No. 23-125084-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

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

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

The Court of Appeals here held that any law potentially burdening the right to vote – no matter how slight or incidental – must be reviewed under the highest level of judicial scrutiny. This fundamentally mistaken holding distorts the history of Kansas' founding, misreads this Court's precedents, ignores the text of the Kansas Constitution, disregards the near universal contrary case law from both the federal judiciary and every other state, and largely disregards the powerful interests of the legislature in adopting safeguards to ensure that elections are free of fraud, efficient, and inspire public confidence. The Court of Appeals rejected all notions of balancing and legislative deference, which are hallmarks of election law jurisprudence. Instead, the court effectively insisted that every constitutional protection in the Bill of Rights must be stripped of its unique functions and nuance, and treated monolithically. But the governing review standard has never been one-size-fits-all. Such a simplistic methodology would twist the meaning of many constitutional provisions and needlessly tie the State's hands.

The Bill of Rights cannot be blithely reduced to a group of fungible widgets in terms of judicial review. Just because a challenged law might touch on a right ranked as fundamental at the highest level of generality does not mean the State must run the strict scrutiny gauntlet in order to legislate in that arena. Nowhere is that more true than in the regulation of elections, where the Kansas Constitution and more than 140 years of this Court's precedent have time and again affirmed the broad flexibility enjoyed by the legislature and the deference owed to that coordinate branch by the judiciary. This suit, which involves a signature verification requirement ("SVR") in K.S.A. 25-1124(h) and ballot collection

restrictions ("BCR") in K.S.A. 25-2437(c), is a case in point. Unless reversed, the decision below jeopardizes the survival of nearly all statutes and regulations governing the mechanics of the election process. These laws are designed to safeguard the security of the ballot, deter fraud, facilitate efficient election administration, and enhance the public's confidence in elections. Their invalidation would indelibly harm the body politic.

The Court of Appeals grounded its transformative ruling in little more than a "see" citation, invoking *Hodes & Nasuer, MDs v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019). *Hodes* cannot withstand such weight. That case's focus was on individual autonomy and the inalienable right to make decisions about parenting and procreation. Those rights are so fundamental, this Court concluded, that they compel strict scrutiny into intrusions to the same. But in contrast to matters involving bodily integrity or intimate relationships, elections are and must be, by their very nature, government regulated. The history of, and judicial considerations inherent to, the regulation of voting and elections, therefore, are in no way parallel to *Hodes*. The tracks diverge dramatically.

As Defendants detailed in their Appellees' Brief, Petition for Review, Response to Plaintiffs' Motion for Injunction, and now here, there is nothing unconstitutional about the SVR and BCR against which Plaintiffs wage facial attacks. These statutes are reasonable prophylactic measures that do not unduly burden the right to vote and simply ensure the fairness and efficiency of our elections. By reaching so far beyond its warrant, however, the Court of Appeals not only misapplied the Kansas Constitution, but it likely also contravened the U.S. Constitution's Election Clause, U.S. Const., art. I, § 4, arrogating to itself

powers that are vested in the legislature. *See Moore v. Harper*, 143 S. Ct. 2065, 2088-90 (2023), *id.* at 2090-91 (Kavanaugh, J., concurring).

II. – Argument

A. – The Court of Appeals erred in applying a strict scrutiny standard of review to Plaintiffs' constitutional challenges to the SVR and BCR statutes.

Rejecting the deferential balancing standard employed by both the federal judiciary, *see Anderson v. Celebrezze*, 460 U.S. 780 (1982); *Burdick v. Takushi*, 504 U.S. 428 (1992), and virtually every state appellate court, *see* Pet. for Review at 5, n.3, the Court of Appeals held that any law potentially impacting the right to vote – including time/place/manner regulations – must be evaluated through the prism of strict scrutiny, no matter how minimal the burden. Op. at 24-28, 33 (right to vote claims), 39 (equal protection claims), 44 (free speech claims). The Court of Appeals reasoned that *Hodes* dictates this result because voting is a fundamental right. Respectfully, *Hodes* does no such thing.

Departing from federal law, this Court invoked strict scrutiny in *Hodes* after probing the meaning of "inalienable natural rights" in Section 1 of the Bill of Rights. Following a deep dive into the history of the State's founding, the Court concluded that the "natural rights" encompassed in Section 1 include the "ability to control one's body, to assert bodily integrity, and to exercise self-determination." *Hodes*, 309 Kan. at 492. The Court then held that personal autonomy (including the right to undergo an abortion) is a fundamental right for which any infringement must survive strict judicial scrutiny. *Id.* at 493.

Rather than undertake a careful examination of the Kansas constitutional provisions governing voting and elections, the history animating those mandates, the early legislation

regulating this area, or this Court's jurisprudence construing the same, the Court of Appeals simply cited *Hodes* reflexively and held that the challenged statutes here must endure the highest level of scrutiny. But this Court has interpreted *Hodes* in a much more textured and layered fashion. *See State v. Carr*, 314 Kan. 615, 629-45, 502 P.3d 546 (2022) (analyzing constitutionality of death penalty under Section 1 of Kansas Constitution's Bill of Rights and holding that, while Section 1 recognizes a right to life, that right is not absolute and is subject to forfeiture through criminal conduct); *Matter of A.B.*, 313 Kan. 135, 144, 484 P.3d 226 (2021) (rejecting minor's argument that Section 1, as interpreted by *Hodes*, endowed her with a constitutional right to engage in sexual intercourse with her age mates). In both of those cases, if the Court had insisted on defining the right at issue at the highest level of generality, the cases likely would have come out differently.

Moreover, as explained in Defendants' Reply Brief in Support of their Petition for Review (at pages 4-5), this Court has regularly examined claims rooted in purportedly fundamental rights without invoking strict scrutiny. So-called "fundamental" rights generally encompass the Bill of Rights as well as certain "substantive due process" interests. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If any and all alleged intrusions into such rights, defined at the highest level, were subjected to strict judicial scrutiny, the government could hardly operate.[1] Indeed, the mere "existence of [a] fundamental right,

[1] In their Motion for Injunction (at 11-13), Plaintiffs cite a series of cases in which this Court discussed (although did not necessarily apply) strict scrutiny in the context of claims involving fundamental rights. *See State ex rel. Schneider v. Liggett*, 223 Kan. 610, 576 P.2d 221 (1978); *Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 853 P.2d 669 (1993); *Bd. of Educ. v. Kan. State. Bd. of Educ.*, 266 Kan. 75, 966 P.2d 68 (1998); *State v. Voyles*, 284 Kan. 239, 160 P.3d 794 (2007); *State v. Ryce*, 303 Kan. 899, 368 P.3d 342 (2016). But

and its potential implication [in the case], is not enough to trigger strict scrutiny. A direct and substantial interference is required." *St. Joan Antida High Sch., Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019).

When it comes to the regulation of voting and election administration, our State's Constitution and history demand much greater deference to the legislature (and, where appropriate, the Executive Branch) than the Court of Appeals saw fit to recognize. *See State v. Albano*, 313 Kan. 638, 645, 487 P.3d 750 (2021) ("When the words themselves do not make the drafters' intent clear, courts look to the historical record, remembering [that] the polestar is the intention of the makers and adopters.") (cleaned up). It is not, and never has been, the role of the judiciary to micromanage this process.

The Kansas Constitution endows the legislature with exclusive responsibility for determining how elections shall be conducted. Kan. Const., art. 4, § 1 ("All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide."). The Constitution also *explicitly directs* the legislature to adopt measures designed to ensure that only eligible voters can exercise the franchise. Kan. Const., art. 5, § 4 ("The legislature shall provide by law for proper proofs of the right of suffrage."). Considering that these provisions were adopted in similar form at the same time during the Wyandotte Convention in 1859, it blinks reality to argue that Section 1 of the Bill of Rights *narrowed*

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all of those cases interpreted either federal law or state law that this Court construes coextensively with federal law. Not one reflected a divergence between federal and state law, as Plaintiffs urge the Court to do here. The only case remotely touching on elections, *Moore v. Shanahan*, 207 Kan. 1, 486 P.2d 506 (1971), merely addressed the one-subject rule governing constitutional amendments, art. 14, § 1, and has no relevance to this lawsuit.

the powers conferred by Art. 4, § 1 or Art. 5, § 4. Indeed, our Constitution was adopted on the heels of the Kansas-Nebraska Act of 1854, which precipitated the Bleeding Kansas era in which thousands of Missouri residents flooded the territory in an effort to influence the "popular sovereignty" elections and extend slavery rights to this region. Territorial elections on the Lecompton Constitution and the so-called Bogus Legislature were riddled with fraud. *See* Nicole Etcheson, *Bleeding Kansas: Contested Liberty in the Civil War Era*, at 156-64; *Lemons v. Noller*, 144 Kan. 813, 819, 63 P.2d 177 (1936). There is no denying that concerns about voter fraud were at the forefront of the framers' minds.

