IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED, CENER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, Plaintiffs-Appellants, v. SCOTT SCHWAB, in his official capacity as Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General, Defendants-Appellees.	Appellate Case No. 2022-125084-A Original Action No. 2021-CV-000299

DEFENDANTS-APPELLEES' MOTION TO DISMISS PLAINTIFFS-APPELLANTS' APPEAL FOR LACK OF JURISDICTION

Defendants-Appellees respectfully move this Court to dismiss this appeal for lack of jurisdiction. As set forth in more detail below, there is no final judgment in the case and Plaintiffs-Appellants' attempt to find a jurisdictional hook via the denial of a last-minute motion for a partial temporary injunction – which the district court denied as moot and did not even consider on the merits – offers them no refuge.

I. Introduction

Plaintiffs seek to appeal the district court's Memorandum Decision and Order, dated April 11, 2022, which dismissed their myriad constitutional challenges to two Kansas election integrity statutes: (i) a signature verification requirement for advance mail ballots;

and (ii) a restriction on the collection of advance mail ballots. *But the district court's ruling did not create a final judgment in the case*. Indeed, there remain multiple causes of action in the Amended Petition attacking statutory prohibitions related to the false representation of election officials. The district court denied Plaintiffs' motion for a temporary injunction on those latter provisions and they are now the subject of an appeal before this Court in Case No. 21-124378-A.

Regardless of whether the Court of Appeals affirms or reverses the district court's decision on the temporary injunction ruling in Case No. 21-124378-A, there still will be no final judgment on the claims at issue in that parallel appeal. One way or another, those causes of action will have to return to the district court for a ruling on the merits. The absence of a final judgment on *all claims remaining in the case* renders Plaintiffs' appeal of the recent dismissal order premature and beyond the jurisdiction of this Court.

Perhaps recognizing this jurisdictional impediment, Plaintiffs amended their notice of appeal to challenge the district court's denial of their new motion for a partial temporary injunction on the signature verification requirements for advance mail voting ballots, a motion they filed on April 11, 2022 – more than ten months after commencing their lawsuit and just four days before the district court dismissed their claims on the merits pursuant to K.S.A. 60-212(b)(6). *But there is effectively nothing to appeal on the temporary injunction issue because, having dismissed Plaintiffs' constitutional challenges to those requirements on the merits, the district court simultaneously denied the motion for a partial temporary injunction as moot and expressly declined to consider the merits of the motion.* At most, then, Plaintiffs' latest appeal is jurisdictionally confined to attacking the district court's

determination that the outright dismissal (on the merits) of the claims at issue in the temporary injunction motion rendered such motion moot, a conclusion that no reasonable person could possibly contest. Accordingly, this appeal must either be dismissed in whole or summarily affirmed.

II. Procedural History

1. Plaintiffs originally filed their Petition in this lawsuit in Shawnee County District Court on June 1, 2021. They asserted fourteen claims, attacking (on a vast array of different constitutional theories) four discrete election integrity statutes passed by the Legislature in 2021. Specifically, they challenged:

a. New criminal provisions related to the false representation of election officials (H.B. 2183, § 3(a)(2), (3)) (codified at K.S.A. 25-2438(a)(2), (3));

b. The signature verification requirement for advance mail voting ballots (H.B. 2183, § 5(h)) (codified at K.S.A. 25-1124(h));

c. Restrictions on the collection of advance mail voting ballots (H.B. 2183, § 2) (codified at K.S.A. 25-2437); and

d. Prohibitions on persons/entities not residing in Kansas from sending advance mail ballot applications to Kansas registered voters (H.B. 2332, § 3(*l*)(1)) (codified at K.S.A. 25-1122(*l*)(1)).

2. On June 18, 2021, Plaintiffs filed a motion for a partial temporary injunction in connection with their causes of action related to the false representation of an election official statute. Plaintiffs did not seek temporary injunctive relief on any other statute in their Petition.

3. Following a hearing, the district court denied Plaintiffs' motion for a partial temporary injunction on September 16, 2021. *See* Ex. A. (Although Defendants also had

a pending motion to dismiss at the time of the district court's ruling, the court expressly declined to consider the motion to dismiss when adjudicating the temporary injunction motion. *Id.* at 1.)

4. Plaintiffs appealed the denial of their partial temporary injunction motion to the Court of Appeals. *See* Case No. 21-124378-A. This case has been fully briefed and was argued before a three-judge panel on April 7, 2022. It is now awaiting a decision from the panel.

