

No. 125,084

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS,
LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.,
and
TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State,
and
KRIS KOBACH, in His Official Capacity as Kansas Attorney General,
Appellees.

SYLLABUS BY THE COURT

1.

An order that involves the Constitution of this state may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(3).

2.

A final decision in any action, except in an action where a direct appeal to the Supreme Court is required by law, may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(4).

3.

Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome."

Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time.

4.

To demonstrate standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable."

5.

An organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action.

6.

The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote.

7.

The Kansas Supreme Court has held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928).

8.

Presuming a state action alleged to infringe a fundamental right is constitutional dilutes the protections established by our Constitution.

9.

The right to vote is a fundamental right protected by the Kansas Constitution. The rule of strict scrutiny applies when a fundamental right is implicated. The rule of strict scrutiny applies here.

10.

Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim.

11.

Under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather, the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed March 17, 2023. Reversed and remanded.

Pedro L. Irigonegaray, Nicole Revenaugh, Jason A. Zavadil, and J. Bo Turney, of Irigonegaray, Turney, & Revenaugh, LLP, of Topeka, for appellants.

Elisabeth C. Frost, Henry J. Brewster, Mollie A. DiBrell, and Marisa A. O'Gara, pro hac vice, of Elias Law Group LLP, of Washington, D.C., for appellants Loud Light, Kansas Appleseed Center for Law and Justice, Topeka Independent Living Resource Center, Charley Crabtree, Patricia Lewter, and Faye Huelsmann.

David Anstaett, pro hac vice, of Perkins Coie LLP, of Madison, Wisconsin, for appellant League of Women Voters of Kansas.

Bradley J. Schlozman and Scott R. Schillings, of Hinkle Law Firm LLC, of Wichita, Brant M. Laue and Anthony J. Powell, solicitors general, and Kris Kobach, attorney general, for appellees.

Before WARNER, P.J., GREEN and HILL, JJ.

HILL, J.: The history of the Kansas Territory joining the union of states is filled with grave struggle. In the Kansas Nebraska Act, 33 Cong. Ch. 59, 10 Stat. 277 (1854), Congress called for the residents of the Kansas Territory to decide if their new state would be free or allow the enslavement of people. The residents of the territory decided the question in two ways—by bloodshed and by the ballot. History teaches that the people finally decided that the Territory would join the United States as a free state. With this history of great struggle, it is not surprising that the Constitution of Kansas enshrines provisions for elections. The Constitution made sure voting rights would be preserved in this State's future. Voting was important then and voting is important now.

This case calls into question various election procedures and limits and asks us to examine the Kansas Constitution and decide if some recent enactments of the Legislature comply with its principles. Do these new laws promote or prohibit voting in accordance with the Kansas Constitution?

Citing the historical importance of voting in the Kansas Constitution, some groups and individuals came together and sued the State and some officials seeking to ban the implementation of some voting law changes made in 2021. They were unsuccessful in district court and therefore bring this appeal, asking us to reverse and remand for a trial on the merits of their claims.

During the 2021 session, the Legislature passed Senate Substitute for House Bill 2183, containing various new election laws. Governor Kelly vetoed the bill, but the

Legislature overrode the veto. HB 2183 went into effect on July 1, 2021. L. 2021, ch. 96, § 2, 3, 5.

Relevant to this lawsuit, the bill:

- Created a new election crime called "False representation of an election official";
- mandated that election officials reject any advance ballot in which the signature on the ballot does not match the signature on file for the voter; and
- made it a crime to deliver more than 10 advance ballots to election officials on behalf of other voters. L. 2021, ch. 96, § 2, 3, 5.

The codified, signature matching requirement in the statute reads:

"(b) The county election officer shall attempt to contact each person who submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file and allow such voter the opportunity to correct the deficiency before the commencement of the final county canvass.

....

"(h) Subject to the provisions of subsection (b), no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted." K.S.A. 2021 Supp. 25-1124.

The ballot collection restriction states: "No person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election." K.S.A. 2021

Supp. 25-2437(c). A violation is a class B misdemeanor. K.S.A. 2021 Supp. 25-2437(d)(2).

THE PLAINTIFFS

All of the Plaintiffs, both groups and individuals, share an intense interest in promoting the electoral process in Kansas. They seek to educate the public and assist voters.

The League of Women Lawyers of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center are nonpartisan, nonprofit organizations that endeavor to educate voters and encourage voting. They all perform voter outreach, education, registration, and assistance activities.

The League members register voters, educate Kansans about the voting process, and assist those voters using advance ballots by collecting and delivering the ballots to election officials. In so doing, the League promotes its message of political and civic participation. League members in prior elections have collected and returned ballots well above the recently established 10-ballot limit.

Loud Light's mission is to engage, educate, and empower individuals from underrepresented populations, in particular young individuals, to become active in the political process. Loud Light focuses on strategies to increase turnout among young voters. Loud Light has encouraged and educated about advance voting. Loud Light also organizes ballot cure programs by contacting voters whose ballots are challenged by election officials and explain to them how to cure their challenged ballots so their votes will be counted and not rejected. Loud Light focuses on voters who election officials have been unable to contact and would have otherwise not known their ballot was rejected.

Kansas Appleseed educates and engages voters in Southwest and Southeast Kansas. In their view, this is where underrepresented populations are not afforded the same access to the ballot as other Kansans. Kansas Appleseed encourages and assists voters in remote and rural areas in returning their advance ballots.

The Center is operated and governed by people with disabilities seeking an opportunity for independent living. Its mission is to advocate for justice, equality, and essential services for people with disabilities. It registers, educates, and supports voters. The Center promotes the use of absentee ballots to increase voter turnout among people with disabilities. It collects and delivers ballots for individuals with disabilities. In 2020, several Center volunteers collected many more than 10 advance ballots from people with disabilities.

A Douglas County resident, Charley Crabtree, is a member of the League. He supplies local nursing homes with applications for advance ballots. He then collects the completed ballots from the nursing home residents who are unable to return the ballots to election officials. In 2020, Crabtree collected more than 75 ballots from nursing home residents.

Faye Huelsmann and Patricia Lewter are residents of Concordia. They are sisters of an institute of religious women of the Roman Catholic Church. They help their sisters who have mobility problems or face other obstacles and are unable to return their advance ballots. They collect and deliver the advance ballots to election officials.

THE DEFENDANTS

The two individuals most responsible for enforcing these election law changes are Defendants—Scott Schwab, the Kansas Secretary of State, and Kris Kobach (formerly

Derek Schmidt), the Kansas Attorney General. They were sued in their official capacities by Plaintiffs.

The lawsuit

In June 2021, the Plaintiffs filed suit challenging the new election laws. They initially moved for a temporary injunction on the ground that the false representation law violated their rights under section 11 of the Kansas Constitution Bill of Rights. Defendants disputed Plaintiffs' interpretation of the false representation statute, contending it would not apply to Plaintiffs' activities. The district court denied the injunction motion and Plaintiffs appealed. A panel of this court dismissed the appeal for lack of standing. *League of Women Voters of Kansas v. Schwab*, 62 Kan. App. 2d 310, 513 P.3d 1222 (2022). Plaintiffs petitioned the Supreme Court for review, which was granted. That review is pending.

