IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0667

MONTANA DEMOCRATIC PARTY and MITCH BOHN, WESTERN NATIVE VOICE, et al., MONTANA YOUTH ACTION, et al.,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,

Defendant and Appellant.

AMICI CURIAE BRIEF OF SCHOLARS OF STATE CONSTITUTIONS AND ELECTION LAW IN SUPPORT OF APPELLEES

On Appeal from the Montana Thirteenth Judicial District, Yellowstone County,
Cause No. DV-21-0451
Honorable Judge Michael G. Moses

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Constitutional Provisions

Montana Constitutional Convention Proceedings

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici, identified in Appendix A, are ten nationally recognized legal scholars with expertise in state constitutional law and the law of democracy. They have researched and published extensively in these areas, and they have a professional interest in promoting a proper understanding of the constitutional and democratic principles at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When voting laws become more restrictive, the Montana Constitution calls for close judicial scrutiny. Heightened scrutiny follows from the constitution's text and structure and is common in courts around the country.

I.A. The Montana Constitution's animating principle is that the people should rule themselves. To facilitate and preserve self-government, the Constitution guarantees "free and open" elections in which all eligible Montanans "free[ly] exercise" their fundamental right to vote. Laws that impose new burdens on the franchise raise the prospect that some voices will be muffled and elections will not truly reflect the popular will. By reviewing such laws carefully, courts help to manage these risks. This is especially true where, as here, evidence indicates that the challenged restrictions disproportionately encumber certain groups of voters.

I.B. Heightened scrutiny properly reflects the respective constitutional roles of the legislature and judiciary. Lawmakers are tasked with facilitating elections that

will accurately translate public preferences into representation and policy. This means acting to keep elections secure without needlessly diminishing participation opportunities. Courts—composed of jurists chosen by the people to safeguard their rights—are tasked with ensuring that voting rules are not more restrictive than necessary.

I.C. Because the Montana Constitution contains textual and structural commitments to voting and democracy that go beyond those of the U.S. Constitution, it would be inappropriate for this Court to adopt the relatively toothless form of federal *Anderson-Burdick* review that Appellant advocates. Applying that standard—which federal courts have developed in part out of deference to state authority in the realm of voting rights and elections—would essentially render Montana's state-specific protections mere surplusage.

II. Rigorous judicial review of voting restrictions is a mainstream practice in the nation's state courts. Consistent with the robust voting rights and democratic commitments spelled out in state constitutions, courts commonly express the need for strict scrutiny or other elevated forms of review. Very few state supreme courts have embraced Appellant's preferred weak-form *Anderson-Burdick* standard to adjudicate claims that a voting restriction violates a state constitutional right to vote.

ARGUMENT

I. MONTANA'S CONSTITUTION REQUIRES EXACTING JUDICIAL SCRUTINY OF LAWS THAT IMPAIR THE FUNDAMENTAL RIGHT TO VOTE.

A. Through its text and structure, the Montana Constitution zealously protects the free exercise of the right of suffrage.

"The right to vote is fundamental." *McDonald v. Jacobsen*, 2022 MT 160, ¶ 57, 408 Mont. 405, 515 P.3d 777. The Montana Constitution's Declaration of Rights guarantees the right in clear and unequivocal terms: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13.

Reading this provision in its broader context underscores its indispensable role in Montana's constitutional system. *Cf. Jones v. Judge*, 176 Mont. 251, 255, 577 P.2d 846, 849 (1978) ("The Constitution must be considered as a whole."). The Montana Constitution's animating premise is that the people should rule themselves. Reinforcing the Preamble's declaration that the document is a charter of "We the people," the first two sections of the Declaration of Rights are entitled "Popular Sovereignty" and "Self-Government." Under Section 1, "All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Mont. Const. art. II, § 1. Under section 2, "The people have the exclusive right of governing themselves as a free, sovereign, and independent state." *Id*. § 2.

The Constitution proceeds to enumerate a litany of rights that undergird and sustain Montana's system of popular sovereignty and self-government. These include, among others, guarantees of due process and equal protection, art. II, §§ 4, 17; a prohibition on discrimination "against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas," *id*. § 4; "the right peaceably to assemble, petition for redress or peaceably protect governmental action," *id.* § 6; the freedom of speech and expression, *id*. § 7; the "right of participation" in "the operation of [governmental] agencies," *id*. § 8; and "the right to examine documents and to observe the deliberations of all public bodies," *id.* § 9.

The Constitution then establishes institutions that enable the people to govern through both elected representatives and direct democracy. For all three branches, Montanans choose who will exercise authority in their name. *Id*. art. V, § 3 (legislature); art. VI, § 2 (executive); art. VII, § 8 (judiciary). The people, moreover, have "reserve[d] to themselves the powers of initiative and referendum," *id*. art. V, § 1, and the power to decide when to alter the Constitution itself, *id*. art. XIV; *see also id.* art. III, §§ 4(1), 5(1).

Voting is the linchpin of this entire system—in this Court's words, "the pillar of our participatory democracy." *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 19, 410 Mont. 114, 518 P.3d 58. The Constitution relies on elections to keep

the people in the driver's seat, and it relies on the free exercise of the right to vote to ensure that those elections will fully and fairly reflect the people's collective will and respect the political equality of all Montanans.

This is something the drafters of Montana's Constitution well understood. Delegates to the 1972 Convention stressed that, "[i]f we are to have a true participatory democracy, we must ensure that as many people as possible vote for the people who represent them . . . ." *Mont. Const. Conv. Proc. Vol. III* 402 (1972) (statement of Delegate McKeon). Their objective, they explained, was "to preserve the rights of the public," and "[t]he only way you preserve the rights of the public is to preserve their vote because that's the only power the public has." *Id*. at 409 (statement of Delegate Holland); *id*. at 503 (reaffirming the "basic principle" that the delegates "were sent [to the Convention] by the people to make sure that their rights were expanded [and] that governments stayed responsible to them") (statement of Delegate Danhood). Commentators have likewise noted the Montana Constitution's "consistent enhancement of the powers of the voters and the encouragement of direct participation in governmental decision making." Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 11 (2001); *see also* Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 Mont. L. Rev. 325, 326, 380 (2010) (explaining that an overarching goal of the

Constitution's drafters was to increase "democratic responsiveness" and that the document is "fundamentally a democratic document").

Laws that encumber the franchise thus pose a serious threat to Montana's constitutional order. They raise the prospect that some voices will be stifled and that electoral outcomes will not genuinely reflect the people's preferences. Those in power may be tempted to restrict the vote precisely because doing so can be such a potent way to insulate themselves from accountability and achieve ends that diverge from the popular will.

That is why close judicial scrutiny of voting restrictions is vital. As this Court has repeatedly held, strict scrutiny is the standard "when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386; *see also Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. As a right that safeguards all other rights and makes self-government possible, the right to vote is as fundamental as it gets. *See Mont. Democratic Party*, ¶ 19 (describing suffrage as "perhaps the most foundational of our Article II" rights and "the basic right without which all others are meaningless") (internal quotation marks omitted).

The need for heightened review is especially important when a voting restriction was adopted with an eye towards altering the electorate's composition or

when it could have such an effect. The record below points to such danger signs in this case, with the district court finding that the challenged laws disproportionately impact identifiable groups (particularly Native Americans and young people) and that this was an intended effect. In instances like these, the risk of a democratic distortion is especially acute, and the right to vote becomes entwined with additional constitutional guarantees, including the right to be free from discrimination "in the exercise of [one's] civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const. art. II, § 4.[1]

B. Heightened scrutiny of laws that make voting more difficult properly reflects the Constitution's allocation of authority between the legislature and the people.

