IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
CIVIL DEPARTMENT

LEAGUE OF WOMEN VOTERS OF KANSAS; LOUD LIGHT; KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.; and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Plaintiffs,* vs. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; and KRIS KOBACH, in his official capacity as Kansas Attorney General, *Defendants.*	Case No. 2021-CV-000299

DEFENDANTS' RENEWED MOTION TO DISMISS FOR LACK OF STANDING COUNTS III-IV OF PLAINTIFFS' AMENDED PETITION CHALLENGING THE SIGNATURE VERIFICATION REQUIREMENTS IN K.S.A. 25-1124(h)

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Following this case's remand from the Kansas Supreme Court, Defendants Scott Schwab and Kris Kobach respectfully submit this renewed motion pursuant to K.S.A. 60-212(b)(1) to dismiss, for lack of standing, Counts III and IV of Plaintiffs' Amended Petition challenging (on due process and equal protection grounds) the constitutionality of Kansas' signature verification requirements for advance ballots in K.S.A. 25-1124(h).

Neither this Court nor the Kansas Supreme Court has addressed Plaintiffs' standing on these two causes of action. And the one legal theory upon which the Court of Appeals suggested Plaintiffs might have standing in its now-reversed opinion—diversion of resources, *see League of Women Voters v. Schwab*, 63 Kan.App.2d 187, 201-04, 525 P.3d 803 (2023) ("*LWV I*")—was repudiated by the U.S. Supreme Court several weeks ago in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 393-96 (2024). Given Plaintiffs' lack of standing—either in their own right or on behalf of any members, constituents, or any other unidentified individuals they might target from the electorate at large—to challenge Kansas' signature verification law, these claims thus must be dismissed for lack of subject matter jurisdictionL.

I. – Procedural History

This case returns to the Court on remand from the Kansas Supreme Court. *See League of Women Voters v. Schwab*, __ Kan. __, 549 P.3d 363 (2024) ("*LWV III*"). In its opinion, the Kansas Supreme Court: (i) reversed this Court's denial of Plaintiffs' request for a temporary injunction against the enforcement of K.S.A. 25-2438(a)(2)-(a)(3), which prohibits the false representation of election officials (not at issue here);[1] (ii) affirmed this Court's dismissal of Plaintiffs' claim challenging the signature verification law as a denial of the right to vote (Count II);

[1] In a separate ruling, the Kansas Supreme Court held that Plaintiffs had standing to pursue their pre-enforcement constitutional challenge to K.S.A. 25-2438(a)(2)-(a)(3). *See League of Women Voters v. Schwab*, 317 Kan. 805, 821, 539 P.3d 1022 (2023) ("*LWV II*").

affirmed this Court's dismissal of all of Plaintiffs' constitutional challenges (i.e., right to vote, free speech, and freedom of association) to ballot collection restrictions in K.S.A. 25-2437 (Counts I-II); and reversed and remanded this Court's dismissal of Plaintiffs' due process and equal protection attacks on the signature verification requirement so that those claims could be evaluated under the newly articulated legal standard. The only causes of action before the Court in this motion, therefore, are the due process and equal protection attacks that Plaintiffs wage against the signature verification requirement in K.S.A. 25-1124(h).

II. – Legal Standard Governing Motions to Dismiss for Lack of Standing

"[S]tanding is a component of subject matter jurisdiction," *State v. Ernesti*, 291 Kan. 54, 60, 293 P.3d 40 (2010), and it may be raised at any time by a party or the court. *State v. Patton*, 287 Kan. 200, 205, 195 P.3d 753 (2008). Plaintiffs must demonstrate that they have standing to raise their claims before they can proceed. *LWV II*, 317 Kan. at 813. "Both the general issue of jurisdiction and the more specific issue of standing are issues of law." *Ernesti*, 291 Kan. at 60 (citing *Mid–Continent Specialists, Inc. v. Capital Homes,* 279 Kan. 178, 185, 106 P.3d 483 (2005)).

At this stage, Defendants are asserting a *facial* challenge to Plaintiffs' standing to pursue due process and equal protection lines of attack against the signature verification law. In other words, Defendants are questioning the sufficiency of the Amended Petition's allegations concerning subject matter jurisdiction. *See United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (describing the nature of a facial attack on subject matter jurisdiction). While the Court must accept Plaintiffs' allegations as true when evaluating such a motion at this phase of the proceedings, *Bd. of Cnty. Comm'rs of Sumner Cnty. v. Bremby*, 286 Kan. 745, 751, 189

P.3d 494 (2008), Plaintiffs maintain at all times the burden of establishing standing. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). If the "court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it." *Chelf v. State*, 46 Kan.App.2d 522, 529, 263 P.3d 852 (2011). Nor is standing issued in bulk. A "plaintiff must demonstrate standing for each claim he seeks to press." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (citation omitted).

