No. 22-125084-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS; LOUD LIGHT; KANSAS APPLESEED CENTER FOR LAW AND JUSTICE; 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

DEFENDANTS-APPELLEES' REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

Appeal from the Kansas Court of Appeals Opinion
Dated March 17, 2023

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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I. Introduction

Plaintiffs acknowledge that the questions presented in the case are "of extremely significant public importance and of first impression." Resp. at 8. At the same time, they characterize the Court of Appeals' decision as a humdrum, nothing-to-see-here opinion that simply applied clearly established precedent to impose the highest degree of judicial scrutiny over challenges to two election integrity statutes. This is the height of disingenuity and emphatically contrary to the jurisprudence, traditions, and history of this State, as laid out in Defendants' Petition for Review. Even accepting the Court of Appeals' view of the rights at stake here, the notion that *all* fundamental rights (however defined) are essentially interchangeable subject to the identical review standard finds no support in the case law of this Court or any other tribunal.

Were this Court to stay its hand, as Plaintiffs urge, similar legal attacks on other election-related laws will undoubtedly ripple through the State, with district courts forced to apply an unprecedented and clearly erroneous legal standard until such time, presumably years from now, that this case finally works its way back up following needless discovery, pointless motions practice, and another superfluous trip to the Court of Appeals. To force the State and counties to dangle in the wind as to how elections can be administered and what type of measures can be implemented in order to ensure that elections are run efficiently and free of fraud would be counterproductive and deleterious to the public's confidence in the entire process. This Court's prompt review, whether as a matter of right or as a matter of discretion, is essential *immediately*. *See, e.g., Berry v. Nat'l Med. Servs., Inc.*, 292 Kan. 917, 918, 257 P.3d 287 (2011) (granting petition for review following Court of

Appeals' reversal of district court's grant of defendants' motion to dismiss "because the issue presented is one of first impression and likely to recur").

Plaintiffs insist they want a prompt resolution of this case, but the district court – applying the *proper* legal standard – already disposed of their claims, which failed as a matter of law. Plaintiffs raced to the courthouse the day after these statutes took effect, mounting *facial* challenges in which they alleged that under no set of circumstances could the provisions pass constitutional muster. Under the applicable case law governing such attacks, there is no need to sort out facts. The issues presented are legal in nature and there is no reason for this Court to delay its review.

II. This Court's Review of the Court of Appeals' Unprecedented Holdings is Essential to Provide Meaningful Standards for Lower Courts Evaluating Challenges to Election- and Voting-Related Statutes

The Court of Appeals' decision has put Kansas at odds with the U.S. Supreme Court and nearly every state that has considered the appropriate standard of review for challenges to statutes governing elections and voting-related matters. Pet. at 5 and n.3. None of those cases took issue with the fact that the rights at issue were, as a general matter, deemed to be fundamental. Nor did they dispute that, under the federal constitution or their respective state counterparts, fundamental rights are generally evaluated under heightened scrutiny. Yet those courts departed from that general standard when evaluating laws governing the mechanics of elections, acknowledging that a state must have substantial latitude to regulate elections. The courts recognized that strict scrutiny cannot be reflexively applied to all election-related statutes, regulations, and procedures just because the general right at issue is fundamental. As the U.S. Supreme Court explained in *Burdick v. Takushi*, 504

U.S. 428, 433 (1992), "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."

A contrary interpretation would be unworkable and intolerable to the body politic. "Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote[.]" *Id.* (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). But "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Kansas' Constitution dictates no different result. Our Constitution treats the right to vote itself as fundamental, but expressly empowers the Legislature to establish the mode of voting and to require individuals to prove their eligibility to exercise the franchise. Kan. Const. Art. 4, § 1; Art. 5, § 4. From the State's inception, the Legislature has substantially regulated elections. The Court of Appeals, however, ignored the Legislature's reserved authority and instead held that election laws imposing even the slightest burden on the right to vote must be exposed to strict scrutiny under a fundamental rights analysis devoid of nuance. Such reasoning constitutes a drastic departure from constitutional jurisprudence.

