

IN THE COURT OF APPEALS OF 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-Appellants,

v.

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

Defendants-Appellees.

Appellate Case No. 125084

Original Action No. 2021CV299

MOTION TO EXPEDITE APPEAL

Plaintiffs-Appellants appeal (1) the district court's dismissal of Plaintiffs' claims challenging the constitutionality of two new restrictions on advance voting in Kansas, and (2) the district court's resulting denial of their motion for a temporary injunction against one of these laws—the Signature Matching Requirement—pending at the time the Court issued its order of dismissal. Plaintiffs respectfully request that the Court of Appeals expedite consideration and resolution of this appeal because the timing of the district court's order puts Plaintiffs, their members, and their constituents at risk of being deprived

of fundamental constitutional rights in the state's upcoming primary and general elections scheduled to take place on August 2 and November 8, 2022.

This matter is brought by the League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center, nonpartisan nonprofit organizations focused on promoting the right to vote, as well as three individual Kansans. At issue in this appeal are Plaintiffs' challenges to two provisions in new omnibus election legislation (HB 2183 and HB 2332), enacted by the Legislature in May of last year over Governor Laura Kelly's veto. Plaintiffs filed this lawsuit immediately after the Legislature enacted the legislation, specifically challenging four provisions that infringe upon their fundamental constitutional rights under the Kansas Constitution. *See* Pet. (filed June 1, 2021) (attached hereto as Exhibit A). This appeal concerns two of those provisions.¹

First, the Signature Matching Requirement mandates that election officials reject mail ballots if they determine that the signature on the ballot

¹ One of the remaining two provisions challenged by Plaintiffs in their initial Petition has since been declared unconstitutional by a federal court in *VoteAmerica v. Schwab*, No. 21-CV-2253-KHV, 2021 WL 5918918 (D. Kan. Dec. 15, 2021) (holding that provision of HB 2332 restricting out-of-state organizations from mailing advance voting applications to Kansans violates First Amendment). A permanent injunction issued, and Plaintiffs accordingly voluntarily dismissed their state claim. The second of the remaining provisions challenged by Plaintiffs in this action is presently before this Court in a separate appeal from the district court's denial of Plaintiffs' motion for a temporary injunction, which was filed shortly after their Petition. *See* No. 124,378. That provision makes it felony to knowingly engage in conduct that gives the appearance of an election official or that would cause someone to believe the actor is an election official (the "False Representation Offense"). The appeal was argued on April 7, 2022 and taken under advisement by this Court.

envelope does not match the signature on file for the voter in the county election file. As Plaintiffs alleged in their Petition and demonstrated with evidence submitted in support of their motion to temporarily enjoin the measure, accurate signature matching is extremely difficult, even when done by experts. When done by inexperienced election officials under these circumstances, it is guaranteed to result in the mistaken rejection of ballots cast by lawful Kansas voters. Plaintiffs challenge this provision as a violation of the right to vote, equal protection, and due process under the Kansas Constitution—in line with several court decisions that have found similar regimes unconstitutional, including decisions by state courts under their state constitutions.

The second provision at issue in this appeal is the Delivery Assistance Restriction, which for the first time makes it a crime in Kansas to offer to assist more than ten voters in helping them return their ballots. The provision not only imposes an arbitrary and unjustifiable constraint on the ability of voters who rely on assistance to cast their ballots (e.g., voters in group living situations, rural areas, and tribal lands), restricting their right to vote, but also limits the ability of voting rights organization and individuals to engage in advocacy for voters who rely on such assistance, unnecessarily restricting free speech and association rights.