III. – Law of the Case Does Not Apply

To preempt any possible argument that Plaintiffs might raise to the contrary, Defendants' motion is in no way foreclosed by the Court of Appeals' prior holding about Plaintiffs' standing on these claims in its subsequently reversed opinion. The law of the case doctrine is designed to prevent litigants "from serially litigating an issue already presented and decided on appeal in the *same* proceeding." *Matter of Ramage*, 53 Kan.App.2d 209, 212, 387 P.3d 853 (2016). It is not, however, "an inexorable command, or a constitutional requirement." *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998) (citation omitted). Rather, it is merely "a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without their power to do so." *Id.* Moreover, among the situations in which the doctrine has no role is when "a controlling authority has made a contrary decision regarding the law applicable to the issues." *State v. Kleypas*, 305 Kan. 224, 245, 382 P.3d 373 (2016).

As described in Part IV.B. below, the U.S. Supreme Court last month significantly clarified (one might even say *fundamentally transformed*) its precedent regarding the scope of organizational standing, marking a major departure from the way that many lower courts had interpreted *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), as to what an entity must prove in

order to demonstrate standing based on a diversion of resources. *See Alliance for Hippocratic Med.*, 144 S. Ct. at 1563-65. Given that this resource diversion theory was the *exclusive* basis upon which the Court of Appeals grounded its standing holding, *see LWV I*, 63 Kan.App.2d at 203 ("We need not identify whether Plaintiffs' failure to identify a specific individual is fatal to their [signature verification requirement] claim. [Plaintiffs] have shown that they have standing in their own right because they will have to divert resources from their usual activities to ballot cure programs."), the change in the applicable law permits this Court to revisit the issue. *See also LWV II*, 317 Kan. at 812-13 (as a component of subject-matter jurisdiction, standing may be raised at any time by a party or the court).

IV. – Plaintiffs Lack Standing to Pursue their Claims

Unlike the U.S. Constitution, the Kansas Constitution contains no "case or controversy" language. However, Kansas courts have adopted such a limitation pursuant to both the Judicial Power Clause in the Kansas Constitution at Article 3, § 1, *see id.* at 812, and the separation of powers doctrine inherent in the State's constitutional framework. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008).

To establish standing in Kansas under its traditional two-part test, a party must demonstrate that (i) it has "suffered a cognizable injury" and (ii) there is "a causal connection between the injury and the challenged conduct." *LWV II*, 317 Kan. at 813 (quoting *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021)). A cognizable injury—i.e., an injury-in-fact—is present when a plaintiff shows that it has already sustained, or will suffer, "some actual or threatened injury as a result of the challenged conduct." *Id.* (quotation and internal alterations omitted). But abstract or inchoate injuries will not suffice. "The injury must pose 'adverse legal interests

that are immediate, real, and amenable to conclusive relief.'" *Id.* (quoting *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015)).

With respect to pre-enforcement challenges, as Plaintiffs here pursue, "[a]n allegation of future injury can satisfy the injury in fact component of the standing inquiry if there is a threatened impending, probable injury." *Id.* (citations omitted). But "[a] high threshold is required to demonstrate standing on a pre-enforcement challenge." *Id.* at 813-14. The threat of harm must be "imminent" and not "speculative or imaginary." *Id.* at 814.

In the case of an organization, legal standing may arise in two different contexts. First, the organization may enjoy standing as a representative of its members, generally referred to as "associational standing." *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Alternatively, the organization may have standing in its own right, typically known as "organizational standing." *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). Plaintiffs allege both associational standing and organizational standing. Neither theory stands up to scrutiny.

A. – Plaintiffs Lack Associational Standing

The associational standing rule is an exception to the general rule that a plaintiff may not ordinarily assert the rights of others. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Ternes v. Galichia*, 297 Kan. 918, 922, 305 P.3d 617 (2013) ("A party generally must assert its own legal rights and interests and may not base its claim to relief on the legal rights or interests of third parties.") (citing *Kowalski*, 543 U.S. at 129). This rule is rooted in the principle that only the party with a cognizable injury "has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Id.* When a plaintiff asserts standing on behalf of a third-party, therefore, two additional elements

must be met: (i) the party asserting the right must have a close relationship with the person who possesses the right; and (ii) there must be a hindrance to the possessor's ability to protect his own interests. *Id.* at 130.

