No. 102569-6

SUPREME COURT OF THE STATE OF WASHINGTON

VET VOICE FOUNDATION, et al.

Petitioners,

v.

STEVE HOBBS, IN HIS OFFICIAL CAPACITY AS WASHINGTON SECRETARY OF STATE, et al.,

Respondents.

BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF NEITHER PARTY

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I. INTRODUCTION

The Washington Constitution provides robust protections for voters, prioritizing popular sovereignty over the interests of a powerful few. As this Court has long recognized, the state charter provides greater protections for the right to vote than does the federal constitution. This Court has long honored the Washington Constitution's strong commitment to the principle of a fully democratic government of the people, in part by making clear in prior cases that burdens on the right to vote enshrined in the state constitution are subject to strict scrutiny.

The lower court erred in this case by applying *Anderson-Burdick*, a deferential level of scrutiny that federal courts apply in challenges to voting laws brought under the U.S. Constitution. In addition to being more consistent with this Court's precedents and the state constitution's commands, strict scrutiny is the most appropriate test for evaluating infringements on voting because it provides consistency and predictability. By contrast, through many years of uneven application in the federal courts,

Anderson-Burdick has proven to be a subjective, overly deferential test whose goalposts are constantly moving.

Requiring regulations burdening the right to vote to be narrowly tailored to advance compelling government interests is the best way for this Court to continue to honor the Washington Constitution's strong protections for the right to vote. At the same time, this case provides the Court with an opportunity to provide guidance to lower courts about how to apply that standard in a way that is sufficiently protective of voting rights while simultaneously appreciating the complex needs of our modern election systems.

II. IDENTITY AND INTEREST OF AMICUS

The identity and interests of *amicus curiae* are set forth in the motion for leave to file brief of *amicus curiae*, filed contemporaneously with this brief.[1]

[1] This brief does not purport to convey the position of NYU School of Law.

III. ISSUES ADDRESSED BY AMICUS

1. Why this Court should not interpret the Washington Constitution's right to vote in lockstep with the federal constitution.

2. Why this Court should reaffirm that strict scrutiny is the correct test for analyzing regulations burdening the right to vote under the Washington Constitution.

3. Why this Court should reject the Superior Court's adoption of *Anderson-Burdick* review.[2]

IV. STATEMENT OF THE CASE

Amicus concurs with and adopts the statement of the case set forth in the Brief of Petitioners.

[2] *Amicus* takes no position on the merits of the case.

V. ARGUMENT

A. The Washington Constitution Provides Broader Protections for the Right to Vote than the U.S. Constitution.

Prior to the adoption of the U.S. Constitution, state constitutions served as "the sole protection against governmental overreaching." Judith S. Kaye, *Dual Constitutionalism in Practice and Principl*e, 61 St. John's L. Rev. 399, 400 (1987). Notwithstanding the addition of the Bill of Rights, which "was taken from and actually mirrored corresponding state enactments," the framers of the federal charter contemplated "that the states would remain the principal protectors of individual rights." *Id.* at 400–01. Indeed, prior to the enactment of the Fourteenth Amendment and incorporation of the Bill of Rights against the states, state constitutions provided the sole source of protection against violations of individual rights by state officials. *See* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 773 (2021). Post-incorporation, "the conceptual genius of federalism remains

an integral component of our system of government." Hon. Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from A Half-Century of New Judicial Federalism*, 75 Me. L. Rev. 1, 11–12 (2023).

This Court has recognized that "the Washington Constitution goes further to safeguard the right to vote than does the federal constitution." *Madison v. State*, 161 Wn.2d 85, 96, 163 P.3d 757 (2007). This approach is rooted in the Washington Constitution's extensive commitment to creating and safeguarding individual rights related to the democratic process more generally and suffrage specifically.

Unlike the federal constitution, the Washington Constitution is replete with provisions that reflect the state's commitment to the fundamental right to vote as an essential feature of democratic government. The very first section of the state charter declares that "[a]ll political power is inherent in the people," Const. art. I, § 1, which – like 48 other state constitutions – demonstrates "an express commitment to popular

sovereignty," Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 Wis. L. Rev. 1337, 1340 (2022). The Free and Equal Elections Clause further underscores the importance of the people's right to vote by ensuring that "no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage." Const. art. I, § 19.