The Court of Appeals gives a passing nod to this history by acknowledging – in an extraordinary understatement – that "[e]lections at the time of the Wyandotte Constitutional Convention were 'held under difficulty and each side accused the other of procuring votes from persons not entitled.'" Op. at 30 (quoting *Lemons*, 144 Kan. at 819). But the court then suggests that, because the Constitution was later amended to extend voting rights to previously disenfranchised groups, the legislature is somehow entitled to less deference in regulating in this sphere. That is a non-sequitur. That the legislature (in tandem with the electorate) reversed certain historical inequities in no way indicates that that body was stripped of its broad authority and latitude to regulate election administration.

Moreover, the Court of Appeals mischaracterized the legal issue by describing it at the highest level of generality. No one disputes that the right to vote, in the abstract, is fundamental or that legally cast votes must be counted. But there is no fundamental right (let alone a natural right) to vote by mail or have a third-party collect and return a completed ballot. Indeed, it is the province of the legislature to determine what constitutes a legally

cast vote. Were it otherwise, both Art. 4, § 1 and Art. 5, § 4 would be dead letters. Notably, it was not until 1936 that this Court formally recognized that the Kansas Constitution even *permitted* absentee voting for individuals outside a handful of discrete categories. *Lemons*, 144 Kan. at 819-20, 832. It took five more decades for the Court to uphold the constitutionality of voting by mail. *See Sawyer v. Chapman*, 240 Kan. 409, 729 P.2d 1220 (1986).

Art. 5, § 1 does reference absentee voting. But it does so simply in the context of underscoring that citizens may vote absentee if they have either moved out of Kansas just before a Presidential election or moved out of their voting area (yet still reside in Kansas) prior to any election. This language was adopted in an amendment approved by the electorate on April 6, 1971, and was designed to implement a new requirement of the Voting Rights Act of 1970, Pub. L. No. 91-285, § 202 (codified at 52 U.S.C. § 10502(d)), which limited durational residency requirements and mandated that "each State shall provide by law for the casting of absentee ballots for President and Vice President . . . by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election."[2] *See* Kan. Legislature, 1971 Report of Special Comm. on Party Convention Nominations and Election Law Changes, at 178-79 (Dec. 1971) ("The committee concludes that changes are necessary in order to implement the recent amendment to [Art. 5, § 1] lowering the age of a qualified voter to 18 and making

[2] A history of why Congress adopted these provisions is set forth in *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 186-88 (5th Cir. 2020).

other changes regarding the right to vote of those who have recently moved, in part necessitated by the federal voting rights act amendments of 1970."). Nothing in the amendment of Art. 5, § 1 suggests that it was intended to restrict the legislature's ability to regulate the process and manner for casting absentee ballots (let alone *advance* ballots, which were introduced decades later, and for which no absence from the State or district is even required in Kansas). *See* K.S.A. 25-1119(a); 1995 Kan. Sess. Laws ch. 192, § 17.

Furthermore, this Court's jurisprudence has consistently reinforced the legislature's extensive authority to mandate that voters provide proof of their right to vote when requesting a ballot, and the Court has consistently applied a deferential standard to its review of such statutes. *See Lemons*, 144 Kan. at 828-29 (invoking reasonableness standard and observing that "the fact that voters under some circumstances may be able to vote while others cannot, does not make the statutes invalid"); *id.* at 826-27 (legislature has broad reserved powers over the manner of holding elections, which include requiring individuals guaranteed the right to vote to execute an affidavit ascribing to their eligibility before exercising that right); *Sawyer*, 240 Kan. at 413 (explaining that how one's right to vote in "secrecy is preserved is a matter for legislative determination," including the requirement that voters must sign their ballot before returning it to the county election office). The Court has also "conceded that voting by mail increases the potential for compromise of secrecy and opportunity for fraud," *id.* at 414, and held that striking the right balance and developing procedures for addressing the same are matters properly left to the legislature. *Id.* at 415.

The Court of Appeals sought to draw a contrast between voting regulations and restrictions, Op. at 28 (citing *State ex rel. Brewster v. Doane*, 98 Kan. 435, 440, 158 P. 38

(1916), but this amorphous distinction does not support any of its conclusions. The Court in *Doane* was simply highlighting the difference between laws that "regulate and preserve the purity of elections" (which are "usually upheld") and laws that "restrict[] the constitutional right to vote" altogether – e.g., by imposing racial, gender, or property requirements – which are "invariably void." *Id.*

In fact, none of this Court's election-related opinions validate the Court of Appeals' holding. *See, e.g.*, *Lemons*, 144 Kan. at 824 (describing constitutional provisions related to voting and elections and noting that "the constitutional convention left much to the discretion of the Legislature"); *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618 (1884) ("If the legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal, and unless this power is abused the courts may not interfere."); *Taylor v. Bleakley*, 55 Kan. 1, 15, 39 P. 1045 (1895) ("The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud. . . .").

Where this Court has found improper "additional qualifications" being imposed on voters, it has targeted *outright disenfranchisement*. *See, e.g.*, *State ex rel. Smith v. Beggs*, 126 Kan. 811, 814, 271 P. 400 (1928) (invalidating statute that required persons to declare party affiliation in order to vote in *general* election); *Doane*, 98 Kan. at 441 (striking down statute that prohibited voters residing in certain municipalities within a county from voting for county officers). Mandating that a voter's signature on an advance ballot match a signature on file in the State's voter database or that a non-disabled voter return his/her own

ballot to the county election office come nowhere near to crossing the line. *Cf. Burke v. State Bd. of Canvassers*, 152 Kan. 826, 107 P.2d 773, 778 (1940) (describing purpose of affidavit that had to be submitted by voter in conjunction with absentee ballot under prior statutory regime "is to show he is the same person as the one who" submitted the ballot, and not for the (improper) purpose of imposing additional qualifications).

Moreover, the federal judiciary's rationale for a sliding scale that affords deference to states in election administration is not, as the Court of Appeals suggested, merely anchored in principles of comity. Op. at 27-28. Rather, it reflects a recognition that legislatures and election officials must be provided great discretion in structuring elections and adopting safeguards to ensure that they are administered in an honest, fair, and orderly manner, lest chaos reign and public confidence in the democratic process diminish. Every election-related provision "inevitably affects – at least to some degree – the individual's right to vote." *Burdick*, 504 U.S. 433. But 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." *Id.* That is why virtually every state appellate court has adopted a similar standard for reviewing election-related challenges under their own constitutions.

B. – The SVR in K.S.A. 25-1124(h) does not unlawfully impair the right to vote.

The Court of Appeals' analysis as to how the SVR in K.S.A. 25-1124(h) can impair the right to vote largely ignored the statutory and regulatory framework in Kansas that governs the SVR process. When properly evaluated in the context of that comprehensive structure, Plaintiffs' SVR-related claims fail as a matter of law.

