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. 125,084

Original Action No. 2021CV299

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLEES' MOTION TO DISMISS APPEAL

The Court should deny the motion to dismiss the appeal filed by Defendants-Appellees (the "State"), which is wrong on both the facts and the law. The Court has jurisdiction to hear this appeal under two different provisions: K.S.A. 60-2102(a)(2) and K.S.A. 60-2102(a)(3). Although both bases for jurisdiction were stated in Plaintiffs' docketing statement, the State's motion to dismiss does not even address K.S.A. 60-2102(a)(3). Instead, the State focuses on K.S.A. 60-2102(a)(2) and a separate jurisdictional provision that Plaintiffs do not rely upon. The Court can and should reject the State's

motion for its failure to address K.S.A. 60-2102(a)(3) alone. But the State's position that this Court lacks jurisdiction under K.S.A. 60-2102(a)(2) is also fatally flawed: it is not even supported by the case law upon which the State relies. The State also misrepresents the series of events before the district court in support of its argument. Plaintiffs' motion for a temporary injunction, which seeks to obtain critical relief to protect against the irreparable violation of Plaintiffs' (and countless other Kansans') fundamental rights in the 2022 elections, was not a "last-minute" attempt to "find a jurisdictional hook" to appeal. Mot. at 1. Plaintiffs filed that motion out of necessity when it became clear that preliminary relief was the only means to obtain relief in time for the 2022 elections, which will be the first large-turnout, statewide election cycle since the challenged laws took effect. At that point, the State's motion to dismiss had been pending for over six months, and every effort that Plaintiffs made to move the case forward had been ignored or rejected. Plaintiffs have attempted to advance this case and obtain timely relief at every turn, but they have been stymied by tactics aimed at delaying review of Plaintiffs' important claims. The motion to dismiss now before this Court is similarly crafted to deny Plaintiffs timely relief. The State's arguments should be rejected.

ARGUMENT

The Court has jurisdiction on at least two separate and independent grounds. *First*, because the district court's order "refuse[d] . . . an injunction,"

this Court has jurisdiction to review that denial under K.S.A. 60-2102(a)(2) and any determinations that are "inextricably intertwined" with it pursuant to its pendent jurisdiction. *City of Neodesha v. BP Corp. N. Am.*, 295 Kan. 298, 312, 287 P.3d 214, 224 (2012). *Second*, because the order "involv[es] . . . the constitution of this state," and represents "a final determination" of the "constitutional questions," this Court also has jurisdiction under K.S.A. 60-2102(a)(3)—a grounds for appeal that was noted in Plaintiffs' docketing statement, but which the State fails to address in its motion to dismiss. *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164, 165 (1965). Remarkably, most of the State's motion argues that the Court lacks jurisdiction over this appeal under K.S.A. 60-2102(a)(4), which grants an appeal as of right from a "final decision in any action." Mot. at 5-8. *But Plaintiffs do not invoke this provision as a basis for jurisdiction in this appeal*. *See* Docketing Statement at 2-3. The State's motion should be denied.

I. The Court has jurisdiction under K.S.A. 60-2102(a)(2).

This Court has jurisdiction to consider this appeal because the district court's order denied Plaintiffs' motion for a temporary injunction. *See* K.S.A. 60-2102(a)(2) (allowing immediate appeal of order refusing an injunction). The State asserts in a two-paragraph argument that Plaintiffs are "precluded from appealing the substance of the district court's ruling on their challenges to the State's signature verification requirements by invoking" this provision,

because the refusal of Plaintiffs' temporary injunction motion was based on the district court's determination that the motion was moot (in light of its dismissal of the underlying claims). Mot. at 8-9. But the State offers no authority in support of this argument, and for good reason: the plain text of the jurisdictional statute and the case law actually instruct the opposite.