The remainder of the Washington Constitution empowers voters to act as a vital check on each branch of government, "reserv[ing]" part of the state's legislative power for the people to propose or approve legislation through ballot initiatives and referenda, *id.* art. II, § 1, requiring citizen approval for each proposal to amend the Constitution, *id.* art. XXIII, §§ 1, 2, 3, allowing citizens to recall all elected officers (except judges), *id.* art. I, § 33, and directly electing many offices, both legislative and non-legislative, *id.* art. II, § 4 (legislators), *id.* art. III § 1 (eight executive offices), *id.* art. IV, §§ 3, 5 (Supreme Court justices and Superior Court judges).

Read in harmony, these provisions make it clear that the right to vote under the Washington Constitution functions not simply as a means of electing representatives but also as a vital check on political power. *See generally Johnson v. Wash. State Conservation Comm'n.*, 16 Wn. App. 2d 265, 279, 480 P.3d 502 (2021) ("All portions of the constitution must be read in harmony."). State laws that burden the right to vote must therefore overcome a strong constitutional presupposition that the people should retain unencumbered access to the franchise.

Washington's Progressive Era state constitutional history affirms the centrality of popular sovereignty in Washington's constitutional design. During the Progressive Era, "public distrust of elected representatives ran high, and many believed that unreformed state legislatures and political parties were corrupt, beholden to moneyed interests and trusts." *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, 28 (2024) (quotations omitted) (applying strict scrutiny to legislative infringements on the constitutional right to reform

government under the Utah Constitution). "When the framers of the state constitution assembled in 1889, Washington was no exception to this trend of suspicion toward the legislature." Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447, 449 (2004). To address these concerns, "Washington ratified certain 'democratic checks' on state government reflecting this populist sentiment," including its Free and Equal Elections Clause. Lee Marchisio, *Executive Privilege Under Washington's Separation of Powers Doctrine*, 87 Wash. L. Rev. 813, 838–39 (2012). A couple decades later, in a "further extension of the democratic principles adhered to by the framers," Washington ratified its "initiative, referendum, and recall amendments." Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 678 (1992). The federal constitution, by contrast, lacks a similar commitment to popular sovereignty. *See* Cornell W. Clayton, *Toward A Theory of the*

Washington Constitution, 37 Gonz. L. Rev. 41, 66 (2002) ("[W]hile Federalists were influenced by the ideas of civic republicanism and a fear of populist majorities, the framers of the Washington Constitution were strong believers in popular sovereignty and believed that liberty could best be secured through open democratic government.").

The text, structure, and history of the Washington Constitution establish that voting is a fundamental right subject to the greatest protections. To read the right to vote in a cramped or myopic fashion would undermine the Washington Constitution's commitment to the right to vote.

B. Under the Washington Constitution, Voting Is a Fundamental Right Subject to Strict Scrutiny.

This Court should reaffirm its prior holdings that strict scrutiny is the correct standard of review for laws burdening the right to vote. The Court should also provide guidance on how to apply strict scrutiny in voting cases.

1. This Court's Precedent Already Establishes that Burdens on Voting are Subject to Strict Scrutiny.

This Court has stated plainly that "any statute which infringes upon or burdens the right to vote is subject to strict scrutiny." *Seattle v. State*, 103 Wn.2d 663, 670, 694 P.2d 641 (1985). Strict scrutiny is warranted because "[t]he right of all constitutionally qualified citizens to vote is fundamental to our representative form of government." *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 407, 687 P.2d 841 (1984). By contrast, this Court has authorized a more deferential standard than strict scrutiny when burdens on voting apply to elections for "nongovernmental" entities, such as irrigation or water districts, that cannot impose taxes or govern the conduct of citizens. *Id.* at 408–09. Whenever there are "constitutionally qualified electors who are significantly affected by" the outcome of an election, any burden on the right to vote "is subject to strict judicial scrutiny." *Id.* at 410.

