No. 23-125084-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS, ET AL.,
Plaintiffs-Appellants,

v.

SCOTT SCHWAB, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE FOR THE STATE OF KANSAS, ET AL.,
Defendants-Appellees.

On Appeal from the Kansas Court of Appeals, Decision Dated March 17, 2023

Appeal from the District Court of Shawnee County, Kansas
Honorable Teresa Watson, District Judge
District Court Case No. 2021-CV-000299

BRIEF OF *AMICI CURIAE* BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Judicial Watch, Inc. is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, the Allied Educational Foundation is dedicated to promoting education in diverse areas of study.

Amici have submitted several briefs before the federal district courts, court of appeals, and the U.S. Supreme Court, regarding the proper interpretation of federal statutes and constitutional provisions in vote denial cases. *See* Brief of *Amici Curiae* Judicial Watch, Inc. and Allied Educational Foundation, *Ohio Democratic Party v. Husted*, No. 16- 3561, Dkt. Entry 43 (6th Cir. 2016) (Section 2 of the Voting Rights Act challenge by Ohio Democratic Party to Ohio's early voting policy); *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (Section 2 challenge to North Carolina's law mandating voter identification and ban on out-of- precinct voting); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (Section 2 challenge to Arizona's ban on third party ballot collection and out-of- precinct voting rule).

Outside of the educational context, Judicial Watch has a substantial interest in the proper interpretation of state and federal election laws. In 2012, Judicial Watch began its election integrity work, primarily enforcing the integrity provisions of the National Voter Registration Act. Since that time, Judicial Watch has obtained numerous state and county

settlement agreements or consent decrees that brought jurisdictions from California to Kentucky into compliance with Section 8 of the NVRA. *See Judicial Watch v. Grimes*, No. 17-94 (E.D. Ky. 2017) (ECF No. 39) (consent decree entered against the Commonwealth of Kentucky to enforce the NVRA); *Judicial Watch v. Logan*, No. 17-8948 (C.D. Cal. 2017) (settlement with Los Angeles County and the State of California to settle NVRA claims).

During this time, Judicial Watch has noticed a substantial number of lawsuits brought by either the local Democratic Party or activist nonprofit organizations seeking to invalidate reasonable state electoral integrity measures such as limitations on third party ballot collection, photo identification requirements, signature verification, and out-of-precinct voting. Like the U.S. Supreme Court did in *Brnovich*, 141 S. Ct. 2321 (2021) and *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008), this Court should give substantial deference to the state legislature's judgment regarding what is necessary to retain electoral integrity and deter fraudulent activity in Kansas elections. To rule otherwise, subjecting all reasonable time, place, and manner regulations to strict scrutiny, as the Court of Appeals did in this case, imposes unworkable legal requirements on legislatures and conflicts with the U.S. Constitution's Elections Clause.

Input from *amici* would be helpful because of *amici*'s extensive experience and subject matter knowledge concerning reasonable election regulations and their interpretation in the context of the U.S. Constitution's Elections Clause. U.S. Const. Art. I, Sec. 4.

SUMMARY OF THE ARGUMENT

Almost a century ago, this Court declared the "legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud." *Lemons v. Noller*, 144 Kan. 813, 829 (1936). That is because the Elections Clause of the U.S. Constitution provides the Kansas Legislature the power to set the "times, places, and manner" of election regulations, subject only to Congress's authority to make or alter those regulations. The Kansas Legislature exercised its authority under this provision and passed two reasonable regulations regarding absentee balloting. The first involves a signature verification requirement, mandating that each county election official match the signature on the absentee ballot envelop with the signature on file and attempt to contact the voter if the signature does not match or if there is no signature. The second is a ballot collection restriction that prohibits any person from transmitting more than 10 advance voting ballots on behalf of others during an election. Both of these statutes are unremarkable in the sense that many other state legislatures have passed similar laws aimed at improving the integrity of absentee balloting in their states.