In earlier briefing in this case, Plaintiffs expressly disavowed any intent to rely on a third-party standing theory. Pls.' Resp. to Defs.' MTD (filed 9/3/2021), at 19. Instead, Plaintiffs insist that they are legally entitled to challenge Kansas' signature verification law in their organizational statuses (i.e., associational standing and organizational standing).[2]

For an association to have standing to sue on behalf of its members, a three-prong test—first invoked by the U.S. Supreme Court in *Hunt*, 432 U.S. at 343, and repeatedly embraced by the Kansas Supreme Court thereafter—must be satisfied: (i) the association's members must have standing to sue individually; (ii) the interests that the association seeks to protect must be germane to its purpose; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members. *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017) (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)). "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved[.]'" *Sierra Club*, 298 Kan. at 35 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

[2] The three individual plaintiffs—Charley Crabtree, Faye Huelsmann, and Patricia Lewter—only challenged the ballot collection restrictions in K.S.A. 25-2437, the claims against which have all been dismissed from the case. *See* Am. Pet. ¶¶ 37-39. None of those individuals claimed any injury from the signature verification requirements. For purposes of this motion, therefore, the only Plaintiffs at issue are the organizational Plaintiffs.

1. – Loud Light and Appleseed lack associational standing to bring claims on behalf of their purported "constituents."

The first prong of the associational standing test asks whether the Plaintiffs' "members" have standing to sue in their own right. *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1126, 307 P.3d 1255 (2013). Plaintiffs Loud Light and Kansas Appleseed Center for Law and Justice ("Appleseed") run into an immediate buzz saw here as neither has members or anything close to them. In order to assert associational standing on behalf of others, therefore, Loud Light and Appleseed must demonstrate that the individuals they seek to represent are *effectively* "members," as that term is understood with respect to membership organizations.

The seminal case regarding associational standing by non-membership organizations is *Hunt*. *Hunt* involved a Washington state commission that was controlled by Washington state apple growers and dealers and whose primary purpose was to promote and protect the State's apple industry. 432 U.S. at 336-37. In a challenge to a North Carolina statute which affected those interests, the commission met the traditional three-part associational standing requirements except, that as a non-membership organization, it lacked "members" on whose behalf to assert a claim. *Id.* at 342. The Supreme Court held that the commission, despite lacking "members" in the "traditional trade association sense," could assert associational standing on behalf of non-members because the organization demonstrated the non-members possessed an "indicia of membership" with the organization. *Id.* at 344. The Court reasoned that, since the growers and dealers "alone elect the members," "alone may serve on the Commission," and "alone finance its activities, including the costs of th[e] lawsuit, through assessments levied on them," *id.*, the Commission effectively "represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests." *Id.* at 345.

Not only are Loud Light and Appleseed not membership organizations, there is not even a remote "indicia of membership" with respect to the individuals whose interests those two entities purport to represent in waging battle against the signature verification law. These two entities reference their outreach activities on behalf of "constituents" across the State. Am. Pet. at ¶¶ 25, 31, and 35. But the Amended Petition does not allege any actual relationship with those voters that would give rise to associational standing. Rather, Loud Light and Appleseed seem to think that their interactions with random, unidentified members of the public whom they target—many times merely a passing encounter—is enough to establish associational standing. *See* Am. Pet. at ¶ 19—Loud Light "builds coalitions within the community to advocate for . . . changes for youth"; *id.* at ¶ 26—Appleseed "works with community partners to understand the root causes of problems, support strong grassroots coalitions, advocates for comprehensive solutions." There is no conceivable indicia of membership that flows from such activities. Nowhere in the Amended Petition, for example, do Appleseed or Loud Light allege that any of these unidentified partners or individuals the entities purport to represent elect leadership in either organization, serve on the boards of either organization, or finance either organization through something akin to dues. Plus, to the extent that *any* Kansas citizen has a cognizable injury from the State's signature verification law (and it is hard to see how one exists), the constituencies and coalitions that Loud Light and Appleseed target are wholly distinct from such population.

Nor would it matter if the organizations tailored their message to these strangers. There is simply no legal support for finding associational standing from such conduct. Modifying an organization's activities to more effectively target its audience is not the same as an organization representing its members' interests. Were it otherwise, the whole requirement of an indicia of

membership would be rendered meaningless. *Cf. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 157-59 (2d Cir. 2012) (rejecting non-membership organization's associational standing theory because there was no indication that its constituents had the ability to elect its directors, make budget decisions, or influence its activities in a way that would reflect an indicia of membership); *Viasat, Inc. v. F.C.C.*, 47 F.4th 769, 781-82 (D.C. Cir. 2022) (organization did not have "indicia of a traditional membership association" where it gave no insight on how it relates with its members nor provided any indication that its members finance the organization, guide its activities, or select its leadership); *Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 89-91 (D.C. Cir. 1987) (organization lacked any type of indicia of membership and instead purported to serve a "completely open-ended" "constituency" that played no role in selecting the organization's leadership, guiding its activities, or financing those activities).