Defendants attempt to deny this reality by asserting that this Court's precedent "tracks" the more deferential *Anderson-Burdick* review, a balancing test established by the U.S. Supreme Court to address challenges to voting rules under the First and Fourteenth Amendments to the U.S. Constitution, which weighs the burdens of a restriction against the state's asserted benefits. Resp't's Br. 18 (quoting *Eugster v. State*, 171 Wn.2d 839, 845, 259 P.3d 146 (2011)); *see generally Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). Yet *Eugster*, the main case they cite for this proposition, is inapposite. In *Eugster*, the Court rejected a one-person, one-vote challenge under the Free and Equal Elections Clause to a state law mandating that Court of Appeals judges be elected from districts based on county lines, resulting in unequal district sizes. But the Court's holding was premised on the existence of other provisions in the Washington Constitution explicitly governing district apportionment. The Court did not address the proper

standard of review for assessing burdens on the right to vote under the Free and Equal Elections Clause or any other constitutional provision, noting only briefly that the Free and Equal Elections Clause prohibits the complete denial of the right to vote. *Eugster*, 171 Wn.2d at 845–47.[3] In contrast, *Seattle v. State* applied strict scrutiny and struck down a statute despite it "not directly limit[ing] the right to vote in annexation elections." 103 Wn.2d. at 670.

This Court should not turn a single sentence in *Eugster* – a proposition it has not subsequently cited – into a repudiation of its longstanding commitment to protect the right to vote from all manner of attack.

[3] The only other case Defendants cite in support of a lower standard is *State v. Superior Court of King Cnty.*, 60 Wash. 370, 111 P. 233 (1910). This 114-year old case is immaterial because it was "not contended that any constitutional right of the voter [was] violated," only that voters were denied the claimed right of having their preferred candidate be listed under a particular political party on the ballot. *Id.* at 373. This decision also predates the 1912 addition of many of the state constitution's direct democracy provisions.

2. Strict Scrutiny Is the Best Framework for Addressing Burdens on the Fundamental Right to Vote.

This Court should not diverge from its prior application of strict scrutiny in the context of voting rights challenges under the Washington Constitution. By requiring a close fit between means and ends, strict scrutiny achieves the best balance between the sanctity of the right to vote and the reality that states must impose some burdens on voters in order to conduct elections.

The doctrine of strict scrutiny exists in large part to protect fundamental rights such as the right to vote. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1281–83 (2007). Strict scrutiny allows "vigorous judicial protection for core rights while nevertheless pragmatically allowing a safety valve in the event of a hard case." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 803 (2006) (quotations omitted). Strict scrutiny works well because it allows courts to protect fundamental rights

without defining rights as "wholly categorical or unyielding," Fallon, 54 UCLA L. Rev. at 1270. At the same time, it appropriately incentivizes policymakers to evaluate prospective burdens on fundamental rights when passing laws, whereas more lenient tests tip the scales towards government interference with rights and lead to inconsistent outcomes. *See* Ben Sheppard & Josh Guckert, *The Ballot Is Stronger Than the Bullet: Alaska's Superior Strict Scrutiny Approach to Ballot Access Laws*, 38 Alaska L. Rev. 183, 199–200 (2022) (explaining how Alaska's strict scrutiny approach provides predictability).

In contrast to strict scrutiny, sliding-scale approaches such as *Anderson-Burdick* force courts to evaluate as a threshold matter whether complicated policies create "severe" or "minor" burdens. *See infra* Section C. Thus, burdens on voting that may seem "minor" in the abstract but have meaningful impacts on voters are often subjected only to rational basis review and are upheld with little inquiry into those impacts.

Under strict scrutiny, there is no need to artificially categorize a burden as either severe or minor. Instead, the severity of the burden plays a significant role in determining whether the regulation is narrowly tailored: the more impactful the burden, the tighter the necessary nexus between the interest and the burden. This allows for a well-informed analysis that considers the realities of running an election in assessing the burden as set against an interest, as opposed to ranking the burden before contextualizing it.

3. A Clear Decision in This Case Can Provide Voters and Election Administrators with Predictability on What Voting Regulations Satisfy Strict Scrutiny.

Strict scrutiny provides a clear and predictable framework for considering challenges to voting regulations.

The only question a court must ask when deciding *whether* to apply strict scrutiny to a voting regulation is whether the regulation places a burden on the right to vote. *See, e.g.*, *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006) ("We apply

strict scrutiny if . . . the state action *threatens* a fundamental right.") (emphasis added); *Rickert v. State, Pub. Disclosure Comm'n.*, 161 Wn.2d 843, 848, 168 P.3d 826 (2007) ("*[A]ny* statute that purports to regulate such speech based on its content is subject to strict scrutiny.") (emphasis added). At the threshold stage, this test does not require assessing whether the burden is severe or of a particular type and leaves no room for a sliding scale test or categorization of the severity of a burden.

