Case No. 102569-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VET VOICE FOUNDATION, THE WASHINGTON BUS, EL CENTRO DE LA RAZA, KAELEENE ESCALANTE MARTINEZ, BETHAN CANTRELL, GABRIEL BERSON, AND MARI MATSUMOTO,

Petitioners,

v.

STEVE HOBBS, IN HIS OFFICIAL CAPACITY AS WASHINGTON SECRETARY OF STATE, JULIE WISE, IN HER OFFICIAL CAPACITY AS THE AUDITOR/DIRECTOR OF ELECTIONS IN KING COUNTY AND A KING COUNTY CANVASSING BOARD MEMBER, SUSAN SLONECKER, IN HER OFFICIAL CAPACITY AS A KING COUNTY CANVASSING BOARD MEMBER, AND STEPHANIE CIRKOVICH, IN HER OFFICIAL CAPACITY AS A KING COUNTY CANVASSING BOARD MEMBER,

Respondents.

REPLY BRIEF OF PETITIONERS

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I. Introduction

The Secretary acknowledges that signature verification is essentially broken. Although he claims he is trying to fix it, the Secretary offers this Court no promises that he will. Nor could he. Signature verification is so fundamentally flawed that it cannot be implemented without disenfranchising thousands of Washington voters every election. It will, in fact, *always* result in the wrongful rejection of otherwise lawfully cast ballots. That's precisely why Plaintiffs filed this facial challenge to the signature verification requirement in RCW 29A.40.110(3).

Defendants urge this Court to disregard the extensive evidence of signature verification's egregious disparate impact on Washington voters, disregard this Court's voting-rights precedent, and reject Plaintiffs' claims before even getting to the merits. This Court

should decline that invitation. This Court can and should examine the record and consider the evidence through the lens of the appropriate constitutional standard.

That constitutional standard is not difficult to discern: Washington has long required the application of strict scrutiny for laws that infringe or deny the fundamental right to vote. As the record before this Court demonstrates, signature verification "infringes" and "denies" the right to vote to thousands of fully qualified Washington voters in every election—a group that is disproportionately comprised of young and minority voters.

Rather than grapple with existing law and its application to this record, Defendants instead ask this Court to depart from this long-standing precedent and weaken the Washington Constitution's protections for

the right to vote by applying a vague sliding scale standard of review borrowed from federal law. With all due respect, this argument should be soundly rejected.

Plaintiffs respectfully request that this Court reverse the Superior Court, apply strict scrutiny to the signature verification requirement found in RCW 29A.40.110(3), and remand this case with instructions to enter summary judgment for Plaintiffs.

II. Argument

A. The Constitutionality of a Challenged Statute Is Evaluated Through the Relevant Constitutional Test

Defendants' primary argument is that, because this is a facial challenge, Plaintiffs must establish beyond a reasonable doubt that the statute requiring signature verification cannot be applied in a constitutional manner under any conceivable circumstances and the facts are "generally irrelevant."

Br. of Resp't ("Hobbs Resp.") at 24–30; *see* King Cnty. Canvassing Bd.'s Br. of Resp't ("KCE Resp.") at 41–42. Defendants are wrong as a matter of law. When evaluating the constitutionality of a statute, this Court must apply the relevant constitutional test.

1. A Facial Challenge Does Not Alter the Relevant Constitutional Test

While this Court has used the "no set of circumstances" language in discussing some facial challenges, in practice, the nature of the challenge does not change the burden of proof or alter the application of the relevant constitutional test. That's because, contrary to Defendants' position, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310,

331 (2010). As a practical matter, a facial challenge succeeds "where a statute fails the relevant constitutional test [and therefore] it can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016); *see also Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶¶ 11, 46–119, --- P.3d --- (on facial challenge to voting restrictions, applying relevant constitutional tests to strike down statutes as unconstitutional).[1]

[1] Courts across the country are in accord. *See People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 834 (4th Cir. 2023) (collecting cases applying the relevant constitutional standard to facial challenges); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016) (considering facial challenge "by resort to the analytical framework governing free speech claims"); *N.H.*

The Tenth Circuit's description, and that of other courts, reflects a widespread rejection of the rigid application of the "no set of circumstances" test that Defendants urge here. The phrase derives from *United States v. Salerno*, 481 U.S. 739 (1987), but since then, the United States Supreme Court has repeatedly refused to apply that test. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), for example, a plurality of the Supreme Court noted that, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *Id.* at 55 n.22.

Democratic Party v. Sec'y of State, 262 A.3d 366, 377 (N.H. 2021) (rejecting argument that plaintiffs needed to show law "was unconstitutional in every set of circumstances").

Instead, the United States Supreme Court frequently does exactly what Plaintiffs argue for here—applies the relevant constitutional standard instead of dodging it by invoking the "no set of circumstances" mantra for which Defendants advocate. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (applying strict scrutiny to hold that statute prohibiting the sale or rental of "violent video games" to minors violated the First Amendment); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124–25, 1125 n.8 (10th Cir. 2012) (identifying thirteen instances where the United States Supreme Court considered facial challenges by applying the relevant constitutional test and noting that if the Supreme Court had rigidly applied the "no set of circumstances" test the result would have been the opposite).

That's particularly true in voting rights cases, which are generally "facial" challenges seeking to strike down a statute or regulation that unconstitutionally infringes on the right to vote rather than challenges based on particular applications to specific voters. *See, e.g.*, *Fish v. Schwab*, 957 F.3d 1105, 1127–36 (10th Cir. 2020) (striking down Kansas's proof of citizenship requirement that prevented 31,089 applicants from registering to vote and imposed an undue burden on the right to vote); *Jacobsen*, 2024 MT 66, ¶¶ 46–119 (striking down three statutes restricting the right to vote); *Weinschenk v. State*, 203 S.W.3d 201, 205–11 (Mo. 2006) (applying strict scrutiny and invalidating photo identification requirement where "approximately 240,000 registered voters may not have the required photo ID").

And although courts addressing voting rights challenges sometimes *mention* the facial standard as part of their analysis, in practice, they consider the facts and apply the underlying constitutional test—such as strict scrutiny or *Anderson-Burdick*. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181–203 (2008) (applying *Anderson-Burdick* to plaintiffs' claims in a facial challenge); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *28, *47 (D. Ariz. Feb. 29, 2024) (same); *Hispanic Fed'n v. Byrd*, No. 4:23cv218-MW/MAF, 2024 WL 906004, at *4 (N.D. Fla. March 1, 2024) (applying strict scrutiny to facial challenge and specifically rejecting argument that *Salerno* rule controlled analysis); *N.H. Democratic Party*, 262 A.3d at 377*; Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009) (citing

"no set of circumstance" language before applying *Anderson-Burdick*).

Defendants' cited cases apply a more rigid facial standard in entirely different circumstances where such a standard makes more sense. Hobbs Resp. at 24–26; KCE Resp. at 41. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), for example, involved a *pre-enforcement* challenge of a statute. *See id.* at 448–49. That's not the case here. Nor does this case "rest on speculation" or require this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it." *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 240, 481 P.3d 1060 (2021). Nor is this a case where a party simply "fundamentally misinterpret[s]" the text of a statute protecting voting

rights. *Portugal v. Franklin Cnty.*, 1 Wn.3d 629, 657, 530 P.3d 994 (2023).

Moreover, the signature verification requirement is unlike the exception to the Washington Law Against Discrimination at issue in *Woods* which might be unconstitutional as applied to a certain job or employee but not to others—and could reasonably be litigated on an as-applied, case-by-case basis. In contrast, every lawful voter has the same right to cast a ballot and participate under the same rules.

For these reasons, Defendants cannot avoid application of the relevant constitutional test—whether it is strict scrutiny, *Anderson-Burdick*, or something else.