In their petition, Plaintiffs also challenged a new restriction that banned nonresidents from mailing advance ballot applications to Kansas voters. Two out-of-state organizations procured an injunction against that restriction in federal court because it violated the First Amendment to the United States Constitution. See *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 892, 894 (D. Kan. 2021). Plaintiffs then voluntarily dismissed that claim from this suit.

Important here is that the Plaintiffs' petition alleged:

- The ballot collection restriction violates the right of freedom of speech and association under sections 3 and 11 of the Kansas Constitution Bill of Rights;
- both the ballot collection restriction and signature matching requirement violate the right to vote under article 5, section 1 of the Kansas Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights;

- the signature matching requirement violates the guarantee of equal protection under article 5, section 1 of the Kansas Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights; and
- the signature matching requirement violates due process under section 18 of the Kansas Constitution Bill of Rights.

Plaintiffs later moved for a partial temporary injunction against the signature matching requirement.

THE DISTRICT COURT'S RULING

The district court granted Defendants' motion to dismiss for failure to state a claim on all Plaintiffs' remaining claims except for Plaintiffs' challenge to the false representation statute, as that issue was pending with the Kansas Supreme Court. The court then denied Plaintiffs' injunction motion as moot. Plaintiffs appeal.

Do we have jurisdiction?

Before the parties submitted briefs in this appeal, Defendants moved to dismiss the case for lack of jurisdiction because the district court had not dismissed all claims. Some procedural history provides a helpful context to understand this argument.

Plaintiffs initially moved to temporarily enjoin enforcement of K.S.A. 25-2438(a)(2)-(3). Those subsections create a new election crime entitled "False representation of an election official." After the district court denied the motion for an injunction, Plaintiffs appealed. A panel of this court later dismissed the appeal for lack of standing. See 62 Kan. App. 2d 310. That standing ruling is now under review by our Supreme Court. Because that contest is pending in the Supreme Court, the district court

concluded it did not have jurisdiction to consider a dismissal of Plaintiffs' claim regarding the false election official crime. Therefore, that claim lies fallow in the district court.

Whether the claims about the new false election official crime are revived awaits the ruling of our highest court. It is this idle claim concerning the new election crime that Defendants use as a reason that we cannot entertain this appeal. In their view, the district court wrongly ruled it had no jurisdiction to rule on their motion to dismiss because the case is now in the Supreme Court. Because it remains in district court, we should not entertain this appeal.

Plaintiffs respond that this court has jurisdiction over the appeal under K.S.A. 2021 Supp. 60-2102(a)(2)—jurisdiction to review an order that refuses an injunction—and K.S.A. 2021 Supp. 60-2102(a)(3)—jurisdiction to review an order involving the Kansas Constitution.

The motions panel of our court denied Defendants' motion to dismiss on present showing. The appeal involves, in part, the denial of a temporary injunction with respect to the signature matching requirement giving rise to an appeal as of right under K.S.A. 2021 Supp. 60-2102(a)(2). The panel ordered the parties to address appellate jurisdiction under K.S.A. 2021 Supp. 60-2102(a)(3) in their briefs.

The right to appeal in a civil case comes from statutes and is not guaranteed by the United States or Kansas Constitutions. Kansas appellate courts have jurisdiction to entertain an appeal in a civil case only if the appeal is taken in the manner prescribed by statutes. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019).

The statute that controls this issue is K.S.A. 2021 Supp. 60-2102(a). That law sets out four categories of cases that may, as a matter of right, be appealed to this court. The categories begin with specific orders and extends to the more general category of all final dispositions, as discussed below.

(1) ***An order that discharges, vacates, or modifies a provisional remedy.*** In the law of injunctions, provisional remedies may be sought under K.S.A. 60-902. Examples of provisional remedies according to caselaw include a preliminary injunction, restraining order, prejudgment receivership, attachment, garnishment, and order of arrest. See *Edwards v. Edwards*, 182 Kan. 737, 747, 324 P.2d 150 (1958); *Macias v. Correct Care Solutions, Inc.*, 52 Kan. App. 2d 400, 407, 367 P.3d 311 (2016).

(2) ***An order that grants, continues, modifies, refuses, or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto, or habeas corpus.***

The rule on injunctions needs no further explanation but this section includes orders pertaining to the three great common-law writs.

(3) ***An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws, or treaties of the United States.***

Several specific orders are included in this category. All are unique to the nature of the legal subject matter. The constitutional questions—the law that governs governments—is included in this subsection.

(4) A *final decision* in any action, except in an action where a direct appeal to the Supreme Court is required by law. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.

This is the general category of appeals. This category, frankly, makes up the bulk of our caseload.

What becomes manifest when reading this statute is that its drafting makes it clear that the Legislature wanted litigants to have an appeal as a matter of right on several specific categories as well as the more general category of final rulings. Otherwise, subsections 1-3 would be unnecessary.

But there is more. A policy comes into play here. In Kansas, our courts try to avoid piecemeal appeals which prolong litigation. We agree with our Supreme Court that the purpose of the Code of Civil Procedure is to assure the just, speedy, and inexpensive determination of disputes. *Harsch v. Miller*, 288 Kan. 280, 288, 200 P.3d 467 (2009). Those goals cannot be met if a litigant could interrupt a lawsuit with an appeal of every adverse ruling when it was made. With such a system, a case could drag on indefinitely and end up costing a fortune.

To this end, the Kansas Legislature limited the statutory categories of appeal under K.S.A. 2021 Supp. 60-2102. *Kansas Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 610, 244 P.3d 642 (2010). "Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory and fractionalized appeals are discouraged, and are the exceptions and not the rule." *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 682, 683 P.2d 1247 (1984) (concluding appeal did not lie under K.S.A. 60-2102[a][3] in original eminent domain proceeding).

A "final decision" under K.S.A. 2021 Supp. 60-2102(a)(4) generally disposes of the entire merits of the case and leaves no further questions or the possibility of future directions or actions by the lower court. *Kaelter v. Sokol*, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015). When an action presents more than one claim for relief, a decision that adjudicates fewer than all the claims does not end the action and may be revised at any time before the entry of a judgment adjudicating all the claims. K.S.A. 2021 Supp. 60-254(b). Here, as Plaintiffs acknowledge, the district court's order was not a final decision because it did not dispose of the false representation issue.

PLAINTIFFS CAN APPEAL THE CONSTITUTIONAL RULINGS IN THIS CASE

Even though this court's jurisdiction to review "an order involving . . . the constitution of this state" under K.S.A. 2021 Supp. 60-2102(a)(3) has been rarely invoked, it is appropriate here. We acknowledge that despite the broad language, the statute does not create an absolute right to appeal any order involving a constitutional question. Our Supreme Court has held that the order involving the constitutional question "must constitute a final determination of the constitutional controversy." *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164 (1965).

In *Cusintz*, the district court denied the defendant's motion to dismiss a petition for alimony and child support. The defendant had argued a relevant alimony and child support statute was unconstitutional. He sought to appeal the denial of his motion to dismiss because the court's order involved a constitutional question, acknowledging that it was not a final decision disposing of the entire merits of the controversy. The Supreme Court ruled it did not have jurisdiction. "[T]he order must have some semblance of finality. The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy." 195 Kan. at 302.

