IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and LOIS CURTIS CENTER,

Plaintiffs,

v.

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. SN-2021-CV-000299

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Lois Curtis Center (collectively, "Plaintiffs"), by and through counsel, and pursuant to Kansas Supreme Court Rule 141(b), hereby respond to Defendants' Motion for Summary Judgment ("Defs.' Mot."). For the reasons stated herein, although Plaintiffs do not contest many of Defendants' factual contentions, most of Defendants' facts are not relevant to the legal claims remaining before this Court and do not establish Defendants' entitlement to summary judgment. Plaintiffs respectfully request the Court deny Defendants' Motion and grant Plaintiffs' Motion for Summary Judgment filed with this Court on November 14, 2025 ("Pls.' Mot.").

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INTRODUCTION

Applying the tests that this Court must as set out by the Kansas Supreme Court in *League of Women Voters v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) ("*LOWV III*"), the undisputed evidence shows that Kansas's signature verification requirement for advance mail ballots (the "SVR") does not comply with equal protection or procedural due process. That evidence—which illustrates that, both on paper and in practice, the SVR fails to ensure meaningful protection for voters against erroneous and arbitrary disenfranchisement and fails to set forth objective standards for its application such that it can be uniformly applied throughout Kansas—compels the conclusion that Plaintiffs are entitled to summary judgment.

In their motion for summary judgment, Defendants invite the Court to disregard the mountain of evidence amassed that shows how the SVR is actually applied by Kansas counties and operates to disenfranchise lawful, qualified voters. To do so, Defendants repeatedly misconstrue the applicable legal standards, including what Plaintiffs must show to succeed on a facial challenge. Similarly, in arguing that the Court should reject Plaintiffs' equal protection claim, Defendants search for any legal standard *other than* the one that this Court must apply as set out by the majority opinion in *LOWV III*. *See* Defs.' Mot. at 17–44 (suggesting that the Court alternatively apply rational basis, *Anderson-Burdick,* intentional discrimination, or the standard from *Bush v. Gore*). Notably, nearly all of these arguments are ones that Defendants previously *lost* on appeal.

As for the sparse "facts" that Defendants put forward to argue that they are entitled to summary judgment on Plaintiffs' equal protection claim, they largely concern Defendants' contention that the law promotes the state's interests in preventing voter fraud and ensuring voter confidence, but—as Defendants themselves have argued in other filings—that is all but irrelevant to this claim under the proper tests. As Plaintiffs show, when this Court applies the facts to the

legal standard that it is required to apply here—which asks whether the SVR "achieve[s] reasonable uniformity on objective standards," 318 Kan. at 807—the answer is a resounding no. This is true not only for how counties determine whether or not a signature "matches," but a host of other factors about the SVR, including who is exempt from signature verification and how that is determined, how signatures are evaluated, and how voters are permitted to have their ballots cured after a county deems their signature to be "inconsistent."

Defendants also fail to show that they are entitled to summary judgment on Plaintiffs' procedural due process claim. Indeed, their argument on this front—which spans only three pages—fails to cite a single procedural due process case, from any court, or cite a single statement of fact in support of their position. *See* Defs.' Mot. at 44–47. And, as Plaintiffs have shown, the record establishes that Kansas voters are not guaranteed meaningful notice or a meaningful opportunity to cure, in large part because the SVR sets forth no minimum requirements for either, letting counties choose how they will enforce it, including in ways that fail to give voters adequate due process.

For all of these reasons, including those set forth in Plaintiffs' separately filed Motion for Summary Judgment, Defendants' Motion should be denied.

RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS

1. Uncontroverted.
2. Uncontroverted.
3. Uncontroverted.
4. Uncontroverted.
5. Uncontroverted.
6. Uncontroverted.
7. Uncontroverted.

8. Uncontroverted.

9. Uncontroverted.

10. Plaintiffs object to the statement in Paragraph 10 as inadmissible hearsay. *See* K.S.A. 60-460; *State v. Hunter*, 241 Kan. 629, 637, 740 P.2d 559 (1987) (newspaper article offered to prove truth of reported facts "fits the classical definition of hearsay").

11. Uncontroverted.

12. Uncontroverted.

13. Uncontroverted.

14. Uncontroverted.

15. Uncontroverted.

16. Uncontroverted.

17. Uncontroverted.

18. Controverted specifically as to its citation to K.A.R. 7-36-9(b)(1) which does not contain a definition of the word "match." Paragraph 18 inaccurately recites Stipulated Fact ¶ 35, which appropriately cites K.A.R. 7-36-9(a)(4) and reads in full: "With respect to advance voting by mail, the county election official, prior to transmitting a ballot to a Kansas voter, must verify that the voter's signature on the advance mail ballot application "matches" (as that term is defined in K.A.R. 7-36-9(a)(4)) the voter's signature on file in the county voter registration records, unless the voter has a disability preventing the voter from signing or preventing the voter from having a signature that matches the voter's registration form." Parties' Joint Statement of Stipulated Facts ¶ 35 (Nov. 11, 2025).

19. Uncontroverted as to when a voter's disability information is available to a county election official. However, as relevant to the issues before the Court in this case, Kansas election

officials who conduct signature verification do not consistently have this information available to them when they are reviewing ballots under the SVR, nor do they (1) keep track of the voters who should be exempted from signature verification pursuant to the law's disability exemption, *see* Pls.' SOF ¶ 279, (2) exempt voters who have a disability preventing them from having a consistent signature from signing advance ballot envelopes (despite the fact that those voters are supposed to be statutorily exempt from signature verification), *see* Pls.' SOF ¶ 278, or (3) apply the law's disability exception in the same way, if they apply it at all, *see* Pls.' SOF ¶ 283. Additionally, State Elections Director Caskey testified that the Secretary's Office does not collect information about how counties implement the law's disability exception, *see* Pls.' SOF ¶ 337, meaning that Mr. Caskey lacks knowledge to testify about what Kansas county election officials actually do when they encounter a voter with a known disability and how they treat that voter for the purposes of signature verification.

20. Uncontroverted.

21. Uncontroverted.

22. Uncontroverted.

23. Controverted as to Shawnee County Election Commissioner Andrew Howell. The cited portions of Commissioner Howell's deposition refer to when Shawnee County contacts a voter *after* making a determination that a signature is an alleged mismatch, not when Shawnee County reviews advance mail ballot envelopes. *See* Defs.' Ex. 5, Howell Dep. Tr. 115:19-116:7, 117:24-118:13.

24. Uncontroverted for the purposes of this motion.

25. Uncontroverted.

26. Uncontroverted.

27. Uncontroverted.

28. Uncontroverted.

29. Uncontroverted. But as detailed in the record, *see, e.g.*, Pls.' SOF ¶¶ 260–266, Kansas has no specific statutes or regulations that mandate when a voter's signature should be added to their registration record, *see* Pls.' Ex. 6, Caskey Dep. Tr. 89:8–14, and counties have not received written guidance from the state as to when a voter's signature must be added to their voter registration record and have instead developed county-specific "workflow[s]" for doing so. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 21:11–22:1. In practice, counties have different approaches as to when and which signatures are added to a voter's file and not every document that a voter submits to a county election office with the voter's signature is added to the voter's registration record. *See* Pls.' SOF ¶¶ 261–262.

30. Uncontroverted that Mr. Barker made this statement to the Legislature, but as detailed in the record, *see, e.g.*, Pls.' SOF ¶¶ 260–266, Kansas has no specific statutes or regulations that mandate when a voter's signature should be added to their registration record, *see* Pls.' Ex. 6, Caskey Dep. Tr. 89:8–14, and counties have not received written guidance from the state as to when a voter's signature must be added to their voter registration record and have instead developed county-specific "workflow[s]" for doing so. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 21:11–22:1. In practice, counties have different approaches as to when and which signatures are added to a voter's file and not every document that a voter submits to a county election office with the voter's signature is added to the voter's registration record. *See* Pls.' SOF ¶¶ 261–262.

31. Controverted. Bryan Caskey's affidavit states that he has "informed" county election officials that the signature verification standard is lenient, Defs.' Ex. 1 at ¶ 26, and he

testified that this has "been said" to county election officials. Defs.' Ex. 2 at 160:15–24. Not only is this inadmissible hearsay that cannot be relied upon on summary judgment (and is among the testimony offered by Mr. Caskey in support of Defendants' motion for summary judgment that is the subject of Plaintiffs' motion to strike filed with this response, *see* Pls.' Mot to Strike at 22–23), there is no evidence that this is currently part of the training given to Kansas election officials on signature verification, the entirety of which is to direct them to watch a YouTube video produced by the State of Oregon, *see* Pls.' Ex. 6, Caskey Dep. Tr. 141:17–143:23, which applies Oregon—not Kansas—law, *see* Pls.' Ex. 3, Mayer Aff. at 11–13. While a prior version of the training contained a verbal instruction that election officials should be "looking for reasons to keep the signature in, to validate the signature, rather than looking for reasons to throw the signature out," Pls.' Ex. 44, Oregon Training Video at 29:02–30:29, the Secretary updated the training in 2025 to *remove* that instruction, *see* Pls.' Ex. 45, Updated Training Video at 29:30–30:10; *see also* Pls.' SOF ¶ 237(d) (establishing these facts).

32. Controverted. This testimony is inadmissible hearsay and not properly relied upon at summary judgment (and is among the statements in Mr. Caskey's affidavit that are the subject of Plaintiffs' motion to strike, *see* Pls.' Mot to Strike at 22–23). It is further controverted as not reflective of the actual formal guidance that has been provided to county officials, including in the regulation issued by the Secretary of State, which includes no such instruction, and is further controverted by the manner in which the law is actually applied by the counties. Pls.' Ex. 6, Caskey Dep. Tr. 159:24–160:11 (testifying that signature reviewers are instructed to presume that a voter's signature is valid but acknowledging that neither the statute nor the regulation contains such an instruction); K.S.A. 25-1124(h); K.A.R. 7-36-9; *see also* Pls.' SOF ¶ 291 (establishing that not all counties apply a presumption that a voter's signature matches); Pls.' Ex. 38, Songer Dep. Tr.

102:13–18 (Defendants' previously identified expert, Mr. Songer, testifying that he agrees that Kansas's definition of what it means to have an inconsistent signature does not give the benefit of the doubt to the voter).

33. Controverted. What Andrew Howell actually testified to was that: "[I]f there is a question about it and there's a significant uncertainty, that we will probably tend to give the voter a little bit of benefit of the doubt." Defs.' Ex. 5, Howell Dep. Tr. 90:11–21. At the same time, Commissioner Howell also testified that Shawnee County does *not* apply a presumption that a voter's signature matches the one on file. *See* Pls.' SOF ¶ 291(b).

34. Controverted that this "echoed" what Andrew Howell said. As noted in the response above to Paragraph 33, Commissioner Howell's testimony was mischaracterized in that paragraph. Uncontroverted that Rich Vargo made the statements quoted in Paragraph 34.

35. Uncontroverted. However, the full testimony from Commissioner Fred Sherman was as follows: "I would just say anecdotally and based off the number of ballots we process and receive versus the number that challenge, that the vast, vast majority of return envelopes do have a consistent signature with the ones on record." Defs.' Ex. 4 at 97:19–98:2. Commissioner Sherman also testified that Johnson County does *not* apply a presumption that a signature matches. *See* Pls.' SOF ¶ 291(b).

36. Uncontroverted.

37. Controverted. The evidentiary record shows that this rarely happens and in fact that county election officials other than Andrew Howell (whose testimony Defendants cite above) do not believe they are allowed to adjust their approach to signature verification based on a voter's disability status. For example, when asked, "Are election officials in Riley County trained to approach signature matching any differently based on whether a voter is on the permanent advance

voter list?" Riley County Clerk Rich Vargo testified, "No. They use the same standards." When asked, "Are election officials in Riley County trained to approach signature matching any differently, based on any other characteristic about a voter?" Mr. Vargo testified, "Nothing in the law allows for us to do that." Pls.' Ex. 14, Riley County Ex., Vargo Dep. Tr. 105:24–106:9; *see also* Pls.' SOF ¶ 281 (establishing these facts). Paragraph 37 also implies that election officials have reason to know about voters' disabilities that would exempt them from signature verification, but the record establishes the opposite. The Secretary of State has issued no guidance or directions as to how to apply the SVR's disability exception and, as Johnson County Election Commissioner Fred Sherman testified, there is nothing on the ballot envelope that would indicate a voter has a disability preventing the voter from having a consistent signature, nor does the State's AV5 form for assistance indicate whether a voter has a disability that would impact their signature, as opposed to needing another kind of assistance, such as physical assistance or language assistance. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 107:9–17; Pls.' Ex. 49, AV5 Form; *see also* Pls.' SOF ¶¶ 274–75 (establishing these facts). Paragraph 37 is also controverted to the extent it implies that election officials will excuse voters with disabilities that affect their signature from needing to cure if their signature is deemed to be inconsistent; as multiple county election officials testified, that is not the case. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 115:13–116:4; Pls.' Ex. 18, Shawnee County Ex., Howell Dep. Tr. 101:10–102:2; Pls.' Ex. 14, Riley County Ex., Vargo Dep. Tr. 118:8–20; *see also* Pls.' SOF ¶ 283 (establishing these facts).

38. Uncontroverted.

39. Uncontroverted.

40. Controverted. Mr. Caskey's affidavit contradicts his deposition testimony. When asked, "If a voter has a disability preventing the voter from having a signature consistent with the

one on file, are they still required to sign the envelope themselves?" State Election Director Bryan Caskey testified that, "If the voter has the capacity to sign an advance ballot envelope, then yes, they are required to sign the envelope." Pls.' Ex. 6, Caskey Dep. Tr. 180:5–11. Likewise, when asked, "If the voter has a disability preventing the voter from having a signature consistent with the voter's registration form, is the voter still required to sign?" Johnson County Election Commissioner Fred Sherman testified, "There needs to be some level of signature identification component of the return envelope, yes." Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 104:8–14. Paragraph 40 is also controverted because, as the ballot envelope itself demonstrates and Johnson County Election Commissioner Sherman agreed, there is no place on the ballot envelope to indicate that a voter has a disability preventing the voter from signing in a manner consistent with the voter's signatures on file. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 107:9–17; Pls.' Ex. 16, Dickinson County Ex. at SUBPOENAS_000160; Pls.' Ex. 26, Butler County Ex. at SUBPOENAS_034252; Pls.' Ex. 29, Leavenworth County Ex. at SUBPOENAS_003651. As a result, there is no way for a voter who has a disability that prevents the voter from either signing the ballot or from signing consistent with the voter's registration form on file to know that they are permitted have a third party sign the ballot on their behalf—even if that were true. Paragraph 40 is also controverted because the AV5 Form referenced in it applies by its own terms to voters who have "a disability *preventing the voter from signing*" at all, not a disability preventing them from signing in a consistent manner. Pls.' Ex. 49, AV5 Form (emphasis added). Paragraph 40 is further controverted because Riley County Clerk Rich Vargo testified that any voter who wishes to be exempt from signature verification must *both* have an assistant sign on their behalf *and* have previously indicated the voter needs assistance signing. Pls.' Ex. 14, Riley County Ex., Vargo Dep. Tr. 108:18–109:1, 112:15–23, 116:24–117:12.

41. Uncontroverted.

42. Controverted. Mr. Caskey's affidavit contradicts his deposition testimony. When asked, "Did the Secretary's office analyze whether Kansas's standards in K.A.R. 7-36-9 for rejecting or accepting a signature on file were the same as Oregon's standards?" Mr. Caskey testified, "That K.A.R. did not exist at the time of the selection of the Oregon video as a training video." Pls.' Ex. 6, Caskey Dep. Tr. 147:12–21. It is therefore not possible that Mr. Caskey determined that the Oregon training most accurately reflected Kansas's standards, all of which did not actually exist at the time he selected that training.

43. Plaintiffs object to Paragraph 43, which is sourced to Bryan Caskey's affidavit, because it is not based on personal knowledge; it was necessarily learned second-hand (from other states' election officials, or from court opinions), and is consequently inadmissible hearsay. *See* K.S.A. 60-460; *see also* Pls.' Mot. to Strike at 23–24. If the Court nonetheless considers this fact, it is controverted to the extent it suggests that the Oregon Training Video is the only signature verification training or directive used in Tennessee. The State of Tennessee supplements this video with directives from the Division of Elections for the Tennessee Office of the Secretary of State. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 384 (6th Cir. 2020).

44. Uncontroverted.

45. Uncontroverted.

46. Uncontroverted.

47. Uncontroverted.

48. Uncontroverted.

49. Uncontroverted.

50. Uncontroverted.

51. Uncontroverted.

52. Controverted. Voters casting a mail ballot may not receive notification that they must cure their ballot for several days or more after Election Day, unlike voters who cast a ballot in person and must cure a problem with photo identification. *See, e.g.*, Pls.' Ex. 32, Sedgwick County Ex. at SUBPOENAS_006483 (noting that voters Kathryn Randall, Christopher Randall, Laura Wolfsbauer, and Richard Wolfsbauer were mailed notice that their signatures were rejected on October 31, 2024, but Sedgwick County officials did not attempt to contact them by phone until nine days later, four days after Election Day); Pls.' Ex. 32, Sedgwick County Ex. at SUBPOENAS_006478 (noting that voter Haley Kottler was mailed notice that her ballot required curing on November 12, 2022, four days after Election Day). Voter Haley Kottler first received notice that she needed to cure her signature by phone on Monday, November 14, six days after Election Day. Pls.' Ex. 32, Sedgwick County Ex. at SUBPOENAS_006478. Some Kansas voters never receive notice that they need to cure their signatures. *See* Pls.' Ex. 48, Anderson Aff. ¶ 6; Pls.' Ex. 41, Moore Aff. ¶ 7.

53. Uncontroverted.

54. Uncontroverted.

55. Uncontroverted.

56. Uncontroverted.

57. Uncontroverted.

58. Uncontroverted.

59. Uncontroverted.

60. Uncontroverted.

61. Uncontroverted.

62. Uncontroverted.

63. Uncontroverted.

64. Controverted only to the extent that such figures are the ones *reported* by the counties to the Secretary's Office for the purpose of reporting that data to the U.S. Election Assistance Commission, not that they necessarily encompass the true and final number of ballots not counted as a result of signature verification. The evidence shows that, in prior years, the number of ballots rejected for a signature mismatch in Kansas that the state has submitted to the Election Assistance Commission has been an undercount of the ballots actually rejected on the basis of signature mismatch. *See* Pls.' SOF ¶ 351.

65. Controverted to the extent that it suggests that all signatures received by the county are entered into the voter's registration file and are used for SVR. Kansas does not have any specific statutes or regulations that mandate when a voter's signature should be added to their registration record. Pls.' Ex. 6, Caskey Dep. Tr. 89:8–14 (State Election Director confirming, "I'm not aware of a state law that references this in either fashion, in either direction."). Not every document that a voter submits to a county election office with the voter's signature is added to the voter's registration record. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 19:14–20:10. When asked whether his staff has the time to add advance ballot applications that arrive close to an election to a voter's file, for example, the Johnson County Election Commissioner testified, "Generally not, no." Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 58:11–18. The record further shows that the counties vary in the number of comparators they have on file for voters, but most had very few comparators on file. Pls.' Ex. 47, Goldberg Aff., Ex. A (35 Johnson County voters had, on average, 3.14 unique comparators on file); Pls.' Ex. 14, Riley County Ex., Vargo Dep. Tr. 130:13–20 (testifying that in Riley County, the "overwhelming majority" of voters have

"one" comparator on file); *see also* Pls.' SOF ¶ 265 (establishing these facts). And *no* Johnson County voter who had their ballot envelope signature flagged for rejection on the basis of signature mismatch in the 2024 General Election had an advance ballot application signature on file for comparison. Pls.' Ex. 47, Goldberg Aff., Ex. A, B; *see also* Pls.' SOF ¶ 262a (establishing these facts). This demonstrates that all signatures that a county comes into contact with during the voting process from voters are not in fact used for signature verification.

66. Controverted to the extent it implies all counties use these signatures to determine whether a signature is a match or that they are required to do so. Kansas does not have any specific statutes or regulations that mandate when a voter's signature should be added to their registration record. Pls.' Ex. 6, Caskey Dep. Tr. 89:8–14. The record establishes that not every document that a voter submits to a county election office with the voter's signature is added to the voter's registration record—including some of the documents listed in Paragraph 66 above—and that county election offices vary in their approach as to which signatures are added and when. Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 19:14–20:10, 20:17–21:7; Pls.' Ex. 18, Shawnee County Ex., Howell Dep. Tr. 17:20–18:14, 20:10–22; *see also* Pls.' SOF ¶ 262 (establishing these facts). For example, when asked whether his staff has the time to add advance ballot applications that arrive close to an election to a voter's file, the Johnson County Election Commissioner testified, "Generally not, no." Pls.' Ex. 5, Johnson County Ex., Sherman Dep. Tr. 58:11–18. Indeed, *no* Johnson County voter who had their ballot envelope signature flagged for rejection on the basis of signature mismatch in the 2024 General Election had an advance ballot application signature on file for comparison. Pls.' Ex. 47, Goldberg Aff., Ex. A, B; *see also* Pls.' SOF ¶ 262a (establishing these facts). The record shows that the counties vary in the number of comparators they have on file for voters, but most had very few comparators on file. Pls.' Ex. 47, Goldberg Aff., Ex. A (35

Johnson County voters had, on average, 3.14 unique comparators on file); Pls.' Ex. 14, Riley County Ex., Vargo Dep. Tr. 130:13–20 (testifying that in Riley County, the "overwhelming majority" of voters have "one" comparator on file); *see also* Pls.' SOF ¶ 265 (establishing these facts).

