No. 22-125084-A

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,

vs.

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

APPELLANTS' REPLY BRIEF

Appeal from the District Court of Shawnee County, Kansas
Honorable Teresa Watson, District Judge, District Court Case No. 2021-CV-000299

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ARGUMENT

Defendants' arguments that this Court lacks jurisdiction over this appeal should be rejected. On the merits, Plaintiffs have stated cognizable claims. The district court's order dismissing the challenges to the Signature Verification Requirement and Ballot Collection Restriction should be reversed.

I. This Court has jurisdiction under K.S.A. 60-2102(a)(3).

K.S.A. 60-2102(a)(3) empowers this Court to hear appeals from orders "involving . . . the constitution of this state." While not every order involving an issue arising under the Kansas Constitution may be reviewed, there need only be a "semblance of finality" to trigger (a)(3). *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164, 165 (1965). That requirement is more than met here. Defendants do not dispute that the district court made a "full investigation and determination" of the claims at issue. *Id.* They argue that this Court lacks jurisdiction because *other* claims that Plaintiffs brought against *different provisions*—K.S.A. § 25-2438(a)(2) and (3) (the "False Representation Provision")—have not yet been subject to final judgment. Defendants' position reads the word "semblance" out of the "semblance of finality" language in *Cusintz* and makes K.S.A. 60-2102(a)(3) superfluous of K.S.A. 60-2102(a)(4).

Defendants argue (a)(3) should only apply when a litigant lacks "any opportunity to meaningful relief on the claim." Appellees' Opp. Br. ("Opp.") at 7. But this reads into the statute a requirement that has never before been

imposed. *See, e.g.*, *State ex rel. Graeber v. Marion Cnty. Landfill, Inc.,* 276 Kan. 328, 339, 76 P.3d 1000, 1008 (2003) (holding courts should not rewrite statutes) (citation omitted). It also does not distinguish (a)(3) from (a)(4). Defendants derive their proposed test from the collateral order doctrine, which allows appeals from orders that, "although they do not end the litigation, are appropriately deemed 'final.'" *In re T.S.W.*, 294 Kan. 423, 434, 276 P.3d 133, 141 (2012). Collateral orders are already appealable under (a)(4) because they are "final" within the meaning of the final order requirement. *See Kan. Med. Mut. Ins. Co. v. Swaty*, 291 Kan. 597, 611, 244 P.3d 642, 654 (2010).[1]

II. Plaintiffs have standing.

Defendants separately argue this Court lacks jurisdiction to hear Plaintiffs' appeal as to the Signature Verification Requirement (but not the Ballot Collection Restriction), for lack of standing. This should be rejected.

A. Legal Standard: Standing

Kansas standing precedent requires that (1) a plaintiff suffers a cognizable injury (2) caused by the challenged law. *Kan. Bldg. Indus. Workers*

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[1] Notably, Plaintiffs' other claims are also not currently before the district court. After that court denied Plaintiffs' motion to enjoin the False Representation Provision, this Court held Plaintiffs lacked standing to challenge that Provision. *League of Women Voters of Kan. v. Schwab*, No. 124,378, 2022 WL 2184823, at *1 (Kan. Ct. App. June 17, 2022). Plaintiffs are seeking review from the Kansas Supreme Court. Accepting Defendants' argument would make it impossible to obtain review of clearly final decisions on constitutional issues at all, until everything in a case is absolutely resolved.

Comp. Fund v. State, 302 Kan. 656, 678, 359 P.3d 33 (2015). General factual allegations of injury from the challenged law—accepted as true at the pleading stage—are sufficient. *Matter of Adoption of T.M.M.H.*, 307 Kan. 902, 915, 416 P.3d 999, 1008 (2018). An organizational plaintiff may also have associational standing if (1) the law injures its members or constituents; (2) the interests the organization seeks to protect are germane to its purposes; and (3) neither the claim asserted nor relief requested requires the participation of members. *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013); *NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, 387, 996 P.2d 821, 824 (2000) (*citing Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

B. Organizational Plaintiffs have associational standing.

Each of the Organizational Plaintiffs has associational standing to challenge the Signature Verification Requirement. As Defendants admit, the Kansas League is a formal membership organization, Opp. at 13, and it has alleged facts demonstrating it has standing to sue on behalf of its members. (R. II, 235-39.) Defendants' associational standing arguments are focused on Appleseed, the Center, and Loud Light, and specifically on the fact that they do not have formal members. Opp. at 13-16. But only one plaintiff in a case need have standing for a claim to proceed. *See Gannon v. State*, 298 Kan. 1107, 1131, 319 P.3d 1196 (2014); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd* 533 U.S. 181 (2008). Thus, Defendants'

arguments on this point are largely academic, but they are also wrong as a matter of law.