Later, in *In re Austin*, 200 Kan. 92, 94-95, 435 P.2d 1 (1967), the court ruled it did not have jurisdiction to hear an appeal from a pretrial order in which the petitioner was ordered to amend the petition and stated that the proceeding would be tried under the new act for obtaining a guardian or conservator that became effective January 1966. The appellant argued her constitutional rights would be violated if the district court proceeded under that act. The Supreme Court ruled it did not have jurisdiction:

"In the case at bar the pretrial orders complained of clearly lacked the requisite semblance of finality. No final determination affecting appellant's rights has been made. Her constitutional privileges have not been infringed in any way. No hearing on appellee's petition has been held and no adjudication of incapacity has been made. Nothing has really happened yet except the laying down of certain ground rules for the ultimate trial of the case, which rules may or may not be adhered to by the trial court in deprivation of appellant's constitutional rights." 200 Kan. at 94-95.

This court has followed the *Cusintz* holding by ruling a trial court's order of the sale of real property was not appealable under the broad "title to real estate" clause of K.S.A. 60-2102(a)(3) because the order had no semblance of finality. The trial court still had to confirm the sale. "[T]he statutes clearly provide for further action by the district court after the order of sale is issued, and the order has no semblance of being a final determination of the title to the real estate." *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 486, 748 P.2d 905 (1988).

But this court has allowed an appeal under K.S.A. 60-2102(a)(3) of an order quieting title in a boundary line dispute because it involved the title to real estate and had some semblance of finality, though it did not resolve the defendant's claim for damages or the plaintiffs' third-party action. *Smith v. Williams*, 3 Kan. App. 2d 205, 206, 592 P.2d 129 (1979).

Here, Plaintiffs argue that K.S.A. 2021 Supp. 60-2102(a)(3) applies because the district court had the opportunity to make a full investigation and determination of the constitutional questions at issue. They argue that K.S.A. 2021 Supp. 60-2102(a)(3) must require something less than a final decision that disposes of all the issues in the case. Otherwise, it would be superfluous of K.S.A. 2021 Supp. 60-2102(a)(4).

Defendants argue this court should not read the statute to permit piecemeal appeals of nonfinal judgments, warning of the deluge of interlocutory appeals that would follow. Defendants argue the court should allow interlocutory appeals of constitutional claims "only in those circumstances when foreclosing an immediate appeal of a non-final judgment would effectively deprive the litigant of any opportunity to meaningful relief on the claim."

The district court dismissed all of Plaintiffs' claims concerning the signature matching statute and the ballot collection statute. We consider this dismissal to be a final determination of the constitutional controversy concerning those statutes. The district court had the opportunity to fully investigate and determine those issues. The court gave no indication it would revisit its dismissal. The court explained it could not rule on the false representation issue only because it lacked jurisdiction over that issue while it was on appeal.

The plain language of the statute says that "an order involving . . . the constitution of this state" under K.S.A. 2021 Supp. 60-2102(a)(3) may be appealed. Such an order may be something less than a "final decision" under K.S.A. 2021 Supp. 60-2102(a)(4). The difference in language between (a)(3) and (a)(4), though, is striking. In fact, all of the orders listed in (a)(1)-(a)(3) may be something less than final decisions. There would be no need for the Legislature to list them that way otherwise.

The statute provides an appeal "as a matter of right" in such circumstances. K.S.A. 2021 Supp. 60-2102(a). The constitutional rights at issue in this case are important to all Kansans. We ask, in what circumstance could K.S.A. 2021 Supp. 60-2102(a)(3) be invoked if not in this case?

This case has already been split in two by the earlier appeal. Rejecting this appeal would only delay resolution of the constitutionality of these two separate statutes. The court can fully resolve the controversy concerning the signature matching and ballot collection statutes separate from the controversy concerning the false representation statute.

We hold that we have jurisdiction under K.S.A. 2021 Supp. 60-2102(a)(3) as a constitutional question.

THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE SIGNATURE-MATCHING STATUTE

Defendants attack Plaintiffs' standing to sue on several fronts. They contend that none of the Plaintiffs have standing to challenge the signature matching requirement because in their petition they have alleged no cognizable injury. They first contend only the League is a membership organization that can assert associational standing. They further assert Plaintiffs have not alleged that any identified person associated with their organizations would have standing to challenge the signature matching requirement individually.

They also argue that a past injury cannot confer standing and that the potential for a future injury is too speculative to confer standing. And they argue the harm must be to one of Plaintiffs' members, not to Kansans generally. Defendants further claim Plaintiffs lack organizational standing because it is mere speculation that they will have to divert

resources to ballot cure programs and that such diversion would not constitute an injury anyway.

In response, Plaintiffs first point out that only one Plaintiff need have standing for their claim to proceed. They argue that nonmembership organizations can assert standing on behalf of their beneficiaries. Plaintiffs contend that the injury to their members and to constituents is not hypothetical. The signature matching requirement will disenfranchise lawful voters due to the unreliability of a layperson matching signatures. In their view, this is particularly true for the signatures of voters who are older or disabled. Plaintiffs further contend they do have organizational standing because the signature matching requirement will force them to divert resources and frustrate their missions.

The district court did not address this issue. It assumed the existence of standing without so deciding.

A PARTY MUST PROVE TWO THINGS TO HAVE STANDING TO SUE:
INJURY AND CAUSATION

Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time. 313 Kan. at 673.

Kansas courts use a two-part standing test. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015). To demonstrate standing, a party "must show a cognizable injury and establish a causal connection between the injury and

the challenged conduct." *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable." *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017). Federal courts also have a prudential standing requirement that the plaintiffs' grievance not be a general one shared by a large class of citizens. But Kansas has not explicitly adopted the federal model. *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 679-80. The burden to establish standing rests with the party asserting it. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

When standing is determined on a motion to dismiss without an evidentiary hearing, the court must resolve factual disputes in the plaintiffs' favor and plaintiffs need only make a prima facie showing of jurisdiction. *KNEA*, 305 Kan. at 747. That is how we shall proceed here.

An association has standing to sue on behalf of its members when:

- The members have standing to sue individually;
- the interests the association seeks to protect are germane to the organization's purpose; and
- neither the claim asserted nor the relief requested requires individual members' participation.

KNEA, 305 Kan. at 747.

Only the first element is at issue here—whether a member has standing to sue individually.

Our Supreme Court has called standing "one of the most amorphous concepts in the entire domain of public law." *Board of Sumner County Comm'rs v. Bremby*, 286 Kan.

745, 750, 189 P.3d 494 (2008). To resolve this amorphous matter in this case, we must examine the Plaintiffs' claims.

In their amended petition, Plaintiffs alleged the signature matching requirement was "certain to disenfranchise lawful Kansas voters"—particularly those who are elderly, disabled, in poor health, young, and nonnative English speakers. Plaintiffs cited a study finding laypersons rejected authentic signatures 26 percent of the time. Age, illness, injury, medication, eyesight, alcohol use, drug use, pen type, ink, writing surface, position, paper quality, and state of mind can all affect a person's signature and cause an untrained layperson to mismatch a signature.

The League engages in efforts to get Kansas voters to use advance ballots. The League alleged injury to their members and the broader electorate:

"The Signature Rejection Requirement is also harmful to the League's members, many of whom are older and are at significant risk of having their ballots flagged erroneously as having a mismatched signature. The League is also extremely concerned about the impact the Signature Rejection Requirement will have on the broader Kansas electorate, countless of whom will be disenfranchised as the result of inexpert and arbitrary decisions by elections officials ill-suited, ill-equipped, and untrained to be signature matching at all. Study after study has shown that not only non-experts particularly bad at accurately 'matching' signatures (something that is nearly impossible for even an expert to do accurately under the conditions that signatures are 'matched' in elections), but that they overwhelmingly misidentify valid signatures as 'mismatches.' Here, the consequences of that could mean total disenfranchisement."

