The Honorable Mark A. Larrañaga

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

VET VOICE FOUNDATION, THE WASHINGTON BUS, EL CENTRO DE LA RAZA, KAELEENE ESCALANTE MARTINEZ, BETHAN CANTRELL, GABRIEL BERSON, and MARI MATSUMOTO,

Plaintiffs,

v.

STEVE HOBBS, in his official capacity as Washington State Secretary of State, JULIE WISE, in her official capacity as the Auditor/Director of Elections in King County and a King County Canvassing Board Member, SUSAN SLONECKER, in her official capacity as a King County Canvassing Board Member, and STEPHANIE CIRKOVICH, in her official capacity as a King County Canvassing Board Member,

Defendants.

No. 22-2-19384-1 SEA

AMICUS CURIAE BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND WASHINGTON STATE REPUBLICAN PARTY IN SUPPORT OF DEFENDANTS

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STATEMENT OF INTEREST

Amici—the Republican National Committee and the Washington State Republican Party—have interests (as do their members, candidates, and voters) in the rules and procedures governing Washington's elections for offices at all levels of state and federal government. The Republican National Committee is a national committee, as defined by 52 U.S.C. §30101, that manages the party's business at the national level, supports Republican candidates for public office at all levels, coordinates fundraising and election strategy, and develops and promotes the national Republican platform. The Washington State Republican Party is a state political committee that works to promote Republican principles and assist Republican candidates for federal, state, and local office. The WSRP conducts fundraising and assists candidates with communication, strategy, and planning.

Amici moved to intervene in this case soon after it was filed. This Court denied the intervention motion in February, but it granted Amici leave to "file amicus briefing for any dispositive motions brought in this case." Doc. 40 at 2. This brief was not authored in whole or in part by any party, and no one other than Amici or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

Washington has one of the most accessible mail-voting systems in the country. Every registered voter automatically receives a mail-in ballot for every election. Each ballot comes with a security envelope and prepaid postage. To vote, a voter simply marks the ballot, places the ballot in the security envelope, signs the envelope, and places it in the mail. The process is as easy as it could be. But no matter how easy it is to vote, some voters will make mistakes. Some will put the ballot in the mail after the election is over. Others will mail in an empty envelope. Some voters will accidentally sign their roommate's envelope instead of their own. Still others will sign a name that even trained professionals would think belongs to someone else. Although these mistakes and others like them may not be fraudulent, they call into question the legitimacy of the ballot.

Nevertheless, Washington doesn't toss these ballots on the first—or second, or third—mistake. Instead, it allows voters to cure any mistakes as many times as the voter needs to before an election. The cure process is simple. Voters can track their ballot online, and election officials will contact voters if their signature is missing or doesn't match the one in their records. Voters can then send in a corrected ballot, now with knowledge of what went wrong the first time. And just as voters make mistakes, election officials sometimes do, too. That's why Washington maintains a thorough ballot review process with detailed standards and trained officials.

But Plaintiffs demand perfection from election officials. And they're ready to throw out the entire signature system because of the potential for errors from voters and election officials alike. Neither the law nor the facts support their claims.

From the start, Plaintiffs go to pains to get this Court to apply strict scrutiny to mail-in voting regulations. They proceed solely under state law because they know federal precedent forecloses that argument. But just because Plaintiffs' arguments are *novel* under state law does not mean they are *right*. Setting election rules is a fundamentally legislative function. The Supreme Court has reminded judges that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For that reason,

federal and state courts approach election challenges with significant deference, not strict scrutiny. Here, that deference is especially warranted: Washington does not recognize a fundamental right to mail-in voting, and even if it did, the signature verification process does not burden that right or any other right. Voters have multiple avenues to vote and multiple opportunities to fix mistakes. The Washington Constitution does not demand more.

Plaintiffs, however, seek to constitutionalize an error rate for election laws. They invite the Court to play an impossible numbers game, deciding how many rejected ballots is too many. That entire project is ill-founded and inappropriate for judicial review. Even if there were judicially manageable standards for applying a "constitutional error rate" to election regulations, Plaintiffs don't deliver on the facts. They complain of 172,000 ballots rejected over the last ten years. But that's out of 56 million *accepted* mail-in ballots. A 0.31 percent rejection rate is not intolerable under any standard of scrutiny. And Plaintiffs' number drastically overstates the number of *errors* because many of those rejections are indisputably proper. The State audit, for example, "agreed with county determinations for more than 98 percent of the signatures reviewed." Doc. 78, Ex. G (Audit) at 15.