Despite the fundamental nature of the right to vote, Appellant contends that Montana courts should defer to legislative decisions to roll back voting rights. This argument rests largely on Article IV, § 3, which requires the legislature to establish laws necessary to conduct elections and to "insure the purity of elections and guard against abuses of the electoral process." Understood in its proper context, Article IV, § 3 tasks the legislature with providing for free and open elections in which the

[1] The district court subjected three of the four laws at issue in this case to heightened scrutiny, but it rejected SB 169 (which tightened voter ID requirements) under a rational basis standard. An alternative ground for affirming with respect to SB 169 would be to hold that heightened scrutiny should apply to it as well since the provision places a new constraint on the free exercise of the franchise.

people can freely exercise their right of suffrage. While the legislature certainly has discretion to decide how to carry out this charge, it does not have carte blanche to make voting more difficult in the name of enhancing "purity" and addressing "abuses."

To put it another way, the only enactments permissible under Article IV, § 3 are ones that align with Article II's Declaration of Rights and the Constitution's overarching democratic aims. This is consistent with how constitutions are normally read: The powers they grant are limited by the rights they confer. As this Court explained, constitutional provisions that authorize governmental action "do[] not confer . . . the power to act in violation of express guarantees contained in the Constitution." *Great Falls Tribune Co., Inc. v. Great Falls Public Schools*, 255 Mont. 125, 129-30, 841 P.2d 502, 504-05 (1992). Appellant's assertion that this Court should limit the scope of the right to vote in light of the legislature's Article IV, § 3 authority would invert this basic principle.

Relatedly, the legislature's duty to "secure the purity of elections and guard against abuses" cannot serve as a permission slip to put up needless obstacles to the exercise of the franchise, because such obstacles are themselves impurities and abuses. *Cf. Harrington v. Crichton*, 53 Mont. 388, 164 P. 537, 539 (1917) (declaring that election rules "intended to prevent fraud and injustice" should not themselves become "instrument[s] of injustice"). If an enactment makes it more difficult to

exercise the right to vote, the onus is on the legislature to show that the enactment is indeed necessary to address some even greater governmental imperative. *Cf. Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 428, 481 P.2d 330, 336 (1971) (explaining that 1889 Constitution's provision authorizing the legislature to secure the purity of elections "[c]onversely, by implication, . . . prohibits the legislature from enacting laws contravening such goals").[2]

Appellant (at Opening Br. 20) criticizes this robust understanding of the right to vote as a "one way ratchet" and posits that legislatures might even be deterred from expanding voting rights if they cannot readily reverse course later. Appellant's position, in other words, is that legislation that makes it harder for eligible Montanans to vote should stand on the same footing as legislation that makes it easier. But constitutionally speaking, these two types of actions are not equivalent, and it is entirely appropriate to treat them differently.

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[2] Under the 1889 Constitution, this Court held that laws directed at preserving the purity of elections could not be used to disenfranchise eligible voters given their objective of ensuring "a full and fair expression of the public will." *Lane v. Bailey*, 29 Mont. 548, 555, 75 P. 191, 193 (1904) (holding that electors should not be disqualified where, "through no fault of theirs, they failed to take the oath prescribed"); *see also Harrington v. Crichton*, 53 Mont. 388, 394-95, 164 P. 537, 539 (1917) (refusing to discard votes based on "a technical error of election officials" where "such holding would defeat the clear expression of the will of the majority" and "subordinate substance to form and defeat the end sought to be secured").

When the legislature creates hurdles to the free exercise of the franchise, then suffrage is less free than it was before—a result at least presumptively at odds with Article II, § 13 and the Constitution's broader democratic structure. This does not mean that a legislature can never choose to backtrack if it realizes that an expansion of the franchise was unwise. Instead, the legislature simply has to show its work and establish that its rollback is indeed necessary. Appellant's suggestion that this might someday down the road discourage lawmakers from expanding voting opportunities is wholly speculative and surely not a reason to leave actual restraints on the franchise unredressed.[3]

Applying heightened scrutiny to laws that encumber the franchise creates exactly the right constitutional incentives. This approach accepts that lawmakers should of course address threats to the integrity of elections, but it calls for them to try to do so without reducing existing voting opportunities. If the legislature adopts a restrictive measure, the Constitution requires the judiciary to take a hard look to ensure (1) that the problem the legislature purports to be addressing is real, and (2) that there were no reasonable options for responding in a less burdensome way.

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[3] For the same reason, requiring heightened scrutiny of laws that reduce voting opportunities is entirely consistent with the language of Article IV, § 3 allowing the legislature to decide whether or not to "provide for a system of poll booth registration." The legislature is entitled to revisit its decision to offer same-day registration, but because eliminating that option would make the franchise less free, the legislature must have weighty and well-tailored justifications for doing so.

C. The federal *Anderson-Burdick* standard is a poor fit for Montana.

Appellant urges this Court to apply a standard of review no more stringent than the federal *Anderson-Burdick* framework. The parameters of that federal framework are somewhat murky and contested, but Appellant favors a version that calls for deferential rational basis review unless a law "severely" burdens the franchise. And Appellant would set an extremely high threshold for severity, meaning that even when laws make it meaningfully more difficult for some voters to participate, they would receive what often amounts to a judicial free pass. *Cf.* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill of Rights J. 59, 62-63 (2021) (discussing recent federal rulings that applied this weakened, overly deferential form of *Anderson-Burdick*).[4]

Lockstepping with *Anderson-Burdick* (especially in its weak form) is inappropriate for several reasons. First, the federal and Montana constitutions significantly differ when it comes to voting and democratic governance. The U.S. Constitution does not expressly confer the right to vote. *Anderson-Burdick* is instead

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[4] Although recent federal cases have reduced the bite of *Anderson-Burdick*, the standard, formulated to assess the constitutionality of ballot access regulations, was originally quite demanding. It directed courts to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," determining not only "the legitimacy and strength of each of those interests," but also "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

rooted in the First and Fourteenth Amendments. As discussed in Section I.A, the Montana Constitution robustly protects the right to vote not only through its plain text, but also through the democratic commitments that permeate the entire document. *See Mont. Democratic Party*, ¶ 20 n.14 ("Notably, unlike the federal constitution, the Montana Constitution contains an explicit grant of the right to vote.").

Appellant's approach, in other words, would essentially erase Montana's distinctive constitutional language, structure, and tradition. It would render Article II, § 13 mere surplusage. Properly understood, the U.S. Constitution and the *Anderson-Burdick* framework merely set a federal floor. State constitutions, including Montana's, build atop it. *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 879-81 (2021) (discussing state constitutions' strong commitments to popular sovereignty, majority rule, and political equality); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 129 (2014) ("[S]tate constitutions go well beyond the U.S. Constitution in granting voting rights. Judicial interpretation should follow suit.").

Second, and related, the U.S. Supreme Court has stressed that federal institutions have a limited role when it comes to voting and elections because those are matters left in substantial part to the states. *See, e.g.*, *Brnovich v. Democratic*

Nat'l Committee, 141 S. Ct. 2321, 2341 (2021) (expressing concern that an expansive construction of the Voting Rights Act would "transfer much of the authority to regulate election procedures from the States to the federal courts"); *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (discussing the "broad autonomy" of states over matters of democratic structure); *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 832–33 (D. Mont. 2020) ("[T]he administration of federal, state, and local elections is quintessentially state business."). As the Ninth Circuit recently put it, "[t]he [U.S.] Constitution permits, and even encourages, States to experiment by making it easier for some to vote." *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1196 (9th Cir. 2021).