The Court of Appeals first embraced Plaintiffs' allegation that "whether an election official perceives a voter's signature as a mismatch is not in the voter's control" and that "lay election officials will erroneously determine voters' signatures are mismatched." Op. at 30. This reasoning, which disregards the elaborate mechanisms erected to avoid erroneous mismatches and afford voters substantial "cure" opportunities, *see, e.g.*, K.S.A. 25-1124(b); K.A.R. 7-36-9, amounts to an argument that "people might be harmed because election officials will not follow the law." But the law affords a strong presumption of regularity to all government functions. *U.S. Postal Serv. v. Gregory,* 534 U.S. 1, 10 (2001); *cf. Sheldon v. Bd. of Educ.*, 134 Kan. 135, 4 P.2d 430, 434 (1931). "[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). Alleging that the SVR process is constitutionally suspect because county election officials, in Plaintiffs' speculation, might not follow the law (e.g., by failing to contact voters to provide them a chance to correct a signature-related deficiency) is a wholly deficient basis upon which to predicate this cause of action, particularly given that Plaintiffs have mounted a facial attack on the statute. *See Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) (fear that individual mistakes will recur does not create a cognizable imminent risk of harm) (citing *O'Shea v. Littleton*, 414 U.S. 488, 495-98 (1974), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983)).

The Court of Appeals further criticized the SVR because "[t]he statute alone does not require training of election officials, contains no standard for determining what constitutes a signature match, and does not provide a standard for the opportunity to cure an error

made when matching signatures." Op. at 30. This holding, which is essentially the inverse of the "major questions" doctrine, requires far too much of the legislature in terms of specificity. *See* S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration.").

Since 2019, the legislature has statutorily mandated that county election officials contact any voter who submits an advance ballot with a signature mismatch and allow such voter an opportunity to correct the deficiency at any time before the final county canvas. K.S.A. 25-1124(b). Meanwhile, the Secretary adopted a comprehensive regulation in May 2022 that fleshes out the standards and procedures for assessing whether a signature is a match, requires special training for election officials performing this function, spells out how and when voters submitting an apparent mismatched signature must be contacted to alert them to a discrepancy, and clarifies and expands voters' right to cure the mismatch. *See* K.A.R. 7-36-9. In other words, the regulation fills in each of the purported statutory "gaps" that the Court of Appeals identified. The regulation has the force and effect of law, K.S.A. 77-425, it is presumed to be valid, *Pemco, Inc. v. Kan. Dep't of Rev.*, 258 Kan. 717, 720, 907 P.2d 863 (1995), and it must be upheld as long as it is appropriate, reasonable, consistent with the governing statute, and within the Secretary's authority. *In re City of Wichita*, 277 Kan. 487, 495, 86 P.3d 513 (2004).

In addition to pretending K.A.R. 7-36-9 did not exist, the Court of Appeals failed to consider the impact of a host of other election administration statutes on Plaintiffs' claim

that the SVR unconstitutionally impedes the right to vote. The problem with this omission is that, like many provisions in Chapter 25 of the Kansas Statutes (the Election Code), the scope of the SVR framework is in no way limited to K.S.A. 25-1124(h)'s statutory text. Indeed, for decades, the legislature has specifically directed the Secretary to train county election officials in all matters relating to their duties in conducting official elections, and dictated that the "form and content of the instruction shall be determined by the secretary of state." K.S.A. 25-124. The legislature has also empowered the Secretary to adopt "rules and regulations relating to advance voting ballots and the voting thereof." K.S.A. 25-1131. The Secretary invoked that authority in promulgating K.A.R. 7-36-9. It would make little sense for the legislature to set forth a detailed scheme of minutiae in implementing K.S.A. 25-1124(h) when it already had delegated such responsibility to the Secretary, whose office is particularly well-suited to this task given its extensive expertise on the topic.

Plaintiffs suggest in their Amended Petition that signature verification is inherently unreliable, making it inevitable that laypersons will make mistakes. (R. II, 265-66). But signatures have historically been required to help prove one's identity or authority in a wide array of daily activities, including check-writing, credit card usage, applications for loans and government benefits, and firearm licenses.

In any event, Plaintiffs' attack on the SVR relies on the construction of a straw man. In defining a signature "match" for purposes of K.S.A. 25-1124(h), K.A.R. 7-36-9(a)(4) requires only that a signature be "generally uniform and consistent" with the voter's signature in the State's voter registration database. An "inconsistent" signature is one that "differs in multiple, significant, or obvious respects from the voter's signature" on file. *Id.* at

7-36-9(a)(2). In other words, the kind of absolute precision / courtroom admissibility that Plaintiffs claim is required (and that they aver necessitates years of experience and can only be performed by a forensic specialist, if anyone) is simply not mandated under Kansas law.

As for Plaintiffs' allegation that certain categories of individuals may be impaired in their right to vote because their signature may have changed (or will be difficult to match with one on file in the county election office) due to age, disability, poor health, psychological status, or limited English proficiency, (R. II, 265), the Court of Appeals and Plaintiffs fail to recognize that the law already provides procedures to avoid any potential burden flowing from such issues. First, K.S.A. 25-1124(h) dictates that signature verification is not required if a voter has a disability that prevents him/her from signing the advance ballot envelope or signing it consistent with his/her registration form on file. While Plaintiffs complain that election officials might not initially be aware of a voter's disability, (R. II, 267-68), the now-mandatory cure procedures are designed to bring those facts to light. Second, any voter concerned that he/she may be unable to sign the advance ballot envelope consistent with a signature on file due to an illness, disability, or limited English proficiency, is free to have a third-party sign on his/her behalf. K.S.A. 25-1121(c); 25-1124(c), (e). The third-party merely needs to sign below the attestation statement that is included on every advance ballot envelope. *Id.*

Plaintiffs' theory also collapses when K.A.R. 7-36-9(b)(1) is taken into account, as it must be. In order to receive an advance ballot, one must first apply for it. K.S.A. 25-

1122.[3] Those applications, which include their own signature matching requirement, *see* K.S.A 25-1122(e)(1) (a provision that is unchallenged here), are scanned into the statewide voter registration database and maintained permanently, as required by K.S.A. 25-1122(i). Because advance ballot applications cannot be submitted until approximately ninety days before an election, K.S.A. 25-1122(f), county election officials will *always* have a very contemporaneous record of what the voter's most recent signature looks like. And election officials must use that application as one of the exemplars in determining if a voter's signature on the advance ballot envelope is a match. K.A.R. 7-36-9(b)(1). So the fact that a voter's signature may have changed since the time of initial registration or due to other events over the years is beside the point.

Finally, the Court of Appeals misunderstood the significance of *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), in criticizing the district court's reliance on that opinion. The Court of Appeals emphasized that *Crawford* had affirmed a grant of summary judgment after discovery. Op. at 31. But one of the most critical holdings in *Crawford* is that burdens of the sort "arising from life's vagaries" – e.g., a voter's appearance having changed from the photo on his identification card, or a voter having to travel across town to the DMV to get a driver's license – "are neither so serious nor so frequent as to raise any question about the constitutionality" about the law. *Crawford*, 553 U.S. at 197-99. That *legal* conclusion fully applies to the SVR here. *See Richardson v. Tex. Sec'y of State*, 978

[3] There is an exception for voters who have previously applied under K.S.A. 25-1122(h) and 25-1122d(c) to be placed on "permanent advance voting status" due to a permanent disability or illness. For those voters, the county election office would obviously be aware of their disabled status.

F.3d 220, 236-37 (5th Cir. 2020) (the fact that some voters might have difficulty signing their names or duplicating their signatures on a mail-in ballot does not amount to a violation of the constitutional right to vote).[4]

Importantly, while signature mismatch cure opportunities afforded to Kansas voters are extraordinarily robust, nothing in the state or federal constitution compels a "'no-risk' of uncorrectable rejection . . . standard for verifying ballots." *Id.* at 238. Nor must a State "afford every voter infallible ways to vote." *Id.* The U.S. Supreme Court, in fact, has described signature verification as less burdensome than a photo ID requirement, which itself was deemed valid. *Crawford*, 553 U.S. at 197; *Richardson*, 978 F.3d at 237 (same).

