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CASE NUMBER: 2021-CV-000299

Court: Shawnee County District Court

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Case Title: League of Women Voters of Kansas, et al. vs. Scott Schwab - Kansas Secretary of State, et al.

Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

LEAGUE OF WOMEN VOTERS OF KANSAS, et al.,

Plaintiffs

2021-CV-299

SCOTT SCHWAB, et al.,

Defendants

MEMORANDUM DECISION AND ORDER

Plaintiffs filed a petition challenging the legality of recently enacted Kansas election laws. Defendants Kansas Secretary of State Scott Schwab and Attorney General Derek Schmidt moved to dismiss the petition. Plaintiffs later filed an amended petition, and Defendants once again moved for dismissal. In the meantime, Plaintiffs sought a partial temporary injunction to prevent the implementation and enforcement of one provision of the challenged laws, Section 3(a)(2) and (3) of Kansas House Bill 2183 (2021) (hereinafter the "False Representation Provision" or "FRP"). The Court denied Plaintiffs' motion for partial temporary injunction. Plaintiffs have appealed that ruling. The Court will now address Defendants' motion to dismiss the amended petition.

STATEMENT OF FACTS

1. Plaintiffs are four Kansas organizations and three individuals interested in the issue of voter participation.
2. Plaintiffs state that they engage in certain voter registration and education activities, including assisting people in navigating the election process.
3. Kansas House Bill 2183 (2021) was adopted by the Kansas Legislature on April 8, 2021. Governor Laura Kelly vetoed the bill on April 23, 2021. The Kansas Legislature voted to override her veto on May 3, 2021. HB 2183 became law effective July 1, 2021.
4. Plaintiffs challenge the constitutionality of three provisions in HB 2183: 1) the false representation provision ("FRP"); 2) the advance ballot signature verification requirement ("SVR"); and 3) the ballot collection restrictions ("BCRs").
5. Plaintiffs also challenged the constitutionality of one provision in Kansas House Bill 2332 (2021), the so-called "Advocacy Ban," a related law that prohibits out of state persons or entities from mailing advance ballot applications to Kansas voters.
6. The same provision in HB 2332 was challenged by different parties in a federal case filed in the United States District Court for the District of Kansas, *VoteAmerica v. Schwab,* No. 1:21-CV-02253-KHV-GEB. The parties in *VoteAmerica* have since resolved the claims involving that provision.
7. On March 2, 2022, Plaintiffs in the instant case voluntarily dismissed their claims related to HB 2332. Thus, the Court will not consider Plaintiffs' claims in the amended petition related to HB 2332 or Defendants' arguments in favor of their dismissal.

8. Plaintiffs in the instant case filed a motion for partial temporary injunction on June 18, 2021, addressing only the FRP. This Court denied the motion in an opinion dated September 16, 2021. Plaintiffs appealed, and the appeal is pending.
9. Kansas law - as it is and as it existed prior to HB 2183 - allows any eligible registered voter to cast an advance voting ballot. Advance ballots may be cast in person or by mail. K.S.A. 25-1119.
10. Kansas law - as it is and as it existed prior to HB 2183 – provides that any eligible registered voter may file an application for an advance ballot with the county election officer. K.S.A. 2020 Supp. 25-1122(a). As part of the application, the voter must provide a Kansas driver's license number or another statutorily approved form of identification. K.S.A. 2020 Supp. 25-1122(c). The county election officer must verify that the voter's signature on the application matches the signature on file in voter registration records before issuing an advance mail ballot. K.S.A. 2020 Supp. 25-1122(e).
11. Kansas law - as it is and as it existed prior to HB 2183 – allows voters to cast advance ballots by mailing completed ballots or dropping off their ballots at a local election office. K.S.A. 2020 Supp. 25-1124(a). Voters who are ill, disabled, or who fit other statutorily defined categories may receive assistance from others to mark the advance ballot. K.S.A. 2020 Supp. 25-1124(c).
12. Under law existing prior to HB 2183, "[t]he 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." K.S.A. 2020 Supp. 25-1124(b).

13. The absentee ballot signature verification requirement, or SVR, is found in HB 2183, Section 5(h). It is now codified at K.S.A. 25-1124(h). It says:

> "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."