2. Courts Routinely Consider Evidence in Evaluating Facial Constitutional Challenges

The evidentiary record before this Court is compelling. Over 170,000 Washington voters have had their ballots rejected for non-matching signatures in the last seven years. CP 325. Tens of thousands more ballots were "cured" after those voters submitted proof that they had been wrongly rejected in the first place. CP 344. Washington voters do not bear this burden equally: Voters of color, young voters, uniformed servicemembers serving outside of Washington, citizens living abroad, first-time voters, and voters who speak a language other than English *all* have their ballots rejected at higher rates. CP 544–46. Indeed, young voters of color bear the heaviest burden: Young Black and Hispanic voters' ballots are rejected at *more*

than seventeen times the rate of older white voters. CP 343.

The Secretary argues that this Court must ignore all these undisputed facts because this is a facial challenge. Hobbs Resp. at 31. But both strict scrutiny and *Anderson-Burdick* require a court to consider evidence and place the burden on Defendants to show, at minimum, evidence that a voting restriction actually advances state interests.[2] *See, e.g.*, *Collier v. City of Tacoma*, 121 Wn.2d 737, 753–57, 854 P.2d 1046 (1993) (requiring defendants to show with evidence that challenged statute is narrowly tailored to serve a

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[2] Indeed, Defendants *themselves* urge this Court to look beyond the text of the statute to resolve this case in their favor. Defendants repeatedly cite declarations from election officials, Hobbs Resp. at 14–15, 58–59; KCE Resp. at 33–34, and experts. CP 500, 2469, 2475–94.

compelling state interest to survive strict scrutiny); *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 152 (3d Cir. 2022) ("Evidence is key to the balancing of interests at the heart of the *Anderson-Burdick* framework."); *see also* Br. of Pet'rs at 62–63.

Moreover, the Secretary's own cited cases undermine his contention. In *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998), this Court looked beyond the face of the statute to find that Island County was the only county that came within the statute's classification and then considered record evidence to determine "whether the purpose of the legislation was rationally related to those counties which were excluded from its application." *Id.* at 148, 151.

Similarly, in *State v. Fraser*, 199 Wn.2d 465, 509 P.3d 282 (2022), this Court considered testimony from

the plaintiffs' expert establishing at least one circumstance in which the statute could be constitutionally applied before dismissing the facial challenge. *Id.* at 487.

Other Washington courts, and courts across the country, routinely look beyond the text of the statute and consider evidence in facial challenges. *See, e.g.*, *City of Redmond v. Moore*, 151 Wn.2d 664, 674, 91 P.3d 875 (2004) (considering, in facial challenge, "illustrative examples" of erroneous suspensions).[3]

[3] *See also* Br. of Pet'rs at 65 n.17 (citing three additional cases); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 407 (S.D.N.Y. 2015) ("Defendants err in their wholesale dismissal of facts specific to Plaintiffs' experience, because it is that experience that may be the only way for the Court or a fact-finder to determine whether the Challenged Laws are facially constitutional.").

In short, the constitutionality of signature verification must be evaluated by applying the relevant constitutional standard, and that evaluation requires consideration of the factual record before this Court.

3. The Secretary's Proposed New Rules Are Irrelevant to the Constitutional Analysis

The Secretary leans heavily on his proposed new regulations in an attempt to avoid constitutional infirmity. Hobbs Resp. at 1, 53–55. But the Secretary offers no promises that his new regulations will or could address the persistent, inherent problems with signature verification. And for good reason: The only thing that the Secretary promises is that *fewer* people will have their ballots wrongly rejected. *Id.* at 1. This does not resolve the constitutional issue.

Even if the Secretary's new regulations reduced *by half* the number of voters disenfranchised for

non-matching signatures—which would be an extraordinary achievement—over 12,000 Washington voters would still have their right to vote stripped in the 2024 general election—and, still, for no discernable benefit (since the process is so ineffective).

But more fundamentally, speculation about the future impact of yet to be implemented regulations cannot defeat a facial constitutional challenge to the entire process of signature verification. *Wash. State Grange*, 552 U.S. at 449–50 (Courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

B. Signature Verification Is Facially Unconstitutional Under Article 1, Section 19

Washington law has long mandated the application of strict scrutiny to laws that infringe or deny the fundamental right to vote. Because signature verification routinely disenfranchises thousands of

fully qualified voters who did everything required of them to cast a lawful ballot, it cannot withstand that constitutional scrutiny.

1. Signature Verification Must Satisfy Strict Scrutiny

This Court, for nearly forty years, has mandated the application of strict scrutiny to any law that infringes or denies the fundamental right to vote. *See City of Seattle v. State*, 103 Wn.2d 663, 670, 694 P.2d 641 (1985) ("[A]ny statute which infringes upon or burdens the right to vote is subject to strict scrutiny."); *Madison v. State*, 161 Wn.2d 85, 99, 163 P.3d 757 (2007); *Fortugal*, 1 Wn.3d at 634 (laws "trigger strict scrutiny" when they "abridg[e] voting rights").

This Court has so carefully protected the right to vote in part because the Washington Constitution is *more* protective of the franchise than the federal constitution. *Foster v. Sunnyside Valley Irrigation*

Dist., 102 Wn.2d 395, 404, 687 P.2d 841 (1984) ("[T]he Washington constitution goes further to safeguard [the right to vote] than does the federal constitution."). For this reason, principles drawn from federal constitutional law must be addressed with caution to avoid diluting this critical and heightened protection offered by our state constitution.

The Secretary readily admits—as he must—that voting is a fundamental right and that strict scrutiny applies to laws that "infringe" or impose a "severe burden" on a fundamental right. Hobbs Resp. at 36, 40.

But the Secretary tries to avoid the implications of his concession and the weight of this Court's precedent by mischaracterizing Plaintiffs' arguments. The Secretary claims that Plaintiffs seek "automatic" strict scrutiny for "all laws implicating the right to

vote" and that "[a]pplying strict scrutiny to all laws implicating the right to vote will make it impossible to administer elections." *Id.* at 45. Such a standard he argues, would invalidate "many longstanding election regulations." *See id.*

But that is not Plaintiffs' argument. Plaintiffs have never argued that strict scrutiny applies ("automatically" or otherwise) to any law that merely "implicates" the right to vote. Rather, Plaintiffs have consistently argued, based on this Court's precedent, that strict scrutiny applies if a challenged statute *infringes or denies* the right to vote.[4] *Tunstall ex rel.*

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[4] Whether a law "implicates" the right to vote or whether it "infringes or denies" the right to vote are very different things. To "implicate" the fundamental right to vote means to "involve in the nature or operation" of it. *Implicate*, Merriam-Webster Online Dictionary, https://www.merriam-

Tunstall v. Bergeson, 141 Wn.2d 201, 225–26, 5 P.3d 691 (2000) ("[T]o apply strict scrutiny, we must first find that a fundamental right is being infringed or a suspect class is involved."); *Portugal*, 1 Wn.3d at 634 (laws "trigger strict scrutiny" when they "abridg[e] voting rights"). Once a court determines a fundamental right is infringed, it has no discretion: Strict scrutiny applies under Washington law. *City of Seattle*, 103 Wn.2d at 670.

Defendants nonetheless argue that strict scrutiny does not apply because signature verification, when

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webster.com/dictionary/implicate (last visited Apr. 25, 2024). But to "infringe" that right means "to encroach upon in a way that violates law or the rights of another." *Infringe*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/infringe (last visited Apr. 25, 2024). A law that does the latter is subject to strict scrutiny, but a law that only does the former is not.

coupled with the so-called "cure" process, neither "infringes" the right to vote nor imposes a "severe burden." Hobbs Resp. at 52–56; KCE Resp. at 69–70. Rather, Defendants contend, signature verification is merely an uncontroversial time, place, and manner regulation of the electoral process. Hobbs Resp. at 34–35; KCE Resp. at 47–48. As such, they argue, it is either subject to the federal law balancing test established by *Anderson-Burdick* (as argued by the Secretary, Hobbs Resp. at 46–52) or rational basis review (as argued by the County, KCE Resp. at 50).

