No. 102569-6

IN THE 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 AMICI CURIAE CENTER FOR CIVIL RIGHTS AND CRITICAL JUSTICE AND FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CONSTITUTION

WASHINGTON CASES

FEDERAL CASES

STATUTES & COURT RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI

The identities and interests of amici are set forth in the accompanying Motion for Leave to File.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has the duty to develop new legal frameworks to ensure fidelity to rights enshrined in the Washington constitution. It has discharged this duty when existing frameworks fail to safeguard those rights. One problematic framework arises from the mechanical application of the false binary between facial and as-applied challenges.

Robust scholarship criticizes this false binary because it produces incoherent results and thwarts development of constitutional law. Rather, courts most effectively discharge their duty to uphold constitutional rights by engaging directly with substantive constitutional tests. And unlike federal courts, which are not a representative body, state courts are electorally

accountable institutions that have an obligation to carefully review the actions of state legislatures on behalf of the people.

Looking beyond the facial versus as-applied binary and employing heightened review to the signature verification statute *as administered* will allow for careful consideration of the nature of the infringements on the right to vote, alongside the State's indisputably important interest in providing for safe and secure elections. This includes how the basic tool of signature verification could be left intact without impermissibly infringing on free exercise of the franchise. This approach is also consistent with how the parties have approached the litigation below, which concerns how the law is implemented, not the text of the statute itself.

Adapting reasonable grounds scrutiny from article I, section 12 privileges and immunities jurisprudence provides an effective alternative to strict scrutiny that centers free exercise of the franchise. The court would review the challenged law through an empirical lens, inquiring into means-ends fit and

requiring the State to explore ways to administer signature verification that do not impermissibly infringe rights. Unlike sliding scale *Anderson-Burdick*[1] review, judicial review of this nature will give important guidance to the coordinate branches about the contours of voter protection enshrined in article I, section 19—instead of striking down the signature verification statute entirely, or turning a blind eye to the problematic way the law has been implemented to date.

ARGUMENT

I. The Court Should Look Beyond the Styling of Plaintiffs' Facial Challenge and Address the Limits that Article I, Section 19 Places Upon Election Administration to Ensure the Free Exercise of the Right of Suffrage.

A robust body of scholarship establishes that the insistence on categorizing constitutional claims as either facial or as-applied challenges is "an inherently flawed and fundamentally incoherent undertaking." Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary

[1] *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

Bill Rts. J., 657, 659-60 (2010); *id.* at 663-67 (summarizing scholarly treatment of the issue); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321 (2000) ("There is no single distinctive category of facial, as opposed to as-applied, litigation."); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 880 (2005) ("The distinction between facial and as-applied challenges is more illusory than the ready familiarity of the terms suggests. The nature of a 'facial' challenge is rarely explored in the case law…"). Rather than adhering to the problematic facial versus as-applied dichotomy, this Court should adopt a form of heightened scrutiny that carefully examines how laws regulating the vote actually impact the free exercise of the franchise under article I, section 19.

Some scholars warn that application of the false binary thwarts development and application of substantive constitutional tests. *See, e.g.*, Michael C. Dorf, *Facial*

Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 239 (1994) (explaining that in practice, no single legal standard controls the judgment of facial challenges, and that "reliance on superficial distinctions between facial and as-applied challenges to statutes only confuses the underlying concerns of substantive constitutional doctrine and institutional competence"); Kreit, *supra*, at 659-60 (the as-applied and facial dichotomy has created "an inconsistent and unwarranted presumption against the adoption of robust constitutional tests on the grounds that they might result in facial invalidation of statutes").

Several scholars suggest that resolution of a particular constitutional claim begins with the particular substantive doctrinal test—of which only some require examination of the challenged law on its face. Fallon, *supra*, at 1321 ("Debates about the permissibility of facial challenges should be recast as debates about the substantive tests that should be applied to enforce particular constitutional provisions."); *see also* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the*

Valid Rule Requirement, 48 Am. U. L. Rev. 359, 438-39 (1998) (noting that some tests inherently measure statutes on their face).