5. On March 2, 2022, Plaintiffs voluntarily dismissed their claims related to the restrictions in H.B. 2332, § 3(*l*)(1) on non-Kansas residents sending advance mail ballot applications to Kansas voters. *See* Ex. B.

6. On April, 7, 2022, Plaintiffs filed a second motion for a partial temporary injunction, this time challenging the signature verification requirement for advance mail voting ballots.

7. Four days later, on April 11, 2022, the district court granted Defendants' motion to dismiss Plaintiffs' causes of action involving signature verification requirements for advance mail voting ballots and restrictions on the collection of advance mail voting ballots.[1] *See* Ex. C. In that Memorandum Decision and Order, the district noted: "Given the Court's dismissal of Plaintiffs' challenge to the [signature verification requirements] for failure to state a claim, the Plaintiffs' motion for a partial temporary injunction is moot and will not be considered." *Id.* at 24.

[1] Defendants had filed a motion to dismiss Plaintiffs' Amended Petition on August 23, 2021.

8. In her dismissal Order, the court also specifically declined to address the merits of Plaintiffs' claims challenging H.B. 2183, § 3 (which she labeled the "False Representation Provision" or "FRP"). In particular, she observed:

> 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. 2d 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."). Ex. C, at 6.

9. On April 12, 2022, Plaintiffs filed a notice of appeal of the district court's dismissal of their various causes of action involving signature verification requirements for advance mail voting ballots and restrictions on advance mail voting ballot collection. *See* Ex. D.

10. On April 22, 2022, Plaintiffs amended their notice of appeal to additionally appeal the district court's decision deny as moot (and not address the merits) their motion for a partial temporary injunction on their various causes of action related to the signature verification requirements. *See* Ex. E.

III. Argument

This Court has no jurisdiction over Plaintiffs' appeal due to the absence of a final judgment on all claims in the case. "Kansas appellate courts may exercise jurisdiction only under circumstances allowed by statute; the appellate courts do not have discretionary power to entertain appeals from all district court orders." *Flores Rentals, L.L.C. v. Flores*, 283 Kan. 476, 481, 153 P.3d 523 (2007). In a Chapter 60 action such as the one in the case

at bar, K.S.A. 60-2102 dictates that appellate jurisdiction generally extends only to the following:

> (1) An order that discharges, vacates or modifies a provisional remedy.
>
> (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.
>
> (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.
>
> (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.

A. *This Court Has No Jurisdiction Over Plaintiffs' Appeal of the Dismissal of their Claims Pursuant to K.S.A. 60-212(b)(6) Because There Has Been No Final Judgment.*

There is no serious question that the only statutory avenue of appeal available to the Plaintiffs from the district court's April 11, 2022 dismissal of their constitutional attacks on the signature verification requirements for advance mail voting ballots and restrictions on the collection of advance mail voting ballots is K.S.A. 60-2102(a)(4). In other words, Plaintiffs may invoke the Court of Appeals' jurisdiction as a matter of right solely from a "final decision in [the] action." A "final decision" is one that "disposes of the entire merits of a case and leaves no further questions or possibilities for future directions or actions by the lower court." *Kaelter v. Sokol*, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015). But there

has been no "final decision" in this lawsuit. Indeed, Plaintiffs' claims challenging the FRP provisions in K.S.A. 25-2438(a)(2) and (3) remain a live issue.

It is true that the district court denied Plaintiffs' motion for a temporary injunction on the FRP issue, and Plaintiffs have appealed that ruling to the Court of Appeals, where it is now pending. A ruling on a temporary injunction, however, is *not* a ruling on the final merits of a claim. *Union Terminal R.R. Co. v. Bd. of R.R. Comm'rs.*, 54 Kan. 352, 38 P. 290, 292 (1894); *Wichita Wire, Inc. v. Lenox*, 11 Kan. App.2d 459, 464, 726 P.2d 287 (1986); *accord Univ. of Tex. v. Camenisch*, 451 U.S. 390, 396 (1981). No matter whether the Court of Appeals affirms or reverses the district court's decision on Plaintiffs' motion for a temporary injunction regarding the FRP, therefore, the claims at issue in that appeal will necessarily have to return to the district for final adjudication on the merits.