14. Under law existing prior to HB 2183, a voter could have another person, as designated by the voter in writing, deliver the advance ballot to the county election official. K.S.A. 2020 Supp. 25-1124(d).

15. The advance ballot collection restrictions, or BCRs, are found in HB 2183, Section 2. They are referenced in amendments to K.S.A. 25-1124(d) and further codified in a new statute, K.S.A. 25-2437. K.S.A. 25-2437 says:

> "(a) No person shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, unless the person submits a written statement accompanying the ballot at the time of ballot delivery to the county election officer or polling place as provided in this section. Any written statement shall be transmitted or signed by both the voter and the person transmitting or delivering such ballot and shall be delivered only by such person. The statement shall be on a form prescribed by the secretary of state and shall contain:
>
> (1) A sworn statement from the person transmitting or delivering such ballot affirming that such person has not:
> (A) Exercised undue influence on the voting decision of the voter; or
> (B) transmitted or delivered more than 10 advance voting ballots on behalf of other persons during the election in which the ballot is being cast; and

(2) a sworn statement by the voter affirming that:
(A) The voter has authorized such person to transmit or deliver the voter's ballot to a county election officer or polling place; and
(B) such person has not exercised undue influence on the voting decision of the voter.

(b) No candidate for office shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, except on behalf of an immediate family member of such candidate.

(c) No person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election.

(d)(1) A violation of subsection (a) or (b) is a severity level 9, nonperson felony.
(2) A violation of subsection (c) is a class B misdemeanor."

CONCLUSIONS OF LAW

Defendants seek to dismiss Plaintiffs' amended petition on two grounds: 1) lack of subject matter jurisdiction; and 2) failure to state a claim.

SUBJECT MATTER JURISDICTION – STANDING.

Defendants assert that all claims against them should be dismissed for lack of subject matter jurisdiction, specifically on the basis that Plaintiffs lack standing to raise any of the claims. Where a motion to dismiss for lack of standing is decided prior to discovery and without an evidentiary hearing, the court must accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn from them. Plaintiffs need only to make a prima facie showing of standing. *Labette Cty. Med. Ctr. v. Kansas Dep't of Health & Env't,* 2017 WL 3203383, *5-6 (Kan. App. 2017) (unpublished).

Standing is the "right to make a legal claim or seek enforcement of a duty or right." *Gannon v. State,* 298 Kan. 1107, 1122, 319 P.3d 1196 (2014). Plaintiffs must have a "sufficient stake in

the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." *Id.* "The injury must be particularized, i.e., it must affect the plaintiff in a personal and individual way." *Id.* at 1123. "Under Kansas law, in order to establish standing, a plaintiff must show that (1) he or she suffered a cognizable injury and (2) there is a causal connection between the injury and the challenged conduct." *Solomon v. State,* 303 Kan. 512, 521, 364 P.3d 536 (2015). A cognizable injury is when a plaintiff demonstrates a "personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." *Id.* The existence of standing is a question of law for the court. *Id.* The burden to establish standing is on the party asserting it. *Gannon,* 298 Kan. at 1123.

For purposes of this motion to dismiss, the Court will assume the existence of standing because other arguments detailed below dispose of the claims before the Court in favor of Defendants.

FAILURE TO STATE A CLAIM.

Defendants assert that Plaintiffs' amended petition fails to state a claim regarding three provisions in HB 2183: 1) the false representation provision; 2) the advance ballot signature verification requirement; and 3) the ballot collection restrictions. The merits of Plaintiffs' FRP claim is the subject of a pending appeal of this Court's denial of a preliminary injunction regarding enforcement of the FRP. Because the merits of the FRP challenge are currently under consideration by the Kansas Court of Appeals, this Court has no jurisdiction to consider Defendants' motion to dismiss the FRP claim. Thus, that part of Defendants' motion will not be addressed here. See *Hernandez v. Pistotnik,* 60 Kan.App.3d 393, 405, 494 P.3d 203 (2021) (trial court loses jurisdiction

to modify a judgment once appeal is docketed, even while trial court may continue to address "matters independent of the judgment.")

In considering a motion to dismiss for failure to state a claim under K.S.A. 60-212(b)(6), "the court must decide the issue based only on the well-pled facts and allegations, which are generally drawn from the petition. Courts must resolve every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief. Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim." *Williams v. C-U-Out Bail Bonds, LLC,* 310 Kan. 775, 784, 450 P.3d 330 (2019) (internal quotations and citations omitted).