The district court's order undeniably "refuses . . . an injunction." K.S.A. 60-2102(a)(2). That is all that is required to invoke this Court's jurisdiction. *Id.* And the State cites nothing that establishes otherwise. Instead, the State relies on a single out-of-jurisdiction case, *Pinson v. Pacheco*, 424 F. App'x 749, 754 (10th Cir. 2011), interpreting the analogous federal rule.[1] But that authority and the later case law interpreting it supports *finding jurisdiction* here, not dismissal as the State urges.

In *Pinson*, the Tenth Circuit stated that, "[w]hen 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." *Id.* (emphasis added). In a subsequent decision not mentioned by the State in its motion, the

[1] "Because the statutory language of K.S.A. 2012 Supp. 60–254(b) and Federal Rule of Civil Procedure 54(b) are identical, Kansas appellate courts have adopted and followed the federal decisions interpreting Rule 54(b)." *Prime Lending II, LLC v. Trolley's Real Est. Holdings, LLC*, 48 Kan. App. 2d 847, 852, 304 P.3d 683, 686 (2013). Thus, Plaintiffs agree that the Tenth Circuit's cases interpreting that rule are persuasive, but they are, of course, not binding.

Tenth Circuit made explicitly clear that by "final judgment" it meant judgment on all of the claims in the action, or a partial final judgment expressly entered under Rule 54(b).[2] As a result, this rule does *not* apply where—as here—the Court has not entered a final judgment on the underlying claims in the case:

> [B]y its plain terms, this rule applies only where there is a *final* judgment. The district court's order granting partial summary judgment *concerned only six of the seven claims at issue* in the case. Because the district court did not direct entry of final judgment on those six claims under Federal Rule of Civil Procedure 54(b), the district court remains free to revise that order "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

Wellington v. Daza, 795 F. App'x 605, 608 (10th Cir. 2020) (first emphasis in original) (quoting Fed. R. Civ. P. 54(b)).

Because the district court has not entered final judgment, Plaintiffs' request for a temporary injunction cannot be considered "moot," and this Court may proceed to review the district court's denial of that motion. *See id.* Indeed, in *Wellington* itself, the Tenth Circuit proceeded to consider whether the plaintiff was entitled to a preliminary injunction, even though the district court had dismissed the underlying claims. *Id.* at 608-09. And, as in *Wellington*, "Defendants have cited no case" to the contrary. *Id.* at 608. Thus, the State's argument that the district court's refusal of Plaintiffs' temporary injunction

[2] The Kansas analog to Rule 54(b) is KSA 60-254(b). Because only some claims have been disposed of here (as in *Wellington*), it's not a final judgment unless the Court entered it as such under KSA 60-254(b), which it did not. *See* Order at 25 ("No further journal entry is necessary.").

motion is not appealable under K.S.A. 60-2102(a)(2) because the court declared it moot is meritless and should be rejected.[3]

The district court's dismissal of the underlying claims upon which Plaintiffs sought the temporary injunction is also reviewable by this Court in this appeal under K.S.A. 60-2102(a)(2), because that decision is "inextricably intertwined" with the Court's denial of Plaintiffs' motion for temporary injunction. *E.g.*, *City of Neodesha*, 295 Kan. at 312 (explaining Kansas's appellate courts have "pendent or supplemental interlocutory jurisdiction where the issue is 'inextricably intertwined' with other issues that do not meet K.S.A. 60–2102's criteria" (quoting *Williams v. Lawton*, 288 Kan. 768, 785, 207 P.3d 1027, 1041 (2009))). The district court's refusal of the motion for a temporary injunction is inextricably intertwined with the district court's grant of the State's motion to dismiss for failure to state a claim because it rested its decision to refuse the temporary injunction solely on its decision to grant the motion to dismiss. Order at 24. As such, unless this Court were to address the district court's disposition of the motion to dismiss (and order that the claims

[3] Relatedly, appellate courts have the power to resolve injunction factors that the district court ignored so long as there is evidence in the record to support the inquiry. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) ("If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so [in the first instance] if the record is sufficiently developed." (quoting *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009))).

be revived), "[a] determination that there was error in [the district court's refusal of Plaintiffs' motion for a temporary injunction] would be meaningless." *Williams*, 288 Kan. at 786; *see also City of Neodesha*, 295 Kan. at 312 ("[T]he second issue presented is inextricably intertwined . . . because if [the] order is left intact, it could potentially negate any ruling by this court.").