The Kansas Court of Appeals' decision to apply strict scrutiny review to both of these election laws is fundamentally at odds with the U.S. Constitution and with this Court's precedent interpreting the Kansas Constitution. Under strict scrutiny review, laws passed by the legislature are presumptively unconstitutional, and the legislature must bear the burden of proof to show they are necessary and narrowly tailored. But under the Elections Clause of Article I, Section 4, such laws are presumptively constitutional, as the state

legislature is given primary authority to set the time, places, and manner of rules and regulations concerning elections.

There is good reason to treat Elections Clause legislation differently than other types of legislation. The powers of state legislatures to regulate the times, places, and manner of federal elections was not a power reserved to the states, but rather one that was delegated to them by the U.S. Constitution. Such detailed supervision by state courts, under the guise of strict scrutiny, of election rules and regulations concerning the usual burdens of voting would flout the powers that the Framers gave to the state legislatures under Article I of the U.S. Constitution. It is for the state legislatures to make policy judgments about election regulations intended to ensure election integrity or reduce the likelihood of fraud. These policy judgments should be given appropriate deference by state courts, unless electoral regulations intentionally discriminate against a protected class or impose a severe burden on the right to vote.

The Kansas Court of Appeals failed to give appropriate deference to the Kansas Legislature's policy judgments regarding absentee ballot signature verification and third-party ballot collection laws. This failure warrants reversal by this Court.

ARGUMENT

I. The Elections Clause Vests Principal Authority in State Legislatures to Regulate the Time, Place, and Manner of Federal Elections.

The U.S. Constitution's Elections Clause in Article I, Section 4 grants state legislatures the authority to set the regulations concerning the time, place, and manner of federal elections, subject only to Congress' ability to preempt those regulations.

Specifically, it provides

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, Sec. 4.

The "substantive scope" of the Elections Clause "is broad." *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8 (2013). The power to set the "Times, Places, and Manner" of election regulation in the hands of state legislatures, checked only by Congress, was an intentional policy choice by the Framers. The "discretionary power over elections ought to exist somewhere" and "there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (citing Federalist No. 59, p. 362 (C. Rossiter ed. 1961)). The "Times, Places, and Manner," provides the authority for state legislatures "to provide a complete code for congressional elections." *Inter Tribal Council of Ariz.*, 570 U.S. at 8-9 (citation omitted). This includes regulations "not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters," and "prevention of fraud and corrupt practices." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

While the Elections Clause does not strip state courts of jurisdiction to remedy state constitutional violations, *see Moore v. Harper*, 143 S. Ct. 2065, 2088-90 (2023), it does mandate that state courts defer to the state legislature whenever it passes a reasonable, non-

discriminatory election regulation to deter fraud or corrupt practices in the election process. *See id.* at 2090 (when interpreting state election law, "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures"); *id.* at 2090-91 (Kavanaugh, J., concurring) (discussing limits on state court discretion) (citing *Bush v. Gore*, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring)).

The deference is necessary because almost all election laws impose some type of burden on the right to vote. The Court of Appeals' decision, however, declared that all such burdens, no matter how slight, must be judged under the exacting standard of strict scrutiny. *See League of Women Voters of Kan. v. Schwab*, 525 P.3d 803, 208 (2023) ("Under strict scrutiny, once the plaintiff has shown an infringement—regardless of degree—the state action is presumed unconstitutional."); *see id.* at 212 ("when considering a law that is an infringement of fundamental rights, the strict scrutiny standard applies regardless of the degree of infringement of rights") (citation omitted). As a result, the decision would ensure constant litigation both about existing electoral laws and, paradoxically, about every attempt to *change* existing electoral laws.

