

NO. 102569-6

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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VET VOICE FOUNDATION, et al.,

Petitioners,

v.

STEVE HOBBS, et al.,

Respondents.

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**CROSS-REPLY BRIEF OF RESPONDENT HOBBS**

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## I. INTRODUCTION

Voting in Washington is easier than it has ever been, and is easier than in virtually any other state. According to Plaintiffs, though, voting in Washington is unconstitutionally burdensome. Their radical view would mean that Washington elections—and those in every other state—have always been unconstitutional, and that many foundational election laws are invalid. No court has accepted this view, and this Court should not either.

In bringing a facial challenge, Plaintiffs made this an easy case. They could have brought an as-applied challenge to the Secretary's rules or county systems for verifying signatures, but instead they brought a facial challenge, claiming it is impossible to apply *any* form of signature verification constitutionally. Under this Court's precedent, they must prove that there is no set of circumstances in which signature verification could be constitutionally applied. They cannot meet this burden. Applying the appropriate standard for facial challenges, this Court should direct entry of summary judgment in favor of the Secretary.

## II. ARGUMENT

### A. The “No Set of Circumstances” Standard Applies to Facial Challenges

Relying on nonbinding and inapplicable cases from other jurisdictions, Plaintiffs ask this Court to ignore its longstanding rule that “[a] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can be constitutionally applied.” *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000) (quoting *In re Detention of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)); *see also* Br. of Resp’t 25-30. But this Court has continuously and recently reaffirmed this standard. *See, e.g., Portugal v. Franklin County*, 1 Wn.3d 629, 660-61, 530 P.3d 994 (2023). And this standard exists for good reasons, including to respect the separation of powers. Here, where the Legislature has relied on signature verification to secure mail-in ballots for more than 100 years, this Court should not entirely invalidate that approach merely because it *could be* applied in an unconstitutional way. Instead, the remedy for any unconstitutional application would

be an as-applied challenge, not enjoining signature verification altogether. The superior court erred in failing to apply this clear standard.

**1. This Court’s precedent is squarely on point**

Contrary to Plaintiffs’ suggestion, Reply Br. of Pet’rs 10-11, this Court’s precedent applying the “no set of circumstances” standard is not distinguishable. The standard applies whenever a challenger seeks to invalidate a statute. *Tunstall*, 141 Wn.2d at 221. This is the relief Plaintiffs seek— “[a] declaration that RCW 29A.40.110(3) . . . violates . . . the Washington Constitution[.]” CP 110. Their argument is not merely that the current application of the statute (through existing regulations and county practices) is unconstitutional; they seek to prohibit *any* method of verifying signatures, including implementation of the Secretary’s new regulations, which raise the bar for challenging signatures and broadly expand cure opportunities. The extraordinary relief that Plaintiffs

seek is the reason that the “no set of circumstances” standard applies.

Plaintiffs’ attempt to distinguish *Woods v. Seattle’s Union Gospel Mission*, 197 Wn.2d 231, 240, 481 P.3d 1060 (2021), backfires. Like the challenge in *Woods*, Plaintiffs’ claim “rest[s] on speculation” and “anticipate[s] a question of constitutional law in advance of the necessity of deciding it[.]” *Id.* (quoting *State v. McCuiston*, 174 Wn.2d 369, 389, 275 P.3d 1092 (2012)). Specifically, Plaintiffs ask this Court to prematurely address whether the Secretary’s updated signature verification regulations (or any other potential regulations) are constitutional based on pure speculation about their impacts. In this way, Plaintiffs’ claim is a pre-enforcement challenge, contrary to their attempt to distinguish *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). Reply. Br. of Pet’rs 10.

Plaintiffs’ attempt to distinguish *Portugal* also fails. This Court applied the “no set of circumstances” standard not because,

as Plaintiffs claim, the challenger had “‘fundamentally misinterpret[ed]’ the text of a statute.” Reply Br. of Pet’rs 10-11. Rather, this Court applied the “no set of circumstances” standard “[b]ecause Gimenez makes facial challenges.” *Portugal*, 1 Wn.3d at 647. The “no set of circumstances” standard applies here for the same reason.

And Plaintiffs do not even attempt to distinguish the other cases in which this Court has applied the “no set of circumstances” standard. *See, e.g., State v. Fraser*, 199 Wn.2d 465, 486-87, 509 P.3d 282 (2022) (rejecting plaintiff’s facial challenge where “there exists the circumstances in which this statute can be constitutionally applied”); *Lummi Indian Nation v. State*, 170 Wn.2d 247, 267, 241 P.3d 1220 (2010) (“[T]his is a facial challenge, and ‘a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied.’” (quoting *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000))).

