing state constitutional challenges

to election laws,[3] (ii) acknowledging that case law in the jurisdiction previously applied *Anderson-Burdick*, but then inexplicably claiming that strict scrutiny would nevertheless apply in future cases,[4] or (iii) referencing cases that make only generalized statements about fundamental rights with no relevant analysis.[5] None of this is helpful to the Court.

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[3] For Colorado, the author does not cite *Lorenz*, 928 P.3d at 1277-78. For Hawaii, the author ignores *Hustace*, 588 P.2d at 919-22. For Illinois, she fails to cite *Puffer-Hefty Sch. Dist. No. 69 v. Du Page Reg'l Bd. of Sch. Trs.*, 789 N.E.2d 800, 808-10 (Ill. App. Ct. 2003), *Orr v. Edgar*, 698 N.E.2d 560, 564-65 (Ill. App. 1998), or *Gercone v. Cook Cnty. Officers Electoral Bd.*, No. 1-22-0724, 2022 WL 2072225, at *14 (Ill. App. June 8, 2022). For New York, she does not cite *Moody v. N.Y. State Bd. of Elections*, 86 N.Y.S.3d 25 (N.Y. App. 2018) or *Kowal v. Mohr*, 188 N.Y.S.3d 845, 848-49 (N.Y. App. 2023). For North Carolina, she makes no mention of *Libertarian Party of N.C. v. State*, 707 S.E.2d 199, 204-06 (N.C. 2011). For Ohio, she omits *State ex rel. Brown v. Ashtabula City Bd. of Elections*, 31 N.E.3d 596, 598-99 (Ohio 2014), *Purdy v. Clermont Cnty. Bd. of Elections*, 673 N.E.2d 1351, 1354-56 (Ohio 1997), and *Libertarian Party of Ohio v. Husted*, 97 N.E.3d 1083, 1101 (Ohio Ct. App. 2017). Even in *State ex rel. Maras v. LaRose*, 213 N.E.3d 672, 678 (Ohio 2022), which the author does cite, the court stated that applying *Anderson-Burdick* would not change the result and applied rational basis scrutiny.

[4] For Florida, Maine, Nevada, Washington, and West Virginia, the author acknowledges prior cases where the state court invoked *Anderson-Burdick* in challenges to election laws brought under the state's constitution, yet nevertheless argues that the case law "points toward" applying strict scrutiny in future cases. *See Libertarian Party of Fla. v. Smith*, 687 So.2d 1292, 1121 (Fla. 1996); *Alliance for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 54 (Me. 2020); *Election Integrity Project of Nev., LLC v. Eighth Jud. Dist. Ct.*, 473 P.3d 1021 (Nev. 2020); *Carlson v. San Juan Cnty.*, 333 P.3d 511 (Wash. Ct. App. 2014); *State ex rel. Blankenship v. Warner*, 825 S.E.2d 309, 318-19 (W. Va. 2018). The author also omits *Wells v. State ex rel. Miller*, 791 S.E.2d 361, 374-77 (W. Va. 2016), where the court applied *Anderson-Burdick* in a ballot access case where the plaintiff claimed that voters' rights "to nominate and vote in the general election for a candidate of their choice" were being violated. Suggesting that the case law in Maine and Washington "points toward strict scrutiny" is particularly troubling given that the author acknowledges two cases that applied *Anderson-Burdick*. *See Alliance for Retired Ams.*, 240 A.3d at 49; *Carlson*, 333 P.3d at 519.

[5] *See, e.g., Fay v. Merrill*, 256 A.3d 622, 642 (Conn. 2021) (case involving whether COVID-19 constituted a "sickness" under the absentee ballot case and containing no analysis whatsoever of the level of scrutiny that would apply to an election law challenge, but instead merely acknowledging in passing that that the right to vote is fundamental).

III. – Conclusion

In sum, the suggestion of *amici* (and the Explainer upon which they rely) that most (or even a few) states apply a strict scrutiny standard to all state constitutional attacks on statutes and regulations affecting the right to vote is categorically false. As Defendants have previously noted, the issue in this case is about Kansas law, not the law of any other jurisdiction. But *amici*'s brief is lamentably misleading and of little assistance to the Court.

Respectfully submitted,

/s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I certify that on October 23, 2023, I arranged for the foregoing document to be hand-filed with the Clerk of the Court (given the inaccessibility of the electronic filing system). I also certify that a true and correct copy of the foregoing document was e-mailed to the following individuals:

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APPENDIX

FORMAL ORDER

STATE OF ARKANSAS,)

) SCT.

SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD, ON APRIL 1, 2022, WAS THE FOLLOWING PROCEEDING, TO-WIT:

SUPREME COURT CASE NO. CV-22-190

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE ARKANSAS; SHARON BROOKS; BILENDA HARRIS-RITTER; WILLIAM LUTHER; CHARLES ROBERTS; JAMES SHARP; AND J. HARMON SMITH, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS APPELLANTS

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION – 60CV-21-3138

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS; ARKANSAS UNITED; DORTHA DUNLAP, LEON KAPLAN; NELL MATTHEWS MOCK; JEFFERY RUST; AND PATSY WATKINS APPELLEES

APPELLANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION AND REQUEST FOR EXPEDITED CONSIDERATION. EXPEDITED CONSIDERATION GRANTED; EMERGENCY MOTION FOR STAY GRANTED.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 1ST DAY OF APRIL, 2022.

Stacey Pectol

CLERK

ORIGINAL TO CLERK

CC: DYLAN L. JACOBS, ASSISTANT SOLICITOR GENERAL
BRITTANY EDWARDS, KESIA MORRISON, AND TREY COOPER, ASSISTANT ATTORNEYS GENERAL
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HON. WENDELL GRIFFEN, CIRCUIT JUDGE