Plaintiffs' claims also fail because the signature verification procedures are supported by compelling state interests. Washington's election rules have evolved, becoming more open, more accessible, and more convenient for voters over time. The legislature must balance that convenience with considerations of efficiency, cost, security, and confidence in the electoral process. Those are difficult policy judgments, which is why they are left to the policy-making branch. Although the legislature could have chosen measures that many other States employ—such as I.D. verification, witness signatures, or excuse-only absentee voting—the legislature has remained steadfast in its longstanding determination that verifying signatures appropriately balances those interests. Among other things, signature verification helps detect and deter fraud, supports voter confidence in the democratic process, and ensures orderly elections. These are all "weighty reasons that warrant judicial respect." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurral). When courts instead reject these interests,

"they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, 143 S. Ct. 2065, 2089 (2023). Even when applying state law, when judicial decisions go so far that they "transgress the ordinary bounds of judicial review," they violate the U.S. Constitution. *Id.*

"Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021) . Washington's easy-to-follow rules are not unlawful, and the Court should deny Plaintiffs' motion for summary judgment.

ARGUMENT

I. Washington's signature verification procedures are not subject to strict scrutiny.

A. Washington does not recognize a fundamental right to vote by mail.

This case is not about the right to vote. It is about a claimed right to be exempt from the ordinary rules of mail-in voting. But *that* right is not one the law recognizes. Neither federal nor state law enshrine the right to mail-in voting. Even if they did, ordinary rules governing the right would not be protected by strict scrutiny.

Universal mail-in voting is a privilege the Washington Legislature extended to all voters in 2011. Sending mail-in ballots to all voters might allow certain voters "to take advantage of the ease of voting that voting by mail fosters," Doc. 78, Ex. B (Herron Report) at 13, but it does not transform the privilege of mail-in voting into a legally protected right. "It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots" and cast them according to Plaintiffs' preferences. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). And that "claimed right" is not subject to strict scrutiny. *Id.*

Start with federal law, as the Washington Supreme Court typically does in voting cases. *See, e.g., Madison v. State*, 161 Wn.2d 85, 98-99, 163 P.3d 757 (2007); *Foster v. Sunnyside Valley Irr. Dist.*, 102 Wn.2d 395, 404-09, 687 P.2d 841 (1984). "In *McDonald v. Board of Election Commissioners of Chicago*, the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail." *Tully v. Okeson*, 977 F.3d 608, 611

(7th Cir. 2020) (citing *McDonald*, 394 U.S. at 807). Hence, "[a]s other courts have stated, 'as long as the state allows voting in person, there is no constitutional right to vote by mail.'" *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (quoting *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020)); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) ("There is no constitutional right to vote absentee.")

Washington does not recognize a right to mail-in voting, either. The Washington Constitution protects the "free exercise of the right of suffrage," not the right to cast a ballot through the mail. Wash. Const. art. I, §19. If the right to mail-in voting were to be found anywhere, it would be in section 29A.04.206, which declares that the "right of qualified voters to vote at all elections" is one of the "fundamental rights" of Washington voters. RCW 29A.04.206(1). Also protected are the rights to "absolute secrecy of the vote" and "to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." RCW 29A.04.206(1)(b), (c). Plaintiffs' claimed right to vote by mail cannot be found anywhere among these other voting rights. The legislature last amended section 29A.04.206 in 2019, several years after Washington adopted its all-mail voting system. That Washington issues mail-in ballots to all voters thus does not enshrine a constitutional right to mail-in voting. *See* RCW 29A.40.010.

Washington makes it easy for all voters to vote in person. And "as long as the state allows voting in person, there is no constitutional right to vote by mail." *Org. for Black Struggle*, 978 F.3d at 607 (citation omitted). Every county must open voting centers to permit people to vote in person eighteen days before all primary, special, and general elections. RCW 29A.40.160(1). The voting centers must be in public buildings and open during business hours. RCW 29A.40.160(1), (3). They must be accessible to disabled voters, and they must provide "at least one voting unit certified by the secretary of state that provides access to individuals who are blind or visually impaired, enabling them to vote with privacy and independence." RCW 29A.40.160(5), (6). Each voting center "must provide voter registration materials, ballots, provisional ballots, disability access voting units, sample ballots, instructions on how to properly vote the ballot, a ballot drop

box, and voters' pamphlets." RCW 29A.40.160(4). The list goes on: provisional ballots, voter assistance, compliance inspections. Washington makes it easy for all voters to vote in person. Thus, there can be no right to vote by mail. *See Org. for Black Struggle*, 978 F.3d at 607.