The debate about the facial versus as applied dichotomy is better understood as a question of remedies—i.e., "rulings that a statute is facially (or partly) invalid are the *consequence of* the particular doctrinal tests that courts apply to resolve particular cases." Fallon, *supra*, at 1321 (emphasis added); *see also id.* at 1324 (explaining that facial challenges are an outgrowth of as-applied litigation, rather than a distinct category of constitutional litigation); Kreit, *supra*, at 673 (case outcomes depend upon "a mixture of the facts of the case, the relevant constitutional protection, and principles of severability").

Application of heightened scrutiny, as articulated in section IV, *infra*, that carefully examines how laws regulating the vote actually impact the free exercise of the franchise under article I, section 19, would avoid the problematic facial versus

as-applied dichotomy. The language of the statute itself is not central to this inquiry; rather, whether signature verification violates article I, section 19 is a question of administration and impact—as demonstrated by the factual record below that includes empirical analyses of how signature verification works and its impact on certain demographics of voters. *Cf. State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) (adopting the "as administered" framework to address the problem of systemic arbitrariness, rather than adherence to either individual or categorical proportionality).

II. Unlike Their Federal Counterparts, State Courts Are Electorally Accountable Institutions Obligated to Meaningfully Review Legislative Schemes.

Gunwall's directive[2] to examine the structural differences between our state constitution and the federal Constitution

[2] *State v. Gunwall*, 106 Wn.2d 54, 62, 720 P.2d 808 (1986) (The federal constitution is "a grant of enumerated powers to the federal government," whereas our state constitution "serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives.")

contributes to a coherent approach to state constitutional rights interpretation.[3] These structural differences create important differences in the relationship between the branches of state government when compared to the relationship between branches of the federal government produced by the federal constitution.[4] Those differences obligate the state judiciary to engage more meaningfully in reviewing legislative schemes, as judges are a part of the democratic process and not merely bystanders. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1908 (2023).

[3] Recognizing state courts as "a font of individual liberties," Justice Brennan wrote, "federal law ... must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

[4] Despite *Gunwall* factor 5's nod to structural differences, the analysis has, to amici's knowledge, not been developed in case law.

Federal judicial review has been shaped by the countermajoritarian difficulty, where federal courts give stronger deference to Congress in recognition that judges are unelected and unaccountable in "what we otherwise deem to be a political democracy." Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 Yale L. J. 153, 155-59 (2002); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 334-36 (1998) (summarizing scholarship regarding characterization of federal court judicial review as in tension with American democracy).

Because Washington judges are elected through direct democracy,[5] courts do not owe the same level of deference to

[5] Const. art. IV, § 3 ("The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature."); Const. art. IV, § 5 ("There shall be in each of the

the state legislature. Bulman-Pozen & Seifter, *supra*, at 1888 (critiquing state courts for echoing the federal judicial role, as state courts are majoritarian actors whose judges are elected and whose decisions can be readily countermanded). While a deferential test for judicial review of federal legislation makes sense because "Congress is a representative body and federal courts are not," state courts, like state legislatures, are a representative body. *Id.* at 1886. In fact, in the states, "legislatures are frequently the least representative branch of government because of districting, geographical clustering, and extreme gerrymandering" while jurists on a state's high court are typically elected statewide. *Id.* Therefore, state courts should not "invoke their relative lack of democratic legitimacy" or "decline to engage in judgments that sound like

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organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election...").

policymaking" because their institutional position is different from that of federal courts. *Id.* at 1888.

Unlike their federal counterparts, state court judges are subject to a variety of accountability mechanisms—the most fundamental of which is electoral politics. Judges may be removed by the legislature,[6] a commission on judicial conduct,[7] or by impeachment.[8] Washington citizens can also respond to state court decisions "by countermanding them through constitutional amendment." Bulman-Pozen & Seifter, *supra*, at 1890; Const. art. XXIII.

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[6] Const. art. IV § 9 ("Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature…").

[7] Const. art. IV § 31 (creating commission on judicial conduct and setting forth procedure for addressing complaints against judges or justices).

[8] Const. art. V, § 2 (excepting only courts not of record from impeachment proceedings); *State v. Smith*, 6 Wash. 496, 497–98, 33 P. 974 (1893). Unlike in many other state constitutions, Washington courts are not subject to recall. Const. art. I, § 33 (excepting courts of record from recall).