67. Controverted. When asked by Defendants' counsel, "Is there any mechanism, other than signature verification review, to be sure that a – that the person who submits an advance ballot is the same person that – to whom the advance ballot was sent?" Mr. Vargo testified, "Yeah. I don't know. Not that I can think of." Defs.' Ex. 3, Vargo Dep. Tr. 203:11–17. In other words, Mr. Vargo testified that he did not have knowledge and could not at that time think of any other mechanism that would serve this purpose; he did not testify that it was the only reasonable mechanism. That testimony, moreover, is at odds with other evidence in this case, including from Clay Barker, General Counsel of the Secretary of State's Office, and Secretary of State Scott Schwab, both of whom have acknowledged that Kansas has additional safeguards other than signature verification, including requiring voters to request absentee ballots and to include their government ID number on advance ballot request forms, which make absentee ballot fraud difficult. Pls.' Ex. 11, Revenaugh Aff. Ex. B, at 3:52:19–3:52:25; Pls.' Ex. 56, KS000304; *see also* Pls.' SOF ¶¶ 443–452 (establishing these facts). Plaintiffs' expert, Dr. Mayer, likewise identified these procedures as safeguards against voter fraud and noted the complete lack of evidence of material voter fraud in Kansas, including a lack of *any* substantiated fraud that would have been prevented by signature verification. Pls.' Ex. 3, Mayer Aff., at 21–22. Throughout this litigation, Defendants have not identified any instance of an individual being charged or prosecuted in Kansas because they signed a voter's advance ballot envelope, strongly indicating that, for the decades that Kansas did not require signature verification but instead ensured the integrity of Kansas's

elections through a variety of different safeguards, those safeguards were more than sufficient for this purpose. *See* Pls.' SOF ¶ 460. To the extent that Defendants are attempting to nonetheless rely on Clerk Vargo's testimony for the proposition that "that signature verification represents the only reasonable mechanism for ensuring that the person who submits an advance ballot is the same person to whom the ballot was sent," Plaintiffs object to this testimony as improper undisclosed expert testimony. Clerk Vargo was identified only as a lay witness, and to the extent he is attempting to offer such an opinion as a lay witness, it is improper lay opinion testimony. Lay "opinions and inferences" are permissible only if they are "(1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are *not* based on scientific, technical or other specialized knowledge within the scope of subsection (b)." K.S.A. 60-456(a) (emphasis added). To "perceive" in this context means to "acquire knowledge through one's own senses." K.S.A. 60-459(c). Thus, "lay opinion testimony is limited to testimony based on the perception of fleeting events that does not require the witness to apply specialized knowledge." *State v. Sasser*, 305 Kan. 1231, 1245, 391 P.3d 698, 708 (2017) (citing treatise). Examples of proper lay opinion testimony include opinions on "the speed of a vehicle, intoxication, sanity, identity and the like," opinions which draw on common knowledge, with the understanding that "the details [are] of such character that people generally are capable of understanding them and of arriving at a conclusion with respect thereto." *Id.* at 1244. Clerk Vargo's lay opinion testimony is thus inadmissible both because it is based on specialized knowledge, and because it is not based on his perception of fleeting events. *Id.* at 1245.

68. Controverted. Commissioner Andrew Howell, when asked whether he had ever encountered voter fraud on a mail ballot envelope, was able to think of only *one potential* incident within the past eight years. Pls.' Ex. 18, Shawnee County Ex., Howell Dep. Tr. 70:8–24. He

testified that he did not know the outcome of that investigation. Pls.' Ex. 18, Shawnee County Ex., Howell Dep. Tr. 72:6–10. He also testified that he had made a referral to law enforcement in 2020 regarding mail ballot *applications* because "there were some applications for ballots that had multiple colors of ink, which indicated to me some question marks about who filled them out and why they were, in some cases, two and three different colors of ink, different handwriting, and even some questions about signatures on those application documents." Defs.' Ex. 5, Howell Dep. Tr. 67:10–68:7. He testified that he did not recall making referrals to law enforcement about any signature on a mail ballot in 2022 or 2024. Pls.' Ex. 18, Shawnee County Ex., Howell Dep. Tr. 72:13–18.

69. Controverted. The portion of the affidavit upon which Defendants rely is improper and inadmissible opinion testimony (and is among the statements in Mr. Caskey's affidavit that are the subject of Plaintiffs' motion to strike, *see* Pls.' Mot to Strike at 21–22). It is further controverted by myriad record evidence in this case including from Clay Barker, General Counsel of the Secretary of State's Office, and Secretary of State Scott Schwab, both of whom have acknowledged that Kansas has additional safeguards, including requiring voters to include their government ID number on advance ballot request forms, that make advance voting by mail safe and secure. *See* Pls.' Ex. 11, Revenaugh Aff. Ex. B, at 3:52:19–3:52:25; Pls.' Ex. 56, KS000304; *see also* Pls.' SOF ¶¶ 447–448 (establishing these facts). Plaintiffs' expert, Dr. Mayer, included in his report a discussion of these safeguards—along with the lack of evidence of voter fraud in Kansas, including advance ballot fraud. Pls.' Ex. 3, Mayer Aff., at 21–23. Dr. Mayer's report identifies the overall rate of voter fraud since 1982 in Kansas as 0.000092%, and states that the rate of advance mail voter impersonation fraud in Kansas since 2008—assuming that one unproven incident was in fact fraud—is 0.000061%. *Id.* at 24. Paragraph 69 is also contested because it

assumes that Kansas election officials are capable of distinguishing between authentic signatures and forgeries. But as Plaintiffs' expert Dr. Linton Mohammed has shown, actually distinguishing between authentic and inauthentic signatures is a formidable task that election officials are bound to fail at, a conclusion that Defendants' previously identified handwriting expert did not dispute. *See* Pls.' SOF ¶¶ 149–164, 170. The record in this case bears that out: all three county election officials deposed in this case accepted as a "match" the example forged signature shown to them, SOF ¶ 197, while two of those same officials rejected as "inconsistent" the genuine signatures of Kansas voters, SOF ¶ 220(e)–(f).

70. Uncontroverted.

71. Uncontroverted.

72. Uncontroverted.

73. Uncontroverted.

74. Uncontroverted.

75. Controverted. Plaintiffs object to the cited paragraph of Mr. Caskey's affidavit as expert testimony which was not disclosed, and additionally because Mr. Caskey lacks personal knowledge of the signature verification laws of all fifty states, as he testified in his deposition. Furthermore, Mr. Caskey's affidavit cites as its source for this assertion the website of the National Conference of State Legislatures, such that Mr. Caskey's assertion is inadmissible hearsay that does not meet any of the hearsay exceptions under Kansas statute. K.S.A. 60-460. For all of these reasons, this assertion is among the statements made by Mr. Caskey in the cited affidavit that are the subject of Plaintiffs' motion to strike. *See* Pls.' Mot. to Strike at 12–13.

76. Controverted. Not only does Mr. Caskey's affidavit state that *three* states require notarization on mail ballots, not *eight*, Defs.' Ex. 1, Caskey Aff. ¶ 8, Plaintiffs also object to the

cited paragraph of Mr. Caskey's affidavit as expert testimony, which was not disclosed, and additionally because Mr. Caskey lacks personal knowledge of the signature verification laws of all fifty states, as he testified in his deposition. Furthermore, Mr. Caskey's affidavit cites as its source for this assertion the website of the National Conference of State Legislatures. As such, it is inadmissible hearsay that does not meet any of the hearsay exceptions under Kansas statute. K.S.A. 60-460. For all of these reasons, this assertion is among the statements made by Mr. Caskey in the cited affidavit that are the subject of Plaintiffs' motion to strike. *See* Pls.' Mot. to Strike at 12–13.

77. Controverted. Plaintiffs object to the cited paragraph of Mr. Caskey's affidavit as expert testimony, which was not disclosed. It is among the statements made by Mr. Caskey in his new declaration that are the subject of Plaintiffs' motion to strike. Mot. to Strike at 18–20. The statement is also controverted to the extent that it suggests that this "surge" of skepticism following the 2020 Presidential Election was warranted. Claims of fraud in the 2020 General Election have repeatedly and definitively been debunked as false. Pls.' Ex. 3, Mayer Aff., Ex. A at 22; *also* Pls.' SOF ¶ 453–456 (establishing these facts).

78. Plaintiffs object to the statement in Paragraph 78 as inadmissible hearsay. *See* K.S.A. 60-460. The cited paragraphs in Mr. Caskey's new affidavit are among those that are the subject of Plaintiffs' motion to strike, both on hearsay grounds as well as several other grounds. Mot. to Strike at 18–21.

79. Controverted. As a threshold matter, Plaintiffs object to the cited paragraph of Mr. Caskey's affidavit as either improper lay opinion testimony or expert testimony, which was not disclosed, and is among the assertions in Mr. Caskey's new affidavit that are the subject of Plaintiffs' pending motion to strike. Mot. to Strike at 14–15. As a substantive matter, the suggestion that signature verification is the only means (or even a good means) of identifying or

preventing illegally cast ballots is controverted by other evidence in this case, including Plaintiffs' expert testimony and the fact that county officials incorrectly identified a forged signature as a "match" and genuine signatures as not matching in their depositions. Pls.' Ex. 3, Mayer Aff. Ex. A at 9–11, 21–25; Pls.' Ex. 4, Mohammed Aff., Ex. A ¶¶ 60–63 (explaining that laypersons are significantly more likely than trained professionals to make errors when comparing signatures); Pls.' SOF ¶¶ 171–73, 184–86; 187–89, 195–97 (demonstrating that election officials identified signatures as matching or not matching); Pls.' Ex. 39, Mohammed Suppl. Aff. at 1–3 (demonstrating that signatures shown to election officials were genuine or not genuine).

80. Uncontroverted for the purposes of this motion.

LEGAL STANDARD

Summary judgment is inappropriate unless "the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 60-256(c)(2); "The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Miller v. Westport Ins. Corp.*, 288 Kan. 27, Syl. ¶ 1, 32, 200 P.3d 419, 420, 423 (2009). Where "reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." *Bracken v. Dixon Indus., Inc.*, 272 Kan. 1272, 1275, 38 P.3d 679, 682 (2002). This command, however, applies only to facts that are in fact *material* to Plaintiffs' claims. "A disputed question of fact which is immaterial to the issue does not preclude summary judgment." *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 934, 296 P.3d 1106, 1124 (2013). In other words, "if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact." *Id.*

ARGUMENT

Defendants' motion for summary judgment must be denied for multiple, independent reasons. First, Defendants fail to put forward sufficient, admissible facts that entitle them to summary judgment. Indeed, Defendants put forward very little evidence (almost none) that shows how the SVR operates in practice, including whether the SVR "achieve[s] reasonable uniformity" across Kansas counties, *LOWV III*, 318 Kan. at 807, or whether it permits voters a meaningful opportunity to cure. In the rare instance where Defendants make an assertion about how the SVR operates, it is often unaccompanied by admissible factual support, as required at summary judgment.

Second, Defendants misapply the law. On Plaintiffs' equal protection claim, the Kansas Supreme Court's decision in *LOWV III* makes clear that the question that this Court must evaluate is whether the SVR "achieve[s] reasonable uniformity on objective standards." *Id.* Defendants ignore this standard, instead asking this Court to apply rational basis review, *Anderson-Burdick*, *Bush v. Gore*, or intentional discrimination standards that are found nowhere in *LOWV III*. This tactic is perhaps not surprising, given the overwhelming evidence that the SVR lacks objective standards for its application and is arbitrarily applied across Kansas, resulting in a conflicting patchwork of procedures, practices, and results based on where a voter lives. On this record it is Plaintiffs—not Defendants—who are entitled to summary judgment on this claim.

Lastly, Defendants are also not entitled to summary judgment on Plaintiffs' procedural due process claim, for which Defendants develop almost no legal argument or facts in support. Here, too, the record overwhelmingly supports Plaintiffs' motion, establishing not only that the SVR fails to guarantee that voters will be notified at a meaningful time or have a meaningful opportunity to cure, but that, in practice, voters have been denied both of these essential requirements of

procedural due process. Accordingly, on this claim, as well, the Court should deny Defendants' motion and grant Plaintiffs' motion for summary judgment.

I. DEFENDANTS' MOTION RELIES ON ASSERTIONS UNSUPPORTED BY ADMISSIBLE EVIDENCE.

At the outset, Defendants' motion is replete with sweeping, unsupported assertions in violation of the summary judgment standard. That standard requires a movant to support its arguments with "[facts] that would be admissible [as] evidence." Kansas Sup. Ct. R. 141(d). On this front, Defendants' motion fails several times over, asking this Court to grant them summary judgment based on speculation and assertions for which Defendants *do not even attempt* to provide a factual citation, as well as assertions for which they offer only inadmissible evidence in support. But speculation, generalizations, and baseless assertions, regardless of how confidently they are stated, cannot substitute for admissible evidence, which is the only evidence the Court may properly consider at this stage. Defendants repeatedly disregard this black letter rule, proceeding as if they are entitled to summary judgment by assertion alone.

Take, for example, Defendants' contention—without evidentiary support—that "Kansas includes virtually the same instructions in the training video shown to all county election officials participating in the signature review process," as does the State of California, Defs.' Mot. at 34. But Defendants put forward nothing to support this claim—not Kansas's training video, let alone California's. Or, take Defendants' contention that certain methods of curing would be "unfeasible" in Johnson County. Defs.' Mot. at 36. Here, Defendants cite only to census numbers of Johnson County's total population, effectively asking the Court to make assumptions about what would and would not be feasible for the County to do, based on nothing more than the size of its population. Or, take Defendants' contention that certain (unnamed) voters who were not able to cure "had other options." Defs.' Mot. at 46. Not only is it made without any factual or legal

citations identified in support, it is also impossible to evaluate without knowing which voters Defendants are talking about, their circumstances, or how Kansas counties apply the SVR. These examples are far from the end of it. And Defendants' unsupported assertions grow much grander in scale.

For example, Defendants contend that the SVR operates "uniformly" throughout Kansas, Defs.' Mot. at 1, and that "there may not be a state with better [rejection] numbers in the country," but fail to offer even a shred of evidence to support those statements, Defs.' Mot. at 2. Nor can one be found in Defendants' statement of facts, which consists largely of stipulations about the text of the statute and regulation and a variety of asserted state interests in the SVR. To know whether the SVR operates "uniformly" throughout Kansas would require actual examination of county practices. But the Secretary's Office has disclaimed knowledge of how the SVR is actually applied in Kansas counties. *See* Pls.' SOF ¶¶ 331–41. And, although Plaintiffs obtained evidence from nearly two dozen counties about their SVR practices via business records subpoenas and turned those records over to Defendants throughout the course of discovery, *see* Pls.' SOF ¶¶ 135, 141, Defendants cite to none of them. Nor do those records support the contention that Kansas's SVR operates "uniformly" throughout Kansas, as further evidenced by the deposition testimony of the three county officials deposed in this matter, as Plaintiffs detail in their own motion for summary judgment. *See* Pls.' Mot. at 13–49.

In other parts of their motion, Defendants *attempt* to provide support for their assertions, but the "evidence" they point to is inadmissible. For example, in support of an assertion about mail voter fraud, Defendants *direct the Court to conduct a search of a website maintained by a conservative public policy organization*. *See* Defs.' Mot. at 40 (stating, "[t]here are many examples of voter fraud involving mail ballots from across the country over the last ten years" and citing

https://electionfraud.heritage.org/ with the parenthetical direction, "search category of fraudulent use of absentee ballots"). *But see* K.S.A. 60-256(e)(1) (summary judgment must be supported by an "affidavit or declaration . . . made on personal knowledge, set out facts that would be admissible as evidence and show that the affiant or declarant is competent to testify on the matters stated"). Defendants' summary judgment motion also relies on newspaper articles (which Defendants sourced from ChatGPT), *see* Defs.' Mot. at 4, 37, but the Kansas Supreme Court has found newspaper articles offered to prove the truth of reported facts "fit[] the classical definition of hearsay." *State v. Hunter*, 241 Kan. 629, 637, 740 P.2d 559, 566 (1987).

Lastly, Defendants submit an Affidavit from Bryan Caskey, the State Elections Director, in support of their motion. But as detailed in Plaintiffs' concurrently filed Motion to Strike, significant sections of that affidavit are inadmissible. Though Plaintiffs do not duplicate those arguments here, the affidavit repeatedly sets forth assertions for which Mr. Caskey disclaimed personal knowledge in his deposition, as well as assertions that are speculative or constitute hearsay, and is full of improper lay opinion (or undisclosed expert) testimony. *See* Pls.' Mot. to Strike (Jan. 9, 2025).

That said, even if the Court accepted all of Defendants' inadmissible "evidence," their motion still must be denied, for the reasons discussed below. But Defendants' failure to support their arguments with admissible evidence only further underscores how thoroughly they have failed to carry their burden to establish that they are entitled to summary judgment in this case.

II. DEFENDANTS MISCONSTRUE THE STANDARD APPLICABLE TO CLAIMS FOR FACIAL RELIEF.

Defendants begin by mischaracterizing the frame through which this Court must evaluate Plaintiffs' claims, effectively arguing that, because this is a facial challenge, the factual record

does not really matter, so long as there is *some* set of circumstances under which the law *could* be valid. *See* Defs.' Mot. at 1–3, 21. This is wrong on multiple fronts.

Although some facial challenges do not require a factual record, *see, e.g.*, *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 6, 446 P.3d 1103, 1108 (2019), others do. Indeed, in a recent facial challenge to another law passed by the Kansas Legislature, the Kansas Supreme Court asked this Court to oversee that case's development of the factual record, eventually affirming this Court's permanent injunction based on the evidence amassed in that case. *See Hodes & Nauser, MDs, P.A. v. Kobach*, 318 Kan. 940, 551 P.3d 37 (2024). Similarly, the Kansas Supreme Court remanded *this* case precisely so Plaintiffs could develop the factual record. *See LOWV III*, 318 Kan. at 807 ("[W]e will not deny the League their full opportunity to prove up their claims *as a matter of evidence* in the district court." (emphasis added)); *see also id.* at 837 (Biles, J., concurring in part and dissenting in part) ("The litigation going forward must focus on how these regulations reliably and uniformly sift out the feared fraudulent ballots by objective means without denying legitimate voters their fundamental right to vote.").

This is not a novel approach. Cases challenging laws that impact voters often proceed—and succeed—as facial challenges, including when they challenge signature verification regimes in particular. *See, e.g.*, *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 213, 217–19 (D.N.H. 2018) (holding New Hampshire's signature-matching law "facially violate[d]" due process after examining the statutory scheme and evidence "in the record," including expert analysis on the reliability of signature matching by Dr. Mohammed, Plaintiffs' expert here); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 796–97 (S.D. Ind. 2020) (holding Indiana's signature verification system "facially . . . violative" of due process after examining the statutory scheme and evidence from experts like Dr. Mohammed, who helped the court understand the likelihood of "a real risk of

erroneous rejection" as a result of signature verification); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018); *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039 (D.N.D. 2020). Similar analysis of the factual record is unquestionably relevant to Plaintiffs' facial claims here.

Defendants nevertheless contend that evidence as to how the SVR is being applied matters little because, in the end, Plaintiffs must establish that "no set of circumstances exists under which the Act would be valid" to succeed. Defs.' Mot. at 16 (quoting *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433, 445 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987))). But the U.S. Supreme Court—from which the language Defendants rely upon came—has long made clear that it does not mean what Defendants argue it means. As the Tenth Circuit has summarized the case law:

> The idea that the Supreme Court applies the "no set of circumstances" test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority. Following *Salerno*, the Court has repeatedly considered facial challenges simply by applying the relevant constitutional test to the challenged statute without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid.

Doe v. City of Albuquerque, 667 F.3d 1111, 1124 (10th Cir. 2012) (citing cases supporting this principle); *see also City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) (criticizing *Salerno*). Among other things, "it has not been established that the 'no set of circumstances' test applies to facial challenges *not based on overbreadth*." *Doe*, 667 F.3d at 1123. And indeed, the Kansas case Defendants cite for this principle, *Jones*, is an overbreadth case, just like *Salerno* was. *See Jones*, 313 Kan. at 445. *This* case, however, is not. And like the U.S. Supreme Court, the Kansas Supreme Court has similarly not enforced *Salerno*'s "no set of circumstances test" in all facial challenges. *See, e.g.*, *State v. Ryce*, 303 Kan. 899, 915, 368 P.3d 342, 354 (2016) (in facial challenge, rejecting State's attempt to apply *Salerno*), *adhered to on reh'g*, 306 Kan. 682, 396 P.3d 711 (2017).

Even when the U.S. Supreme Court *has* applied the "no set of circumstances" test, it has not done so in the way that Defendants urge this Court to apply it. To the contrary, the U.S. Supreme Court has explained that, in determining whether a law is "unconstitutional in all of its applications," the "proper focus" of the court's inquiry is how the law affects "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 576 U.S. 409, 415–19 (2015) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)). As multiple courts have held, this means that a facial challenge to a signature law is not defeated simply because the state can point to an application which a voter's ballot might be "correctly" rejected, such as for voters who accidentally omit signatures or sign the wrong ballot. *See Saucedo*, 335 F. Supp. 3d at 221–22; *Jaeger*, 464 F. Supp. 3d at 1052.[1]

The voters for whom the law is a *restriction* are voters who genuinely signed their ballot envelope, but whose ballot is now subject to an arbitrary and effectively standardless decision about whether that ballot should or should not be counted, depending on how the SVR is applied in their county. As the Kansas Supreme Court made clear in *LOWV III*, *all* mail voters are entitled to have their ballot's validity evaluated under a system that complies with equal protection, whether or not their ballot is ultimately rejected. *See* 318 Kan. at 805 ("To comply with equal

[1] A voter's ballot in that category "would be rejected regardless" of K.S.A. 25-1124(h), "as they would fail to meet independent requirements" of state law, *Saucedo*, 335 F. Supp. 3d at 222—here, K.S.A. 25-1124(a), which requires the voter to sign their ballot envelope. Nor is it true (as the State appears to contend, *see* Defs.' Ex. 1, Caskey Aff. ¶ 14), that the state would be forced to accept "obviously fraudulent ballots" if K.S.A. 25-1124(h) was enjoined. If the county has knowledge, for example, that the voter did not sign their ballot, but another individual did, the ballot could be excluded under K.S.A. 25-1124(a) for failure to bear the voter's signature. Tellingly, Defendants *fail to point to a single instance* in which the SVR actually prevented the fraudulent submission of a ballot. Nor do Defendants point to any incidents in the decades before Kansas enacted the SVR where a county was "forced" to accept an "obviously fraudulent ballot."

protection . . . any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that *no voter* is subject to arbitrary and disparate treatment." (emphasis added)). All mail voters are also entitled to have constitutionally adequate procedures in place before their ballots are rejected. *See id.* ("In designing a process of providing proper proofs, the Legislature still must comply with other constitutional guarantees such as those of equal protection and due process."). For those reasons, if the law does not comply with equal protection or procedural due process, it *is* facially unconstitutional, full stop.

Defendants' repeated refrain that the SVR has resulted in "only" hundreds of voters whose ballots were (almost certainly *wrongfully*) not counted in Kansas elections misunderstands the nature of the injury caused by the SVR and how the Court must evaluate the constitutionality of the law under *LOWV III*. For one, Defendants' framing assumes that the only injury the SVR can possibly impose is disenfranchisement. But that is not consistent with the Kansas Supreme Court's decision, which made clear that the question is whether *any* voter is subject to arbitrary and disparate treatment under the law—it was not limited to those who are disenfranchised. *See LOWV III*, 318 Kan. at 805 ("To comply with equal protection . . . any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that *no voter* is subject to arbitrary and disparate treatment." (emphasis added)). And, as the record establishes, the chaotic and arbitrary system created by the SVR is itself a harm to voters, including voters whose ballots are flagged for rejection but manage to ultimately cure their ballots. *See* Pls. SOF ¶¶ 363–368, 375–376. But even if the Court were to focus only on those voters ultimately disenfranchised by the law, the evidence that Plaintiffs have presented would *still* be enough for them to succeed on their facial challenge under the U.S. Supreme Court's own application of the "no set of circumstances" standard.