Even Plaintiffs' nonbinding authorities fail to support their position. Plaintiffs incorrectly assert that the United States Supreme Court no longer applies the "no set of circumstances" standard to facial challenges, but that court continues to characterize this standard as the "normal[]" rule for facial challenges, *e.g.*, *United States v. Hansen*, 599 U.S. 762, 769, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023), and federal courts routinely apply it, *e.g.*, *CDK Global LLC v. Brnovich*, 16 F.4th 1266, 1274 (9th Cir. 2021). Indeed, Plaintiffs' own cited cases recognize that the "no set of circumstances" standard applies to facial challenges. *E.g.*, *Montana Democratic Party v. Jacobsen*, 545 P.3d 1074, 1084 (Mont. Mar. 27, 2024). Several of the cases Plaintiffs cite that did not apply this standard, such as *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), and *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 835-36 (4th Cir. 2023), involved as-applied challenges, which Plaintiffs disclaim here. And several

of the cases Plaintiffs cite reveal only that some free speech doctrines have unique facial validity standards, such as for content-based speech restrictions and overbreadth standard. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799-805, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363, 373-74 (3d Cir. 2016).

In short, because Plaintiffs seek to facially invalidate the signature verification statute, this Court's precedent requires that they establish that there is no set of circumstances in which signature verification can be constitutional.

**2. Plaintiffs do not attempt to establish that the standard is incorrect and harmful**

There is no basis for this Court to reject its precedent governing facial challenges. To overturn precedent, a party must make "a clear showing that an established rule is incorrect and harmful." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Plaintiffs do not even attempt to make this showing. *See* Reply Br. at 3-17. Nor could

they. Because it serves important separation of powers values, the standard is correct. And because any unconstitutional application can still be challenged on an as-applied basis, the standard is not harmful.

**3. Plaintiffs must show that there is no set of circumstances in which signature verification could pass the relevant constitutional test**

Plaintiffs argue that this Court should “apply the relevant constitutional test” rather than the “no set of circumstances” standard, but this is a false dichotomy. Reply Br. of Pet’rs 4-10. Because this is a facial challenge, these standards apply in tandem. Plaintiffs must establish that the law can never be applied constitutionally under the relevant constitutional test, whether that be *Anderson-Burdick* or something else.

**B. Plaintiffs Cannot Satisfy the Facial Standard**

In a facial challenge, the relevance of evidence depends on the statute that is challenged. The fundamental inquiry is “whether the terms of the statute itself” inherently contain a constitutional infirmity. *Doe v. City of Albuquerque*, 667 F.3d

1111, 1127 (10th Cir. 2012). If the statute is specific and narrow, then evidence about its specific application is highly relevant to a facial challenge. For example, if a challenged statute required proof of United States citizenship using statutorily-specified documents, evidence about the impact of such specific statutory requirements would be highly relevant to a facial challenge. *See Fish v. Schwab*, 957 F.3d 1105, 1111-12 (10th Cir. 2020). Where there are many ways in which a statute can be implemented, however, evidence about a particular allegedly unconstitutional application has little relevance in a facial challenge.

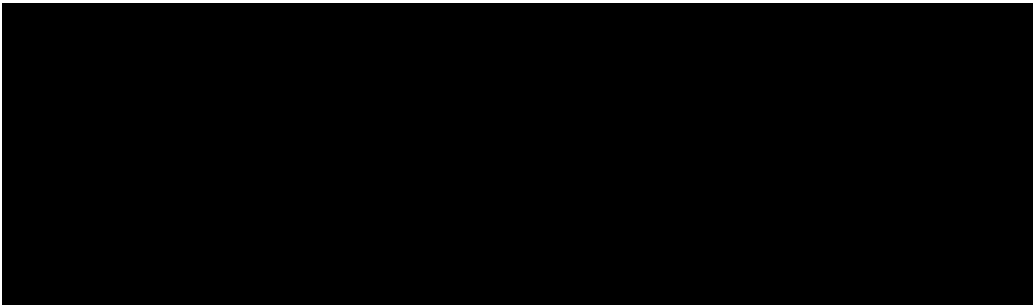
In this case, signature verification is capable of many potential applications. While it requires that elections personnel “verify that the voter’s signature on the ballot declaration is the same as the signature of that voter in the registration files of the county,” RCW 29A.40.110, the Secretary has broad discretion to adopt the verification standard and processes, RCW 29A.04.611(54). To be sure, this statute *could* be applied in an unconstitutional manner. For example, if the rules made it

virtually impossible for a voter to cure a signature mismatch, the rules could be appropriately invalidated in an as-applied challenge.