Both are wrong.

a. Signature Verification "Infringes" and "Severely Burdens" the Right to Vote

Signature verification infringes and severely burdens the right to vote for the thousands of voters it disenfranchises each election—including the nearly

24,000 Washington voters disenfranchised in the last presidential election. Br. of Pet'rs at 13. These voters did *everything* required of them under the Washington Constitution, but their ballots were nevertheless discarded solely because of signature verification. *See* CP 862–1067.

For the many voters without the means or opportunity to cure, this is nothing less than complete disenfranchisement. CP 936–62; Br. of Pet'rs at 19–21. For others, it imposes a burdensome "cure" process that requires those voters whose signatures are challenged to prove themselves to election officials.

The burden on voters is not, as Defendants suggest, just signing the ballot envelope. Hobbs Resp. at 52–53; KCE Resp. at 69. To be clear, Plaintiffs don't challenge the requirement *to sign* the ballot envelope under penalty of perjury or the rejection of *unsigned*

ballots. Plaintiffs challenge the requirement to reject *signed* ballots for perceived signature mismatches. And the burden from that requirement is that voters must sign their name in a way that lay election judges will subjectively determine is sufficiently similar to the voter's signature on file with the state. Such a burden not only takes the successful casting of the ballot out of the voter's hands, but it is also arbitrary.

This is hardly a theoretical point. Plaintiff Kaeleene Escalante Martinez, a young Latina voter, has had her ballot rejected *three times* for non-matching signatures in the last four years. CP 871–73. Meanwhile, Plaintiff Dr. Gabriel Berson had his ballot rejected in 2020 and never received notice of that rejection from the state but has successfully voted eight times since then. CP 865–67, 1107. The record is full of stories like these—of voters who participate in

this subjective system, not knowing whether their ballot will be accepted or rejected once they submit it. *See* CP 862–1067.

And the burden falls disproportionately on voters who are young, people of color, and first-time voters—the very groups whose votes should be most vigorously protected.[5] Br. of Pet'rs at 22–27.

b. Signature Verification Is Not a Time, Place, or Manner Regulation of Elections

Defendants argue that signature verification does not infringe the right to vote and is merely a regulation

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[5] King County argues that there is no evidence of discriminatory intent in the record before this Court. KCE Resp. at 52–53. But that's not the point: The evidence is offered not to suggest that either the state or counties are *intentionally* discriminating against minority or younger voters, only that the arbitrary system employed by the state has a profoundly disparate impact on minority and younger voters.

of the time, place, and manner of voting within the province of the legislature and subject to deferential review. Hobbs Resp. at 34–35; KCE Resp. at 47–48, 50–51.

But signature verification does not regulate *when, where, or how* an eligible voter casts their ballot.[6] These voters in fact did everything that was required of them: they timely registered to vote, received their ballot, properly marked the candidates or issues of their choice on the ballot, sealed the ballot in the envelope, signed and dated the declaration under penalty of perjury, and returned their voted

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[6] *Cf. Bost v. Ill. State Bd. of Elections*, No. 22-CV-02754, 2023 WL 4817073, at *12–13 (N.D. Ill. July 26, 2023) (counting ballots received after Election Day is a time, place, and manner regulation); *Baber v. Dunlap*, 376 F. Supp. 3d 125, 137–38 (D. Me. 2018) (ranked choice voting is a time, place, or manner regulation).

ballot to election officials on time. The Legislature defined the "time" and "manner" of voting, and these voters—by definition—followed those instructions *to the letter*. Yet their ballots were still rejected *despite* the voters' compliance with the state's time and manner regulations.

The problem is not with the voters' behavior (after all, they did everything right) but with the highly subjective signature verification process, where non-expert election workers with minimal training apply the pseudo-science of "comparing" signatures to decide which ballots should be counted and which should be subjected to the burdensome "cure" process. This is not a time, place, or manner regulation; it is an arbitrary process imposed by the state *independent of*

any action by the voters that operates to disqualify ballots by the thousands every election.[7]

Regardless, federal courts apply *Anderson-Burdick* to time, place, and manner restrictions, so rational basis or deference to the legislature would be inappropriate, given the Washington Constitution is more protective of the right to vote. *See Mazo*, 54 F.4th at 130.

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[7] Defendants have to reach back nearly one hundred years to find a case that they believe supports their position. Even those few cases coalesce around a distinguishable theme: that "determining the proof which one shall present to establish the fact that he is a citizen and entitled to register and vote" is entitled to legislative deference. *See State ex rel. Carroll v. Super. Ct. of Wash. for King Cnty.*, 113 Wash. 54, 57, 193 P. 226 (1920); Hobbs Resp. at 34–35; KCE Resp. at 48–49. But the voters who have their ballots rejected already proved that they are citizens, entitled to register to vote, and entitled to vote. Indeed, they have already voted.

c. Defendants' Cited Cases Support Plaintiffs' Position

The Secretary cites Washington cases where this Court applied a lower standard of review to statutes that "implicate[d]" the right to vote. Hobbs Resp. at 37–38. The result in each of these cases is neither surprising nor relevant since none of them dealt with statutes that *infringed* or *denied* the right to vote.

State ex rel. Shepard v. Superior Court of King County, 60 Wash. 370, 111 P. 233 (1910), for example, addressed a law preventing candidates from appearing on a ballot more than once—the law did not prevent any eligible voter from voting. *Id.* at 371.

Eugster v. State, 171 Wn.2d 839, 259 P.3d 146 (2011), in turn, considered whether different-sized Court of Appeals districts violated Article I, Section 19. *Id.* at 841. The plaintiff argued that the Washington Constitution requires "the one-person, one-vote

principle to apply to judicial elections." *Id.* at 843. The statute did not infringe or deny anyone's right to vote.

And *State ex rel. Carroll v. Superior Court of Washington for King County*, 113 Wash. 54, 193 P. 226 (1920), involved the proof required for a foreign-born citizen to register to vote. This Court noted the proof required was a "condition precedent to his right to register . . . , and *not* . . . a question of the right to vote." *Id.* at 57 (emphasis added). Indeed, this Court was clear that the Legislature cannot "add[] a qualification not mentioned in the Constitution." *Id.* at 59.[8]

Finally, in *Carlson v. San Juan County*, 183 Wn. App. 354, 333 P.3d 511 (2014), the Court of Appeals

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[8] Consistent penmanship is—of course—not a constitutional qualification to vote.

specifically found that the law at issue does not "infringe" and "does not deny the right to vote in council elections." *Id.* at 374.

King County cites *State ex rel. Pemberton v. Superior Court of Whatcom County*, 196 Wash. 468, 83 P.2d 345 (1938), but in that case this Court instructed, in words aptly suited for this litigation: "[C]ourts should not be too ready to reject ballots or votes on account of the violation of technical requirements, especially in the absence of a charge of fraud, lest, in so doing, they disfranchise persons who voted in entire good faith." *Id.* at 480. To the extent this Court takes anything from *Pemberton*, it should be that guidance.

None of these cases is particularly relevant here, and all merely restate or reflect the long-standing distinction in Washington law between statutes that infringe or deny the fundamental right to vote, which

are subject to strict scrutiny, and those that do not, which are subject to less-exacting scrutiny.

Indeed, this Court has repeatedly acknowledged and reaffirmed this crucial and fundamental distinction. Defendants' efforts to distinguish those cases are misplaced. *See* Hobbs Resp. at 39. *City of Seattle*, *Foster*, *Portugal*, and *Madison* either acknowledge or hold that a law that infringes or denies the right to vote is subject to strict scrutiny. *City of Seattle*, 103 Wn.2d at 670; *Foster*, 102 Wn.2d at 408; *Portugal*, 1 Wn.3d at 634; *Madison*, 161 Wn.2d at 99.

Moreover, in *Portugal*, this Court did not apply strict scrutiny to the Washington Voting Rights Act because that statute does not "abridg[e] voting rights." 1 Wn.3d at 634, 658 ("[T]he WVRA on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. . . . Therefore,

Gimenez's facial equal protection claim triggers rational basis review, not strict scrutiny."). Likewise, in *Madison*, this Court did not apply strict scrutiny because it held that felons do not have a constitutional right to vote in the first place. 161 Wn.2d at 103.

d. Defendants' Reliance on Cases from Other States is Misplaced

The Secretary argues that no other state court applies strict scrutiny to "*all*" election laws that "implicate" the right to vote. Hobbs Resp. at 43.[9] That might be true—but it's irrelevant: Plaintiffs do not contend that "all" elections laws that "implicate" the right to vote are subject to strict scrutiny. Full stop.