In other words, federal doctrines on voting-related matters look the way they do in part because they contemplate an independent role for state-level actors. Simply importing these federal doctrines thus makes little sense. Instead, this Court best serves our nation's system of federalism by giving effect to the Montana Constitution's own strong set of democratic safeguards. *See, e.g.*, Douglas, *The Right to Vote Under State Constitutions*, *supra*, at 121-29 (detailing the reasons to reject a lockstep approach for voting rights).

Finally, to the extent federal doctrine is relevant, the U.S. Supreme Court's voting rights rulings around the time of the Montana Constitution's adoption are

more instructive than recent federal applications of *Anderson-Burdick*.[5] The Montana Constitution was drafted at a moment when federal constitutional concern with voting rights was arguably at its peak. In the preceding years, the U.S. Supreme Court had stressed that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system" and that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964). According to the Court, because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 562. Elsewhere the U.S. Supreme Court discussed the need for "close and exacting examination," since "statutes distributing the franchise constitute the foundation of our representative society," and "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969); *see also Dunn v. Blumstein*, 405 U.S. 330, 337-38, 343 (1972) (explaining that "any

[5] *Anderson* and *Burdick* were decided in 1983 and 1992, respectively. The U.S. Supreme Court did not apply their analysis to voting regulations (as opposed to ballot access regulations) until *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

statute that places a condition on the exercise of the right to vote" is subject to an "exacting test" that places a "heavy burden of justification" on the state and precludes the state from choosing "the way of greater interference" when less burdensome alternatives are available) (alterations and internal quotation marks omitted).

These contemporaneous federal rulings indicate that, to the extent they had federal standards in mind, the drafters and ratifiers of Montana's Constitution would have expected close judicial scrutiny of laws that encumber the free exercise of the franchise. *See, e.g.*, *Johnson v. Killingsworth*, 271 Mont. 1, 4, 894 P.2d 272, 274 (1995) (discussing *Reynolds*, *Kramer*, and *Dunn* and noting "the general rule requiring strict scrutiny in voting rights-related cases"); *cf. Mont. Democratic Party v. Jacobsen*, ¶ 19 (discussing this Court's "solemn duty . . . to review the Legislature's work to ensure that the right of suffrage guaranteed to the people by our Constitution is preserved"). It would be strange to hold that later federal precedents dilute the Montana Constitution's independent force.

II. COURTS IN OTHER STATES COMMONLY APPLY CLOSE SCRUTINY TO LAWS THAT BURDEN VOTING.

Consistent with the distinctive nature of their constitutions, state courts frequently protect voting rights more vigorously than do their federal counterparts. Only a small minority of state courts have embraced the weak form of *Anderson-Burdick* review that Appellant advocates to resolve right-to-vote challenges to voting

restrictions. Many more state courts have adopted standards of review that materially exceed the federal floor. State courts offer a variety of linguistic formulations to describe their approaches. Even when state courts invoke *Anderson-Burdick* or notions of balancing, they commonly insist upon strong justifications and careful tailoring before they will uphold a law that nontrivially burdens voters. Appendix B details the state of the law across the country.

Notably, a number of state courts have held that restrictive voting laws are subject to strict scrutiny, sometimes expressly rejecting *Anderson-Burdick* in the process.[6] Additional state courts have held that strict scrutiny applies to laws that burden fundamental rights, have recognized that voting is a fundamental right, and

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[6] *See, e.g.*, *Van Valkenburg v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000) (declining to follow *Burdick* and instead applying strict scrutiny because "the right of suffrage is a fundamental right"); *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996) ("Where challenged legislation implicates a fundamental constitutional right, . . . such as the right to vote, . . . the court will examine the statute under the strict scrutiny standard."); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007) ("[B]ecause the right to vote has been recognized as fundamental for all citizens, restrictions on that right generally are subject to strict scrutiny, meaning they must be narrowly tailored to further a compelling state interest"); *Shumway v. Worthey*, 37 P.3d 361, 366 (Wyo. 2001) ("The right to vote is fundamental, and we construe statutes that confer or extend the elective franchise liberally (as opposed to those limiting the right to vote in some way, which then invokes strict scrutiny)."); *League of Women Voters of Kansas v. Schwab*, 525 P.3d 803, 822 (Kan. Ct. App. 2023) (explaining that *Anderson-Burdick* is "a federal test" and that "[s]trict scrutiny applies" because "[t]he right to vote is a fundamental right").

have not suggested that the right to vote should be subject to a less stringent standard than other fundamental rights.[7]

To the extent state courts have invoked *Anderson-Burdick*, it is most often in circumstances distinct from those present here, and frequently with a gloss that differs from the weak federal form. Contrary to the suggestion of *amicus curiae* Restoring Integrity & Trust in Elections (RITE), following in lockstep with a weakened *Anderson-Burdick* is the rare exception, not the rule. Many of the cases that RITE identifies as instances of state courts "expressly follow[ing] *Anderson* and *Burdick*" (RITE Br. at 16) are not squarely on point. First, some of the cases involve federal claims or jointly litigated federal-state claims in which there was no real occasion for independent state constitutional analysis.[8] Second, some of the cases

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[7] *See, e.g.*, *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) ("This court has applied "strict scrutiny" analysis to laws . . . impinging upon fundamental rights expressly or impliedly granted by the constitution[.]") (alterations and internal quotation marks omitted); *Akizaki v. Fong*, 461 P.2d 221, 222-23 (Haw. 1969) ("The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government."); *Wells by Wells v. Panola Cty. Bd. of Educ.*, 645 So. 2d 883, 893 (Miss. 1994) ("A statute . . . interfering with the exercise of a fundamental right, such as voting, is subject to strict scrutiny."); *Wrigley v. Romanick*, 988 N.W.2d 231, 242 (N.D. 2023) ("A statute which restricts a fundamental right is subject to strict scrutiny[.]"); *Poochigian v. City of Grand Forks*, 912 N.W.2d 344, 349 (N.D. 2018) ("The right to vote is a fundamental constitutional right.").

[8] *See, e.g.*, *Rhoden v. Athens-Clarke Cty. Bd. of Elections*, 850 S.E.2d 141, 152 (Ga. 2020) (noting that appellants "made no argument for a different application" of federal and Georgia equal protection principles); *Pick v. Nelson*, 528

involve claims that were litigated under state equal protection or free speech/association provisions (where the analogy to *Anderson-Burdick* may arguably be stronger) rather than squarely under right-to-vote guarantees.[9] Third, many of the cases do not involve voting restrictions, but instead other election matters, such as ballot access (where, again, the analogy to *Anderson-Burdick* is conceivably stronger, since that was the original domain of those federal cases).[10]

N.W.2d 309, 317 (Neb. 1995) (declining to analyze federal and state free speech guarantees separately on the ground that the guarantees are "the same"); *Walsh v. Katz*, 953 N.E.2d 753 (N.Y. 2011) (addressing federal and state equal protection claims); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843 (Ariz. Ct. App. 2005) (addressing federal and state equal protection claims); *State ex rel. Maras v. LaRose*, __ N.E.3d__, 2022 WL 15654420, at *3 (Ohio 2022) (addressing "equivalent" federal and state equal protection claims); *Wilkins v. West*, 571 S.E.2d 100, 111 (Va. 2002) (addressing "congruent" federal and state equal protection claims).