The associational standing theory advanced by Loud Light and Appleseed is nearly identical to the third-party standing theory rejected in *Democracy North Carolina v. North Carolina State Board of Elections*, 476 F. Supp.3d 158, 189-190 (M.D.N.C. 2020). Perhaps the rejection of the plaintiffs' third-party standing theory in that case is the reason why Plaintiffs here insist that they are *not* asserting third-party standing. Regardless, what is clear is that Loud Light and Appleseed cannot assert associational standing on behalf of the unidentified and unaffiliated "constituents" they purport to represent.

2. – None of the Plaintiffs can satisfy the *Hunt* three-part test for associational standing.

As for Plaintiffs Topeka Independent Living Resource Center ("TILRC") and League of Women Voters of Kansas ("LWV"), whether they are membership organizations or at least have indicia of membership is ultimately irrelevant. The reason is that, in the context of an attack on

the State's signature verification requirements, *none of the Plaintiffs* can meet *Hunt*'s three-part test for associational standing.

a. *None of the Plaintiffs' "members" has standing to sue in their own right.*

The first problem Plaintiffs collectively encounter in their associational standing theory is that, even if some have members or at least an indicia of membership, none can demonstrate that any member would have individual standing. Standing at this stage requires allegations of a cognizable injury that is causally connected to the challenged law. *LWV II*, 317 Kan. at 813. Plaintiffs' overarching theory for injury is that the individuals they purport to represent *might* be subject to an erroneous mismatch of a signature. Am. Pet. at ¶¶ 17, 24, 31, and 35. But claiming that members *might* erroneously be subject to a mismatched signature is entirely speculative in nature and cannot establish an injury-in-fact for standing. Indeed, the same premise Plaintiffs advance here was categorically rejected as a basis for standing in *Memphis A. Phillip Randolph Institute v. Hargett*, 978 F.3d 378 (6th Cir. 2020) ("*MPRI*"), a case nearly on all-fours with the instant action. Evaluating a highly similar challenge to Tennessee's signature matching requirements for absentee ballots, the court there noted that "plaintiffs' allegations boil down to fear of the ever present possibility that an election worker will make a mistake." *Id.* at 389. An "allegation of *possible* future injury," however, is insufficient to constitute a "certainly impending" threatened injury. *Id.* at 386 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)); *accord LWV II*, 317 Kan. at 813 (injury-in-fact must be "immediate" and "real"). Moreover, when "allegations of future injury are based on past human errors, the plaintiffs face a high bar to demonstrate standing." *MPRI*, 978 F.3d at 386.

Plaintiffs here do not even allege that anyone, let alone one of their members or "constituents," has had a signature improperly mismatched in Kansas. Their whole basis for standing is nothing more than conjecture that a mismatch *might* happen to some random individual in the future due to human error, and if it does, it *might* be to one of their members or constituents. But Kansas has had a similar signature-matching law since 2012 for advance ballot applications, and that statute includes the same verification "by electronic device or by human inspection" as the provision being challenged in K.S.A. 25-1124(h). *See* 2011 Kan. Sess. Laws Ch. 56, § 2(e) (amending K.S.A. 25-1122(e)). Kansas has also required county election officials to permit voters who cast an advance ballot by mail to cure mismatched signatures since 2020. *See* Kan. Sess. Laws. 2019, ch. 36, § 1 (amending K.S.A. 25-1124(b)). So despite signature matching laws being in effect for more than twelve years, Plaintiffs did not (and presumably could not) allege that a single individual, let alone a member of one of their organizations, suffered the kind of erroneous mismatch that Plaintiffs aver will "inevitably" happen. Am. Pet. at ¶ 17.[3]

Moreover, an organization must identify at least one member by name who would have standing to sue in his/her own right to establish the first element of the *Hunt* test. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990). Plaintiffs have not and cannot do so. This is hardly surprising. Indeed, while Plaintiffs speculate that some individuals might 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, Am. Pet.

[3] To be clear, even if Plaintiffs had included allegations of prior mismatch errors, that would not have conferred standing upon them to attack the current law. *See O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."), *cited with approval in Baker v. Hayden*, 313 Kan. 667, 678, 490 P.3d 1164 (2021).

at ¶¶ 133, 135, Kansas law already provides procedures to avoid any potential burden flowing from such issues. K.S.A. 25-1124(h), for example, 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, Am. Pet. at ¶¶ 145-146, the mandatory cure procedures in K.S.A. 25-1124(b) would bring those facts to light. Additionally, 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.* There is, in short, nothing beyond complete speculation in the Amended Petition indicating an "imminent" or "certainly impending" injury from an improperly rejected signature match. *See Sierra Club*, 298 Kan. at 33-34. Moreover, the law is clear that standing cannot be predicated on "statistical probabilities" or "organizations' self-descriptions of their membership." *Summers*, 555 U.S. at 499.