These structural differences obligate the state judiciary to meaningfully review legislative enactments, express judgments about competing interests, and draw difficult lines, Bulman-Pozen & Seifter, *supra*, at 1891—precisely what is required here to resolve the tension between individual rights and governmental power created by the signature verification statute. *Id.* at 1908.

III. Discernment of the Right to Vote Requires a Broad Analysis of Constitutional Text Informed by State Constitutional and Common Law History.

Article I, section 19 affirmatively safeguards the right to vote, providing that: "[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Const. art. I, § 19. This safeguard is a cornerstone of the constitution, and any laws burdening the franchise should receive careful scrutiny.

Against this bedrock right of the franchise is the legislature's power to create and regulate a system of voting.

Article VI grants the legislature[9] authority to regulate elections. Article VI, section 6 directs the Legislature to provide ballot-based elections, and requires it to provide "for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot." Const. art. VI, § 6. Article VI, section 7 confers legislative authority to regulate elections, requiring the Legislature to "enact a registration law" and to ensure compliance with the registration law as a precondition to voting.[10] Const. art. VI, § 7.

In exercising its power under Article VI, the Legislature may not create unnecessary obstacles for qualified voters'

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[9] The government's interest in regulating the franchise begins with those powers conferred by the Washington constitution upon the legislature. *See* Const. art. II, § 1.

[10] A "qualified voter" is described within multiple other constitutional provisions and, thus, "a registration law cannot add new qualifications" and the requirements to prove qualification "must not be so burdensome, difficult or impossible of attainment, as in effect to amount to a qualification additional to that required by the Constitution." *State ex. rel. Carroll v. Superior Court of Wash. for King Cnty.*, 113 Wash. 54, 58, 193 P. 226 (1920); *see* art. VI, §§ 1, 4 (defining certain qualifications for voters).

exercise of their right to vote. *State v. Superior Ct. of King Cnty.*, 60 Wash. 370, 372, 111 P. 233 (1910) ("It is not within the power of the Legislature to destroy the franchise, but it may control and regulate the ballot, *so long as* the right is not destroyed or made so inconvenient that it is impossible to exercise it."); *see also Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 501, 585 P.2d 71 (1978) ("When it comes to considering individual rights…the courts have ample power, and will go to any length within the limits of judicial procedure, to protect such constitutional guaranties.").

A. Article I, Section 19 Is a Cornerstone of Our State Constitutional Structure.

The text of article I, section 19 is the starting point to define the scope and weight of the right to vote,[11] and must be

[11] *Gunwall*, 106 Wn.2d at 62 ("The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution.").

interpreted in the larger framework of the entire constitution.[12]

The inclusion of article I, section 19 within Article I's Declaration of Rights underscores the need for an expansive interpretation of the right to vote, because it is a precondition to the exercise of other rights. The bedrock principle is that "political power is inherent in the people," and that the government derives its power from the governed and is affirmatively obligated to "protect and maintain individual rights." Const. art. I, § 1.

The rest of Article I articulates complementary rights and correlative government obligations necessary for self-government and democracy. These encompass the right to due process, Const. art. I, § 3; the right to petition, assemble and free speech, Const. art. I, §§ 4, 5; the privileges and immunities

[12] This holistic approach to interpretation allows courts to recognize how "abundant provisions, added over time by amendments may work together to enhance a right," "multiple clauses may define and deepen a right," and "later-added provisions supplement existing rights." Bulman-Pozen & Seifter, *supra*, at 1897-98.

clause, which protects the people of Washington against legislative favoritism as well as guarantees equal protection of the laws, Const. art. I § 12; a command that constitutional provisions are mandatory unless explicitly stated otherwise, Const. art. I, § 29; and a broad guarantee of rights outside of those recognized within the constitution, Const. art. I, § 30. Article I also mandates that "A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government." Const. art. I, § 32.[13]

Understanding the central role of the right to vote in the broader structure of the constitution also reinforces the need for careful judicial review of laws regulating the franchise. To aid in the creation, maintenance, and auditing of systems meant to