The League further alleged injury to their organization:

"Because of these inevitable consequences, the League will have to expend additional resources, including valuable and limited volunteer time, to develop and execute programs to ensure that eligible voters are educated about and ultimately are not

disenfranchised by the Requirement. These are resources that the League would expend on other programs and initiatives but for the passage of the Signature Rejection Requirement."

Loud Light works "tirelessly to encourage voters to sign up for advance voting and to educate them on the process." Loud Light organizes ballot cure programs, contacts voters whose ballots are challenged by election officers for mismatched signatures, and educates them on how to cure their ballots. "Much of Loud Light's efforts focus on voters who election officials have been unable to contact, and many of these voters would not have known about their rejected ballot if it had not been for Loud Lights' contact." Loud Light alleged it will be forced to expand its ballot cure program:

"Loud Light will have to expend greater resources educating the public about the lack of standards for signature rejection, and how to avoid its disenfranchising effects. Because counties will now be *required* to reject any signatures that an official believes is not a match—which will necessarily result in a greater number of mismatches, Loud Light will be forced to expend more resources recruiting and training additional staff and volunteers to help voters cure their ballots and combat the disenfranchising effects of county election officials rejecting purportedly mismatched signatures. These are resources that Loud Light would have expended on its other important programs and initiatives."

Kansas Appleseed encourages voters to sign up for advance voting. It alleged its constituencies "are far more likely to have their ballot rejected due to purportedly mismatched signatures."

The Center promotes advance voting to increase voter turnout among individuals with disabilities. The Center alleged its constituency is likely to vote by advance ballot, likely to have their ballots rejected due to an alleged signature mismatch, and that mismatches will be a burden to cure due to transportation concerns. The Center alleged:

"Because of the Requirement the Center will expend more resources, including limited staff hours, ensuring that people are educated about its disenfranchising effects and how to avoid them, as well as assisting any voters whose ballots are rejected as a result of a signature mismatch. These are resources the Center would expend on its other key services if the Restriction were not in place."

In conjunction with its motion for a partial temporary injunction, Plaintiffs provided an expert report from Dr. Linton Mohammed confirming that "'Kansas' signature matching procedures are all but guaranteed to result in the erroneous rejection of properly cast ballots." Signature verification is a difficult task even for a trained forensic document examiner because signatures are written in different styles with varying levels of readability and variability. Signatures also vary because of age, health, native language, and writing conditions. Dr. Mohammed confirmed particular groups of voters—the young, disabled, elderly, and nonnative English speakers—are more likely to have their ballots rejected.

We need not decide whether Plaintiffs' failure to identify a specific individual is fatal to their claim. The League, Loud Light, Kansas Appleseed, and the Center have shown that they have standing in their own right because they will have to divert resources from their usual activities to ballot cure programs.

An organization may assert standing in its own right if it can establish a cognizable injury and a causal connection between the injury and the challenged conduct. See *Gannon*, 298 Kan. at 1127.

We find law from a federal case persuasive on this point. It is generally accepted that an organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action. This theory was adopted by the United

States Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).

In *Havens Realty*, the Housing Opportunities Made Equal organization alleged that Havens Realty Corporation's racial steering practices frustrated their efforts to assist equal access to housing through counseling and referral services to low-income home seekers. HOME had to devote significant resources to identify and counteract the racially discriminatory steering practices. The Court held:

"If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." 455 U.S. at 379.

HOME had standing in its own right. *Havens Realty*, 455 U.S. at 379.

Courts have distinguished *Havens Realty* in ways that do not apply here. Organizations do not have standing based on activities that are no different from their daily operations. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). The costs of detecting an illegal practice, preparing for litigation, and mounting a legal challenge do not qualify as an injury. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 611-12 (5th Cir. 2017); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008); *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 386, 870 S.E.2d 430 (2022).

Some courts have demanded plaintiffs show what specific activities they would divert resources away from to counteract the challenged law. *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1250 (11th Cir. 2020); *N.A.A.C.P. v. City of Kyle, Tex.*,

626 F.3d 233, 238-39 (5th Cir. 2010). But a broad allegation of diversion of resources is sufficient at the pleading stage. *Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, 36 F.4th 1100, 1115 (11th Cir. 2022).

Plaintiffs have alleged that they encourage advance voting and that they will have to divert resources from their other voter assistance activities to ballot cure programs to prevent voters from being disenfranchised by the new signature matching requirement. These are sufficient allegations to establish their standing at this point.

We hold that Plaintiffs have standing to sue.

DO THE TWO PROVISIONS IN THE NEW LAW VIOLATE THE RIGHT TO VOTE IN KANSAS?

In their amended petition, Plaintiffs alleged the signature matching requirement and ballot collection restriction violate the fundamental right to vote under the Kansas Constitution. They alleged that legal voters will be disenfranchised by the signature matching requirement because their ballots will be rejected. They contend the ballot collection restriction severely burdens the right to vote by limiting the pool of individuals who can help deliver ballots. It is their view that the ballot collection restriction will particularly affect senior citizens, minorities, people with disabilities, rural voters, natives living on tribal land, those with limited access to transportation, and those with work, school, and family care commitments.

The district court presumed the statutes were constitutional and decided that Plaintiffs were mounting a facial challenge to the statutes. The court chose to analyze whether Plaintiffs had established that "no set of circumstances exist[ed]" under which the statutes would be valid. The court made a rational-basis review of these claims and also applied the *Anderson-Burdick* balancing test. We find this approach and analysis to

be erroneous. This is like saying, "This glass of water is pure, show me where there are any impurities." The correct inquiry should be, "This is important, show me this glass of water is entirely pure." The first test begins with the assumption that this is all pure. The second test requires proof that it is entirely pure.

Our Supreme Court has held that presuming a state action alleged to infringe a fundamental right is constitutional "dilutes the protections established by our Constitution." *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 674, 440 P.3d 461 (2019). The court was referring to the right of personal autonomy protected by section 1 when it made that statement, but its reasoning was not limited to that one fundamental right. The court called the right to vote a "fundamental" right protected by the Kansas Constitution in the same opinion. 309 Kan. at 657. The court reiterated its holding that laws infringing fundamental rights are not presumed constitutional in *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019). So we see that the district court here erred by beginning with a presumption that the questioned statutes were constitutional.

There is no question that the right to vote is a fundamental right protected by the Kansas Constitution. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote. We agree with the language of our Supreme Court in 1971:

"The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system. . . . This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971).

Even earlier than that, the court held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928). Voting is serious in Kansas from the beginning of statehood to now.

Our Supreme Court has instructed that strict scrutiny "applies when a fundamental right is implicated." *Hodes*, 309 Kan. at 663. We follow the command and presume that strict scrutiny applies.

Turning to the use of a federal test by the district court, we find another error. Federal law is not controlling here. Federal courts use a flexible balancing test when evaluating the constitutionality of election laws that govern the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself (and that thereby burden the right to vote). The standard is known as the *Anderson-Burdick* flexible balancing test:

"A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

"Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." [Citations omitted.] *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (state's interest in prohibiting write-in voting outweighed limited burden on voters' rights).

See also *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (the burden filing deadline placed on voters' freedoms outweighed state's minimal interest in deadline).