The problem for Plaintiffs, though, is that RCW 29A.40.110(3) can be applied in a constitutional manner under any constitutional test. The Secretary, for example, could adopt a signature verification standard under which only the most obvious discrepancies are the basis for a signature challenge, such as where the ballot declaration contains an entirely different name. For example, the signature in the voter registration file for Clark County voter Jonathan Gaskill appears as follows:



CP 3026. But the returned ballot declaration that purported to come from Mr. Gaskill clearly contained a different name:



CP 3027; *see also* CP 3037. An application of the statute rejecting only such obvious discrepancies would surely be constitutional under any standard. And because the statute can be applied in a constitutional manner, Plaintiffs' facial challenge fails.

Whether the Secretary's newly-adopted regulations are a constitutional application of the statute can be addressed in an as-applied challenge. But Plaintiffs did not bring an as-applied challenge, nor do they submit any evidence that implementing signature verification under the new regulations imposes any burden, much less a severe one. They bring an exclusively facial challenge that, if successful, would require elections officials to accept ballots where the ballot declaration signature obviously comes from a third party. Because RCW 29A.40.110(3) can be

applied in a constitutional manner, the superior court erred when it denied the Secretary's motion for summary judgment.

\* \* \*

The analysis above is dispositive, and this Court need go no further. The following sections provide additional reasons that each of Plaintiffs' facial challenges fail.

**C. Signature Verification does not Facially Violate Article I, Section 19**

All parties now appear to agree that, consistent with the *Anderson-Burdick* framework, challenges to voting regulations under article I, section 19 involve a two-step process. First, courts determine the appropriate level of scrutiny, which Plaintiffs agree is not always strict scrutiny. Reply Br. of Pet'rs 33. Second, courts apply the appropriate level of scrutiny. Consistent with decisions of federal and state courts across the country, this Court should hold that the level of scrutiny is based on the magnitude of the burden imposed by the challenged election law or regulation. Plaintiffs' alternative proposal is analytically unsound, unworkable, and unsupported by decisions

of any state or federal court. On Plaintiffs' facial challenge, the relevant burden is not severe and is outweighed by the benefits to election security. Signature verification can be implemented in a manner that ensures all voters have the opportunity to have their ballot counted. On the face of the statute, no voters are systematically excluded from exercising the right to vote. And even if strict scrutiny did apply, the Secretary would still be entitled to summary judgment.

**1. The level of scrutiny appropriately turns on the magnitude of the burden**

Under the *Anderson-Burdick* framework, the degree of constitutional scrutiny depends on the magnitude of the burden imposed by a challenged regulation. A law imposing a severe burden must satisfy strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). For purposes of article I, section 19, a law imposes a severe burden if it results in "the complete denial of the right to vote to a group of affected citizens." *Eugster v. State*, 171 Wn.2d 839, 845, 259 P.3d 146 (2011). This would apply to a statute expressly

precluding certain voters from participating in an election, *e.g.*, *City of Seattle v. State*, 103 Wn.2d 663, 672, 694 P.2d 641 (1985); *Foster v. Sunnyside Irrigation Dist.*, 102 Wn.2d 395, 410, 687 P.2d 841 (1984), and to a law that makes it practically impossible for a voter exercising reasonable diligence to cast their ballot, *see, e.g.*, *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784, 794 (9th Cir. 2012) (using “‘reasonably diligent’” standard for determining burden in ballot access case). Laws that do not impose a severe burden are subject to a lesser degree of scrutiny. Laws imposing only a *de minimis* burden need satisfy only rational basis review, *e.g.*, *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 (9th Cir. 2015), while laws imposing a burden that is more than *de minimis* but less than severe are subject to a form of intermediate scrutiny, *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021).

Every state to squarely address the issue under state constitutional provisions has also adopted a framework under

which the level of scrutiny is based on the magnitude of the burden. The cases cited by Plaintiffs demonstrate this. In *Weinschenck v. Missouri*, 203 S.W.3d 201, 215-16 (Mo. 2006), the Court held that “[s]o long as [election] regulations do not impose a heavy burden on the right to vote” they are subject to rational basis review and that “[i]f the regulations place a heavy burden on the right to vote,” they are subject to strict scrutiny. Similarly, in *Montana Democratic Party*, the Montana Supreme Court adopted a framework that looks to a law’s burden to determine the level of scrutiny to apply, categorizing laws as either “impermissibly interfer[ing] with the right to vote” or “minimally burden[ing] the right to vote.” 545 P.3d at 1093. To determine which category applied, the Montana Supreme Court looked to whether—and the degree to which—the challenged law prevented registered voters from voting. *Id.* at 1094, 1096-97, 1102, 1105. The Idaho Supreme Court recently reached largely the same conclusion. *Babe Vote v. McGrane*, 546 P.3d

694, 710-11, 713 (Idaho 2024). Other states are in accord. Br. of Resp't 44 & n.4.