[13] For a thorough treatment of article I, section 32, see generally Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 685 (1992) (identifying liberty, democracy, natural law, and federalism as the four fundamental principles).

facilitate the exercise of these rights, Washington's constitution accounts for the election of all three branches of government. Const. art. II, §§ 4, 6 (election of representatives and senators); Const. art. III, § 1 (elections in relation to the executive); Const. art. IV, §§ 3, 5 (election of supreme court judges and superior court judges). There is also reserved power for Washington citizens through initiatives, referendums, and constitutional amendments, as well as the ability to recall state-wide elected officials.[14] Const. art. II, §§ 1, 1(a) (initiative), (b) (referendum); Const. art. XXIII, §§ 1, 2, 3 (constitutional amendment); Const. art. I, § 33 (recall); RCW 29A.56.110.

B. The State Constitutional History and Common Law of Article I, Section 19 Confirm that Laws Burdening the Franchise Receive Careful Scrutiny.

Gunwall's directive to examine state constitutional history and related common law[15] reinforces the need for

[14] Judges of courts of record are not subject to recall, *supra* n. 8.
[15] *Gunwall*, 106 Wn.2d at 61 ("[State constitutional and common law history] may reflect an intention to confer greater

careful judicial review of the signature verification statute. Although Washington courts recognize the fundamental nature of the right to vote and have historically applied exacting scrutiny when laws violate the "free and equal" clause of article I, section 19, this Court has not had occasion to address how the "free exercise of the right of suffrage" clause acts as a limit on regulation of the franchise.

A review of Washington constitutional history of the right to vote makes clear that the framers intended the broadest possible protection of the franchise. A year before Washington's constitution was drafted, ratified, and accepted, the Territorial Supreme Court held a territorial legislative act

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protection from the state government than the Federal Constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law."); *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 196 Wn.2d 506, 518 , 475 P.3d 164 (2020) ("Interpreting the ordinary meaning of a constitutional provision at the time of drafting also includes examining the provision's historical context.").

that attempted to confer the right to vote to women conflicted with federal restrictions because it was available only to male citizens. *Bloomer v. Todd*, 3. Wash. Terr. 599, 623,19 P. 135 (1888). In dicta, the Court emphasized a hope that Washington would shortly embrace a broad conception of the right to vote.

The following year, Washington's Constitutional Convention gathered, and although they were presented with a variety of examples that granted broad legislative control over the voting franchise, they ultimately limited the legislative role and included the expansive article I, section 19. *Foster v. Sunnyside Valley Irr. Dist.*, 102 Wn.2d 395, 405, 687 P.2d 841 (1984) (citing historical sources) (taking from the Oregon constitution, the convention expanded upon "all elections shall be free and equal" to include "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); *see also* William L. Hill, *A Constitution Adapted to the Coming State: Suggestions by Hon. W. Lair Hill: Main Features Considered in Light of Modern Experience: Outline*

and Comment Together, 1889, 23-29 (1889), https://digitalcommons.law.uw.edu/selbks/5.

Since ratification of the constitution, Washington courts have given heightened scrutiny to laws alleged to violate article I, section 19. *See, e.g.*, *Foster*, 102 Wn.2d at 410 (article I, section 19 "demands that those constitutionally qualified electors who are significantly affected by..." legislative decisions be given an opportunity to vote, and "whether the right to vote is in fact so apportioned is subject to strict judicial scrutiny."); *Madison v. State*, 161 Wn.2d 85, 99, 163 P.3d 757 (2007) ("because the right to vote has been recognized as fundamental for all citizens, restrictions on that right generally are subject to strict scrutiny").[16]

To date, however, courts have only had occasion to address whether challenged laws violate the "free and equal"

[16] In *Carlson v. San Juan County*, the Court of Appeals applied the *Anderson-Burdick* test in the context of federal and state equal protection and substantive due process claims. 183 Wn. App. 354, 333 P.3d 511 (2014).