Once the Court has determined that strict scrutiny applies, the state has the burden of showing that the challenged regulation satisfies two inquiries. The first is whether the regulation achieves a compelling state interest, which is to say it accomplishes a goal essential to running elections. The second is whether the action is narrowly tailored to achieve that interest. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 527, 475 P.3d 164 (2020) (González, J., concurring) (citing *Darrin v. Gould*, 85 Wn.2d 859, 865, 540 P.2d 882 (1975)).

In the elections context, there are many compelling interests the state can potentially put forward. Lawmakers and election administrators must balance dozens of considerations in crafting and implementing election rules, including voter access, the safety of voters and poll workers, election security, cybersecurity, the need for efficiency around Election Day, resource limitations, ballot tracking, and ballot secrecy, among others. Running successful elections requires many tradeoffs.

That is not to say that all potential interests are compelling. The interest the state puts forward must accomplish the election goal, not just have some relationship to election administration. Even if a state interest is compelling in the abstract, the state must demonstrate that the interest asserted is necessary to burden the plaintiffs' rights and that those rights are not burdened any more than needed. Vague, tangential, or hypothetical interests cannot justify even a slight burden on the right to vote. The key is that the state must show how its policy advances the burden-causing interest, not solely that there is one.

The heart of the inquiry, however, lies in the second question: whether the policy is narrowly tailored to achieve the interest. This stage of the analysis is where the Court can weigh the severity of the burden to determine whether the regulation's scope is an appropriate fit to accomplish the goal. It should be a searching inquiry that takes seriously the state's rationales when they are adequately supported. Indeed, to make elections function effectively and securely, some burdens on the right to vote may be unavoidable – but the regulations must achieve the goal with as little collateral burden as possible.

Focusing the brunt of the analysis on the narrow-tailoring stage gives the defendant a real opportunity to justify its policies. Negligible burdens will easily survive scrutiny. For example, if a county that previously had 25 ballot drop boxes were to remove the least used box, it would likely be able to demonstrate narrow tailoring (assuming the removal did not disproportionately harm

one class of voters) because so few people would be impacted.[4] Yet it would be very hard to prove that removing all drop boxes would be narrowly tailored to achieve any interest. Only dramatic circumstances or significant corresponding changes in other election laws could possibly justify such a policy.

The state asserts that "[a]pplying strict scrutiny to all laws implicating the right to vote will make it impossible to administer elections." Resp't's Br., 45. This echoes the U.S. Supreme Court's warning that using strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. This concern is unfounded. While strict scrutiny imposes much of the burden of proof on defendants – a reasonable shift, considering it happens only after plaintiffs establish a burden on the fundamental right to vote – the bar is clearable for well-designed policies. *See, e.g.*,

[4] The county would first have to prove a compelling interest, perhaps under a theory that maintaining this drop box is resource-intensive yet does not serve a significant number of voters.

Qutb v. Strauss, 11 F.3d 488, 492–95 (5th Cir. 1993) (upholding under strict scrutiny a juvenile curfew law that imposed on the fundamental right to travel because protecting the safety of minors was a compelling interest and it was narrowly tailored to minimize the time of the restrictions and provide exceptions). Burdens on the right to vote will survive scrutiny when the state has carefully considered how to advance its interest in a way that limits negative impact on voters. Indeed, other states have applied strict scrutiny to burdens on voting without their election apparatus collapsing under the weight of judicial review. Emily Lau, *Explainer: State Constitutional Standards for Adjudicating Challenges to Restrictive Voting Laws*, State Democracy Research Initiative, (Oct. 3, 2023), https://statedemocracy.law.wisc.edu/explainers/2023/explainer-state-constitutional-standards-for-adjudicating-challenges-to-restrictive-voting-laws/ (explaining, for example, how the Arkansas Supreme Court has said that burdens under the state constitution's right to vote provision trigger strict scrutiny).

Additionally, the presence of a clear strict scrutiny standard would incentivize legislators and election officials to engage in careful impact analyses before passing or implementing policies. The Court can crystallize for officials how to think through not just the purpose of a potential policy but also how to minimize the burden on voting while still accomplishing that purpose. Rather than prognosticate about how a court would categorize the burden, the officials can make a practical assessment and refine policies so they do not needlessly interfere with the right to vote.