For over 40 years, courts have found that non-membership organizations can assert associational standing on behalf of their beneficiaries, even if they are not technically "members." *See, e.g.*, *Hunt*, 432 U.S. at 343; *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 280 (3d Cir. 2014) (rejecting "formalistic" view of membership); *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003) (holding organization that advocates for the mentally ill may sue on their behalf); *see also Am. Unites for Kids v. Rousseau*, 985 F. 3d 1075, 1096-97 (9th Cir. 2021); *Flyers Rts. Educ. Fund, Inc. v. U.S. Dep't of Transp.*, 957 F.3d 1359, 1362 (D.C. Cir. 2020); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999); *Disability Rts. Pa. v. Pa. Dep't of Human Servs.*, No. 1:19-CV-737, 2020 WL 1491186, at *7 (M.D. Pa. Mar. 27, 2020).

Loud Light, Appleseed, and the Center each have associational standing. *First*, they seek relief on behalf of their primary beneficiaries. (R. II, 239-40) (Loud Light serves underrepresented populations, in particular, young voters); (R. II, 242-43) (Appleseed focuses on voter education and turnout among underrepresented populations); (R. II, 244-45) (the Center advocates for people with disabilities). *Second*, each has substantial indicia of traditional membership. (R. II, 239-40) (Loud Light); (R. II, 242-43) (Appleseed); (R. II, 244-45) (the Center). *Finally*, their activities are driven by and responsive to

the needs of their constituencies to enable them to best "express their collective views and protect their collective interests." *Hunt*, 432 U.S. at 345; *see, e.g.*, (R. II. 239-40) (Loud Light); (R. II, 242-43) (Appleseed); (R. II, 244-45) (the Center).

Plaintiffs' allegations also establish that their members and constituents have been or will be injured by the Requirement and would have standing in their own right. *See, e.g.*, (R. II, 238) (Requirement harms League members, "many of whom are older and are at significant risk of having their ballots flagged erroneously as having a mismatched signature"); (R. II, 245-46) (the Center's constituency is more likely to vote by mail and have issues curing in person). These impacts are not hypothetical. Plaintiffs allege in detail how the Restriction will disenfranchise lawful voters among their membership and constituencies. *See, e.g.*, (R. II, 265) (explaining unreliability of layperson matching); (R. II, 245-46, 266-68) (explaining risk of disenfranchisement is particularly high among voters with disabilities). Courts have found such facts to prove a constitutional violation on the merits; they are certainly sufficient to demonstrate standing at this stage. *See, e.g.*, Pls.' Br. at 35 n.10.[2]

[2] Defendants' reliance on *Memphis A. Philip Randolph Institute v. Hargett*, 978 F.3d 378 (6th Cir. 2020), is misplaced. *See* Opp. at 18-19. There, the court concluded the defendants had rebutted plaintiffs' evidence regarding likelihood of signature rejection with affirmative contrary evidence at a later stage in the proceedings. It is premature to weigh the evidence at this stage—indeed, Defendants have not yet proffered any. *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 268, 275 P.3d 869, 878 (2012).

C. Organizational Plaintiffs have standing based on direct injury to their missions.

The Organizational Plaintiffs also independently have standing because the Requirement will force them to divert resources and frustrate their missions. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350-1351 (11th Cir. 2009); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016). Because counties now must reject any signatures flagged as a mismatch by election officials, Loud Light must expand its "cure" program, recruiting and retaining more staff and volunteers to aid an increasing number of impacted voters. (R. II, 240-42.) The League and the Center similarly must divert critical resources to counteract the Requirement. (R. II, 238, 245-46). *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (finding organizations establish standing "by showing that they will have to divert personnel and time to educating potential voters on compliance . . . and assisting voters" who may be harmed by law); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1158, 1165-66 (11th Cir. 2008) (similar). Defendants' argument that expanding pre-existing programs is insufficient, Opp. at 22, has been repeatedly rejected. *See, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (holding diversion of resources towards activities already "regularly [] conducted" was cognizable); *Fair Fight Action, Inc. v. Raffensperger*, 413 F.