Plaintiffs' theory also collapses when K.A.R. 7-36-9(b)(1) is taken into account. In order to receive an advance ballot, one must first apply for it. K.S.A. 25-1122. Those applications, which include their own signature matching requirement, *see* K.S.A. 25-1122(e)(1) (a provision 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 contemporaneous record of what a 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)(l). 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.

To the extent Plaintiffs seek to predicate an injury on the premise that election officials might not follow the law, that theory is legally unsustainable. The law affords a strong presumption of regularity to all government functions. *U.S. Postal Serv. v. Gregory,* 534 U.S. 1, 10 (2001); *Sheldon v. Ed. 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). Plaintiffs' theory is particularly weak in a facial challenge to signature verification requirements. *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)).

Nor are Plaintiffs' claims salvaged by the fact that this standing issue arises in the context of a motion to dismiss. The issue is not about viewing facts pled in the light most favorable to Plaintiffs. The issue is Plaintiffs' failure *to allege any facts at all* demonstrating a concrete and imminent injury sufficient to meet their burden for standing. Speculative claims of future hypothetical injuries about hypothetical errors by election workers do not allege a concrete injury that permits standing. *MPRI*, 978 F.3d at 386; *Clapper*, 568 U.S. at 409 ("allegations of *possible* future injury' are not sufficient"); *see also MPRI*, 978 F.3d at 401 (claim that "objectively reasonable likelihood that their communications will be acquired . . . at some point in the future"

was "too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending'").

Worse still for Plaintiffs, evidence in the *public record* refutes their baseless speculation that substantial signature mismatches are "inevitable" in Kansas and puts this dispute into proper context. In particular, in the 2022 General Election, the first federal election held in the wake of the legislature's passage of K.S.A. 25-1124(h), roughly 1,020,208 Kansans cast a valid ballot, 129,973 by mail. *See* http://sos.ks.gov/elections/election-results.html. This was a near-record in terms of total turnout for a non-presidential election. Yet, as the United States Election Assistance Commission ("EAC") noted in its biennial Election Administration and Voting Survey (EAVS) issued on June 29, 2023, a mere *105 Kansas voters* had their ballots rejected due to a non-matching or incomplete signature during that election.[4] *See* Ex. A.[5] That is just 0.000103 (or barely 1/100 of 1%) of total votes and just 0.0008 (or only 8/100 of 1%) of all votes by mail. The bottom line is that not a single "member" of any of the organizational Plaintiffs can establish a cognizable injury at this time.

[4] This Court can and should take judicial notice of this federal agency's report. *See Matter of Nwakanma*, 306 Kan. 704, 706, 397 P.3d 403 (2017) ("judicial notice may be taken of matters of public record in other courts or governmental bodies"); K.S.A. 60-409.

[5] Defendants prepared Exhibit A for the Court's convenience. These figures can be found in the Excel spreadsheet – at column "IF," corresponding to Question C9e – of the EAVS Datasets Version 1.0 (released on June 29, 2023). This spreadsheet is available on the EAC's official public website at: https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys (under the heading "2022"). The questions corresponding to the data in the Excel spreadsheet can be found in the "2022 Election Administration and Voting Survey Instrument," which is available at the same link. The question pertaining to non-matching or incomplete signatures – Question C9e – is found at page 28 of the document, which is page 31 of the PDF.

b. *Plaintiffs' Challenge to Kansas' Signature Verification Law Requires Participation of Individual Members.*

A second impediment Plaintiffs have in their effort to meet the *Hunt* test for associational standing is that the nature of their constitutional attacks on the signature verification law would require the participation of individual members. Signature matching is an inherently individualized determination. Just because a voter is old, disabled, or has limited English proficiency in no way suggests that the signature on his/her advance ballot envelope is going to be rejected. This is especially true in light of the myriad exceptions to signature verification requirements noted above. Any potential issues with particular voters will necessarily entail an exploration into the individual's unique circumstances. *See Sierra Club*, 298 Kan. at 35-36 ("The injury must be particularized, meaning it must affect the plaintiff in a 'personal and individual way.'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)); *312 Educ. Ass'n v. U.S.D. No. 312*, 273 Kan. 875, 886-87, 47 P.3d 383 (2002) (rejecting entity's associational standing theory because the claim asserted required the participation of individual members). And as noted above, standing cannot be based merely on "statistical probabilities" or "organizations' self-descriptions of their membership." *Summers*, 555 U.S. at 499.