Defendants ask this Court to apply the federal standard for determining whether to grant a motion to dismiss for failure to state a claim. See *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (pleading must "contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (federal courts must determine whether claim has "facial plausibility"). The Kansas appellate courts have not yet explored the merits of adopting this standard, and the Court will not do so here because it makes no difference to the outcome.

Plaintiffs raise facial challenges to the election laws at issue. "A facial challenge is an attack on a statute itself as opposed to a particular application of that law. In comparison, as its name suggests, an as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as applied challenge necessarily requires findings of fact." *State v. Hinnenkamp,* 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019) (internal quotations and citations

omitted). It is "an important distinction" because it affects "the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy." *Id.*

"It is difficult for a challenger to succeed in persuading a court that a statute is facially unconstitutional. Such challenges are disfavored, because they may rest on speculation, may be contrary to the fundamental principle of judicial restraint, and may threaten to undermine the democratic process. It is easier for a challenger to succeed in persuading a court that a statute is unconstitutional as applied to that particular challenger." *State v. Bollinger,* 302 Kan. 309, 318–19, 352 P.3d 1003 (2015).

Plaintiffs do not specifically state in the amended petition whether their challenges are facial or as applied. But the remedy they seek is not to undo any particular result but to strike the challenged laws as contrary to the state constitution. This amounts to a facial challenge. And even where facial challenges and as-applied challenges may overlap, if the "claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs . . . they must satisfy . . . standards for a facial challenge to the extent of that reach." *Doe v. Reed,* 561 U.S. 186, 194 (2010).

Thus, the Court in this case will analyze whether Plaintiffs stated a claim under the facial challenge standard. "A facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *State v. Jones,* 313 Kan. 917, 931, 492 P.3d 433 (2021). Alleging that the challenged laws "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

The constitutionality of a statute is question of law. "A statute is presumed to be

constitutional, and all doubts must be resolved in favor of constitutionality. If a court can find any reasonable way to construe a statute as constitutionally valid, it must do so. Before a statute may be struck down, the constitutional violation must be clear." (Internal citations omitted.) *Solomon,* 303 Kan. at 523.

The Kansas Supreme Court has recently purported to scale back this presumption, but only in cases where it has declared a "fundamental interest" specially protected by the Kansas Constitution, such as in the case of abortion. See *Hodes & Nauser, MDs v. Schmidt,* 309 Kan. 610, 673-74, 440 P.3d 461 (2019). Because there is currently no such specific declaration by the Kansas Supreme Court about the particular state-created rights alleged here, the general presumption of constitutionality applies to the challenged provisions.

A. BALLOT COLLECTION RESTRICTIONS.

RIGHT TO FREE SPEECH/ASSOCIATION (COUNT I) AND RIGHT TO VOTE (COUNT II).

Plaintiffs argue that the ballot collection restrictions in HB 2183, Section 2, now codified at K.S.A. 25-2437, violate the right to freedom of speech and association embodied in Sections 3 and 11 of the Kansas Constitution Bill of Rights. Section 3 says: "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." Section 11 says in pertinent part that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights."

By way of comparison, the First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It is applicable to the states through the Fourteenth Amendment. Though not identically worded, Kansas courts consider the two provisions to be "coextensive." *Prager v. Kansas Dept. of Revenue,* 271 Kan. 1, 33, 37, 20 P.3d 39 (2001); *State v. Russell,* 227 Kan. 897, 899, 610 P.2d 1122, *cert. denied* 449 U.S. 983 (1980). To the extent Plaintiffs suggest that Section 3 or 11 affords greater protection than the First Amendment, the suggestion is rejected as inconsistent with existing Kansas precedent, which this Court is bound to follow. *Henderson v. Board of Montgomery County Com'rs,* 57 Kan. App. 2d 818, 830, 461 P.3d 64 (2020).

Plaintiffs also assert that the BCRs violate the right to vote found in Article 5, Section 1 of the Kansas Constitution, and Sections 1 and 2 of the Kansas Constitution Bill of Rights. Article 5, Section 1 of the Kansas Constitution says in part: "Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Section 1 of the Kansas Constitution Bill of Rights says: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 says in pertinent part: "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."