Consider that Kansas' election code contains 47 separate articles. *See* KAN. STAT. ANN. chap. 25 (Elections). These contain a total of 585 individual statutes, excluding those that have been repealed, transferred, or reserved. Kansas' election code runs to 283 single-spaced pages in this font, and has over 120,000 words.[1] To provide some context, this is

[1] Counts conducted by *amici*. The full text of Kansas' election code is available online at https://ebenchbook.org/kansas/.

longer than *Gulliver's Travels* (107,349 words), *Wuthering Heights* (107,945 words) or *The Adventures of Huckleberry Finn* (109,571 words).[2] Cities and counties in Kansas, moreover, often have their own election codes.[3] The City of Leavenworth, for example, has ordinances regarding the time polls open and close, intoxicating beverages at the polls, electioneering, voter intimidation, and disorderly conduct at a voting place.[4] All that is needed to challenge any small part of this great mass of electoral laws, or any proposed change to such laws, no matter how trivial, is a colorable assertion that the challenged law or change burdens a plaintiff's right to vote *in any way*. At that point the State must make the difficult showing that the challenged law is narrowly tailored to achieve a compelling interest. As a practical matter this guarantees that decisions about state election laws will be made in state courts and not in the state legislature.[5]

Recognizing that all electoral laws impose some burden on the right to vote, the U.S.

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2 *See* https://blog.fostergrant.co.uk/2017/08/03/word-counts-popular-books-world/.

3 *See*, *e.g.*, the codes collected at https://library.municode.com/ks.

4 *See id.* at link for Leavenworth.

5 It would also lead to strange results regarding Kansas laws that enable federal legislation. For example, the National Voter Registration Act (NVRA) requires Kansas to implement a general program that makes reasonable efforts to identify and remove registrants who are ineligible by reason of death or a change of address. 52 U.S.C. § 20507(a)(4). The Kansas legislature has adopted enabling legislation to do so. *See* K.S.A. § 25-2316c(D)(2)(A) (requiring removal of voters who fail to respond to an address verification notice and fail to vote for two consecutive elections). There is no question that this legislation, which closely tracks the NVRA's requirements, inflicts a potential burden *to some degree* on voters who fail to respond to a verification notice. Thus, under the Court of Appeals' reasoning, this Kansas state law would be subject to strict scrutiny and presumptively unconstitutional. It would be odd indeed if the NVRA were governing federal law, while Kansas' statutes embodying and enabling it were presumptively unconstitutional. *See Inter Tribal Council of Ariz.*, 570 U.S. at 13-15 (finding the NVRA is a constitutional exercise of authority under the Elections Clause of the U.S. Constitution and any conflicting state law is superseded).

Supreme Court incorporated deference to state legislatures in the *Anderson-Burdick* balancing test, finding that when a state election law imposes only "reasonable, nondiscriminatory restrictions," then the "'State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Kansas Court of Appeals rejected this test, finding that strict scrutiny must apply in all circumstances where a fundamental right is burdened. But "[v]ery few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring). A state law "reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations." *Id.* And it may be the case that "some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State … expand absentee balloting." *Id.*

The "sort of detailed judicial supervision of the election process" required by subjecting every voting regulation that burdens voters to a strict scrutiny review "would flout the Constitution's express commitment of th[at] task to the States." *Crawford*, 553 U.S. at 208 (citing U.S. Const. Art. I, Sec. 4). Rather, it "is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Id.* "Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe." *Id.*

Applying strict scrutiny to all election regulations that affect or burden the fundamental right to vote ignores these principles and inevitably pits Article I, Section 4 of the U.S. Constitution against the Kansas Constitution. Under strict scrutiny, the law is presumptively unconstitutional and the burden of justifying it is on the state, whereas a law passed by the state legislature under the Elections Clause is presumed valid. Imposing a "necessity requirement" under strict scrutiny to all "Times, Places, and Manner" regulations and "[d]emanding such a tight fit" by the legislature "would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests." *Brnovich*, 141 S. Ct. at 2341.

II. The Kansas Court of Appeals Did Not Give Proper Deference to the Kansas Legislature in Its Time, Place, and Manner Regulation of Absentee Ballots.