In the unlikely event that some voter—notwithstanding the extremely liberal standard for signature matching, the extensive exceptions to the law's applicability, and the elaborate cure mechanisms for correcting any mismatches—believes that the structure of the State's signature verification requirement caused his/her ballot to be unfairly rejected, he/she may be able to bring an "as applied" challenge to the law. But there is no suggestion beyond rank speculation in this case that any voter has sustained or is about to experience an imminent injury as a result of the

signature verification law. Accordingly, Plaintiffs' associational standing theory for their facial constitutional attack on the statute must fail.

B. – Plaintiffs Lack Organizational Standing

Plaintiffs likewise have no organizational standing to pursue their claims against the signature verification law. To demonstrate organizational standing, an entity must show that (i) it suffered its own cognizable injury and (ii) there is a causal connection between such injury and the challenged conduct. *Gannon*, 298 Kan. at 1127. In other words, the organization must meet the same standards for standing that apply to individuals. *Alliance for Hippocratic Med.*, 602 U.S. 393-94. This is no small task. As the U.S. Supreme Court recently underscored, "like an individual, an organization may not establish standing simply based on the intensity of the litigant's interest or because of strong opposition to the government's conduct, no matter how longstanding the interest and no matter how qualified the organization." *Id.* at 394 (internal quotations omitted). The organization "must show far more than simply a setback to the organization's abstract social interests." *Id.* (quotation omitted).

LWV, Loud Light, and TILRC each ground their organizational standing argument on a diversion of resources theory.[6] *See* Am. Pet. at ¶ 17 (LWV claiming it will need to expend "resources . . . to develop and execute [educational] programs"); ¶ 24 (Loud Light claiming it will need to spend "greater resources" on education and claiming it "will be forced to expend more resources recruiting and training additional staff and volunteers"); ¶ 35 (TILRC claiming it will spend more "resources" on education and "assisting any voters whose ballots are rejected"). These Plaintiffs allege they will now have to divert time and resources to develop and execute

[6] Appleseed asserts no allegations that would support organizational standing on the signature verification requirement claims.

programs to educate voters and combat the speculative harms allegedly flowing from the statute. But Plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 402. For the same reasons that Plaintiffs lack associational standing to challenge the signature mismatch provision, they also lack organizational standing.

In embracing Plaintiffs' diversion of resources argument for organizational standing, the Court of Appeals relied on the U.S. Supreme Court's adoption of that theory in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). *See LWV I*, 63 Kan.App.2d at 203-04. But last month, the U.S. Supreme Court expressly and unanimously rejected the "expansive" reading the Court of Appeals gave to *Havens Realty*. The Supreme Court held that an entity cannot establish organizational standing merely by incurring costs to oppose a government regulation or policy, or expending time and resources "to the detriment of other spending priorities." *Alliance for Hippocratic Med.*, 602 U.S. at 394. In other words, the Court noted, it is "incorrect" that *Havens Realty Corp.* stands for the proposition that "standing exists when an organization diverts its resources in response to a defendant's actions." *Id.* at 395.[7] The Court explained that, were the rule otherwise, "all the organizations in America would have standing to challenge almost every federal policy they dislike, provided they spend a single dollar opposing those policies." *Id.*

The Court of Appeals in this action found it sufficient for organizational standing that Plaintiffs "alleged that they encourage advance voting and that they will have to divert resources from their other voter assistance activities to ballot cure programs to prevent voters from being disenfranchised by the new signature matching requirement." *LWV I*, 63 Kan.App.2d at 204.

[7] The Court even went so far as to subtly and indirectly cast doubt on the precedential value of its Havens Realty Corp. decision. *See Alliance for Hippocratic Med.*, 602 U.S. at 396 ("*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context.").

That holding is no longer tenable in light of *Alliance for Hippocratic Medicine*. Plaintiffs' education and outreach activities here are not materially different than what the medical associations did in *Alliance for Hippocratic Medicine* in incurring additional costs and diverting resources to engage in public advocacy and education about FDA policies regarding abortion medication. The Supreme Court deemed the medical associations' activities an inadequate basis for organizational standing and the same holds true for Plaintiffs' activities here.

Whatever might be said about the merits of the Court of Appeals' standing analysis prior to *Alliance for Hippocratic Medicine*, the panel's reasoning is now without legal foundation. As the Supreme Court pointed out, "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." *Alliance for Hippocratic* Medicine, 602 U.S. at 394.