Plaintiffs first argue that the ballot collection restrictions are unconstitutional because they criminalize certain advance ballot collection activities protected by the state constitution. Analysis of the challenged provision begins with the framework used to consider Plaintiffs' argument. There are four choices on the current First Amendment spectrum, and they apply here: 1) the strict scrutiny test; 2) the *Meyer-Buckley* "exacting scrutiny" test; 3) the *Anderson-Burdick* "flexible balancing" test; and 4) the rational basis test. The parties appear to agree that the legal challenges

based on freedom of speech and the right to vote are subject to the same analysis.

The strict scrutiny test has been applied to laws that proscribe core political speech. For example, the strict scrutiny test was applied to a city ordinance that prohibited non-residents from circulating initiative, referendum, or recall petitions inside city limits. *Chandler v. City of Arvada, Colo.,* 292 F.3d 1236 (10th Cir. 2002). Strict scrutiny requires any prohibition on protected speech to be narrowly tailored to support a compelling state interest. A compelling state interest includes "policing the integrity" of the political process. *Id.* at 1241.

But it is an "erroneous assumption" that strict scrutiny applies to any law touching upon the First Amendment rights in the election context. *Burdick v. Takushi,* 504 U.S. 428, 432 (1992).

> "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (Internal quotations and citations omitted.) *Id.* at 433.

For this reason, the United States Supreme Court has more often applied some form of a balancing test to laws that restrain or reduce core political speech to some degree. There are two such balancing tests. The more demanding of the two is the *Meyer-Buckley* "exacting scrutiny" test. This refers to *Meyer v. Grant,* 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182 (1999). In *Meyer,* the court invalidated the state's prohibition on the use of paid petition circulators. 486 U.S. at 428. In *Buckley,* the court invalidated three additional restrictions on petition circulators, including that circulators be registered voters, wear

an identification badge with name, and be listed in a report with the names and addresses of all paid circulators and the amount paid to each. 525 U.S. at 186. The so-called "exacting scrutiny" test arising from these cases requires a law to be "substantially related to important government interests" that cannot be addressed by "less problematic measures." 525 U.S. at 202, 204.

The *Meyer-Buckley* test has been applied in other jurisdictions in scenarios not analogous here. See *League of Women Voters v. Hargett,* 400 F.Supp.3d 706, 725 (M.D. Tenn. 2019). In *Hargett,* a federal district court in Tennessee applied "exacting scrutiny" to strike laws requiring among other things: 1) prior registration with the state for those who plan to collect 100 or more voter registration applications during a voter registration drive; 2) a 10-day turn-in period for voter registration applications collected, with criminal penalties for failure to do so; 3) civil penalties for submitting incomplete applications on behalf of others; and 4) mandatory disclaimers on communications regarding voter registration status. *Id.* at 711-13. Not wanting to "slice and dice" the numerous provisions at issue, *Id.* at 720, the *Hargett* court decided that it would apply *Meyer-Buckley* because taking all of the provisions together, "the regulation of First Amendment-protected activity is not some downstream or incidental effect" of the law as a whole. *Id.* at 720-24.

In the context of challenges to election laws, the most oft-applied test in the Tenth Circuit is the *Anderson-Burdick* "flexible balancing" test. See, e.g., *Fish v. Schwab,* 957 F.3d 1105 (10th Cir. 2020); *Navajo Nation v. San Juan Cty.,* 929 F.3d 1270 (10th Cir. 2019); *Utah Republican Party v. Cox,* 892 F.3d 1066 (10th Cir. 2018). This test is derived from *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983); and *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). In *Anderson,* the court invalidated a state's early filing deadline for independent candidates to appear on the ballot. 460

U.S. at 806. In *Takushi,* the court upheld a state's prohibition on write-in voting. 504 U.S. at 441-42. The resulting "flexible balancing" test is generally explained as follows:

> "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." (Internal citations and quotations omitted.) *Cox,* 892 F.3d at 1077.

Further:

> "If a regulation is found to impose severe burdens on a party's associational rights, it must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." (Internal citations and quotations omitted.) *Id.*

The fourth and final test is the rational basis test. Where plaintiffs fail to demonstrate an actual burden on a constitutional right, a straightforward rational basis standard should be applied. *Hargett,* 400 F.Supp.3d at 722, citing *McDonald v. Bd. of Election Com'rs,* 394 U.S. 802, 807–09 (1969). The rational basis test requires only that the law "bear some rational relationship to a legitimate state interest." *Hodes,* 309 Kan. at 611.

