IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED, CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, 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' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION TO EXPEDITE APPEAL

Defendants-Appellees Scott Schwab and Derek Schmidt respectfully submit this response in opposition to Plaintiffs-Appellants' motion to expedite this appeal. There is no sound basis for expediting this appeal and the motion, therefore, should be denied.

1. Preliminarily, as Defendants pointed out in their own motion to dismiss this appeal for lack of jurisdiction (filed on April 27, 2022), this Court has no jurisdiction over Plaintiffs' appeal. There is no final judgment in the case because Plaintiffs' constitutional challenges to the statute prohibiting false representations of election officials, K.S.A. 25-2438(a)(2), (3), have not yet been adjudicated on the merits. Moreover, the district court's outright dismissal of Plaintiffs' claims attacking the signature verification requirement in K.S.A. 25-1124(h) rendered their motion for a partial temporary injunction on those same

causes of action moot, further depriving this Court of jurisdiction over the appeal of that motion's denial. *See Pinson v. Pacheco*, 424 F. App'x 749, 754 (10th Cir. 2011) (Briscoe, J.) ("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."). Accordingly, there is no statutory basis for Plaintiffs to pursue an appeal at all (let alone an expedited appeal) of the district court's rulings in its Memorandum Decision and Order from April 11, 2022.

2. Although Plaintiffs lament that the district court did not rule on Defendants' motion to dismiss until April 11, 2022, the actual source of their predicament is that they waited until April 7, 2022 – more than *ten months* after commencing their lawsuit on June 1, 2021 – before seeking temporary injunctive relief on their claims directed at the signature verification requirement. They thus have no one to blame but themselves for the tight time crunch between now and the upcoming elections.

3. Even if this Court had jurisdiction over Plaintiffs' appeal of their dismissed claims – and it clearly does not – Plaintiffs' proposed expedited time frame for resolving this appeal is totally unrealistic and would essentially accomplish nothing. The idea that all briefing in this appeal will be completed, an oral argument will be held, and a written decision by the Court will be handed down by June 24, 2022 borders on the absurd. Much more to the point, though, such an accelerated schedule would serve little point.

There have been no evidentiary hearings in the district court on any of the claims at issue in this appeal. In fact, Defendants did not even have an opportunity to respond to

Plaintiffs' partial temporary injunction motion on the signature verification requirement because the district court dismissed all claims targeting that statute *on the merits* pursuant to K.S.A. 60-212(b)(6) four days after the motion was filed. As a result, even if this Court were to reverse the district court's April 11 ruling on the time frame that Plaintiffs request, the case would simply return to the district court for record development, discovery, and further proceedings. And as sure as night follows day, there would be another appeal of any district court ruling on remand. There is thus no conceivable way that Plaintiffs would obtain a final decision on their challenges to these election integrity statutes prior to the upcoming elections.

4. Moreover, just as the U.S. Supreme Court has consistently directed federal district courts to exercise significant caution and restraint before ordering any changes to a state's election procedures in the run-up to an election, the same principles are applicable here. Such "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As the election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *id.* at 5-6 (vacating trial court's stay of injunction against enforcement of voter ID issued less than five weeks before election). Requests for any sort of injunctive relief that would change election procedures in close proximity to an election are met with extreme skepticism and nearly always rejected. *See Veasey v. Perry*, 769 F.3d 890, 894-95 (5th Cir. 2014) (cataloguing Supreme Court cases).

Justice Kavanaugh, in a recent concurrence denying an application to vacate a stay of a district court's attempt to change a state's election procedures too close to the election,

nicely described the policy considerations behind courts needing to stay their hand in these late-in-the day disputes. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020):

> The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.
>
> Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.
>
> That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion – and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election. *See Purcell*, 549 U.S., at 4–5; *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality opinion). The principle also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process. For those reasons, among others, this Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate.