[9] *See, e.g.*, *Edelstein v. City & Cty. of San Francisco*, 56 P.3d 1029 (Cal. 2002) (addressing state free speech claim); *Election Integrity Project of Nev. LLC v. Eight Judicial Dist. Court, Clark Cty.*, 473 P.3d 1021 (Nev. 2020) (unpublished) (addressing state equal protection claim); *Montano v. Los Alamos Cty.*, 926 P.2d 307 (N.M. 1996) (addressing state equal protection claim); *State ex rel. Blankenship v. Warner*, 825 S.E.2d 309 (W.V. 2018) (addressing state free association claim).

[10] *See, e.g.*, *Edelstein*, 56 P.3d 1029 (write-in voting—the precise issue in *Burdick*); *Orr v. Edgar*, 698 N.E.2d 560 (Ill. Ct. App. 1998) (elimination of "one punch" straight-party voting); *Burruss v. Board of Cty. Comm'rs of Frederick Cty.*, 46 A.3d 1182 (Md. Ct. App. 2012) (signature requirement for local government board); *Election Integrity Project of Nev. LLC v. Eight Judicial Dist. Court, Clark Cty.*, 473 P.3d 1021 (Nev. 2020) (unpublished) (vote-by-mail expansion); *Montano*, 926 P.2d 307 (N.M. 1996) (at-large county elections); *Maras*, __ N.E.3d__ (election observers); *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015) (electronic voting systems); *Wilkins*, 571 S.E.2d 100 (racial discrimination involving electoral districts); *Carlson v. San Juan County*, 333 P.3d 511 (Wash. Ct. App. 2014) (size and composition of

Additionally, even when state courts use an *Anderson-Burdick*-style balancing approach, they most commonly apply a more voter-protective version than Appellant advocates. In particular, their review often ratchets up from rational basis as soon as laws impose nontrivial burdens, with the level of scrutiny becoming increasingly exacting as the burden grows. If these courts find the burden less than severe, then the scrutiny may not be "strict," but it is still quite rigorous, requiring lawmakers to identify weighty interests that truly justify the challenged restrictions.[11]

The bottom line is that very few state courts have embraced Appellant's preferred gloss of *Anderson-Burdick*, which would subject voting restrictions to rational basis review so long as the burdens they impose are deemed non-severe. Instead, state courts commonly safeguard voting rights under state constitutions by

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county councils); *Blankenship*, 825 S.E.2d 309 (candidate nominations and ballot access).

[11] *See, e.g.*, *Rhoden*, 850 S.E.2d at 147 (stating that, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden"); *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 333 (Mass. 2018) (noting that state constitution may apply "in a manner that 'guard[s] more jealously against the exercise of the State's police power' than the application of the framework under the Federal Constitution"); *Guare v. State*, 117 A.3d 731, 741 (N.H. 2015) (applying intermediate scrutiny and explaining that, "even if we assume that the burden is not severe, the State has failed to advance a sufficiently weighty interest to justify the language"); *Fisher v. Hargett*, 604 S.W.3d 381, 399 (Tenn. 2020) (applying similarly elevated scrutiny).

scrutinizing restrictive laws more rigorously than federal doctrine requires. Given the Montana Constitution's strong textual and structural commitment to a system in which the people govern themselves by freely exercising the vote, it is entirely appropriate—and completely within national mainstream—for this Court to review laws that reduce voting opportunities with a highly skeptical eye.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to affirm the District Court's decision permanently enjoining HB 176, SB 169, HB 506, and HB 530.

Dated this 7th day of July, 2023.

Respectfully submitted,

By: /s/ *Caitlin Boland Aarab*
Caitlin Boland Aarab
BOLAND AARAB PLLP
Local Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4993, excluding certificate of service and certificate of compliance.

DATED:

Signed,

By: /s/ *Caitlin Boland Aarab*
Caitlin Boland Aarab
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Local Counsel for *Amici Curiae*

TABLE OF APPENDICES

APPENDIX A
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APPENDIX B
SURVEY OF STATE COURT PRACTICES FOR REVIEWING STATE CONSTITUTIONAL RIGHT-TO-VOTE CHALLENGES TO RESTRICTIVE VOTING LAWS

This Appendix identifies and classifies state judicial standards for adjudicating challenges to restrictive voting laws brought under state constitutional right-to-vote provisions.

A survey of this nature should not be taken to suggest that states fall neatly into hard-edged categories. In many states, courts have not definitively articulated a standard of review for adjudicating state constitutional right-to-vote challenges to restrictive voting laws. Cases also arise in a variety of distinct legal and factual circumstances. Still, existing precedent can provide an indication of how courts would approach a case like the one under review.

Based on a review of case law in every state (detailed state-by-state below), we have identified at least 26 states with at least some precedent that affirmatively points toward the application of strict scrutiny to restrictive voting laws.

In 16 additional states, at least some precedent affirmatively points toward a standard of review that, if not formally strict, would be more stringent than the weak form of federal *Anderson-Burdick* review that Appellant advocates.

In 6 states, the existing precedent offers no meaningful indication of the standard the courts would likely apply.

Only 2 states (Texas and Wisconsin) have supreme court precedent that directly embraces weak-form federal *Anderson-Burdick* review for adjudicating state constitutional right-to-vote challenges to restrictive voting laws.

State	Standard of Review
Alabama	Alabama courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. The Alabama Supreme Court has held that, for the purposes of state equal protection analysis, when a fundamental right guaranteed by the Alabama Constitution is impaired, strict

	scrutiny applies. *See, e.g.*, *Opinion of the Justices*, 624 So.2d 107, 156-57 (Ala. 1993). The Alabama Supreme Court has also held that federal standards of review do not control when evaluating claims brought under the Alabama Constitution. *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 170 (Ala. 1991). The Court has only applied the *Anderson-Burdick* test (two-tiered) when evaluating federal equal protection claims. *E.g.*, *Vietch v. Friday*, 314 So.3d 1232, 1239 (Ala. 2020) (regarding disenfranchisement of a subset of county residents in primary elections); *Blevins v. Chapman*, 47 So.3d 227, 231-32 (Ala. 2010) (ballot access challenge).
Alaska	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. The Alaska Supreme Court has applied a four-step analysis similar to the sliding-scale version of *Anderson-Burdick* (rather than the weaker two-tier approach) in a case brought under the state constitution's right-to-vote provision. The Court observed that is more rigorous than the prevailing federal approach, reflecting "the principle that Alaska's constitution is more protective of rights and liberties than is the United States Constitution." *State v. Arctic Village Council*, 495 P.3d 313, 321 (Alaska 2021); *see also Kohlhaas v. State*, 519 P.3d 1095 (Alaska 2022).
Arizona	Arizona courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. The Arizona Supreme Court has held that, for the purposes of state equal protection analysis, when a fundamental right—i.e., "a right explicitly or implicitly guaranteed by the constitution"—is burdened, strict scrutiny will apply. *Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002). An Arizona appellate court has discussed the fundamental right to vote in the equal protection context. *Arizona Minority Coalition for Fair Redistricting v. Arizona*

	Independent Redistricting Commission, 121 P.3d 843, 851-52 (Ariz Ct. App. 2005). The same appellate court indicated that the two-tiered *Anderson-Burdick* test may apply to cases where plaintiffs bring equal protection claims under both the United States and Arizona Constitutions. *Arizona Minority Coal.*, 121 P.3d at 85. However, even in the context of federal claims, there are more recent indications that Arizona courts apply a more rigorous version of *Anderson-Burdick*. *See, e.g.*, *AZ Petition Partners LLC v. Thompson*, __ P.3d __, 2023 WL 4104100, at *6 (Ariz. 2023) ("approving of much of [the lower court's] reasoning," which included requiring more than the mere assertion of an interest in preventing fraud to satisfy the government's burden); *see also id*. at *2 n.2 (clarifying that the Court's *Anderson-Burdick* analysis pertained only to the federal claim and that the Court was not reaching state constitutional questions).
Arkansas	Precedent points toward strict scrutiny. In a recent challenge to several laws that plaintiffs alleged would restrict the vote, an Arkansas trial court held that a statute that burdens the state constitution's right to vote is subject to strict scrutiny. *League of Women Voters of Arkansas v. Thurston*, 60CV-21-3138, at *12-15 (Ark. Cir. Ct. March 24, 2022). This is in line with Arkansas Supreme Court precedent, which states: "When a statute infringes upon a fundamental right, it cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002). The Arkansas Supreme Court has previously declined to adopt the reasoning of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), emphasizing the unique features of Arkansas' constitution and precedent. *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014) (invalidating a photo voter ID requirement).