The bottom line is that an SVR is the only reasonable way to ensure the security of an advance ballot. Since individuals who vote via advance ballot necessarily do not appear in person, there is no other reasonable mechanism for verifying that the voter to whom the advance ballot was sent is the person casting that ballot.[5] While the Court of Appeals held

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[4] The U.S. Supreme Court has underscored that the proper judicial inquiry in cases attacking election integrity provisions is *not* on the burden to a handful of individual voters who might be adversely affected by the statute, but is instead targeted at the electorate "as a whole." *Brnovich v. DNC*, 141 S. Ct. 2321, 2339 (2021). The Court of Appeals nevertheless said that it would scrutinize the law based on its impact on "specific categories of voters." Op. at 31. But the case it cited for this proposition, *Fish v. Schwab*, 957 F.3d 1105 (10th Cir.), *cert. denied*, 141 S. Ct. 965 (2020)), involved a statute – documentary proof of citizenship – that offered no cure opportunity after Election Day and allegedly led to the disenfranchisement of approximately *30,000* voters. *Id.* at 1130. By contrast, as noted in Defendants' Response to Plaintiffs' Motion for Injunction (at page 6), a mere *105* Kansas voters (out of 1,013,728 total votes, and 135,832 mail votes) had their ballots rejected due to a signature mismatch in the 2022 General Election. And it is unlikely that more than a handful (if any) were improperly rejected.

[5] One can conceive of other options (e.g., thumbprint, DNA sample, etc.), but none are reasonable in terms of their cost or administrability. This is particularly true since such data is not currently contained in the State's voter registration database for any voters.

that Plaintiffs' facial challenge to the law necessitated a fact-driven test, Op. at 30 – an odd conclusion given the nature of facial attacks, the standard governing such claims, and the infinitesimally small number of people whose ballots were rejected due to signature mismatch in Kansas after this law took effect – the reasonableness of the SVR is ultimately a legal determination. Considering the full statutory and regulatory structure of Kansas' SVR process described above, with all its safeguards and flexibility for voters, there is no legitimate basis for concluding that the SVR poses a severe impairment on the right to vote. No deposition, discovery, or motion for summary judgment can change that fact.

A facial attack on the SVR can succeed only if the SVR lacks a "plainly legitimate sweep," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), or that a "substantial number" of its applications are unconstitutional, "judged in relation to [its] plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770-71 (1982). The challenge will thus fail "where at least some constitutional applications exist." *Wash. State Grange*, 552 U.S. at 457 (citation omitted). The idea that an SVR must be invalidated on its face because, according to Plaintiffs' supposition, some election officials might not follow the law, reflects a fundamental misunderstanding of the nature of such a claim. In short, the district court was correct to dismiss this cause of action and the Court of Appeals' ruling to the contrary should be reversed.

C. – The Court of Appeals erred by holding that Plaintiffs stated a valid equal protection claim against the SVR.

The Court of Appeals' handling of Plaintiffs' equal protection cause of action was similarly problematic. The court opined that, if it applied the reasoning of *Bush v. Gore*,

531 U.S. 98 (2000), Plaintiffs "adequately stated an 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. Election officials will use varying methods to judge whether signatures are truly mismatched or merely natural variations in signatures." Op. at 41-42. This analysis misconstrues *Bush* and ignores the uniform standard laid out by the Secretary in controlling regulations.

As a threshold matter, the Court of Appeals erred by suggesting that this claim must undergo strict scrutiny. In *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022), this Court held that equal protection claims sound in Section 2 of the Kansas Constitution's Bill of Rights, and they are co-extensive with the guarantees under the federal constitution. At worst, therefore, such claims are evaluated under *Anderson-Burdick* balancing. *See Fish*, 957 F.3d at 1122-23 & n.3. Arguably, Plaintiffs must show intentional discrimination by the State in order to prevail. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). Either way, Plaintiffs' cause of action fails as a matter of law.

In *Bush*, the U.S. Supreme Court confronted an equal protection claim challenging the Florida Supreme Court's decision to order manual recounts in certain counties – but not others – and then directed that the recounts be undertaken with no guidance or standard other than that the counties seek to discern the "intent of the voter." 531 U.S. at 102, 105. The U.S. Supreme Court held that, while focusing on a voter's intent was "unobjectionable as an abstract proposition and a starting principle," there must be some sort of "uniform rules to determine intent" in order to ensure equal application. *Id.* at 106. The Court noted

that each of the Florida counties were using different standards to identify a legal vote and pulling together ad hoc teams of judges with no training in handling or interpreting ballots. *Id.* at 107, 109. The Court emphasized that "local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* The problem was that a state court with the power to assure uniformity had ordered a recount with no "assurance that the rudimentary requirements of equal treatment and fundamental fairness" would be satisfied. *Id.* The Court then added that its "consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.*

The Court of Appeals below, despite acknowledging the existence of a regulation that addresses the SVR's supposed equal protection shortcomings, held that it would be "unfair" to "interpret and apply this regulation from a record that lacks any information about [it]." Op. at 42.[6] Instead, after reiterating that a balancing test would be inappropriate and that strict scrutiny must applied, *id.* at 39, 40-41, the court opted to remand the matter for additional "evidence and arguments." *Id.* at 42. But Plaintiffs raised a *facial*

[6] As noted in the Petition for Review (at page 11, note 4), K.A.R. 7-36-9 was first adopted as a temporary regulation, effective May 26, 2022. It was published on June 2, 2022 in the Kansas Register, and the public was invited to submit written comments and/or attend a public hearing on August 5, 2022. *See* 41 Kan. Reg. at 1059-61. No Plaintiff filed comments or attended the hearing. In their Reply Brief, Plaintiffs suggested that the regulation was not part of the record. But neither a statute nor a regulation is part of the record, and it is hornbook law that courts must take into account any statutory or regulatory developments that arise while a case is pending on appeal, particularly on a prospective basis. *See Tonge v. Werholtz*, 279 Kan. 481, 486-87, 109 P.3d 1140 (2005). Plaintiffs' only substantive criticism of the regulation is that it is insufficiently detailed and allows lay humans to conduct the signature matching, despite their purported inability to do so. This theory would totally upend Kansas' county canvassing procedures. *See* K.S.A. 25-3002(b)(1).

challenge to the SVR. There are no necessary findings of fact to resolve, particularly given the nature of the regulation. The issue presented is a legal question – i.e., it is an "attack on a statute itself rather than a particular application," *City of Los Angeles v. Patel,* 576 U.S. 409, 415 (2015); *Ryce*, 303 Kan. at 915 – and an appellate court equally capable of resolving it. *See Forsyth Cnty. v. Nationalist Movement,* 505 U.S. 123, 133 n.10 (1992) ("Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular" decision).

K.A.R. 7-36-9 provides a uniform, statewide standard to govern signature matching on advance ballot envelopes in each of the State's 105 counties. The standards and training are identical across the State.[7] Human beings, of course, are not automatons. But the fact that it is theoretically possible for two individuals, applying the same standard, to come to different conclusions about whether a particular signature is a match is not constitutionally significant, let alone fatal. *See N.E. Ohio Coalition for the Homeless v. Husted,* 837 F.3d 612, 619, 636 (6th Cir. 2016) ("Arguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected, just as judges in sentencing-guidelines cases apply uniform standards with arguably different results. In fact, that flexibility is part and parcel of the right of 'local entities, in the exercise of their expertise, [to] develop different systems for implementing elections.'") (quoting *Bush*, 531 U.S. at 109); *cf. Butts*, 31 Kan. 537

[7] Indeed, in April 2022, the Secretary launched a Certified Election Training Program that is required for all county election officials and helps ensure uniformity across all counties. https://www.sos.ks.gov/media-center/media-releases/2022/04-11-22-schwab-administration-announces-new-certified-election-training-program.html.

(rejecting equal protection attack on state voter registration law that imposed different rules for municipalities of different sizes).

Even if the Secretary had not adopted K.A.R. 7-36-9 and this Court's analysis was restricted to the text of K.S.A. 25-1124(h), Plaintiffs' equal protection claim would still fail. The SVR prohibits election officials from counting an advance ballot if the signature on the advance ballot "does not match the signature on file in the county voter registration records." K.S.A. 25-1124(h). The Ninth Circuit found a statute worded indistinguishably from the provision at issue here – requiring county election officials in Oregon to "compare the signature on the petition and the signature on the voter registration card to identify whether the signature is genuine and must be counted" – to pass muster easily under *Bush*. *See Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008). The court there held that a uniform standard requiring that a signature match the signature on file with the county registration office was sufficiently specific to avoid any equal protection concerns. *Id.* at 1105-06. The court also deemed insignificant the fact that there might be isolated discrepancies. *Id.* at 1106. Nor was it relevant that certain counties had higher rejection rates than others. As the court recognized, "signature gatherers in some counties do a better job than those in other counties," and "uniform standards can produce different results." *Id.* at 1107. The Fifth and Sixth Circuits had little difficulty rejecting nearly identical claims under the same rationale. *See Richardson*, 978 F.3d at 235-38; *Husted*, 837 F.3d at 635-36.