It is one thing, *in the abstract*, to argue that the right to vote is fundamental. It is something altogether different to require the State to have to undergo strict scrutiny review before deciding that polls should close at 7:00 PM as opposed to 7:30 PM, K.S.A. 25-

106(a), that advance ballots must be received by the county election office within three days of an election versus four, K.S.A. 25-1132(b), that certain types of identification and not others are acceptable proofs of identity at the polls, K.S.A. 25-2908, or that signatures on ballot envelopes must be verified. Yet that is the effect of the Court of Appeals' opinion. If not reversed by this Court, the State will soon see an explosion of litigation.

Notwithstanding the insistence of the Court of Appeals panel, this Court's decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) does not mandate that strict scrutiny must be applied automatically whenever *any* fundamental right is at stake. Even the cases of this Court suggest otherwise. Freedom of speech, for example, is considered to be among the most fundamental of our constitutional rights. Yet because this right rests at the intersection of the State's police power and an individual's personal freedoms, courts engage in a "careful weighing and balancing of the respective interests" to assess whether the government's attempted regulation of expression is permissible. *State v. Russell*, 227 Kan. 897, 901, 610 P.2d 1122 (1980). The manner and time of the regulation, in turn, "affect the severity of the court's scrutiny." *Id.* at 900.

Similarly, courts do not employ strict scrutiny in suits involving other fundamental rights, such as Fourth Amendment search and seizure cases, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 663 (1995) (invoking a reasonableness test and asserting that the Court has repeatedly declined to apply strict scrutiny in search and seizure cases); *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014) ("Kansas courts interpret § 15 of the Kansas Constitution Bill of Rights to provide the same protection from unlawful gov-

ernment searches and seizures as the Fourth Amendment"); Fifth Amendment self-incrimination cases, *see Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189-90 (2004) (using categorical rules that require the privilege against self-incrimination to be respected whenever the testimony has a "reasonable danger of incrimination"); *Bankes v. Simmons*, 265 Kan. 341, 349, 963 P.2d 412 (1998) ("[T]he provisions of § 10 of the Kansas Constitution Bill of Rights grant no greater protection against self-incrimination than does the Fifth Amendment to the United States Constitution."); or Sixth Amendment right to counsel cases, *see Michigan v. Jackson*, 475 U.S. 625 (1986) (applying a categorical rule that any interrogation outside of the presence of counsel, after the defendant has asserted the right, is invalid); *State v. Morris*, 255 Kan. 964, 979-81 880 P.2d 1244 (1994) (right to counsel under § 10 of the Kansas Constitution Bill of Rights provides same protections as Sixth Amendment). Other examples abound as well. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 697-98, 700 (2007) ("mere fact of 'fundamentality' does not answer the question of what would be the appropriate standard of review for the right to bear arms" as "many of the individual rights in the Bill of Rights do not trigger strict scrutiny, including many that are incorporated").

Nor is it "hyperbolic" to acknowledge that the Court of Appeals' decision will fundamentally transform election administration in Kansas. The ruling below would require the State to demonstrate that every enacted election statute represents the least restrictive means for meeting the compelling state interest that justifies that statute. The inevitable uncertainty and chaos from this holding is predictable. As the U.S. Supreme Court has noted, "it is the rare case in which we have held that a law survives strict scrutiny." *Burson*

v. Freeman, 504 U.S. 191, 211 (1992). Although *Burson* was deemed to be one of those "rare" cases where the challenged statute (a 100-foot anti-electioneering buffer zone) was upheld, the inability to know with any certainty how the State's election integrity statutes will be adjudged by the court will make legislating in this sphere a Herculean task and will no doubt invite forum shopping by sophisticated advocacy organizations and litigants.