California	California courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision. California "has followed closely the analysis of the United States Supreme Court" in addressing equal protection challenges to election laws. *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) (abrogated on other grounds). The California Supreme Court also applied the two-tiered version of the *Anderson-Burdick* test to a state constitutional free speech challenge to a write-in voting law. *Edelstein v. City and County of San Francisco*, 56 P.3d 1029 (Cal. 2002).
Colorado	Some precedent points to strict scrutiny. Although an unpublished state trial court declined to recognize broader right-to-vote protections under the state constitution than the federal constitution and applied the two-tier the version of *Anderson-Burdick* test, *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *3 (Colo. Dist. Ct. Oct. 8, 2004), the Colorado Supreme Court has indicated a more rigorous approach. When considering a restriction on the initiative and referendum power, the Colorado Supreme Court applied strict scrutiny, writing, "Any law that limits this 'fundamental right at the very core of our republican form of government' is viewed with the closest scrutiny." *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983). The Colorado Supreme Court has similarly held that "the right to vote is a fundamental right of the first order," *Erikson v. Blair*, 670 P.2d 749, 754 (Colo. 1983), and that, when considering equal protection claims, strict scrutiny applies to statutes impinging on fundamental rights. *Mayo v. National Farmers Union Property and Cas. Co.*, 833 P.2d 54, 57 (Colo. 1992).
Connecticut	Connecticut courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points to strict scrutiny.

	In the equal protection context, the Connecticut Supreme Court has written: "If, in distinguishing between classes, the statute . . . intrudes on the exercise of a fundamental right. . ., the court will apply a strict scrutiny standard." *Fay v. Merrill*, 256 A.3d 622, 642 (Conn. 2021). And the court has called the right to vote "fundamental." *Id*.
Delaware	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. The Delaware Court of Chancery has nominally adopted the sliding-scale version of *Anderson-Burdick* to analyze vote restriction claims brought under the Delaware Constitution's Elections and Right-to-Vote Clauses. *League of Women Voters of Delaware, Inc. v. Department of Elections*, 250 A.3d 922 (Del. Ch. 2020). However, the test appears to be more rigorous than its federal analog. According to the court, "the voting rights provided for and guaranteed in the Delaware Constitution" are "more robust than those in the U.S. Constitution." *Id.* at 936; *see also Young v. Red Clay Consolidated School District*, 122 A.3d 784, 812 (Del. Ch. 2015) ("Delaware jurisprudence generally favors the primacy model and resists the lockstep model. Skepticism about lockstep interpretations is particularly strong for provisions which, like the Elections Clause, appear in Delaware's Declaration of Rights.").
Florida	Florida courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. Florida courts have frequently described voting as a fundamental right, *see, e.g.*, *Fields v. Askew*, 279 So.2d 822 (Fla. 1973); *City of Miami Beach v. Board of Trustees of City Pension Fund for Firefighters and Police Officers in the City of Miami Beach*, 91 So.3d 237, 241 (Fla. Ct. App. 2012), and held that "'strict' scrutiny . . . applies to legislation impinging on certain fundamental rights," *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 626 (Fla. 2003); *see also*, *Armstrong v. Harris*, 773 So.2d 7, 22 n.36

	("Special vigilance is required where the fundamental rights of Florida citizens . . . are concerned . . . ."). The Florida Supreme Court has held that the Florida Constitution's Political Power and Right-to-Assembly Clauses at least sometimes track the political association rights guaranteed under the First and Fourteenth amendments of the U.S. Constitution, and thus *Anderson-Burdick* may govern in those contexts. *Libertarian Party of Florida v. Smith*, 687 So.2d 1292, 1121 (Fla. 1996).
Georgia	Georgia courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. In the context of a statute regulating the manner of voting (the replacement of paper ballots with an electronic voting system), the Georgia Supreme Court has held that the state constitutional equal protection guarantee is coextensive with the protections afforded by the federal Equal Protection Clause and applied *Anderson-Burdick*. *Favorito v. Handel*, 684 S.E.2d 257, 260-61 (Ga. 2009). However, there is no indication whether a voting restrictions challenge would receive the same treatment. There is also reason to believe that, if Georgia courts were to adopt the *Anderson-Burdick* test to a voting restriction, they would apply the more stringent version of it. *See Rhoden v. Athens-Clarke County Board of Education*, 850 S.E.2d 141, 147 (Ga. 2020) (applying the stronger sliding-scale version of *Anderson-Burdick* and explaining that, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden.").
Hawaii	Hawaii courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny.

	The Hawaii Supreme Court has written that when a statute "imping[es] upon fundamental rights expressly or impliedly granted by the [c]onstitution," strict scrutiny applies. *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993). The Court has also previously held that the right to vote is fundamental. *See, e.g.*, *Ahia v. Lee*, No. SCEC-22-0000707, 2023 WL 334610 (Haw. Jan. 20, 2023); *Akizaki v. Fong*, 461 P.2d 221, 222-23 (Haw. 1969).
Idaho	Idaho courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. The Idaho Supreme Court rejected the *Anderson-Burdick* test in the context of a challenge to a term limits pledge. The Court held that the statute infringes on the right to vote guaranteed by the Idaho Constitution's Right of Suffrage Clause. It wrote: "This Court has previously held that if a fundamental right is at issue, the appropriate standard of review to be applied to a law infringing on that right is strict scrutiny." *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000).
Illinois	Illinois courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. The Illinois Supreme Court has written: "Where challenged legislation implicates a fundamental constitutional right, . . . such as the right to vote, the presumption of constitutionality is lessened and a far more demanding scrutiny is required. When the means used by a legislature to achieve a legislative goal impinge upon a fundamental right, the court will examine the statute under the strict scrutiny standard." *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996).
Indiana	Indiana courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision. Addressing a challenge to a voter ID statute under the state constitution's elector qualifications and equal privileges and

	immunities provisions, the Indiana Supreme Court did not invoke *Anderson-Burdick.* It instead applied a distinctive state framework that asked whether "(a) the disparately treated classifications are rationally distinguished by distinctive, inherent characteristics, and (b) such disparate treatment is reasonably related to such distinguishing characteristics." *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *see also Indiana Gaming Com'n v. Moseley*, 643 N.E.2d 296 (Ind. 1994) (writing in the context of an Equal Privileges and Immunities challenge that, "while voting is a fundamental right, not all restrictions trigger such strict scrutiny"). Plaintiffs did not bring a claim under the state's Free and Equal Elections Clause.
Iowa	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. Addressing a challenge to statute prohibiting county auditors from using voter registration databases to correct incorrect information or fill in missing information on absentee ballot requests without contacting the applicant, the Iowa Supreme Court adopted the stronger sliding-scale version of *Anderson-Burdick. League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 209 (Iowa 2020). The Court did not specify, however, what constitutional provisions it was applying, so the scope of its ruling is not clear.
Kansas	Precedent points toward strict scrutiny. Kansas courts have applied strict scrutiny when addressing whether a voting restriction violates the state constitutional right to vote. *League of Women Voters of Kansas v. Schwab*, 525 P.3d 803, 822 (Kan. Ct. App. 2023) (evaluating a challenge to a signature-matching requirement and ballot-collection restrictions). The Court wrote: "[W]e do not see our Supreme Court adopting a flexible balancing test that varies depending on how severe the court characterizes the burden. The *Anderson-Burdick* test is a federal test based on the federal Constitution for reviewing state election laws. . . . The Kansas constitutional provisions are unique. The right to vote is a fundamental right. Strict scrutiny applies here." *Id*.

