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

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF

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 foundation of Plaintiffs' novel legal position can be summed up into three principles: (1) the right to vote (in general) is a fundamental right; (2) all laws burdening fundamental rights are subject to strict scrutiny; and (3) because the right to vote is a fundamental right, any law impacting voting or elections – regardless of degree – must survive strict scrutiny. This simplistic argument, which both the federal judiciary and nearly every state to confront the issue have *expressly* rejected, is not only unworkable, but it defies this Court's precedents, ignores the Kansas Constitution's broad delegation of authority to the legislature to regulate in this space, disregards the history of our State's founding, impairs the ability of State officials to safeguard the fairness of elections, and will only serve to undermine the public's confidence in the integrity of the electoral process.

Plaintiffs effectively seek to convert the judiciary into a super-administrator of all voting regulatory matters and ask it to micromanage every aspect of election oversight. That is a dangerous (if not disastrous) path. It would steer the Court into a collision with well-established principles of separation of powers. The only reasonable course of action is to reverse the Court of Appeals' decision and affirm the dismissal of Plaintiffs' Petition.

II. – Argument

A. – Plaintiffs Ignore 150 Years of Kansas Precedent and Constitutional History

Plaintiffs remarkably assert that the Court of Appeals' decision was firmly grounded in this Court's case law. Resp. at 1. That historical lens is short-sighted, not extending beyond *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663, 440 P.3d 461 (2019). Even then, Plaintiffs misread a decision about inalienable natural rights to bodily integrity

and self-determination as somehow radically transforming Kansas election law and largely neutering the legislature's power to enact measures designed to protect the integrity of the ballot, deter fraud, facilitate efficient election administration, and inspire public confidence in the same. And how do Plaintiffs respond to the roughly *150 years* of Kansas Supreme Court precedent and election history that Defendants comprehensively recounted in their Supplemental Brief (at 5-10) and Petition for Review (at 6-7), all of which emphasizes the necessity of judicial deference to the legislature in this sphere and undermines the predicate for Plaintiffs' legal theory? They don't. Plaintiffs simply ignore it. So, too, with Defendants' citations to Art. 4, § 1 and Art. 5, § 4 of the Kansas Constitution, which empower the legislature to regulate elections and adopt any measures necessary to ensure that only those eligible to vote are able to vote. Plaintiffs nowhere even reference those provisions in their response brief. The omission is both telling and damning to their case.

Plaintiffs' efforts to distinguish this Court's analytical review of other constitutional rights (Resp. at 5-7) is also unpersuasive. As Defendants explained in the Reply to their Petition for Review (at 4-5), the mere "fundamentality" of the right at issue does not automatically dictate the applicable standard of review. Plaintiffs' one-size-fits-all approach, meanwhile, rests on entirely circular reasoning. If the asserted constitutional right at issue has not been violated, they claim, then there is no need for strict scrutiny. True enough, but that is hardly a practicable standard. It puts the cart before the horse, which is why courts employ a more nuanced methodology. In any event, Plaintiffs' theory applies with equal or greater force to the facial constitutional challenges in this case. The notion that the right to vote has been infringed merely because an individual must sign his/her advance

ballot envelope, or because limits are imposed on how many executed ballots may be collected and returned by third-party ballot harvesters is the height of unreasonableness. The *legal conclusion* that must be drawn is that there is no violation. Under Plaintiffs' own theory, therefore, strict scrutiny should have no application.

The Court of Appeals conceded that "[e]very voting rule imposes a burden of some sort." Op. at 26. The legislature, however, has been endowed with broad constitutional authority to regulate elections. Kan. Const., art. 4, § 1; art. 5, § 4. It cannot follow that "every voting rule" is subject to strict scrutiny. Virtually every court – including the U.S. Supreme Court – has repudiated Plaintiffs' theory, and none (so far as Defendants know) had the kind of robust constitutional text that Kansas has to bolster its case.

Were this Court to apply strict scrutiny to any election law merely because such law might tangentially touch on the right to vote, "regardless of degree," Op. at 28, all Kansas election regulations would be in jeopardy. For example, the State would have to establish the least restrictive means for when advance voting may commence or when ballots must be accepted. As technology changes, so might the answers to those inquiries. The result would be chaos, and there is nothing "hyperbolic" about Defendants' concerns. Furthermore, because any illegal vote necessarily dilutes the value of a properly cast vote, it makes no sense for the Court to impose heightened scrutiny to every election integrity provision. Such a one-way ratchet would effectively subordinate the interests of the State (and voters) in ensuring that only valid votes are counted.