Supp. 3d 1251, 1266 (N.D. Ga. 2019) (rejecting argument that diversion of resources to pre-existing "get-out-the-vote activities and voter-education programs" was inadequate). It is enough that Plaintiffs must put additional resources into education and cure efforts because of the Restriction, leaving less to support other mission-critical activities. *See, e.g.*, *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (affirming standing where organizations must "increase the time or funds (or both) spent on certain activities to alleviate potentially harmful effects of" challenged law); *OCA-Greater Hous. v. Tex.*, 867 F.3d 604, 610 (5th Cir. 2017) (similar); *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1336 (N.D. Ga. 2012) (similar claims "plainly" sufficient for standing).

III. Plaintiffs state cognizable claims for relief.

Defendants ask this Court to depart from well-settled precedent governing motions to dismiss, which requires that courts "assume as true the well-pled facts," and "resolve every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief." *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330, 338 (2019). Dismissal is "proper only when" plaintiffs' allegations "clearly demonstrate" they "do[] not have a claim." *Id.* Defendants admit that, in the more than 10 years since the U.S. Supreme Court altered the federal standard, the Kansas Supreme Court has maintained its less demanding standard. *See id.* They ask

this Court to be the first change settled precedent, Opp. at 22-24, but it cannot. *See, e.g.*, *State v. Brown*, No. 107512, 2013 WL 2395319, at *3 (Kan. Ct. App. May 24, 2013) ("[A]bsent some indication the Kansas Supreme Court has begun a retreat from those decisions—and we are aware of none—they remain controlling authority."), *aff'd*, 399 P.3d 872 (Kan. 2017). As discussed below, Plaintiffs' allegations are more than sufficient to state a claim against both challenged provisions.

A. Plaintiffs state cognizable claims against the Signature Verification Requirement.

1. The Requirement burdens the right to vote under Article 5, § 1 and Bill of Rights, §§ 1, 2.

Defendants' argument that "Kansas appellate courts have never articulated the legal standard for evaluating a constitutional challenge to an election integrity statute," Opp. at 25, ignores that the Supreme Court has held that Article 5, Section 1 of the Kansas Constitution "recognizes a distinct and broader category of rights than does the Fourteenth Amendment [of the U.S. Constitution]." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 626, 440 P.3d 461, 472 (2019). Those include the right to vote which, though not "absolute," is "fundamental." *Id.* at 657. And the Kansas Supreme Court applies strict scrutiny to laws violating such rights. *See* Pls.' Br. at 19-20.

In contrast, *Anderson-Burdick* has never been endorsed, adopted, or even cited by *any* Kansas court of appeals. *Id.* at 31. And the case upon which

Defendants rely, *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2339 (2021), is doubly distinguishable—it did not involve constitutional claims at all (under the Kansas *or* federal Constitution), nor did it apply *Anderson-Burdick*. *See id.* (evaluating claim brought under § 2 of federal Voting Rights Act). Defendants' attempt to graft federal jurisprudence onto a case involving *only* claims under the Kansas Constitution is as incoherent as it is misguided.

Even if *Anderson-Burdick* applied, Plaintiffs state a claim that the Requirement imposes an unconstitutional burden. *See* Pls.' Br. at 31-33. Because of the Requirement, lawful voters' ballots will be rejected based on subjective assessments about their handwriting. *See id.* at 34-35. The fact that many whose signatures are rejected are never contacted exacerbates this issue. (R. II, 241-42.) And even if they *are* contacted, it may not be in time to save their ballots from rejection. The State's "regulatory interests" are not sufficiently weighty to overcome these burdens on the fundamental right to vote. Defendants' purported interests in preserving the integrity of the election process and maintaining voter confidence in elections, Opp. at 35-37, are insufficient without making a showing as to how the signature match regime in question actually advances those interests. Pls.' Br. at 37-38.

