No. 12-738

IN THE

Supreme Court of the United States

ROBERT DOOL, *et al.*,

Petitioners,

v.

ANNE E. BURKE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE JUDICIAL EDUCATION PROJECT, GOVERNOR SAM BROWNBACK, SPEAKER OF THE HOUSE RAY MERRICK, PRESIDENT OF THE SENATE SUSAN WAGLE, SENATOR JEFF KING, AND REPRESENTATIVE LANCE KINZER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The Judicial Education Project ("JEP"), Governor Sam Brownback, Speaker of the House Ray Merrick, President of the Senate Susan Wagle, Senator Jeff King, and Representative Lance Kinzer respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amicus curiae JEP is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that Petitioners and Respondents, upon timely receipt of notice of *amici*'s intent to file this brief, have consented to its filing. Such consents are being submitted herein.

Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media. JEP has previously participated as *amicus curiae* in cases critical to its mission. *See, e.g.*, *Shelby County v. Holder*, No. 12-96 (2012); *Fisher v. Univ. of Texas*, No. 11-345 (2012); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

Amicus curiae Sam Brownback is the Governor of Kansas. *Amicus curiae* Ray Merrick is the Speaker of the Kansas House of Representatives. *Amicus curiae* Susan Wagle is the President of the Kansas Senate. *Amicus curiae* Jeff King is the Vice President of the Kansas Senate and Chairman of the Senate Standing Committee on Judiciary. *Amicus curiae* Lance Kinzer is the Chairman of the House Standing Committee on Judiciary.

Amici have a substantial interest in this case. Kansas has adopted a system that affords a Supreme Court Nominating Commission virtually unfettered authority to select state-court judges and allows only lawyers to vote for a majority of the Commission. As elected officials, *amici* have a substantial interest in ensuring that the right to vote is extended equally to all Kansans.

SUMMARY OF THE ARGUMENT

A number of states choose their judges through a form of selection known as the "Missouri Plan." Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479 (2009). This plan has its roots in the Progressive Era of the early twentieth

century. Like many other reforms in the Progressive Era, the plan takes important public decisions away from elected officials and places them in the hands of persons considered "experts." Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675, 677-78 (2009).

The cornerstone of this method of selection is that members of the state bar are given a preferred role in the selection of the state's judges. *See* Stephen J. Ware, *The Bar's Extraordinarily Powerful Role In Selecting The Kansas Supreme Court*, 18 Kan. J.L. & Pub. Pol'y 392, 392-93 (2009). In these states, governors are forced to fill judicial vacancies by selecting from a small pool of judicial nominees submitted by the state's nominating commission. The nominating commissions, in turn, are dominated by lawyers. *See* Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 Mo. L. Rev. 751, 758-60 (2009); Fitzpatrick, *supra*, at 680-81. As a general matter, whether selection of state judges through some form of the "Missouri Plan" is wise public policy should be debated in the public square, not in federal courts. It is a matter the United States Constitution envisions each state resolving for itself.

But it is an altogether different question when a state adopts a method of selection that tramples the constitutional equal-protection rights of non-lawyers. That is precisely the circumstance presented by this Petition. Kansas and at least eight other states (Hawaii, Indiana, Iowa, Missouri, Nebraska, Oklahoma, Vermont and Wyoming) have devised a system that allows lawyers and lawyers alone to vote in elections for members of state commissions, and those commissions have virtually unfettered authority to select state-court judges.

Specifically, Kansas law requires the Governor to fill vacancies on the state appellate courts by appointing one of three nominees chosen by the Supreme Court Nominating Commission ("Commission"). The Commission comprises nine members, five of whom are chosen in an election in which only Kansas lawyers may participate. Accordingly, it is undisputed that "[t]he effect of the system is to give Kansas lawyers disproportionate influence over the selection process." Pet. App. 2a (O'Brien, J., concurring).

The Tenth Circuit nevertheless rejected Petitioners' argument that elections from which they are excluded, solely because they are not members of the bar, infringed their Fourteenth Amendment right to vote. Although the two judges in the majority below wrote separately, their reasoning was nearly identical. Both acknowledged that strict scrutiny normally applies when "a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others." *Id.* at 9a (quoting *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969)); *see also* Pet. App. 21a (Matheson, J., concurring). As they noted, "[s]tatutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." Pet. App. 9a (O'Brien, J., concurring) (quoting *Kramer*, 395 U.S. at 626-27).