This Court should reject Plaintiffs' novel and unworkable alternative. Plaintiffs attempt to distinguish between laws that "infringe[] or deny the right to vote" and all other voting laws, Reply Br. of Pet'rs 34, but their application of this distinction is unworkable. It is true that laws completely denying affected voters an opportunity to cast a ballot are generally subject to strict scrutiny, *see Eugster*, 171 Wn.2d at 845, but that does not apply here because signature verification does not deny any voter the opportunity to cast a ballot (this is especially obvious because of Washington's robust cure process).

Plaintiffs' argument seems to be that if an election law can result in a ballot being rejected, then the law "infringes or denies the right to vote" and must receive strict scrutiny, but that cannot possibly be right, and no court has ever so held. Under that view strict scrutiny would apply to—and likely invalidate—many foundational election laws. For example, Plaintiffs cite the

requirement to sign a ballot declaration under the penalty of perjury as an important measure for protecting election integrity. Br. of Pet'rs 9-10. Yet under Plaintiffs' framework, this requirement would receive strict scrutiny due to the number of ballots rejected for lack of a signature, even where Plaintiffs agree it imposes no undue burden. Plaintiffs respond only that they do not challenge that statute in this litigation. Reply Br. of Pet'rs 23-24. That's hollow comfort. Similarly, as the Secretary pointed out previously, the 8:00pm deadline for returning a ballot results in more rejected ballots than signature verification, and it would be easy to argue that 8:01pm is a less restrictive alternative. Br. of Resp't 45. Any ballot return deadline or identity verification requirement would be presumptively unconstitutional under Plaintiffs' approach. This perhaps explains why no court has adopted it. Neither should this Court.

No other state court has adopted Plaintiffs' proposed framework. To be sure, there is dicta using similar terminology in *Montana Democratic Party* and *Weinschenk*. *Montana*

*Democratic Party*, 545 P.3d at 1093 (characterizing threshold determination as “whether the challenger has shown that a statute impermissibly interferes with the right to vote”); *Weinschenck*, 203 S.W.3d at 215 (characterizing threshold determination as whether “statutes imping[e] upon the right to vote”). But in determining the level of scrutiny to apply, those courts—like federal courts and courts in other states—looked to the magnitude of the burden imposed by the challenged law. *Montana Democratic Party*, 545 P.3d at 1093; *Weinschenck*, 203 S.W.3d at 215-16.

Plaintiffs’ arguments about time, place, or manner regulations also miss the mark. Plaintiffs misconstrue the Secretary’s argument. The Secretary’s point is that the Washington Constitution mandates that the Legislature “require a compliance” with voter registration laws “before any elector shall be allowed to vote.” Const. art. VI, § 7. Ensuring compliance with voter registration laws is precisely what signature verification does—it ensures that the ballot was cast by

a registered voter. The constitutional delegation of authority to the Legislature counsels in favor of a more deferential standard of review. Even under a “time, place, or manner” framework, though, signature verification is part of the “manner” of voting. Under current law, the Legislature provides two ways for voters to prove their identity: appearing in person with photo identification or providing a signature for verification. RCW 29A.40.110(3), .160(9). That regulates the “manner” of voting.

Plaintiffs argue that when a voter has timely marked, sealed, and returned that voter’s ballot, with a signed ballot declaration, any additional restrictions are subject to strict scrutiny. Reply Br. of Pet’rs 26-27. The problem with Plaintiffs’ argument is that it assumes that every received ballot is from the named voter. The record demonstrates that this is not always true. *E.g.*, CP 3026, 3037-38, 3046, 3043. Plaintiffs’ argument does not justify strict scrutiny where signature verification simply ensures that the ballot is, in fact, from a registered voter.

**2. The burden imposed by the statute is not severe**

In this facial challenge, RCW 29A.40.110 does not impose a severe burden. The statute requires only that election “[p]ersonnel shall verify that the voter’s signature on the ballot declaration is the same as the signature of that voter in the registration files of the county.” RCW 29A.40.110(3). The statute does not define *how* that verification is conducted; the standards and processes are left to regulations adopted by the Secretary. RCW 29A.04.611(53). In this facial challenge, Plaintiffs must establish that there is no regulatory scheme under which the statute can be constitutionally applied. *See supra* 2-8. On the face of the statute, there is no category of voters that is completely denied the right to vote. If a voter is unable to apply a signature (such as due to disability), the statutory scheme expressly provides alternatives. RCW 29A.40.160(9)(a) (allowing identification of voter with disability by another registered voter), (9)(b) (allowing any voter to vote in person with photo identification instead of matching signature). And the

statutory scheme expressly requires that election officials provide notice of signature challenges, RCW 29A.60.165(2)-(3), and provides every voter with a meaningful opportunity to cure a mistaken signature challenge, RCW 29A.60.190.