In *Casey*, for example, the challenged law required a woman to notify her husband before obtaining an abortion. As the Court explained in discussing the decision in *Patel*, "[t]hose defending the statute [in *Casey*] argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden." 576 U.S. at 418. And because the record showed that the law would be a restriction upon only "one percent of the women seeking abortions," its defenders argued "the statute cannot be invalid on its face." *Casey*, 505 U.S. at 894. But, as the Court held, "[t]he analysis does not end with the one percent of women upon whom the statute operates; it *begins* there. . . . *The proper focus of constitutional inquiry is the group for whom the law is a restriction*, not the group for whom the law is irrelevant." *Id.* (emphases added).

Thus even under Defendants' narrow framing of this case, the fact that hundreds—and not yet thousands—of Kansas voters have thus far been disenfranchised by the SVR is no barrier to Plaintiffs' ability to obtain relief. If the law operates unconstitutionally to disenfranchise those voters, it is facially unconstitutional, even if the majority of Kansas voters are treated with "extraordinary leniency," as Defendants claim, Defs.' Mot. at 1, a contention that even Defendants' own hired expert did not agree with, *see infra* at III(B).

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIM.

Beyond their mistaken characterization of how this Court must approach a facial constitutional challenge, Defendants' arguments that they are entitled to summary judgment on Plaintiffs' equal protection claims repeatedly fail to apply the correct legal standard as expressly set forth by the Kansas Supreme Court in *LOWV III*. Consequently, nearly all of the case law and the facts cited by Defendants are irrelevant to the equal protection claim that is actually before this Court. As Plaintiffs have shown, the SVR at issue in this case does not comply with equal

protection under the Kansas Constitution under the standards imposed by *LOWV III* in this case. *See* Pls.' Mot. at 12–52; *see also infra* at III(A)–B. The Court must deny Defendants' motion for summary judgment on this claim.

A. Defendants ignore the proper legal standard.

The Kansas Supreme Court articulated the legal test that this Court must apply to Plaintiffs' equal protection claim on remand. Specifically, the Court held: "To comply with equal protection . . . any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment." *LOWV III*, 318 Kan. at 805. The Court remanded to give Plaintiffs an "opportunity to test the signature requirement against the proper legal standard: Does the signature requirement (and its implementing regulations and policies, such as those promulgated in K.A.R. 7-36-9, K.A.R. 7-36-7 [2023 Supp.], and K.A.R. 7-36-3) achieve reasonable uniformity on objective standards . . . ?" *Id.* at 807. As Plaintiffs have shown, the undisputed evidence in this case establishes that the answer to these questions is a resounding no. *See* Pls.' Mot. at 13–44.

Although Defendants' motion initially quotes this language from the Kansas Supreme Court, *see* Defs.' Mot. at 17, it quickly abandons that legal test in favor of tests that Defendants previously—and unsuccessfully—advocated on appeal. Those arguments span the gamut from rational basis review, to the federal *Anderson-Burdick* balancing test, to intentional discrimination, to *Bush v. Gore*. But each of these are tests that were either explicitly rejected on appeal or plainly not adopted by the reviewing courts, which instead adopted the test that is expressly articulated in the Kansas Supreme Court's decision in *LOWV III*. Remarkably, nowhere do Defendants even acknowledge that these were arguments they made and lost—instead inviting this Court to blaze forward with Defendants' preferred legal tests and ignore the rulings on appeal.

Defendants first ask this Court to evaluate the SVR under rational basis review, *see id.* at 18–20, and in the alternative using the federal *Anderson-Burdick* balancing test, *see id.* at 20–44. Although Defendants do not acknowledge it, these are the legal tests this Court initially adopted in its order dismissing Plaintiffs' equal protection claim and that Defendants advocated for on appeal *in this case, without success*. *See* Court's Order Granting Mot. to Dismiss at 18–20 (Apr. 11, 2022) (applying *Anderson-Burdick* to Plaintiffs' equal protection claims); Ex. A, Brief of Appellees at 25 (Defendants arguing to Court of Appeals that Plaintiffs' equal protection claims should be analyzed under *Anderson-Burdick*); *League of Women Voters of Kan. v. Schwab*, 63 Kan. App. 2d 187, 205, 525 P.3d 803, 820 (2023) (Court of Appeals holding it was error to apply rational basis review and *Anderson-Burdick* to Plaintiffs' claims); Ex. B, Supplemental Brief of Defendants-Appellees at 17–18 (Defendants arguing to Kansas Supreme Court that Plaintiffs' "equal protection claims . . . are coextensive with the guarantees under the federal constitution," and "[a]t worst, therefore . . . evaluated under *Anderson-Burdick*").

The Kansas Supreme Court, however, reversed this Court's dismissal of Plaintiffs' equal protection claim and remanded it to decide under the standard articulated above, *not* under rational basis or *Anderson-Burdick*. *See LOWV III*, 318 Kan. at 805. Nor does that decision provide any support for Defendants' contention that Plaintiffs must prove discriminatory intent or disparate impact on a protected class to prevail on their equal protection claim. *See* Defs.' Mot. at 18, 20. This is particularly notable given that Defendants made this exact argument to the Kansas Supreme Court, which did not endorse it. *See* Ex. B at 18 (Defendants arguing to Kansas Supreme Court that Plaintiffs' equal protection claim required Plaintiffs to show "intentional discrimination by the State in order to prevail"). Instead, the Kansas Supreme Court made clear that, on remand, this Court would need to ensure that "*no voter* is subject to arbitrary and disparate treatment," *LOWV*

III, 318 Kan. at 805 (emphasis added), a standard that applies to every voter, regardless of race or class, and that the SVR must "*achieve* reasonable uniformity," *id.* at 807 (emphasis added), a standard that looks to results, not intent.

Defendants also alternatively and repeatedly invoke the standards set forth in *Bush v. Gore*, 531 U.S. 98 (2000), or cases applying that decision, *see* Defs.' Mot. at 32–37, but, as *LOWV III* makes clear, the Justices themselves understood the majority to have rejected this standard for Plaintiffs' equal protection claim. *See LOWV III*, 318 Kan. at 807 (majority setting standard); *see also id.* at 827 (Rosen, J., concurring in part and dissenting in part) (Judge Rosen noting, "I disagree with the inexplicable change the majority makes to the standard of evaluation it directs the district court to apply upon remand. It instructs the court to look for 'reasonable uniformity upon objective standards.' I do not know where this language comes from, and I would not substitute it for the standard articulated by the United States Supreme Court in *Bush v. Gore*." (internal citation omitted)). Defendants make no effort to explain how this Court could nevertheless properly apply *Bush* in lieu of the standard expressly articulated by the majority opinion to apply to this claim on remand.[2]

At this point in these proceedings, there is *no* ambiguity about how the Court should analyze the equal protection claim in this case: it is clearly set forth in *LOWV III*. That binding decision forecloses the Secretary's arguments for any other standard. *See Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 53 Kan. App. 2d 622, 645, 390 P.3d 581, 596 (2017) (emphasizing uncontroversial principle that the "district court" is "duty bound to follow Kansas

[2] Plaintiffs also cite *Bush* in their Motion for Summary Judgment, but in doing so acknowledge that it was not the standard the majority opinion adopted. Plaintiffs do so to preserve the argument that even if *Bush* were the standard, Plaintiffs would nonetheless meet it. *See* Pls.' Mot. at 49–52 ("Whether a court evaluates the law under [*Bush* or] the one set out by the majority in *LOWV III*, the result is the same: The SVR violates equal protection.").

Supreme Court precedent, absent some indication the court is departing from its previous position" (citation omitted)). This is true not only under rules of precedent, *see id.*, but, as this Court recognized in refusing to revisit whether Plaintiffs had standing after remand, *see* Order Den. Renewed Mot. to Dismiss (Mar. 27, 2025), also under the mandate rule, which similarly precludes it from revisiting the legal standard the Supreme Court set forth to judge Plaintiffs' equal protection claim in *LOWV III*. *See id.* at 8 ("[T]his Court was directed to analyze the merits of Plaintiffs' due process and equal protection arguments regarding signature verification *according to standards set forth in the Supreme Court's majority opinion*." (emphasis added)).[3]

That test is not rational basis, nor *Anderson-Burdick*, nor any analysis of discriminatory intent or impact, nor *Bush v. Gore*; it is, as the Kansas Supreme Court majority clearly stated: "Does the signature requirement (and its implementing regulations and policies, such as those promulgated in K.A.R. 7-36-9, K.A.R. 7-36-7 [2023 Supp.], and K.A.R. 7-36-3) achieve reasonable uniformity on objective standards . . . ?" *LOWV III*, 318 Kan. at 807; *see also Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058, 1063–64 (1987) (confirming Kansas Supreme Court can create different legal tests when interpreting the Kansas Constitution compared to analogous provisions of the U.S. Constitution).

Because this Court cannot properly apply Defendants' preferred legal tests to Plaintiffs' equal protection claim, Defendants' reliance on decisions that applied their preferred tests and held that other different signature laws used in different states—some entirely outside of the voting

[3] As this Court has recognized, there is no exception to the mandate rule. *See* Order Den. Renewed Mot. to Dismiss at 4. Although there are exceptions to the law of the case doctrine, Defendants do not argue one applies. By contrast, where Plaintiffs are seeking an exception to the law of the case doctrine—for Plaintiffs' right-to-vote claim—Plaintiffs expressly acknowledge the decision of the Kansas Supreme Court and argue it was clearly erroneous, an argument the Plaintiffs put forward in this Court only to preserve it for appeal. *See* Pls.' Mot. at 74–77.

context—did not violate the U.S. Constitution, is of little relevance, and certainly does not provide a basis to grant Defendants summary judgment under the Kansas Constitution in this case. This includes Defendants' reliance on *Richardson v. Texas Secretary of State*, 978 F.3d 220, 235 (5th Cir. 2020), which applied *Anderson-Burdick* to Texas's signature verification procedures; *Lemons v. Bradbury*, 538 F.3d 1098, 1105 (9th Cir. 2008), which applied *Anderson-Burdick* and *Bush v. Gore* to Oregon's signature verification procedures for petitions, *not* to invalidate a voter's actual ballot; and *Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072 (9th Cir. 2024), which applied *Bush v. Gore* to dismiss a challenge to California's signature verification procedures where the plaintiffs sought to invalidate the 2020 election on a host of theories, none of which the court ultimately found plausible. *See* Defs.' Mot. at 34.

Defendants also wrongly assert that the states whose laws were at issue in the above cases have "standards and procedures that are closely identical to, or substantially less protective of voters, than those used in Kansas." Defs.' Mot. at 34. They make this assertion without identifying any facts that actually support it, and a closer examination reveals why. For example, Defendants repeatedly invoke *Weber*, 113 F.4th 1072, a case starkly different from this one, in which the plaintiffs sought to decertify the results of the 2020 election under a host of after-the-fact challenges to the state's election laws, including its signature verification requirement. For that reason alone, it is not a good analog to the case presently before this Court, but Defendants' characterizations about California's signature laws—including that its "procedures [are] largely indistinguishable from" Kansas' procedures, Defs.' Mot. at 34—are simply incorrect. In reality, California law differs significantly from Kansas law, including in ways that make California's law both more protective of voters and more likely to lead to consistent outcomes:

- California has an express presumption *in the law itself* that the signature is the voter's signature. Cal. Elec. Code § 3019(a)(2)(A). *But see* K.S.A. 25-1124(h) (no presumption); K.A.R. 7-36-9 (no presumption).

- California law has a requirement that a signature cannot be rejected unless three elections officials conclude "*beyond a reasonable doubt*" it differs in "multiple, significant, ***and*** obvious respects." Cal. Elec. Code § 3019(c)(1)–(2) (emphases added). *But see* K.S.A. 25-1124(h) (no standard); K.A.R. 7-36-9(a)(2) (permitting rejection for "multiple" differences, a "significant" difference, ***or*** an "obvious" difference, with *no* standard of proof).[4]

- California law has a requirement that signatures *cannot* be rejected for specific reasons, such as the "substitution of initials for the first or middle name, or both." Cal. Elec. Code § 3019(a)(2)(H). *But see* K.S.A. 25-1124(h) (no such guidance); K.A.R. 7-36-9 (no such guidance); *see also* Pls.' SOF ¶ 250(a) (Riley County Clerk testifying that he would consider substitution of initials an obvious and significant difference).

- California law requires election officials to timely contact voters about an alleged mismatch, including "on or before the next business day." Cal. Elec. Code § 3019(d)(1)(A). *But see* K.S.A. 25-1124(h) (no timeliness requirement); K.A.R. 7-36-9 (no timeliness requirement).

- California law has a requirement that voters be permitted to cure by providing a new signature in a variety of means, including by personal delivery, mail, email, or other electronic means. Cal. Elec. Code § 3019(d)(4)(A). *But see* K.S.A. 25-1124(h), (b) (not specifying how voters are permitted to cure); K.A.R. 7-36-9 (similarly not specifying how voters are permitted to cure, resulting in some Kansas counties requiring in-person cure, *see* Pls.' Mot. at 42–43).

California, moreover, has an entire regulation dedicated to reasons for differences in signatures that election officials *must* consider before rejecting a signature, including:

(1) Evidence of trembling or shaking in a signature could be health-related or the result of aging.

(2) The voter may have used a variation of their full legal name, including, but not limited to the use of initials, or the rearrangement of components of their full legal name, such as a reversal of first and last names, use of a middle name in place of a first name, or omitting a second last name.

(3) The voter's signature style may have changed over time.

[4] Like Kansas's standard, this provision of California's standard is subjective. But the Ninth Circuit was not deciding whether California's law contained "objective standards" as the Kansas Supreme Court has tasked this Court with determining.

(4) The signature may have been written in haste.

(5) A signature in the voter's registration file may have been written with a stylus pen or other electronic signature tool that may result in a thick or fuzzy quality.

(6) The surface of the location where the signature was made may have been hard, soft, uneven, or unstable.

Cal. Code Regs. tit. 2, § 20960(g)(1)–(6); *see also Weber*, 113 F.4th at 1093 ("California's statutes and regulations provide detailed guidance to elections officials on which factors or characteristics to consider (or not consider) when comparing signatures."). Defendants assert that "Kansas includes virtually the same instructions in the training video shown to all county election officials participating in the signature review process," Defs.' Mot. at 34, but provide no evidence that supports that assertion—not in their brief, not in their statement of facts, not in the Caskey Affidavit—indeed, Defendants do not even produce the training video for this Court's review. There is therefore no basis for this Court to make such a conclusion. Nor could the Court reach such a conclusion if it watched the video itself: it does not mandate Kansas election officials take the above issues into consideration before rejecting a signature, nor is it plausible that Kansas election officials would *remember* all of these instructions after watching a video a single time, months or years before engaging in signature verification. *See* Pls.' SOF ¶¶ 238–39. And both the Kansas law and its implementing regulation are entirely devoid of any remotely similar instructions. *See* K.S.A. 25-1124(h); K.A.R. 7-36-9.[5]

[5] As the record reflects, whether or not a county election official takes these issues into account can change their decision on whether or not to accept a signature. Commissioner Howell, for example, testified that he would accept a voter's signature as a match after learning that the exemplar was made with a stylus, *see* Pls.' SOF ¶ 220(g), something that California law *requires* election officials to take into account.

All of this is ancillary to the fact that, as noted, *Weber* was not merely a signature verification case; it was a case that sought to "decertify the results of the 2020 election in California due to alleged irregularities and to declare unconstitutional California's vote-by-mail election system." 113 F.4th at 1077. The case, which never proceeded past the motion to dismiss stage, was a full attack on California's entire system of voting, of which signature verification was one small part. *Id.* at 1078 (noting plaintiffs sought "a court order declaring that nearly two dozen California election administration statutes and regulations are unconstitutional on their face and as applied; an audit of all ballots and voting machines used in all California elections since, and including, the November 2020 general election; and a court appointed special master to oversee the administration of California's elections"). The Ninth Circuit, not surprisingly, refused to do so.

Finally, as with the other cases Defendants rely upon, the Ninth Circuit was *not* applying the test the Court must apply here. The word "objective," for instance, does not appear in *Weber* at all. The Ninth Circuit examined California's signature verification system under *Bush v. Gore*, 531 U.S. 98 (2000), a standard the majority of the Kansas Supreme Court appears to have rejected. *See supra at* III(A). And although Kansas's SVR would not survive scrutiny under *Bush*'s standard for reasons Plaintiffs have explained, *see* Pls.' Mot. at 49–52, the fact that the Ninth Circuit held that California's more robust scheme would survive *Bush*'s standard on a motion to dismiss says nothing about whether Kansas's scheme applies objective standards or achieves reasonable uniformity, which the record establishes it absolutely does not, *see* Pls.' Mot. at 12–49.

Just as *Weber* is of limited relevance to this Court, *Lemons*, 538 F.3d 1098, in which the Ninth Circuit held that Oregon's signature verification rules for *petitions* (not ballots) complied with *Anderson-Burdick* and *Bush*, is similarly of limited usefulness here. Indeed, the decision in that case depended in large part on that fact that the statutory scheme at issue concerned *petition*

signatures, *not* ballot signatures. *See Lemons*, 538 F.3d at 1104 (repeatedly contrasting Oregon's petition signature requirements with Oregon's ballot signature requirements, and explicitly noting that "[t]hese differences between referendum petitions and vote-by-mail ballots justify the minimal burden imposed on plaintiffs' rights in this case"). *Lemons* of course, was also decided on its own record. *See id.* at 1101. Thus, it, too, simply *does not answer* whether Kansas's SVR, on *this* record, complies with the Kansas Constitution's equal protection standards under the test the majority set out in *LOWV III*.

Finally, *Richardson*, 978 F.3d 220, upon which Defendants repeatedly rely, Defs.' Mot. at 27–28, 34, 40, is inapposite not only because it applied *Anderson-Burdick* to uphold Texas's signature verification procedures, but also because it reached a variety of legal holdings concerning signature verification for which the Kansas Supreme Court has already reached an opposing conclusion. Those include (1) whether voters have a liberty interest in having a ballot cast by mail counted, which the Kansas Supreme Court already answered in the affirmative, *see* Pls.' Mot. at 54–55, and (2) whether voters must be notified before their mail-in ballot can be rejected for an alleged signature inconsistency, which the Kansas Supreme Court similarly already answered in the affirmative, *see* Pls.' Mot. at 52; *compare*, *Richardson*, 978 F.3d at 232–33, 238. Put simply, *Richardson* was decided in a state that has a very different approach to mail-voting (restricting access to only certain citizens, unlike Kansas), and the decision does not reflect the principles and standards the Kansas Supreme Court has already set forth, and this Court should not rely on it.

Defendants' reliance on two state appellate court decisions from other states similarly fails to acknowledge the stark differences in the legal standards and legal questions at issue in those other cases, and the ones at issue here. In *Thurston v. League of Women Voters of Arkansas*, 2024 Ark. 90, 10, 687 S.W.3d 805, 813 (2024), the Arkansas Supreme Court rejected a signature

verification challenge, finding that the *Arkansas* Constitution's "equal protection clause [is] not implicated" by those laws. Because the Kansas Supreme Court has already ruled that the Kansas Constitution *does* require Kansas to comply with equal protection in designing proper proofs, the fact that the Arkansas Supreme Court rejected a challenge under that state's constitution is of no relevance here. As for *Arizonans for Second Chances, Rehabilitation, & Public Safety v. Hobbs*, 249 Ariz. 396, 409, 471 P.3d 607, 620 (2020), it applied *Anderson-Burdick* to Arizona's signature verification procedures for petitions, not ballots. Moreover, it did not—as Defendants imply—reject an equal protection challenge to the signature verification law itself. *See* Defs.' Mot. at 34. Instead, the court there simply concluded that a requirement that signatures for *petitions* be collected in person, rather than online, did not violate voters' equal protection rights, *see* 249 Ariz. ¶ 3—a far cry from the question this Court is tasked with resolving.

B. Defendants' factual assertions are largely irrelevant and do not entitle them to summary judgment.

Because Defendants build their motion around the wrong legal tests, the "factual" arguments they advance are largely irrelevant. Indeed, Defendants dedicate the majority of their argument that the SVR survives challenge under *Anderson-Burdick*. *See* Defs.' Mot. at 20–32, 38–44. But, because this Court cannot resolve Plaintiffs' claims by engaging that balancing test, which considers the harms to voters on the one hand and the state interests in enforcing the SVR on the other, virtually all of the facts that Defendants point to in support of their contention that they are entitled to summary judgment are simply irrelevant. *See, e.g.*, *id.* at 20–43 (Defendants arguing about the SVR's alleged "leniency," the alleged "*de minimis* nature of . . . [the] harms" from SVR, and the alleged state interests supporting the SVR).

Defendants' argument that the Court should consider the state's interest in fraud prevention is also at odds with their position in other recent filings, including their motion to exclude the

testimony of Dr. Kenneth Mayer, who provided testimony on voter fraud, among other issues. There, Defendants argued that, whether "there is a justification for [the] law ***is not relevant*** to any claim at issue in this case." Defs.' Mot. to Exclude Test. of Dr. Mayer at 12 (Nov. 14, 2025) (emphasis added). Plaintiffs agree, but even if the Court were to find that there were some basis to consider these arguments under the standard required by *LOWV III*, Defendants' claims do not withstand scrutiny.

Take, for instance, Defendants' insistence that the SVR's standard is "very lenient" and "voter-friendly." Defs.' Mot. at 1, 22. Defendants make no effort to tie these standards (the SVR's alleged "leniency" and "voter-friendliness") to the two questions the Court must answer in deciding Plaintiffs' equal protection claim—namely: (1) Does the SVR contain objective standards? and (2) Does it achieve reasonable uniformity? *See supra* at III(A). Nor are Defendants' claims even true, as a matter of fact.

For example, Defendants gesture to the regulation's language that a signature can only be rejected if it has "multiple, obvious, or significant" differences from those on file. Defs.' Mot. at 22 (citing K.A.R. 7-36-9(a)(2)). But because *all* signatures have variation, Pls.' SOF ¶¶ 146–56, this standard, allowing for rejection of a ballot where a signature has "multiple" differences—with no other limitations or requirements—is *not* on its face a voter-friendly standard. The same is true of its allowance for rejection based on (undefined) "obvious" or "significant" differences. And that the standard is not, in fact, "voter-friendly" or "very lenient" is further proven by its application in practice, including as to voter Kenton Felmlee, whose ballot was rejected despite the fact that his signature on his returned ballot envelope clearly bore a strong resemblance to his signatures on file. *See* Pls.' SOF ¶ 219.