Finally, while strict scrutiny sets a high bar for voting regulations, it is not impossible to clear. Indeed, this Court has not shied from upholding policies under it. In *State v. Arlene's Flowers Inc.*, 193 Wn.2d 469, 528–32, 441 P.3d 1203 (2019), the Court "assumed" that strict scrutiny applied to the Free Exercise Clause claims of a flower shop owner.[5] It then upheld the law in

[5] The Court declined to hold in that case whether strict scrutiny covered the claims at issue because it determined that the claims

question, finding it was a public accommodation law intended to "eradicat[e] barriers to the equal treatment of all citizens in the commercial marketplace" and that such an interest could not be upheld if the Court were to "carve out a patchwork of exceptions." *Id.* at 531; *see also*, *Gonzales v. Inslee*, 2 Wn.3d 280, 296–99, 535 P.3d 864 (2023) (upholding eviction moratorium under strict scrutiny).

C. Washington Should Not Apply the *Anderson-Burdick* Test to Claims Under the Washington Constitution.

Despite precedent requiring the application of strict scrutiny to burdens on voting and the fact that "no Washington court has examined the *Anderson-Burdick* framework," the Superior Court nevertheless applied the *Anderson-Burdick* balancing test to Petitioners' claims. App. to Pet'rs' Statement of Grounds for Direct Review Mot. for Discretionary Review, A-277–283.

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would fail even under that test. *Arlene's Flowers*, 193 Wn.2d at 528. It also cited nine other times state regulations impinging on free exercise survived strict scrutiny. *Id.* at 528–31.

1. *Anderson-Burdick*'s Deferential Approach to Voting Burdens is Inconsistent with the Washington Constitution's Broad Protections for Voting Rights.

The federal *Anderson-Burdick* test is a poor match for Washington's robust constitutional protections for voting rights.

Anderson-Burdick provides for a "quite deferential" posture toward burdens on the right to vote. *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022) (quotations omitted). While *Anderson* held that courts "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," 460 U.S. at 789, in practice many federal courts have not "require[d] states to explain their 'precise interests' for their laws or why they were 'necessary' to burden voters," Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 62 (2021). Because "the evidentiary demands on each element of the balancing test are not similarly rigorous," with voters required to mount "substantial empirical

evidence" to prove a burden exists while "the state's interest in maintaining an election law can be supported with little more than a citation," the test often "gives states a significant leg up," Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. Rev. 123, 141, 143 (2021), running contrary to the structure of and populist spirit animating Washington's Constitution.

Under these circumstances, there is no reason that *Anderson-Burdick*, a test developed to apply to challenges under the U.S. Constitution, should apply to claims involving Washington constitutional provisions for which there are no federal analogues. While state constitutions like Washington's "explicitly grant the right to vote," Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 101–03 (2014), "federal courts generally protect the right to vote via other constitutional provisions, especially the Equal Protection Clause," Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of* Bush v. Gore*: How* Moore v. Harper

Haunts State and Federal Constitutional Interpretation of Election Laws, 59 Wake Forest L. Rev. 61, 89–90 (2024).

2. The Federalism Concerns Underlying *Anderson-Burdick* Review Do Not Apply When State Courts Review State Election Laws Under State Constitutions.

The United States Supreme Court adopted *Anderson-Burdick* review partly because the Constitution, in addition to protecting voters, delegates to state legislatures the authority to regulate the "Times, Places, and Manner" of federal elections. U.S. Const. art. I § 4. Under this theory, federal courts should therefore apply some deference to state election laws even when such laws implicate the right to vote. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (recognizing that because "[t]he States possess a broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives," it follows that "[i]f a statute imposes only modest burdens . . . then the State's important regulatory interests

are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures" (quotations omitted)); Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 175 (2018) (explaining how federal courts often apply a "federalism discount" to federal constitutional rights that leave them underenforced relative to state-granted rights).

State courts applying state constitutions have no need to review exercises of state legislative authority with the same level of deference. *See Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30, 208 L. Ed. 2d 247 (2020) (Roberts, J., concurring) (permitting judicial modification of election rules in Pennsylvania but not Wisconsin because the former "implicated the authority of state courts to apply their own constitutions to election regulations" while the latter "involve[d] federal intrusion on state lawmaking processes"); *see also Moore v. Harper*, 600 U.S. 1, 37, 143 S. Ct. 2065, 216 L. Ed. 2d 729 (2023) ("State courts retain the authority to apply state

constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause.").