The 2022 elections will be the first statewide, large-turnout election cycle in which the legislation challenged in this action will be in effect. When

Plaintiffs initiated this litigation in June of 2021, they believed that, with the sole exception of the False Representation Offense, there was ample time to address their claims at a trial held in the normal course before the 2022 elections. To that end, Plaintiffs made repeated efforts to move the case forward on the merits. For example, once the Defendants' motion to dismiss the case—filed on August 23, 2021—had been briefed, Plaintiffs moved to expedite the case and proceed with discovery. *See* Pls.' Mot. to Set Case Management Conf. at 1, 3 (filed Oct. 14, 2021) (attached hereto as Exhibit B) (“Unless this litigation is quickly advanced and resolved—and the challenged provisions authoritatively construed upon a full record that evidences their anticipated and practical impact on Kansas voters, advocates, and elections officials alike—they will operate to chill core political speech and cause confusion in the 2022 elections, undermining public faith in the electoral system.”) (“Plaintiffs respectfully request that a case management conference be set as soon as the Court deems practicable.”). The district court denied the motion and stayed proceedings and discovery pending its resolution of the State's motion to dismiss. Order (Nov. 1, 2021) (attached hereto as Exhibit C).

Although the motion to dismiss became ripe for decision in October 2021, the district court did not issue a ruling until April 11, 2022, nearly six months later. The timing of the district court's decision does not leave Plaintiffs sufficient time to appeal and obtain relief on a normal appellate schedule. The

August 2 primary election is now less than four months away, and the November 8 general election only a little more than five months away. Unless this appeal is expedited and resolved in advance of those dates, lawful Kansas voters will have their ballots rejected, and Plaintiffs will be impeded in their efforts to help Kansans exercise their most fundamental rights, risking criminal penalty if they do so. Plaintiffs therefore respectfully request a briefing schedule under which this Court can issue a decision (and, if appropriate, relief) by **June 24, 2022**. Once the elections have come and gone, “there can be no ‘do-over’ or redress of a denial of the right to vote.” *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016), 840 F.3d at 752 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)); see also, e.g., *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). Indeed, “[t]he nature of elections . . . is that time is of the essence.” *Tenn. State Conf. of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 711 (M.D. Tenn. 2019).

The district court’s decision is premised on a series of significant legal errors, most of which flow from the court’s refusal to recognize that encroachments on fundamental rights—including the right to vote and freedom of speech—are subject to searching scrutiny under the Kansas Constitution. For example, the district court held that statutes that burden

these rights enjoy a presumption of constitutionality, despite the Kansas Supreme Court's recent pronouncement that laws that burden fundamental constitutional rights are given no such presumption. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461 (2019) (“[I]n cases involving . . . ‘fundamental interests’ . . . the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis” (quoting *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221, 227 (1978))). Additionally, contrary to Kansas Supreme Court and federal court precedent, the district court concluded that, in a facial challenge, no factual inquiry is necessary to determine the extent to which a law burdens a fundamental constitutional right. *See Hodes*, 309 Kan. at 672 (examining “factual findings” in facial challenge to determine whether Plaintiffs established infringement on right to abortion); *Fish v. Schwab*, 957 F.3d 1105, 1125 (10th Cir. 2020) (explaining that, in a facial challenge alleging that a statute unconstitutionally burdens the federal right to vote, courts must examine “evidence in the record” to determine the “magnitude of the burden”), *cert. denied*, 141 S. Ct. 965 (2020); *see also, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 213, 217–218 (D.N.H. 2018) (holding New Hampshire’s signature-matching law “facially violate[d]” due process because, “in light of the fundamental importance of the right to vote,” it failed to guarantee basic fairness, relying on evidence “in the record,” including expert analysis on the

reliability of signature matching by Dr. Linton A. Mohammed, who has submitted a report in this case). The district court's dismissal for failure to state a claim was premised on these and other significant legal errors that implicate important questions of constitutional law, further warranting this Court's immediate attention and reversal.

In short, if this appeal is not determined on an expedited schedule, Plaintiffs—through no fault of their own—will be effectively denied an opportunity to obtain meaningful review of the challenged provisions prior to the upcoming elections.

CONCLUSION

For the reasons stated herein, Plaintiffs-Appellants respectfully request that the Court of Appeals expedite briefing and resolve this appeal by June 24, 2022.

Respectfully submitted, this 27th day of April 2022.

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** Pro Hac Vice Motions Forthcoming*

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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