Although this Court need go no further in its analysis in turning away Plaintiffs' capacious theory of organizational standing, Defendants note that Plaintiffs' legal position would be deficient even in the absence of *Alliance for Hippocratic Medicine*. Loud Light, for example, alleges that because Kansas "counties will *now* be required to reject any signatures that an official believes is not a mismatch," there will be "a greater number of mismatches," which will in turn force it "to expend more resources" as part of its extant ballot cure programs. Am. Pet. at ¶ 24 (emphasis added). But this argument is no different than the wholly speculative theory that it advanced for purposes of associational standing, i.e., that possible signature mismatch determinations by unidentified election officials, potentially involving its members or "constituents," at some unknown date in the future, may cause the organization to spend more resources. A

plaintiff cannot obtain organizational standing by simply presenting a "repackaged version of [its] first failed theory of [associational] standing." *Clapper,* 568 U.S. at 416.

Meanwhile, LWV and TILRC allege no facts as to how the signature verification law will cause any cognizable injury to them. They merely claim that the law will force them to "expend additional resources . . . to develop and execute programs to ensure that eligible voters are educated about and ultimately are not disenfranchised," and that they otherwise would not spend that money. Am. Pet. at ¶¶ 17, 35. Those statements are purely conclusory. They contain no actual *factual allegations* as to how the challenged law will require the organizations to spend more resources, beyond the same rank speculation they rely on to try to engineer associational standing. Further, given that these programs have been part of these entities' respective missions for many years, Am. Pet. at ¶¶ 20, 32), the fact that they might infuse additional resources into such activities does not mean that they have suffered a legal injury. *See NAACP v. City of Kyle, Tex.,* 626 F.3d 233, 238-39 (5th Cir. 2010) (diversion of resources to activities cannot support organizational standing if such activities do not differ from plaintiff's routine activities or projects). This is all the more true in this case considering that signature verification has been a requirement in Kansas for obtaining advance mail ballots for more than twelve years. *See Clark v. Edwards*, 468 F.Supp.3d 725, 748 (M.D. La. 2020) ("Injury does not arise because of their desire or preference for a different scheme of absentee by mail voting, nor because they adjust their organization's activities in response to . . . changes to the law. The law is not static. It cannot follow that every change in voting laws that causes voting advocacy groups to 'check and adjust' is an injury.").

V. – Conclusion

In sum, none of the Plaintiffs have standing to assert the constitutional challenges to the signature verification law that are now before this Court on remand. Plaintiffs' associational and organizational standing theories fail as a matter of law, particularly in the wake of the recent U.S. Supreme Court decision in *Alliance for Hippocratic Medicine*, which cut out the legs from the one legal theory that the Court of Appeals had previously embraced in allowing Plaintiffs' causes of action to survive Defendants' motion to dismiss for lack of subject matter jurisdiction.

Although difficult to conceive, it is theoretically possible that some individual voter may one day have standing to bring an "as applied" challenge to the signature verification law based on his/her unique and peculiar circumstances. But that day has not arrived yet, and Plaintiffs have made no allegations in the Amended Petition to remotely suggest such an individual exists. For all these reasons, Defendants' request that the Court dismiss for lack of standing Counts III and IV of Plaintiffs' Amended Petition challenging (on due process and equal protection grounds) the constitutionality of Kansas' signature verification requirements for advance ballots in K.S.A. 25-1124(h).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 23, 2024, I electronically filed a copy of the above with the Clerk of the District Court by using the eFlex filing system, which will transmit a copy to all counsel of record. In addition, I e-mailed a copy of the above to the following individuals:

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Number of Advance Ballots Rejected Due to Siganture Mismatch/Incomplete Signatures in Kansas in the 2022 General Election