Finally, contrary to Defendants' suggestion, multiple courts have struck down signature verification requirements with similar constitutional deficiencies. *See Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646 (N.D. Ill.

Mar. 13, 2006); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217-22 (D.NH. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *La Follette v. Padilla*, No. CPF-17-515931, 2018 WL 3953766 (Cal. Super. Ct. Mar. 5, 2018).

2. The Requirement violates Article 5, § 1's guarantee of equal protection.

For the first time in these proceedings, Defendants refer to a "new regulation that the Secretary of State recently adopted," K.A.R. 7-35-9. Opp. at 37. The regulation appears to have been published mere days before Plaintiffs' merits brief was due. It is not a part of the record and not properly before this Court. *See Haddock v. State*, 282 Kan. 475, 491, 146 P.3d 187, 205 (2006).

In any event, the regulation changes very little. It is exceedingly, and remarkably, brief—running less than a page in length. It expressly asserts that "[s]ignature verification may occur by electronic device or by human inspection," K.A.R. 7-35-9(g)(2), affording significant discretion to election officials that will undermine uniformity between counties. And although it purports to create an exemption for those with certain disabilities, disability advocates have repeatedly expressed concerns that there is no "way for county election officials to know for certain if someone has a disability[.]" (R. II, 267). The regulation does nothing to address this issue. In sum, even with the late-breaking (and woefully insufficient) guidance, K.S.A 1124(h) continues to "explicitly and arbitrarily endorse [ ] multiple, standardless processes for

verifying signatures" (R. II, 254, 264-69, 279) in violation of equal protection.

Defendants cite only one case to support their equal protection argument—*Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008)—which they claim found a "similar" law constitutional. Opp. at 37. But *Lemons* concerned signatures on ballot petitions, *not* ballots themselves—so rejection of a signature did not threaten to deny *the right to vote*. The court emphasized that its analysis hinged on that distinction, holding, "[t]hese differences between referendum petitions and vote-by-mail ballots justify the minimal burden imposed on plaintiffs' rights in this case." *Lemons*, 538 F.3d at 1104.[3]

3. The Requirement violates the Bill of Rights § 18's due process guarantees.

As with the equal protection claim, Defendants' due process argument rests almost entirely on the new regulation. But even considering that extraneous guidance, it does not provide reason to find that Plaintiffs failed to state a claim under the Kansas Constitution's due process guarantees.

For example, the regulation says nothing about the timeframe during which matching must occur, nor when a voter must be notified of a rejection.

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[3] Defendants also mischaracterize *Lemons* in suggesting it found the requirement that signatures be matched to a voter's registration card as "in and of itself represent[ing] a sufficiently uniform standard to survive an equal protection challenge." Opp. at 38. *Lemons* says nothing of the sort—it explains this was merely a factor the Court considered in determining that the standard ensured equal treatment. 538 F.3d at 1106.

It indicates voters will only be permitted to cure mismatches on ballot applications until the Tuesday prior to the election. K.A.R. 7-36-9(d)(2). This year, that means curing will be permitted until November 1—the *same day* ballot applications are due. Thus, Defendants have created a scheme that will prohibit voters whose signatures are arbitrarily flagged for rejection on or near the deadline from requesting an advance ballot, giving them no opportunity to obtain a new application. If they are contacted in time to cure *at all*, they are likely to be required to do so in person—which many will be unable to do for the same reasons they needed to vote by advance ballot in the first place.

Defendants' argument that Plaintiffs' due process claims fail because there is "not even a constitutional right to vote via absentee ballot," Opp. at 40, is without merit. In support, they cite *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), a *federal* case that did *not* involve a due process claim and has since been substantially undermined. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) (holding *McDonald* is not precedential because it predates the ratification of the Twenty-Sixth Amendment and the 1970 Amendments to the Voting Rights Act); *League of Women Voters of Fla., Inc. v. Lee*, 566 F. Supp. 3d 1238, 1260 (N.D. Fla. 2021) (finding "*McDonald* did not—in one sentence—create a sweeping vote-by-mail exception to the Constitution"). Further, in a due process inquiry, the existence of a state liberty interest is "determined by

reference to state law." *Montero v. Meyer*. 13 F.3d 1444, 1447 (10th Cir. 1994). Here, Kansas has offered the right to vote by mail for almost three decades. In doing so, it has created a liberty interest that cannot be denied without adequate process, as Defendants threaten to do so here. Pls.' Br. at 40-42.