For the same reason, the State's argument that this Court's jurisdiction is "[a]t most" 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," Mot. at 2-3, is incorrect. Even if this Court were to consider the limited question of whether it was proper for the district court to declare that Plaintiffs' motion for a temporary injunction was moot, as the State appears to concede it may, *see id.*, the Court would still necessarily have to address the district court's dismissal of the underlying claims to effectively review that decision (otherwise, were the Court to rule in Plaintiffs' favor on that question, there would be no live claim on remand).[4]

Plaintiffs admittedly did not move for a temporary injunction on their claims against the Delivery Assistance Restriction, the provision criminalizing the delivery of more than ten advance ballots. However, the district court's

[4] Though the State is wrong that this is the only matter the Court may consider, its concession that the Court may review some aspect of the district court's ruling is sufficient reason to deny its motion, which is premised on the court having *no* jurisdiction.

dismissal of those claims is also intertwined with the denial of the temporary injunction motion because it rested on the same faulty conclusions about the protections afforded by the Kansas Constitution that led the district court to dismiss the claim that was the subject of Plaintiffs' temporary injunction motion. *See* Order at 6-9 (discussing legal standards that purportedly apply to Plaintiffs' challenges to both the Signature Matching Requirement and the Delivery Assistance Restriction); *see also* Plaintiffs-Appellants' Mot. to Expedite Appeal at 5-7 (explaining the district court erred, among other things, in presuming the constitutionality of the challenged laws and concluding it need not consider any evidence to determine whether the laws infringe fundamental rights).

As the Kansas Supreme Court has emphasized, pendent jurisdiction is intended to "promote judicial economy." *City of Neodesha*, 295 Kan. at 312 (2012); *Williams*, 288 Kan. at 785. To avoid the State's purported concern about "piecemeal" litigation, Mot. at 7, the Court should reverse all the adverse rulings that flow from the district court's error. Dismissing this appeal would also run afoul of the purpose underlying the statutory right of appeals from denials of temporary relief. *See, e.g.*, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (explaining that appeals from a refusal of preliminary injunction are granted "as of right" so the adverse party may immediately and "effectually challenge interlocutory orders of serious, perhaps irreparable, consequence").

Here, given the time-sensitive nature of the appeal, if the State's position is adopted and the district court's order left intact as the 2022 elections proceed, Plaintiffs will be at grave risk of suffering the serious and irreversible consequences of being irreparably deprived of fundamental constitutional rights. And, under the State's theory, *even if the district court got it completely wrong*, Plaintiffs will have no opportunity whatsoever to seek appellate review to preserve and protect their fundamental rights until the entire case is again before the district court, *and* the district court either dismisses the claim over which it presently lacks jurisdiction (because it is the issue of a separate appeal pending before this Court), or tries the case to judgment. That could take months, or even years. Such a result would run afoul both of the plain text of the law governing this Court's jurisdiction and basic principles of equity, not least of all because this matter involves fundamental constitutional rights.

In short, jurisdiction is proper under K.S.A. 60-2102(a)(2), and Plaintiffs should not be denied review of their motion for a provisional remedy ahead of the 2022 elections merely because the district court made errors of law that caused it to dismiss the underlying claims and then deny the temporary injunction. The State's motion to dismiss should be denied.