Every voting rule imposes a burden of some sort. *Brnovich v. Democratic National Committee*, 594 U.S. ___, 141 S. Ct. 2321, 2338, 210 L. Ed. 2d 753 (2021). There is no litmus test for measuring the severity of the burden. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). Under the *Anderson-Burdick* test, the court first determines the extent of the burden the challenged law places on the right to vote. A severe burden is subject to strict scrutiny. But if the court characterizes the burden as something other than severe, the court weighs the competing interests. This so-called "flexible" balancing test has led to a wide array of decisions on comparable state statutes.

One court reviewing a state's signature matching requirement stated, "If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does." *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. 2016) (unpublished opinion). But not all courts agree.

Federal courts have come to differing conclusions on whether signature requirements and ballot collection limits constitute a severe burden on the right to vote. Cf. *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (finding signature matching scheme—that mandated no uniform standards for matching signatures, no training for election officials, and did not ensure voters would be informed of a mismatch with adequate time to cure—imposed "at least a serious burden on the right to vote"); *Democratic Executive Committee of Florida v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018) (finding disenfranchisement of thousands of voters based on a standardless determination of signature mismatches by laypeople is a

substantial burden on the right to vote); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 735-36 (S.D. Ohio 2020) (finding signature matching requirements impose "some burden on the right to vote," or a moderate burden); *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1181 (9th Cir. 2021) (holding that correcting a missing signature by election day is a minimal burden); *Richardson v. Texas Secretary of State*, 978 F.3d 220, 237 (5th Cir. 2020) (finding signature-verification requirements without notice and an opportunity to cure "are even less burdensome than photo-ID requirements"); see *DSCC v. Simon*, 950 N.W.2d 280, 293 (Minn. 2020) (finding ballot collection and delivery limit not a severe burden on voting).

But when we return to Kansas law, we see that when our Supreme Court faced whether to adopt an undue burden standard in *Hodes*, the court recognized that the right to personal autonomy was not absolute. 309 Kan. at 661. The court strongly criticized and rejected the undue burden test and adopted strict scrutiny. The undue burden standard was difficult to understand and apply. The determination of what constituted an undue burden was subjective and varied from person to person. Thus, it lacked predictability concerning what regulations would be constitutional. And the court held the strict scrutiny test best protected fundamental rights. 309 Kan. at 665-69. The court stated the undue burden standard "lacks the rigor demanded by the Kansas Constitution" for protecting fundamental rights. 309 Kan. at 670. "This balancing test relieves the State of some of the burden of proof and from having to narrowly tailor an infringement to the interest it seeks to protect." 309 Kan. at 670.

Given the strong criticism in *Hodes*, we 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. Federal courts must deal with the concept of comity—respecting the integrity of two court systems. State courts do not have to deal with that

issue. The Kansas constitutional provisions are unique. The right to vote is a fundamental right. Strict scrutiny applies here.

Under strict scrutiny, once the plaintiff has shown an infringement—regardless of degree—the state action is presumed unconstitutional. The burden then shifts to the State to establish a compelling interest and narrow tailoring of the law to serve the interest. *Hodes*, 309 Kan. at 669.

We are mindful that in the context of the review of election laws, there is a long recognized distinction made by Kansas courts between regulations and restrictions. Benign election regulations which are a mere exercise of police powers to regulate and preserve the purity of the election are usually upheld. But statutes that restrict the constitutional right to vote are invariably void. *State v. Doane*, 98 Kan. 435, 440, 158 P. 38 (1916). The statutes we are dealing with are not mere regulations, such as setting the opening and closing time of the polls. The statutes we are reviewing are restrictions that must be examined closely.

But before we apply strict scrutiny, we must decide whether the government action impairs the constitutionally protected right to vote. As the *Hodes* court explained: "In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment." 309 Kan. at 672.

THE SIGNATURE MATCHING STATUTE IMPAIRS THE RIGHT TO VOTE

In interpreting the Kansas Constitution, Kansas courts read its wording with great care:

"[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing." [Citation omitted.]" *State v. Albano*, 313 Kan. 638, 645, 487 P.3d 750 (2021).

When the words do not make the intent clear, courts look to the historical record. The state-centric focus of the analysis leaves room for variance or divergence between the rights guaranteed under the Kansas and United States Constitutions. *Albano*, 313 Kan. at 645.

We note that the right to vote is not absolute. The Kansas Constitution protects the right of *qualified* electors to vote. See Kan. Const. art. 5, § 1.

"The legislature shall provide by law for proper proofs of the right of suffrage." Kan. Const. art. 5, § 4.

Shortly after the Kansas Constitution was adopted, our Supreme Court interpreted this latter provision. The court stated, "Obviously, what was contemplated was the ascertaining beforehand by proper proof of the persons who should, on the day of election, be entitled to vote, and any reasonable provision for making such ascertainment must be upheld." *State v. Butts*, 31 Kan. 537, 554, 2 P. 618 (1884).

The *Butts* court distinguished between simple "matters of proof" to find out who may vote—such as requiring that a party be registered, requiring a voter to go to a specific place to vote, and requiring proof by oath of the right to vote—and laws that "under the pretext of securing evidence of voters' qualifications . . . would cast so much burden as really to be imposing additional qualifications." 31 Kan. at 554. "The legislature cannot, by, in form, legislating concerning rules of evidence, in fact,

overthrow constitutional provisions." 31 Kan. at 554-55. The court found that a registration law was permissible if ample facilities for registering were furnished, and the opportunities for registering were continued down to within a reasonable time of the election day. 31 Kan. at 554-55.

Elections at the time of the Wyandotte Constitutional Convention were "held under difficulty and each side accused the other of procuring votes from persons not entitled." *Lemons v. Noller*, 144 Kan. 813, 819, 63 P.2d 177 (1936). But our understanding of who may vote changed in subsequent years with amendments.

We also note that signature matching is not new. See *Sawyer v. Chapman*, 240 Kan. 409, 413, 729 P.2d 1220 (1986). But because the only purpose of statutes relating to the validity of signatures is to prevent fraud, an overly strict regulation can impair the right to vote. See *Cline v. Meis*, 21 Kan. App. 2d 522, 905 P.2d 1072 (1995) (excluding electors who could not write in cursive from a recall petition was improper).

The Legislature can require voters to establish their right to vote. But, as pled by Plaintiffs, whether an election official perceives a voter's signature as a mismatch is not in the voter's control. Lay election officials will erroneously determine voters' signatures are mismatched. Thus, the statute disenfranchises voters even after the voter provided "proper proofs." See Kan. Const. art. 5, § 4. The statute alone does not require training of election officials, contains no standard for determining what constitutes a signature match, and does not provide a standard for the opportunity to cure an error made when matching signatures. Plaintiffs have met their minimal burden to plead a claim that the signature matching requirement impairs the constitutionally protected right to vote.

The district court here ruled there were no facts necessary to evaluate Plaintiffs' facial challenge. But it then conversely applied a fact-driven test to determine the questioned statutes were not a severe burden on the right to vote. This is akin to saying, "I

will not consider your factual allegations but I will use my own facts to decide this motion to dismiss." In doing so, the district court relied on *Crawford*, 553 U.S. at 199-203, where the *Crawford* Court looked to facts to determine the severity of the burden of the voting restriction and affirmed the grant of summary judgment after discovery.