In further support of the proposition that the SVR is "voter-friendly," Defendants assert that "[s]ubstantial accommodations are also made available to disabled voters in the signature review process," Defs.' Mot. at 24, but as Plaintiffs have shown, what the evidence actually establishes is that the SVR's disability "exception" exists functionally only on paper, not in practice, because of Defendants' complete failure to take steps to ensure that it is implemented at all—much less uniformly. *See* Pls.' Mot. at 26–30.

Nor is it true that Kansas counties uniformly apply a presumption in favor of a signature matching, as Defendants also claim. *See* Defs.' Mot. at 23. In support, Defendants rely on inadmissible hearsay. *See* Pls.' Resp. to Defs.' SOF 31–32. But, notably, there is no such presumption in either the law itself or the implementing regulation, and the record makes clear that Kansas counties do *not* uniformly apply any such presumption when reviewing voters' ballots—in fact, two out of the three county officials deposed in this case testified that they do *not* do so. *See* Pls.' SOF ¶¶ 288, 291(a)–(b).

Nor does evidence support Defendants' contention that Kansas voters get the "benefit of the doubt," Defs.' Mot. at 23, a phrase Defendants cherry-pick from Commissioner Howell's testimony, who actually said that his county would "probably tend to give the voter a little bit of the benefit of the doubt," and only in certain circumstances—not that it definitively does or that it is a universal practice. Defs.' Ex. 5, Howell Dep. Tr. 90:11–21; *see also* Pls.' Resp. to Defs.' SOF 33. The assertion that Kansas voters are given the "benefit of the doubt" is also inconsistent with the SVR itself, which permits the rejection of a signature for nothing more than "multiple" differences from the signature on file, regardless of whether those differences appear meaningful or significant. *See* K.A.R. 7-36-9(a)(2). This makes voters' signatures quite vulnerable to wrongful rejection, as a person's legitimate signature can vary significantly from one to the next for a host

of reasons—a fact that is not only undisputed in this case, but was recognized by the legislature when it was considering the SVR, expert witnesses in this case, and Kansas election officials alike. *See* Pls.' SOF ¶¶ 110(c), 111, 112(b), 146–147, 149, 152–155, 160, 217(d). Furthermore, even Mark Songer, who Defendants hired to serve as an expert for them in this case, agreed that Kansas's definition of an inconsistent signature does *not* give the benefit of the doubt to voters. Pls.' SOF ¶ 290.

Next, take Defendants' insistence that the harms from the SVR are "*de minimis*" because, in recent elections, they have disenfranchised a small percentage of all mail voters. Defs.' Mot. at 25–26. This, again, has no relevance to whether the standard for ballot rejection is "objective," nor whether the standard has been applied with reasonable uniformity across Kansas counties. Nor did the Kansas Supreme Court authorize the disenfranchisement of Kansas voters, even in small percentages. To the contrary, the Court held, "[t]o comply with equal protection . . . any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that *no voter* is subject to arbitrary and disparate treatment." *LOWV III*, 318 Kan. at 805 (emphasis added); *see also id.* at 837 (Biles, J., concurring in part and dissenting in part) ("[T]he litigation going forward must focus on how these regulations reliably and uniformly sift out the feared fraudulent ballots by objective means without denying legitimate voters their fundamental right to vote.").

Even courts applying federal constitutional standards have found similar "*de minimus*" arguments lacking, recognizing that when the rates of rejection are "low," it "translate[s] to the disenfranchisement of dozens, if not hundreds, of otherwise qualified voters, election after election." *Saucedo*, 335 F. Supp. 3d at 217. That is precisely what the record reflects here. *See*

Pls.' SOF ¶¶ 394–30, 435–39, 466, 469–70.[6] Given how close some races are in Kansas, *see* Defs.' SOF ¶ 80, the disenfranchisement of even a small percentage of voters is "a risk with real consequences." *Saucedo*, 335 F. Supp. 3d at 217. And that disenfranchisement, of course, matters to every individual voter it affects, whether or not it changes the outcome of any particular race. *See* Pls.' SOF ¶¶ 384–439 (recounting disenfranchisement of voters like Elizabeth Anderson and Abigail Moore as a result of the SVR).

Finally, take Defendants' argument that the SVR is supported by state interests such as preventing voter fraud, promoting orderly elections, and promoting voter confidence. *See* Defs.' Mot. at 38–44. These issues, once again, are not relevant to the question of whether the SVR contains objective standards or achieves reasonable uniformity across Kansas counties—the questions this Court must answer under *LOWV III*. *See* Pls.' Mot. at 44–49. But to the extent the Court considers these issues, "[t]he existence of a state interest . . . is a matter of proof," *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993), and Defendants' evidence of the extent to which the SVR serves these interests is sorely lacking.

In fact, Defendants put forward *no* actual evidence of *any* fraud that the SVR has actually prevented—or any fraud that occurred before the SVR was enacted that it would have prevented—excusing themselves from even attempting to make that showing. *See* Defs.' Mot. at 40. Defendants also fail to demonstrate how the SVR actually *would* prevent fraud. Indeed, Defendants' argument assumes that election officials are *capable* of distinguishing between

[6] The total number of ballots that Defendants represent as not counted as a result of the SVR (224), is also an undercount because it includes only records from the 2022 and 2024 November General elections, as those are the only elections for which the information is required to be compiled and reported to the U.S. Election Assistance Commission. *See* Pls.' SOF ¶¶ 331, 349–351. The true number, of course, would include ballots rejected in "off-year" general elections, primary elections, municipal elections, and special elections—a number that is not available because Defendants do not collect it.

authentic signatures and forgeries, but the record evidence is undisputed that accurately distinguishing between authentic and inauthentic signatures is a formidable task that election officials are bound to fail at. *See* Pls.' SOF ¶¶149–164, 170. Illustrating exactly this, *all three county election officials* deposed in this case testified that they would accept as a "match" the example forged signature shown to them, Pls.' SOF ¶ 197, while two of those three rejected as "inconsistent" the genuine signatures of Kansas voters, Pls.' SOF ¶ 220(e)–(f).

Defendants' argument that the SVR promotes the "orderly administration of elections," Defs.' Mot. at 42–43, similarly cites no evidence that supports that claim. Nor do Defendants attempt to explain how the fact that signature verification is "widely accepted" for use in banks or hospitals, *see* Defs.' Mot. at 42–43, has any bearing on the constitutionality of the SVR. The question before this Court, again, is whether the SVR complies with equal protection under the Kansas Constitution, a standard that banks and hospitals and other agencies need not comply with when they approve checks, loan documents, or passport applications.

Defendants finally argue that the SVR promotes voter confidence, *see id.* at 43, but this argument is also untethered to the applicable legal standard. Moreover, even if it were relevant, Defendants fail to support it with admissible evidence. Instead, Defendants simply point to the fact that the Secretary's Office *tells* voters that the SVR is a reason to feel confident in the state's elections. *See id.* This is not the same thing as evidence that the SVR *does in fact* promote voter confidence, and to the extent Defendants are arguing that by telling voters that it does, it is fact, the assertion is clearly hearsay. *See* Pls.' Mot. to Strike at 22–23. In addition, and as detailed in Plaintiffs' motion to strike, it is also improper lay opinion testimony. *See id.* at 18–21.

The assertion also makes little sense. If the SVR were enjoined, nothing would prevent the Secretary's Office from pointing to the myriad other protections that Kansas had in place that

effectively guarded against voter fraud for decades before the SVR was enacted. *See* Pls.' SOF ¶¶ 443–52. It is also contradicted by other evidence in the record, including the testimony of the State Elections Director, who acknowledged several other components of voter confidence, including ensuring that genuine ballots are counted. *See* Pls.' SOF ¶ 473. But, as Plaintiffs have shown, that interest is directly jeopardized by the SVR. *See* Pls.' SOF ¶¶ 384–430, 435–439. Indeed, the actual voters who have been disenfranchised by the SVR offer direct evidence that its existence and their experience with it has *decreased* their confidence in the state's elections. *See* Pls.' SOF ¶ 474.

At bottom, however, Defendants' primary equal protection arguments apply the wrong standards, and rely on the wrong evidence (when they rely on any evidence at all). Consequently, the Court must deny Defendants' motion.

C. Defendants fail to prove that the SVR contains objective standards or achieves reasonable uniformity.

Defendants dedicate more than twenty pages of their brief to arguments only relevant to an *Anderson-Burdick* analysis, but spend almost no time grappling with the actual legal question that the Supreme Court directed this Court to answer on remand: "Does the [SVR] . . . achieve reasonable uniformity on objective standards . . . ?" *LOWV III*, 318 Kan. at 807. To the extent that Defendants engage with this question at all, they seem to take the position that because all of Kansas's 105 counties are now governed by the same regulation regarding signature verification, K.A.R. 7-36-9, Defendants have *necessarily* shown that the SVR complies with equal protection. *See, e.g.*, Defs.' Mot. at 2 (arguing "[c]ounties statewide follow the identical standard") and 21 (arguing, "Kansas employs a uniform regulatory standard").

But this argument, which effectively takes the position that the SVR survives *LOWV III*'s equal protection scrutiny so long as there is some regulation that purportedly applies statewide—no matter what the law actually says or how it is actually applied—is not reconcilable with *LOWV*

III's direction that the critical questions are (1) is the SVR in fact using "objective standards"? and, if so, (2) does it "*achieve* reasonable uniformity" in the application of those objective standards? *LOWV III*, 318 Kan. at 807 (emphasis added). As Plaintiffs have shown, the record requires the conclusion that the SVR fails both parts of this test: it fails to put forward objective standards by which election officials may disqualify ballots, and it fails to achieve reasonable uniformity in how county election officials actually determine which ballots should not be counted under the SVR. *See* Pls.' Mot. at 12–44.

First, neither the statute nor the regulation ensures that ballots will be rejected using objective standards. As at least one Justice of the Supreme Court already noted, the statute itself, which permits the rejection of ballots that do not "match[] the signature on file," K.S.A. 25-1124(h), is not an objective test for the disqualification of ballots. Simply put, "subsection (h) could not be more subjective—it obviously fails the majority's uniform and objective standard because its language leaves each of our 105 county officials to exercise this authority on their own." *LOWV III*, 318 Kan. at 837 (Biles, J., concurring in part and dissenting in part). Defendants provide no reason for this Court to find otherwise. The regulation also fails to impart an objective test by which to apply the statute; instead, it doubles down on an already subjective standard, indicating that officials should reject signatures that have "multiple" *or* "significant" *or* "obvious" differences, K.A.R. 7-36-9(a)(2), while permitting the acceptance of signatures that are "*generally* uniform" or "[*generally*] consistent," K.A.R. 7-36-9(a)(4) (emphases added). But what does it mean for a difference to be "significant"? What does it mean for a difference to be "obvious?" How many differences constitute "multiple" differences? When is a signature "generally" uniform or consistent? The regulation does not say. Nor has the Secretary's Office issued any written

guidance explaining the answers to these questions, and the State's "training" does not answer them either. *See* Pls.' Mot. at 16–18.

Even now, Defendants make no effort to identify what about K.A.R. 7-36-9's standards for the rejection of ballots are "objective." Instead, they dodge that issue, criticizing Plaintiffs for allegedly focusing on the definition of what it means to be "inconsistent," while claiming that the regulation's definition of the word "match" (i.e., that a signature is "generally uniform and consistent" with the voter's signature in the registration database) should allay any confusion about what signatures should be rejected. *See* Defs.' Mot. at 24–25. But that assertion only raises more ambiguities. As Plaintiffs have pointed out, one of the difficulties in interpreting how the SVR should be applied is the interplay between the definition of "match" (requiring a signature to be "generally uniform or consistent," and that is, seemingly not identical to the one on file), with the definition of "inconsistent" (permitting rejection for "multiple" OR "significant" OR "obvious" differences). *See* K.A.R. 7-36-9(a)(2), (4). Because all signatures have variation, distinguishing which differences are *acceptable* enough to render it a "match" and which are not is an entirely subjective exercise. *See* Pls.' Mot. at 18–22. Plaintiffs are not "advocat[ing] for the harshest conceivable construction" of the statute, as Defendants contend. Defs.' Mot. at 24. Plaintiffs are simply *reading the plain text of the statute*, which permits the rejection of a ballot for "multiple" differences in a signature from those on file, even if they do not appear to be "obvious" or "significant" differences.

It is not only Plaintiffs who view the standard as subjective—county election officials and Defendants' own hired expert witness concede this as well. *See* Pls.' SOF ¶¶ 215(f), 216(c), 217(a)–(c). The Johnson County Commissioner aptly (and colorfully) described the inquiry of determining whether a signature is a "match" as similar to "judging art or judging a pie eating

contest." Pls.' SOF ¶ 217(c). In other words, it depends on the eye of the beholder—the very definition of a subjective standard. *See* Pls.' Mot. at 20–22. And its subjectivity is starkly illustrated by the fact that, when county election officials were shown the exact same signatures, they came to diametrically different conclusions as to whether the signature should be rejected under the SVR. *See* Pls.' Mot. at 33–39.

If anything, Defendants appear to acknowledge that the standard *is* a subjective one, *see* Defs.' Mot. at 25 ("The regulation is properly construed to instruct election officials to make a *global judgment* about overall uniformity"), but that its subjectivity should be excused because there is no other way to conduct signature verification. But this position runs headlong into the direction of the Kansas Supreme Court, which instructed this Court to confirm that a ballot would be rejected based on "objective standards," or else violate the Kansas Constitution's equal protection guarantees. *LOWV III,* 318 Kan. at 805; *see also id.* at 835 (Biles, J., concurring in part and dissenting in part) (Justice Biles observing that "[s]ignature verification presents a tough row to hoe for the State" on remand); *see also id*. at 837 ("On remand, the Secretary of State's administrative regulations will need to do the heavy lifting to save these statutes, *if they even can*." (emphasis added)). As Justice Biles anticipated, it is possible that the SVR is simply incompatible with the standard set forth in *LOWV III*. That Defendants effectively concede they cannot show that it is, is itself strong reason to conclude that it violates the Kansas Constitution.

In addition to the lack of objectivity in the definition of what it means for a signature to be a "match" or be "inconsistent," the SVR also fails to provide objective standards (or any standards at all) for several other critical aspects of the verification process, as well. This includes as it relates to (1) what signatures are part of the "file" to which ballot signatures are compared; (2) the process counties must use to determine when a ballot may be disqualified due to a signature issue; (3) the

application and enforcement of the SVR's disability exception; (4) the use of machines for signature verification; and (5) the process to "cure" a ballot flagged for rejection under the SVR. *See* Pls.' Mot. at 22–30, 42–43.

Defendants' own motion inadvertently underscores how the lack of objective standards for these issues means the standard can—and does—change from one day to the next. Take, for example, the SVR's exemption from signature verification for voters who have a disability that prevents them from (1) signing the ballot envelope at all, or (2) having a consistent signature. *See* K.S.A. 25-1124(h); K.A.R. 7-36-9(g)(5). Neither the statute nor the regulation provides any standards for how that exemption should be applied and enforced. *See* Pls.' Mot. at 26–30. The result is that even the *Secretary* cannot decide how it is supposed to operate—either from the voter's perspective or that of an election official applying the law. At his deposition representing the Secretary's Office, Elections Director Caskey testified that voters who are able to physically make a signature—even if they cannot make a consistent one—are still required to sign the ballot envelope themselves. Pls.' SOF ¶ 278(a). That is, they would *not* qualify to have a voter assistant sign for them, a proposition the Johnson County Commissioner endorsed. Pls.' SOF ¶ 278(b). In Defendants' motion for summary judgment, however, Defendants argue that a voter who has "a disability or illness that prevents her from either signing the ballot or signing consistent with her signature(s) on file" should "have a third party execute an affidavit (including the one contained on the outside of every ballot envelope) and sign on the voter's behalf." Defs.' Mot. at 24. Defendants then have the audacity to argue voters who cannot make a consistent signature but "chose not to avail themselves of that opportunity *is a problem of their own choosing, not a defect in the law*." Defs.' Mot. at 28–29 n.8 (emphasis added). Setting aside the alarming indifference that comment reflects towards voters with disabilities, if the Secretary's Office itself cannot decide

what is required for voters with disabilities to be exempt from signature verification, or who is exempt in the first place, how would one expect a county to know, let alone a voter?

The reason the Secretary's answer could change so significantly is that *there is no standard* for knowing how to apply the statute's mandatory exemption from signature verification for voters with disabilities. To the extent the Secretary's new position is that a voter who cannot make a consistent signature should know that renders them "physically unable" to sign their name, and thus entitled to have a voter assistant sign for them, the Secretary is asking these voters to make that determination with zero guidance from the state and to be confident enough in that determination that they feel comfortable asking their assistant to attest to the voter's physical inability to make a signature *under penalty of perjury*. *See* Pls.' Mot. at 28–29. For understandable reasons, that is a risk that many voters who *can make* a signature, but have difficulty signing consistently, are unwilling to take. *See* Pls.' Mot. at 28. For the purpose of summary judgment, however, it does not matter which position is "right" and which is "wrong." The point is that not even the Secretary knows how to apply the law's statutory exemption because there are no standards for its application. The Secretary's own conflicting interpretations of the law prove just that.

Under the test required by *LOWV III*, the SVR must also "achieve reasonable uniformity" across Kansas counties to comply with equal protection. 318 Kan. at 807. But as Plaintiffs have shown, the record establishes that, applying the bare standards provided for whether a signature is a "match," officials from different counties come to opposite conclusions when asked whether they would accept or reject the same ballot. *See* Pls.' Mot. at 33–39. And, just as Justice Biles predicted would occur without objective standards, *see* 318 Kan. at 837 (Biles, J., concurring in part and dissenting in part), different practices have emerged across counties as to how voters'

ballots are evaluated, rejected, and permitted to be cured for an alleged signature inconsistency. Among other things, counties have adopted different approaches regarding (1) what circumstances permit a voter to be exempt from signature verification and how a county makes that determination, *see* Pls.' Mot. at 26–31, (2) whether to apply a presumption that a voter's signature is authentic, *see* Pls.' Mot. at 40–41, (3) how many election workers must agree a signature is "inconsistent" before it is rejected, *see* Pls.' Mot. at 41, (4) whether a county's canvassing board is able to reverse the determination of election officials that a signature is "inconsistent," *see* Pls.' Mot. at 41–42, (5) whether to perform signature matching on a voter assistant signature, *see* Pls.' Mot. at 42, and (6) how a voter is able to cure a ballot that is flagged for rejection for having an "inconsistent" signature, *see* Pls.' Mot. at 42–43.

Defendants' motion is noticeably silent about most of these issues, but on the cure issue, it confirms that counties *do* demand different things from voters to save their ballots from rejection under the SVR. *See* Defs.' Mot. at 36–37. In Johnson County, for example, a voter may cure a ballot flagged under the SVR *only* if they appear in person at the county election office during business hours and present photo ID. *See* Pls.' SOF ¶ 330(c)(i). There is no exception for voters who are sick or disabled, or who inform the county that their signature did not match on account of a disability. *See* Pls.' SOF ¶ 330(c)(iii). In other counties, such as Riley County, voters can cure in a variety of ways, including by email, mail, text, or fax. *See* Pls.' SOF ¶ 330(e)(ii); *see also* Pls.' SOF ¶ 330(d) (Shawnee County allowing same). Defendants dismiss the difference of whether a voter is required to physically appear in person at a county election office to have their ballot counted or do something far less (send a picture of their signature by email, mail, or text, for example), as other states permit voters to do, *see supra* at III(A) & *infra* at IV, as a "trivial" difference. Defs.' Mot. at 36. But many voters vote by mail *because* it is difficult (and in some

cases impossible) for them to appear in person to do so. *See* Pls.' Mot. at 69. Kansas recognizes this in its establishment of the permanent advance voter list. *See* Pls.' SOF ¶¶ 81–84.

Defendants also wrongly argue that they are entitled to summary judgment on Plaintiffs' equal protection claim because Plaintiffs have not shown a statistically significant difference in the rejection rates of ballots across counties. *See* Defs.' Mot. at 35 (arguing, "Plaintiffs have failed to demonstrate . . . that 'any difference between counties is markedly disproportionate to [a] difference in population'" (quoting *Weber*, 113 F. 4th at 1090)). As matter of law, there is *no* requirement that Plaintiffs make this showing to succeed on their claim. Indeed, even under Defendants' preferred precedent of *Bush*, the U.S. Supreme Court did not require it to find an equal protection violation. *See* 531 U.S. at 107. But, as a matter of fact, Plaintiffs have shown that there is substantial variation in the rejection rates of ballots under the SVR across Kansas, including in a variety of different counties. *See* Pls.' SOF ¶¶ 353–56. Indeed, the Secretary's own records show that if Shawnee County had rejected advance mail ballots under the SVR at the same rate as Franklin County in 2024, it would have rejected 70 ballots, not one. *See* Pls.' SOF ¶ 355(a). If Douglas County had rejected ballots under the SVR at the same rate as Franklin County in 2024, it would have rejected 129 ballots, not zero. *See* Pls.' SOF ¶ 355(b). And if Johnson County had rejected ballots under the SVR at the same rate as Franklin County in 2024, it would have rejected 470 ballots, not 12. *See* Pls.' SOF ¶ 355(c).[7] Counties with roughly the same number of mail-ballots (Shawnee and Wyandotte, with 7,057 and 6,715 advance mail ballots respectively), differed in their rejection rates by a factor of 18. *See* Pls.' SOF ¶ 356(c).

[7] Plaintiffs use Franklin County as an example because its rejection rate on the basis of signature mismatch was 1%, making the math particularly easy. *See* Pls.' SOF ¶ 355(f). But other counties had rates of rejection higher than Franklin's rate, including Rooks County, with a rejection rate of 1.4%. *See* Pls.' SOF ¶ 355(d).

These rates of rejection only further confirm that Kansas counties are *not* "achiev[ing] reasonable uniformity" in the application of the SVR, *LOWV III*, 318 Kan. at 807, a conclusion that is obvious from the rest of the record as well, which includes evidence that Kansas election officials cannot even agree whether to reject the same ballots and have different methods for determining who is exempt from signature verification. *See* Pls.' Mot. at 13–49. When two "trained" election officials attempt to apply the same standard and come to diametrically different results based on the same information, they are plainly *not* "achiev[ing] reasonable uniformity on objective standards." *LOWV III*, 318 Kan. at 807.

In the end, it is telling that Defendants expend so much effort seeking to convince this Court to apply any legal test other than the one the Kansas Supreme Court required when it remanded this case for adjudication on the merits. When this Court applies "the proper legal standard: Does the signature requirement . . . achieve reasonable uniformity on objective standards . . . ?," 318 Kan. at 807, the Court will find the answer is no, *see* Pls.' Mot. at 13–49. Defendants' motion barely attempts to answer these questions. As a result, Defendants are plainly not entitled to summary judgment on Plaintiffs' equal protection claim.