Plaintiffs cite no Washington authority supporting their claimed right to mail-in voting. Although they cite state and federal cases discussing the right to vote, those authorities do not support a right to *mail-in* voting. *See* Doc. 77 at 30-31. The high courts of other States have rejected this bait-and-switch. *E.g.*, *Mo. State Conf. of NAACP v. State*, 607 S.W.3d 728, 735 (Mo. 2020) ("Holding that the right to vote is fundamental, however, is a separate matter from determining whether *absentee* voting is a fundamental right. Although the Missouri Constitution establishes that the right to vote is fundamental to Missouri citizens, the right to vote absentee does not enjoy such high status."). Plaintiffs' undeveloped argument citing Washington's free elections clause also has no bearing, as that clause is at most a grant of legislative authority that "necessarily gives the legislature a wide field for the exercise of its discretion in the framing of acts to meet changed conditions and to provide new remedies for such abuses as may arise from time to time." *State v. Bartlett*, 131 Wn. 546, 555, 230 P. 636 (1924) (quoting *Winston v. Moore*, 91 A. 520 (Pa. 1914)).

Plaintiffs might respond that they don't rely on a right to mail-in voting, only the right to vote writ large. But their own claims would rebut that assertion. Plaintiffs challenge only the signature verification procedures for mail-in ballots in section 29A.40.110(3). *See* Doc. 60 at 40; Doc. 77 at 4 (designating the procedures in section 29A.40.110(3) as the "Signature Verification Requirement" throughout their brief). But Washington also verifies signatures on provisional ballots for voters who vote in person without photo identification. *See* RCW 29A.40.160(9). And it verifies signatures for ballot declarations in canvassing. *See* RCW 29A.60.165, .010. Plaintiffs don't challenge signature verification in any of those circumstances. And all their evidence is about mail-in voting. *See* Doc. 77 at 5-11. They come forward with no one who voted by provisional ballot in person, even though those voters have their signatures verified, too. All of this confirms that Plaintiffs' claim is not that signature verification infringes on their right to *vote*, but that it infringes on an alleged right to *mail-in* voting.

Even if Plaintiffs were right that Washington recognizes a right to mail-in voting, that right is not fundamental. And only undue infringements on "fundamental rights" are subject to strict scrutiny. *Madison*, 161 Wn.2d at 99. The Washington Supreme Court has said the "right to vote" is fundamental for two reasons: First, "the United States Supreme Court has repeatedly recognized that the right to vote is fundamental for all citizens." *Id.* at 98 (citing *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)). Second, the Washington Constitution explicitly protects the "free exercise of the right of suffrage." Wash. Const. art. I, §19. The Washington Supreme Court thus rejected the notion that felons had a fundamental right to vote because neither federal precedent nor the Washington Constitution recognized it.

So, too, for mail-in voting. Neither federal nor state law recognize a fundamental right to mail-in voting. Under federal law, "[t]he right to vote is unquestionably basic to a democracy, but the right to an absentee ballot is not," and thus absentee voting is not a "fundamental right." *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D. Ala. 1972), *aff'd*, 410 U.S. 919 (1973). Under state law, the Washington Constitution does not recognize a fundamental right to mail-in ballots. Even the "fundamental rights" of Washington voters set out in statute include only the "right of qualified voters to vote at all elections," the "right of absolute secrecy of the vote," and the "right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." RCW 29A.04.206(1). They do not include the right to mail-in ballots. Thus, mail-in voting satisfies neither condition necessary to recognize it as a fundamental right. *Madison*, 161 Wn.2d at 99.

Finally, all-mail voting is still relatively new in Washington. If Plaintiffs were correct that mail-in voting is a fundamental right, that would mean Washington was denying fundamental rights to its citizens until it implemented all-mail voting in 2011. Plaintiffs' theory would also wipe out virtually every election regulation, including the ones they say are duplicative of the signature verification procedures. *See* Doc. 77 at 24-26 (discussing voter registration requirements, voter list maintenance, and ballot security measures). These are all legislative determinations on how best to conduct an election, not infringements on the right to vote. Like felon-voting, mail-in voting is

not a fundamental right. *Madison*, 161 Wn.2d at 99. And "[b]ecause no fundamental right is at stake in this case," strict scrutiny does not apply. *Id.* at 103.