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[9] The Secretary argues that "contrary to Plaintiffs' misleading suggestion, no state appellate court has held that strict scrutiny applies to *all* election regulations implicating the right to vote." *Id.* No citation followed that statement, and for good reason: Plaintiffs do not take that position.

In fact, like the Washington cases cited by the Secretary, the authority from other states reflects the well-settled distinction between (a) laws that infringe, or deny the right to vote (in which case strict scrutiny applies) and (b) those that do not (in which case some lesser standard of scrutiny applies).

The distinction appears to have been entirely overlooked in the Secretary's briefing. For example, the Secretary cites *Weinschenk* to suggest that Missouri only "*sometimes* appl[ies] strict scrutiny to laws implicating the right to vote." *Id.* at 43 (emphasis in original). That's exactly right: Missouri, like Washington, only applies strict scrutiny to laws that *infringe, burden, impinge, or deny* the right to vote. The court in *Weinschenk* applied strict scrutiny to a photo ID requirement because it put a "substantial burden" on the right to vote. 203 S.W.3d at 215. Its

decision was "consistent with the past decisions of Missouri courts, which have uniformly applied strict scrutiny to statutes *impinging* upon the right to vote." *Id.* (emphasis added).

Orr v. Edgar, 698 N.E.2d 560 (Ill. 1998) stands for the same unremarkable proposition: "It is axiomatic that the right to vote is a fundamental right that deserves zealous protection by the courts. As such, legislation that *infringes* upon the right to vote is subject to strict scrutiny." *Id.* at 437 (emphasis added; internal citations omitted).

These cases do little more than underscore this important distinction and critical protection of the right to vote offered by the Washington Constitution.

2. Signature Verification Fails Strict Scrutiny

Strict scrutiny, applied here, is fatal to the signature verification requirement. Indeed,

Defendants appear to understand as much, as they fail to meaningfully engage with the strict scrutiny standard. The Secretary devotes a mere footnote to it, baldly asserting that the State's interests would "justify the law" and "[t]here is currently no less restrictive means of verifying identity." Hobbs Resp. at 69 n.5. This falls rather decidedly short of the mark.

To survive strict scrutiny, *Defendants* "must prove" that signature verification is "narrowly drawn to serve a compelling state interest." *Collier*, 121 Wn.2d at 753–54. Indeed, Defendants acknowledge that they must "put forward" specific interests and support them with actual evidence. Hobbs Resp. at 66; KCE Resp. at 58.

Defendants raise three state interests supposedly served by signature verification: (a) election security, (b) voting rights of individuals, and (c) public

confidence in elections. But signature verification advances none of those and it is certainly not narrowly tailored to serve them.

a. Signature Verification Does Not Protect Election Security

First, Defendants contend that signature verification improves election security, Hobbs Resp. at 57–63; KCE Resp. at 53–61, and indeed, that signature verification is the "only safeguard" that prevents a third party from casting the voter's ballot. KCE Resp. at 54; Hobbs Resp. at 58.

But Defendants candidly admit that they have never actually studied whether signature verification either improves election security or prevents voter fraud. CP 449–50. And it shows: the record before this Court is barren of any actual admissible evidence to support the proposition.

The record *does* demonstrate that signature verification has *never once* caught a single case of confirmed voter fraud—none that led to a conviction or guilty plea. *See* Hobbs Resp. at 59; KCE Resp. at 54–56. Defendants do not dispute that fact but instead contend criminal convictions are not an accurate measure of fraud or potential fraud. Hobbs Resp. at 59; KCE Resp. at 54–56.

The Secretary relies on declarations from county election officials that raise *unconfirmed suspicions* of voter fraud. Hobbs Resp. at 14–15, 58–59. None of those voters was ever charged with, much less convicted of, voter fraud, so whatever election officials may have "thought" or "suspected" is irrelevant in court, where evidentiary proof, not unsubstantiated suspicion, is required. Unsupported allegations of voter fraud hardly demonstrate its existence (as recent

history all too well demonstrates). Fundamental rights cannot be swept aside by the tens of thousands based on election officials' guesses, fears, or unsubstantiated suspicions.

Indeed, the Secretary's expert acknowledged that many of the "invalid" ballots he identified were signed by a spouse or family member and could have simply been an accident. CP 2236–37. That's a far cry from the specter of election interference by hostile foreign actors and other far-fetched scenarios imagined by Defendants. Hobbs Resp. at 16. There's certainly no hint of that in the record.

But even if this Court were to credit mere allegations of voter fraud arising from signature verification, those cases constitute only a vanishingly small fraction of the tens of thousands of voters stripped of their right to vote. Indeed, local election

officials suspect less than one percent of the ballots that they reject for non-matching signatures. CP 2103–08. Even that number grossly overestimates potential cases of fraud. *See* Br. of Pet'rs at 31.

Moreover, some election officials may very well *think* that signature verification is necessary, but such beliefs do not make it constitutional, especially in light of how many ballots election officials wrongly reject. CP 449–50, 467. In fact, those claims are quite remarkable given the absence of empirical data to support their position and the mountain of evidence that contradicts it.

Moreover, that signature verification purportedly prevents abuse of easily obtainable replacement ballots is irrelevant. Securing, supposedly, the process to obtain a replacement ballot does not justify continued

constitutional violations of hundreds of thousands of voters.

Indeed, as noted in Plaintiffs' opening brief, at least seven states require signatures under penalty of perjury on absentee ballot envelopes but do not attempt to "compare" signatures, recognizing how extraordinarily error-prone that process is. Br. of Pet'rs at 32. None of those states suffer higher rates of fraud or election interference, providing a rather dramatic counterpoint to the Secretary's "election security" argument.

The Secretary half-heartedly responds by noting that Pennsylvania conducts signature verification on absentee ballot *applications* to verify voters. Hobbs Resp. at 60. That misses the point. Pennsylvania, one of the most narrowly divided and hotly contested

electoral states in the country, does not conduct signature verification on the *actual cast ballot*.

Unable to identify any *actual fraud* that was identified by signature verification, Defendants pivot to arguing that signature verification *deters fraud*. *Id.* at 61; KCE Resp. at 55. But there is little in the record to support that argument, either. The only relevant citation is to an out-of-context statement by the Secretary's expert criticizing Plaintiffs' expert.[10] *See* CP 1785. Defendants cite no studies, no data, no

[10] Without any support whatsoever, King County also asserts that signature verification has prevented widespread coordinated efforts to flood Washington with fraudulent ballots. KCE Resp. at 56. Absent citation to record evidence, this factual assertion should be given no weight. *See Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991) ("Unsupported conclusory allegations are not sufficient to defeat summary judgment.").

academic literature, and no lived experiences, to support that claim.

None of this comes even close to justifying on "election security" grounds the disenfranchisement of tens of thousands of Washington voters who did everything required of them to vote.

b. Signature Verification Does Not Protect Individual Voting Rights

Defendants next argue that signature verification "protects the voting rights of individual voters." Hobbs Resp. at 56–58. But it is hard to imagine how disenfranchising over 170,000 voters between 2016 and 2023 "protects" individual voting rights. Signature verification certainly did not protect the individual voting rights of the sixty-five voters who submitted declarations to the trial court about being wrongfully disenfranchised by signature verification. See CP 862–1067.

To the extent Defendants suggest that signature verification protects Washington voters against vote dilution from fraudulent votes, that finds no support in the record. Defendants are bereft of evidence of any *fraudulent votes* caught by signature verification—no one charged, much less convicted, of fraudulent voting.[11]

Defendants fail to show that signature verification protects the rights of individual voters.

c. Signature Verification Does Not Increase Public Confidence in Elections

Finally, Defendants claim that "[s]ignature verification is essential to ensuring public confidence in the vote-by-mail system." Hobbs Resp. at 65. But

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[11] Indeed, signature verification failed to catch all three recent cases of convicted voter fraud involving someone signing another's ballot. CP 195.

there is no direct evidence to support this assertion. There's also no evidence to suggest that states that do not utilize signature matching suffer a lower level of voter confidence in their elections.