In *Crawford*, the Court considered both the statute's broad application to all of Indiana's voters, but also the burden imposed on specific categories of voters. The Court found the evidence lacking. As the Tenth Circuit explained:

"In sum, *Crawford* teaches that . . . while we are to evaluate 'the statute's broad application to all . . . voters' to determine the magnitude of the burden, *Crawford*, 553 U.S. at 202-03, 128 S. Ct. 1610 (plurality opinion of Stevens, J.), we may nevertheless specifically consider the 'limited number of persons' on whom '[t]he burdens that are relevant to the issue before us' will be 'somewhat heavier,' *id.* at 198-99, 128 S. Ct. 1610 (plurality opinion of Stevens, J.)." *Fish v. Schwab*, 957 F.3d 1105, 1127 (10th Cir.), *cert. denied* 141 S. Ct. 965 (2020).

When the district court applied the *Anderson-Burdick* test to the signature matching requirement, it found it important that under the statute, the election officials "must notify an advance ballot voter of a missing signature or signature mismatch and provide an opportunity to cure." The court held the signature matching requirement thus was not a severe burden on the right to vote and any burden was outweighed by the State's interest in the integrity of its elections.

Upon what facts in this record did the district court make this determination? Even though it rejected Plaintiffs' argument that this was a factual determination, *it was*. The court weighed the provisions and ruled that it was fair. This ruling was reached before any depositions, discovery, or motions for summary judgment. In its eagerness to use the *Anderson-Burdick* test, the court erred by making factual determinations with no evidence.

Plaintiffs claimed that the signature matching requirement burdens the right to vote because ballots are rejected erroneously. This provision burdens the whole electorate because signatures are wrongly mismatched for reasons we have already discussed above.

THE BALLOT COLLECTION RESTRICTION RESTRICTS THE RIGHT TO VOTE

The Plaintiffs make a similar argument concerning the ballot collection restriction. They contend it is an unreasonable infringement of the right to vote under the Kansas Constitution. Their petition contends that the ballot collection restriction will limit the ability of voters to cast their ballots, including many who may not be able to return them at all.

The argument is straightforward. Not all voters can make a trip to the polls, for various reasons. In the past, other people have assisted them in voting by helping them mark their ballot or by simply taking their marked ballot to the ballot box for them. The limit of 10 ballots means only 10 voters will be helped. What about any others? The restriction will prevent those votes from being cast and counted because those who can get to the polls are limited to 10. If a volunteer routinely picked up 30 ballots and now is limited to 10, who will take up the slack?

This statute is a limitation that prevents votes from being cast and counted. The district court in dealing with this said "the need may still be met" and perhaps other people could be found to collect 10 ballots each. But we see no facts that support the court's hope. It is clear that the court did not take as true the facts as pled in the petition as it was required to do when considering a motion to dismiss. See *KNEA*, 305 Kan. at 747; see also K.S.A. 2021 Supp. 60-212(b)(6).

Strict scrutiny must apply here as well. After all, *Hodes* held that when considering a law that is an infringement of fundamental rights, the strict scrutiny standard applies regardless of the degree of infringement of rights. 309 Kan. at 663.

The rule we follow

Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

Also, in considering how pleadings work in Kansas, our Supreme Court has advised that, "under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order." *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008).

When we apply those standards to the district court's ruling, we conclude that the court erred.

Preventing voter fraud is a compelling state interest. See *Brnovich*, 141 S. Ct. at 2347. But our Supreme Court has also held there is a compelling state interest in increased participation in the election process from mail ballot voting. *Sawyer*, 240 Kan. at 415. The State must establish a compelling interest and narrow tailoring of the law to serve the interest. *Hodes*, 309 Kan. at 669. Courts have commented that states will have a

problem with the latter part of its burden if there is no evidence mismatched signature ballots were submitted fraudulently. See *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. 2016) (unpublished opinion). And courts have commented that the State's interest in preserving the integrity of the election process is better served by ensuring that all nonfraudulent ballots timely submitted are counted. See *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1323 (11th Cir. 2019).

We therefore remand this matter to the district court to give the State the opportunity to show that these statutes can overcome strict scrutiny.

PLAINTIFFS CLAIM THE SIGNATURE MATCHING REQUIREMENT VIOLATES
THE RIGHT TO DUE PROCESS

In their amended petition, Plaintiffs alleged the signature matching requirement violates the right to procedural due process protected by section 18 of the Kansas Constitution Bill of Rights. They alleged due process requires uniform standards for matching signatures and additional procedures to safeguard the right to vote.

The district court ruled that there is no constitutional right to vote by mail and that state law providing for advance voting did not give rise to a liberty interest entitled to procedural due process protections.

Plaintiffs contend the district court erred in dismissing their due process claim under section 18 of the Kansas Constitution Bill of Rights and improperly concluded that there is no protected liberty interest in voting by mail. They argue the right to vote necessarily includes the right to have one's vote counted. And they argue that once a state offers an absentee voting scheme, the state has created a sufficient liberty interest in exercising the right to vote in such manner.

Defendants contend that Plaintiffs ignore a new regulation—K.A.R. 7-36-9—and that the right to vote does not implicate a liberty interest. Defendants look to federal law in search of such liberty interest. Plaintiffs respond that the regulation is inadequate.

"All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Kan. Const. Bill of Rights, § 18.

Kansas courts have long held that "remedy by due course of law" refers to due process. *State v. N.R.*, 314 Kan. 98, 113, 495 P.3d 16 (2021), *cert. denied* 142 S. Ct. 1678 (2022). Due process may refer to substantive due process or procedural due process. Procedural due process means notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 462, 447 P.3d 959 (2019).

Historically, Kansas courts have analyzed section 18 of the Kansas Constitution Bill of Rights as coextensive with its federal counterpart. *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019). "In reviewing a procedural due process claim, the court first must determine whether a protected liberty or property interest is involved. If so, the court then must determine the nature and extent of the process which is due." *N.R.*, 314 Kan. at 113.

The right to procedural due process is not limited to fundamental rights; it may be applied to state-created "privileges." *Creecy*, 310 Kan. at 463 (holding person is entitled to due process before driving license taken away). A liberty interest may arise from the Constitution itself or it may arise from an expectation or interest created by state law. *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

The scope of a claimed state-created liberty interest is determined by state law. *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1994). In Kansas, "[t]he concept of 'liberty' is broad." *N.R.*, 314 Kan. at 113 (recognizing liberty interest includes protection of a person's good name).

The district court here held there was no constitutional right to vote by mail, relying on *McDonald v. Board of Election*, 394 U.S. 802, 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) (finding it was "not the right to vote that is at stake here but a claimed right to receive absentee ballots"). *McDonald* is a federal equal protection case from 1969 interpreting an Illinois law that made absentee balloting available only to distinct groups of people. It does not control Plaintiffs' claim that lawfully cast absentee votes under Kansas law cannot be rejected without due process.

The right at issue is not the right to vote by mail. A person cannot know beforehand that their mail-in ballot will be rejected for a signature mismatch by the elections office. A qualified voter that votes by mail for whatever reason in accordance with Kansas law has an expectation that their vote will be counted. The right at issue is really the fundamental right to have one's vote counted.

The right to vote is illusory if it does not include the right to have one's vote counted.

"It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted '[T]he right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.'" *Reynolds v. Sims*, 377 U.S. 533, 554-55, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

But even if the right at issue were only the right to vote by mail, voting by mail is a state-created right that all Kansans have had for decades. If due process is required in

Kansas before a person's driving license is revoked, then a qualified voter's mail-in ballot cannot be thrown out without due process.