Finally, Plaintiffs' suggestion that this case presents no "new question of constitutional law," Resp. at 6, is unsupportable. Plaintiffs concede that no Kansas appellate court has ever addressed what standard of review (*Anderson-Burdick*, a functionally similar balancing test, or something different) applies to challenges to election/voting-related statutes brought solely under the Kansas Constitution. Resp. at 3. Nor do Plaintiffs dispute that the Court of Appeals' decision represents the first time any Kansas court has held that a signature verification requirement can impair the right to vote or (possibly) that collecting another individual's ballot might infringe on the free speech rights of the collector.[1] In short, if these are not important matters of first impression, it is hard to fathom what is.

III. Plaintiffs Misrepresent Defendants' Position on Plaintiffs' Claim that the Signature Verification Requirement Infringes on the Right to Vote

Plaintiffs claim that Defendants "do not dispute" that "valid ballots will be rejected." Resp. at 10. This is flatly untrue. The statutory and regulatory procedures governing the signature verification requirement all but ensure that valid ballots will *not* be rejected. If a voter submits an advance ballot envelope with a signature that does not match the one on

[1] The holding on ballot collection restrictions, incidentally, will also directly affect myriad other election statutes, including a prohibition against candidates for office transmitting or delivering other individuals' ballots. *See* K.S.A. 25-2437(b)(1).

file in the county election office, K.S.A. 25-1124(b) mandates that the office contact the voter to give him/her an opportunity to cure the deficiency. A detailed regulation, K.A.R. 7-36-9, further reinforces that requirement. Plaintiffs' Amended Petition, meanwhile, does not (and could not) allege that a single voter has ever been improperly disenfranchised as a result of this statutory signature matching obligation. Plaintiffs simply speculate that, based on their experiences before the statute and accompanying regulation even took effect, some election officials allegedly failed to contact certain voters with sufficient time to cure. But the statute and regulations now *demand* timely notification. In any event, conjecture that election officials might not follow the law does not suffice to state a claim.

IV. The Court of Appeals Erred in Reversing and Remanding Plaintiffs' Claim that Ballot Collection Restrictions Infringe on the Right to Vote

The Court of Appeals' opinion was largely bereft of legal analysis in reversing the district court's dismissal of Plaintiffs' attack on the Ballot Collections Restrictions as an unconstitutional infringement on the right to vote. Op. at 32-34. The Court did not even address Defendants' argument on this claim that there is no constitutional right to vote by mail, and Plaintiffs' Response to the Petition for Review (Resp. at 11) rings equally hollow. The Court simply implied that almost no limit is reasonable because more volunteers will always be needed to pick up the slack from any limit imposed by the State. Op. at 33. That cannot be the law. Defendants laid out in detail why this cause of action cannot survive a motion to dismiss. Appellees' Brief at 47-50. In fact, Defendants are not aware of a single court that has embraced this type of claim. Analyzed under the proper standard of review, and particularly considering the reasoning in *Brnovich v. Democratic National Committee*,

141 S. Ct. 2321 (2021) and *DSCC v. Simon*, 950 N.W.2d 280 (Minn. 2020), which upheld substantially more restrictive measures than exist with K.S.A. 25-2437, none of the hardships that Plaintiffs allege in their Amended Petition – even accepting them all as true – are of sufficient magnitude to run afoul of the Kansas Constitution.

V. A Signature Verification Requirement Does not Trigger a Liberty Interest

In responding to Defendants' Petition for Review on the due process attack on the Signature Verification Requirement, Plaintiffs mostly regurgitate the flawed analysis of the Court of Appeals. Resp. at 12-13. Defendants explained in their Petition (at 13-14) and Appellees' Brief (at 39-40) why the Court's reasoning was unsound. Unsurprisingly, every appellate court to review the issue has rejected the notion of a *liberty* interest flowing from the right to vote. Plaintiffs' suggestion that the Legislature could not take away the right to vote by mail "without due process" just because such an option has been available for decades is illogical. It also conflates property rights with liberty interests. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 232-33 (5th Cir. 2020).

