

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' REPLY IN SUPPORT OF
MOTION TO EXPEDITE APPEAL**

Plaintiffs-Appellants submit this short reply to briefly address two assertions Defendant-Appellees (the “State”) make in their Response to Plaintiffs’ Motion to Expedite. *First*, the Court absolutely has the authority to decide this appeal, and it is not too late for it to provide meaningful relief. For reasons already discussed in prior filings, this Court has jurisdiction. The State’s reliance on the *Purcell* doctrine, which was created by the federal judiciary, is not only *not* binding on this Court, it is based on concerns that are not applicable here. *Second*, the State—for the very first time—asserts that

the Secretary intends to hold training on the Signature Matching Requirement at an annual conference of Kansas election officials taking place “this week,” and issue guidance on the Requirement “later this month.” Resp. ¶¶ 7-8. The Secretary does not provide any further information about what this training or guidance will entail, and there is no reason to conclude that it will have any impact on Plaintiffs’ claims. The Court should decline to delay resolution of this important matter on this basis.

ARGUMENT

I. The Court has time and authority to issue the requested relief.

The State’s arguments that this Court lacks jurisdiction to decide this appeal should be rejected for the reasons addressed in Plaintiffs’ opposition to the State’s motion to dismiss. *See* Pls.-Appellants’ Opp’n to State’s Mot. to Dismiss Appeal (filed May 3, 2022).

The State’s reliance on the federal judiciary’s *Purcell* doctrine as reason to delay prompt adjudication of this appeal is also thoroughly misplaced. *See* Resp. ¶ 4 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). No Kansas court has ever adopted *Purcell*, much less relied on it to deny relief for violations of the Kansas Constitution. For good reason: *Purcell* is a *federal* doctrine of “judicial restraint” that governs “a *federal* court’s last-minute interference with state election laws.” Resp. ¶ 4 (quoting *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J.,

concurring) (emphasis added)). The comity concerns that underly *Purcell* do not apply here, where a state court is considering a challenge brought under the state's constitution to that state's own election laws. *E.g.*, *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *11 n.16 (N.Y. Apr. 27, 2022).

And, in fact, state courts have often issued decisions suspending state election laws in the months and even weeks leading up to an election. *See, e.g.*, *Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. 2020), *reh'g denied* (Jan. 30, 2020) (affirming district court's injunction prohibiting enforcement of voter-ID law entered 14 days before 2018 general election); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020) (ordering extension of deadline for mail ballots six weeks before 2020 general election). This is consistent with the direction of the Kansas Supreme Court in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 621, 440 P.3d 461, 470 (2019), that Kansas courts apply state law "independently of the manner in which federal courts" do, and that blindly following federal decisions "seems inconsistent with the notion of state sovereignty." *Id.* The State's request that this Court decline to allow Plaintiffs an opportunity to obtain pre-election relief on their state constitutional claims in this appeal based on *Purcell* would be similarly inconsistent with Kansas's sovereign power to interpret and enforce its own Constitution.

It is true that *Purcell* advises federal judges to avoid altering election rules on the eve of an election if doing so would cause "voter confusion [and]

election administrator confusion.” *Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). But the relief that Plaintiffs seek is not of this nature. It would help ensure that lawful voters are *not disenfranchised* by confusion over the new laws. Election officials would need only *refrain* from enforcing the unlawful provisions, conducting elections just as they did prior to the enactment of these new provisions. There is no credible argument that this would raise a serious risk of confusion, much less one that outweighs the concrete threat to voters’ fundamental rights by the laws’ enforcement.¹

The State’s argument that Plaintiffs’ motion should be denied because the State did not have an opportunity to respond to the motion for a temporary injunction before the district court denied it as moot, should also be rejected. *See Resp.* ¶ 3. There are multiple means of addressing this issue without denying Plaintiffs the opportunity to obtain meaningful relief. For example, the State could make a proffer to this Court of the evidence that it would introduce below on remand. This Court could make a determination as to

¹ Notably, in arguing to the contrary, the State points to election procedures *that would not actually be impacted* by the relief Plaintiffs seek. *See Resp.* ¶ 6. Plaintiffs do *not* challenge any signature verification that may occur with respect to “advance mail ballot *applications*,” *id.* (emphasis added), nor do they challenge the procedures governing ballots submitted by “members of the military or individual residing outside the United States,” *id.* (citing 52 U.S.C. 20302(a)(8)). The State’s failure to explain how the requested relief would actually impact the election apparatus, much less cause confusion, is reason alone to reject its *Purcell* argument.

whether that evidence, if credited, could have an impact on the legal issues; if that evidence would not make a difference, there would be no reason to remand. *See also State v. Delgado*, 322 P.3d 1028 (Kan. Ct. App. 2014) (noting this Court is granted “such original jurisdiction as may be necessary to the complete determination of any cause on review” under K.S.A. 20-3001 and resolving a motion the district court “did not consider”).

Until now, the State’s position has been that its generalized interests in election administration and preventing voter fraud justify the restrictions, and that it has no obligation to present evidence. *See, e.g.*, Defs.’ Reply In Supp. of Mot. to Dismiss Pls.’ Am. Pet. at 1 (filed Oct. 1, 2021) (arguing it is “unnecessary” to “develop a factual record here”). If that remains the case, then it is not at all clear why remand would be necessary (and the State cites no authority that would require it). But if the Court were to find remand appropriate, it could do so with clear directions to the district court to decide the matter expeditiously. *E.g., In re M.B.*, 241 P.3d 601 (Kan. Ct. App. 2010) (remanding to district court with “explicit directions,” including order “to expedite these proceedings on remand”).

If anything, the State’s concerns about being heard provide further reason to grant the motion to expedite and decide this appeal quickly. It is not reason to delay and deny Plaintiffs any chance of having these critical matters addressed in time to avoid irreparable injury in the 2022 elections.

II. The Secretary’s purported plans to issue guidance or conduct training do not impact this appeal.

The State also asserts for the first time in its Response that “training . . . on the new signature verification requirements” will take place at an annual conference of Kansas election officials, and that “the Secretary of State’s Office will soon be issuing guidance on the signature verification requirements via a temporary regulation.” Resp. ¶¶ 7-8. That is news to Plaintiffs—and, likely, to the rest of Kansas. Indeed, at *no* point during the course of this litigation has the State suggested there would be any guidance on the Requirement at all.

In any event, generalized promises about training and guidance provide no reason to delay resolution of this appeal. There is no reason to conclude that any of it—the contents of which remain a mystery—will have any impact on, much less cure, the constitutional deficiencies that Plaintiffs assert with the Signature Matching Requirement, and the State provides no explanation to the contrary. *Se id.* Nor does the Secretary provide any cogent reason why his newly-announced intention to provide such training and guidance should delay resolution of this appeal.

CONCLUSION

For the reasons stated herein, Plaintiffs-Appellants respectfully request that the Court of Appeals grant Plaintiffs’ motion to expedite this appeal.

Respectfully submitted, this 6th day of May 2022.

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** Pro Hac Vice Motions Forthcoming*

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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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