Yet the Court of Appeals found that rational-basis review applied because the Commission does not perform the kind of governmental functions that demand strict scrutiny. Judge O'Brien concluded that strict scrutiny did not apply because the Commission does not perform a traditional governmental function like raising taxes or

building roads. *See id.* at 11a-15a (O'Brien, J., concurring). Judge Matheson contended that strict scrutiny did not apply because the Commission has only a limited, intermediate role in judicial selection, and the Commission's impact is felt disproportionately by the state's attorneys. *See* Pet. App. 21a-25a (Matheson, J., concurring). Judge McKay dissented, concluding that strict scrutiny applied under this Court's precedent and that Kansas's scheme could not meet that exacting standard. *See* Pet. App. 25a-27a (McKay, J., dissenting).

The Petition meets the criteria for certiorari review because the Tenth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Any state law flagrantly denying the right to vote to millions of its citizens is by definition an important constitutional question. The right to vote is "fundamental." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). As a result, "[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*, 395 U.S. at 626.

The fact that the denial involves the selection of state judges makes the issue especially important. "The question of how we choose our judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judiciary and, indeed, our nation." O'Connor, *supra*, at 479. The state court judges nominated by the lawyer-dominated Commission and ultimately appointed by the Governor will "have broad and powerful effects on the general public," Nelson Lund, *May Lawyers be Given the*

Power to Elect Those Who Choose Our Judges? 'Merit Selection' and Constitutional Law, 34 Harv. J. L. & Pub. Pol'y 1043, 1052 (2010), and play a critical role in developing "the rules governing social behavior," Pet. App. 25a (McKay, J., dissenting). Indeed, "[n]ot only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002); *see also* The Federalist No. 39, at 210 (James Madison) (Clinton Rossiter ed., 1999) ("Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves.").

And, as noted above, the Commission does not have some merely intermediate or inconsequential role in this process. "The nominating commission does not simply screen and recommend candidates in an advisory fashion—it presents three possible candidates to the governor, one of whom he must select even if he finds all three unacceptable." Pet. App. 26a (McKay, J., dissenting). In giving such influence to the state's lawyers, the state bar "can effectively choose its own candidate by nominating only one acceptable choice along with two individuals it knows the governor will not select." *Id.* at 26a-27a. "By delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices." *Id.* at 27a. This process gives the state's lawyers an outsized impact on the lives of every Kansan, and it does so through elections in which only lawyers may vote.

Absent this Court's intervention, this problem is only going to get worse. Kansas chose this system after an intense lobbying effort by the state bar. Like any other interest group, the bar has a parochial interest in filling the bench with judges who favor rules friendly to its constituents and in maximizing its own influence over the judicial selection process. Lawyers should be free to persuade their fellow citizens to select certain judges or advocate for a system that leads to their selection. But they should not be allowed to shut non-lawyers out of the selection process. Given the popularity of lawyer-only voting among lawyers, combined with lawyers' immense lobbying power in state capitals, this particular version of the Missouri Plan threatens to spread to other states. The important question presented in the Petition should be resolved before it does so.

The Tenth Circuit's decision is also incorrect. The Equal Protection Clause includes a one-person, one-vote principle guaranteeing that "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever their home may be in that geographical unit." *Reynolds v. Sims*, 377 U.S. 533, 557-58 (1964) (citations and quotations omitted) (emphasis added). In other words, the Equal Protection Clause protects the "right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "[E]ach qualified voter must be given an equal opportunity to participate in [an] election." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*,

377 U.S. at 562. "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society." *Kramer*, 395 U.S. at 626. To withstand judicial review, the state must demonstrate that the denial of the right to vote is "necessary to promote a compelling state interest." *Id.* at 627.

The Court of Appeals incorrectly subjected the Kansas system to mere rational-basis review. Its view that the Commission does not exercise the type of governmental functions necessary to trigger strict scrutiny conflicts with this Court's precedent. Strict scrutiny applies because Kansas discriminates based on occupation for this important election, and the Commission exercises a traditional governmental function—the nomination of judges—typically exercised by a state's governor. *See, e.g.*, *id.* at 633. Indeed, state court judges have an enormous impact on the lives of every Kansan—from developing the state's common law to declaring rights protected by the state's constitution. Much more so than the school board's functions in *Kramer*, the Commission's "selection of judicial candidates is quintessentially governmental in nature." Pet. App. 25a (McKay, J., dissenting). Accordingly, an election for the nominating commission bears no resemblance to the narrow special-purpose elections reviewed in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981).