The statutory directive that appeals may be pursued only after all issues in the case have been ruled upon is rooted in the desire to avoid piecemeal litigation and thereby limit unnecessary litigation delays and costs. *See Honeycutt ex rel. Phillips v. City of Wichita*, 251 Kan. 451, 459, 836 P.2d 1128 (1992) ("The purpose of requiring a final decision prior to an appeal is to prevent intermediate and piecemeal appeals that extend and prolong the litigation and add cost to the litigation."). Were the rule otherwise, an "appellate yo-yo" could appear. As the Kansas Supreme Court noted in rejecting such a practice:

> A trial court order, however minor, would be appealed and all trial court proceedings would be stayed until the appeal's legitimacy eventually was ruled upon by the appellate court. Even if the appeal of the order were dismissed for lack of jurisdiction, another trial court order could be appealed and the trial court proceedings would again be stayed until ruled upon by the appellate court, and so on. *Harsch v. Miller*, 288 Kan. 280, 287, 200 P.3d 467 (2009).

The manner in which Plaintiffs have attempted to slice and dice this litigation presents the very type of concerns that K.S.A. 60-2102(a)(4) was designed to minimize. Indeed, there is a virtual certainty that whichever party loses on the merits on the RFP claims on remand will appeal once again to this Court. Allowing the appeal now before the Court to proceed, therefore, would guarantee a *third* appeal. This outcome is foreclosed by the rules of civil procedure and should not be countenanced.

Plaintiffs will eventually have their opportunity to appeal the district court's merits-based rulings on the causes of action at issue in this premature appeal. But such an appeal will have to await the district court's final adjudication of the merits of Plaintiffs' RFP-related claims. For now, the appeal of those dismissed claims must itself be dismissed for lack of jurisdiction.

B. *Plaintiffs' Appeal of the District Court's Denial of Their Motion for a Partial Temporary Injunction on the Signature Verification Requirements Must Be Dismissed or Summarily Affirmed.*

Plaintiffs are similarly precluded from appealing the substance of the district court's ruling on their challenges to the State's signature verification requirements by invoking the rule in K.S.A. 60-2102(a)(2) allowing for immediate appeals from the grant or denial of a temporary injunction. Indeed, the district court expressly declined to consider this motion and denied it as moot (just four days after it was filed and long before Defendants even had the opportunity to respond) in light of her outright dismissal under K.S.A. 60-212(b)(6) of the very same claims at issue therein. "When a district court proceeds to adjudicate the merits of the underlying action and enters a final judgment, an appeal from the denial of a

preliminary injunction is moot because a preliminary injunction is by its nature a temporary measure intended to furnish provisional protection while awaiting a final judgment on the merits." *Pinson v. Pacheco*, 424 F. App'x 749, 754 (10th Cir. 2011).

In any event, given the absence of a final judgement in this case, the only ruling that Plaintiffs could conceivably challenge in this appeal is the district court's determination that the motion for a temporary injunction on the signature verification claims was mooted by the dismissal of those same causes of action on the merits. And that was undeniably the case. In other words, there is absolutely nothing of substance in this appeal at this time. Accordingly, Plaintiffs' appeal of the denial of their last-minute motion for a temporary injunction must either be dismissed for lack of jurisdiction (as moot) or else summarily affirmed.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman
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CERTIFICATE OF SERVICE

I certify that on this 27th day of April, 2022, I electronically filed the foregoing "Defendants-Appellees' Motion to Dismiss Plaintiffs-Appellants' Appeal for Lack of Jurisdiction" with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record.

/s/ Bradley J. Schlozman

Exhibit A

(District Court Memorandum Decision and Order Denying Pls.' Mtn. for Partial Temp. Inj. On False Representation of Election Official Statute)

9/16/2021

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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

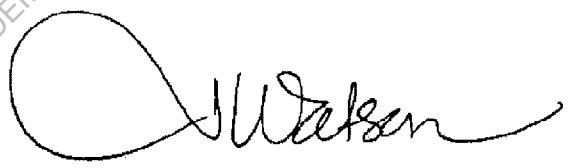
Court: Shawnee County District Court

Case Number: 2021-CV-000299

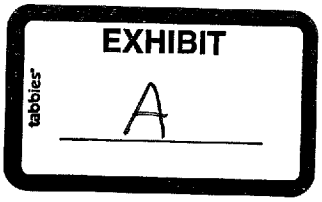
Case Title: League of Women Voters of Kansas, et al. vs. Scott Schwab - Kansas Secretary of State, et al.

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"). Plaintiffs submitted their motion based solely on affidavits and documentary evidence attached to their briefs. The Court at this time will address only Plaintiffs' motion for partial temporary injunction. The Court will not address Defendants' motion to dismiss the amended petition here.