The Secretary offers a nationwide study that reached the highly general conclusion that voters have more confidence in elections when states enact laws designed to prevent voter fraud. *Id.* at 67 (citing CP 1797). While that may be *generally* true (and entirely unsurprising), it says nothing about signature verification specifically, much less about voters' opinions in Washington.

Next, the Secretary points to an apparently unpublished survey from Florida that asked whether some unknown number of Florida voters thought Florida's specific signature verification law was strict enough. *Id.* at 67. Tellingly, the Secretary did not

include the actual survey in the record for this Court to evaluate. Setting aside the lack of foundation for the survey, it of course says nothing about whether *Washington* voters feel more confident in *Washington* elections because of *Washington's* signature verification law. This is not proof of a "compelling state interest."

Defendants fall far short of demonstrating with competent, much less convincing, evidence that signature verification improves public confidence in elections.

d. Signature Verification Is Not Narrowly Tailored

Defendants do not respond to Plaintiffs' arguments that signature verification is not narrowly tailored. *Id.* at 69 n.5; KCE Resp. at 56–61. Nor could they credibly do so. A statute is narrowly tailored if "the means chosen are not substantially broader than

necessary to achieve the government's interest." *In re Recall of Inslee*, 199 Wn.2d 416, 431, 508 P.3d 635 (2022); *see also Collier*, 121 Wn.2d at 753–57. In every respect, signature verification is wildly overinclusive. Br. of Pet'rs at 78–81. The process operates to disenfranchise thousands of voters in every election—nearly 24,000 in the 2020 general election—while only identifying a small handful of potentially fraudulent ballots. This is the very definition of an overinclusive statute. On this basis alone, signature verification fails strict scrutiny.

3. Even Under Defendants' Facial Challenge Framework, Signature Verification Cannot Survive

Even if this Court were to apply Defendants' rigid "facial challenge" framework, signature verification would nonetheless fail that test, too.

At the outset, the Secretary's defense hinges on his claim that the signature verification statute "does not require the rejection of any registered voter's ballot." Hobbs Resp. at 31. So, the Secretary argues, "the [statute], on its face, does not require unconstitutional actions." *Id.* (quoting *Portugal*, 1 Wn.3d at 659).[12]

In fact, it does.

The statute mandates the rejection of ballots that cannot be verified by signature. As part of initial ballot processing, RCW 29A.40.110(3) requires that election officials "shall verify that the voter's signature on the

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[12] This argument is more than a little surprising: The Secretary (and King County) have consistently argued for deference to the Legislature and cited the constitutional delegation of authority to the Legislature—an argument that relies expressly on the premise that *the Legislature* mandated that ballots be rejected based on perceived signature mismatches.

ballot declaration is the same as the signature of that voter in the registration files of the county." If election officials cannot verify a voter's signature, then the ballot must be rejected. That's what results in the consistent rejection of thousands of ballots every election cycle.

And there is "no set of circumstances" in which signature verification *can* constitutionally be applied. *Woods*, 197 Wn.2d at 240. Signature verification cannot accomplish its goal of verifying the identity of voters based on signatures. It will always severely burden and disenfranchise voters without any discernable benefit to Washington elections.[13]

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[13] Defendants neither rebutted nor responded to these facts. Instead, the Secretary claims that Plaintiffs "never attempt to show that signature verification is inherently unconstitutional" and only

Election officials do not have the time, skill, nor resources to effectively verify signatures. And even if they did, they would still make significant errors, which would subject voters to additional burdens of curing their ballots and outright deny the right to vote to others. [14] Br. of Pet'rs at 34–35.

While the "cure" process helps to reduce, to a limited extent, the unconstitutional rejection of ballots, it does not, and cannot, eliminate the inherent and subjective unconstitutional injury that it inflicts upon

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argue that signature verification was unconstitutional under previous regulations. Hobbs Resp. at 2, 31. Not so, as Plaintiffs' opening brief demonstrates. Br. of Pet'rs at 65–68.

[14] No matter how well-trained election officials may be, and regardless of the standards adopted by the Secretary, voters' signatures will inevitably vary with age, disease, injury, writing instruments or surfaces, preferences, or other perfectly innocent reasons. CP 245–49.

Washington voters. *See id.* at 15–16. There will always be voters who do not have the time, opportunity, or resources to cure their lawfully cast ballots, no matter how many methods of curing are available. *See* CP 936–62 (declarations from voters who were unable to cure their ballot in recent elections). And there will always be some voters who never actually receive notice that their ballot was wrongly rejected. *See* CP 865–67, 910–28–31 (declarations from voters who never received notice or received it too late).

For these voters, signature verification will always unconstitutionally fail them. And despite all of this, signature verification will continue to offer no discernable benefit to Washington elections. In short, "there is no reasonable doubt that the statute violates

the constitution." *Quinn v. State*, 1 Wn.3d 453, 471 n.9, 526 P.3d 1 (2023).

At the very least, the inherent flaws in signature verification are sufficient to create a material dispute of fact that would preclude summary judgment for Defendants on their facial challenge argument.

4. Even if This Court Applies a Lower Level of Scrutiny, Signature Verification Is Still Unconstitutional

For the reasons outlined above, this Court should apply strict scrutiny rather than the federal *Anderson-Burdick* balancing test adopted by the trial court. But even if this Court were to adopt *Anderson-Burdick* to evaluate signature verification, it would still fail.

a. This Court Should Not Adopt *Anderson-Burdick*

The trial court rejected the application of strict scrutiny to Plaintiffs' constitutional claims, finding instead that the federal *Anderson-Burdick* balancing

test was more appropriate for weighing constitutional challenges to voting regulations. CP 2918–21. The Secretary, shifting his position from what he argued before the trial court, *see* CP 1334, embraces this standard before this Court and argues that, applied here, it would result in the defeat of Plaintiffs' claims. Hobbs Resp. at 32, 52, 46.

With all due respect to the Secretary, this Court should reject *Anderson-Burdick*. That federal standard does not reflect the Washington Constitution's long-recognized heightened protection of the right to vote and, in any event, is a flawed framework that is not applied consistently at the federal or state level.

(i) *Anderson-Burdick* Does Not Adequately Protect Washingtonians' Right to Vote

First, and perhaps most obviously, *Anderson-Burdick* is based on the *federal* constitution, but the

Washington Constitution affords greater protection to the right to vote. *See Foster*, 102 Wn.2d at 404. As a result, *Anderson-Burdick* is ill-suited to safeguard Washingtonians' right to vote. The Montana Supreme Court recognized as much in March 2024 when, for precisely this reason, it declined to adopt *Anderson-Burdick* to evaluate voting rights claims brought under the Montana Constitution. The court found that *Anderson-Burdick* "provides less protection than that clearly intended by the plain language and history of the Montana Constitution's right to vote." *Jacobsen*, 2024 MT 66, ¶¶ 15, 32. That court also recognized the dilution of *Anderson-Burdick* over time from a "more meaningful test" to one that "now often gives undue deference to state legislatures." *Id.* ¶ 15. Given the similarity between the Washington and Montana

constitutions on this point, the same analysis should apply here.[15]

Contrary to Defendants' assertions, *Anderson-Burdick* is not "consistent with this Court's past cases," and it does not "match[] well with Washington's elections jurisprudence." KCE Resp. at 67; Hobbs Resp. at 49. This Court has never applied a balancing test similar to *Anderson-Burdick*, as the trial court candidly conceded. Instead, this Court consistently applies strict scrutiny to any law that infringes or denies the right to vote.