It is certainly true that regulations implementing the statutory scheme *could* impose a more substantial burden. But Plaintiffs expressly disclaimed any challenge to the Secretary's regulations, CP 51, and, in any event, the Secretary's new regulations do the opposite, creating an express presumption that the ballot declaration signature is valid, WAC 434-261-051(2), establishing a high standard for challenging a signature, WAC 434-261-052(1)(b) (requiring "multiple, significant, and obvious discrepancies from all signatures in the voter's registration record"), permitting any signature of the voter's choosing, *see* WAC 434-261-005(6), and providing expansive opportunities to cure, WAC 434-261-053. Nothing in the statute itself involves anything approaching a severe burden.

Plaintiffs' attempt to portray the signature verification statute as burdensome misses the mark. Plaintiffs first rely on the number of voters who did not cure signature challenges, *E.g.*, Reply Br. of Pet'rs 12, but there are at least two problems with that argument. First, those numbers were the result of a regulatory standard that is not required by the statute and has since been replaced. *See* Wash. St. Reg. 24-07-018. The numbers at most speak to the burden of former regulations (which Plaintiffs do not challenge), not an unavoidable burden imposed by the statute. Second, those numbers include many voters who did not even attempt to cure the ballot challenge under the former cure process, much less under the expanded and simplified current cure process, WAC 434-261-053. *See, e.g.*, CP 999, 1008, 1017. Plaintiffs' statistics do not speak to the burden imposed by the statute itself.

Plaintiffs repeatedly rely on the allegation that some declarants did not receive notice that their ballots were challenged. Reply Br. of Pet'rs 24, 51, 60 n.16, 62-63, 71. While

that allegation is disputed, CP 1567, even if true, it does not support a facial challenge. The statute *requires* that election officials notify voters. RCW 29A.60.165(2). Recent legislation and regulations *expand* the notice requirement. Laws of 2024, ch. 269, §1; WAC 434-261-053(1). Plaintiffs may, of course, bring an as-applied challenge if counties are not complying with state law. But even if Plaintiffs could establish isolated instances of noncompliance with state law, that would not justify facially invalidating signature verification.

Plaintiffs also rely on allegations that signature verification has resulted in disproportionate ballot rejections based on age, race, native language, military status, and voter experience. Reply Br. of Pet'rs 70. Even accepting Plaintiffs' disputed statistics, that is not a burden attributable to the statute itself. Nothing about a voter's age, race, native language, military status, or voting experience inherently prevents them from providing a signature that they can re-create

without “multiple, significant, and obvious discrepancies.”  
WAC 434-261-052(1)(a).

The Secretary’s updated regulations are designed to address potential disparities under prior implementations of the statute. For all voters, the heightened standard for challenging a ballot signature will reduce mistaken ballot challenges. The option to cure a challenge using secondary identify verification methods (such as a multifactor authentication code), WAC 434-261-053(5)(b), do not require additional signatures or the return of any forms, and will be particularly familiar to younger voters. And the regulations require that signature cure notice letters be available in multiple languages. WAC 434-261-053(1)(a)(ii). Further, recent legislation requires additional notice to voters about signature verification and community outreach by county auditors that specifically “target[s] groups with higher rates of ballot rejection.” Laws of 2024, ch. 269, §§ 5-7. If any counties continue to experience disproportionate results, the remedy is either additional amendments under the

Secretary's broad authority or as-applied legal challenges to the implementation in those counties, *see Reyes v. Chilton*, No. 4:21-cv-05075-MKD (E.D. Wash. 2021) (challenging, under federal Voting Rights Act and United States Constitution, implementation of signature verification in three counties). Plaintiffs cannot establish that the statute itself requires disproportionate ballot rejection among identifiable groups.

Plaintiffs also suggest an unavoidable burden because "voters' signatures will inevitably vary with age, disease, injury, writing instruments or surfaces, preferences, or other perfectly innocent reasons." Reply Br. of Pet'rs 50 n.14. It is certainly true that voters' signatures can vary, but nothing about the statute requires ballot rejection based on those changes. Under recent regulations, each accepted ballot declaration signature becomes an additional comparator for future ballot declaration signatures. WAC 434-261-005(6)(c). And the Secretary's regulations provide that a ballot declaration signature should be accepted where an apparent discrepancy "can reasonably be explained

by,” among other things: “[a] change in the voter’s signature over time”; shaking that is “health-related or the result of aging”; the use of a stylus or other instrument for signatures in the voter registration file; or the “writing surface.” WAC 434-261-051(4). There is no requirement of “consistent penmanship” or “consistent signatures.” Reply Br. 30 n.8, 61 n.17, 72, 77. Signature verification can account for changes in signatures.