STATEMENT OF FACTS

1. Plaintiffs named in the original petition are four Kansas organizations interested in the issue of voter participation. The amended petition added as plaintiffs three individuals who allege they are negatively affected by the recently enacted election laws.
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. HB 2183's New Section 3 is the focus of the instant motion. It says:

> "(a) False representation of an election official is knowingly engaging in any of the following conduct by phone, mail, email, website or other online activity or by any other means of communication while not holding a position as an election official:
>
> (1) Representing oneself as an election official;
>
> (2) engaging in conduct that gives the appearance of being an election official; or
>
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official.
>
> (b) False representation of an election official is a severity level 7, nonperson felony.
>
> (c) As used in this section, 'election official' means the secretary of state, or any employee thereof, any county election commissioner or county clerk, or any employee thereof, or any other person employed by any county election office."

CONCLUSIONS OF LAW

Plaintiffs seek a partial temporary injunction preventing the implementation and enforcement of Section 3(a)(2) and (3) in HB 2183. A temporary injunction is extraordinary relief, and the burden is on the movant to demonstrate all of the factors required to obtain it. *Schuck v. Rural Tel. Serv. Co., Inc.,* 286 Kan. 19, 24, 180 P.3d 571 (2008).

> "A temporary injunction merely preserves the relative positions of the parties until a full decision on the merits can be made. Even so, in order to obtain such an injunction, a plaintiff must show the court: (1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest." *Hodes & Nauser, MDs, P.A. v. Schmidt,* 309 Kan. 610, 619, 440 P.3d 461 (2019).

A. Likelihood of success on the merits.

Plaintiffs raise three constitutional challenges to the FRP, all grounded in Section 11 of the Kansas Constitution Bill of Rights: (1) it restricts core political speech without justification; (2) it is overbroad; and (3) it is vague. Section 11 provides that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." 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 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).

The constitutionality of a statute is question of law for the Court. "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 v. State,* 303 Kan. 512, 523, 364 P.3d 536 (2015). 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,* 309 Kan. at 673-74. Because there is no such declaration by the Kansas Supreme Court in regard to Section 11, the general presumption of constitutionality applies to the challenged provision.

1. Political speech.

Plaintiffs first argue that the FRP is unconstitutional because it criminalizes certain voter registration and education 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 spectrum of First Amendment jurisprudence: 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 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). HB 2183 Section 3(a) defines false representation of an election official as "knowingly engaging" in certain conduct "while not holding a position as an election official," to include: (1) "[r]epresenting oneself as an election official"; (2) "engaging in conduct that gives the appearance of being an election official"; or (3) "engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official." Plaintiffs for purposes of this motion do not challenge Section 3(a)(1), nor do they complain about the definition of "election official" in Section 3(c).

A culpable mental state is an essential element of every crime. K.S.A. 21-5202(a). K.S.A. 21-5202(i) defines "knowingly" in the context of criminal culpability as follows: "A person acts knowingly, or with knowledge, with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such

person's conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result." Put more succinctly, "knowingly" means that a person was "reasonably certain that X action would lead to X result." *State v. Chavez,* 2016 WL 5867484, *18 (Kan.App. 2016) (unpublished), citing *State v. Hobbs,* 301 Kan. 203, 211, 340 P.3d 1179 (2015).

Plaintiffs first argue that the FRP is unconstitutional because it criminalizes certain voter registration and education activities protected by Section 11. Defendants counter that the FRP does not infringe on Plaintiffs' free speech rights at all because neither Section 11 nor the First Amendment protect knowing false representations through conduct as described in Section 3(a)(2) and (3). While some types of false or misleading speech are protected by the First Amendment, falsely representing that one is speaking on behalf of the government or impersonating a government officer is not protected conduct. *U.S. v. Alvarez,* 567 U.S. 709, 721 (2012). Statutes criminalizing such activities "protect the integrity of Government processes, quite apart from merely restricting false speech." *Id.*

Plaintiffs assert that the FRP "prevents Plaintiffs from engaging in all voter registration, education, and engagement activities" because "Plaintiffs would consistently run the risk that their activities might overlap with the types of activities that election officials also perform, making them appear as if they are election officials, or causing them to be mistaken (however innocently) for election officials." Further, Plaintiffs argue that the FRP "shift[s] the law's focus away from the impersonator's intent and plac[es] it entirely in the subjective perceptions of others."

Plaintiffs downplay the word "knowingly" in Section 3 almost to the point of ignoring it. Section 3(a) defines the various types of false representation of an election official as "knowingly engaging" in certain conduct. "Knowingly" means that the actor must be aware of his or her conduct or circumstances and aware that the conduct is reasonably certain to cause the prohibited result. The statute requires a culpable state of mind on the part of the actor; there is no violation based solely on the subjective perception of a bystander. Indeed, to be convicted of a crime as defined in Section 3(a)(2) or (3) requires that the *actor* - not the bystander - be reasonably certain that what he or she is doing gives the appearance of or causes another person to believe that he or she is - specifically - the secretary of state, a county election official, a county clerk, or an employee of any of those.