All the law requires is that Kansas have "*adequate* statewide standards for determining what is a legal vote." *Bush*, 531 U.S. at 110 (emphasis added). They need not be perfect. Minor deviations in administration are permissible and likely inevitable. Kansas'

SVR easily satisfies that standard, and Plaintiffs' claim must fail.

D. – The Court of Appeals erred by holding that Plaintiffs stated a valid due process claim against the SVR.

The Court of Appeals' suggestion that the SVR denies Plaintiffs their due process rights is likewise unsound. As Defendants explained in their Appellees' Brief and Petition for Review, not only has every federal appellate save one turned away this cause of action due to the absence of a liberty interest, but all of the outlier federal district court cases cited by the Court of Appeals involved signature matching procedures that afforded voters no, or almost no, opportunity to correct mismatches. *See Saucedo v. Gardner*, 335 F. Supp.3d 202, 206 (D.N.H. 2018) (voters given neither notice of rejection nor opportunity to cure); *Frederick v. Lawson*, 481 F. Supp.3d 774, 782 (S.D. Ind. 2020) (same); *League of Women Voters v. Andino*, 497 F. Supp.3d 59, 66-67 (D.S.C. 2020) (same); *Zessar v. Helander*, No. 15-C-1917, 2006 WL 642646, at *1, 6 (N.D. Ill. 2006) (same); *Martin v. Kemp*, 341 F. Supp.3d 1326, 1329-32 (N.D. Ga. 2018) (voters with signature mismatch on absentee ballot envelope must either apply for new ballot prior to Election Day or vote in person).[8] In marked contrast, Kansas gives voters all the way up until the county canvas (i.e., as much as 13 days after the election, K.S.A. 25-3104) to correct any deficiencies. Defendants are unware of any other state that offers as much due process.

[8] The one contrary court of appeals case similarly required any cure to occur prior to Election Day. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1316 (11th Cir. 2019). The Eleventh Circuit subsequently criticized that decision and suggested it had no precedential value. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020).

With regard to a liberty interest, the Court of Appeals reasoned that because advance voting has been a privilege afforded to Kansas voters for decades, it cannot be taken away without due process. Op. at 36-37. Although there is no suggestion that the legislature is considering rolling back this option, the court's argument conflates the concept of property rights with liberty interests. As the Fifth Circuit explained in rejecting an identical theory:

> The [district] court concluded that because Texas has created a mail-in ballot regime, the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots. That notion originated in *Raetzel* [*v. Parks/Bellmont Election Bd.*, 762 F. Supp. 1354 (D. Ariz. 1990)], in which the District of Arizona acknowledged that absentee voting is a privilege and a convenience, and yet concluded – without citation – [that] such a privilege is deserving of due process. In its defense, *Raetzel*'s reasoning resembles the principle animating *Goss v. Lopez*, 419 U.S. 565 (1975). *Goss* concluded that, "[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures." *Goss*, 419 U.S. at 574. Although several district courts have regurgitated *Raetzel*'s reasoning, the plaintiffs and the district court point to no circuit court that has embraced it.
>
> And properly so. There is a problem with grafting *Goss*'s reasoning onto the voting context: *Goss* found two cognizable due process interests, namely a "property interest in educational benefits" and a "liberty interest in reputation." *Goss*, 419 U.S. at 576. In context, *Goss*'s language about the state's "[h]aving chosen to extend" benefits and being thus bound by due process came from its analysis of a "protected *property* interest." *Id.* at 579 (emphasis added). *Raetzel*, however, concluded that "the right to vote is a '*liberty*' interest." *Raetzel*, 762 F. Supp. at 1357 (emphasis added). Thus, *Raetzel* grafted the Supreme Court's reasoning concerning property interests onto a claimed liberty interest without providing any authority justifying that extension. We decline to adopt *Raetzel*'s extrapolation of Supreme Court precedent.

Richardson, 978 F.3d at 232-33 (cleaned up). Tellingly, the only Kansas case cited by the Court of Appeals was a decision about *property* interests. *See Creecy v. Kan. Dep't of Rev.*, 310 Kan. 454, 458, 447 P.3d 959 (2019) (describing due process rights of a motorist

before being deprived of property interest in license). In sum, while voting interests are important, they do not implicate the Due Process Clause. For multiple reasons, therefore, Plaintiffs' due process claim was properly dismissed by the district court.

E. – The Court of Appeals erred by finding that the BCR in K.S.A. 25-2437(c) imposes a severe burden on the right to vote.

In evaluating Plaintiffs' claim that the BCR restricts their right to vote, the Court of Appeals held that the State's interest in preventing voter fraud had to be balanced against its interest in increasing electoral participation via mail voting. Op. at 33 (citing *Sawyer*, 240 Kan. at 415). This makes no sense. The court effectively pitted the State against itself. *Sawyer* merely held that the legislature had the constitutional *authority* to allow for mail voting. 240 Kan. at 414-15. In fact, this Court recognized in *Sawyer* that mail ballots "increase[] the potential for compromise of secrecy and opportunity for fraud." *Id.* at 414. The Court held that the balancing of these policy considerations is a matter left to the legislature. *Id.* at 415. It is not the role of the judiciary to interfere in such policy judgments.

In the next sentence of its analysis, the Court of Appeals observed that "Courts have commented that states will have a problem with the latter part of its burden if there is no evidence mismatched signature ballots were submitted fraudulently." Op. at 33-34. What this has to do with BCR is a mystery.

Regardless, as Defendants noted in their Appellees' Brief, even taking every allegation in Plaintiffs' Amended Petition as true, there is simply no unconstitutional burden imposed on voters – *as a matter of law* – in potentially having to put a stamp on an advance mail ballot if the voter is unwilling or unable to deposit the ballot in a drop box or vote in

person. The proper focus in reviewing these constitutional challenges to election statutes is on the electorate as a whole, not on a smattering of discrete voters with allegedly peculiar circumstances. *Brnovich*, 141 S. Ct. at 2339. The State's interests in regulating this type of electoral activity are overwhelming and have been repeatedly recognized by the judiciary. The fact that the State extended such flexibility to voters in casting advance ballots in no way means that it is constrained in regulating that activity. With respect, a holding to the contrary would be a gross overstep of this Court's authority and would greatly undermine public confidence in the integrity of our electoral process.[9]

III. – Conclusion

Defendants request that this Court reverse the Court of Appeals' decision and affirm the district court's dismissal of Plaintiffs' constitutional challenges.

Respectfully submitted,

/s/ Bradley J. Schlozman

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[9] With regard to the Court of Appeals' ruling – whatever it might have been – on Plaintiffs' free speech attack on the BCR, Defendants rest on the arguments in their Petition for Review and Appellees' Brief.

CERTIFICATE OF SERVICE

I certify that on July 24, 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 will be e-mailed to the following individuals:

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APPENDIX

Unreported Case:

Zessar v. Helander, No. 15-C-1917, 2006 WL 642646 (N.D. Ill. 2006)

2006 WL 642646
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Bruce M. ZESSAR, Plaintiff,
v.
Willard R. HELANDER, Lake County Clerk, et al., Defendants.

No. 05 C 1917.
|
March 13, 2006.

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MEMORANDUM OPINION AND ORDER

COAR, J.

I. BACKGROUND FACTS [1]

A. Plaintiff and the November 2004 Election

*1 Plaintiff Bruce M. Zessar is a resident of Lake County, Illinois, but works in Chicago's Loop area. In early October 2004, Zessar contacted the Lake County Clerk's office about requesting an absentee ballot because he expected to be absent from Lake County on Election Day that year. Zessar received an absentee ballot application and an absentee ballot by mail. He completed the application and returned it to the Clerk's office by mail, after checking the box indicating that he expected to be absent from Lake County and would be unable to vote in person at his precinct. Zessar provided his name, address, and business telephone number on the absentee ballot application, but did not provide his email address although there was space provided. In addition, he voted the absentee ballot, signed and dated the certification form on the accompanying envelope on October 4, 2004, and returned it by mail to the Lake County Clerk's Office, well before the November 2, 2004 General Election.