IV. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' DUE PROCESS CLAIM.

Defendants' request that the Court grant them summary judgment on Plaintiffs' procedural due process claim is devoid of both relevant legal argument and factual support. Indeed, Defendants' argument on Plaintiffs' procedural due process claim *fails to cite a single procedural due process case*, from any court, or to cite a single supported statement of fact. *See* Defs.' Mot at 44–47. The motion should be denied as to this claim, as well.

The primary authority Defendants invoke to argue that they are entitled to summary judgment on this claim is not a procedural due process case. Specifically, Defendants contend that

the Washington Supreme Court rejected an "identical facial due process attack on [Washington's] signature verification law," Defs.' Mot. at 47, but that is false two times over—that case did not consider a procedural due process claim at all, and the circumstances were far from "identical." As the Washington court made clear, that case "implicate[d] the *substantive* component of the due process clause, which protects against arbitrary and capricious government action *even when the decision to take action is pursuant to constitutionally adequate procedures*." *Vet Voice Found. v. Hobbs*, 4 Wash. 3d 383, 407, 564 P.3d 978, 991 (2025) (cleaned up) (emphases added); *see also State v. Genson*, 316 Kan. 130, 138, 513 P.3d 1192, 1198 (2022) ("Substantive due process 'protects individuals from arbitrary state action,' while procedural due process 'protects the opportunity to be heard in a meaningful time and manner.'") (citing *Creecy v. Kansas Dep't of Revenue*, 310 Kan. 454, 463, 447 P.3d 959, 966 (2019)).

Plaintiffs here challenge Kansas's failure to provide adequate procedural due process before rejecting a ballot with an alleged signature mismatch, *see* Am. Compl. ¶ 227, but the Washington plaintiffs did not, likely because—far from being "identical" to Kansas's approach—Washington's notice and cure procedures are far more protective of voters. For example:

- In Washington, a voter with an alleged signature mismatch "must be notified as soon as practicable" and "no later than three business days following receipt" of the ballot by the county. Wash. Admin. Code 434-261-053(1). In contrast, Kansas has no timeliness requirement whatsoever for notifying a voter of an issue. *See* Pls.' Mot. at 66.

- In Washington, that notice "*must*" go to the voter in four forms: by first class-mail, by telephone, by text message, and by email. Wash. Admin. Code 434-261-053(1) (emphasis added). In contrast, the Kansas regulation implementing the SVR permits but does not require Kansas counties to contact voters by "other means." K.A.R. 7-36-9(b)(2).

- In Washington, a voter can have a ballot with a mismatched signature counted so long as they verify their identity to the county and confirm "*orally* or in writing, that the voter in fact returned the ballot." Wash. Admin. Code 434-261-053(5) (emphasis added); *see also Vet Voice Found.*, 4 Wash. 3d at 389 n.2 (emphasizing the options that Washington voters have to cure ballots with alleged signature mismatches, such as "by mail, e-mail, or online," or as the regulation also allows, over the phone). Under *no* circumstances is a voter in

> Washington required to appear in person to cure a signature flagged as a mismatch, nor are they required to produce a "consistent" signature to have the ballot counted. *See* Wash. Admin. Code 434-261-053(5). In contrast, the Kansas statute and regulation are ambiguous as to how a voter can cure their ballot, leaving it to the discretion of the counties. And the evidence shows that Johnson County for example *only* allows a voter to cure a ballot flagged under the SVR if they *appear in person at the county elections office during business hours*. *See* Pls.' SOF ¶ 330(c)(i). There is *no* exception for voters who are sick or disabled, or who inform the county that their signature did not match the one on file on account of a disability. *See* Pls.' SOF ¶ 330(c)(iii).

In sum, not only was the Washington case a substantive—not procedural—due process claim, its notice and cure procedures are *not* like Kansas's procedures. If anything, they resemble the procedures Plaintiffs contend *would* be compliant with procedural due process. *See* Pls.' Mot. at 66–71 (requesting Court require timely notice, require counties to exhaust all reasonable means of contacting voters, and to permit voters to cure an alleged signature mismatch by verbal or written confirmation that the voter in fact signed their ballot envelope).

Throughout their motion, Defendants appear to assume that the simple *existence* of any notice and cure requirement, regardless of its terms or effectiveness, complies with procedural due process. *See* Defs.' Mot. at 2–3, 45; *see also* Defs.' Mot to Exclude Dr. Mayer's Testimony at 11 (arguing Dr. Mayer's testimony regarding the difficulty of complying with Kansas's cure processes is "not relevant to the issues in this case"). But if the Kansas Supreme Court had meant what Defendants now argue, there would have been no reason to remand the case on this question at all—the fact that the law contemplated *some* cure process would have been sufficient.

Instead, the Supreme Court was clear that, to comply with procedural due process, the notice and cure procedures must be provided "at a meaningful time and in a meaningful manner." *LOWV III*, 318 Kan. at 806; *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (quotation marks omitted). Defendants notably *do not actually argue* that

the SVR guarantees that voters will be notified at a meaningful time or will have a meaningful opportunity to cure. Instead, they blaze right by those standards, arguing that "it is inconceivable that the SVR, in light of its detailed cure procedures set forth in K.A.R. 7-36-9, could be construed not to satisfy [due process]." Defs.' Mot. at 45. But saying this does not make it so. And Defendants identify no requirement in the SVR—neither in the statute or implementing regulation—that voters be contacted in a timely manner before their ballots are rejected, nor do they identify any requirement that voters will have an effective option to cure—only that *some option* will be provided.

In this void, counties have developed different approaches to both notifying voters, and how they may cure, often choosing methods that clearly violate due process. *See* Pls.' Mot. at 65–71. Indeed, the undisputed evidence demonstrates both that some Kansas voters are not receiving timely notice (or any notice whatsoever) of the need to cure before their ballot is rejected, *see* Pls.' Mot. at 66-69, 72, *and* that they have difficulty curing (or cannot cure at all), including in particular in Johnson County, where they must appear in person to do so, *see id.* at 69–71. In recent elections, multiple voters informed Johnson County that they would not be able to appear in person to cure—because they were bedridden, ill, or wheelchair bound—and the County did not make any accommodation to allow them to have their ballots counted. Pls.' SOF ¶ 330(c)(vi)-(ix); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339 (N.D. Ga. 2018) (holding Georgia's signature cure procedures did not comply with procedural due process in requiring voters to appear in-person to cure, recognizing the class of "absentee voters who vote by mail because they physically cannot show up in person").

Defendants make no effort to argue that requiring a mail voter to appear in person to cure their ballot is in fact reasonable *for the voter*. Instead, Defendants argue that such a system is

reasonable for *Johnson County*. *See* Defs.' Mot. at 37. They make this argument, moreover, simply by speculating that because Johnson County is a large county, this is a reasonable approach. *See id*. As a legal matter, this is fundamentally the wrong question. As the Supreme Court emphasized in *LOWV III*, although the Legislature is entitled to establish proper proofs, such proofs are impermissible if they "disenfranchise[] the genuine vote of someone who is qualified to vote." 318 Kan. at 802. Here, Plaintiffs have shown not only that there is a high risk that the SVR will do so, but that it has actually done so. *See* Pls.' SOF ¶¶ 384–430, 435–439.

No provision of the Kansas Constitution permits the disenfranchisement of a voter simply because it would be more administratively convenient for a county to retain its existing procedures. This is true of federal law as well: the U.S. Supreme Court has held that, "administrative convenience" cannot justify the deprivation of a constitutional right. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *see also Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1032 (N.D. Fla. 2018) (finding "any potential hardship imposed" by requiring additional notice and cure procedures for ballots rejected for signature mismatch "is out-weighed by the risk of unconstitutionally depriving eligible voters of their right to vote and have that vote counted"). And Defendants' argument that Johnson County somehow lacks the capacity to cure ballots in any manner other than in person is also not supported by any evidence in the record. *See supra* at I.

In the end, the only piece of "evidence" that Defendants even attempt to offer in support of their argument that the Court should grant them summary judgment on Plaintiffs' procedural due process claim is Defendants' claim that the three county election officials who testified in this matter attempt to reach voters "within 24 hours of the ballot's receipt," or at worst, 48 hours. *See* Defs.' Mot. at 46. But Defendants cite no evidence for this at all, and the claim is not supported by Defendants' own statement of facts, which asserts only that two election officials "testified that

their offices nearly always *review* advance mail ballot envelopes within one day of receipt to determine whether the voter's signature on the envelope matches the voter's signature on file," not that they attempt to *contact* voters of the need to cure within that timeframe. *See* Defs.' SOF ¶ 23. This distinction matters: Determining whether a ballot has a signature that matches the signature on file is wholly separate from actually notifying the voter of that decision.

Defendants' assertion also runs headlong into the actual record, which establishes that voters are not in fact always notified of the need to cure quickly—if at all. For example, it is undisputed that voters Abigail Moore and Elizabeth Anderson, both of whom were ultimately disenfranchised by the SVR, *never* received notice that their ballots were flagged for rejection due to signature issues. *See* Pls.' SOF ¶¶ 384–401 (Moore), ¶¶ 402-430 (Anderson). And, even when counties reach out to voters shortly after determining their signature is "inconsistent," those contacts are not necessarily effective. The undisputed record shows that, in some cases, those first contacts are made by mail, which functionally means that voters are not learning of the need to cure *for a week or more* after a county flags a ballot for an alleged signature mismatch, if they even receive such notice at all before the county canvass. *See* Pls.' Mot. at 66 (demonstrating that even the Secretary advises voters to assume at least a week for election mail to be delivered). Such notice cannot be said to be meaningful or reasonable, particularly when Kansas already has the shortest period for voting by mail in the country. *See* Pls.' Mot. at 66–67.

Finally, neither the statute nor the regulation imposes any requirement that election officials timely contact voters to alert them of the need to cure their ballot. As a result, there is *no* guarantee that timely or reasonable notice will occur. That is in and of itself sufficient for Plaintiffs to succeed on their facial procedural due process challenge. *See* Pls.' Mot. at 66; *see also Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (explaining that procedural due process hinges on the

"*guarantee* that one may not be deprived of his rights, neither liberty nor property, without due process of law") (emphasis added). For this reason, Defendants' suggestion that the Court "presum[e]" the "regularity" of county officials' conduct, Defs.' Mot. at 46, makes no sense. Because Kansas counties are not required to timely notify voters of alleged signature mismatches, *see* Pls.' Mot. at 66, *there is no presumption that counties timely notify voters*, only a hope that counties choose to do so.

In sum, under the SVR, whether any Kansas voter receives constitutionally adequate notice and a constitutionally adequate opportunity to cure is subject to the whims and preferences of the voter's county. For all of the reasons that Plaintiffs have already set forth in their motion for summary judgment, those standards do not guarantee Kansas voters constitutionally adequate notice or cure procedures. *See* Pls.' Mot. at 65–71. Summary judgment to Defendants must be denied.[8]

CONCLUSION

For the reasons stated, the Court should deny Defendants' Motion for Summary Judgment. The record evidence not only precludes summary judgment to Defendants, it compels the conclusion that Plaintiffs have proven their claims.

[8] Contrary to Defendants' contention, Defs.' Mot. at 45–46, it is not true that Plaintiffs' procedural due process claim re-litigates their right to vote claim. *See generally LOWV III*, 318 Kan. at 806 (articulating a different standard for Plaintiffs' procedural due process claim as opposed to Plaintiffs' right-to-vote claim). In support of that argument, Defendants provide a single interrogatory response from Plaintiff Kansas Appleseed. *See* Defs.' Mot. at 44–45. Although the Court does not have a copy of that response because Defendants did not include it in their statement of facts or offer it as an exhibit, Defendants' Interrogatory No. 11 asked Plaintiffs to "identify the substantial burdens that Kansas voters face in attempting to cure" ballots and address how those "burdens" violate their due process rights. Plaintiffs thus reasonably responded by addressing the burdens the SVR imposes on Kansas voters. In any event, Plaintiffs' response *does* address the fundamental bases for their procedural due process claim: a lack of any guarantee that voters will be contacted promptly, if at all, and the unreasonableness of asking voters who vote by mail to appear in person to cure their ballots. *See* Defs.' Mot. at 44–45 (providing partial response).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2026, a true and correct copy of the above and foregoing was served on all parties by electronic transmission via the Court's electronic filing system and electronically mailed.

/s/ Nicole M. Revenaugh
Nicole M. Revenaugh (#25482)

EXHIBIT A

No. 21-125084-A

IN THE COURT OF APPEALS 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 DEREK SCHMIDT, in his official capacity as Kansas Attorney General

Defendants-Appellees

BRIEF OF APPELLEES

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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Oral Argument Requested: 15 minutes

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D. Did the district court abuse its discretion in denying as moot Plaintiffs' motion for a temporary injunction against the Signature Verification Requirement?

E. Did the district court properly hold that Plaintiffs' Amended Petition failed to state a claim with respect to its causes of action challenging the Ballot Collection Restrictions as violative of the freedom of speech and right to vote?

II. – STATEMENT OF RELEVANT FACTS

Plaintiffs are four organizations – League of Women Voters of Kansas ("LWV); Loud Light; Kansas Appleseed Center for Law and Justice, Inc. ("Appleseed"); and Topeka Independent Living Resource Center ("TILRC") – and three individuals who appeal the dismissal of their facial, pre-enforcement constitutional challenges to two election integrity statutes passed by the legislature in 2021. The first, a signature verification requirement ("SVR") codified at K.S.A. 25-1124(h), prohibits election officials from accepting advance voting ballots through the mail unless the voter's signature on the required ballot envelope matches the signature on file in the county's voter registration records (with exceptions for disabled voters who cannot provide a consistent signature). Signature-matching is not new in Kansas elections. Since 2019, the State has required that voters be afforded a "cure opportunity" to correct missing or mismatched signatures for advance ballots up to the time of the final county canvass. K.S.A. 25-1124(b). If a voter is ill, disabled, or not proficient

in English, the law further allows the voter to seek assistance in completing and signing the ballot application or envelope. K.S.A. 25-1124(c).

Pursuant to his authority under K.S.A. 25-1131, the Secretary of State recently adopted a regulation to help facilitate consistent administration of this statute and provide standards for the signature verification process. *See* K.A.R. 7-36-9 (effective May 26, 2022) (published in 41 Kan. Register 1060-61 (June 2, 2022)). This regulation additionally requires any county election official performing signature verification responsibilities to undergo approved training before undertaking such work. *Id.* at 7-36-9(f).

The second challenged statute, a ballot collection restriction ("BCR") codified at K.S.A. 25-2437, requires that any person transmitting or delivering another voter's advance ballot to the county election office or polling place submit a written statement attesting to certain information to ensure the security of the ballot and integrity of the electoral process. *Id.* at 25-2437(a). The statute also restricts any person from transmitting or delivering more than ten advance ballots on behalf of other voters during an election. *Id.* at 25-2437(c).

Plaintiffs devote nearly five pages of their opening brief to an irrelevant recitation of the legislative debates that culminated in the passage of H.B. 2183. (Br. 7-11). The brief highlights the views of legislators whose views did not carry the day and other citizens who wished that they had more opportunity to comment before the legislation's passage. None of that discussion has any bearing on the issues before the Court. Plaintiffs also dedicate multiple pages to the evidence they sought to introduce in connection with a preliminary injunction motion (filed *ten months* after their original Petition) in support of their attack on the signature verification requirements. (Br. 14-15). But that discussion is also

immaterial because the district court never even addressed (and Defendants never had an opportunity to respond to) that motion in light of the district court's dismissal, two business days later, of Plaintiffs' Amended Petition for failure to state a claim upon which relief can be granted pursuant to K.S.A. 60-212(b)(6). (R. V, 54-79).

III. – ARGUMENT AND AUTHORITIES

A. Jurisdictional questions ordered addressed by the Court of Appeals

1. *Which of Appellants' claims remain pending before the district court, and what is the status of those claims?*

Plaintiffs' various constitutional challenges to K.S.A. 25-2438(a)(2) and (3), which criminalize conduct related to the knowingly false representation of an election official, remain pending before the district court. The district court denied Plaintiffs' motion for a temporary injunction against the enforcement of those statutes, (R. III, 21), and Plaintiffs appealed that Order to this Court, which recently dismissed the appeal for lack of standing. Case No. 21-124378-A. Because no *final judgment* has been issued on those claims, the district court retains jurisdiction.

"The general rule . . . is that the docketing of an appeal divests the district court of jurisdiction to modify a judgment." *Hernandez v. Pistotnik*, 60 Kan. App.2d 393, 405, 494 P.3d 203 (2021). But this rule is not absolute. A district court, for example, remains free to proceed with any collateral "matters independent of the judgment." *Id.* More to the point here, a district court is empowered to suspend, modify, restore, or grant an injunction "[w]hile an appeal is pending from an interlocutory order" granting, dissolving, or denying an injunction. K.S.A. 60-262(c).

2. *What is required for a decision to have a "semblance of finality" such that it may be reviewable under K.S.A. 2020 Supp. 60-2102(a)(3)?*

As this Court has noted, the "parameters of jurisdiction" under K.S.A. 60-2102(a)(3) are "less than clear." *Cummings v. Gish*, No. 96,124, 2007 WL 1530113, at *2 (Kan. Ct. App. May 25, 2007). But the Supreme Court has refused to read the statute as conferring appellate jurisdiction over *any order* involving the Kansas or federal constitution. Rather, there must be a "semblance of finality." *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164 (1965). The Court explained as follows:

> An appeal is permitted from '[a]n order . . . involving . . . the constitution of this state . . . .' However, the order must have some semblance of finality. The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy. An order involving a constitutional question or one where the laws of the United States are involved has always been subject to review regardless of the amount in controversy. Such an order is, however, subject to the rule that an order involving the constitutional question must constitute a final determination of the constitutional controversy. Any other conclusion would constitute a usurpation by this court of the original jurisdiction of the district court to determine actions involving constitutional questions. *Id.* (alterations in original) (internal citations omitted).

Plaintiffs argue that the district court's dismissal of their claims challenging the SVR and BCR means that there has been a "semblance of finality" on those causes of action because there has been a "full investigation and determination of the controversy." (Br. 3.) But the Supreme Court has not been so flexible with this statute. Indeed, Defendants have not found *a single case* since the code of civil procedure was adopted in 1963 in which a Kansas appellate court agreed to exercise jurisdiction over an interlocutory appeal of a non-final judgment involving a constitutional question. In fact, two years after *Cusintz*, the

Supreme Court again addressed the scope of K.S.A. 60-2102(a)(3) and underscored that "[t]he policy of the new code (of civil procedure) leaves no place for intermediate and piecemeal appeals which tend to extend and prolong litigation." *In re Austin*, 200 Kan. 92, 94, 435 P.2d 1 (1967) (citing *Connell v. State Highway Comm'n*, 192 Kan. 371, Syl. ¶ 1, 388 P.2d 637 (1964)). Two decades later, the Court was even more emphatic, noting:

> If appeals in original proceedings were allowed under K.S.A. 60-2102(a)(3), the original proceedings would be subject to interminable interruption and delay. As we said in *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976): "Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory appeals and fractionalized appeals are discouraged, and are the exceptions and not the rule." *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 683 P.2d 1247 (1984).

The handful of cases in which appeals of non-final judgments have been allowed under K.S.A. 60-2102(a)(3) involve either the appointment of receivers to sell or dissolve property free and clear of encumbrances – which would effectively abrogate a party's entire interest in the property – or definitive rulings on quiet title actions – which similarly would divest a party of its right to occupy or use the realty. *See Cummings*, 2007 WL 1530113, at *2 (citing *J.E. Akers Co. v. Advert. Unlimited, Inc.*, 274 Kan. 359, 360 49 P.3d 506 (2002) and *Smith v. Williams*, 3 Kan. App. 2d 205, 206, 592 P.3d 129 (1979)); *see also Pistotnik v. Pistotnik*, No. 115,715, 2017 WL 2210776, at *6 (Kan. Ct. App. May 19, 2017).

Plaintiffs' references to dictionary definitions of "semblance" add little to the debate given that the concept of a "semblance of finality" is not statutorily grounded, but is judicial gloss on an opaque and largely untested provision. What *is* clear is the Supreme Court's prudential rationale for minimizing collateral appeals. The mere fact that a litigant asserts

a constitutional claim in its petition provides no sound basis for awarding the litigant an early admission ticket to the court of appeals prior to the issuance of a final judgment.

In this lawsuit, Plaintiffs initially asserted fourteen constitutional claims involving four different statutes. Plaintiffs then opted to proceed piecemeal on the claims, filing a motion for a partial temporary injunction directed at one statute, an appeal of the denial of that motion (Case No. 21-124378-A), and later a separate motion for partial temporary injunction targeted at another statute. Unless this appeal is dismissed, there will be *at least* three appeals in this case (including a second appeal of any post-remand final judgment in Case No. 21-124378-A), and the principles of finality that the Supreme Court has consistently declared to be of paramount importance in passing on the scope of K.S.A. 60-2102(a)(3) will be reduced to meaningless palaver.

If the Court embraces Plaintiffs' broad interpretation, one can also expect a deluge of interlocutory appeals that will assuredly tax the resources and staffing of the appellate courts, undermine the case-management authority of district courts, and often tilt the scales of justice towards litigants with greater financial means. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). As for certain litigants without resources (think inmates), the explosion of interlocutory appeals will be felt across the judicial system. Worse still, once this Court blesses the growth of such appeals, litigants will assuredly seek to bootstrap other claims allegedly "inexplicably intertwined" with the cause of action that the Court must now take up despite the absence of a final judgment. Defendants urge the Court to avoid that dangerous path.