Subjecting the Kansas system to strict scrutiny—whether in this Court or on remand once the standard of review issue is settled—will undoubtedly lead to reversal of the underlying judgment. To survive exacting

review, Kansas must demonstrate that the measure is "sufficiently tailored" to accomplish a compelling interest. *Kramer*, 395 U.S. at 633. It cannot do so. Restricting the vote to lawyers for an important governmental unit that affects the lives of every Kansan is not remotely tailored to achieve any compelling governmental interest. As Justice O'Connor has explained, "[t]here is nothing in the goals of a non-partisan court plan that requires it to be dominated by attorneys…. [M]embers of the public who are duly engaged and attentive can quite ably select judges." O'Connor, *supra*, at 492. The Court should grant the Petition and reverse the judgment below.

ARGUMENT

I. The Petition Presents An Important Question Of Federal Law Involving The Denial Of The Right To Vote.

The right to vote is a "fundamental political right" as it is "preservative of all rights." *Yick Wo*, 118 U.S. at 370; *see also Reynolds*, 377 U.S. at 562 (explaining that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights"). "The right to vote freely for the candidate of one's choice is the essence of a democratic society." *Id.* at 555; *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (citation omitted)). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. Accordingly, "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, 377 U.S. at 554;

see also Katzenbach v. Morgan, 384 U.S. 641, 647 & n.6 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965). Any case involving state infringement of constitutionally-protected voting rights thus raises an important issue of federal law worthy of this Court's consideration.

The disenfranchisement scheme at issue raises an especially important question of federal law. Although the Equal Protection Clause has been interpreted to protect a variety of voting rights,[2] its guarantee against selective extension of the franchise to only "some bona fide residents of requisite age and citizenship" is absolutely central and unimpeachable. *Kramer*, 395 U.S. at 627. "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626. "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 626-27. Thus, "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, *whatever their occupation*, whatever their income, and wherever their home may be in that geographical unit." *Reynolds*, 377 U.S. at 557-58 (citations and quotations omitted) (emphasis added); *see also Dunn*, 405 U.S. at 336; *Hadley*, 397 U.S. at 56.

2. For example, the Court has held that "[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. This case does not involve vote dilution—it involves state denial of the core Fourteenth Amendment right to equal ballot access.

Yet the state law at issue in this case outright denies the right to vote to millions of Kansans. As the Petition explains, *see* Pet. 2-4, in the event of a vacancy on the Kansas Supreme Court or Court of Appeals, the Kansas Constitution requires the Governor to appoint one of three persons nominated by a Supreme Court Nominating Commission, *see* Kan. Const. art. 3, § 5(a); *see also* Kan. Stat. Ann. §§ 20-3004(a), 20-132. The Commission comprises nine members: five attorneys and four non-lawyers. Kan. Const. art. 3, § 5(d). Only Kansas lawyers are permitted to vote for the five attorney members (including the chairman) who are a majority of the Commission. *Id.* There can be no dispute, therefore, that "[t]he effect of the system is to give Kansas lawyers disproportionate influence over the selection process." Pet. App. 2a (O'Brien, J., concurring). Whether Kansas can deny non-lawyers the right to participate in the selection of state judges based on overt occupation discrimination raises an exceptionally important equal-protection question that warrants review.

The Court's review would be warranted even if this question only implicated Kansas, given the law's outright denial of the equal right to vote. But this is *not* a merely local issue. Eight other states—Hawaii, Indiana, Iowa, Missouri, Nebraska, Oklahoma, Vermont, and Wyoming—all similarly exclude non-lawyers from Commission elections.[3] Pet. 2 n.1; *see also* Lund, *supra*, at 1045-47. The

3. In all, thirteen states select their high-court judges through some form of the Missouri Plan. The other thirty-seven states select judges in a variety of ways. In five states, judges are appointed directly by a democratic body or by the governor with advice and consent of a democratic body. In twenty-two states, the judges of the highest court are elected. The remaining ten

widespread nature of this constitutional issue makes the need for this Court's review all the more urgent.