In any event, the thrust of due process is notice and an opportunity to be heard. The notice rights and cure opportunities provided to Kansas voters under K.S.A. 25-1124(b) and K.A.R. 7-36-9 are extraordinarily extensive. As a matter of law, a due process attack on those procedures cannot survive a motion to dismiss.

VI. The Court of Appeals Improperly Refused to Consider K.A.R. 7-36-9 in Reviewing Plaintiffs' Equal Protection Attack on the Signature Verification Requirement

Despite recognizing that K.A.R. 7-36-9 addressed the purported shortcomings in K.S.A. 25-1124(h), the Court of Appeals held that Plaintiffs had stated a valid equal

protection claim "because the signature matching statute contains no standards to determine what constitutes a signature match, and requires no training – ensuring that what constitutes a signature match will vary from county to county and even from one election official to another." Op. at 41-42. Plaintiffs argue that the Court was simply properly applying the standard governing a motion to dismiss. Resp. at 14. But the quoted text is a *legal conclusion*, not a factual allegation, and is thus entitled to no deference. *Duckworth v. City of Kansas City*, 243 Kan. 386, 391, 758 P.2d 201 (1988). Moreover, a regulation is not simply a piece of evidence that is part of the record, as Plaintiffs intimate. Resp. at 14. It has the force of law and – just like any statute enacted while a case is pending on appeal – it must be taken into account and applied at least prospectively. While Plaintiffs wish the regulation was more detailed, the law does not require such level of specificity and no court has ever required that it do so. Indeed, what Plaintiffs seek would be a major intrusion on the separation of powers. In short, the district court is in no better position to evaluate this regulation than the appellate court, and there was no reason for the appellate court to remand the claim.

VII. The Ballot Collection Restrictions Do Not Violate Collectors' Free Speech Rights

In an effort to find meaning in the Court of Appeals' ambiguous ruling on their free speech attack on the Ballot Collection Restrictions, Plaintiffs aver that, "*read as a whole*," the Court of Appeals "clearly instructs" that these restrictions limit the free speech of the ballot collector. Resp. at 14-15. The problem is that the Court's opinion was equally "clear" in stating that (i) the ballots themselves are the speech of the voter, not the ballot

collector, and (ii) individuals who perform ballot collection activities "are not involved in either protected speech in either collecting those ballots or in delivering them." Op. at 46. The Court then immediately added that "regulation of the handling of those ballots is warranted" and "[t]his claim does not survive Defendants' motion to dismiss." *Id.* Plaintiffs, moreover, failed to file a cross-appeal of this claim.

True, the Court of Appeals suggested on the next page of its opinion that the claim might be part of its remand order, but that would be impossible if the claim was dismissed. Regardless, for all the reasons set forth in detail in Defendants' Appellees' Brief, there is no precedential support for claiming that an individual has a free speech right to collect and return the voted ballot of another person. Not only have all the reported appellate cases rejected that position, a number of which the Court of Appeals itself cited, Op. at 45, but the two trial court decisions (which were the same case) cited in the opinion – *Tenn. State Conference of NAACP v. Hargett*, 420 F. Supp.3d 683 (M.D. Tenn. 2019), and *League of Women Voters v. Hargett*, 400 F. Supp.3d 706 (M.D. Tenn. 2019) – did not even involve the return of completed absentee ballots. Those cases focused on restrictions on voter registration assistance (e.g., forcing individuals to register with, and undergo training by, the state before participating in such work, and not retain any voter information collected during the registration drive). The federal court analogized such conduct to petition drives for ballot initiatives, but as Defendants have explained, Appellees' Br. at 41-43, the two are fundamentally different in their expressive interaction with voters. Whatever might be said about the *distribution* of registration forms or advance ballot applications, the *return* of others' completed / voted ballots surely is not expressive conduct on the collector's part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 8th day of May 2023, I electronically filed the foregoing document with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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