3. *How, if at all, does the finality requirement of K.S.A. 60-2102(a)(3) differ from the final order requirement of K.S.A. 60-2102(a)(4)?*

The parties all agree that a "final decision" under K.S.A. 60-2102(a)(4) is one "that disposes of the entire merits of a case and leaves no further questions or possibilities for future directions or actions by the lower court." *Kaelter v. Sokol*, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015). Plaintiffs contend that Defendants' proposed construction of K.S.A. 60-2102(a)(3) would effectively render K.S.A. 60-2102(a)(4) superfluous since the latter already permits appeals from final judgments. (Br. 3.) But Plaintiffs' interpretation of the former would accomplish exactly what the Supreme Court has warned against: multiplicity of appeals via piecemeal litigation. It is inconceivable that the legislature intended such a revolutionary outcome in 1963, particularly in light of the paucity of such appeals over the last sixty years. The only logical way to give meaning to K.S.A. 60-2102(a)(3), while not undermining core principles of finality and avoidance of piecemeal appeals, is to sanction interlocutory appeals of constitutional claims only in those circumstances when foreclosing an immediate appeal of a non-final judgment would effectively deprive the litigant of any opportunity to meaningful relief on the claim. This proposal would be akin to collateral orders, which the Court has previously embraced as an exception to the final judgment rule. *See In re T.S.W.*, 294 Kan. 423, 434-35, 276 P.3d 133 (2012). Or to qualified immunity defenses in the federal courts. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985) (granting governmental officials sued for violations of federal constitutional rights in federal court the ability to immediately appeal the denial of their motion to dismiss such claims on the grounds that the official enjoys immunity from suit, not just from liability);

Estate of Belden v. Brown Cnty., 46 Kan. App.2d 247, 255, 261 P.3d 943 (2011) (allowing interlocutory appeal of denial of qualified immunity dismissal motion in state court).[1]

4. *What was the basis of the district court's conclusion that the request for temporary injunction of the SVR was moot?*

The district court properly determined that, after having dismissed Plaintiffs' claims attacking the SVR under K.S.A. 60-212(b)(6), their dilatory request (filed ten months after their original Petition and two business days before the dismissal Order) for a temporary injunction on those same claims was now moot. One of the elements to obtain a temporary injunction is establishing a "substantial likelihood of eventually prevailing on the merits." *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 492-93 173 P.3d 642 (2007). If Plaintiffs could not even state a claim upon which relief can be granted, they necessarily could not show a likelihood of success on the merits. Moreover, once the SVR claim was dismissed on the merits, it became illogical to grant injunctive relief on that same claim.

5. *May we review the district court's denial of the temporary injunction since the district court dismissed the constitutional challenges to the SVR on the merits?*

There is nothing to review in connection with Plaintiffs' motion. Defendants had no opportunity to respond to the motion (since it was mooted by the district court's outright dismissal of the claim before a response was due), no evidence was admitted, no hearing was conducted, and the district court never evaluated the motion (other than to note that it was moot). Any appeal of the motion would thus be pointless. To allow a litigant to appeal

[1] If a litigant cannot satisfy the standard Defendants advocate, K.S.A. 60-254(b) and 60-2102(c) remain available. For whatever reason, Plaintiffs did not pursue those options.

the denial of a temporary injunction on a cause of action on which the district court *simultaneously* dismissed the claim on the merits defies logic.

In an attempt to circumvent this factual and legal impediment, Plaintiffs first propose that the Court review the district court's K.S.A. 60-212(b)(6) dismissal of their SVR claims under a more liberal standard applicable to the evaluation of temporary injunction motions. *See Idbeis*, 285 Kan. at 492-93. That "mix and match" approach would make a mockery of appellate review principles and promote gamesmanship. It should not be countenanced.

Second, Plaintiffs seek to pivot to pendant appellate jurisdiction and argue that this Court is empowered to review the district court's denial of their motion because that ruling is "inextricably intertwined" with the dismissal of the same claim on the merits. But that would stretch the concept of pendant appellate jurisdiction far beyond its breaking point.

The Kansas Supreme Court has embraced pendant appellate jurisdiction only in narrow contexts, primarily in cases where a specific question or issue has been certified. *See Williams v. Lawton*, 288 Kan. 768, 783-87, 207 P.3d 1027 (2009) (where district court certified questions related to admissibility of evidence and proper handling of the jury, the court of appeals could also evaluate whether a new trial was necessary because the certified questions go to the heart of whether there should be a new trial); *City of Neodesha v. BP Corp. of N. Am., Inc.*, 295 Kan. 298, 310-12, 287 P.3d 214 (2012) (after district court certified the question whether it had erred in granting plaintiffs judgment as a matter of law, court of appeals properly expanded its review to consider whether district court also erred in conditionally granting a new trial since, "if the conditional order is left intact, it could

potentially negate any ruling by this court that the district court's entry of judgment as a matter of law was improper."). Even then, the Supreme Court emphasized that its holding hinged in significant part on the deferential standard under which it scrutinizes challenges to the scope of certified questions. *Williams*, 288 Kan. at 782.

If, as Plaintiffs propose here, an appellate court could reach the merits of a district court's dismissal of any and all causes of action – in a lawsuit in which there has been no final judgment (and no certification under K.S.A. 60-254(b) or 60-2102(c)) – anytime there is an appeal from the denial of a motion for a temporary injunction pursuant to K.S.A. 60-2102(a)(2), restrictions on appellate jurisdiction in K.S.A. 60-2102(a)(4) could be avoided with ease and the thin reeds of pendent appellate jurisdiction would take over the swamp. That was clearly not the intent of the Supreme Court. Interlocutory appeals are highly disfavored in Kansas, *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976), and the jurisdictional theory Plaintiffs' now promulgate is deeply at odds with that principle.

6. *How, if at all, was the district court's constitutional analysis of the BCR related to the district court's constitutional analysis of the SVR?*

Plaintiffs acknowledge that their constitutional attacks on the SVR and BCR only slightly overlap and are rooted in different provisions of the Kansas Constitution. (Br. 5-7). This recognition reinforces why this Court's entertainment of the BCR claims would be inappropriate at this time. As noted in the response to Question 5, allowing Plaintiffs to invoke pendant appellate jurisdiction with respect to those claims – for which they never even sought a temporary injunction in the district court – and backdoor them into this interlocutory appeal would leave nothing left of the final judgment rule and serve as an

open invitation for fractionalized appeals.

B. Plaintiffs lack standing to pursue their claims challenging the SVR

The district court assumed that Plaintiffs had standing and proceeded directly to the merits of their claims. (R. V, 60). But unless this Court opts to simply affirm the district court's ruling on the merits, it will need to address Plaintiffs' standing to pursue an attack on the SVR statute because none of the Plaintiffs have standing on those causes of action.

Standing requires Plaintiffs to prove that they have suffered a cognizable injury that is causally connected to the challenged conduct. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). "[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 v. Morton*, 405 U.S. 727, 739 (1972). "[S]tanding is not dispensed in gross," meaning that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotations omitted). While only one party need possess standing to raise a claim, none of the Plaintiffs has standing to challenge the SVR in K.S.A. 25-1124(h).

1. Standard of Review

"While standing is a requirement for case-or-controversy, i.e., justiciability, it is also a component of subject matter jurisdiction." *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015) (quoting *Gannon*, 298 Kan. at 1122). It is thus a jurisdictional prerequisite to suit. *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296

Kan. 906, Syl. ¶ 1, 296 P.3d 1106 (2013). Plaintiffs bear the burden of establishing standing. *Gannon*, 298 Kan. at 1123. At the motion to dismiss stage, factual disputes regarding standing are resolved in the plaintiff's favor based on the allegations in the petition. *See Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017).

2. Plaintiffs lack Associational Standing to challenge the SVR law

In the case of an organization, legal standing may arise in two different contexts. First, the organization may assert standing as a representative of its members, which is 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). In their Amended Petition, Plaintiffs plead two categories of purported injuries in connection with the SVR: (i) harm to each organization's members or "constituents;" and (ii) harm to the organizations themselves. (R. II, 283 at ¶ 17, 242 at ¶ 25, 244 at ¶ 31, 245-46 at ¶ 35). None of these allegations supports associational standing.

For an association to have standing to sue on behalf of its members, in addition to establishing the cognizable injury and causal connection elements referenced above, the association must also satisfy three additional requirements: (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*, 305 Kan. at 747 (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)).

To meet the first prong of this test, the association must show that it, or at least one

of its members, "has suffered actual or threatened injury – i.e., the association or one of its members must have suffered cognizable injury or have been threatened with an impending, probable injury and the injury or threatened injury must be caused by the complained-of act or omission." *Moser*, 298 Kan. at 33. The injury also must be "concrete, particularized, and actual or imminent." *Gannon*, 298 Kan. 1123. In other words, the injury "must affect the [member] in a personal and individual way." *Moser*, 298 Kan. at 35 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). It "cannot be a 'generalized grievance' and must be more than 'merely a general interest common to all members of the public.'" *Gannon*, 298 Kan. at 1123 (quoting *Lujan*, 504 U.S. at 575).

Plaintiffs fall far short of the mark in satisfying the standard for associational standing. Only LWV is a membership organization. (R. II, 235 at ¶ 10). The others are non-membership organizations claiming associational standing on behalf of "constituents." (R. II, 238-246).[2] Lacking any members, the organizations can assert associational standing only if they are seeking to represent persons who are effectively "members," meaning that they possess an "indicia of membership." *Hunt*, 432 U.S. at 344.

In evaluating indicia of membership, the cases construing *Hunt* focus on whether the relationship between the organization and the persons it purports to represent resembles that of a membership organization. *See e.g.*, *Friends of the Earth, Inc. v. Chevron Chem.*

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[2] Although Appleseed claims to be suing "on behalf of its members and constituencies," (R. II, 244 at ¶ 31), it never alleged that it is a membership organization. Nor did it suggest as much in response to Defendants' motion to dismiss. (R. II, 398-400). It merely alleged that it was asserting associational standing on behalf of its *constituents*. (Vol. II at 398-399). In any event, with respect to its challenge to the SVR, Appleseed refers only to its "constituencies." (R. II, 244 at ¶ 31).

Co., 129 F.3d 826, 827-829 (5th Cir. 1997); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 261 F. Supp.3d 99, 103-109 (D. Mass. 2017); *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 157 (2d Cir. 2012). These factors generally include whether the non-members can elect the directors, make budget decisions, and influence the organization's activities or litigation strategies. *Hunt*, 432 U.S. at 344-45. Plaintiffs' associational standing arguments fail to satisfy these criteria. *Cf. Disability Advocates*. *See* 675 F.3d at 157 (rejecting associational standing because organization did not allege that the individuals on whose behalf it was purporting to act had "the power to elect its directors, make budget decisions, or influence [its] activities or litigation strategies").

a. Loud Light, Appleseed, and TILRC do not allege facts supporting associational standing

Loud Light and Appleseed nowhere allege facts sufficient to establish associational standing. Instead, they advocate for an exceptionally broad theory of standing in which an organization could assert any claim on behalf of its "primary beneficiaries." (R. II, 398). They further purport to bring this case on behalf of other unidentified individuals within unidentified "coalitions" or "community partners," (R. II, 398-99), and claim to tailor their activities to those constituents. (R. II, 399). But while Plaintiffs parrot the words "indicia of membership," the Amended Petition's allegations in no way support that representation.

In claiming to bring this case on behalf of their "primary beneficiaries," Loud Light and Appleseed contend that they educate their constituents and encourage them to vote and become involved in the political process. (R. II, 398). Yet despite using the magic words

"indicia of membership," they seek to represent an entirely different category of individuals and groups, none of whom possess the "indicia of membership" that *Hunt* demands. (R. II, 398-99) (citing R. II, 239 at ¶ 19 – Loud Light "builds coalitions within the community to advocate for . . . changes for youth;" R. II, 242 at ¶ 26 – Appleseed "works with community partners to understand the root causes of problems, support strong grassroots coalitions, [and] advocates for comprehensive solutions.").

Loud Light and Appleseed also claim they "tailor[]" their activities to their "constituents" so that the organizations can "express their collective views and protect their collective interests." (R. II, 399) (allegedly supported by R. II, 239, 242 at ¶¶ 19, 26). But modifying an organization's activities to more effectively target its audience is not the same as an organization representing its members' interests. Loud Light and Appleseed are not claiming to represent any persons in a membership-like capacity but are instead asserting associational standing on behalf of individuals whom they target for their own organizations' voting goals. In any event, even if such theories could satisfy *Hunt*, those allegations are not in the Amended Petition and the cited paragraphs do not support the assertions. The quoted part of ¶ 19 regarding meeting the "needs" of the community refers to Loud Light and its non-existent members' "fundamental belief" about what "less voter turnout" means. As for Appleseed, it is a mystery what allegation, if any, in ¶ 26 matches this assertion.

The associational standing theory advanced by Loud Light and Appleseed is nearly identical to the third-party standing theory rejected in *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp.3d 158, 189-190 (M.D.N.C. 2020). Perhaps the rejection of the third-party standing theory in that case is the reason Plaintiffs here insist that they are *not*

asserting third-party standing. (R. II, 399). Regardless, neither Loud Light nor Appleseed can assert associational standing on behalf of the unidentified and unaffiliated "constituents" they purport to represent.

In contrast to Loud Light and Appleseed, TILRC at least alleges that it is "operated and governed by people who themselves have disabilities" and its "mission is to advocate for justice, equality and essential services" for people with disabilities. (R. II, 237 at ¶ 15). However, TILRC does not allege that these constituents guide and influence its mission or that they fund the organization. *See Hunt*, 432 U.S. at 344. Plaintiffs intimate that some kind of guidance occurs, (R. II, 399), but the cited allegations in the Amended Petition (R. II, 244 at ¶ 32) do not support that representation. Moreover, even if TILRC pled enough facts to establish an "indicia of membership," it must be asserting claims on behalf of those specific individuals as opposed to disabled voters in general or the electorate as a whole.

b. LWV's claimed associational standing must be limited to its members

As for LWV, while it pled that it has members, it cannot assert associational standing on behalf of "the broader Kansas electorate" or on behalf of non-members whom it registers, educates, or assists. (R. II, 236-39 at ¶¶ 13-18). Thus, to the extent LWV could challenge this claim, its standing would have to be rooted in one of *its own members* having standing to assert the claim. *See Moser*, 298 Kan. at 33. The problem for LWV, and every other organizational Plaintiff in this case is that, as discussed below, not a single individual affiliated with any of the entities (member, constituent, primary beneficiary, or otherwise) would have standing to challenge the constitutionality of the State's SVR at this time.

c. No member/constituent of any of the Plaintiff organizations would have standing to challenge the SVR on her own

Other than LWV, none of the organizational Plaintiffs can demonstrate the type of "indicia of membership" necessary to establish associational standing. But the Court need not delve into Plaintiffs' overly broad membership theories in order to uphold the dismissal of the SVR legal challenges. The claims can be dismissed simply because no organization has alleged that any of its "members" or "constituents" would have standing to bring such suit individually. Indeed, even if every organization had members and properly pled as much, it would not matter for purposes of the SVR because no Plaintiff could show that at least one member possesses standing to challenge the law on her own. All Plaintiffs thus lack associational standing. *See Moser*, 298 Kan. at 33.

Standing requires allegations of a cognizable injury that is causally connected to the challenged conduct. *Gannon*, 298 Kan. at 1123. Yet Plaintiffs have not alleged (nor could they) that any of their members have suffered a past injury in connection with this law. The only thing they say about the past is that, prior to the passage of K.S.A. 25-1124(h), some counties allegedly "failed to contact voters" to cure perceived signature mismatches. (R. II, 269 at ¶ 151). That allegation has nothing to do with the new law, which now *mandates* cure opportunities. More importantly, Plaintiffs' allegation would still not confer standing upon them to attack the amended law. "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." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974), *cited with approval in Baker v. Hayden*, 313 Kan. 667, 678, 490 P.3d 1164

(2021). That is why a plaintiff seeking declaratory or injunctive relief must demonstrate that *she herself* will face a sufficient likelihood of future harm from the challenged policy. *Baker*, 313 Kan. at 678 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

Plaintiffs do allege is possible future injuries, all of which are speculative and none of which are impending. But allegations of speculative, possible future injuries are insufficient to establish a cognizable injury. *Moser*, 298 Kan. at 33. The threatened injury must be "certainly impending." *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiffs' injury allegations are strikingly similar to those rejected as a basis for standing in *Memphis A. Phillip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) ("*MPRI*"). In that case, the plaintiffs challenged a state law requiring signature verification for absentee ballot applications. As here, Plaintiffs cited an "expert" who alleged that it was "highly likely that Tennessee officials will erroneously reject some absentee ballots in the upcoming election." *Id.* at 387. The Sixth Circuit held such "allegations of *possible* future injury are not sufficient" to confer standing on the organizational plaintiffs or their individual members; rather, any injuries must be "*certainly impending*." *Id.* at 386 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The Court added that when "allegations of future injury are based on past human errors," which Plaintiffs here do not even allege, "the plaintiffs face a high bar to demonstrate standing." *Id.* at 386.

Moreover, *MPRI* did not address a larger problem that Plaintiffs face in this case. Not only would Plaintiffs need to allege a certainly impending injury, but that injury would have to be to one of its *members*, not to Kansans generally. LWV merely claims that the SVR is "harmful to [its] members, many of whom are older and are at a significant risk of

having their ballots flagged erroneously as having a mismatched signature." (R. II, 238 at ¶ 17). In other words, LWV is alleging that some unidentified member might someday be subject to an erroneous signature mismatch. That will not cut it for associational standing. Appleseed and TILRC suffer from the same pleading infirmity. (R. II, 238 at ¶ 17; 244 at ¶ 31; 245-46 ¶ 35). Loud Light, meanwhile, does not even attempt to describe how its purported constituents would suffer from this statute. (R. II, 241-42 at ¶¶ 24-25). Yet claiming that members or "constituents" (or even voters generally) *might* erroneously be subject to a mismatched signature in the future on the premise that the SVR is "inherently unreliable" and that mismatches are "inevitable," (R. II, 265-66 at ¶¶ 131-36), is entirely speculative in nature and does not establish an injury-in-fact for standing. This argument also fails to take into account the new mandatory cure opportunities in K.S.A. 25-1124(h).

Plaintiffs argued below that *MPRI* should be distinguished because the court there reviewed evidence provided by the defendant in dismissing the case for lack of standing. (R. II, at 401-02). But the context of why the Sixth Circuit majority did so is critical. In reviewing the denial of a preliminary injunction, the majority highlighted evidence refuting arguments that plaintiffs' expert had presented and that the dissent had raised. *MPRI*, 978 F.3d at 387. But that evidence was in no way essential to the majority's *standing* holding, and the Court's rationale for determining the absence of standing fully applies to this case.

Plaintiffs here do not allege that anyone, let alone a member or constituent, has had a signature improperly mismatched in Kansas. Their basis for standing is nothing more than rank speculation that a mismatch *might* happen in the future due to human error, and that if it does, such mismatch *might* be to one of their members or constituents. Although

past instances of injury would still not provide a basis for standing, *see supra*, the absence of any such allegation is telling. Indeed, Kansas has had a similar signature-matching law since 2012 for advance ballots applications; that statute includes the same verification "by electronic device or by human inspection" as the statute being challenged. 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. 2019 Kan. Sess. Laws. Ch. 36, § 1 (amending K.S.A. 25-1124(b)). Yet despite one of the laws being in effect for more than eight years, Plaintiffs have not alleged a single individual who suffered the kind of mismatch they insist is "inevitable."

The fact that this appeal is from a motion to dismiss also does not help Plaintiffs. The issue is not about facts pled being viewed 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 to establish standing. Speculative claims of future hypothetical injuries about hypothetical errors by election workers do not allege a concrete injury that permits standing. *Moser*, 298 Kan. at 33; *MPRI*, 978 F.3d at 386.[3]

3. Plaintiffs lack Organizational Standing to challenge the SVR

LWV, Loud Light, and TILRC also claim organizational standing to challenge the SVR law.[4] They allege that they will now have to divert time and resources to develop and

[3] If, as Defendants expect, Plaintiffs cite the same inapposite cases in their reply brief as they did in the district court, Defendants urge the Court to refer to Defendants' analysis below as to why those cases have no bearing here. (*See* R. III, 59).

[4] Appleseed asserts no allegations that would support organizational standing on the signature verification requirement claims, and Plaintiffs appear to concede that Appleseed has no standing to assert such claims on that theory. (R. II, 395-97).

execute programs to educate voters and ensure that the law does not result in voter disenfranchisement. (R. II, 238 at ¶ 17; 241-42 at ¶ 24; 245-46 at ¶ 35). 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 Plaintiffs lack associational standing to challenge this statute, they also lack organizational standing.

The closest any Plaintiff comes to alleging an organizational standing injury is Loud Light, which states that it "organizes ballot cure programs, contacting voters whose ballots are challenged . . . including for mismatched signatures, and educating them on how to cure their ballots." (R. II, 240 at ¶ 20). Loud Light claims that because "counties will *now* be required to reject any signatures that an official believes is not a match," there will be "a greater number of mismatches," which will force it "to expend more resources." (R. II, 241-42 at ¶ 24) (emphasis added). This argument is no different than the wholly speculative theory it advanced for purposes of associational standing, i.e., that potential signature mismatches by unidentified election officials, possibly involving its members or "constituents," at some unknown date in the future may require them 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.

With regard to LWV and TILRC, they allege no facts as to how this law will cause any legally cognizable injury to them. They merely claim that the SVR will necessitate that they "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. (R. II, 238 at ¶ 17; 246-47 a ¶ 35). That statement

is purely conclusory. It contains no actual *factual allegations* as to how the SVR 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 Plaintiffs' respective missions for many years, (R. II, 235-36 at ¶ 11; 240 at ¶ 20; 244-45 at ¶ 32), the fact that they might infuse additional resources into such activities does not mean that they have suffered an 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 the 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 nearly a decade, and the State has also required for two years that voters be afforded cure opportunities for mismatched signatures on ballot applications and ballot envelopes.

In sum, LWV, Loud Light, and TILRC lack organizational standing because they have not alleged a concrete injury to their organizations. Their entirely conclusory claims of diverting or spending additional funds are predicated on conjecture, and the speculative future harms they identify are self-inflicted injuries based not on the statute, but on their own subjective fears. *See Clapper*, 568 U.S. at 416. This does not give rise to standing.

C. The district court properly held that Plaintiffs' Amended Petition failed to state a claim with respect to its challenges to the SVR in K.S.A. 25-1124(h)

1. Standard of Review

Historically, the Kansas Supreme Court has held that, in reviewing the legal sufficiency of a claim in response to a motion to dismiss under K.S.A. 60-212(b)(6), a court

"must decide the issue based only on the well-plead facts and allegations, which are generally drawn from the petition," and must also "resolve every factual dispute in the plaintiff's favor." *Halley v. Barbabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001) (citations omitted). The appellate court then reviews a district court's decision granting a motion to dismiss under a *de novo* standard. *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438 (2008).

But recent developments in the federal standards for evaluating motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the language of which is identical to K.S.A. 60-212(b)(6), counsel in favor of applying the same federal standard to this action. Indeed, when first articulating the standard governing motions to dismiss in state court, our Supreme Court expressly relied on the then-applicable federal standard, noting that K.S.A. 60-212(b)(6) had been patterned after its federal counterpart. *Monroe v. Darr*, 214 Kan. 426, 430, 520 P.2d 1197 (1974); *accord Back-Wenzel v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194 (2005) ("[B]ecause the Kansas Rules of Civil Procedure are patterned after the federal rules, Kansas appellate courts often turn to federal case law for persuasive guidance."). The one time the Kansas Supreme Court was asked to adopt the federal standard, it declined to do so only because the issue had not been properly preserved on appeal. *See Williams v. C-U-Out Bonds, LLC*, 310 Kan. 775, 785, 450 P.3d 330 (2019).