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[15] *Compare* Wash. Const. art. I, § 19 ("All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.") *with* Mont. Const. art. II, § 13 ("All election shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

The Secretary does not even attempt to explain how applying the *federal Anderson-Burdick* framework would account for the greater protection that the Washington Constitution affords the right to vote. Hobbs Resp. at 47. Instead, he opines that if this Court adopts *Anderson-Burdick*, Washington courts should take federal decisions as "persuasive" but would be "free to depart from federal decisions on particular applications." *Id.* That's hardly more protective of the right to vote. It would, instead, mark an unfortunate and disheartening retreat from Washington's long-standing constitutional guaranties.

The Secretary's proffered standard would invite free-form application of an inherently ambiguous standard by Washington courts without guidance. Such an approach would be profoundly inconsistent

with Washington's Constitution and this Court's precedents. It should be rejected.

(ii) *Anderson-Burdick* Is an Imprecise, Flawed Framework

This lack of guidance about departing from federal precedent is particularly problematic given two facets of *Anderson-Burdick* federal case law: (1) the inconsistency in its application, *see* Br. of Pet'rs at 54–55, and (2) the dilution of *Anderson-Burdick* over time from a "more meaningful test" to one that "now often gives undue deference to state legislatures," *Jacobsen*, 2024 MT 66, ¶ 15.

This trend, and the uncertainty inherent in its application, is illustrated by Defendants' disagreement about *Anderson-Burdick*. The Secretary, for his part, advocates for a version that applies strict scrutiny to laws that "completely deny" the right to vote, rational

basis review to those imposing a *de minimis* burden, and a balancing test that weighs the "precise interests put forward by the State" against the burden to plaintiffs' rights for everything in between. Hobbs Resp. at 46–49.

By contrast, King County argues for rational basis review for all laws infringing on voting rights except for those that impose a severe burden. KCE Resp. at 68–69; *see Crawford*, 553 U.S. at 205 (Scalia, J., concurring).

The federal courts, the Secretary, and King County all have varying views about how to define *Anderson-Burdick*—yet none reflects Washington's heightened protection of the right to vote. The test is not right for Washington, and Washington should not join the disarray.

b. Under Any Balancing Test, Signature Verification Falls

In any event, even if this Court were to adopt *Anderson-Burdick,* signature verification would not survive its application.

(i) Signature Matching Imposes a Severe Burden on Impacted Voters

Signature verification imposes a severe burden, disenfranchising thousands of voters every election who did everything required of them to lawfully cast a ballot. *See Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."); Br. of Pet'rs at 49. And for tens of thousands more, it imposes additional burdens, forcing them to take steps to prove themselves to election officials. As

a result, even under *Anderson-Burdick*, strict scrutiny would apply, and, for all the reasons discussed above, signature verification fails that test. *See* Section II(B)(2) *supra*; Br. of Pet'rs § V(E).

Defendants argue that the burden of signature verification "is, at most, *de minimis*."[16] Hobbs Resp. at 56; KCE Resp. at 69. Defendants suggest that the burden on voters is merely signing their name. Hobbs Resp. at 52–53; KCE Resp. at 69. Not so.

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[16] King County dismisses voters who "chose" not to utilize the cure process as "noncompliant," asserting that the burden on those voters should not count. KCE Resp. at 71. But King County ignores the voters who do not have the time or resources to cure their ballots, or those who never received notice in the first place. *See* CP 865–70, 906–62. For voters who are, for example, traveling overseas or deployed in the military, or the elderly without ready access to computers or cars, the invitation to "cure" a problem created by election officials (and not the voter) is cold comfort. And those voters hardly deserve to be disparaged as "noncompliant."

Voters must sign their name in a way that any lay election judge will subjectively determine is sufficiently similar to the voter's signature on file with the state.[17] But that's entirely out of the voter's control and completely arbitrary. Defendants loudly trumpet that only 0.5% of ballots are ultimately rejected.[18]

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[17] The statute, after all, requires such consistency in penmanship that election officials can use it to *verify* the voter's identity. *See* RCW 29A.40.110(3).

[18] Defendants' analysis in any event focuses on the wrong denominator—the entire electorate. In evaluating burden, the "proper focus of the constitutional inquiry is the group for whom the law is a restriction"—namely those who have their ballots rejected for non-matching signatures. *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015); see *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) ("Under *Burdick*, . . . courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden when considered in context, may be more severe."); *see also Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020) ("All binding authority to

Hobbs Resp. at 8. That's true, but only highlights the random impact of signature verification from *the voter's* point of view. A diligent voter has no way of knowing whether his or her signature will be challenged. The voter can do everything required of them and still have their ballot rejected for reasons that cannot be anticipated or addressed in advance.

And for those voters, the burdens are truly just beginning. For those who never receive notice, like Radu Cimpian and Elizabeth Muzik, they are simply and completely disenfranchised. CP 916–18, 922–25. For those who receive delayed notice, like Anthony Pellitteri, they must rush to address the issue caused

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consider the burdensome effects of disparate treatment on the right to vote has done so from the perspective of only affected electors—not the perspective of the electorate as a whole.").

by the wrongful challenge of their signatures. CP 929–31. And for those who are traveling, serving in the military, ill, elderly, poor, or otherwise unable to receive notice or take action to respond to the notice, the burden is simply insurmountable. *See, e.g.*, CP 932–51, 956–62, 1056–58; *see generally* Br. of Pet'rs at 19–20.

Moreover, a burden is more severe when it disproportionately falls upon populations who already face greater hurdles to participation and are less likely to overcome the increased costs of participation. *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 547 (6th Cir. 2014). That's certainly the case here, where signature verification consistently and disproportionally rejects the ballots of young voters, voters of color, non-native English speakers, active-

duty military members serving away from home, first time voters, and more. *See* Br. of Pet'rs at 22–24.

King County cites *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th Cir. 2021), to suggest that the mere requirement that a voter correct a missing signature is no significant burden. But in that case, the burden was that a voter to provide a *missing signature* by election day, not to correct a non-matching signature. *Id.* at 1187. Simply supplying a signature, of course, is far less burdensome than needing to provide a signature that a lay election official will think is a subjective "match."

(ii) Any Benefit Does Not Outweigh the Burden

Whether the burden is characterized as "moderate" or "severe" is ultimately of no consequence to the analysis under *Anderson-Burdick*. Either way, the benefit provided by the law must be at least equally

weighty. But here, as noted above, signature verification offers no corresponding benefit in identifying or preventing fraud, protecting voting rights, or maintaining public confidence in elections. *See* Section II(B)(2) *supra*.

Defendants have not shown, as they must, that signature verification furthers a "specific, rather than abstract, state interest[]" nor why it actually addresses that interest. *Ohio State Conf. of NAACP*, 768 F.3d at 545; *see* Br. of Pet'rs at 69–78. Because Defendants have not shown that the benefits outweigh the burden, signature verification is unconstitutional under *Anderson-Burdick*.

c. Rational Basis Review Does Not Apply

By abandoning his argument about rational basis review from below, CP 1334, the Secretary wisely concedes that rational basis should not be applied to a

law that infringes or denies the right to vote. After all, a rational basis review standard would be even *less* protective of the right to vote than that afforded by the federal constitution.

King County, however, doubles down on its argument for rational basis review, suggesting that because signature verification "does not make voting 'so inconvenient that it is impossible to exercise,'" it must only be rationally related to any hypothetical legitimate government interest. KCE Resp. at 67. This is clearly contrary to settled Washington law. *See* Section II(B)(1)(b) *supra*.

C. Signature Verification Is Unconstitutionally Arbitrary in Violation of the Due Process Clause of Article I, Section 3

Signature verification also violates the substantive due process clause, for two reasons: it is

arbitrary and capricious, and it arbitrarily values voters in some counties over others.

Article I, Section 3, of the Washington Constitution "protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Yim v. City of Seattle*, 194 Wn.2d 682, 688–89, 451 P.3d 694 (2019), as amended (Jan. 9, 2020). "The Due Process Clause protects against extraordinary voting restrictions that render the voting system 'fundamentally unfair.'" *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597–98 (6th Cir. 2012) (poll worker error caused thousands of voters to cast wrong-precinct provisional ballots, and those votes were not counted).