B. The signature verification process does not infringe the right to vote.

Strict scrutiny does not apply for another reason: the signature verification procedures do not unduly burden the right to vote. As the last section explained, Plaintiffs are pressing for a new mail-in voting right. Their claims should be evaluated—and rejected—on those terms. But even if this Court expands Plaintiffs' claim as concerning the "right to vote" writ large, the signature verification procedures are not subject to strict scrutiny.

"[I]nfringement of a fundamental right is [a legal] requirement to applying strict scrutiny review." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 224, 5 P.3d 691 (2000) (emphasis omitted). Strict scrutiny is the process through which the court determines whether an infringement of a fundamental right is an "*impermissible* infringement." *Id.* But "finding an infringement of the fundamental right is a necessary predicate to determining whether that right was *impermissibly* infringed." *Id.* The Washington Supreme Court employed that reasoning in an equal protection case, but the logic applies whenever the court is determining what level of scrutiny applies. *See Burdick v. Takushi*, 504 U.S. 428, 432 (1992) ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny.")*; Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("'Laws that *burden* political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (emphasis added, citation omitted)).

The signature verification process does not "infringe" or "burden" the right to vote. Throughout their brief (including their statement of facts), Plaintiffs assert that voters whose ballots were rejected were "disenfranchised." That assumes a premise Plaintiffs have not proven.

First, the signature verification process does not infringe the right to vote because all voters can vote in person. "[U]nless a state's actions make it harder to cast a ballot *at all*, the right to vote is not at stake." *Tully*, 977 F.3d at 611. Plaintiffs offer declarations from several voters who admit

to signing their name different ways, either intentionally or unintentionally. *E.g.*, Doc. 77 at 5. Some are aware that their signatures "can be a bit sloppy." *Id.* Washington provides all these voters with an easy, convenient accommodation: they can vote in person anytime during the day for up to eighteen days before an election. *See* RCW 29A.40.160. Plaintiffs point to no person who was unable to take advantage of that accommodation. And this Court "cannot lightly assume, with nothing in the record to support such an assumption, that [the State] has in fact precluded [Plaintiffs] from voting." *McDonald*, 394 U.S. at 808.

Second, the signature verification process does not infringe the right to vote because voters can cure deficient signatures. When applicants can cure defects, "it is hard to conceive" that signature rules "deprive[] anyone of the right to vote." *Vote.Org v. Callanen*, 39 F.4th 297, 306 (5th Cir. 2022). "[E]ven if an individual's ballot is erroneously rejected as part of the signature verification process, the individual may still have an opportunity to vote through another means." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 388 (6th Cir. 2020). A voter who cures her application and then votes has not had her right to vote infringed upon. Some voters might subjectively view the signature and cure process as "burdensome steps," Doc. 77 at 7, but they are at most "a de minimis burden" that does not rise to the level of a constitutional infringement. *Vote.Org*, 39 F.4th at 307. "Election laws will invariably impose some burden upon individual voters," but "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest … would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Likewise, a voter who cures her application and decides not to vote has not been denied the right to vote, nor has a voter who chooses not to cure her ballot. At most, an individual who was unable to cure because of the *State's error* could press an as-applied challenge against the cure process. But the remedy for that claim, if any, would not be the statewide invalidation of all signature verification.

Third, the signature verification process does not infringe the right to vote merely because some signatures are erroneously rejected. Plaintiffs' claims rest on the supposition that when applying election rules, there is some undefined error rate at which the rule becomes

unconstitutional. But "because a government has such a compelling interest in securing the right to vote freely and effectively," the Supreme Court "never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question." *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality op.) (cleaned up). Even in redistricting cases, where numbers and percentages lie at the heart of the claims, the Constitution "does not demand mathematical perfection." *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016). And in the criminal context, where the stakes are much higher, "the Constitution does not guarantee" an "error-free, perfect trial," "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants." *United States v. Hasting*, 461 U.S. 499, 508-09 (1983). For the same reasons, "[p]recise mathematical formulas … have never been a part of voting rights cases or cases involving strict judicial scrutiny. A judicially imposed mathematical formula for evaluating voting rights cases would be purely arbitrary. We simply cannot say that x% error rate raises constitutional concerns but y% error rate does not." *Stewart v. Blackwell*, 444 F.3d 843, 876 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (2007). Courts have thus rejected arguments claiming that the Constitution requires States to adopt more efficient or less error-prone voting procedures. *E.g.*, *Green Party of State of N.Y. v. Weiner*, 216 F. Supp. 2d 176, 190 (S.D.N.Y. 2002). Plaintiffs cite no authority—state or federal—that indicates what error rate in signature verification would pass constitutional muster.