The scenarios described by Plaintiffs in their affidavits do not help them. A representative of each organizational Plaintiff stated that its members always identify themselves as members of their respective organizations and not as election officials. See, e.g., Lightcap Affidavit, ¶25 ("At each in-person and virtual event, the Kansas League members have always represented themselves as such, and not local elections officials."); Hammet Affidavit ¶23 (in direct calls to voters offering assistance with provisional ballots, "we always identified ourselves as affiliated with Loud Light and not any governmental organization"); Smith Affidavit ¶18 ("we always correctly identify ourselves as affiliated with Kansas Appleseed, and not any governmental office or body"); Hyten Affidavit ¶26 ("to my knowledge, if anyone at the Center has been mistaken for an election official, we have moved swiftly to correct that misunderstanding. Nor am I aware of anyone at the Center or elsewhere intentionally misrepresenting themselves as an election official."). In light of their own evidence, it is difficult to credit Plaintiffs' fear of prosecution for knowingly engaging in false

representation through certain conduct when Plaintiffs insist that their members always correctly identify themselves as affiliates of their own organizations and not as government officials.

A plain reading of Section 3(a)(2) and (3) reveals no violation of Plaintiffs' free speech rights under Section 11. This dictates the application of the rational basis standard, asking whether the FRP bears a rational relationship to a legitimate state interest. But even assuming that Plaintiffs' free speech rights are somehow implicated by the FRP, any burden on protected speech or conduct would be slight at best. If any test other than rational basis could be applied, it would be the *Anderson-Burdick* "flexible balancing" test. This is also known as a "sliding scale" approach, where the scrutiny applied "will wax and wane with the severity of the burden imposed," and "lighter burdens will be approved more easily." *Fish,* 957 F.3d at 1124. This test provides that in the case of lesser burdens, the government's important regulatory interests justify reasonable, nondiscriminatory restrictions.

The state's interest in election laws is clear and well recognized. 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). These interests qualify as legitimate and important at the very least. Indeed, the Tenth Circuit has recognized a compelling state interest in the integrity of the election process. *Chandler,* 292 F.3d at 1241.

The FRP passes both the rational basis and the "flexible balancing" tests. The prohibitions on knowing false representation through conduct in Section 3(a)(2) and (3) are rationally related to the legitimate state interests of deterring fraud, protecting the integrity and fairness of elections, and maintaining public confidence in the election process. The FRP is also a reasonable, non-discriminatory provision justified by these same important, even compelling, government interests. Indeed, if it were necessary the FRP could pass more stringent scrutiny. In sum, the FRP does not violate the free speech clause of Section 11 of the Kansas Constitution Bill of Rights.

2. Overbreadth.

Plaintiffs next assert that the FRP is unconstitutionally overbroad. An overbroad statute criminalizes conduct that is constitutionally protected under some circumstances. *In re Comfort,* 284 Kan. 183, 201, 159 P.3d 1011 (2007). But because "almost every law is potentially applicable to constitutionally protected acts, [a] successful overbreadth challenge can thus be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications." *Smith v. Martens,* 279 Kan. 242, 253, 106 P.3d 28 (2005). An overbreadth challenge will only be successful if the challenged law "trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep." *State v. Whitesell,* 270 Kan. 259, 271, 13 P.3d 887 (2000).

Further, "[a] statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected, and as so construed the statute will thereafter be immune from attack on grounds of overbreadth." *State v. Stauffer Communications, Inc.,* 225 Kan. 540, 547, 592 P.2d 891 (1979). This is consistent with the notion

that the "overbreadth doctrine should be employed sparingly and only as a last resort." *Martens,* 279 Kan. at 253.

Plaintiffs assert that the FRP is overbroad because "every time Plaintiffs engage in their protected voter education, registration, or engagement activities they encounter an unavoidable risk that they will violate the . . . prohibitions because there is always a chance an observer might mistake them for a state or county employee," and the effect of the FRP is to "ban practically every third-party voter registration, education, or engagement program in the state." This is simply not true. As explained above, the FRP does not infringe on Plaintiffs' free speech rights at all because neither Section 11 nor the First Amendment protect *knowing* false representations through conduct as described in Section 3(a)(2) and (3). As discussed above, protected activity is not the law's target at all; it is certainly not a substantial part of the law's target given its plainly legitimate sweep. The FRP is not unconstitutionally overbroad.