With these frameworks in mind, the analysis turns to the plain language of the statute, "giving common words their ordinary meaning." *Carman v. Harris,* 313 Kan. 315, 318, 485 P.3d 644 (2021). K.S.A. 25-2437(a) requires that any person delivering the advance ballot of another person to a county election office or polling place must submit a written statement on a form approved by the Secretary of State with attestations from the voter and the delivery agent that the agent did not exert undue influence over the voter, the voter authorized the agent to deliver the ballot, and the agent has not delivered more than 10 advance voting ballots on behalf of others

during the election in which the ballot is being cast. K.S.A. 25-2437(b) prohibits a candidate for office from delivering advance voting ballots on behalf of another person other than immediate family members. K.S.A. 25-2437(c) prohibits a person from delivering more than 10 advance voting ballots on behalf of others during the election. Violation of Sections (a) and (b) are severity level 9, nonperson felonies. Violation of Section (c) is a class B misdemeanor.

Plaintiffs argue that the criminal prohibition of certain ballot collection activities "directly restricts Plaintiffs' core political speech and expressive conduct by severely diminishing their capacity and ability to assist voters." Defendants counter that the BCRs do not infringe on Plaintiffs' free speech or association rights at all because they do not target speech or expressive conduct. The only thing restricted under the BCRs is the specific conduct of delivering a third-party's advance ballot to election officials. "[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny." *DCCC v. Ziriax,* 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020); *Lichtenstein v. Hargett,* 489 F.Supp.3d 742, 765-77 (M.D. Tenn. 2020) (same); *New Georgia Project v. Raffensperger,* 484 F.Supp.3d 1265, 1300-02 (N.D. Georgia 2020) (same); *Knox v. Brnovich,* 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting argument that the act of collecting early ballots is expressive conduct that conveys any message about voting, concluding that this type of conduct cannot reasonably be construed "as conveying a symbolic message of any sort"); *Feldman v. Ariz. Sec'y of State's Office,* 843 F.3d 366, 392 (9th Cir. 2016) (collecting ballots is not expressive conduct "[e]ven if ballot collectors intend to communicate that voting is important"); *Voting for America v. Steen,* 732 F.3d 382, 393 (5th Cir. 2013) (similarly, collecting voter registrations is not protected speech).

Because the BCRs do not restrict core political speech or expressive conduct, the rational basis test applies. As set forth above, rational basis review requires that legislative action bear some rational relationship to a legitimate state interest. There is a "strong presumption of validity" when examining a statute under rational basis review, and the burden is on the party challenging the validity of the legislative action to establish that the statute is unconstitutional. *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 314–15 (1993). The party defending the constitutionality of the action need not introduce evidence or prove the actual motivation behind passage but must only demonstrate that there is some legitimate justification that could have motivated the action. *Id.* at 315.

Defendants assert multiple justifications for the BCRs, primarily the government's interest in combating voter fraud and instilling public confidence in elections. The United States Supreme Court has emphasized that the state has an interest in deterring election fraud. *John Doe No. 1 v. Reed,* 561 U.S. 186, 217 (2010). The state has an interest in maintaining "public confidence in the integrity of the electoral process." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 197 (2008). "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997). Indeed, the Tenth Circuit has recognized a compelling state interest in the integrity of the election process. *Chandler,* 292 F.3d at 1241.

The United States Supreme Court has recently recognized these interests in the context of advance ballot collection restrictions.

> "A State indisputably has a compelling interest in preserving the integrity of its election process. Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election

> Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.
>
> The Commission warned that vote buying schemes are far more difficult to detect when citizens vote by mail, and it recommended that States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting third-party organizations, candidates, and political party activists from handling absentee ballots. The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials
> . . . .
>
> The Court of Appeals thought that the State's justifications for HB 2023 were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. But prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. Section 2's command that the political processes remain equally open surely does not demand that a State's political system sustain some level of damage before the legislature [can] take corrective action. Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States. . . . The Arizona Legislature was not obligated to wait for something similar to happen closer to home." *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2347–48 (2021) (internal quotation marks and citations omitted).