On Election Day, Zessar was absent from Lake County during polling hours. He took the 5:50 a.m. commuter train from Highland Park, Illinois (in Lake County) to the Loop and returned on the 7:00 p.m. commuter train from Chicago. During the days immediately before and after Election Day, Zessar did not leave the greater Chicago and Lake County area.

In mid-January 2005, some two and a half months after the November 2004 election, Zessar received a yellow Notice of Challenge postcard by mail from the Lake County Clerk's office. The Notice of Challenge card, which had been prepared on the night of the election by Lake County election judges, informed Zessar that election officials in Moraine Precinct number 215 (Lake County) had determined that Zessar's signature on his absentee ballot did not match the signature on file on his voter registration card and that his ballot had been rejected. All parties now agree that this determination was erroneous. Zessar's vote was not cast and did not count in the election results. For the November 2004 election, Lake County reported 538 rejected ballots from a total of 458 precincts.

The final election results for Lake County had been posted on the County Clerk's website on November 17, 2004, approximately two weeks after Election Day. The results were labeled "unofficial," although the Lake County operations manager state that they were final. Under Illinois law, county offices were required to complete the abstract of votes and official canvass for county offices by November 23, 2004. The Illinois State Board of Elections must complete the official canvass and abstract of votes for state and judicial offices by 31 days after the election.

The Illinois Election Code and related regulations require that a rejected absentee voter must receive notice of the ballot rejection but otherwise give no guidance about the time frame in which such notice must be given. State law makes no provision for a rejected absentee voter to challenge the ballot rejection or to have any form of hearing prior to the rejection of the ballot or completion of the official canvass.

B. Illinois Election Authorities

*2 The Illinois State Board of Elections ("The State Board") is an independent state agency created to supervise voter registration and the administration of elections throughout Illinois. Locally, elections are administered by the state's 110 election authorities, which consist of the county clerks in Illinois' 101 counties, one county election commission, and eight municipal election commissions. These local election authorities oversee local voter registration programs, train election judges, [2] identify polling places, get ballots printed, oversee election day activities, and supervise the local vote count. The State Board works with the election authorities by providing oversight and guidance, including ongoing training programs for authorities. Both the State Board and the local election authorities are governed by the Illinois Election Code and its provisions regarding absentee ballot procedures.

C. Absentee Ballot Procedures

Under the Illinois Election Code, absentee ballots received prior to Election Day are placed, unopened, together with the absentee ballot application in a large, securely sealed envelope, which is endorsed by an official of the election authority with the words, "This envelope contains an absent voter's ballot and must be opened on election day." 10 Ill. Comp. Stat. 5/19-7. The envelopes are kept in the election official's office until Election Day, when they are delivered to the polling place of the precinct where the voter resides. 10 Ill. Comp. Stat. 5/19-8. Election judges at each precinct "cast" absentee ballots at the close of polls on Election Day. State law provides that the election judges shall open the outer envelope, announce the absent voter's name, and compare the signature on the application with the signature on the ballot envelope. If the signatures do not correspond, the applicant is not a duly qualified voter, the ballot envelope is open or has been opened and resealed, or the voter has voted in person on Election Day, the absentee ballot will be left unopened and on its face shall be marked "Rejected," along with the reason therefor. 10 Ill. Comp. Stat. § 5/19-9. The Election Code further provides that if a challenge to an absentee ballot is sustained, "notice of the same must be given by the judges of election by mail addressed to the voter's place of residence." 10 Ill. Comp. Stat. 5/19-10.

The State Board publishes manuals for local election officials. Under regulations contained in these instruction manuals, a majority of the election judges decides whether a challenged ballot will be counted. Acceptable reasons in addition to those provided by the Illinois Election Code include: the voter filled out the certification envelope incompletely; the information in the certificate is incorrect; the signature and/or address on the application do not match the signature and/or address on the verification record or on the certification envelope; the individual is not a qualified voter; or the individual died prior to the opening of polls on Election Day.

*3 After agreeing to reject an absentee ballot, the election judges complete and sign a Notice of Challenge card (a yellow postcard) provided by the election authority. The election judges return the notice of challenge cards to the election authority, along with all election materials, on election night. The election authority then mails the card to the voter. Lake County's Election Judge Manual directed election judges to follow this procedure with respect to rejected absentee ballots in 2004.

D. Lake County and November 2004 Election

Lake County directed its precinct election judges to put all notice of challenge postcards in a red voting materials bag at the end of the evening and return the bags to the election authority headquarters. If there is the possibility of a discovery recount, all election materials, including the red bags, are sequestered. Such a discovery recount or election contest period does not commence until the final canvass of votes, which is not completed until 21 days after election day. The notice of challenge postcards would not be mailed until the end of the discovery recount period. If there is no possibility of a discovery recount or the recount period has ended, the red bag is opened and the envelope (Envelope # 3) containing the notice of challenge postcards is removed and sent to the absentee ballot department. This department removes the postcards from Envelope # 3 and mails them. In all, the process takes one to two weeks after the election.

For the November 2004 election, Lake County issued 26,578 absentee ballot applications and absentee ballots. Voters returned 23,506 absentee ballots to the Clerk's office. The absentee ballot application form used in Lake County provides space for absentee voters to provide a telephone number and email address. In the event that a "facially incomplete" application is returned well before the election or a court decrees that a candidate appear or not appear on a ballot after the ballots are printed and the absentee voting period has commenced, the Clerk's office may attempt to contact that absentee voter in order for the voter to complete the application fully or to vote the corrected ballot. Of the absentee ballot applications for the November 2004 election, approximately fifty percent lacked both an email address and a telephone number.

A total of 3,696 active voters in Lake County are enrolled in the absent student, nursing home resident, disabled, or "snowbird" voter programs administered by the County Clerk. There are approximately 4,000 additional voters serving in the military or residing overseas. Voters enrolled in these programs automatically receive an absentee ballot application and an absentee ballot; they do not have to make a specific request.[3] Of the absentee ballot requests from individuals not enrolled in these programs for the November 2004 election, approximately fifty percent were mailed to voters at addresses outside Illinois.

***4** Five hundred thirty-eight absentee ballots submitted in Lake County were rejected on election night in November 2004. Of these, the Clerk's office received inquiries from approximately five individuals, including Zessar, after they received their rejection notification postcards.

Elections place additional burdens on county clerk's offices. For the November 2004 election, thirty-nine permanent and temporary employees at the Lake County Clerk's office were assigned to election duties. Several of these employees were diverted from their regular duties in the Tax, Vital Records, and County Board Record Departments. On Election Day, 213 additional temporary workers and volunteers assisted with opening and closing polls, replenishing supplies, handling technical problems and delivering absentee ballots. Fifteen people worked until approximately one a.m. on November 3, 2004, to finish unloading all election materials from precinct locations at the Clerk's office. From November 3, 2004 until at least January 1, 2005, Clerk's office staff were engaged in performing all their post-election statutory duties.

There were a total of 688 provisional ballots cast in Lake County during the election. Eight full time staff members worked six hours a day to process the provisional ballots completely. Of the total, 199 were found to be valid and were cast. Provisional voters are individuals who voted in person on Election day but whose registration could not be verified. Instead, they signed affidavits attesting that they were registered and eligible to vote. A provisional voter has two calendar days following the election to provide any required additional documents to the Clerk's office and the Clerk's office has fourteen calendar days after the Election to validate and, if appropriate, count the provisional ballots. 10 Ill. Comp. Stat. 5/18A-15(d). No more than ten provisional voters actually contacted the Clerk's office.

On November 2, 2004, there was a possibility of a discovery recount because the race for County Coroner was decided by a very small margin. Accordingly, the Lake County officials did not allow envelopes or other material to be opened until after the period for discovery recount had ended. Lake County officials determined that the Coroner's race was entitled to a discovery recount upon the completion of the election canvass. The unsuccessful candidate for Lake County Coroner, however, did not pursue his statutory right to a discovery recount during the allotted time period.