Kentucky	Kentucky courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In the state equal protection context, the Kentucky Supreme Court has indicated that strict scrutiny is the standard: "Rational basis analysis is used when an equal protection claim does not involve a suspect class such as race or gender or interfere with a fundamental right such as the right to privacy or the right to vote. The right to candidacy is not a fundamental right. Therefore, the right to candidacy, unlike the right to vote, does not always require strict scrutiny." *Mobley v. Armstrong*, 978 S.W.2d 307, 309 (Ky. 1998).
Louisiana	No relevant cases found.
Maine	Maine courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. When considering whether the COVID-19 pandemic required a modification of the deadline for receipt of absentee ballots to be compliant with the Maine Constitution's absentee voting provision, the Maine Supreme Court used a test modeled after the stronger sliding-scale version of *Anderson-Burdick*. *Alliance for Retired Americans v. Sec'y of State*, 240 A.3d 45, 54 (Me. 2020). Elsewhere, the Maine Supreme Court has stated that "[v]oting is a fundamental right, it is at the heart of our democratic process." *Opinion of the Justices*, 162 A.3d 188, 207 (Me. 2017). Separately, in the state due process context, it has stated that when a statute infringes a fundamental constitutional right, strict scrutiny applies. *Doe I v. Williams*, 61 A.3d 718 (Me. 2013) ("If state action infringes on a fundamental right or fundamental liberty interest, the infringement must be narrowly tailored to serve a compelling state interest.").
Maryland	Maryland courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but

	precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. In the ballot access context, the Maryland Court of Appeals used *Anderson-Burdick*-type analysis to uphold petition signature requirements that it concluded were minimally burdensome. *Burruss v. Board of County Commissioners of Frederick County*, 46 A.3d 1182 (Md. 2012). The Maryland Supreme Court, however, has subjected more burdensome ballot access rules to strict scrutiny and emphasized that "the federal and state guarantees of equal protection are obviously independent and capable of divergent application." *Maryland Green Party v. Maryland Bd. of Elections*, 832 A.2d 214, 232 (Md. 2003) (citations and internal quotation marks omitted).
Massachusetts	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. When considering a challenge to a vote restriction under the state constitution's right-to-vote provision, the Massachusetts Supreme Judicial Court has applied "different levels of scrutiny depending on the substantiality of the interference." *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 100 N.E.3d 326, 331-32 (Mass. 2018). "Because the right to vote is a fundamental one . . ., a statute that significantly interferes with that right is subject to strict judicial scrutiny. . . . By contrast, statutes that do not significantly interfere with the right to vote but merely regulate and affect the exercise of that right to a lesser degree are subject to rational basis review to assure their reasonableness." *Id*.; *see also Grossman v. Secretary of the Commonwealth*, 151 N.E.3d 429 (Mass. 2020) (stating that the state framework may involve subjecting statutes to intermediate level scrutiny—rather than just either strict scrutiny or rational basis). This approach resembles the stronger sliding-scale version of *Anderson-Burdick* test, and the Court has observed that "there may be circumstances where the Massachusetts Declaration of Rights and art. 3 require application of this analysis in a manner that 'guard[s] more jealously against the exercise of the State's police power' than the application of the framework under the Federal Constitution." *Chelsea Collaborative*, 100 N.E.3d at 333.

Michigan	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*, and new constitutional provisions may point toward strict scrutiny. When considering a challenge to a voter ID statute that focused primarily on the state constitution's equal protection provision, the Michigan Supreme Court has applied the sliding-scale version of *Anderson-Burdick*. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (2007). The Michigan Constitution, however, was amended in 2022 to bolster its right-to-vote protections, so the continued force of this ruling is in doubt. *See* Mich. Const. art. II, § 4(1)(a) (prohibiting laws that have "the intent or effect or denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote").
Minnesota	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick.* When considering a state right-to-vote challenge to a statute limiting the number of absentee ballots that could be delivered by a single agent, the Minnesota Supreme Court applied the stronger sliding-scale version of *Anderson-Burdick*. *DSCC v. Simon*, 950 N.W.2d 280, 291-93 (Minn. 2020). The Court, however, has not committed to applying the test identically to federal courts. *Kahn v. Griffin*, 701 N.W.2d 815, 834 (Minn. 2005) (keeping the door open to finding, in the future, that the Minnesota Constitution grants greater protections than the U.S. Constitution).
Mississippi	Mississippi courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. However, the Mississippi Supreme Court has held that acts abridging fundamental rights are subject to strict scrutiny, *see, e.g.*, *Doe v. Doe*, 644 So.2d 1199, 1209 (Miss. 1994) ("[A]ny attempt to abridge this fundamental right is required to pass muster under "strict scrutiny" analysis.") (Lee, J., concurring). And, at least in the context of federal equal protection challenges, the Court has described the right to vote as

	fundamental. *Wells by Wells v. Panola County Bd. of Educ.*, 645 So.2d 883 (Miss. 1994).
Missouri	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick.* Although Missouri has adopted a two-tiered test similar to *Anderson-Burdick* for voting restriction claims brought under the state's Free Elections Clause, Missouri has applied rational basis review with more bite than the weak federal version of the standard. *Priorities USA v. State*, 591 S.W.3d 448, 453 (Mo. 2020). The Court held that the state's affidavit alternative to providing photo ID at polling locations was not rationally related to the interest of combating voter fraud. *Id*.
Montana	Precedent points toward strict scrutiny. Montana courts have applied strict scrutiny to laws that implicate a fundamental right found in the Montana Constitution's declaration of rights, such as the right to vote. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, ¶ 18, 473 P.3d 386, ¶ 18 ("The most stringent level of scrutiny, and the one employed by the District Court, is strict scrutiny, used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights.").
Nebraska	Nebraska courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision. In a redistricting case, the court applied the *Anderson-Burdick* test, but only in the context of explaining that the free speech guarantees of the state and federal constitutions were coextensive. *Pick v. Nelson*, 528 N.W.2d 309, 316-17 (Neb. 1995).
Nevada	Nevada courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In the equal protection context, the Nevada Supreme Court has held that statutes implicating fundamental rights are subject to strict scrutiny. *Williams v. State*, 50 P.3d 1116, 1120 (Nev.