Plaintiffs assert that there is no evidence of voter fraud or insecurity in Kansas' election processes and thus no need to enact prophylactic measures. But as articulated in *Brnovich,* the government need not demonstrate that fraud exists to justify taking measures to prevent it. The BCRs pass constitutional muster under the rational basis test.

Even if the BCRs incidentally implicated speech or conduct protected by the Kansas Constitution, they would be subject only to the *Anderson-Burdick* flexible balancing test. This test weighs the character and nature of the burden on protected speech or conduct versus the

government's important regulatory interests, and whether these interests are enough to justify reasonable, non-discriminatory restrictions. The BCRs allow a person to deliver the advance ballots of others, but only with the submission of a written statement and a cap on how many advance ballots may be delivered in each election. To the extent Plaintiffs argue that there is a need in certain communities for help in collecting and delivering ballots, the need may still be met. And as Defendants point out, the United States Supreme Court in *Brnovich* recently upheld a more restrictive state law that prohibits third party ballot collection except by a postal worker, election official, or family or household member. 141 S.Ct. at 2325. Finally, the government's regulatory interests are important and justify the BCRs, which are reasonable, non-discriminatory restrictions. Even if the *Anderson-Burdick* test applies, it is easily met.

The ballot collection restrictions in HB 2183, Section 2, now K.S.A. 25-2437, do not violate the right to freedom of speech and association embodied in Sections 3 and 11 of the Kansas Constitution Bill of Rights, or the right to vote in Article 5, Section 1 of the Kansas Constitution, and Sections 1 and 2 of the Kansas Constitution Bill of Rights. For the reasons set forth above, the Court grants Defendants' motion to dismiss Plaintiffs' challenge to the BCRs.

B. SIGNATURE VERIFICATION REQUIREMENT.

Plaintiffs challenge the signature verification requirement in HB 2183, Section 5(h), now K.S.A. 25-1124(h). It says, "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." There is an exception where a voter's disability prevents him or her from signing the ballot or creating a signature consistent with the one on the voter's registration form. The signature

may be verified by an electronic device or human inspection. If the signatures do not match, the ballot does not count. But K.S.A. 25-1124(b) requires the county election officer to attempt to contact each person who submits an advance voting ballot 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."

1. RIGHT TO VOTE (COUNT II) AND EQUAL PROTECTION (COUNT III).

Plaintiffs assert that the SVR violates the right to vote and to equal protection found in Article 5, Section 1 of the Kansas Constitution, and Sections 1 and 2 of the Kansas Constitution Bill of Rights. These provisions are quoted above. The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Kansas courts have interpreted Sections 1 and 2 of the Kansas Constitution Bill of Rights to be counterparts to the Equal Protection Clause of the Fourteenth Amendment and have interpreted the state and federal provisions in the same manner. *State ex rel. Tomasic v. City of Kansas City,* 237 Kan. 572, Syl. ¶ 12, 701 P.2d 1314 (1985).

Plaintiffs assert that the SVR is unreliable, non-uniform, and lacks standards for evaluating the authenticity of a signature match. Plaintiffs argue that for these reasons, the SVR imposes such a severe burden on advance ballot voters that it amounts to robbing them of their right to vote. Plaintiffs briefly assert that a strict scrutiny test applies to the SVR, but it does not. The strict scrutiny test applies to laws that restrict core political speech. Plaintiffs do not explain how a signature match requirement implicates political speech. On this issue, the Court will apply the

Anderson-Burdick test. This requires weighing the character and magnitude of the burden on constitutional rights against the government interests justifying the burden.

Plaintiffs cite *Democratic Executive Committee v. Lee,* 915 F.3d 1312, 1321 (11th Cir. 2019), where the court applied the *Anderson-Burdick* test and found Florida's SVR imposed "at least a serious burden" on the right to vote. But part of the burden calculus in that case was that there was no meaningful right to cure the signature discrepancy built into the legislation. *Id.* The court acknowledged the government's interests in "preventing fraud; promoting the orderly, efficient, and timely administration of the election; and ensuring fairness and public confidence in the legitimacy of the election," but considered the "legitimacy and strength" of these interests to be diminished by the voter's lack of an opportunity to cure, which was effectively absent from the Florida scheme. *Id.* at 1321-22.