After receiving a Notice of Challenge postcard, a voter is free to re-register and update his or her signature on the registration file.

E. November 2004 Absentee Voting In Illinois

The State Board was required to submit data to the United States Election Assistance Commission after the November 2004 election. A State Board questionnaire sent to each election authority sought data on the total number of absentee ballots requested, the total number of absentee ballots returned, and the total number of absentee ballots counted. Not all counties reported the total number of absentee ballots counted.

F. Zessar Files Suit In Federal Court

***5** On April 1, 2005, Zessar brought a class action complaint against Willard Helander, the Lake County Clerk, the Lake County Board of Elections, Lake County Election Judges, the Illinois State Board of Elections and the members thereon. Zessar claims that the lack of notice and an opportunity to rehabilitate his absentee ballot before the official election canvass date violated his constitutional right to due process under the Fourteenth Amendment to the United States Constitution. As relief, Zessar asks this Court to declare unconstitutional certain provisions of the Illinois Election Code which relate to absentee voting, to order the State Board of Elections to require pre-deprivation notice and hearing to absentee voters whose ballots are challenged, to award reasonable attorney's fees and costs, and to grant other such legal or equitable relief as the Court finds proper. Plaintiff also filed a motion for certification of both a plaintiff and a defendant class in this matter, which this Court granted. Presently before the Court are motions for summary judgment filed by Zessar, by Willard Helander, and by the Illinois State Board of Elections. These motions have been fully briefed and are ripe for decision.

II. STANDARD OF REVIEW

A party seeking summary judgment has the burden of showing, through "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact that would prevent judgment as a matter of law. Fed.R.Civ.P. 56(c). On a motion for summary judgment, courts "must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party." *Allen v. Cedar Real Estate Group, LLP,* 236 F.3d 374, 380 (7th Cir.2001). "If, however, the record as a whole 'could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.' " *Id.* Once a motion for summary judgment has been filed, "the burden shifts to the non-moving party to show through specific evidence that a triable issue of fact remains on issues on which the non-movant bears the burden of proof at trial." *Liu v. T & H Machine, Inc.,* 191 F.2d 790, 796 (7th Cir.1999) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The non-movant must provide more than a "mere scintilla" of evidence to carry its burden under the summary judgment standard. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, weighing evidence, making credibility determinations, and drawing reasonable inferences are functions of a jury, not of a judge deciding a summary judgment motion. *Id.* at 255.

III. ANALYSIS

Zessar alleges that the Illinois Election Code violates his right to procedural due process because it does not require timely notice and an opportunity for a hearing prior to the official canvass date. Put another way, Zessar contends that the lack of timely notice and hearing under Illinois law works to deprive him of his fundamental right to vote. Plaintiff's argument is that the right to vote is a fundamental right, afforded the fullest constitutional protection. *Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Ill. State Bd. Of Elections v. Socialist Worker's Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). The right to vote by absentee ballot is not, in and of itself, a fundamental right. But once the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot. *See Raetzel v. Parks/Bellemont Absentee Election Bd.,* 762 F.Supp. 1354 (D.Ariz.1990). Defendants Helander and the State Board deny that this case addresses the right to vote. Instead, they contend that the issue turns on whether there is a constitutional interest in the right to vote absentee. Defendants also seek to characterize this as a case about Zessar's particular experience. As such, they characterize the facts as representing a "garden variety" election irregularity, with which federal courts should not interfere. *Dieckhoff v. Severson,* 915 F.2d 1145, 1150 (7th Cir.1990).

A. Procedural Due Process

***6** It is undisputed that the right to vote is a fundamental right under the United States Constitution. *Harper v. Va. Bd. of Elections,* 383 U.S. 662, 666 (1966). In this case, however, the parties disagree about whether due process protects the rights of an absentee voter. Perhaps the easiest way to answer the question is to examine what is ultimately at stake. Under the Illinois Election Code, an absentee voter in Illinois completes, certifies, and returns an absentee ballot to her polling place at some point during the statutorily prescribed period. She then must wait until some time after the election to learn if her ballot was challenged and rejected. She has no opportunity to oppose the rejection or to demonstrate that it was erroneous. Her vote simply does not count in the election. At best, she has the opportunity to re-register so as to prevent a future rejection.

There is no question that the federal constitution does not require states to create absentee voting regimes. *McDonald v. Bd. of Election Comm'rs,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). States may regulate absentee voting and determine who qualifies to vote absentee. The right to receive an absentee ballot is not the same as the right to vote, and will not receive the same constitutional protection. *Id.* It is not unconstitutional, for example, for a state to refuse to permit working mothers *qua* working mothers to vote by absentee ballot even though it might be a great hardship to require them to vote in person on Election Day. *Griffin v. Roupas,* 385 F.3d 1128 (7th Cir.2004). Defendants correctly assert that state regulations or restrictions on absentee voting do not, as a general matter, violate a fundamental constitutional right. *McDonald,* 394 U.S. at 810-11; *Griffin,* 385 F.3d at 1130-31; *Prigmore v. Renfro,* 356 F.Supp. 427, 433 (N.D.Ala.1972). But once they create such a regime, they must administer it in accordance with the Constitution. *Paul v. Davis,* 424 U.S. 693, 710-12, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (an otherwise protected interest can attain "constitutional status by virtue of the fact that [it has] been initially recognized and protected by state law" if "as a result of the state action complained of, a right or status previously recognized by state law was

distinctly altered or extinguished"). An absentee voter, by definition, is someone who is unable to vote in person because of physical absence or incapacity. By creating an absentee voter regime, the state has enabled a qualified individual to exercise her fundamental right to vote in a way that she was previously unable to do. The Lake County Clerk contends that an absentee voter has no right or status as an approved absentee voter until her ballot is reviewed and accepted by the election judges on election night. This proves too much. By this logic, an inperson voter has no right or status as an approved voter until her identity as a registered voter has been reviewed and accepted at the polling place. But the in-person voter has a right to due process. Under Helander's argument, the absentee voter does not.[4] This Court finds that the state's action in creating an absentee voting program served to alter the rights of those electors who participate in the program. Accordingly, approved absentee voters are entitled to due process protection. Under the Illinois Election Code, such voters risk the deprivation of their vote, a liberty interest, based on factual issues relating to their ballot.

B. What Process is Due

***7** Due process is "flexible and calls for such procedural safeguards as the situation demands." *Gilbert v. Homar,* 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). To determine what process is due, a court must balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The court also must balance the interests the state asserts as justification for a rule restricting voting against the nature and degree of asserted injury to a plaintiff's First and Fourteenth Amendment rights. *Burdick,* 504 U.S. at 434 (citing *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)).

1. Private Interest

Zessar contends that the private interest at stake is the right of approved and statutorily-compliant absentee voters to cast their votes.[5] Once the state approves a qualified individual to vote by absentee ballot, he contends that it violates due process to reject the absentee ballot without providing notice and a pre-deprivation hearing. The State Board and Helander deny that there is a liberty interest present in an absentee voting program. In particular, Helander argues that Plaintiff's primary case law support for the proposition that absentee balloting is entitled to some minimal amount of due process is inapplicable. In *Raetzel v. Parks/Bellemont Absentee Election Board,* 762 F.Supp. 1354 (D.Ariz.1990), a federal district court in Arizona held that Arizona's statutory scheme regarding absentee ballots violated constitutional due process requirements because it did not provide for notice and a hearing for voters whose ballots were rejected. Under applicable Arizona law, only county political party chairmen received notice of a disqualified vote, and then only if the challenge was made in writing. The political parties were under no obligation to notify the individual voter about the disqualification. *Id.* at 1357. The *Raetzel* court described absentee voting as "a convenience for those unable to vote in person." *Id.* at 1358 (citing *Prigmore v. Renfro,* 356 F.Supp. 427, 432 (N.D.Ala.1972), *aff'd* 410 U.S. 919, 93 S.Ct. 1369, 35 L.Ed.2d 582 (1973). It then went on to characterize absentee voting as "deserving of due process," and stated that "[the state] cannot disqualify ballots, and thus disenfranchise voters, without affording the individual due process protection .... [such as] advising the individual of the disqualification and the reason therefor[ ], and providing some means for the individual to make his or her position on the issue a matter of record before the appropriate election official." *Raetzel,* 762 F.Supp. at 1358.