Conformity with the notice-pleading requirements of K.S.A. 60-208(a)(1) are enforced by way of a motion filed under K.S.A. 60-212(b)(6). The U.S. Supreme Court – in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) – reinterpreted Federal Rule 8(a)(2), the counterpart to Kansas Rule 8(a)(1), and abandoned the long-held rule "that a complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Instead, the Court in *Twombly* and *Iqbal* directed that a two-step inquiry be undertaken. First, the court must disregard all recitals in the complaint that are mere legal conclusions. Second, the court must accept assertions in a complaint as true, for the purposes of a motion to dismiss, only if the trial judge finds those factual assertions plausible as a matter of judicial common sense.

In evaluating whether this standard is met, Plaintiffs' Petition must contain "enough facts to state a claim to relief that is plausible on its face," and Plaintiffs must "nudge [their] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Petition also must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 550. A claim has "facial plausibility" only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan-Arapahoe, LLP v. Bd. of Cnty. Com'rs of Cnty. of Arapahoe, Colo.*, 633 F. 3d 1022, 1025 (10th Cir. 2011). But this general rule does not apply where a plaintiff's allegations are mere legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). As the Supreme Court observed, "[w]here a Complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted).

To be clear, Defendants believe – as did the district court (R. V, 61) – that Plaintiffs' claims must be dismissed under either the historical Kansas standard or the revised federal standard now being advocated. But re-calibrating the state and federal standards is in order.

2. Analysis

Plaintiffs attack the SVR as violative of their right to vote, equal protection, and due process. The claims are meritless.

a. *Anderson-Burdick* provides the proper standard of review

Although Kansas appellate courts have never articulated the legal standard for evaluating a constitutional challenge to an election integrity statute, there is abundant federal and state case law on the subject. Where a statute revolving around the mechanics of the electoral process – as the SVR surely does – implicates speech, voting, or association rights, courts invoke the *Anderson-Burdick* standard. *See Anderson v. Celebrezze*, 460 U.S. 780 (1982); *Burdick v. Takushi*, 504 U.S. 428 (1992); *accord DSCC v. Pate*, 950 N.W.2d 1, 6-9 (Iowa 2020); *DSCC v. Simon*, 950 N.W.2d 280, 291-96 (Minn. 2020); *Fisher v. Hargett*, 604 S.W.3d 381, 399-405 (Tenn. 2020); *Arizonans for Second Chances v. Hobbs*, 471 P.3d 607, 619-25 (Ariz. 2020). This test utilizes a sliding scale under which the court assesses the burden that a State's regulation imposes on a plaintiff's constitutionally protected rights. The test recognizes that, when a State invokes its constitutional authority to regulate elections to ensure that they are fair and orderly, the resulting restrictions will "inevitably affect – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Those burdens, how-

ever, "must necessarily accommodate a State's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party*, 892 F.3d 1066, 1077 (10th Cir. 2018). Unless the burdens are severe, the State's "important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions" on election procedures, *Anderson*, 460 U.S. at 789, and the law is evaluated under a standard akin to rational basis. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016).

Plaintiffs dismiss the *Anderson-Burdick* balancing test as insufficiently protective of their rights under the Kansas Constitution and advocate for a strict scrutiny standard that they claim is necessitated by *Hodes & Nauser v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 46 (2019). (Br. 19-21, 34). Plaintiffs read that case far too broadly.

The Court in *Hodes & Nauser* confronted a constitutional challenge to an abortion statute under Section 1 of the Kansas Constitution's Bill of Rights. Parsing the scope of the "inalienable natural rights" language in that provision, the Court held that the explicit protection of "natural rights" in Section 1 afforded broader safeguards (in particular, to the right of personal autonomy) than the Federal Constitution's Fourteenth Amendment. 309 Kan. at 624-25. The Court reached that conclusion only after taking a deep dive into both the historical roots of Section 1 and the understanding at common law as to the meaning of a "natural right" in this context. *Id.* at 622-72.

Plaintiffs seek to short-circuit our Supreme Court's detailed analysis by suggesting heightened scrutiny applies whenever a statute touches on fundamental rights, regardless of the context of the asserted right. That is not the law. In marked contrast to Section 1's "natural rights" language discussed in *Hodes & Nauser*, or Section 5's "inviolate" right to

a jury trial elucidated in *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019), nothing in our constitution or history could be construed as limiting the ability of the legislature to enact reasonable measures to ensure the fairness and efficiency of the election process. Indeed, our constitution *explicitly directs* the legislature to adopt voter integrity measures of the type at issue here. *See* Kan. Const., Art. 5, § 4 ("The legislature shall provide by law for proper proofs of the right of suffrage.").

While Section 1's reference to "inalienable natural rights" has been held to confer broader rights in the context of personal autonomy rights involving abortion, nothing in that section speaks to voting. Considering that our Bill of Rights and Article 5, § 4 were both adopted at the same time during the Wyandotte Constitutional Convention in 1859, it makes little sense to argue that Section 1 was intended to *narrow* the powers conferred by Article 5, § 4. After all, 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 citizens flooded the State in an effort to influence the "popular sovereignty" elections and extend slavery to this region.[5] Concerns about voter fraud and ineligible voters were at the forefront of framers' minds. As Kansas (and later U.S.) Supreme Court Justice Brewer noted in describing the broad reach of Article 5, § 4, "Obviously, what was contemplated was the ascertaining beforehand by proper proof of the persons who should, on the day of election, be entitled to vote, and any reasonable provision for making such ascertainment must be upheld." *State v. Butts*, 31 Kan. 537, 2 P. 618, 621 (1884).

[5] *See* Jason Roe, *The Contested Election of 1855*, K.C. Pub. Library Digital History, *available* at https://civilwaronthewesternborder.org/blog/contested-election-1855.

As for Section 2 of our Bill of Rights, the exact scope of that provision has never been a model of clarity. But the Kansas Supreme Court has made clear that Section 2 does *not* extend to voting. *See Buffington v. Grosvenor*, 46 Kan. 730, 27 P. 137, 139 (1891) ("The privilege of voting . . . [does] not fall within the privileges and immunities of general citizenship.").

Regarding Plaintiffs' equal protection claim, the Supreme Court has also held that the U.S. Constitution's Fourteenth Amendment and Section 2 of the Kansas Constitution's Bill of Rights provide the same protection when it comes to equal protection of the laws. *Rivera v. Schwab*, No. 125,092, __ Kan. __ (slip op. at 18-22) (June 21, 2022); *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315, 255 P.3d 1186 (2011). And *Anderson-Burdick* balancing is the test used to analyze election-related, equal protection claims. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235 (5th Cir. 2020); *Fish v. Schwab*, 957 F.3d 1105, 1122 (10th Cir. 2020); *Husted*, 834 F.3d at 626.

The due process protections found in Section 18 of the Kansas Constitution's Bill of Rights have similarly been held to provide the same procedural safeguards as the Federal Constitution. *See State v. Boysaw*, 309 Kan. 526, 536-37 439 P.3d 909 (2019) ("[N]othing in the history of the Kansas Constitution or in our caselaw . . . would suggest a different analytic framework for questions of fundamental fairness [or] due process."). Indeed, the Kansas Supreme Court has, time and again, construed Section 18 as being "coextensive" with its Fourteenth Amendment federal counterpart. *Id.* at 537-38 (collecting cases).

b. Right to Vote

i. The SVR does not severely burden Plaintiffs' right to vote

Even accepting all of the allegations in the Amended Petition as true, the burden of K.S.A. 25-1124(h)'s SVR on Plaintiffs and their "members," to the extent one exists at all, is so *de minimis* that it renders it unnecessary to proceed past the motion to dismiss stage. As the Fifth Circuit observed:

> Signature-verification requirements, like photo-ID requirements, help to ensure the veracity of a ballot by "identifying eligible voters." Signature-verification requirements are even less burdensome than photo-ID requirements, as they do not require a voter "to secure . . . or to assemble any documentation. True, some voters may have difficulty signing their names on ballots. But in *Crawford*, even though some voters might find it "difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification," that difficulty did not render the photo-ID law a severe burden on the right to vote.
>
> Even if some voters have trouble duplicating their signatures, that problem is "neither so serious nor so frequent as to raise any question about the constitutionality" of the signature-verification requirement. No citizen has a Fourteenth Amendment right to be free from the usual burdens of voting. And mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect.

Richardson, 978 F.3d at 236-37 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008)). Kansas also mitigates any potential burden the SVR might impose on voters in a number of ways. First, the State mandates that county election officials contact any voter whose advance ballot appears to contain a signature mismatch (or missing signature) and provide her an opportunity to cure the deficiency. K.S.A. 25-1124(b). Second, the statute wholly exempts disabled individuals from its reach to the extent their disability prevents them from signing the ballot or having a verifiable signature on file with

the county election office. *Id.* at 25-1124(h). Third, directly refuting much of Plaintiffs' claimed harms, the statute allows any voter with an illness or disability that prevents her from signing the ballot to request assistance from a third-party in marking the ballot. *Id.* at 25-1124(c), (e). Fourth, for individuals who are concerned that they will be unable to provide a matching signature, the State allows them to vote in person either on Election Day itself or during an extensive advance voting period. These mitigation measures negate even the conjectural burdens that Plaintiffs allege the SVR poses. Identical measures in other states have been deemed sufficient to render the verification requirements a non-severe burden. *See Richardson*, 978 F.3d at 237; *MPRI*, 978 F.3d at 388.

Furthermore, the proper judicial inquiry is *not* on the burden to a handful of individual voters who might be adversely affected by the statute; it is on the electorate "as a whole." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021); *cf. Crawford*, 553 U.S. at 200-03 (rejecting facial constitutional challenge to voter ID law despite burden it might impose on certain segments of population). Reinforcing this point in turning away a constitutional challenge to a signature verification law similar to the one here, the Fifth Circuit noted, "If the Court were 'to deem ordinary and widespread burdens like these severe' based solely on their impact on a small number of voters, we 'would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.'" *Richardson*, 978 F.3d at 236 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)).

Plaintiffs contend that Defendants' emphasis on the *de minimis* impact that the SVR will have on voters is not an appropriate argument at the motion to dismiss stage. (Br. 35-

37). The problem with Plaintiffs' argument is that they have raised only a *facial* attack on the statute. "A facial challenge is an 'attack on a statute itself as opposed to a particular application' of that law." *State v. Hinnenkamp*, 57 Kan. App.2d 1, 4, 446 P.3d 1103 (2019) (quoting *Los Angeles v. Patel*, 576 U.S. 409, 415 (2015)). In contrast to as-applied claims, *there are no necessary findings of fact in a facial challenge*. *Id.* With facial attacks, "courts must interpret a statute in a manner that renders it constitutional if there is any reasonable construction that will maintain the Legislature's apparent intent." *Id.* Such claims are disfavored and are generally resolved early in the proceeding because they typically rest on speculation, run contrary to the principle of judicial restraint, and threaten to short-circuit the democratic process by preventing laws representing the will of the people from being implemented. *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).[6]

Plaintiffs argue on appeal that the district court ignored their factual allegations. (Br. 36). Not so. Nowhere in the Amended Petition do Plaintiffs allege that any particular voter had a ballot rejected due to a signature mismatch under this law. The most Plaintiffs allege is that, based on Loud Light's ballot cure program in past elections, "election officials in counties that have previously engaged in signature matching have often failed to contact voters, let alone contact them with sufficient time for those voters to cure any perceived signature mismatch," thus "leav[ing] the fate of many people's votes to depend on

[6] Even if Plaintiffs had not raised a facial challenge, dismissal would still be appropriate. *See Tedards v. Ducey*, 951 F.3d 1041, 1067-68 (9th Cir. 2020) (affirming dismissal of constitutional attack on election statute evaluated under *Anderson-Burdick* standard).

the availability of volunteers who work to help track down voters who would otherwise be disenfranchised." (R. II, 269 at ¶ 151). And they add that election officials might not know if a voter's inability to apply a proper signature is due to disability. (R. II, 267-68 at ¶ 146). These allegations, which totally ignore the cure mechanisms in K.S.A. 25-1124(b), and amount to "people might be harmed because election officials will not follow the law," do not suffice to survive a motion to dismiss.

The law affords a strong presumption of regularity to all government functions. *U.S. Postal Serv. v. Gregory,* 534 U.S. 1, 10 (2001); *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *cf. Sheldon v. Bd. of Educ.*, 134 Kan. 135, 4 P.2d 430, 434 (1931) ("[P]ublic officers . . . are presumed to be obeying and following the law in the discharge of their official duties[.]"); *Kosik v. Cloud Cnty. Comm. Coll.*, 250 Kan. 507, 517, 827 P.2d 59 (1992) (recognizing "presumption of regularity" in Kansas). "[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). To suggest that the SVR process is constitutionally suspect because county election officials might not follow the law (e.g., contacting voters to provide them an opportunity to cure a signature-related deficiency) would require allegations far more specific than anything Plaintiffs have asserted here.

What is left in Plaintiffs' Amended Petition is nothing more than rank speculation. Plaintiffs allege that signature verification by laypersons is inherently unreliable (R. II, 265 at ¶ 131), that certain segments of the population are likely to have greater signature variability (*id.* at ¶ 135), and that it is "inevitable that Kansas election officials who choose to

inspect signatures by hand will erroneously determine voters' signatures are mismatched, leading to wrongful rejection of legitimate ballots and the disenfranchisement [of] hundreds of eligible voters." (R. II, 266 at ¶ 136). This is insufficient pleading to survive a motion to dismiss. Were the rule otherwise, the "cognizable injury" element of the test for standing in Kansas would be rendered a dead letter. *See Gannon*, 298 Kan. at 1123 ("a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.").

Moreover, the burden of a nondiscriminatory law is analyzed *categorically* under *Anderson-Burdick*, without consideration of "the peculiar circumstances of individual voters." *Crawford*, 553 U.S. at 206 (2008) (Scalia, J., concurring); *cf. id.* at 190 (plurality opinion) (noting that *Burdick* held that reasonable, nondiscriminatory election law imposed only a minimal burden despite preventing "a significant number of voters from participating in Hawaii elections in a meaningful manner") (cleaned up); *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020) ("One less-convenient feature does not an unconstitutional system make."); *Memphis A. Philip Randolph Instit. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) (same).

Every federal appellate court save one to consider constitutional challenges to state election-related signature verification requirements has rejected those claims. *Richardson v. Texas Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *MPRI*, 978 F.3d at 378; *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008). The one outlier, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019), is wholly distinguishable from this case, (R. V, 73), and was later criticized by the Eleventh Circuit itself, which questioned the case's

precedential validity. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) ("Nor need we decide whether *Lee* – which was issued by a motions panel instead of a merits panel – is even binding precedent.").

The Kansas Supreme Court has also held that a challenged statute "comes before the court cloaked in a presumption of constitutionality." *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989). Plaintiffs insist that *Hodes & Nauser* rendered this presumption no longer valid. (Br. 18-21). As previously discussed, Plaintiffs read that case much more broadly than is warranted. In fact, the Supreme Court reiterated the soundness of this presumption last year in *Matter of A.B.* *See* 313 Kan. 135, 138, 484 P.3d 226 (2021) ("This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction.") (quoting *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015)). A plaintiff cannot define a right at the highest level of generality and then argue that any statute touching on that right – however indirectly – is inherently suspect. Here, then, the proper inquiry is not on the right to vote, but the right to vote by mail. And there is nothing fundamental about the right to vote by mail. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-09 (1969) (no constitutional right to vote absentee).

But even if this presumption is disregarded, it still cannot be the case that the State is constitutionally precluded from imposing a SVR on advance ballots in the absence of meticulous standards that would satisfy a forensic accountant. After all, the only way to verify the identity of the person casting an advance ballot is by comparing her signature

with the one on file in the voter registration records. Imposing the kind of standards that Plaintiffs insist are necessary would fly in the face of *Burdick* and grind election offices to a halt. What Plaintiffs are proposing would also undermine Kansas' county canvassing board process. The impact would be not just revolutionary, but devastating; it would be antithetical to the way that nearly every state administers its elections.

ii. State's Strong Regulatory Interests Justify the Signature Verification Requirement

The next prong of the *Anderson-Burdick* test looks to the State's regulatory interests in the challenged statute. Kansas has a number of well-recognized interests in requiring that signatures on advance ballots are verified before being counted. The primary interest is in avoiding fraud. As the Supreme Court recently observed, although "every voting rule imposes a burden of some sort," a "strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich*, 141 S. Ct. at 2340. The risk of voter fraud is particularly acute with mail-in voting. *Sawyer v. Chapman*, 240 Kan. 409, 416, 729 P.2d 1220 (1986) ("[I]t must be conceded that voting by mail increases the . . . opportunity for fraud."); *see also Crawford*, 553 U.S. at 195-96; *Richardson*, 978 F.3d at 239; Comm'n on Federal Elections Reform, Building Confidence in U.S. Elections ("Baker-Carter Commission"), *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").

Plaintiffs take the Legislature to task for not providing "evidence of fraud or other issues that would support requiring signature matching in any of the counties, much less statewide." (R. II, 254 at ¶76). But there is no such requirement:

> [W]e do not force states to shoulder the burden of demonstrating empirically the objective effects of election laws. States may respond to potential deficiencies in the electoral process with foresight rather than reactively. States have thus never been required to justify their prophylactic measures to decrease occasions for voter fraud.

Richardson, 978 F.3d at 240 (quoting *Munro v. Socialist Workers Party*, 497 U.S. 189, 195 (1986)), and *Tex. LULAC v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020)); *accord Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.")

Kansas also has a powerful interest in promoting the orderly administration of all elections. This interest was expressly endorsed by the Supreme Court in *Doe v. Reed*, 561 U.S. 186 (2010). The Court there noted:

> [T]he State's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is essential to the proper functioning of a democracy. (*Id.* at 198).

In sum, Plaintiffs have demonstrated no burden to voting whatsoever from the SVR. Even if they could show that some voters' advance ballots were previously rejected due to a signature mismatch and that previous cure opportunities in the law proved inadequate for those individuals – which they clearly have not alleged, and which *Lyons* would operate as a standing roadblock anyway – the burden on the electorate "as a whole" would still be

minimal. And the State's regulatory interests are strong enough to easily outweigh such minor burden under the rational basis review dictated by *Anderson-Burdick*. That these Plaintiffs might have adopted a different law or drawn up a different regulatory scheme is beside the point. What Plaintiffs are asking the Court to do in this facial challenge is to micromanage the State's electoral regulatory process and second-guess the Legislature's policy decisions. With respect, that is not the Court's role.

c. Equal Protection

Plaintiffs further attack the SVR on equal protection grounds, claiming that the lack of standards for judging signatures confers too much discretion on election officials and provides no uniformity for each of the State's 105 counties. (R. II, 254-55 at ¶¶ 73-77). They suggest that accurate signature matching is a difficult task often susceptible to error. (R. II, 265-66 at ¶¶ 131-36). Citing *Bush v. Gore*, 531 U.S. 98 (2000), they maintain that the law's allowance of no, or at least different, standards in counties across the State violates their equal protection rights. (R. II, 279 at ¶¶ 206-08).

Plaintiffs' argument fails to take account of the new regulation that the Secretary of State recently adopted to provide more consistent standards across the State. *See* K.A.R. 7-36-9. That regulation also requires training of any election official performing signature verification responsibilities. *Id.* at 7-36-9(f).

In any event, the Ninth Circuit rejected a similar constitutional challenge to a signature verification regulatory scheme in *Lemons*, 538 F.3d at 1105-07. The court of appeals noted that the Supreme Court went to great lengths in *Bush* to underscore the narrow scope of its ruling ("limited to the present circumstances") and found an Equal Protection Clause violation

"only because it was a *court-ordered* recount." *Id.* at 1106 (quoting *Bush*, 531 U.S. 106-07, 109) (emphasis added). In addition, the Ninth Circuit held that the requirement that referendum signatures be matched to an individual's signature on file with the county registration office in and of itself represented a sufficiently uniform standard to survive an equal protection challenge. *Id.* The fact that a few signatures might have been rejected in error was deemed to be little more than "isolated discrepancies" that did "not demonstrate the absence of a uniform standard." *Id.* After all, individual counties administer elections in every state and "[a]rguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected." *N.E. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016). It is also inevitable – human nature being what it is – that certain election officials will do a better job than others. But that is simply not constitutionally significant. *See Lemons*, 538 F.3d at 1107.

Given that the statute only took effect on July 1, 2021 – after Plaintiffs filed their original Petition – Plaintiffs have not, and could not, allege any evidence of improperly rejected ballots. But the fact that similarly situated persons may not be treated identically is not sufficient to establish an equal protection violation. The law requires neither absolute precision nor perfect symmetry among the State's 105 counties on this issue. Every state's electoral system is administered on a county-by-county basis. To suggest that *de minimis* deviations from one county to another – particularly on matters that involve human judgment and discretion – trigger Equal Protection Clause violations would be unprecedented. As noted, it would totally upend the county canvassing procedures. Neither the federal nor the Kansas constitution requires anything so radical. The bottom line is that Plaintiffs'

facial equal protection attack on the SVR fails to state a claim.

d. Due Process

Plaintiffs next contend that the law's failure "to provide any standard by which county election officials are to evaluate a voter's ballot" constitutes a violation of voters' due process rights. (R. II, 284 at ¶¶ 229-230). The flaw in this claim, in addition to failing to take into account the new regulation, *see* K.A.R. 7-36-9, is that the right to vote does not implicate any property or liberty interest protected by the Fourteenth Amendment's Due Process Clause or its apparent analogue in Section 18 of the Kansas Constitution's Bill of Rights. "In the absence of a protected property or liberty interest, there can be no due process violation." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 544, 216 P.3d 158 (2009) (citing *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cnty. / Kansas City,* 265 Kan. 779, 809, 962 P.2d 543 (1998)).

At least with respect to the federal Constitution, a "liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation of interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests arising out of the U.S. Constitution encompass "the right to contract, to engage in the common occupations of life, to gain useful knowledge, to marry and establish a home to bring up children, to worship God, and to enjoy those privileges long recognized as essential to the orderly pursuit of happiness." *Richardson*, 978 F.3d at 230 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 546, 572 (1972). State-created liberty interests, on the other hand, are "generally limited to freedom from restraint." *Id.* (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

While the right to vote may be a fundamental right implicating the Equal Protection Clause, it is *not* a constitutionally-protected liberty interest. *Id.* at 231; *accord New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *LWV v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008). And invoking a liberty interest in the context of an SVR is even more of a stretch. Having held that there is not even a constitutional right to vote via absentee ballot, *see McDonald*, 394 U.S. at 807-09, it is unfathomable that the Supreme Court would find a liberty interest in avoiding a SVR in connection with such ballots. In short, Plaintiffs' due process rights are not at stake here and this claim must be dismissed.[7]

D. The district court did not abuse its discretion in denying as moot Plaintiffs' motion for a temporary injunction against the SVR

For the same reasons set forth in Parts III.A.4 and III.A.5., *supra*, which Defendants specifically incorporate here, the district court properly denied Plaintiffs' motion for a temporary injunction against the signature verification requirement.