The Kansas Court of Appeals rejected the approach adopted by the U.S. Supreme Court, finding that all voting regulations that burden the right to vote are subject to strict scrutiny. *Schwab*, 525 P.3d at 819-20. The Court of Appeals reversed the district court's ruling that followed the U.S. Supreme Court's guidance on Elections Clause cases and on the deference owed to the state legislature for election regulations in *Anderson-Burdick*. The Court of Appeals found the district court "erred by beginning with a presumption that the questioned statutes were constitutional" because the Kansas Supreme Court "has instructed that strict scrutiny 'applies when a fundamental right is implicated.'" *Id.* at 820 (quoting *Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610, 663 (2019)).

But there is no limiting principle when it comes to applying strict scrutiny to *all* election laws that impact the fundamental right to vote. The Court of Appeals recognized

that "[e]very voting rule imposes a burden of some sort," *id.* at 821 (citing *Brnovich*, 141 S. Ct. at 2338), but found that since there was "no litmus test for measuring the severity of the burden," then all election regulations passed by the legislature are presumed unconstitutional and must satisfy strict scrutiny under *Hodes*.

There are several things wrong with this reasoning. First, there is no logical endpoint to it, as every law to protect the integrity of the electoral process passed by legislatures burdens the right to vote in some capacity. *See Brnovich*, 141 S. Ct. at 2338; *Crawford*, 553 U.S. at 208. It cannot be the case that the Kansas Legislature has broad authority under the Elections Clause of the U.S. Constitution to regulate "Times, Places and Manner" of elections and has an interest "to prevent intimidation, bribery, and fraud" in the elections process, while its election laws are presumed unconstitutional and subject to strict scrutiny review. *Lemons*, 144 Kan. at 829. Under the Court of Appeals reasoning, every voting law to protect the integrity of elections in Kansas that burdens the right to vote "regardless of degree" would be subject to constitutional challenge and strict scrutiny. *Schwab*, 525 P.3d at 822. This would include practically every regulation concerning voter registration, in-person voting, and absentee ballot requests, since all of these laws make it technically harder to vote.

In any case, this Court rejected the argument that voting regulations that make it harder for "electors who are physically unable to go to the polls" would be unconstitutional since "it was within its constitutional power for the legislature to provide that an offer to vote in a township or ward" where the elector resides. *Lemons*, 144 Kan. at 827. This Court in *Hodes* did not overrule *Lemons*.

Second, *Hodes* did not involve a challenge to any "Times, Places, and Manner" election regulation by the legislature. *Hodes* concerned a challenge to abortion regulations, which this Court has determined to be a fundamental right. Unlike abortions, the right to regulate the "Times, Places, and Manner" of elections is a power that the Framers expressly conferred to state legislatures. Applying strict scrutiny to all "Times, Places, and Manner" regulations would inherently usurp the power of the legislature and transfer that power to the judicial branch.

Finally, the Court of Appeals' distinction between "regulations and restrictions" is almost impossible to discern in this context. Are signature-matching requirements and limitations on third-party collection of ballots not the type of laws designed to "regulate and preserve the purity of the election"? Are regulations such as those "setting the opening and closing times of polls" not a burden on the right to vote "regardless of degree"? *Schwab*, 525 P.3d at 822. The Court of Appeals does not say. Kansas certainly has an interest in avoiding a fraudulent ballot collection scheme and in preserving the integrity of election results. Unregulated collection of third-party ballots can undermine public confidence in the integrity of elections. This was demonstrated by the ballot collection fraud that occurred in North Carolina in 2018.[6]

Regardless, those types of tough "policy" judgments are better left to national or state legislators, as the Framers intended. The Courts should only apply strict scrutiny to election laws that constitute a severe burden on the right to vote, not to commonplace election

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[6] *See* "Election Fraud in North Carolina Leads to New Charges for Republican Operative," THE NEW YORK TIMES, available at https://www.nytimes.com/2019/07/30/us/mccraedowless-indictment.html.

integrity measures like signature requirements for absentee ballots or limitations on third-party ballot collection. The Court of Appeals committed constitutional error by ignoring the Elections Clause's assignment of "Times, Places and Manner" regulations to state legislatures, in the absence of contrary congressional legislation. The Court of Appeals' errors warrant reversal and clarification by this Court.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court reverse the decision of the Kansas Court of Appeals.

Dated: September 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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