This Court finds that under the current statutory system, the election judges' rejection-erroneous or not-wholly deprives an absentee voter of the right to vote. There is no recourse for the voter and no way to remedy the loss of that vote in that election.

2. Risk of Erroneous Deprivation and Probable Value of Additional Procedures

***8** The risk of erroneous deprivation of a protected voting right is admittedly not tremendous, but there is a risk. For the 2004 General Election, the parties estimate that at least 1,100 absentee ballots were rejected. By contrast, at least 253,221 absentee ballots were returned to election authorities and 191,177 absentee ballots were counted. These numbers fail to give the full picture, however, because not all counties reported the number of absentee ballots counted.

Plaintiff proposes that Notice of Challenge postcards should be mailed to the address on file for the voter as soon as possible after the election, but in no event more than a few days thereafter. He then envisions a kind of "informal"

administrative hearing conducted by an employee of the election authority to confirm that the absentee ballot in fact belongs to the voter. An absentee voter whose ballot had been challenged could submit identification in person or via written affidavit. [6] At that point, Zessar contends, the ballot in most instances would be sufficiently validated and could be counted. On behalf of Lake County, defendant Helander contends that the risk of erroneous deprivation is very small. The Illinois Election Code provides only limited grounds for election judges to reject an absentee ballot, based on: finding that signatures do not correspond; that the applicant is not a registered voter in that precinct; that the absentee ballot envelope has been sealed and then opened and re-sealed (suggesting some kind of ballot tampering); that the absentee voter also voted in person on Election Day; or that the voter is known to have died before the start of the polling hours on Election Day. 10 Ill. Comp. Stat. 5/19-9. Election judges, being human, may make mistakes, but Helander argues that such mistakes, if made without invidious or fraudulent intent, are not redressable in federal court. The State Board contends that Zessar's proposed remedy of immediate notice and a hearing prior to the official canvass date [7] is "hugely disproportionate" to the problem. Further, the State Board questions whether the proposed procedure would remedy the deprivation for absentee voters in other factual situations, such as those who are students at colleges and universities out of their home district, military service members serving out of state or overseas, "snowbirds" living out of state for part of the year, or nursing home or hospital residents with mobility limitations.

In addition, the State Board questions the value of additional procedures in preventing what was, in the instant case at least, a good-faith mistake during the signature verification stage. Plaintiff's response is that additional procedures would provide a way to safeguard his protected interest in voting. Helander contends that Zessar can offer no guarantees that the additional safeguards he seeks would be effective. [8] In particular, Helander contends that sending notice of challenge postcards to the voter's Lake County address (on file with the voter registration) would be ineffective for voters who were out of the county for an extended time period. [9]

***9** This Court finds that a post-deprivation hearing provides only prospective relief in that it allows the rejected voter to correct something about her registration for future elections. The fact that Zessar and his fellow rejected absentee voters may have been deprived of their vote through a good-faith error, rather than outright fraud, does not eliminate their due process interest in preserving their right to vote. Once rejected, the ballot cannot be rehabilitated and cast after a post-deprivation hearing. The voter's right to vote would have been irremediably denied. The defendants belief that timely notice and a pre-deprivation hearing would provide little additional value to the effort to protect the voters' interests in their voting right is unpersuasive. It is apparent that the risk of erroneous deprivation of the protected interest in absentee voting is not enormous, but the probable value of an additional procedure is likewise great in that it serves to protect the fundamental right to vote.

3. Government's Interest

The third factor in the *Mathews* balancing test examines the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). Zessar maintains, in rather conclusory fashion, that the burden of additional procedure on the government would be slight. Although the parameters of the hearing he envisions are unclear, he asserts that an affidavit form could be created and sent to rejected absentee voters, who could then return it in person or by mail or fax. He also notes that the process would involve a relatively small number of individuals. By way of example, of the 688 provisional voters in Lake County in the November 2004 election, no more than 10 contacted the Clerk's office after the election. For the same election, Lake County reported 528 rejected absentee ballots.

The defendants cry foul with regard to the burden of additional procedures. They note that election authorities face a cascade of statutory obligations in the time period leading up to and following the election, which has only increased with the advent of in-person absentee voting or "early voting" in Illinois in the March 2006 election. 10 Ill. Comp. Stat. 5/19-2.1. In Lake County, election authority staff worked six hours per day for fourteen days after the election to validate the 688 provisional voters who voted in the election. Additional procedure relating to absentee voters would be an untenable burden, according to Defendants. This Court is not convinced by Defendants' parade of horribles. For one thing, absentee voters and provisional voters stand in different positions before the election authority. Under Section 19-4 of the Illinois Election Code, upon receipt of an application to vote absentee, [10] an election authority must examine voter

registration records to verify that the applicant is "lawfully entitled to vote as requested." 10 Ill. Comp. Stat. 5/19-4. Only after making such a determination is the absentee ballot itself issued. Thus, the burden on the election authority staff is much less than it is with regard to provisional ballots. 10 Ill. Comp. Stat. 5/18-1 *et seq.* The staff verifies that the voter is lawfully entitled to vote before the election, rather than during the fourteen days following the election. A process along the lines of that described by Zessar would pose some additional administrative and fiscal burden on the election authorities, but this Court finds that Defendants have not demonstrated that the burden would be so great as to overwhelm plaintiff's interest in protecting his vote.

Conclusion

***10** For the foregoing reasons, Plaintiff's motion for summary judgment is granted in part and denied in part. Defendant Helander and Defendant Illinois State Board of Elections' motions for summary judgment are denied. This Court finds that the Illinois Election Code provisions regarding the casting of absentee ballots, 10 Ill. Comp. Stat. 5/19-9, violate absentee voters' due process rights. Although plaintiffs have been damaged by the rejection of their ballots, this Court does not find that economic damages are appropriate or that equitable relief is required beyond what is necessary to implement a constitutional absentee voting system. This Court does not reach the issue of attorney's fees and costs at this stage of the proceedings.

The parties shall submit proposed procedures for providing timely notice and pre-deprivation hearing to absentee voters whose ballots have been rejected to this Court by May 1, 2006.

All Citations

Not Reported in F.Supp.2d, 2006 WL 642646

Footnotes

1 Unless otherwise stated, these facts are taken from the parties' L.R. 56.1 submissions.

2 In Lake County, for example, there are over 6,000 individuals in the Election Judge Pool. Of these, 2,2522 Election Judges served on November 2, 2004.

3 The Lake County Clerk's office has a current mailing address on file for these voters.

4 Helander contends that an elector, such as Zessar, always has the option of voting in person rather than taking advantage of the statutorily-provided absentee voting regime. But that misstates the issue. The absentee voting provisions do not-and could not-distinguish between classes of absentee voters and offer differing levels of procedural protection depending on the relative hardship the class members might face in getting to the polls in person.

5 Zessar does not contend, as Defendants seem to suggest, that all absentee ballots, even those validly rejected for statutory noncompliance must be counted. Rather, he argues that all approved absentee voters have the right to notice and a pre-deprivation hearing before their ballots are rejected and their right to vote violated.

6 Zessar compares the process of showing valid identification with the "everyday" process of going through an airport or government building security checkpoint.

7 For all practical purposes, the pre-deprivation hearing would occur within the two week period immediately following Election Day. This is also the time period during which election authorities are verifying provisional votes. 10 Ill. Comp. Stat. 5/18A-15(a).

8 This Court notes that Lake County already provides some additional protection to certain absentee voters who submit "facially incomplete" ballots prior to Election Day. The Clerk may contact the voter and invite her to complete the ballot fully.

9 Helander does not explain why notice of challenge postcards could not be sent to the address where the absentee ballot was sent.

10 By law, applications to vote absentee must be received at the appropriate election authority by mail not more than 40 days nor less than 5 days prior to the election or by personal delivery not more than 40 days nor less than one day prior to the election. 10 Ill. Comp. Stat. 5/19-4.

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