There is every reason to expect this form of disenfranchisement to proliferate given the popularity of lawyer-only voting among lawyers. The Kansas system came into being only after "the state bar's 'intensive lobbying efforts' persuaded the voters" to grant attorneys this preferred role in selecting judges. *Id.* at 1067; *see also* Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, *supra*, at 413-21. This should come as no surprise. When acting as a guild, lawyers have the same tendencies toward self-interest as any other faction. It is only natural that bar associations and trial-lawyer groups prefer state judges "who are likely to create legal rules that generate more business for lawyers, and perhaps make decisions that favor the economic interests of the most numerous segments of the legal profession." Lund, *supra*, at 1052 n.41; *see also* Michael E. DeBow, *The Bench, the Bar, and Everyone Else: Some Questions About State Judicial Elections*, 74 Mo. L. Rev. 777, 779 & n.10 (2009); Fitzpatrick, *supra*, at 691. At base, this system affords a special interest group the virtually unfettered ability to ensure this outcome. *See infra* at pp. 16-17. Kansas trial lawyers thus have made it a priority to oppose any effort to reform this selection process. *See* Kansas Ass'n for Justice, https:// www.ksaj.org/index.cfm?pg=KsAJUpdates.

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states use a hybrid of these methods. *See, e.g.*, The Federalist Society, *Judicial Selection in State High Courts* (2011), at http://www.statecourtsguide.com/wp-content/uploads/2012/01/Judicial-Selection-in-State-High-Courts.pdf

The fact that lawyers have reasons for promoting this scheme is not a basis for upholding it. On the contrary, the Kansas law is no more justifiable than a law permitting bank presidents to choose the Banking Commissioner or a law allowing only police officers to vote for County Sheriff. States are not required to choose nominating commissioners via election, *see Kramer*, 395 U.S. at 629, but once a state goes the election route, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment," *id*. (citation omitted). It is the task of the federal judiciary to ensure that state constitutions do not run afoul of the federal Constitution. *See* U.S. Const. art. VI, cl. 2; *Dodge v. Woolsey*, 59 U.S. 331, 355 (1855); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). The Court should grant the Petition to prevent Kansas and other states from continuing to deny their non-lawyer citizens the voting rights to which they are entitled by the Fourteenth Amendment.

II. The Court's Review Is Required Because The Court Of Appeals Incorrectly Decided This Important Constitutional Question.

The Court should also grant the Petition because the Tenth Circuit's decision upholding Kansas's denial of the right to vote to non-lawyers conflicts with the Court's precedent. It is well settled that state laws denying equal access to the ballot are subject to strict scrutiny. The Tenth Circuit's application of mere rational-basis review here must be reversed.

A. Kansas's Denial Of Non-Lawyers' Right To Vote Is Subject To Strict Scrutiny.

The Court of Appeals held that the Kansas system is subject to mere rational-basis review. Pet. App. 19a-20a (O'Brien, J., concurring); Pet. App. 24a (Matheson, J., concurring). This was error. As this Court has repeatedly held, "*any* alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562 (emphasis added); *see also* Pet. 17-20. "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society." *Kramer*, 395 U.S. at 626. For that important reason, "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials." *Id.* at 627. "Accordingly, when ... reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." *Id.* at 627-28. Instead, the state must demonstrate that the denial of the right to vote is "necessary to promote a compelling state interest." *Id.* at 627; *see also Hill v. Stone*, 421 U.S. 289, 295 (1975).

The court below found this settled rule inapplicable because, in its view, "the Commission does not exercise the type of governmental functions necessary to trigger strict scrutiny." Pet. App. 15a (O'Brien, J., concurring); *see also* Pet. App. 22a (Matheson, J., concurring) (concluding that "rational basis scrutiny applies" because "the

Commission performs a limited purpose"). Judge O'Brien concluded that the Commission does not exercise general governmental functions because it has only a "carefully circumscribed intermediate role" in "interviewing candidates and recommending suitable nominees" and "has no say in matters of safety or welfare—no authority to levy taxes, issue bonds, condemn property, or build roads." Pet. App. 16a-17a (O'Brien, J., concurring). Judge Matheson similarly found that the Commission has a "limited role" as only "one step in a judicial appointment process—screening applicants and selecting three nominees—that concludes when the Governor appoints" and that the process "disproportionately affects attorneys" as opposed to the general public. Pet. App. 22a-3a (Matheson, J., concurring). Thus, although the judges in the majority framed their opinions in slightly different terms, their reasons for rejecting strict scrutiny are "two sides of the same coin." *Id.* at 24a.