3. Vagueness.

Finally, Plaintiffs assert that the FRP is unconstitutionally vague.

> "We use a two-part test to determine whether a statute is unconstitutionally vague. First, we consider whether the statute conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice. Next, we consider whether the statute adequately guards against arbitrary and discriminatory enforcement. The second part of the test embodies the requirement that a legislature establish minimal guidelines to govern law enforcement. We are interested in whether the language of the provision conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute that either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. A statute is not invalid for vagueness or uncertainty where it uses words of commonly understood meaning. At its heart, the test for vagueness is a common-sense determination of fundamental fairness." *Comfort,* 284 Kan. at 199.

Plaintiffs say that because the FRP "focuses entirely on others' subjective perceptions, it is impossible for Plaintiffs to know when they might be violating it." First, the FRP does not focus entirely on subjective perceptions. The first sentence in Section 3 makes clear that false representation of an election official is knowingly engaging in any of the described conduct. This focuses on the culpable mental state of the actor, not the subjective impression of a bystander. Second, a person of common intelligence understands what is meant by knowingly doing something that gives the appearance of or causes another person to believe that he or she is the secretary of state, a county election official, a county clerk, or an employee of any of those. Likewise, the required element of acting "knowingly" establishes more than minimal guidelines to govern enforcement of the law. Enforcement simply cannot occur without indicia of knowing conduct.

Plaintiffs at various points in their motion reference K.S.A. 21-5917(a), another false representation statute. It says: "False impersonation is representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false." This statute was held not to be unconstitutionally vague simply because the idea of "representing oneself" was not defined. The court held it was sufficiently clear that the crime was to claim to be something one is not. *State v. Marino,* 23 Kan.App.2d 106, 110, 929 P.2d 173 (1996) (statute also held not to be overbroad). Likewise here, common sense dictates that the crime is to claim, through knowing conduct, to be something one is not – specifically, the secretary of state, a county election official, a county clerk, or an employee of any of those. The FRP is not unconstitutionally vague.

4. Conclusion.

For the reasons stated above, Plaintiffs have not demonstrated a substantial likelihood of eventually prevailing on the merits of their Section 11 challenge to the FRP. This is fatal to their request for a partial temporary injunction.

B. Plaintiffs' other issues.

Because the Court has concluded that Plaintiffs have not demonstrated a substantial likelihood of eventually prevailing on the merits of their Section 11 challenge to the FRP, there is no need to examine the other components necessary to a grant of temporary injunction.

C. Defendants' other issues.

In their response to Plaintiffs' motion for partial temporary injunction, Defendants assert that Plaintiffs lack standing because there is no justiciable case or controversy, and Plaintiffs cannot prove associational or organizational standing. Because the Court has denied Plaintiffs' motion for partial temporary injunction on another basis as set forth above, the Court will not address Defendants' standing arguments here.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for partial temporary injunction is denied.

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

Exhibit B

(Pls.' Vol. Dismissal of Claims Challenging HB 2332, § 3(*l*)(1))

3/2/2022

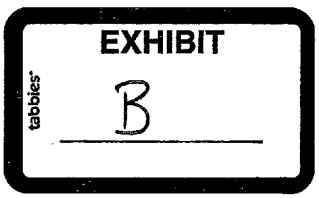
ELECTRONICALLY FILED
2022 Mar 02 PM 1:58
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE HUELSMANN, and PATRICIA LEWTER, Plaintiffs, v. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General, Defendants.	)	Case No. 2021-CV-299

PLAINTIFFS' NOTICE OF DISMISSAL OF CLAIMS RELATED TO HB 2332, SEC. 3

Pursuant to Kansas Rule of Civil Procedure 60-241(a)(1), Plaintiffs, Loud Light and Kansas Appleseed Center for Law & Justice, Inc., hereby voluntarily dismiss their challenges to HB 2332, Sec. 3 (codified at K.S.A. 25-1122(l)(1)) (the "Advocacy Ban"), which are found within the First, Fourth, and Fifth Claims for Relief in Plaintiffs' Amended Complaint. A different set of plaintiffs brought a challenge to the Advocacy Ban in the U.S. District Court for the District of Kansas in the matter of *VoteAmerica v. Schwab*, No. 1:21-cv-02253-KHV-GEB. In that case, as here, the Secretary of State and Attorney General are named defendants. The parties in the *VoteAmerica* case have since resolved the plaintiffs' claims against the Advocacy Ban, and the district court approved a Stipulated Order for Permanent Injunction and Declaratory Judgement on February 25, 2022, attached hereto as Exhibit A.