Plaintiffs endeavor to minimize the fallout by noting that Defendants can always attempt to show on remand that the challenged laws are compelling and narrowly tailored.

Resp. at 10. But as Plaintiffs well know, it is the "rare case" in which a law can withstand strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Such exacting scrutiny leads to "almost certain legal condemnation." *Reed v. Town of Gilbert*, 576 U.S. 155, 176 (Breyer, J., concurring).

Moreover, the Court of Appeals' amorphous distinction between "benign election regulations" and harmful election "restrictions" is as illogical as it is unfeasible. *See* Defs.' Supp. Br. at 8-9. If embraced, legal predictability in this area would disappear. Not only is this purported demarcation wholly opaque, but neither the Court of Appeals nor Plaintiffs explain how or why the Signature Verification Requirement ("SVR") and Ballot Collection Restriction ("BCR") would fall into the latter category and not the former.[1]

B. – Anderson-Burdick is the Only Workable Standard

Plaintiffs point out that this Court has never endorsed the *Anderson-Burdick* test. Resp. at 4. But it has never rejected it either. It is a matter of first impression in Kansas,

[1] Plaintiffs separately contend that the BCR represents an unlawful restriction on speech, as opposed to a mere election administration provision, and is thus subject to strict scrutiny for that reason as well. Resp. at 23. The Court of Appeals held this "claim does not survive Defendants' motion to dismiss," Op. at 46, and Plaintiffs failed to file a cross appeal. While there is dicta in the opinion about potential remand considerations, the best reading is that the claim is no longer part of the case. In any event, Plaintiffs' argument has been consistently rejected by other courts. *See, e.g.*, *DSCC v. Simon*, 950 N.W.2d 280, 294–96 (Minn. 2020); *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1234–35 (N.D. Okla. 2020). Plaintiffs cite only one decision supporting their theory, *Priorities USA v. Nessel*, 462 F. Supp.3d 792, 812 (E.D. Mich. 2020), but they fail to inform this Court that that preliminary ruling was later invalidated *in the same case* when a different judge reviewed the issue and held that delivery of absentee ballots is *not* expressive speech and that strict scrutiny does not apply. *Priorities USA v. Nessel*, 628 F. Supp.3d 716, 725, 727 (E.D. Mich. 2022). Simply put, collecting and returning the ballots of others is *not* expressive conduct and, even if it were, the law is an election measure regulating how ballots may be returned, necessitating a deferential review standard.

and it is only percolating here and in other state courts (where the standard has been almost uniformly adopted) because litigants, having consistently lost in federal court, are hoping that state tribunals will throw up roadblocks against reasonable election integrity provisions based on the most general provisions in state constitutions. These efforts have met with near total failure. *See* Pet. for Rev. at 5, n.3. State courts recognize that, even where the fundamental right to vote is at play, the proper level of review must turn on the severity of the regulatory burden on that right.

Nor is the *Anderson-Burdick* standard "rudderless." Resp. at 8. Federal courts have applied this test for decades and numerous state courts have followed suit. But even if this Court opts not to adopt *Anderson-Burdick*, the solution would be to invoke Justice Scalia's binary approach from his *Crawford* concurrence, not Plaintiffs' unworkable strict scrutiny standard that arrogates to the judiciary vast powers over election oversight and disregards the authority expressly delegated to the legislature. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205-08 (2008) (Scalia, J., concurring) (eschewing balancing in favor of a test that "calls for application of a deferential 'important regulatory interests' standard for nonsevere nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote").

C. – Neither the SVR nor BCR Unlawfully Impair the Right to Vote

Plaintiffs argue that they have pled sufficient facts to show that the SVR and BCR burden the right to vote. But Plaintiffs brought a *facial challenge*, and consequently, "must establish that no set of circumstances exists under which [these two statutes] would be valid." *State v. Watson*, 273 Kan. 426, 435, 44 P.3d 357 (2002) (quoting *United States v.*

Salerno, 481 U.S. 739, 745 (1987)). A statute's facial validity is a legal question, which can be properly disposed of prior to discovery. *See Kan. Jud. Rev. v. Stout*, 519 F.3d 1107, 1118 (10th Cir. 2008) ("[A] first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting."). Plaintiffs' hypothetical harms on the right to vote are irrelevant in the context of a facial challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) ("[T]he fact that the [challenged legislation] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," since overbreadth is limited to First Amendment challenges.).