But neither opinion is remotely compatible with governing precedent. Contrary to Judge O'Brien's view, the Commission exercises a traditional governmental function—the nomination of judges—typically exercised by a state's chief executive. Pet. 21-27. Judicial elections are no less essential to "representative government" than "legislative elections" because "state-court judges possess the power to 'make' common law" and "have the immense power to shape the States' constitutions as well." *White*, 536 U.S. at 784; *see also* The Federalist No. 39, at 210 (James Madison) ("Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves."). State court judges thus "have broad and powerful effects on the general public," Lund, *supra*, at 1052, and play a critical

role in developing "the rules governing social behavior," Pet. App. 25a (McKay, J., dissenting).

Moreover, concluding that the Commission does not exercise a general governmental function cannot be reconciled with *Kramer*. There, the state law allowed only those who owned or leased taxable property within the district or those with children enrolled in local schools to vote in school board elections. *Kramer*, 395 U.S. at 622. As noted above, the Court concluded that limiting the franchise to these discrete groups of eligible voters triggered strict scrutiny. *See id.* at 627-29. It is inconceivable that a school board exercises general governmental functions but a Commission with the exclusive power to nominate state judges does not. A state judge—especially a state supreme court justice—certainly has far more power to affect the general public than a local school board has over a childless man who does not pay local taxes.

Judge O'Brien's assertion that this issue can be elided as "it is the governor, not the Commission" who selects judges under Kansas law is factually wrong. The Commission's nominations are binding on the governor, and the nominees are not subject to confirmation by the legislature. Pet. App. 27a (McKay, J., dissenting). As a consequence, the Commission "can effectively choose its own candidate by nominating only one acceptable choice along with two individuals it knows the governor will not select." *Id.* at 26a-27a. In short, "[t]he nominating commission does not simply screen and recommend candidates in an advisory fashion—it presents three possible candidates to the governor, one of whom he must select even if he finds all three unacceptable." *Id.* at 26a. "By delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all

of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices." *Id.* at 27a (citation omitted).

And contrary to Judge Matheson's conclusion, the Commission's impact on the general public bears no resemblance to the "special purpose" governmental units at issue in *Salyer* and *Ball*. The *Salyer* case involved a nominally governmental unit whose primary responsibility was to acquire, store, and distribute water for farming in a limited geographic area. 410 U.S. at 728. The unit covered all of its expenses by levying assessments against landowners in the special-interest district. *Id*. at 724. The governing board of this unit was elected by those who owned land in the district (including nonresident owners), and their votes were proportionate to the assessed value of the land that they owned. *Id*. at 724–25.

The Court found that, given this unusual factual setting, the issue involved "functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups" that *Reynolds* was inapplicable. *Id.* at 727-28. The costs and benefits of the functions this special-purpose district performed fell overwhelmingly on the landowners, and did so in proportion to the value of their lands. *See id*. at 729. Unlike the school-board election at issue in *Kramer*, the water district, "although vested with some typical governmental powers, ha[d] relatively limited authority," *id*. at 728, and "its actions disproportionately affect[ed] landowners," *id*. at 729. Accordingly, the Court upheld as rational the law limiting the franchise to those "primarily interested" in the result. *Id*. at 726.

Ball involved special-purpose water districts similar to the one at issue in *Salyer*. *See* 451 U.S. at 357. In *Ball*, however, the water districts also generated electricity that was sold to a large swath of the state's population, *see id*., so they seemingly had a greater effect on persons ineligible to vote in its elections. The Court nonetheless upheld the *Ball* scheme because the districts were not performing traditional governmental functions. The districts did not "exercise the sort of governmental powers that invoke the strict demands of *Reynolds*." *Id*. at 366. Their water district functions were "relatively narrow," *id*. at 367, and "the districts remain[ed] essentially business enterprises, created by and chiefly benefiting a specific group of landowners," *id*. at 368.