And even if a genuine signature is mistakenly challenged despite these regulations, the statutory scheme allows an easy opportunity to cure: by signing a signature update form and returning it postage prepaid; through a secondary identity verification; or, at the voter’s option, appearing in person and signing a new registration form. WAC 434-261-053(5). Particularly in light of the availability of an easy electronic means to cure and the generous statutory cure period, if there are any “voters who do not have the time, opportunity, or resources to cure,” Reply Br. 51, it is a vanishingly small number. Contrary to Plaintiffs’ suggestion, nothing about the statute itself

inevitably imposes a substantial burden on voters. No court has *ever* struck down a signature verification law that included such expansive cure mechanisms.

In assessing the burden, courts should also consider the burdens that the challenged law removes. Plaintiffs do not dispute that signature verification is essential to allowing easy access to replacement ballots and forwarding of ballots to new addresses. *See* Br. of Resp't 55-56. Instead, they contend that this Court should ignore the ballot accessibility benefits that signature verification enables—tools that voters have used hundreds of thousands of times to easily replace a missing or lost ballot. *See* Reply Br. of Pet'rs 40-41; *see also* CP 2702. Plaintiffs also ignore that signature verification is less burdensome than requiring that voters appear in-person at poll sites on Election Day. Courts should look holistically at the effect of a challenged regulation in determining the burden it imposes. Otherwise, in striking down an election regulation that might appear burdensome in isolation, a court might *increase* the actual burden

on a much larger set of voters. Plaintiffs identify no authority requiring this perverse result.

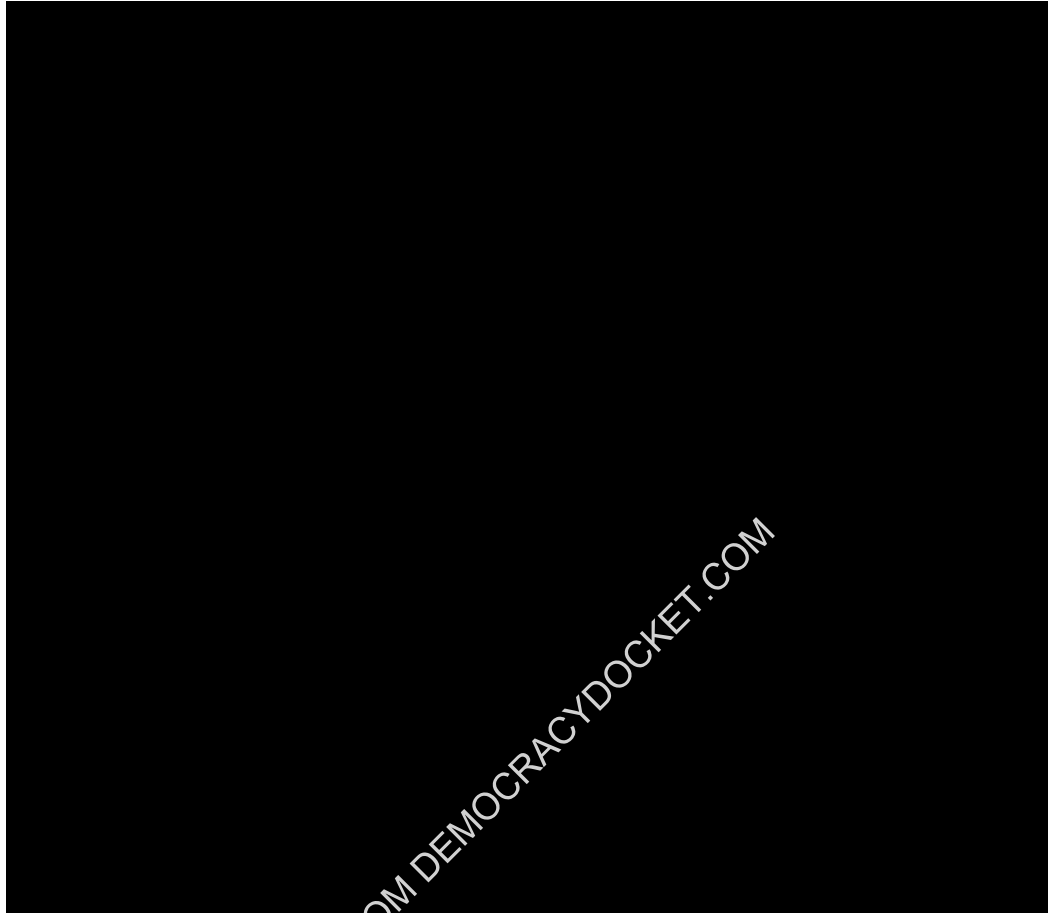
**3. The State's interests easily outweigh the statute's minimal burden**