5. To be sure, the U.S. Supreme Court has recognized that *state legislatures* – in light of their express authority to prescribe the "Times, Places, and Manner" of holding federal elections under Article I, Section 4 of the U.S. Constitution – may make last-minute changes to election procedures. But the *judiciary* must exercise much greater restraint. As one court noted, "Call it what you will – laches, the *Purcell* principle, or common sense – the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

6. The primary election in Kansas is scheduled for August 2, 2022. Pursuant to K.S.A. 25-1122(f)(1), county election offices began formally accepting advance mail ballot applications for the primary election – which include a signature verification requirement – on April 1 (approximately one week before Plaintiffs even filed their most recent motion for a partial temporary injunction). Although advance ballots for most voters will not be sent out until July 13 (twenty days before the election) by virtue of K.S.A. 25-1123(a), the signature verification process will commence long before then. In fact, applications from members of the military and individuals residing outside the United States are processed, and ballots are mailed out to voters, by county election offices well in advance of the July 13 date; federal law dictates that validly requested absentee ballots must be transmitted to absent uniformed services and overseas voters at least forty-five days prior to the election. 52 U.S.C. § 20302(a)(8).

7. Furthermore, the Kansas County Election Clerks and Election Officials Association is holding its annual conference this week, and election official training – including on the new signature verification requirements – are included in that training.

Additional training is also slated to occur well in advance of the time frame that Plaintiffs propose for resolution of their appeal.

8. Meanwhile, the Secretary of State's Office will soon be issuing guidance on the signature verification requirements via a temporary regulation, which is expected to be presented to the State Rules and Regulations Board for approval later this month.

9. As if all the foregoing were not reason enough to reject Plaintiffs' request to expedite this appeal, Plaintiffs have no standing to pursue any cause of action challenging the signature verification requirements in K.S.A. 25-1124(h) – the only statute targeted by their most recent motion for a partial temporary injunction. While the district court opted to assume standing and reach the merits of the claims, the standing issue would have to be addressed if the court of appeals were to find fault with the district court's reasoning. This unequivocal lack of standing – spelled out in great detail in Defendants' Memorandum in Support of their Motion to Dismiss Plaintiffs' Amended Petition (and reply thereto), filed August 23, 2021 and October 1, 2021, respectively – would further render pointless any acceleration of the briefing schedule in this appeal.

10. In sum, expediting the briefing schedule (and resolution) of this appeal along the lines that Plaintiffs request would be both counterproductive and devoid of utility. The Court has no jurisdiction due to the lack of a final judgment, the Plaintiffs have no standing, the legal landscape will soon change with imminent regulatory guidance, a reversal of the district court's decision (however unlikely) would not provide Plaintiffs the relief they seek given the necessary proceedings on remand, and the immanency of the upcoming elections

strongly counsels against any action by this Court (or the district court) that would alter the mechanics and procedures in place for those elections.

Accordingly, Defendants submit that Plaintiffs' motion to expedite this appeal should be denied.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman
Bradley J. Schlozman (Bar # 17621)
Scott R. Schillings (Bar # 16150)
HINKLE LAW FIRM LLC
1617 North Waterfront Parkway, Suite 400
Wichita, KS 67206
Telephone: (316) 267-2000
Facsimile: (316) 630-8466
Email: bschlozman@hinklaw.com
E-mail: sschillings@hinklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 2022, I electronically filed the foregoing "Defendants-Appellees' Response to Plaintiffs-Appellants' Motion to Expedite Appeal" with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which caused electronic notifications of such filing to be sent to all counsel of record. I also hereby certify that a true and correct copy of the foregoing was e-mailed to the following individuals:

Pedro L. Irigonegaray
Nicole Revenaugh
Jason Zavadil
J. Bo Turney
IRIGONEGARAY, TURNEY, & REVENAUGH LLP
1535 S.W. 29th Street
Topeka, KS 66611
Email: Pedro@ITRLaw.com
Email: Nicole@ITRLaw.com
Email: Jason@ITRLaw.com
Email: Bo@ITRLaw.com

David Anstaett
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703
Email: DAnstaett@perkinscoie.com

Elizabeth C. Frost
Henry J. Brewster
Tyler L. Bishop
Spencer M. McCandless
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
Email: efrost@elias.law
Email: hbrewster@elias.law
Email: tbishop@elias.law
Email: smccandless@elias.law

/s/ *Bradley J. Schlozman*
Bradley J. Schlozman (KS Bar #17621)