Fourth, even if courts could divine a coherent mathematical formula that determines when an election process is sufficiently error-free, Plaintiffs' evidence indicates that the signature verification process would easily pass that test. For starters, Plaintiffs overestimate the number of errors by wrongly assuming that *every* rejection of a qualified voter's ballot for a deficient signature is an *erroneous* rejection. But signatures might not match for a variety of reasons, including bad handwriting, altered signatures, changed names, switched ballots, and fraud. The State audit on which Plaintiffs rely provides some common examples: "if multiple voters live in one household, someone may accidently sign and return the ballot of a roommate or a family

member." Audit, 10. In that example, all would agree the ballot *should be* rejected because the ballot was not signed and returned by the voter who marked the ballot. So, too, should a ballot placed in the wrong security envelope be rejected. Plaintiffs provide no evidence distinguishing these indisputably proper rejections from allegedly improper ones.

Plaintiffs' erroneous assumptions don't end there. Plaintiffs assume that a rejection is legitimate only if the ballot was "cast fraudulently." Doc. 77 at 10. That balloons the error rate and holds the State to an impossible standard. The audit itself rejects that standard: "To determine whether ballots were appropriately accepted or rejected," the audit used "automatic signature verification software" to look at 7,200 voter ballot signatures. Audit, 15. "If the software deemed a signature as genuine and the county had also accepted it, we determined it was appropriately accepted." *Id.* If the software disagreed with the county's determination, or if the software deemed the signature a possible forgery, multiple "[a]uditors trained by the State Patrol in signature review" reviewed those signatures in several rounds of review. *Id.* The audit highlights the finding that it "agreed with county determinations for more than *98 percent of the signatures reviewed*." *Id.* (emphasis added). That is, in only 2 percent of cases did the audit conclude a reviewer should have accepted a ballot that the reviewer had rejected. Plaintiffs' evidence consists of voters who admit that they "changed [their] signature over time" or sign their name "several different ways." *See* Doc. 77 at 5-6. Rejecting those signatures—which those voters all but admit wouldn't match their registration forms—is not an erroneous rejection. An election official observing those mismatched signatures has prima facie evidence that the ballot was not cast by the person who is registered under that name. Whether from innocent mistake or voter fraud, the ballot shows evidence that it doesn't belong to the voter who cast it.

Finally, even if Plaintiffs had evidence proving all those assumptions, the signature verification procedure still results in relatively few rejections. Take Plaintiffs' figure of 172,000 rejections. For the reasons just explained, that figure overestimates the number of erroneous objections by sweeping in many ballots that *should be* rejected. Even assuming, contrary to the evidence, that the 172,000 ballots were all erroneous rejections that every reviewer should have

accepted, the number is still a tiny error rate. Plaintiffs' expert Michael Herron calculated that election officials rejected 172,000 ballots during all special, primary, presidential primary, and general elections from 2012-23. Herron Report, 63. Herron also calculates that "there were approximately 56 million mail ballots cast and accepted by elections officials" during those same elections. *Id.* at 42. That is a rejection rate of 0.31 percent.[1] In their brief, Plaintiffs downplay similarly small percentages as statistically insignificant. *See* Doc. 77 at 2 ("only 0.2 percent" of nonmatching signatures were referred to prosecutors). By their own standards, Plaintiffs' claim fails. More importantly, it fails according to judicial standards. *See League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 934 (11th Cir. 2023) (In voting rights cases, "[a] difference of only 1.3 percentage points is not substantial."); *United States v. Nagy*, No. A-11-cr-646, 2012 WL 12877951, at *3 (W.D. Tex. Jan. 27, 2012) ("[T]he Court would be inclined to find a 97% accuracy rate sufficient to pass constitutional muster…."), *aff'd*, 524 F. App'x 958 (5th Cir. 2013).