"Having once granted the right to vote on equal terms, the State may not, by later arbitrary and

disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (discussing disparate standards and procedures among counties); *see also Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.").

1. Strict Scrutiny Applies to Plaintiffs' Due Process Claim

The Secretary argues that because Washington's substantive due process law generally tracks federal law, *Anderson-Burdick* applies. Hobbs Resp. at 74. That's wrong for two reasons.

First, the only case on which the Secretary relies, *Yim*, itself acknowledges that "[i]n a substantive due process claim . . . [s]tate interference with a fundamental right is subject to strict scrutiny." 194 Wn.2d at 689. Here, signature matching "interferes"

with a fundamental right for the reasons outlined above. *See* Section II(B)(1)(a) *supra*.

Second, as discussed above, the Washington Constitution is *more* protective of the franchise than the federal constitution. *Foster*, 102 Wn.2d at 404. Adopting *Anderson-Burdick* would conflict with that express constitutional language and long-settled Washington law.

King County relies on the same analysis as the Secretary yet concludes that rational basis applies because signature verification "addresses only the method of voting." KCE Resp. at 65–66. That analysis, too, is wrong for the reasons discussed above. *See* Section II(B)(1)(b) *supra*.

2. Signature Verification Cannot Survive Strict Scrutiny

Signature verification cannot survive strict scrutiny because it is fundamentally unfair and arbitrarily favors some voters over others.

First, consistently rejecting ballots based on the flawed and arbitrary pseudoscience of signature verification is fundamentally unfair, especially when those voters otherwise did everything required of them to vote. The Washington State Auditor, the Secretary, and King County all agree that signature verification is subjective and prone to implicit biases. *See* Br. of Pet'rs at 15–16. Indeed, it requires voters to not simply sign their name, but sign it in a way that a lay election official will decide sufficiently matches the voter's signature on file. It also disproportionately impacts certain groups based on age, race, native language, military status, and more. *See id.* at 22–24.

The fundamental unfairness of signature verification is only compounded by the fact that some voters never received notice that their ballot was rejected, were too busy or did not have the resources to fix the election official's mistake, or jumped through all of the necessary hoops to fix their ballots but *still* were disenfranchised. CP 865–70, 906–62.

Second, signature verification favors voters in counties with lower rejection rates over voters in other counties with higher rejection rates, and whether a voter's ballot will be treated more or less favorably is essentially random. Rejection rates consistently vary widely among Washington counties and within the same county across election years. Br. of Pet'rs at 27–28. Indeed, the rejection rates vary so much that the Washington State Auditor concluded that "the county where a ballot was cast was the most significant

variable related to rejection." CP 540; *see Reynolds*, 377 U.S. at 567.

In short, the undisputed facts show that signature verification cannot survive strict scrutiny. Because strict scrutiny is the applicable constitutional standard, the trial court erred by denying summary judgment for Plaintiffs on their due process claim.

D. Signature Verification Violates the Privileges and Immunities Clause

Signature verification also violates the Privileges and Immunities Clause because it inherently favors certain classes of voters, including those with consistent penmanship and those who sign their name in a way that is verifiable to any lay election official.

"Equal protection requires that all persons similarly situated should be treated alike." *Am. Legion Post No. 149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (internal quotation

marks omitted). In Washington, the similarly situated requirement is rooted in the Privileges and Immunities Clause, Article I, Section 12: "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." The clause is "intended to prevent favoritism and special treatment for a few to the disadvantage of others," and it "is more protective than the federal equal protection clause." *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518–19, 475 P.3d 164 (2020).

Courts considering a Privileges and Immunities claim ask "whether a challenged law grants a privilege or immunity for purposes of our state constitution" and "whether there is a reasonable ground for granting that privilege or immunity." *Id.* at 519. "[T]he level of

scrutiny applied when determining whether a reasonable ground exists in distinguishing between classifications has differed depending on the issues involved." *Quinn*, 1 Wn.3d at 487 (internal quotation marks and citation omitted). Because voting is a fundamental right of the utmost importance and signature verification directly infringes that right, this Court should apply strict scrutiny. *Madison*, 161 Wn.2d at 95; *Martinez-Cuevas*, 196 Wn.2d at 527. (Gonzalez, J., concurring) ("If a law disadvantages a suspect class or infringes on a fundamental right, we apply strict scrutiny.").

1. Signature Verification Cannot Survive Strict Scrutiny Under the Privileges and Immunities Clause

While the Secretary does not address what standard applies, King County incorrectly argues that only "reasonable grounds" scrutiny should apply here.

KCE Resp. at 64. This Court recently applied intermediate scrutiny "reasonable grounds" standard to economic regulations that nonetheless implicate fundamental rights protected by the Privileges and Immunities Clause. *Martinez-Cuevas*, 196 Wn.2d at 523–25. While this standard has been occasionally applied to statutes that *implicate* fundamental rights, it has never been applied to a statute that has deprived 170,000 voters of the fundamental right to vote, nor should it.

In any event, signature verification would not meet even the lower reasonable grounds standard because "[t]he provision must be justified in fact and theory," and "a court will not hypothesize facts to justify a legislative distinction. . . . Speculation may suffice under rational basis review, but article I,

section 12's reasonable ground analysis does not allow it." *Id.* at 523.

There is little evidence that signature verification actually advances the State's goals, let alone justifies them. That is insufficient even under the less demanding reasonable grounds test. *See id.*

2. Signature Verification Grants a Privilege or Immunity

Defendants argue that signature verification does not implicate the Privileges and Immunities Clause because "there is no classification on the face of the statute." Hobbs Resp. at 73–74; KCE Resp. at 62.

But if express classifications on the face of the statute were always required for a Privileges and Immunities violation, the state could hide behind well-crafted grants of favoritism and enjoy immunity to challenge. Under the Secretary's theory, for example, a statute mandating that each county have just one

polling location would present no Privileges and Immunities problem despite giving King County (population of over two million people) and Ferry County (population of fewer than 8,000 people) the same number of polling locations. That cannot be right.

Moreover, unlike in *Portugal*, where the WVRA affirmatively protects the "equal opportunity" of all voters "to elect candidates of their choice," signature verification inherently favors citizens who have consistent signatures and strips those who do not of their fundamental right to vote. 1 Wn.3d at 634. Put simply, the WVRA expands the right to vote, but signature verification arbitrarily infringes that right.

Even so, the wide-ranging and disparate impacts demonstrated in this case are inherent in signature verification. For example, voters under the age of

twenty-five "are not likely to have fully developed signatures," which "exacerbate[s] the potential for error in rejecting their ballots." CP 249. Voters whose native languages are Chinese and Urdu naturally show more variations in their signatures. *Id.* More broadly, signature verification favors certain groups of voters who consistently have their ballots rejected at lower rates, including white voters, older voters, voters with experience voting, and voters who speak English as a first language. CP 544–46. Signature verification inherently does not apply "on the same terms to all Washington voters," as the Secretary argues. Hobbs Resp. at 72. That, indeed, is the problem.

E. The Additional Issues Raised by King County Are Not Properly Before This Court

King County seeks review of the trial court's deferral of a ruling on severability and the Superior Court's denial of the motion to exclude the expert

testimony of Dr. Michael Herron. KCE Resp. at 30–41, 54–56. Neither issue is properly before this Court, and neither has merit.

1. Severability Is Not Properly Before This Court, and in Any Event, Signature Matching Is Severable from the Larger Vote-by-Mail Scheme

Before the trial court, King County sought a preliminary ruling that, in the event the trial court concluded that signature matching violated constitutional principles, this Court would have to strike down Washington's entire vote-by-mail scheme because, the county claimed, signature matching was not severable. CP 1133–34. The trial court, not surprisingly, deferred ruling on the scope of any remedial order. CP 2925.

King County seeks review of that decision. But severability is not properly before this Court, and even if it were, King County's arguments are not convincing.

a. Severability Is Not Properly Before This Court

As an initial matter, review of the question of severability is not properly before this Court because the trial court has yet to decide that issue. The only decision actually made by the lower court was to *defer its ruling* on the scope of its remedial order until after considering and ruling on the underlying constitutional challenges. CP 2925.