The Kansas SVR requires a signature match between advance mail ballots and voter registration records. But importantly, county election officials must notify an advance ballot voter of a missing signature or signature mismatch and provide an opportunity to cure before the commencement of the final county canvass. The final county cavass occurs on the Monday next following a Tuesday election but can be moved by a county election officer to any business day not later than 13 days following an election. See K.S.A. 25-3104. Further, disabled persons are exempt from the signature match requirement if the disability prevents them from creating a signature consistent with the one on the voter's registration form. Ill or disabled persons who cannot sign the ballot may receive help from a third party in casting the ballot. Those who believe they cannot provide a matching signature can vote in person on Election Day or during advance voting.

"No citizen has a Fourteenth Amendment right to be free from the usual burdens of voting." *Richardson v. Texas Secretary of State,* 978 F.3d 220, 237 (5th Cir. 2020). In *Richardson,* the court concluded that Texas' signature verification requirement – much like the one at issue here and with some of the same mitigating measures – was not a severe burden on the right to vote, but a reasonable and non-discriminatory restriction justified by legitimate government interests in election integrity. *Id.* at 241. Accord *League of Women Voters of Ohio v. LaRose,* 489 F.Supp.3d 719, 737 (Ohio's SVR imposed a moderate burden on the right to vote, but was outweighed by the government's interest in combatting fraud and the appearance of fraud); *Lemons v. Bradbury,* 538 F.3d 1098 (9th Cir. 2008) (procedures for verifying referendum petition signatures did not violate plaintiffs' equal protection or due process rights; where there was no requirement to notify a voter of a non-match and no opportunity to dispute the finding, court held that any burden on the right to vote was minimal and outweighed by the state's interests in "detecting fraud and in the orderly administration of elections," interests which are "weighty and undeniable").

Plaintiffs' only remaining argument against dismissal is that the nature of the burden on the right to vote or equal protection concerns is a fact question that cannot be decided on a motion to dismiss. But Plaintiffs' claim is essentially a facial challenge to the SVR – in other words, there are no "facts" necessary, other than the provisions of the statute themselves to be weighed against the government's recognized compelling interest in preserving the integrity of its election process, preventing voter fraud and improving voter confidence in election results.

The Court concludes that the provisions of the SVR are reasonable, non-discriminatory restrictions which are outweighed by the state's compelling state interest in the integrity of its

elections. The Court grants Defendants' motion to dismiss the right to vote and equal protection claims regarding the SVR.

2. RIGHT TO DUE PROCESS (COUNT VI).

Plaintiffs also assert that the SVR violates the right to procedural due process found in Section 18 of the Kansas Constitution Bill of Rights because it allows for rejection of an advance mail ballot without adequate procedural protections. Section 18 says: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Remedy by due course of law refers to procedural due process. *In re Marriage of Soden,* 251 Kan. 225, 233, 834 P.2d 358 (1992). Historically, Kansas courts equate the due process protections of Section 18 with those guaranteed by the Fourteenth Amendment. *State v. Boysaw,* 309 Kan. 526, 537-38, 439 P.3d 909 (2019).

"The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. 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." *State v. N.R.,* 314 Kan. 98, 113, 495 P.3d 16 (2021).

There is no federal constitutional right to vote by mail. *McDonald,* 394 U.S. at 807-08. Kansas law provides an option to vote by mail. Plaintiffs cite a smattering of federal district court cases from other jurisdictions for the proposition that once a state provides the option to vote by mail, that option gives rise to a liberty interest entitled to procedural due process protections. Those cases are not persuasive.