Jurisdiction_Name	State_Full	State_Abbr	Response to C9e
ALLEN COUNTY	KANSAS	KS	1
ANDERSON COUNTY	KANSAS	KS	0
ATCHISON COUNTY	KANSAS	KS	0
BARBER COUNTY	KANSAS	KS	0
BARTON COUNTY	KANSAS	KS	1
BOURBON COUNTY	KANSAS	KS	
BROWN COUNTY	KANSAS	KS	0
BUTLER COUNTY	KANSAS	KS	0
CHASE COUNTY	KANSAS	KS	0
CHAUTAUQUA COUNTY	KANSAS	KS	0
CHEROKEE COUNTY	KANSAS	KS	
CHEYENNE COUNTY	KANSAS	KS	0
CLARK COUNTY	KANSAS	KS	0
CLAY COUNTY	KANSAS	KS	0
CLOUD COUNTY	KANSAS	KS	0
COFFEY COUNTY	KANSAS	KS	0
COMANCHE COUNTY	KANSAS	KS	0
COWLEY COUNTY	KANSAS	KS	0
CRAWFORD COUNTY	KANSAS	KS	0
DECATUR COUNTY	KANSAS	KS	0
DICKINSON COUNTY	KANSAS	KS	1
DONIPHAN COUNTY	KANSAS	KS	0
DOUGLAS COUNTY	KANSAS	KS	9
EDWARDS COUNTY	KANSAS	KS	0
ELK COUNTY	KANSAS	KS	1
ELLIS COUNTY	KANSAS	KS	2
ELLSWORTH COUNTY	KANSAS	KS	0
FINNEY COUNTY	KANSAS	KS	1
FORD COUNTY	KANSAS	KS	0
FRANKLIN COUNTY	KANSAS	KS	0
GEARY COUNTY	KANSAS	KS	0
GOVE COUNTY	KANSAS	KS	0
GRAHAM COUNTY	KANSAS	KS	0
GRANT COUNTY	KANSAS	KS	0
GRAY COUNTY	KANSAS	KS	0
GREELEY COUNTY	KANSAS	KS	0
GREENWOOD COUNTY	KANSAS	KS	0
HAMILTON COUNTY	KANSAS	KS	0
HARPER COUNTY	KANSAS	KS	0
HARVEY COUNTY	KANSAS	KS	0
HASKELL COUNTY	KANSAS	KS	0
HODGEMAN COUNTY	KANSAS	KS	0
JACKSON COUNTY	KANSAS	KS	1
JEFFERSON COUNTY	KANSAS	KS	0
JEWELL COUNTY	KANSAS	KS	
JOHNSON COUNTY	KANSAS	KS	37

KEARNY COUNTY	KANSAS	KS	0
KINGMAN COUNTY	KANSAS	KS	0
KIOWA COUNTY	KANSAS	KS	0
LABETTE COUNTY	KANSAS	KS	0
LANE COUNTY	KANSAS	KS	0
LEAVENWORTH COUNTY	KANSAS	KS	0
LINCOLN COUNTY	KANSAS	KS	0
LINN COUNTY	KANSAS	KS	0
LOGAN COUNTY	KANSAS	KS	0
LYON COUNTY	KANSAS	KS	0
MCPHERSON COUNTY	KANSAS	KS	0
MARION COUNTY	KANSAS	KS	0
MARSHALL COUNTY	KANSAS	KS	0
MEADE COUNTY	KANSAS	KS	0
MIAMI COUNTY	KANSAS	KS	3
MITCHELL COUNTY	KANSAS	KS	0
MONTGOMERY COUNTY	KANSAS	KS	0
MORRIS COUNTY	KANSAS	KS	0
MORTON COUNTY	KANSAS	KS	0
NEMAHA COUNTY	KANSAS	KS	0
NEOSHO COUNTY	KANSAS	KS	0
NESS COUNTY	KANSAS	KS	0
NORTON COUNTY	KANSAS	KS	0
OSAGE COUNTY	KANSAS	KS	
OSBORNE COUNTY	KANSAS	KS	0
OTTAWA COUNTY	KANSAS	KS	0
PAWNEE COUNTY	KANSAS	KS	0
PHILLIPS COUNTY	KANSAS	KS	0
POTTAWATOMIE COUNTY	KANSAS	KS	1
PRATT COUNTY	KANSAS	KS	
RAWLINS COUNTY	KANSAS	KS	0
RENO COUNTY	KANSAS	KS	0
REPUBLIC COUNTY	KANSAS	KS	0
RICE COUNTY	KANSAS	KS	1
RILEY COUNTY	KANSAS	KS	2
ROOKS COUNTY	KANSAS	KS	0
RUSH COUNTY	KANSAS	KS	0
RUSSELL COUNTY	KANSAS	KS	0
SALINE COUNTY	KANSAS	KS	0
SCOTT COUNTY	KANSAS	KS	0
SEDGWICK COUNTY	KANSAS	KS	52
SEWARD COUNTY	KANSAS	KS	0
SHAWNEE COUNTY	KANSAS	KS	4
SHERIDAN COUNTY	KANSAS	KS	1
SHERMAN COUNTY	KANSAS	KS	0
SMITH COUNTY	KANSAS	KS	0
STAFFORD COUNTY	KANSAS	KS	Data not available
STANTON COUNTY	KANSAS	KS	0
STEVENS COUNTY	KANSAS	KS	0
SUMNER COUNTY	KANSAS	KS	0
THOMAS COUNTY	KANSAS	KS	1
TREGO COUNTY	KANSAS	KS	0

WABAUNSEE COUNTY	KANSAS	KS	0
WALLACE COUNTY	KANSAS	KS	2
WASHINGTON COUNTY	KANSAS	KS	0
WICHITA COUNTY	KANSAS	KS	0
WILSON COUNTY	KANSAS	KS	0
WOODSON COUNTY	KANSAS	KS	0
WYANDOTTE COUNTY	KANSAS	KS	8

Total	**105**