The few federal cases that have struck down signature matching laws because of due process concerns support our view. "Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217, 222 (D. N.H. 2018) (holding signature match law that did not give voters timely notice of ballot rejection, contained no functional standards on signature matching, and vested unreviewable discretion on an untrained moderator was facially unconstitutional); see *Frederick v. Lawson*, 481 F. Supp. 3d 774, 793 (S.D. Ind. 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. 2006) (unpublished opinion).

We are persuaded by the *Andino* court when it stated that, the contention that there is no liberty interest in the right to have one's vote counted "is contrary to a large body of case law, which recognizes that the franchise is a fundamental right and the cornerstone of a citizen's liberty." *League of Women Voters of South Carolina v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed and remanded* 849 Fed. Appx. 39 (4th Cir. 2021).

The cases holding otherwise do not explain why voting deserves less protection than other state-created rights or constitutionally created liberty interests. The Fifth Circuit held that state-created liberty interests are limited to freedom from restraint, and that a constitutionally created fundamental right is different from a liberty interest. *Richardson v. Texas Secretary of State*, 978 F.3d 220, 230-32 (5th Cir. 2020); see also *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (holding fundamental rights for purposes of substantive due process are not liberty interests for purposes of procedural due process).

In Kansas, the right of a parent to the custody, care, and control of their child is considered a fundamental right and a liberty interest deserving of procedural due process. *In re. J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). Likewise, the fundamental right to vote can be considered a liberty interest for procedural due process analysis. Both rights are fundamental. Both rights are important.

The district court erred by ruling that the signature matching requirement did not implicate a liberty interest entitled to procedural due process.

But neither party has briefed the next question—the nature and extent of the process due.

Plaintiffs claimed that the signature matching requirement violates the right to procedural due process protected by section 18 of the Kansas Constitution Bill of Rights.

The new regulation was issued after the district court dismissed this case. We will not consider the regulation now. It would be unfair to the parties for us to consider its impact on these issues if they have not had the chance to brief the point. Additionally, it would be improper for us to take up the effect of the regulation since the district court did not have a chance to consider the matter. No doubt the impact of this new regulation will affect the procedural due process analysis on remand.

PLAINTIFFS MAKE AN EQUAL PROTECTION CLAIM BUT WE CANNOT REVIEW IT
PROPERLY

Plaintiffs' petition alleged the signature matching requirement violates the equal protection provisions of sections 1 and 2 of the Kansas Constitution Bill of Rights. In their view, the statute "explicitly and arbitrarily endorses multiple, standardless processes for verifying signatures, placing voters across the state's 105 counties at differing risks of

disenfranchisement." Different counties will have different procedures for matching signatures. There is no statutory definition of a "match." And the statute allows the county to choose between an electronic device or human inspection. Thus, a ballot that would be accepted in one county could be rejected in another county.

The district court grouped Plaintiffs' equal protection claim with their right to vote claim. The court then applied the *Anderson-Burdick* test and concluded the signature matching requirement was a reasonable, nondiscriminatory restriction that was outweighed by the State's compelling interest in the integrity of elections. We again point out that applying the *Anderson-Burdick* test was erroneous.

But Plaintiffs also contend it was error for the district court to merge the two issues and that the district court skirted its claim that the signature matching requirement violates the equal protection provisions of sections 1 and 2 of the Kansas Constitution Bill of Rights. They argue that the Constitution protects against differential treatment, particularly in the context of voting. Plaintiffs argue that the statute allows the 105 counties to institute different procedures for verifying signatures with no guidance, resulting in unequal treatment of voters across the state. Plaintiffs also allege voters who are elderly, disabled, in poor health, young, or nonnative English speakers are particularly likely to have their legitimate ballots rejected. They again argue strict scrutiny applies.

Defendants contend that Plaintiffs have disregarded a new regulation the Secretary adopted to provide consistent standards for implementing the signature matching requirement across the state. See K.A.R. 7-36-9. Defendants argue the signature matching statute is a sufficiently uniform standard. Discrepancies in how county election officials apply uniform standards that require human judgment are to be expected and are not constitutionally significant. They argue that a contrary ruling would "totally upend the county canvassing procedures."

In response, Plaintiffs argue that the new regulation was published mere days before their brief was due, is not part of the record, and is not properly before the court. They also argue the regulation provides "woefully insufficient" guidance.

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, § 1. "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, § 2.

Our Supreme Court has recently held:

"[T]he equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution. . . . Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022).

"The guiding principle of equal protection analysis is that similarly situated individuals should be treated alike." *In re K.M.H.*, 285 Kan. 53, 73, 169 P.3d 1025 (2007). Thus, the question that must be answered here is whether this law treats similarly situated voters differently?

Equal protection challenges are evaluated in three steps. First, the court determines whether the legislation creates a classification resulting in different treatment of similarly situated individuals. Second, the court determines the appropriate level of scrutiny by examining the nature of the right affected by the classification. Third, the court applies that level of scrutiny to the legislation. *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, Syl. ¶ 3, 291 P.3d 1056 (2013); *State v. Dixon*, 60 Kan. App. 2d 100, Syl. ¶ 8, 492 P.3d 455, *rev. denied* 314 Kan. 856 (2021). Strict scrutiny applies in cases involving suspect classifications such as race, and fundamental rights guaranteed by the

Constitution. *Farley v. Engelken*, 241 Kan. 663, 669-70, 740 P.2d 1058 (1987); *In re T.N.Y.*, 51 Kan. App. 2d 956, 965, 360 P.3d 433 (2015). Voting is a fundamental right for purposes of equal protection. *Farley*, 241 Kan. at 669-70.

Our reading of the signature matching statute leads us to conclude that it does not directly treat similarly situated individuals differently because it applies to all mail-in ballots. Plaintiffs' argument is really based on the ruling in *Bush v. Gore*, 531 U.S. 98, 105-106, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). There, the Supreme Court held the right to vote was fundamental and equal weight must be given to each vote:

"The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05.

The Court held that a recount of ballots to determine the voters' intent violated the guarantee of equal protection because of "the absence of specific standards to ensure its equal application." 531 U.S. at 106. The Court stated the formulation of uniform rules to determine intent was "practicable" and "necessary." 531 U.S. at 106. The Court was concerned that the standards for accepting or rejecting ballots would "vary not only from county to county but indeed within a single county from one recount team to another." 531 U.S. at 106. Compliance with the requirements of equal protection would require adopting "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them." 531 U.S. at 110. But the Court stated that its analysis was "limited to the present circumstances." 531 U.S. at 109. It is unclear what level of scrutiny was applied.

If we apply the *Bush* reasoning to this case, Plaintiffs have adequately stated an equal protection claim because the signature matching statute contains no standards to determine what constitutes a signature match, and requires no training—ensuring that

what constitutes a signature match will vary from county to county and even from one election official to another. Election officials will use varying methods to judge whether signatures are truly mismatched or merely natural variations in signatures.

But that conclusion does not end the matter. Defendants have pointed out that the new regulation adopted after the district court's ruling fixes all of these concerns. We say, again, that it would be unfair to the parties for us, on appeal, to interpret and apply this regulation from a record that lacks any information about this regulation. Nor is it proper for us to consider this issue without giving the parties a chance to brief the matter. Since we are remanding this case, the effect of the new regulation can be considered by the district court after allowing the parties to present evidence and arguments they think are sufficient for the court to resolve these questions.