No amount of discovery or fact-finding will save Plaintiffs' facial challenges. Even when one accepts the truth of every allegation in the Amended Petition, there is no basis for allowing the claims to proceed. With regard to the SVR, Defendants previously cited public records (of which the Court may take judicial notice) showing that a mere *105* voters in the entire State (out of 135,832 total mail votes) had their ballots rejected based on a signature mismatch in the 2022 General Election – less than 7/100 of 1% (.00077). Such an infinitesimal figure cannot possibly justify a *facial invalidation* of the statute. Plaintiffs respond that Defendants, by referencing the cure mechanisms in place, and acknowledging that a handful of ballots (literally, an average of *one per county*) were rejected due to mis-matched signatures, concede that the SVR leads to improper rejection of ballots. Resp. at 11. Nonsense. Defendants have conceded nothing. The cure procedures give voters the opportunity to rectify any deficiencies with their ballot. And the fact that a ballot is rejected

in no way means that the rejection was improper. But even if a particular rejection was improper (which Defendants find extremely unlikely given the liberal standard for approval in K.A.R. 7-36-9), the proper analysis of any burden imposed by the SVR is *on the population as a whole*, not on individual voters. Moreover, by deliberately misrepresenting the regulatory standard governing signature matches – a *legal* issue – and insisting that it is far more demanding than it actually is, Plaintiffs erect a straw man that the Court can easily dismantle. There is, in short, no other reasonable mechanism to ensure that the voter casting an advance ballot is the same voter to whom the ballot was sent. Common sense must come into play here.

As for the BCR, it is difficult to conceive how requiring a voter to potentially place a stamp on an advance ballot envelope poses an unconstitutional burden on the right to vote. No court, so far as Defendants know, has ever held that restricting the mere collection and return of already-cast ballots by third-parties improperly infringes upon voting rights.[2] The U.S. Supreme Court, in fact, has categorically rejected such a claim. *Brnovich v. DNC*, 141 S. Ct. 2321 (2021); *accord DSCC v. Simon*, 950 N.W.2d 280, 291-94 (Minn. 2020). Considering that there is no constitutional right to advance vote in the first place,[3] and that having to put a stamp on an advance ballot envelope or deposit an advance ballot in a

[2] Plaintiffs' reference to Secretary Schwab's legislative testimony about ballot collection during the Civil War, Resp. at 9, n.3, borders on the farcical. Needless to say, the practices used to ensure that soldiers – often deployed out of state – could have their ballots timely returned in the days of the Pony Express has little relevance to the modern era.

[3] Plaintiffs consistently conflate "absentee" voting (not at issue) with "advance" voting. Absentee voting has been permitted in Kansas since the 1930s, and Article 5, § 1 merely protects – consistent with federal law – the right of voters *who are absent from the State or their residence on Election Day* to vote via absentee ballot.

mailbox or dropbox is substantially less taxing than the kinds of burdens on voting upheld by the U.S. Supreme Court, *see, e.g.*, *Crawford*, 553 U.S. at 198 (forcing voter to travel to DMV office to obtain ID "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting), Plaintiffs' facial challenge to the BCR must fail.

D. – Plaintiffs' Due Process and Equal Protection Challenges to the SVR Fail

Plaintiffs' due process and equal protection attacks on the SVR fare no better. This Court reviews the district court's dismissal *de novo* and, contrary to Plaintiffs' position (Resp. at 20), can and should decide whether K.A.R. 7-36-9 sufficiently guards against Plaintiffs' due process and equal protection concerns without remand. *See State v. Ernesti*, 291 Kan. 54, 66, 239 P.3d 40 (2010) (holding that regulation could "be considered for the first time on appeal because it presents a question of law that is potentially dispositive of the appeal"). Even if the SVR creates a liberty interest, which Defendants dispute, the cure mechanisms in K.A.R. 7-36-9 provide ample due process to enable voters to correct any signature mismatch. *See* Defs.' Supp. Br. at 11-13, 22. Similarly, K.A.R. 7-36-9 provides a uniform signature matching process for election officials to follow across all 105 Kansas counties. *See id.* at 20-21. It is not the role of the judiciary to micromanage that process.

III. – Conclusion

Defendants urge the Court to reverse the Court of Appeals' decision and affirm the district court's dismissal of Plaintiffs' constitutional challenges to the SVR and BCR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 11, 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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