And *that decision* plainly lies within the sound discretion of the trial court. King County doesn't even attempt to argue that the trial court somehow abused its discretion by deferring a ruling on the question. KCE Resp. at 54–56. Nor could it. But that's the only decision that was made by the trial court that even *could be* considered on appeal at this point.

For obvious reasons, the trial court was well within its discretionary authority to defer the decision.

In the event it ruled against Plaintiffs, no decision need ever be reached on severability. In the event it ruled in favor of Plaintiffs, the precise scope of the appropriate remedial order is far from clear and the trial court's decision to defer addressing the issue without a complete factual record before it is obviously sensible and reasonable.

Accordingly, this Court should decline to address severability. That issue is not properly before this Court.

b. Signature Verification Is Severable

In any event, even if the issue were properly before this Court, signature verification is severable from Washington's vote-by-mail system because it is not a necessary component of mail voting.

An unconstitutional provision of a statute may be severed unless it is so connected to the rest of the

statute that "it could not be believed that the legislature would have passed one without the other" *or* it "is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature" without it. *State v. Abrams*, 163 Wn.2d 277, 285, 178 P.3d 1021 (2008).

Courts also consider whether the provision is "grammatically, functionally, and volitionally severable" from the remainder of the statute. *Id.* at 287.[19]

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[19] "[A] severability clause is not necessarily dispositive on the question of whether the legislative body would have enacted the remainder of the act." *League of Women Voters of Wash. v. State*, 184 Wn.2d 393, 412, 355 P.3d 1131 (2015).

(i) The Legislature Would Have Enacted Universal Vote-by-Mail Without Signature Verification

King County argues that "[l]egislative history conclusively shows" that the Washington Legislature would not have enacted universal mail voting without signature verification, KCE Resp. at 32, but offers no evidence and cites no authority to support that definitive assertion. *Id.*

Instead, King County offers the opinions of current election administrators. *Id.* at 32–36. That's hardly illuminating as to *legislative* intent in 2011. Nor are the cases King County deems "election fraud cases," *id.* at 34, relevant legislative history.[20]

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[20] The County cites recent examples from other states with different laws and different legislatures, which could not even have been considered by this

There is no dispute the Legislature had an "interest in protecting against election fraud" when it passed the legislation implementing universal mail-in voting. *Id.* at 36–38. But King County offers nothing to establish that signature verification specifically was the linchpin between this legislative concern and the passage of the statute as opposed to any of the other numerous fraud prevention safeguards. Br. of Pet'rs at 8–11. If the Legislature believes verification or an additional safeguard is necessary, it can choose a new one or not. That's the Legislature's choice. King County has failed to establish that vote-by-mail and signature verification "are so connected that it could not be believed that the legislature would have passed

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Legislature in 2011. *Id.* at 39–40. None of this is relevant to severability.

one without the other." *Abrams*, 163 Wn.2d at 285. They are not.

(ii) Mail Voting Accomplishes the Purposes of the Legislature Without Signature Verification

The Legislature enacted Washington's universal vote-by-mail system to increase voter access while also maintaining election integrity. *See* RCW 29A.04.205. The mail-in voting statute accomplishes these purposes without signature verification for several reasons.

First, there's little evidence that signature verification actually catches or prevents fraudulent votes or otherwise improves election security. *See* Br. of Pet'rs at 30–31; Section II(b)(2)(a) *supra*.

Second, eliminating signature verification would actually *increase* voter access because it would eliminate the routine disenfranchisement of thousands of fully-qualified Washington voters.

Third, King County ignores Washington's other extensive and overlapping protections against voter fraud that actually safeguard elections. Br. of Pet'rs at 8–11.

Finally, King County argues that recently enacted legislation, including ESB 5890 and SSB 6269, is "conclusive evidence that the legislature views the signature verification requirement as necessary to prevent fraudulent interception of ballots." KCE Resp. at 28.

But King County has this entirely backwards because the new legislation seeks *alternatives to replace signature verification*. *See* SSB 6269 § 1 (The stated purpose of this bill is to "allow for the development and testing of supplemental methods, *other than signature verification*, to verify that a ballot was filled out and returned by the intended voter.")

(emphasis added). If the Legislature thought signature verification was necessary to mail voting, then it would not be seeking alternatives to replace it. If anything, the bills reflect the Legislature's awareness of the obvious problems with signature matching.

(iii) Signature Verification Is Functionally Severable

There is no colorable argument that signature verification is grammatically or functionally inseverable from the mail voting statute (and King County does not attempt to make one). The signature verification requirement is a discrete portion of Washington's vote-by-mail system. It makes up a single sentence of RCW 29A.40.110. Section .110 is only one of eleven sections in RCW Chapter 29A.40 ("Elections by Mail"). The unconstitutional portion of RCW 29A.40.110(3) relating to signature verification

can easily be stricken without disturbing the statutory scheme.

If signature verification were in fact inextricably tied to mail-in voting, its removal would surely result in the inability for the state's elections to run successfully. But functionally, without signature verification, the voter's experience with vote-by-mail would not change at all. And the change for election administrators would be minimal. Indeed, there is no evidence that the states without signature verification cannot successfully run elections.

2. The Admissibility of Dr. Herron's Report Is Not Properly Before This Court, and in Any Event, the Trial Court Properly Considered It

King County's challenge to the admissibility of the report by Plaintiffs' expert, Dr. Herron, is not properly before this Court. Even if it were, it has no merit.

Dr. Herron conducted an exhaustive search for cases of voter fraud that resulted in criminal convictions or guilty pleas in Washington state. CP 289–302. In the over twelve-year period of his search, Dr. Herron could not find *a single case* of voter fraud that was caught by the signature verification requirement and resulted in a criminal conviction or a guilty plea. CP 299–301. King County moved to strike the report as "not helpful," which the trial court denied. CP 1124, 2925–26.

a. The Trial Court's Decision to Deny the Motion to Strike Is Not Properly Before This Court

This issue, like severability, is not properly before this Court at this time. The Superior Court never certified this issue for interlocutory appeal. CP 2982–83. King County failed to include it in its motion for discretionary review. *See* King Cnty. Canvassing Bd.'s

Mot. for Discretionary Review. And the Supreme Court Commissioner never mentioned it in his order granting review. *See* Ruling Granting Direct Discretionary Review and Granting Mot. for Accelerated Review in Part.

And for good reason. The admissibility of an expert report is the very definition of a routine discretionary evidentiary ruling that can and should be raised on an appeal from a ruling *on the merits*. And it hardly makes sense to take up this lone evidentiary issue at this point, in an interlocutory appeal, out of context, and prior to a ruling on the merits.

b. The Trial Court Did Not Abuse Its Discretion by Considering Dr. Herron's Report

In any event, the Superior Court properly rejected King County's motion to strike Dr. Herron's report. "[T]rial courts are afforded wide discretion and

trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). The trial court's decision here was clearly not an abuse of discretion.

Dr. Herron's report provided key data about the rate of voter fraud in Washington and whether signature verification has caught any cases of voter fraud that ultimately led to a conviction or guilty plea, information that is helpful to the fact finder and directly relevant to the issues in this litigation. CP 289–302. King County, for its part, offers no competing expert, and no quantifiable data to assess signature verification, only anecdotal evidence.

The trial court, in short, properly rejected the County's request.

III. Conclusion

Plaintiffs respectfully ask this Court to reverse the Superior Court, apply strict scrutiny to the signature verification requirement found in RCW 29A.40.110(3), and remand this case with instructions to enter summary judgment for Plaintiffs.

Certificate of Compliance: I certify this brief contains 11,993 words in compliance with Rules of Appellate Procedure 10.4 and 18.17(b).

RESPECTFULLY SUBMITTED this 26th day of April, 2024.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on April 26, 2024, I electronically filed the foregoing document via the Washington State Supreme Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 26th day of April, 2024.

s/June Starr
June Starr

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