More compelling is Defendants' argument that the right to vote by mail does not implicate a protected liberty or property interest under the federal and state constitutions. See, e.g., *Richardson,* 978 F.3d at 231 (the United States Supreme Court has not extended the label of "liberty interest" to the right to vote in general, let alone to the right to vote by mail); *Org. for Black Struggle v. Ashcroft,* 2021 WL 1318011, at *6 (W.D. Mo. 2021), citing *Org. for Black Struggle v. Ashcroft,* 978 F.3d 603, 607-08 (8th Cir. 2020) ("the right to vote by mail is not a liberty interest to which procedural due process protections apply"); *New Georgia Project v. Raffensperger,* 976 F.3d 1278, 1282 (11th Cir. 2020) (in case involving absentee ballot submission deadlines, the "generalized due process argument . . . would stretch concepts of due process to their breaking point"); *Memphis A. Phillip Randolph Inst. v. Hargett,* 482 F. Supp. 3d 673, 691 (M.D. Tenn.), *aff'd on other grounds Memphis A. Philip Randolph Inst. v. Hargett,* 978 F.3d 378 (6th Cir. 2020) (right to vote is not a liberty interest for purposes of procedural due process); *League of Women Voters of Ohio v. Brunner,* 548 F.3d 463, 479 (6th Cir. 2008) (right to vote does not trigger procedural due process because voting is not a liberty interest protected by the due process clause).

The state-created option to vote by mail does not give rise to a protected liberty interest under Section 18 of the Kansas Constitution Bill of Rights. Without such an interest, there is no entitlement to procedural protections and thus no need to analyze whether the protections provided are adequate. Plaintiffs' claim for deprivation of procedural due process rights under the state constitution fails as a matter of law. Defendants' motion to dismiss Plaintiffs' challenge to the SVR on this basis is granted.

OTHER MOTIONS.

The parties filed procedural motions related to the briefing of Defendants' motion to dismiss. Further, Plaintiffs very recently moved for a second partial temporary injunction.

A. PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANTS' REPLY IN SUPPORT OF THE MOTION TO DISMISS.

On October 14, 2021, Plaintiffs moved to strike a few sentences of Defendants' reply brief devoted to the observation that Plaintiffs raised only a facial challenge to portions of HB 2183. Plaintiffs asserted that this was a new argument not raised in the opening brief in support of the motion to dismiss, thus it was waived and could not be raised in the reply. Plaintiffs then explained why Defendants' underlying observation was wrong.

Defendants responded that the discussion of a facial challenge was referenced in the motion to dismiss, acknowledged in Plaintiffs' response to the motion to dismiss, and properly raised in Defendants' reply to counter Plaintiffs' assertions in their response. The Court agrees and denies the motion to strike portions of Defendant's reply in support of the motion to dismiss.

Defendants in a similar vein accuse Plaintiffs of using the motion to strike as a vehicle for an unauthorized sur-reply. Defendants urge the Court to disregard at least one portion of Plaintiffs' motion to strike. The Court has read both the Defendants' reply and Plaintiffs' motion to strike portions of the reply and will accept these documents for what they are worth to the analysis.

B. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY.

On November 24, 2021, Plaintiffs filed a "notice of supplemental authority and explanation." In essence, Plaintiffs wanted to draw the Court's attention to an opinion in *VoteAmerica v. Schwab*, No. 1:21-cv-02253-KHV-GEB, filed November 19, 2021. There, the

Kansas federal district court considered a challenge to HB 2332 regarding mailing advance ballot voting applications. Two of the defendants in the VoteAmerica case are Defendants here. In the November 19, 2021, opinion, the federal court denied a motion to dismiss the HB 2332 claims and granted Plaintiffs' request for a preliminary injunction preventing enforcement of a portion of HB 2332.

On December 1, 2021, Defendants filed a response and motion to strike Plaintiffs' notice of supplemental authority and explanation, and on December 15, 2021, Plaintiffs replied. Rather than spend time analyzing this repartee, the Court will simply take judicial notice of the November 19, 2021, opinion in *VoteAmerica* (later amended by the federal court in an opinion dated December 15, 2021) and draw its own conclusions about any application here, notably since Plaintiffs here have dismissed their challenge to HB 2332. Defendants' motion to strike the notice and explanation is denied.

C. PLAINTIFFS' MOTION FOR PARTIAL TEMPORARY INJUNCTION REGARDING THE SVR.

On April 7, 2022, Plaintiffs filed a motion for partial temporary injunction regarding the signature verification requirement. Given the Court's dismissal of Plaintiffs' challenge to the SVR for failure to state a claim, the Plaintiffs' motion for partial temporary injunction is moot and will not be considered.

CONCLUSION

For the reasons set forth above, the Court grants Defendants' motion to dismiss Plaintiffs' claims in the amended petition regarding the ballot collection restrictions and the signature verification requirement. No further journal entry is necessary.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to counsel of record.

/s Angela Cox
Administrative Assistant