elections clause, as the claims involved an outright bar on voter participation[17] in the context of hyper-local elections. *See Malim v. Benthien*, 114 Wash. 533, 538, 196 P. 7 (1921) (statute permitting taxes to be levied against landowners but preventing them from participating in relevant elections violated "free and equal" clause); *Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cnty.*, 8 Wn.2d 136, 152, 111 P.2d 583 (1941) ("free and equal" elections clause is not violated when the property rights of persons affected is merely incidental); *City of Seattle v. State*, 103 Wn.2d 663, 672-73, 694 P.2d 663 (1985) (secondary voting system which permitted only homeowners to participate in a specialty election to check a general annexation

[17] In other cases, the limited nature of the claims precluded robust interpretation of the "free and equal" elections clause. *See In re Coday*, 156 Wn.2d 485, 498-99, 130 P.3d 809 (2006) (holding procedures for requesting a recount within an election, for recount methodology, and for ballot enhancement does not violate the constitutional requirement of "free and equal" elections); *Carlisle v. Columbia Irr. Dist.*, 168 Wn.2d 555, 577-80, 229 P.3d 761 (2010) (holding article I, section 19's command for "free and equal elections" does not apply because the statute at issue did not provide for an election).

vote violated "free and equal" elections clause); *Foster*, 102 Wn.2d at 411 (irrigation district's voting scheme violated "the Washington constitutional guaranty of free and equal suffrage."); *Eugster v. State*, 171 Wn.2d 839, 843-44, 259 P.3d 146 (2011) (free and equal elections clause neither requires one-person, one-vote apportionment for election of judges to different districts of the Court of Appeals nor does it demand that three-judge panels have a judge from each district).[18]

Because of this Court's affirmative duty to enforce the constitution and ensure the proper balance between governmental power and individual rights, this Court must determine the proper substantive test required by article I, section 19—which guarantees free and equal elections and also prevents interference with the free exercise of the franchise. *Sears v. W. Thrift Stores of Olympia*, 10 Wn.2d 372, 382, 116

[18] *Madison*, 161 Wn.2d at 129 n. 4 (declining to address issue of felon disenfranchisement under article I, section 19 as no independent claim asserted under that provision).

P.2d 756 (1941) ("A constitutional provision must be regarded as a whole, with effect and meaning given to every part subjected to construction."). Legislation may not violate the free and equal elections clause but nevertheless unconstitutionally interfere with the exercise of the vote. *See Superior Ct. of King Cnty.*, 60 Wash. at 372 (Legislature has plenary authority to control and regulate the ballot as long as the exercise of that power is consistent with the right to vote).

IV. Comprehensive Judicial Review That Assesses Legislative Schemes as Administered Will Better Protect the Right to Vote.

In determining how the "free exercise of the right to suffrage" acts as a limit on regulation of the franchise, reasonable grounds scrutiny under article I, section 12's privileges and immunities clause provides a model of meaningful judicial scrutiny.[19] This test could be adapted to

[19] Article I, section 12 illustrates the framers' intent that courts would be meaningfully engaged in assessing legislative actions, as the clause was introduced as a counterbalance to legislative

claims regarding the free exercise of the right to vote under article I, section 19, as an alternative to strict scrutiny.

The independent analysis of the privileges and immunities clause of article I, section 12 involves a two-step analysis. If the challenged law grants a privilege or immunity,[20] then "we ask whether there is a "reasonable ground" for granting that privilege or immunity." *Martinez-Cuevas*, 196 Wn.2d at 519) (citations omitted). The reasonable grounds prong of the test demands actual fit between means and ends. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 783, 317 P.3d 1009 (2014) ("To meet the reasonable ground requirement, distinctions must rest on 'real and substantial

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favoritism that ran rampant during the territorial period. *Martinez-Cuevas*, 196 Wn.2d at 514. Historically, courts have read the anti-favoritism framework of article I, section 12 as limited to fundamental rights of state citizenship. *Id.* at 514. And, this Court has said the right to vote is a privilege article I, section 12. *Madison*, 161 Wn.2d at 95.

[20] Benefits triggering this analysis are only those implicating fundamental rights of state citizenship. *Id.* (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

differences bearing a natural, reasonable, and just relation to the subject matter of the act.'"); *Schroeder v. Weighall*, 179 Wn.2d 566, 574, 316 P.3d 482 (2014) ("Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction. . . . Rather, the court will scrutinize the legislative distinction to determine whether it *in fact* serves the legislature's stated goal" (emphasis in original)).