The undisputed evidence establishes that signature verification prevents third parties from casting a voter's ballot. The record contains examples of signatures on ballot envelopes that clearly are not the signature of the voter, such as signatures of a completely different name:

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CP 3037



CP 3038. These ballots were properly challenged—and ultimately rejected—through the signature verification process. If RCW 29A.40.110(3) is facially invalidated, there would be no basis to reject these obviously invalid ballots. The record also contains admissible evidence that signature verification is essential to preventing invalid ballots from being counted and that it is the *only* existing method in Washington for doing so. CP 1562, 1811, 1821, 1922, 1939. Signature verification’s

exclusion of invalid ballots advances the State's interest in protecting the integrity of the election. *See* Br. of Resp't 57-63. It protects an individual's right to vote by ensuring that a third party does not cast their ballot, depriving the actual voter of the opportunity to do so. *See* RCW 29A.60.160(14). And it advances public confidence in the electoral process because the public knows that there is a mechanism for preventing invalid votes from being cast. *See* Br. of Resp't 63-68.

Plaintiffs' counterarguments miss the mark. Many of them are irrelevant to a facial challenge. For example, Plaintiffs highlight the number of ballots rejected under past implementations of the signature verification statute. Reply Br. of Pet'rs 47. While those numbers would be relevant in an as-applied challenge to prior regulations, they say nothing about implementation of the new regulations or future refinements to the signature verification process.

The absence of criminal prosecutions is also no answer. *See* Reply Br. of Pet'rs 38, 44. That prosecutors exercise

discretion not to prosecute individuals for unsuccessful attempts to vote another's ballot is no reason to eliminate the exclusive means of detecting such attempts.

Plaintiffs' focus on the lack of studies is also wrong. The State's burden is, at most, to "put forward" the "precise interests" served by the regulation and demonstrate how the law serves those interests. *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). This does not require "elaborate, empirical verification." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). Because this is a facial challenge there is no need to establish that the existing regulations advance those precise interests, just that there is a "set of circumstances" in which the statute could advance those interests. *See Portugal*, 1 Wn.3d at 647. The Secretary has done so. *Supra* 28-29.

Plaintiffs also make two particularly curious arguments. Plaintiffs highlight three successful prosecutions of individuals signing another's ballot declaration, in which the fraud was not

detected through the signature verification process. Reply Br. of Pet'rs 44 n.11. That hardly supports eliminating the only existing process for detecting such fraud. And Plaintiffs also point to states with *more* burdensome election systems to argue that Washington's system is unconstitutionally burdensome. *Id.* at 41. For example, in some of those states, voters must apply each year—or even each election—for an absentee ballot, *see* Conn. Gen. Stat. §§ 9-140, 9-140e, or cannot easily obtain a replacement ballot if theirs is lost, *see* Vt. Stat. Ann. tit. 17, § 2532(e). While some states do not conduct signature verification on the returned ballots of a subset of voters, those states impose other, more burdensome measures to protect the security of their elections. There is a reason that Washington is in the top few states for ease of voting, and the flexibility allowed by signature verification is a key component of that.

**4. The Secretary would be entitled to summary judgment even under strict scrutiny**

Even if this Court were to accept Plaintiffs' invitation to presume that election laws like signature verification are

unconstitutional, signature verification would satisfy strict scrutiny. To satisfy strict scrutiny, a law must advance a compelling governmental interest and be narrowly tailored. *E.g.*, *Elster v. City of Seattle*, 193 Wn.2d 638, 642, 444 P.3d 590 (2019). For purposes of strict scrutiny, a law is narrowly tailored if it is “the least restrictive means among available, effective alternatives” of accomplishing the compelling interest. *E.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004); *see also First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 227, 840 P.2d 174 (1992). Plaintiffs have already conceded that the State’s interests are compelling. Br. of Pet’rs 70. The signature verification statute can be—and is—implemented in a manner that advances those interests. Other methods that the Legislature could choose, such as photo ID requirements, are *more* burdensome to voters. Br. of Resp’t 55. Because Plaintiffs do not identify any alternative, there is no dispute of fact preventing summary judgment in favor of the Secretary.