DOES THE VOTE COLLECTION LIMIT VIOLATE FREEDOM OF SPEECH IN KANSAS?

Plaintiffs have alleged that they are exercising core political speech when they engage, encourage, register, educate, and assist voters, including by collecting and delivering completed advance ballots. They argue that the ballot collection restriction limits their core political speech and expressive conduct by diminishing the number of voters they can assist. They also alleged they will have to recruit more volunteers, stressing their limited resources. They alleged there is no compelling state interest to justify this restriction and that the restriction is not narrowly tailored to that interest.

The district court ruled that the delivery of advance ballots to election officials is not expressive conduct and therefore the rational basis test applies. The court ruled the ballot collection restriction was justified by the State's interest in combating voter fraud and instilling public confidence in elections, stating that the government need not actually show that the fraud existed to justify measures to prevent it. The court further ruled that

even if the ballot collection restriction implicated constitutionally protected speech or conduct, then the *Anderson-Burdick* test would apply rather than strict scrutiny.

Plaintiffs contend they stated a claim that the ballot collection restriction limits constitutionally protected speech because assisting voters to return ballots is expressive activity. They argue that ballot collectors necessarily advocate for democratic participation and the fact that they have other means to disseminate their ideas does not take their speech outside the bounds of constitutional protection. They argue that strict scrutiny applies because free speech is a fundamental right protected by section 11 of the Kansas Constitution Bill of Rights. And they argue that whether the ballot collection restriction is narrowly tailored to address a state interest is a factual question that could not be resolved on a motion to dismiss and that the district court improperly credited the State's factual allegations.

Defendants contend that this statute makes no impact on either speech or expressive conduct. They argue collecting and returning ballots of another voter does not communicate any particular message. They argue that Plaintiffs can still interact with all voters and provide them with advance ballot applications. They argue the restriction is needed to prevent ballot harvesting.

"The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." Kan. Const. Bill of Rights, § 3.

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." Kan. Const. Bill of Rights, § 11.

Freedom of speech is "among the most fundamental personal rights and liberties of the people." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). The right is "generally considered coextensive" with that right protected under the First Amendment to the United States Constitution. It is not absolute. *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 37, 20 P.3d 39 (2001); *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). The freedom of speech constitutional guarantee has "its fullest and most urgent application" to political speech. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

A review of Kansas precedent leads us to hold that strict scrutiny applies when a fundamental right is implicated. Strict scrutiny analysis requires consideration of whether the enactment serves some compelling state interest and is narrowly tailored to further that interest. *Hodes*, 309 Kan. at 663. "Where a statute restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *McKinney*, 236 Kan. at 235. But courts apply varying degrees of scrutiny depending on the nature of the infringement on free expression. *City of Wichita v. Trotter*, 58 Kan. App. 2d 781, 790, 475 P.3d 365 (2020), *rev. denied* 312 Kan. 890 (2021).

The United States Supreme Court has cautioned that free speech concerns sometimes intersect with a state's need to regulate elections. First Amendment protection is "at its zenith" when it comes to "core political speech." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186-87, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). But "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." 525 U.S. at 187. When a law burdens "core political speech" or "pure speech," it is subject to "exacting scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344-45, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). But when the law merely regulates

the mechanics of the electoral process, it is subject to a less exacting scrutiny. *McIntyre*, 514 U.S. at 345-46; *Meyer*, 486 U.S. at 420.

"Exacting scrutiny" has been likened to strict scrutiny. See *McIntyre*, 514 U.S. at 346, n.10; *Buckley*, 525 U.S. at 215 (O'Connor, J., concurring). When a law burdens core political speech, the court upholds the law "only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___, 141 S. Ct. 2373, 2384, 210 L. Ed. 2d 716 (2021).

Several federal courts have concluded that ballot collection is not an expressive activity and therefore not subject to strict scrutiny for various reasons. Ballot collection does "not communicate any particular message." See, e.g., *DCCC v. Ziriach*, 487 F. Supp. 3d 1207, 1235 (N.D. Okla. 2020). Regardless of the ballot collector's intent, ballot collection is not reasonably perceived as a way to communicate a message; it is perceived as a way to facilitate voting. *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 392-93 (9th Cir. 2016). A voted ballot constitutes the voter's speech rather than the speech of the person delivering the ballot on their behalf. *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018). A limit on the number of voted ballots that a person can collect for others governs the way voting occurs—not core political speech. *DSCC v. Simon*, 950 N.W.2d 280, 295 (Minn. 2020).

But other courts have been skeptical of an analytic approach that would separate an advocacy for voting from the collection of ballots or applications themselves. This approach allows the government to indirectly burden protected activity. "The defendants are not free to rewrite the way democracy has been practiced for decades." *Tennessee State Conference of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 699 (M.D. Tenn. 2019) (stating voter registration drives have historically involved both encouraging registration

and physically transporting registration applications); see also *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 728 (M.D. Tenn. 2019) (holding that the collection of applications is "inextricably intertwined" with the expressive and advocacy aspects of a voter registration drive, and "it is impossible to burden one without, in effect, burdening the other").

The ballot collection restriction limits one-on-one communication between the ballot collector and voter. Plaintiff Crabtree alleged he communicates a message of civic participation and engagement when he collects ballots for others. The statute reduces the number of voters he can assist. And volunteer ballot collectors have been a part of how democracy in Kansas has been practiced. Collecting ballots and delivering those ballots to election officials is part of a larger advocacy for voting itself.

The ballots themselves, however, are the speech of the voter, not the ballot collector. After all, postal carriers who deliver hundreds of ballots to an election office are not involved in protected speech in either collecting those ballots or in delivering them. They are delivering the mail. Individuals who perform the same task are doing just that—carrying the mail. Therefore, regulation of the handling of those ballots is warranted. This claim does not survive Defendants' motion to dismiss.

Summary of our rulings

Statutory authority to bring this appeal exists under K.S.A. 2021 Supp. 60-2102(a)(3).

The Plaintiffs have standing to sue as they have sufficiently alleged injury and causation to overcome a motion to dismiss.

Because the right to vote is a fundamental right guaranteed under the Kansas Constitution, an act that infringes on that right must be strictly scrutinized to determine if it is enforceable.

Some federal courts have created a balancing test used by the district court in this case and it is not applicable to the questions concerning the Kansas Constitution.

The signature matching provision of this law does impair the right to vote, but due to the fact that the district court used the incorrect test, we remand this matter to the district court to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny.

The ballot collection restriction of this law does impair the right to vote. We remand this matter to the district court to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny.

The ballot collection limitation statute does limit the free speech of the ballot collector but not the speech of the voter as expressed in the ballot. On remand, when applying strict scrutiny, the effect of the law on the collector is the focus and not the content of the vote.

THE MOTION FOR A TEMPORARY INJUNCTION WAS NOT MOOT

The district court ruled Plaintiffs' motion for a temporary injunction was moot because it dismissed the claim. For all of the reasons we have set out above, we hold that this issue is not moot, and the district court should not have dismissed the Plaintiffs' claims.

History records the struggle Kansans experienced when joining the Union of States. It was by free elections that we gained statehood. Thus, voting rights are preserved in the Kansas Constitution. Great care must be taken when trying to limit or infringe on those rights. Voting was important then. Voting is important now.

Reversed and remanded for further proceedings.

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