For all these reasons, Washington's signature verification process does not burden the right to vote. Plaintiffs' evidence is built on assumptions this Court cannot accept. Even if the court accepted those assumptions, the rate of rejection is tiny. Washington makes it easy to vote by mail, easy to vote in person, and easy to cure any problems that arise while voting. No single method of voting will be the most convenient method for every person. Voters have different schedules, preferences, and abilities. But a State's voting system is not unconstitutional simply because one method of voting is not the easiest method for all voters. Neither is it unconstitutional because some election officials make human mistakes. This Court need not look beyond Plaintiffs' own evidence to dismiss their motion: "Overall, ballots appear to have been accepted or rejected appropriately…." Audit, 15.

* * *

[1] Because Plaintiffs don't distinguish proper rejections from improper ones, even this small rejection rate drastically overstates the number of improper rejections. The audit concluded that 98 percent of rejections were proper, meaning the rate of potentially improper rejections is, at most, about 0.006 percent.

Washington does not recognize a fundamental right to mail-in voting, and the signature verification procedures do not burden the right to vote. So strict scrutiny doesn't apply. *Madison*, 161 Wn.2d at 103. Likewise, intermediate scrutiny does not apply because the privilege of voting by mail is not "an important right," and the signature verification process does not on its face implicate "a semi-suspect class not accountable for its status." *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993). Regardless, Plaintiffs have forfeited any argument that the Court should apply intermediate scrutiny, as they don't mention it in either their complaint or their brief. Rational basis thus applies. *Tunstall*, 141 Wn.2d at 224 ("In the absence of infringement of a fundamental right or involvement of a suspect class, rational basis review applies."); *Madison*, 161 Wn.2d at 103 (applying rational basis review to law that prohibits felons from voting after concluding neither strict nor intermediate scrutiny applied). For the reasons explained in the next sections, Washington's signature verification satisfies any level of review.

II. Washington has strong interests in election regulation.

Even if strict scrutiny applied, election regulations are supported by compelling state interests. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). At a minimum, Washington's interests include protecting against voter fraud, avoiding voter confusion, conducting orderly elections, and enhancing public confidence in the integrity of elections. These are all "weighty reasons that warrant judicial respect." *Democratic Nat'l Comm.*, 141 S. Ct. at 34 (Kavanaugh, J., concurral). Amici highlight two interests that stand out in this case.

A. Washington has a strong interest in detecting and deterring fraud.

States have a strong interest in protecting their elections from voter fraud. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op.). Indeed, "[t]he State's interest is *particularly* strong with respect to efforts to root out fraud." *Doe v. Reed*, 561 U.S. 186, 197 (2010) (emphasis added). That's because "[f]raud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that

carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich*, 141 S. Ct. at 2340 .

Plaintiffs cling to the small rate of fraud detection in Washington, but that doesn't obviate the State's interest in deterring and guarding against fraud. States have legitimate interests in guarding against fraud even when the "record contains no evidence of any such fraud." *Crawford*, 553 U.S. at 194. Requiring evidence of fraud "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). But the Washington "Legislature was not obligated to wait" for that "to happen" before acting to deter fraud. *Brnovich*, 141 S. Ct. at 2348.

In any event, courts routinely recognize as a matter of historical fact that "[v]oting fraud is a serious problem in U.S. elections generally … and it is facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (collecting sources). Even if the record contained *no* evidence of voter fraud in Washington—and Plaintiffs admit at least some evidence—the legislature is entitled to rely on "flagrant examples of such fraud in other parts of the country [that] have been documented throughout this Nation's history." *Crawford*, 553 U.S. at 195. And even if *that* evidence were insufficient, "the long, uninterrupted and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof" Plaintiffs demand. *Burson*, 504 U.S. at 208 (plurality op.). By its very nature, "election fraud [is] successful precisely because" it is "difficult to detect." *Id.* Finally, Plaintiffs overlook that their evidence of few voter-fraud convictions is itself evidence of the deterrent effect of signature requirements. In the end, "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment." *Griffin*, 385 F.3d at 1131.

Given their strong interest in guarding against fraud, it is unsurprising that most States verify signatures on mail-in ballots. *See* Nat'l Conf. of State Legislatures, *Table 14: How States Verify Voted Absentee/Mail Ballots* (Mar. 15, 2022), https://perma.cc/JVC7-9XJH. Nearly all those States do not offer all-mail elections like Washington, which has even greater reason for guardrails around its mail-in system.