B. Plaintiffs state cognizable claims against the Ballot Collection Restriction.

1. The Restriction violates the Bill of Rights' free speech protections.

Defendants do not disagree that Sections 3 and 11 of the Kansas Bill of Rights provide strong protections for election-related speech, or that restrictions on such speech are subject to strict scrutiny. Pls.' Br. at 22-25. Instead, they argue that the Ballot Collection Restriction does not burden "expressive conduct," and thus does not implicate free speech rights at all.

This runs contrary to a recent decision of this Court in a parallel proceeding in which all three judges indicated that encouraging and helping others to vote is "pure speech" that "falls squarely within the ambit of the First Amendment." *League of Women Voters of Kan. v. Schwab*, No. 124,378, 2022 WL 2184823, at *5 (Kan. Ct. App. June 17, 2022). This is consistent with the decisions of multiple other courts that have found that constitutionally-protected expressive rights are curtailed by restrictions on voter assistance, *see* Pls.' Br. at 22 (citing cases)—indeed this Court cited many of these same cases in that recent decision. *League of Women Voters*, 2022 WL 2184823, at *5.

Defendants' attempts to limit those cases to discussions of voter registration or of whether to sign a petition, Opp. at 42, are overly narrow.

Defendants also ignore the allegations that each Individual Plaintiff engages in this activity as an expression of their civic beliefs and ideals. (R. II, 246-47) ("In 2020 alone, [Plaintiff] Crabtree collected and returned more than 75 ballots for Douglas County nursing home residents who were unable to return those ballots themselves . . . [the Restriction] limit[s] his engagement with voters and his ability to effectively communicate his message of civic participation and engagement, and placing him at risk of prosecution."); (R. II, 247) ("To Sister Huelsmann, the ability to provide ballot delivery assistance is critical to her commitment to building a community of loving, helpful neighbors united by faith in Concordia, and to her efforts to encourage others to exercise their fundamental right to vote."); (R. II, 248) (similar for Lewter). At this stage, these allegations must be viewed in the light most favorable to Plaintiffs and are more than sufficient to state a claim for violation of their speech rights under the Kansas Constitution. *Aeroflex*, 294 Kan. at 268.

2. The Restriction burdens the right to vote under Article 5, § 1 and Bill of Rights, §§ 1, 2.

As discussed, *supra* at III.A.1, Pls.' Br. at 22-27, voting rights are "fundamental" under the Kansas Constitution. *Hodes*, 309 Kan. at 626. Burdens upon fundamental rights are subject to strict scrutiny, and must serve

some compelling interest and be narrowly tailored to further that interest. *Id.* at 673. That test applies "regardless of [the] degree" of infringement. *Id.*

Rather than address this well-settled standard, Defendants attempt to recast the relevant right as the "right to vote by mail." That argument relies on a misreading of *McDonald*, 394 U.S. 802 (1969), which, as explained above, has been undermined by subsequent developments in the law. Further, federal cases have limited bearing on the resolution of this claim, which is brought under the Kansas Constitution. *See Hodes*, 309 Kan. at 626 (Article 5, Section 1 of the Kansas Constitution "recognizes a distinct and broader category of rights than does the Fourteenth Amendment [of the U.S. Constitution].").

Taking Plaintiffs' allegations as true, the burden on the right to vote imposed by the Restriction is far from minimal. As Plaintiffs explain, Kansans with disabilities, seniors, voters in rural areas, and voters living on tribal lands have significant difficulty accessing mail services or election offices—often requiring them to travel great distances. (R. II, 265.) These individuals rely on organizations and individuals like Plaintiffs to assist them with delivering their ballots. The district court erred by refusing to accept the truth of these factual allegations. And Defendants' brief ignores them.

CONCLUSION

This Court should reverse the district court's decision.

Respectfully submitted, this 25th day of July 2022.

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