The differences between these cases and the present one are readily apparent. Whereas in *Salyer* and *Ball* "the end impact was on discrete groups," and the "general public was only nominally impacted," "the election at issue [here] is for a majority of the members of the nominating commission which limits the governor as judicial-appointing authority to one of three candidates." Pet. App. 25a (McKay, J., dissenting). As a result, "[t]his nominating power has to be regarded as a governmental function, and subjected to strict scrutiny, for the same reason that the Supreme Court applies strict scrutiny to primary elections conducted by political parties and elections to the electoral college." *Id*. at 26a (citation omitted); *see also Gray v. Sanders*, 372 U.S. 359, 379-80 (1963); *Bush v. Gore*, 531 U.S. 98, 109 (2000). The state judiciary is simply not like a water district in any meaningful respect: "[t]he end objective of the process at issue is the selection of judges whose impact is fundamentally general." Pet. App. 25a (McKay, J., dissenting).

Only by viewing the proper functioning of the justice system as the private domain of lawyers could the Commission plausibly be thought to resemble the water districts at issue in *Salyer* and *Ball*. To be sure, "[o]nly licensed Kansas attorneys may be nominated to serve as judges on a Kansas appellate court" and "[t]he Commission's task is to nominate attorneys to serve on the bench." Pet. App. 23a (Matheson, J., concurring). But that completely misses the point. The Commission has almost complete control over who is appointed to the Kansas appellate courts, and those courts have a significant role in the lives of *all Kansans*. *See supra* at pp. 15-17. Accordingly, unlike a water district, state courts are not nominally public enterprises operating for the private benefit of those who make money from the enterprise. Courts (and the commissions that select their members) do not exist for the benefit of the bar. They exist for the benefit of the general public, all of whom must abide by the courts' interpretations of state law and rely on the courts to reach a just outcome in cases in which they are parties. Excluding the general public from these elections therefore triggers strict scrutiny.

B. The Kansas Scheme for Judicial Selection Fails Strict Scrutiny.

To pass strict scrutiny, the government must demonstrate that the measure is "sufficiently tailored" to accomplish a compelling interest. *Kramer*, 395 U.S. at 633. "In other words, the classifications must be tailored so that the exclusion ... is necessary to achieve the articulated state goal." *Id.* at 632. As an initial matter, it is far from clear that Kansas's interest in "limit[ing] the influence of politics on the nomination process," Pet. App. 20a

(O'Brien, J., concurring), is a compelling one. It certainly is no more compelling than the vague interest in judicial "impartiality" that this Court has already rejected. *See White*, 536 U.S. at 777. A judge's insulation from politics "has never been thought a necessary component of equal justice" because "it is virtually impossible to find a judge who" is not at least to some degree influenced by such matters. *Id.*; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

As in *Kramer*, however, the Court need not resolve that issue to invalidate this law, which is not narrowly tailored to achieve that or any other compelling interest.[4] "There is nothing in the goals of a non-partisan court plan that requires it to be dominated by attorneys…. [M]embers of the public who are duly engaged and attentive can quite ably select judges." O'Connor, *supra*, at 492.

To the extent that the law is responsive to the so-called "triple play" scandal, *see* Pet. App. 3a (O'Brien, J., concurring), Kansas could have addressed the issue through less restrictive means. For instance, the state could have adopted a rule under which a lame-duck governor is precluded from making judicial appointments near the end of his term, or by a rule under which he can make only interim appointments that expire with his own term in office. Kansas did not need to take the drastic step of disenfranchising millions of eligible voters to ward off political corruption.

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4. Indeed, there also is no support for upholding the Kansas system for judicial selection under any other line of arguably relevant precedent. *See* Lund, *supra*, at 1054-63.

Indeed, there are countless other methods through which gubernatorial abuses can be checked. The most obvious is a requirement based on the federal model, whereby judicial candidates nominated by the governor are confirmed by one or both houses of the legislature. And there are also many other ways in which a state's lawyers could be given a significant advisory role in judicial selection. The governor, for example, might be required to give the bar an opportunity to comment on candidates he was considering before making an appointment. If a stronger role for the bar were desired, the governor might be required to provide a written explanation for any decision to appoint an appellate judge whom the bar had not recommended. Also, a state could always impose more comprehensive qualification requirements for judicial nominees.

In short, as these many less restrictive alternatives to the current system demonstrate, the Kansas scheme cannot survive strict scrutiny because it is not narrowly tailored. The Court should grant the Petition to correct this misguided decision, and to ensure that the right to vote is protected in the other states that already have, or may later adopt, unconstitutional judicial selection systems like the one in Kansas.

CONCLUSION

For all of the foregoing reasons, and for those set forth in the Petition, the Court should grant the petition for a writ of certiorari and reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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