In the Stipulated Order, the court declared that the Advocacy Ban "violates the First and Fourteenth Amendments [to the United States Constitution], both facially and as-applied to [the *VoteAmerica*] Plaintiffs." Ex. A at 3. The order also permanently enjoined the Secretary and Attorney General, as well as their agents, employees, representatives, attorneys, and all persons in active concert or participation with them, from enforcing the Advocacy Ban. Ex. A at 3. Defendants stipulated that they would not appeal the order. Ex. A at 2. As a consequence of the stipulated order, there is no longer any live controversy in this case related to the Advocacy Ban. Plaintiffs therefore voluntarily dismiss their claims only to the extent they challenge that provision.

Respectfully submitted,

/s/ Pedro L. Irigonegaray

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/s/ Elisabeth C. Frost

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Counsel for Loud Light and Kansas Appleseed Center for Law and Justice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted via the Court's electronic filing system, to the following:

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/s/ Pedro L. Irigonegaray
Pedro L. Irigonegaray (#08079)

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VOTEAMERICA and VOTER PARTICIPATION CENTER, Plaintiffs, v. SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE in his official capacity as District Attorney of Johnson County, Defendants.	Civil Action No. 2:21-CV-2253

STIPULATED ORDER FOR PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

WHEREAS Plaintiffs VoteAmerica and Voter Participation Center (collectively, "Plaintiffs") filed a Complaint in this case against Defendants Scott Schwab, in his official capacity as Secretary of State of the State of Kansas; Derek Schmidt, in his official capacity as Attorney General of the State of Kansas; and Stephen M. Howe in his official capacity as District Attorney of Johnson County (collectively, "Defendants");

WHEREAS Plaintiffs allege that Defendants' enforcement of sections 3(k)(2) and 3(*l*)(1) of Kansas House Bill (HB) 2332 (codified at Kan. Stat. Ann. § 25-1122) violate their rights under the First and Fourteenth Amendments to the U.S. Constitution, and, as to section 3(*l*)(1) only, the Commerce Clause of the U.S. Constitution, as more fully set out in the Complaint;

WHEREAS Plaintiffs' Complaint seeks declaratory and injunctive relief to redress the alleged unlawful conduct, attorneys' fees, and costs;

WHEREAS Plaintiffs filed a motion to preliminarily enjoin Defendants from enforcing the challenged sections, and the Court issued an order granting Plaintiffs' motion and preliminarily enjoined Defendants from enforcing Sections 3(k)(2) and 3(*l*)(1) of HB 2332;

WHEREAS Defendants answered Plaintiffs' Complaint and did not appeal the Court's entry of a preliminary injunction;

WHEREAS Defendants as well as Plaintiffs wish to resolve this matter in part;

WHEREAS the Parties have stipulated to the entry of this Order and agree to be bound by its terms;

WHEREAS Defendants, without admitting any allegations in the Complaint beyond those admitted in their answer, do not object to entry of partial judgment in favor of Plaintiffs with respect to the entry of this Order;

WHEREAS Defendants stipulate that they will not appeal this Order;

WHEREAS entry of this stipulated Order will partially resolve Plaintiffs' freedom of speech, freedom of association, and overbreadth claims (Counts I, II, and III of the Complaint, respectively) as to section 3(*l*)(1) of HB 2332 and fully resolve Plaintiffs' dormant Commerce Clause claim (Count IV of the Complaint);

WHEREAS this stipulated Order will be entered under Federal Rule of Civil Procedure 65 and will constitute a final judgment in this matter as to the aforementioned claims;

WHEREAS the parties will continue to litigate Plaintiffs' claims (Counts I, II, and III) as to section 3(k)(2) of HB 2332, but the parties further stipulate that section 3(k)(2) does not apply to persons who mail or cause to be mailed an application for an advance voting ballot with any portion completed to a registered voter where the portion of such application completed prior to mailing is completed at the request of the registered voter. For the avoidance of doubt, the parties

stipulate that where a registered voter asks a person to mail or cause to be mailed an advance voting ballot application to the registered voter, and that person does so, that person does not "solicit[] by mail a registered voter to file an application for an advance voting ballot" as set forth in section 3(k)(1) of HB 2332;

THEREFORE, the Court HEREBY ORDERS:

1. Section 3(*l*)(1) of HB 2332 violates the First and Fourteenth Amendments, both facially and as-applied to Plaintiffs.