II. The Court has jurisdiction under K.S.A. 60-2102(a)(3).

The Court also separately has jurisdiction under K.S.A. 60-2102(a)(3), which grants an appeal as a matter of right from orders "involving . . . the

constitution of this state." *Id.*; *Cusintz*, 195 Kan. at 302 ("An appeal is permitted from '[a]n order . . . involving . . . the constitution of this state.'" (quoting K.S.A. 60-2102)). To qualify for review under K.S.A. 60-2102(a)(3), the lower court's order must involve a "constitutional question" and it must have "some semblance of finality." *Cusintz*, 195 Kan. at 302; *see also id.* ("The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy."). Here, both requirements are met because the district court's dismissal represents a "final determination of the constitutional controversy" raised by Plaintiffs' claims. *Id.* Although Plaintiffs noted K.S.A. 60-2102(a)(3) as a basis for appellate jurisdiction in their docketing statement, the State's motion to dismiss this appeal offers no argument as to this provision. But K.S.A. 60-2102(a)(3) independently gives this Court jurisdiction over this appeal, and its applicability is beyond credible dispute.

First, there can be no dispute that the district court's order involves the constitution of this state: All of Plaintiffs' claims arise under provisions of the Kansas Constitution's Bill of Rights. Order at 17 ("The [Delivery Assistance Restriction] . . . do[es] 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."); *id.* at 21 ("The Court grants Defendants' motion to dismiss the right to vote and equal protection claims regarding the [Signature Matching Requirement]."); *id.* at 22 ("Plaintiffs' claim for deprivation of procedural due process rights under the state constitution fails as a matter of law."); *see also Cusintz*, 195 Kan. at 302 (appellant challenging constitutionality of child-support statute "raise[d] a constitutional question").

Second, the district court's April 11 Order purports to conclusively resolve these constitutional questions, creating a semblance of finality. Again, *Cusintz* is instructive. There, the district court denied a defendant's motions to dismiss and to strike a temporary alimony order, in which the defendant had argued that the statute permitting the plaintiff's claim was unconstitutional. *Cusintz*, 195 Kan. at 301-02. The defendant sought review, and the Kansas Supreme Court concluded that, because the claim he was defending against remained live in the district court, the district court had not yet had an "opportunity to make a full investigation and determination of the controversy." *Id.* at 302. The Court therefore held the order did not have the "semblance of finality" necessary for interlocutory jurisdiction to lie under the "constitutional question" provision. *Id.*

In marked contrast to *Cusintz*, the district court in this case expressly declared that it had fully resolved Plaintiffs' constitutional claims against the

Signature Matching Requirement and the Delivery Assistance Restriction. Order at 6 (The "arguments detailed [in the order] dispose of the claims before the Court."). Thus, as indicated in the order itself, the district court determined there was no need for further "investigation and determination" as to the constitutional controversy. *Cusintz*, 195 Kan. at 302; *see* Order at 25. The order therefore has the semblance of finality that was lacking in *Cusintz*, rendering it appealable under K.S.A. 60-2102(a)(3).

Given that this appeal satisfies the jurisdictional requirements as set out by the Legislature and the decisions of the Kansas Supreme Court, this Court should not accept the State's invitation to turn a blind eye to the significant and time-sensitive constitutional questions at issue. "Statutory rules of appellate procedure" are intended "to accomplish the ends of justice." *Atkinson v. Bd. of Educ., Unified Sch. Dist. No. 383*, 235 Kan. 793, 796, 684 P.2d 424, 427 (1984); *see also id.* at 797 ("Where the legislature has provided the right of an appeal, the minimum essential elements of due process of law, in an appeal affecting a person's life, liberty or property, are notice and an opportunity to be heard at a *meaningful time and in a meaningful manner*.") (emphasis added); *cf.* K.S.A. 60-2101(a) ("In any case properly before it, the court of appeals shall have jurisdiction to . . . assure that any such act, order or judgment is just, legal and free of abuse."). Absent this Court's swift review, Plaintiffs, their members, and their constituents across Kansas—not to

mention countless other Kansas voters—will suffer severe, irreparable harm to their rights guaranteed to them by the Kansas Constitution. Such a result would not only be unjust, but also contrary to the purpose of the jurisdictional statutes that confer jurisdiction in this appeal.

CONCLUSION

For the reasons stated herein, Plaintiffs-Appellants respectfully request that the Court of Appeals deny the State's motion to dismiss this appeal.

Respectfully submitted, this 2nd day of May 2022.

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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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