To the contrary, there are compelling reasons for Washington courts to engage in more exacting scrutiny of state election laws than their federal counterparts do. *See supra* Section A. Rather than balance federalism concerns, state judges have obligations to ensure that those entrusted with exercising political power neither abuse their authority nor circumvent democratic accountability. *See generally* Kafker & Jacobs, 59 Wake Forest L. Rev. at 117 ("[T]he Framers were highly skeptical of state legislatures," but they had "at least some 'faith in state courts as protectors of liberty'" and "understood that state courts could review state statutes to determine whether they complied with state constitutional requirements" (quoting Sutton, *51 Imperfect Solutions* at 180)).

3. Adopting the *Anderson-Burdick* Test Would Promote Neither Uniformity Nor Predictability.

"[T]he arguments in favor either of a lockstep approach or an approach that places a strong presumption on the side of following federal constitutional precedent are prudential," primarily focusing on promoting uniformity or clarity. Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 Md. L. Rev. 309, 314 (2017). However, interpreting the Washington Constitution in lockstep with the federal constitution through the adoption of the *Anderson-Burdick* test would not result in uniformity with federal law or greater clarity for Washingtonians.

Since the U.S. Supreme Court instructed courts to review federal challenges to state election laws under *Anderson-Burdick* review, courts have decidedly *not* achieved uniformity in case outcomes. *See* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013). For example,

judges applying the standard "have disagreed vociferously over how to apply *Anderson-Burdick* to voter ID laws" and "struggled with applying *Anderson-Burdick* to various state rules governing the casting and counting of provisional ballots." *See* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws,* 84 U. Chi. L. Rev. 655, 678 (2017); *see also Daunt v. Benson*, 999 F.3d 299, 323, 325 (6th Cir. 2021) (Readler, J., concurring) ("*Anderson-Burdick*'s hallmark is standardless standards . . . . [O]nce jurists have cooked up these competing interests, they weigh them, without any safeguards or benchmarks to channel the process."). A test of "rampant subjectivity," *id.*, *Anderson-Burdick* has not yielded uniform results for Americans. Thus, the best that could be achieved should Washington courts adopt *Anderson-Burdick* is uniform disuniformity.

Nor has the "broad, freewheeling equal protection analysis that has informed the *Anderson-Burdick* line of cases" created a predictable jurisprudence. "*As the Legislature Has Prescribed":*

Removing Presidential Elections from the Anderson-Burdick Framework, 135 Harv. L. Rev. 1082, 1101 (2022). As the Montana Supreme Court recently recognized in a case rejecting *Anderson-Burdick* review under Montana's right to vote, while *Anderson-Burdick* review began as "a more meaningful test similar to 'intermediate scrutiny,'" over time many federal courts have diluted the federal voting protections embedded in the test. *Montana Democratic Party v. Jacobsen*, 416 Mont. 44, 55, 545 P.3d 1074 (2024). "[A]fter four decades of federal precedent, the *Anderson-Burdick* balancing test now often gives undue deference to state legislatures," *id.*, with the test now frequently "function[ing] as a sort of rational basis review," Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1917 (2023). A standard of review prone to drifting over time is no lodestar for Washington courts to follow.

In other contexts, when state courts have faced the prospect of interpreting state constitutional provisions in

lockstep to federal constitutional provisions that have undergone dramatic jurisprudential changes, they have rightly chosen not to follow the federal standard, observing that "incorporation of the body of federal law under the [state] [c]onstitution will incorporate confusion, not certainty." *State v. Short*, 851 N.W.2d 474, 488 (Iowa 2014) (declining to interpret Iowa's Fourth Amendment analogue in lockstep). By contrast, in such moments, "independent holdings can bring stability to the state's law in the face of frequent inconsistencies and changes in Supreme Court doctrines." Hans A. Linde, *E Pluribus--Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 177 (1984).

VI. CONCLUSION

Amicus respectfully requests this Court to find that the Washington Constitution calls for strict scrutiny review of all regulations burdening voting rights.

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RESPECTFULLY SUBMITTED this 16th day of September, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of September, 2024, I caused a true and correct copy of the foregoing document to be served on all counsel of record by e-filing this document through the Washington State Appellate Courts' Secure Portal.

Dated: September 16, 2024

/s/ Yurij Rudensky
Yurij Rudensky