Adapting and applying the reasonable grounds element of the privileges and immunities analysis to cases where government action is interfering with the franchise would harmonize the protections of article I, section 19 with the privileges and immunities protections of article I, section 12—both of which are ultimately concerned with infringements on fundamental rights of state citizenship.

The core of the adapted test would ask whether the challenged voting legislation in fact serves the legislature's stated goal, and would not hypothesize facts to justify the specific regulation of the franchise. Given the fundamental

importance of the right to vote, this Court should additionally require judicial inquiry into less rights-impairing alternatives.

Reasonable grounds scrutiny under the free exercise clause of article I, section 19 could involve the following steps:

1. What are the stated government interests, and what is the nature of the right(s) at stake?

2. Does the challenged legislation *in fact* serve the government's stated goal? Relatedly, is there a less rights-impairing way to achieve those same interests?

3. Does the benefit of the challenged legislation *as administered* outweigh the intrusion on voting rights?

The first step of the analysis puts the rights discernment (*supra*, part III) in conversation with the exercise of government power. The State has identified three interests stemming from its authority to regulate elections which are served by the signature verification requirement: 1) protecting election security and integrity; 2) advancing public confidence in elections; 3) protecting voters and serving the state's interest in efficient administration of elections. Br. of Resp't at 56-68.

The second step of the analysis empowers courts to reject hypothetical justifications for the challenged law, and requires empirical evidence to show that the law in fact meets the government's stated purpose. For example, upon remand, the State would have to show concretely and specifically how the interests articulated in the first step are furthered by signature verification.

Here, the parties disagree both on the facts related to the State's ability to show whether signature verification has or has not prevented voter fraud, and also disagree on the seriousness of the threat of fraud. This latter disagreement renders it unclear whether prevention of fraud, while more specific than the protection of the security and integrity of elections, is more than a hypothetical justification. These disagreements can be effectively resolved under this second step of the inquiry, as it gives the parties clear standards by which the claim will be judged, and focuses the court's attention on discerning whether there is empirical justification for use of signature verification.

The second step of the analysis would also require the court to consider, and the government to address, whether there are less rights-impairing ways to administer signature verification, resulting in lower rejection rates of legitimate votes. Petitioners' chief concern with signature verification is the documented disparate impact on groups according to race, age, and disability, among other characteristics. Br. of Pet'r at 14-29.[21] Indeed, the State does not dispute that signature verification likely can and should be improved. The Legislature and Secretary of State, through recent legislation and administrative regulations, have recognized the necessity of improving the signature verification process to ensure a more robust training for election officials, and to strengthen voters' ability to cure signature mismatches. And the new regulations

[21] Below, the parties disagreed about whether signature verification results in a disparate impact, and specifically over the statistical methods used to analyze rejected voter ballots. Def.'s Opp'n to Pl.'s Mot. Summ. J. and Cross Mot. Summ. J. 30, 35. This is something the court on remand would address by questioning experts and comparing methodologies.

create a presumption of signature validity. The court could inquire into the expected result of these adjustments to the administration of signature verification.

Finally, in the third part of the analysis, the court engages in the familiar balancing function, weighing the benefit of signature verification *as administered* against the intrusion on voting rights. And where traditional tiers of scrutiny limit possible remedies, judicial balancing after empirical assessments of a law's administration also allows courts to craft tailored remedies—rather than being forced either to uphold the law without inquiry into its possible improvement, or to jettison the important election administration tool wholesale. Bulman-Pozen & Seifter, *supra*, at 1885, 1892.

CONCLUSION

If this Court declines to hold that Petitioners' claims warrant strict scrutiny, Amici urge this Court to adapt reasonable grounds scrutiny to address claims of interference with free exercise of the right to vote under article I, section 19.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 4,885 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images. This brief therefore meets the word count limitation of 5,000 words for amicus briefs as required by RAP 18.17(c)(6).

DATED this 16th day of September, 2024.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on September 16, 2024, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 16th day of September, 2024.

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