2. Defendants, their agents, employees, representatives, attorneys, and all persons in active concert or participation therewith, are permanently enjoined from enforcing section 3(*l*)(1) of HB 2332, including the penalties contained therein.

3. Plaintiffs' claims for declaratory and injunctive relief under the dormant Commerce Clause (Count IV) shall stand dismissed as moot.

4. Plaintiffs are the prevailing parties on Counts I, II, and III with respect to section 3(*l*)(1), and are entitled to an award of attorneys' fees and costs of this suit pursuant to 28 U.S.C. § 1920 and 42 U.S.C. § 1988. Within 45 days of this Order the parties shall attempt to reach an agreement regarding the amount of attorneys' fees and costs due to Plaintiffs. If they are unable to do so, Plaintiffs may file a motion for attorneys' fees and costs.

5. Defendants, their agents, employees, representatives, attorneys, and all persons in active concert or participation therewith, are permanently enjoined from enforcing section 3(k)(2) of HB 2332 against persons who mail or cause to be mailed an application for an advance voting ballot to a registered voter where the registered voter has asked such person(s) to mail or cause to be mailed an application for an advance voting ballot to such registered voter.

IT IS SO ORDERED.

Dated: 2/25/2022

s/ Kathryn H. Vratil
U.S. District Judge Kathryn H. Vratil

We agree to abide by the terms of this Order

Respectfully Submitted,

By: */s/ Mark P. Johnson*
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Attorneys for Plaintiffs

Dated: February 22, 2022

We agree to abide by the terms of this Order

Respectfully Submitted,

By: */s/ Bradley J. Schlozman*
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Scott R. Schillings (Bar # 16150)
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Attorneys for Defendants

Dated: February 22, 2022

Exhibit C

(District Court Memorandum Decision and Order Granting Defs.' Mtn. to Dismiss Pls.' Claims on Signature Verification Requirements and Ballot Collection Restrictions)

4/11/2022

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2022 Apr 11 PM 2:10
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

Court: Shawnee County District Court

Case Number: 2021-CV-000299

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

Exhibit D

(Pls.' Notice of Appeal)

4/11/2022

ELECTRONICALLY FILED
2022 Apr 11 PM 4:31
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

IN THE DISTRICT COURT OF SHAWNEE COUNTY KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAWAND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE HUELSMANN, AND PATRICIA LEWTER,

Plaintiffs,

v. CASE NO. 21-CV-299

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and DEREK SCHMIDT in his official capacity as Kansas Attorney General,

Defendants.

NOTICE OF APPEAL

Pursuant to K.S.A. 60-2102, Plaintiffs enter this notice of their intent to appeal the Court's dismissal of their claims regarding the ballot collection restrictions and the signature verification requirement filed on April 11, 2022.

Respectfully submitted, this 11th day of April, 2022.

/s/ Pedro L. Irigonegaray
Pedro L. Irigonegaray (#08079)
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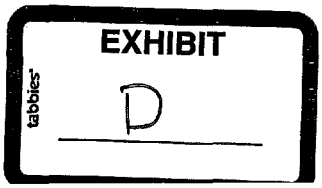

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**Appearing Pro Hac Vic*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted via the Court's electronic filing system to the following:

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/s/ Pedro L. Irigonegaray
Pedro L. Irigonegaray (#08079)

Exhibit E

(Pls.' Amended Notice of Appeal)

4/22/2022

ELECTRONICALLY FILED
2022 Apr 22 AM 10:44
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

IN THE DISTRICT COURT OF SHAWNEE COUNTY KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAWAND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE HUELSMANN, AND PATRICIA LEWTER,

Plaintiffs,

v. CASE NO. 21-CV-299

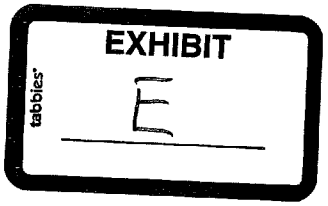
SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and DEREK SCHMIDT in his official capacity as Kansas Attorney General,

Defendants.

AMENDED NOTICE OF APPEAL

Pursuant to K.S.A. 60-2102, Plaintiffs enter this notice of their intent to appeal to the Kansas Court of Appeals the Court's dismissal of their claims regarding the ballot collection restrictions and the signature verification requirement filed on April 11, 2022, and the Court's refusal of Plaintiffs' Motion for a Temporary Injunction regarding signature verification as moot.

Respectfully submitted, this 22nd day of April, 2022.



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