	2002). The Nevada Supreme Court has also described the right to vote as fundamental. *E.g.*, *Clark County v. City of Las Vegas*, 550 P.2d 779, 792 (Nev. 1976) ("It is, of course, well established that the right to vote is fundamental in a free democratic society."). In an unpublished order, the court has indicated that a less stringent standard may be appropriate when reviewing laws that expand the franchise, but the court distinguished restrictive laws from non-restrictive ones. *Election Integrity Project of Nevada, LLC v. Eighth Judicial District Court in and for County of Clark*, 473 P.3d 1021, at *2 (Nev. 2020) (declining to repudiate lower court's rational basis review of a statute that *expanded* vote by mail where petitioners did not allege any burden imposed on the right to vote).
New Hampshire	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick.* Considering a challenge to a voting restriction brought under the state's Free Elections Clause, the New Hampshire Supreme Court has applied a flexible test "similar to intermediate scrutiny." *Guare v. State*, 117 A.3d 731, 736, 738, 740 (N.H. 2015). This is a more rigorous analysis than the weak two-tiered version of *Anderson-Burdick.*
New Jersey	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick.* Considering a challenge to an advance-registration requirement under the state constitution's voter qualifications provision, a New Jersey appellate court applied the stronger sliding-scale version of *Anderson-Burdick*. *Rutgers University Student Assembly v. Middlesex County Bd. of Elections*, 141 A.3d 335 (N.J. Super. Ct. App. Div. 2016). Even after finding a minimal burden on the right to vote, the court still undertook a rigorous analysis of the evidence supporting the state's interest in advance registration. *Id.* at 344-47. The New Jersey Supreme Court has not directly addressed the proper standard of review in such a case.

New Mexico	New Mexico courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision. In a state constitutional equal protection challenge to the use of at-large elections rather than single-member districts, the New Mexico Supreme Court cited *Burdick* approvingly and applied what seems to be the two-tiered *Anderson-Burdick* test. *Montano v. Los Alamos County*, 926 P.2d 307 (N.M. 1996). But it is not clear that the Court would apply the same standard in other contexts.
New York	New York courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In the equal protection context, the New York Court of Appeals has held that when a statute infringes on a fundamental right, strict scrutiny applies, *Golden v. Clark*, 561 N.E.2d 611, 613 (N.Y. 1990), and that voting is a fundamental right, *id.* at 614. The Court of Appeals has invoked *Anderson-Burdick* in cases raising federal constitutional challenges to ballot access laws, but even in these federal-law cases the Court's review appears to have been more stringent than the weak two-tiered form of the standard. *See LaBrake v. Dukes*, 758 N.E.2d 1110 (N.Y. 2001) (finding a severe burden and applying strict scrutiny).
North Carolina	North Carolina courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. However, in a redistricting challenge brought under the state constitution's Whole-County Provisions, the Court wrote: "It is well settled in this State that 'the right to vote on equal terms is a fundamental right. The classification of voters into both single-member and multi-member districts within plaintiffs' proposed remedial plans necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the

	applicable standard." *Stephenson v. Bartlett*, 562 S.E.2d 377, 378 (2002) (citations omitted).
North Dakota	North Dakota courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. However, the North Dakota Supreme Court has held that "[a] statute which restricts a fundamental right is subject to strict scrutiny standard of review which will only be justified if it furthers a compelling government interest and is narrowly tailored to serve that interest." *Wrigley v. Romanick*, 988 N.W.2d 231, 242 (N.D. 2023). And the Court has elsewhere held that the right to vote is fundamental. *E.g.*, *Poochigian v. City of Grand Forks*, 912 N.W.2d 344, 349 (N.D. 2018).
Ohio	Ohio courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In a voting rights challenge brought under both the state and federal Equal Protection Clauses, an Ohio appellate court wrote that, "once a fundamental right . . . is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional," and the court subjected the statute to strict scrutiny. *Bd. of Lucas Cty. Comm'rs v. Waterville Twp. Bd. of Trustees*, 870 N.E.2d 791, 798 (Ohio Ct. App. 2007). This is consistent with statements from Ohio Supreme Court that, "[i]f the challenged legislation impinges upon a fundamental constitutional right, courts must review the statutes under the strict-scrutiny standard," *Harrold v. Collier*, 836 N.E.2d 1165, 1171 (Ohio 2005), and, in the equal protection context, that "[t]he right to vote is a fundamental right," *Desenco, Inc. v. Akron*, 706 N.E.2d 323, 332 (Ohio 1999). In a recent case involving election observers (rather than a voting restriction), the Ohio Supreme Court applied rational basis after concluding that the law did "not burden the right

	vote." *State ex rel. Maras v. LaRose*, __ N.E.3d __, 2022 WL 15654420, at *4 (Ohio 2022).
Oklahoma	Precedent points toward a standard more rigorous than weak-form *Anderson-Burdick.* Considering a challenge to voter ID brought under the state's right-to-vote provision, the Oklahoma Supreme Court applied a balancing test that "consider[ed] whether the law was designed to protect the purity of the ballot, not as a tool or instrument to impair constitutional rights" and whether it "reflects a conscious legislative intent for electors to be deprived of their right to vote." *Gentges v. State Election Bd.*, 419 P.3d 224, 228 (Okla. 2018). The analysis cited federal cases such as *Anderson*, *Burdick*, and *Crawford*, but did not purport to proceed in lockstep with those cases. *Id.* at 230.
Oregon	Oregon courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. The Oregon Supreme Court has previously rejected federal balance-of-interests analysis when considering a ballot access case under Oregon law. Instead, the Court wrote that its proper function was "to determine what the specific provisions of the constitution require and to apply those requirements to the case before it." The Court proceeded to consider "whether a purpose of these [challenged] statutes [was] to [unconstitutionally] protect the major political parties from rival political organizations." *Libertarian Party of Oregon v. Roberts*, 750 P.2d 1147, 1151, 1153 (Ore. 1988).
Pennsylvania	Precedent points toward strict scrutiny. A Pennsylvania Commonwealth Court most directly addressed the standard of review question in a voting restriction case brought under the state constitution's right-to-vote provision, holding that a voter ID law was subject to strict scrutiny because it infringed on the fundamental right to vote guaranteed by the state's Free and Equal Elections Clause.

	Applewhite v. Commonwealth, 2014 WL 184988 (Pa. Cmwlth. 2014) (unpublished). The Pennsylvania Supreme Court has not squarely addressed the question. However, the Court has stated that voting is a fundamental right guaranteed by the state's Free and Equal Elections Clause. *Banfield v. Cortes*, 110 A.3d 155, 178 (Pa. 2015). And the Court has held, in the equal protection and due process contexts, that acts impinging on fundamental rights are subject to strict scrutiny. *See, e.g.*, *Shoul v. Commonwealth, Dept. of Trans., Bureau of Driver Licensing*, 173 A.3d 669, 677 (Pa. 2017); *William Penn School Dist. v. Pennsylvania Dept. of Educ.*, 170 A.3d 414 (Pa. 2017). The Court has not indicated that the right to vote is an exception to this general rule. As with other courts, the Pennsylvania Supreme Court reviews election laws that do not restrict the vote more permissively. *See, e.g.*, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Penn. 2020) (citing *Anderson* and *Burdick* approvingly in discussion of poll watcher requirements and applying rational basis because no fundamental right was involved); *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015) (declining to subject implementation of electronic voting systems to strict scrutiny).
Rhode Island	Rhode Island courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In the state constitutional equal protection and due process context, the Rhode Island Supreme Court has written: "If a statute impinges on a fundamental right . . . this Court must examine the statute with 'strict scrutiny.'" *Cherenzia v. Lynch*, 847 A.2d 818, 823 (R.I. 2004); *see also Federal Hill Capital, LLC v. City of Providence by and through Lombardi*, 227 A.3d 980 (R.I. 2020). The Court has described voting as a fundamental right with reference to federal case law and has noted that it retains the "prerogative to interpret its equal protection and due process provisions in a manner "more protective" than the federal constitution. *Id*. at 989; *see also*

	Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence, 888 A.2d 948, 956 (R.I. 2005) (noting that federal constitutional guarantees "in no way limit" those protections secured by analogous provisions in the Rhode Island Constitution).
South Carolina	South Carolina courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. The South Carolina Supreme Court has written: "The right to vote is a fundamental right protected by heightened scrutiny under the [state and U.S.] Equal Protection Clause[s]." *Sojourner v. Town of St. George*, 679 S.E.2d 182 (S.C. 2009); *see also State v. Thompson*, 563 S.E.2d 325, 329-30 (S.C. 2002) ("The fundamental rights which usually are protected by heightened scrutiny are personal rights such as the rights to vote . . ."). In the equal protection and due process context, the Court has stated: "Legislation restricting or impairing a fundamental right or implicating a suspect class is subject to "strict scrutiny" to determine its constitutionality," *Planned Parenthood South Atlantic v. State*, 882 S.E.2d 770, 804 (S.C. 2023). The Court has not indicated that a less stringent standard would apply to a state constitutional voting rights challenge.
South Dakota	No relevant cases found.
Tennessee	Tennessee courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but precedent points toward a standard more rigorous than weak-form *Anderson-Burdick. Cf. Fisher v. Hargett*, 604 S.W.3d 381, 398 (Tenn. 2020) ("This Court has not definitively determined the appropriate analytical framework by which to evaluate claims alleging violations of the Tennessee constitutional right to vote.") In a challenge to the state's absentee and mail-in voting regulations during the COVID-19 pandemic, the Tennessee Supreme Court assumed *without deciding* that the *Anderson-Burdick* framework applied to claims brought under the state's Free Elections Clause. *Id.* at 400. Additionally, the version of

	the test described by the Court calls for more than mere rational basis review even when the burden on the right is only "moderate," making it more rigorous than the two-tiered federal version of *Anderson-Burdick*. *Id.*
Texas	Precedent points toward weak-form *Anderson-Burdick*. Texas has applied what appears to be the two-tiered version of *Anderson-Burdick* to vote restriction claims brought under the state Equal Protection Clause. *Abbott v. Anti-Defamation League, Austin, Southwest, and Texoma Regions*, 610 S.W. 3d 911, 920 (Tex. 2020). It is not entirely clear that the Court would apply the same test if presented with a claim brought under another constitutional provision, such as the state's Free Elections Clause.
Utah	Utah courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*. However, the Utah Supreme Court has indicated that the appropriate standard of review is heightened scrutiny. *See Gallivan v. Walker*, 54 P.3d 1069, 1086 (Utah 2002) (explaining that heightened scrutiny applies in a challenge to an act that restricts a fundamental right guaranteed by the Utah Constitution, such as the right to initiative, which the Court analogized to the right to vote). The Court has also reiterated that the right to vote is fundamental: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Id.* at 1080-81 (citations and quotation marks omitted).
Vermont	Vermont courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but precedent points toward a standard more rigorous than weak-form *Anderson-Burdick*.

	If the Vermont Supreme Court were to apply a standard akin to *Anderson-Burdick* to state constitutional claims, there are indications that its review would be more rigorous than the weak two-tiered version of the test. When applying *Anderson-Burdick* test to federal constitutional claims, the Court held that some evidence is required to support the state's claimed interests even when applying rational basis review. *Anderson v. State*, 82 A.3d 577, 582 (Vt. 2013) (explaining that "deferential review is not shorthand for 'rubber stamp'" and "the State 'cannot rely on hollow or contrived arguments as justifications.'").
Virginia	Virginia courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In the due process and equal protection contexts, Virginia courts have written that fundamental rights are subject to strict scrutiny. *E.g.*, *F.E. v. G.F.M.*, 547 S.E.2d 531 (Va. Ct. App. 2001). The Virginia Supreme Court has also described voting as a fundamental right. *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999). When applying *Anderson-Burdick* to federal constitutional claims, lower Virginia courts have split on which version of the *Anderson-Burdick* test to use. *Compare Omari Faulkner for Virginia v. Virginia Department of Education*, 104 Va. Cir. 373, 2020 WL 8971534 (Va. Cir. 2020) (unpublished) (using the sliding-scale version of *Anderson-Burdick*), *with Williams v. Legere*, 886 S.E.2d 292 (Va. App. 2023) (applying the two-tiered version). The case *amicus curiae* Restoring Integrity & Trust in Elections cites for the proposition that Virginia courts require a showing of racial discrimination to subject an election law to strict scrutiny states only that such a showing is required for strict scrutiny to apply *to a racial gerrymandering claim*. *Wilkins v. West*, 264 Va. 447 (2002).

Washington	Washington courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In a case holding that felons lack the right to vote (and therefore declining to apply strict scrutiny), the Washington Supreme Court wrote: "[B]ecause the right to vote has been recognized as fundamental for all citizens, restrictions on that right generally are subject to strict scrutiny, meaning they must be narrowly tailored to further a compelling state interest." *Madison v. State*, 163 P.3d 757, 769 (Wash. 2007). A Washington appellate court has applied *Anderson-Burdick* to federal and state equal protection and due process claims, holding that the provisions provided equivalent protections. *Carlson v. San Juan County*, 333 P.3d 511 (Wash. Ct. App. 2014). But the courts have not indicated that the same standard would apply to claims under a distinctive state right-to-vote provision.
West Virginia	West Virginia courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In the equal protection context, the West Virginia Supreme Court has held that "the strict scrutiny test is required when the law or governmental action at issue impinges upon a fundamental right." *Board of Educ. of County of Kanawha v. West Virginia Bd. of Educ.*, 639 S.E.2d 893, 899 (W.Va. 2006). The West Virginia Constitution includes a right to vote, and the Court has elsewhere described fundamental rights as those "explicitly or implicitly protected by the West Virginia Constitution." *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 484 S.E.2d 909, 913 (W.Va. 1996). In a ballot access case, the West Virginia Supreme Court applied *Anderson-Burdick* analysis to the plaintiff's joint federal and state constitutional freedom of association claim.

	State ex rel. Blankenship v. Warner, 825 S.E.2d 309, 318-19 (W. Va. 2018).
Wisconsin	Precedent points toward weak-form *Anderson-Burdick*. The Wisconsin Supreme Court adopted the two-tiered approach to *Anderson-Burdick* and applied it to a vote restriction claim brought under the state's right-to-vote provision. *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 279 (Wis. 2014) ("Strict scrutiny applies only when a statute imposes a severe burden on the exercise of the franchise.").
Wyoming	Wyoming courts have not directly addressed the standard of review that applies when voting restrictions are challenged under a state constitutional right-to-vote provision, but some precedent points toward strict scrutiny. In a challenge to a law that expanded access to the franchise, the Wyoming Supreme Court carefully distinguished between election statutes that do and do not burden the right to vote, explaining that, "The right to vote is fundamental, and we construe statutes that confer or extend the elective franchise liberally (*as opposed to those limiting the right to vote in some way, which then invokes strict scrutiny*)." *Shumway v. Worthey*, 37 P.3d 361, 366 (Wyo. 2001) (emphasis added).