**D. The Secretary is Entitled to Summary Judgment on Plaintiffs' Due Process Claim**

Plaintiffs' due process claim fails for the same reason as their article I, section 19 claim. Substantive due process claims under the Washington Constitution are subject to the same standards as federal due process claims, and federal due process claims are analyzed under the *Anderson-Burdick* framework. Br. of Resp't 74-75. Plaintiffs ignore this and simply argue that strict scrutiny applies. Reply Br. 68-69. Despite proposing "an alternative, more stringent test," Plaintiffs fail to "explain how the Washington Constitution commands the proposed test" by applying the *Gunwall*<sup>1</sup> factors. *State v. Rivers*, 1 Wn.3d 834, 859, 533 P.3d 410 (2023). Plaintiffs identify nothing in the state constitutional text or preexisting state law that presumes identity verification laws are unconstitutional. State constitutional text does the opposite, directing the Legislature to "require a compliance" with voter registration laws, Const. art. VI, § 7, and

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<sup>1</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

preexisting state law required identity verification to vote, Code of 1881, §§ 3079, 3081 (requiring in-person voting, announcement of voter's name, and opportunity for objection to the voter's qualifications). It is not enough for Plaintiffs to assert that the Washington Constitution is "more protective." Reply Br. of Pet'rs 69. This Court has rejected the contention that Washington's due process clause is categorically more protective than its federal counterpart. *Yim v. City of Seattle*, 194 Wn.2d 682, 690, 451 P.3d 694 (2019).

Because Plaintiffs do not justify a more stringent test under the Washington Constitution, the *Anderson-Burdick* test applies, and the Secretary is entitled to summary judgment for the reasons described above. The only new argument Plaintiffs offer is that rejection rates vary by county. Reply Br. of Pet'rs 71-72. While there is some county-to-county variation, it is minimal. In the 2020 General Election, the rejection rate for non-matching signatures was below 1.25 percent in all counties. CP 348. To the extent that a particular county's application of the

signature verification process results in inappropriately high rejection rates, the remedy is an as-applied challenge to that county's application, not a facial challenge that would prohibit *any* identity verification.

**E. The Secretary is Entitled to Summary Judgment on Plaintiffs' Privileges or Immunities Claim**

Plaintiffs cannot satisfy their burden to show that the signature verification statute facially violates the privileges or immunities clause. Plaintiffs acknowledge that this Court applies a distinct inquiry to privileges or immunities claims, Reply Br. of Pet'rs 73-74, implicitly conceding the trial court erred in applying the *Anderson-Burdick* test. Plaintiffs cannot meet the actual test.

Plaintiffs never dispute that the signature verification statute, on its face, creates no classification. Under *Portugal*, that is fatal to Plaintiffs' claim. *Portugal* rejected a facial privileges or immunities claim, holding that the challenged law "can clearly be applied in a manner that does not violate article I, section 12 because, on its face, the WVRA does not grant any privilege or

immunity to any class of citizens.” *Portugal*, 1 Wn.3d at 647. A classification on the face of the statute is required.

Plaintiffs cite no authority for their contrary argument. Reply Br. of Pet’rs 76-77. And their hypothetical law mandating a single polling location per county is irrelevant. Such a law *would* create a facial classification. Considering only judicially noticeable facts about the populations of counties, that hypothetical law would, on its face, treat voters differently based on their county of residence. The signature verification law creates no similar classification or mandatory differential treatment of voters.

Plaintiffs attempt to superficially distinguish this Court’s controlling decisions in *Portugal* and *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007), while ignoring this Court’s core holdings. Contrary to Plaintiffs’ suggestion, Reply Br. of Pet’rs 77, this Court’s decision in *Portugal* was based entirely on the absence of any classification, not the type of law at issue. And Plaintiffs ignore that, in *Madison*, this Court rejected the

privileges or immunities challenge in part because the statutory scheme, on its face, applied to all individuals “on equal terms.” *Madison*, 161 Wn.2d at 97. Though the uniform requirement to fully pay legal financial obligations had different impacts in individual circumstances, this Court held that such impacts alone cannot constitute a “grant of favoritism or a granting of a privilege on unequal terms, in violation of article I, section 12, because the same standard is applied evenly to all felons seeking restoration of their voting rights.” *Id.* This holding forecloses Plaintiffs’ reliance on alleged disparate impacts in their facial challenge.

Plaintiffs try to get around the lack of any facial classification by arguing that signature verification “inherently” impacts voters differently. But Plaintiffs identify *no* evidence showing *any* disparate impacts under the Secretary’s new regulations, much less inherent ones. Plaintiffs’ concerns about changing signatures are addressed by changes to the system. *See supra* 25-26.

### III. CONCLUSION

This Court should reverse the superior court and remand with instructions to enter summary judgment in favor of Secretary Hobbs.

This document contains 6,000 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of May 2024.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of May 2024, at Olympia,  
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/s/ Karl David Smith  
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