

**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 KRIS KOBACH, in his official  
capacity as Kansas Attorney General,

Defendants-Appellees.

Appellate Case No. 22-125084-A

Original Action No. 2021CV299

**MOTION TO TAKE JUDICIAL NOTICE OF PUBLIC STATEMENTS  
BY DEFENDANT-APPELLEE SECRETARY OF STATE SCOTT  
SCHWAB**

Pursuant to K.S.A. 60-409, Plaintiffs-Appellants respectfully request that this Court take judicial notice of public statements recently made by Defendant-Appellee Secretary of State Scott Schwab in hearings before the Legislature. Secretary Schwab's statements were recorded and are publicly available on the Legislature's YouTube page. They are relevant to questions pending before the Court in this appeal, including whether the district court erred in dismissing Plaintiffs' claims challenging K.S.A. 25-2437(c) (the "Ballot Collection Restriction"), which restricts the collection of voted advance ballots

for direct delivery to election officials, a practice that has long helped Kansas voters ensure that their ballots reach election officials in time to be counted.

Secretary Schwab made the statements in question at a February 20, 2023 Senate Committee hearing on S.B. 208, which (if passed) will restrict the availability of ballot drop boxes to return advance ballots. Secretary Schwab testified against S.B. 208, repeatedly pointing out the difficulties imposed on voters when they must rely on the mail service to submit advance ballots. In making this point, Secretary Schwab made the following statements:

- “[W]hy in God’s green earth would you want the federal post office or the federal government in charge of your ballot? I got a Christmas card last week.” Kan. Legis., *Senate Federal and State Affairs Committee 02/20/2023* at 21:37-21:45, YouTube <https://www.youtube.com/watch?v=sWJUgtUmPvA>, (last visited Mar. 9, 2023) [hereinafter “2/20/23 Committee Hr’g”];
- “Russell County got a ballot from the 2020 election six months late,” and the Ford County Clerk received a ballot “a year and a half late because in southwest Kansas your mail goes to Santa Fe, New Mexico.” *Id.* at 21:51-22:04; and
- Described places called “black holes” because “mail goes in, but it don’t come out.” *Id.* at 22:07-22:13.

This Court can take judicial notice of these statements pursuant to K.S.A. 60-409(b)(4), which provides that judicial notice may be taken of “specific facts . . . which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.” “Courts shall notice such facts at the request of a party if the party furnishes the court with sufficient information to comply with the request and has given the adverse

party notice and an opportunity to respond.” *In re Starosta*, 314 Kan. 378, 388, 499 P.3d 458, 466 (2021) (citing K.S.A. 60-409(c)); *see also Gannon v. State*, 305 Kan. 850, 870-73, 903, 390 P.3d 461, 477-79, 495 (2017). Secretary Schwab’s statements to the Legislature qualify under K.S.A. 60-409(b)(4) as “specific facts” that can be judicially noticed. His testimony was recorded and made publicly available by the Legislature on its YouTube page.<sup>1</sup> The accuracy of the quotations above can be immediately determined by viewing that online recording, whose accuracy cannot seriously be disputed. And, prior to filing this motion, Plaintiffs’ counsel gave the Secretary’s counsel notice of their intent to ask that the Court take judicial notice of these statements. The Secretary’s counsel advised that he would oppose the motion.

The Court should overrule the Secretary’s objection and grant the motion. Testimony given at a public legislative hearing is a proper subject of judicial notice. *See, e.g., Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168 n.12 (10th Cir. 2000) (taking “judicial notice of the content of hearings and testimony before the congressional committees and subcommittees cited by the government”); *Lopez v. Bank of Am., N.A.*, 505 F. Supp. 3d 961, 970 (N.D. Cal. 2020) (“In general, courts may take judicial notice of publicly available congressional records, including transcripts of congressional

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<sup>1</sup> *See* 2/20/23 Committee Hr’g at <https://www.youtube.com/watch?v=sWJUgtUmPvA>.

hearings.”); *Johnson & Johnson v. Am. Nat. Red Cross*, 528 F. Supp. 2d 462, 464 n.1 (S.D.N.Y. 2008) (congressional hearing testimony “constitutes a public record of which the Court can take judicial notice”). Here, the statements are relevant to this Court’s review of the district court’s dismissal of Plaintiffs’ claims challenging the Ballot Collection Restriction. Among Plaintiffs’ claims are that the Restriction imposes a burden on the fundamental right to vote because it requires voters to rely more heavily on the mail service to return their advance ballots. *See, e.g.*, Am. Pet. ¶¶ 155-56, 199 (R. II, 270, 277). In his comments to the Legislature, Secretary Schwab testified as to several of the factual bases for that burden.

Whether this Court applies strict scrutiny under the Kansas Constitution in evaluating Plaintiffs’ claims (as Plaintiffs argue they should) or the federal *Anderson-Burdick* balancing test (as Defendants propose), these factual admissions from the Secretary further demonstrate why dismissal of these challenges at the outset, without allowing the Plaintiffs to engage in any factual development concerning (among other things) the burden imposed on voters by the Ballot Collection Restriction, was error, and should be reversed. *See, e.g.*, Appellants’ Br. at 28-33 (describing the competing tests, and noting that even the federal test strongly disfavors dismissal prior to an opportunity for factual development as to the burdens on voters and justifications offered by the state to impose those burdens).

## CONCLUSION

Accordingly, Plaintiffs respectfully request that this Court take judicial notice of Secretary of State Scott Schwab's February 20, 2023 statements.

Respectfully submitted, this 9th day of March 2023.

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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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