B. Washington has a strong interest in preserving confidence in its elections.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197; *accord Swanson v. Kramer*, 82 Wn.2d 511, 518, 512 P.2d 721 (1973) ("The state has a legitimate interest too, in discouraging frivolous and prankish candidacies, and use of the ballot for political stunts or for fraudulent filings."). When courts issue "orders affecting elections," particularly by invalidating longstanding election procedures, they necessarily interfere with legislatively enacted election rules, which can "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. And the Supreme Court has "*never* required a State to make a particularized showing of the existence of voter confusion." *Munro*, 479 U.S. at 194 (emphasis added). Public confidence in election administration is still recovering,[2] and courts must defer to legislatures on how best to assure voters and encourage democratic participation. *See Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

III. Washington's signature verification procedures are narrowly tailored.

Verifying mail-in ballot signatures increases voter confidence in elections by deterring and preventing fraud. The State need not provide extensive evidence to justify its interests or show narrow tailoring. *See State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 462, 461 P.3d 334 (2020) (applying "exacting scrutiny" to a campaign finance law and rejecting plaintiffs' arguments that "the State cannot show a sufficiently important interest by pointing to its general interest[s]" and that "the State must demonstrate with evidence" that the law advanced specific interests). This Court can also rely on other courts that "have repeatedly recognized a sufficiently important

[2] *E.g.*, Pew Research Center, *Two Years After Election Turmoil, GOP Voters Remain Skeptical on Elections, Vote Counts* (Oct. 31, 2022), https://perma.cc/8P8E-8XKA.

government interest" in election regulation "without requiring specific evidence" of how the signature verification procedures function "in the context of a particular election." *Id.* at 463.

In any event, Plaintiffs' own evidence disproves their case. Plaintiffs' chief complaint is that the signature verification is not narrowly tailored because it rejects too many ballots. That complaint rests on many false premises, as Section I.B, *supra*, explains. In addition, the rule is tailored to achieve Washington's interests. Signature verification applies largely to mail-in voting, which "presents a greater opportunity for fraud" than in-person voting. *Feldman v. Ariz. Sec'y of State's Off.*, 208 F. Supp. 3d 1074, 1091 (D. Ariz.), *aff'd*, 840 F.3d 1057 (9th Cir. 2016). And of those voters who choose to vote by mail, less than one percent have their ballots flagged for mismatched signatures. The fraction of those that are *erroneous* rejections is vanishingly small, as Plaintiffs' evidence indicates.

Plaintiffs' secondary complaint is that signature verification applies unequally to counties, races, and other groups. The evidence does not support these arguments, either. As to county disparities, the audit concluded that "[o]verall, ballots appear to have been accepted or rejected appropriately, but counties with lower rejection rates appeared more willing to *accept* less conclusive signatures." Audit, 15. That some counties are shirking their duty to enforce state law, however, does not make the law unconstitutional statewide. That's not a problem of the law's narrow tailoring—it's a problem of inconsistent enforcement. The other disparities, such as race, require evidence that Plaintiffs "received disparate treatment *because of* membership in a class of similarly situated individuals and that the disparate treatment was the result of *intentional or purposeful discrimination*." *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006) (emphasis added). But Plaintiffs have zero evidence of "intentional or purposeful discrimination." Indeed, the audit concluded that "[d]isparities in rejection rates for different racial and ethnic groups are unacceptable," but the auditors "found no evidence of bias" in "the decisions to accept or reject individual ballots." Audit, 37. In any event, evidence of discrimination would at most support a challenge to enforcement of the law, not a facial challenge of the law itself.

Plaintiffs' own evidence is fatal to their claims. The audit "overwhelmingly concurred with counties' decisions about which ballots to accept and which to reject." *Id.* at 37. Washington has some of the most open, accessible mail-in voting procedures in the entire country. Signature verification is an important safeguard that allows Washington to conduct its elections largely through mail-in voting. A court order invalidating the legislature's judgment would sow distrust in the electoral system and upset democratically enacted laws that provide security and confidence in Washington's elections.

CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment.

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CERTIFICATE OF SERVICE

On August 16, 2023, I served a copy of the foregoing document on all counsel of record via the Court's e-service system.

By: */s/ Robert Maguire*