E. The district court properly held that Plaintiffs' Amended Petition failed to state a claim with respect to its challenges to the BCRs in K.S.A. 25-2437

1. Standard of Review

The same standard of review applicable to Plaintiffs' signature verification claims applies to their claims challenging the BCRs in K.S.A. 25-2437. *See* Part III.C.1, supra.

2. Analysis

Plaintiffs allege that the BCRs violate their free speech and association rights and

[7] The cases Plaintiffs cite in opposition to this point, (Br. 40-41), have their roots in *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp.2d 1354 (D. Ariz. 1990), the flaws in which were explained by the Fifth Circuit in *Richardson*, 978 F.3d at 230-32.

the voting rights of their members and constituents. All of those causes of action were properly dismissed.

a. Free Speech/Association

Plaintiffs argue that K.S.A. 25-2437 implicates free speech and association rights because the statute targets core political speech. (R. II, 275-76 at ¶¶ 184-88). But the law impacts neither speech nor expressive conduct. The statute clearly does not prevent any individual from speaking to another person, nor does it impose any content restriction on such speech. And while certain conduct enjoys constitutional protection, "only conduct that is 'inherently expressive' is entitled to First Amendment protection." *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("FAIR")). In assessing whether conduct has "sufficient 'communicative elements' to be embraced by the First Amendment, courts look to whether the conduct shows an 'intent to convey a particular message' and whether 'the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Courts have consistently held that "collecting and returning ballots of another voter, do not communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny." *DCCC v. Ziriax*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020); *accord Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting argument that act of collecting early ballots is expressive conduct that conveys any message about voting; concluding that this type of conduct cannot reasonably be construed "as conveying a symbolic message of any sort"); *Lichtenstein v. Hargett*, 489 F. Supp.3d 742, 765-77 (M.D.

Tenn. 2020); *New Ga. Project v. Raffensperger*, 484 F. Supp.3d 1265, 1300-02 (N.D. Ga. 2020) (same); *Steen*, 732 F.3d at 393 (collecting voter registrations isn't protected speech); *Middleton v. Andino*, 488 F. Supp.2d 261, 305-06 (D.S.C. 2020).[8] Although a handful of federal district courts – acting against the heavy weight of contrary authority – have held the First Amendment to be implicated where a third-party endeavors to distribute absentee ballot applications to voters,[9] we are unaware of *any* case in which a court has taken the additional step to find that the *collection and return of a voter's completed ballot* somehow constitutes expressive conduct on the part of the third party.

As the party invoking the First Amendment (or its Kansas Constitution counterpart), Plaintiffs have the burden of proving its applicability. *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and they simply cannot do so. *See Simon*, 950 N.W.2d at 294-96 (rejecting free speech and association attacks on statute that limited third-parties from collecting and returning more than three absentee ballots of other voters).

The Supreme Court in *FAIR* "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 547 U.S.

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[8] In *Meyer v. Grant*, 486 U.S. 414 (1988), upon which Plaintiffs heavily rely, (Br. 23-25), referendum circulators presented a petition to voters for signature. The *presentation itself conveyed a political message*, and the voter, by signing, expressed agreement therewith. Restricting those interactions thus limited the quantum of speech and the message that could be communicated. *Id.* at 421-23. There are no such limitations with K.S.A. 25-2437. Plaintiffs are free to share any message they want with an unlimited number of voters; they simply cannot return the completed ballots of more than ten voters. *See Simon*, 950 N.W.2d at 294-96 (*Meyer* test has no applicability in constitutional challenge to state restriction on third-party assistors seeking to return absentee ballots of other voters).

[9] In the latest case rejecting this theory, the court in *VoteAmerica v. Raffensperger*, No. 21-cv-1390, 2022 WL 2357395, at *8-9 (N.D. Ga. June 30, 2022) held that the act of distributing absentee ballot applications to voters by a third-party is not expressive conduct.

at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The Court has "extended First Amendment protection only to conduct that is inherently expressive." *Id.* at 66. And where the expressive component of an individual's "actions is not created by the conduct itself but by the speech that accompanies it," that "explanatory speech is . . . strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under" the First Amendment. *Id.* Were the rule otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

This law in no way prohibits Plaintiffs from engaging in any interactions with voters regarding advance ballots. Plaintiffs are free to encourage voters to request an advance ballot, to provide voters an advance ballot application, to help voters complete the ballot (with the proper attestation mandated by K.S.A. 25-1124(e)), and to return a completed application to the county election office. There is no restriction whatsoever on the message or form thereof that Plaintiffs may share with voters. Nor is there any limit on how many voters Plaintiffs can interact with. The *only* thing being limited by the BCR is the number of completed applications that a third-party may return on behalf of other voters during a particular election cycle (a mechanism designed to stave off the kind of fraud that jurisdictions across the U.S. have experienced with ballot harvesting, some as recently as last month). *See* Michael Lee, "*Texas woman pleads guilty on 26 counts of voter fraud over alleged vote harvesting operation*," Yahoo News (June 19, 2022), available at https://news.yahoo.com/texas-woman-pleads-guilty-26-141213898.html.

Given that the collection and return of another person's advance ballot is nothing more than non-expressive conduct, the State is free to regulate it as part of a legitimate,

non-discriminatory election process, and that law is subject only to rational basis scrutiny. *See Steen*, 732 F.3d at 392; *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (law that involves neither a "fundamental right" nor a "suspect" classification is constitutionally valid if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

The same principle governs Plaintiffs' freedom of association theory (*which they do not address on appeal and have thus waived*). The Supreme Court has recognized a First Amendment right "to associate for the purpose of speaking," which it characterizes as a "right of expressive association." *FAIR*, 547 U.S. at 68 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000)). This right is rooted in the fact that the "right to speak is often exercised most effectively by combining one's voice with the voices of others." *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). But there is no impairment of Plaintiffs' speech or association rights. Nothing in the BCRs limit Plaintiffs' ability to speak or associate with anyone about anything at any time. The statute's reach is strictly confined to *non-expressive conduct*. This is a purely legal issue and Plaintiffs cannot prevail on it.

But even if some minimal expressive conduct were implicated by K.S.A. 25-2437, *Anderson-Burdick* would still apply. The Kansas Supreme Court has held that Section 11 of our Bill of Rights is "generally considered coextensive" with the First Amendment when it comes to free speech rights, and, like the First Amendment, it "is not without certain limitations." *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). Moreover, the challenged statute must be considered and construed as part of an election-related regulation. *See State Bd. of Nursing v. Ruebke*, 259 Kan. 599, Syl. ¶ 12, 913 P.2d 142 (1996)

("A statute must be interpreted in the context in which it was enacted and in light of legislature's intent at that time."). If the contrary were true, the State's authority to enact legislation regulating the electoral process would be neutered by the threat of a plaintiff raising a free speech or association challenge. Eschewing deference to the State on such matters – which is effectively what Plaintiffs advocate here by insisting that *any* state regulation of the electoral process that might touch on an individual's speech, association, or voting rights (in other words, *virtually all regulations involving the electoral process*) must be subjected to strict scrutiny – would greatly compromise the State's ability to ensure the integrity, fairness, efficiency, and public confidence in its elections.

As the Court noted in *Burdick*, while "voting is of the most fundamental significance under our constitutional structure," that does not mean "the right to associate for political purposes through the ballot [is] absolute." 504 U.S. at 433 (citations omitted). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections" lest elections be reduced to chaos. *Id.*

Plaintiffs take issue with the State's regulatory interests in adopting the new BCRs, suggesting there is a factual dispute on the issue. (Br. 28). This argument ignores the significance of the *facial* nature of their constitutional challenge, *see* Part III.C.2.b, *supra*, and unduly seeks to elevate the State's burden of proof. What is presented is a *legal*, not *factual*, question. For reasons that are foundational to the division of powers among the coordinate branches, legislative choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). As the Kansas Supreme Court noted,

even if the State's justification for a statute amounts to "an after-the-fact rationalization which was never espoused by the legislature," it is entirely irrelevant. *Injured Workers of Kan. v. Franklin*, 262 Kan. 840, 862, 942 P.2d 591 (1997).

It certainly was not necessary for the legislature to show that the State had been victimized by systematic fraud from ballot harvesting before enacting certain prophylactic measures to minimize the chance of harm. *See Munro*, 479 U.S. at 195 ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."); *id.* ("State's political system [need not] sustain some level of damage before the legislature [can] take corrective action."). In any event, the dangers that ballot harvesting activities can inflict on election integrity are well established. The Supreme Court, in upholding the legality of a ballot harvesting law far more restrictive than the one at issue here against a Voting Rights Act challenge, underscored that "[f]raud is a real risk that accompanies mail-in voting even if [a state has] had the good fortune to avoid it." *Brnovich*, 141 S. Ct. at 2348; *see also Crawford*, 553 U.S. at 195-96 ("the risk of voter fraud" – particularly with "absentee ballots" – is "real.").

Nor is a State restricted to demonstrating harms only within its own borders. *See Brnovich*, 141 S. Ct. at 2348 (upholding Arizona's ballot collection restrictions despite "Arizona ha[ving] the good fortune to avoid" fraud, and referencing fraud from proscribed activity in North Carolina); *Crawford*, 553 U.S. at 194-95 (upholding Indiana voter ID law even though "[t]he record contained no evidence of any such fraud actually occurring in Indiana at any time in its history," but noting that "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history"); *Burson v.*

Freeman, 504 U.S. 191, 208-09 (1992) (upholding dismissal of facial attack on Tennessee law prohibiting solicitation of voting and campaign materials within 100 feet of polling place despite the State producing no evidence of the necessity of that boundary, and noting that the Court "never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question"). Discovery, therefore, would be pointless on this issue.

b. Right to Vote

Finally, Plaintiffs argue that Article 5, § 1 of the Kansas Constitution, which affords Kansas resident citizens age eighteen or older the right to vote, is somehow absolute and invalidates the BCRs. (Br. 28-29).[10] But the very next section empowers the legislature to exclude persons from voting if they are convicted of a felony, and the same article *requires* the legislature to adopt measures to ensure that only eligible voters are permitted to cast ballots. Kan. Const., art. 5, §§ 2, 4. This claim is also undermined by the fact that the U.S. Supreme Court has held that there is no federal constitutional right at all to vote by mail. *McDonald*, 394 U.S. at 807-08. So to describe the right at issue as the "right to vote" in general, as opposed to the "right to vote by mail," inappropriately modifies the legal inquiry and the proper level of scrutiny.

[10] In addition to failing on the merits, Plaintiffs also have no standing to pursue their right to vote claim in connection with the BCRs. Organizational standing does not work because an organization lacks the right to vote. *See Vote.org v. Callanen*, __ F.4th __, 2022 WL 2389566, at *4 (5th Cir. July 2, 2022). And while Plaintiffs have failed to plead adequate facts to establish associational standing, *see* Part III.B., even if they could, the alleged "members" themselves are not limited in their ability to vote. Any purported limitation is on the voters who Plaintiffs seek to help. If there is to be claim attacking the BCRs' impact on the right to vote, those voters – not Plaintiffs – must bring such an action.

Plaintiffs allege that the law's restrictions will have an adverse impact on the State's "most vulnerable citizens" who purportedly have a great need for "ballot collection and delivery assistance." (R. II., 269-70 at ¶ 154). While it is entirely speculative whether certain segments of the population use ballot collection assistance in statistically significant greater numbers than others, those issues are ultimately irrelevant. Any burden on voting from the BCRs (if there even *is* one) is extremely minimal. Putting a stamp on an advance ballot envelope is hardly so great a hardship as to trigger constitutional protections. And the U.S. Postal Service delivers (and picks up) from every community in the country.

If, as the Supreme Court held, having to travel to the local DMV office to obtain a voter 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," *Crawford*, 553 U.S. at 198, then surely requiring a voter – who chooses to vote absentee rather than on Election Day – to mail in an advance ballot does not contravene the Constitution. And Kansas does not even require *that*; it simply limits the number of ballots that any one person can collect and deliver from other individuals. Moreover, as the Supreme Court held in repudiating a legal challenge to an Arizona statute did not allow *any* third-party collection or delivery, the relevant judicial inquiry is on the burden to the electorate "as a whole," not on the burden to a handful of individual voters who might be adversely affected by the statute. *Brnovich*, 141 S. Ct. at 2339; *see also id.* ("[E]ven neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

Since a state is not required to allow *any* absentee voting at all, by choosing to offer such a feature, Kansas has actually "increase[d] options, not restrictions." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J., concurring). "Of course, there will always be other voters for whom, through no fault of the state, getting to the polls is difficult or even impossible. But . . . that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that the state has in fact precluded voters from voting – that the voter has been prohibited from voting by the State." *Id.* (cleaned up) (quoting *McDonald*, 394 U.S. at 808 & n.7, 810).

The State's restrictions on third-parties' collection and delivery of advance ballots are rooted in strong interests of combating voter fraud and facilitating public confidence in the election process. To quote the Supreme Court's recent decision in *Brnovich*:

> "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*) (internal quotation marks omitted). Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that "[a]bsentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005).
>
> The Commission warned that "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," and it recommended that "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.* The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to "the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." *Id.* at 47. [Arizona's law] is even more permissive

in that it also authorizes ballot-handling by a voter's household member and caregiver.

* * *

> The Court of Appeals thought that the State's justifications . . . were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. . . . But prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. *Brnovich*, 141 S. Ct. at 2347-48 (final alteration in original).

Discovery is unnecessary because this case can easily be resolved at the motion to dismiss stage. Crediting every allegation in the Amended Petition as true, there is *nothing* that would constitute so significant a burden as to justify striking down the BCRs on their face. And the State's powerful interests in limiting potential mischief that can accompany advance ballots, particularly when those ballots are returned by individuals other than the voters themselves, is undeniable. Any balancing required by *Anderson-Burdick* thus must be resolved in favor of the State. Even if the plaintiffs could somehow show a disparate burden on certain groups, the State's justifications in avoiding voter fraud would more than suffice to uphold the law. *See Brnovich*, 141 S. Ct. at 2347; *accord DCCC*, 487 F. Supp.3d at 1235; *New Ga. Project*, 484 F. Supp.3d at 1299-1300.

Respectfully submitted,

/s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I certify that on this 11th day of July 2022, I electronically filed the foregoing Brief of Appellee with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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UNPUBLISHED OPINIONS CITED IN THE BRIEF

- *Cummings v. Gish*, No. 96,124, 2007 WL 1530113 (Kan. Ct. App. May 25, 2007)
- *Pistotnik v. Pistotnik*, No. 115,715, 2017 WL 2210776 (Kan. Ct. App. May 19, 2017)
- *VoteAmerica v. Raffensperger*, No. 21-cv-1390, 2022 WL 2357395 (N.D. Ga. June 30, 2022)
- *Vote.org v. Callanen*, No. 22-50536, __ F.4th __, 2022 WL 2389566 (5th Cir. July 2, 2022)

158 P.3d 375 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Ron CUMMINGS, Appellee,
v.
Ina M. GISH, et al., Defendant/Appellees,
Isaac MILLER, Defendant/Appellee,
Dan NEAR and Toinette Near, Defendant/Appellant.

No. 96,124.
|
May 25, 2007.

Appeal from Rooks District Court; Thomas L. Toepfer, judge. Opinion filed May 25, 2007. Appeal dismissed.

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Before MCANANY, P.J., ELLIOTT and PIERRON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Toinette Near and Dan Near appeal from the trial court's order granting partition of mineral interests they held with others in property located in Rooks County, Kansas. The Nears contend their interest is not subject to partition. We dismiss the appeal for lack of jurisdiction under K.S.A. 60–2102(a)(3) and (a)(4).

Ron Cummings initially filed this action against numerous parties who allegedly owned fractional shares of the mineral interests in 400 acres in Rooks County. Cummings requested partition of the parties' commonly held mineral interests under K.S.A. 60–1003. The Nears allegedly owned a 1/8th share of the mineral interests and were the only parties contesting partition. Judgment on the pleadings was entered in Cummings' favor as to all the remaining parties who failed to respond to the petition. After contentious and convoluted pretrial proceedings, the claims involving the Nears proceeded to trial in December 2005. It was agreed at the pretrial conference that the only issues at trial would be the nature of the Nears' interests in the property, whether partition was appropriate, and whether sanctions under K.S.A. 60–211 were appropriate against the Nears.

In its journal entry, the trial court found that all the parties owned mineral interests in the property as tenants in common and rejected the Nears' claims they only held a nonpossessory overriding royalty interest in the minerals produced. Finding no credible evidence that partition would create an extraordinary hardship or oppression as to any party, the trial court found partition was warranted. However, the court found that partition in kind would be inequitable. Accordingly, the court ordered that appraisers be appointed to appraise the mineral interests and that an election period be established to determine if one or more of the parties elected to purchase the complete interest at the appraised price. If no such election was made, the court ordered that a public sale be held. In either event, the trial court ordered any proceeds from a sale be divided according to the ownership proportions previously held by the parties.

The trial court also found the Nears had violated K.S.A. 60–211(b)(1) and (3) in their various pleadings. The court found that attorney fees and nonmonetary sanctions were appropriate but deferred imposition of sanctions until the conclusion of the partition sale.

The Nears appealed from this order challenging various evidentiary rulings made by the trial court as well as the court's conclusion their property interest was subject to partition and that their conduct violated K.S.A. 60–211(b).

This court issued an order to show cause directing the parties to show case why the appeal should not be dismissed for lack of jurisdiction; the court pointed out that the order from which the appeal was taken was interlocutory. Only the Nears filed a response to the court's show cause order.

Kansas courts have only such appellate jurisdiction as is conferred by statute, pursuant to Article 3, § 3, of the Kansas

Constitution. *In re Condemnation of Land v. Stranger Valley Land Co.*, 280 Kan. 576, 578, 123 P.3d 731 (2005). The right to appeal is purely statutory, and an appellate court has a duty to question jurisdiction on its own initiative. If the record indicates that jurisdiction does not exist, the appeal must be dismissed. *State v. Phinney*, 280 Kan. 394, 398, 122 P.3d 356 (2005). Whether jurisdiction exists is a question of law over which we have unlimited review. *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 414, 997 P.2d 681 (2000).

***2** The parties do not dispute that there is no final order in this case within the meaning of K.S.A. 60–2102(a)(4). Under that statute, appellate jurisdiction exists when all claims between all parties are resolved and there are no further questions or the possibility of future directions or actions by the court. *Investcorp, L.P. v. Simpson Investment Co., L.C.*, 277 Kan. 445, Syl. ¶ 3, 85 P.3d 1140 (2003). The record fails to reflect whether appraisers have appointed, an appraisal has been made, any sale has been completed, or any final determination made as to the appropriate amount of sanctions to be assessed.

In response to the court's order to show cause, however, the Nears encourage the court to retain jurisdiction under K.S.A. 60–2102(a)(3). That statute permits a party to invoke the jurisdiction of the court of appeal from "an order involving ... the title to real estate...." This particular provision has been interpreted to allow review of nonfinal order involving real estate only if the order has " 'some semblance of finality.' " *In re Estate of Ziebell*, 2 Kan.App.2d 99, 101, 575 P.2d 574 (1978).

The parameters of jurisdiction under K.S.A. 60–2102(a)(3) is less than clear. However, the cases where jurisdiction have been found clearly meet the "semblance of finality" standard. For example, in *J.E. Akers Co. v. Advertising Unlimited, Inc.*, 274 Kan. 359, 49 P.3d 506 (2002), the district court authorized the receiver of a dissolved corporation to sell corporate realty free and clear of any encumbrances, including judgment liens held by the appellants. The appellants immediately appealed, and the Supreme Court found jurisdiction under K.S.A. 60–2102(a)(3) to consider the merits of the nonfinal order. 274 Kan. at 360. Under those facts, however, the district court's order effectively abrogated the appellants' liens and their interest in the property; any further proceedings regarding the real estate would have no effect on the appellants' interests. Such an order possesses "some semblance of finality."

Likewise, in *Smith v. Williams*, 3 Kan.App.2d 205, 592 P.3d 129, *rev. denied* 226 Kan. 792 (1979), adjoining landowners filed counter-petitions for quiet title in a boundary line dispute. The original defendant filed a counterclaim for monetary damages and the plaintiffs filed a third party claim against their predecessor in interest for indemnification if monetary damages were awarded. The trial court granted summary judgment to the defendant on the quiet title claims and reserved ruling on the claim for monetary damages and the third party petition. The Plaintiffs immediately appealed. The Court of Appeals concluded jurisdiction existed under K.S.A. 60–2102(a)(3). 3 Kan.App.2d at 206.

Although the *Smith* court did not discuss why jurisdiction existed under that provision, the facts support a finding that the order in question had "some semblance of finality." The order finally determined the boundary line dispute as between all the parties; the only remaining issues related to the defendant's claims for monetary damages which were collateral to the title issue.

***3** However, the mere fact an order affects title to real estate does not render the order subject to immediate appeal under K.S.A. 60–2102(a)(3). In *Valley State Bank v. Geiger*, 12 Kan.App.2d 485, 748 P.2d 905 (1988), this court dismissed an appeal from a district court's order directing the sale of real property in a mortgage foreclosure action; the debtor immediately appealed because of the order directed the sale in parcels different from those he requested. 12 Kan.App.2d at 485. This court declined to exercise jurisdiction under K.S.A. 60–2102(a)(3) because the statutory requirements for future review and confirmation of the sale of the property established there was no semblance of finality to the order being appealed. 12 Kan.App.2d at 486.

The reasoning of *Valley State Bank* is more compelling in this case. Here, the partition statute requires, once partition is ordered, the appointment of commissioners to appraise the value of the property. K.S.A. 60–1003(c)(2). Any party may then take exception to the commissioners' report and the court may modify the same. K.S.A. 60–1003(c)(3). The statute then provides for election to purchase by any of the parties or for sale of the property. K.S.A. 60–1003(c)(4). The Nears or other parties may well challenge any of the orders from these subsequent proceedings and all these proceedings have some effect on the parties' interest in the property. Likewise, the Nears are challenging the finding that they violated K.S.A. 60–211(b), even though no final determination has been made as to the amount of sanctions that will be imposed.

In noting the limits of jurisdiction under K.S.A. 60–2102(a)(3) in eminent domain cases, the Supreme Court noted:

> "All original eminent domain proceedings, to some extent, involve title to real estate. If appeals in original proceedings were allowed under K.S.A. 60–2102(a)(3), the original proceedings would be subject to interminable interruption and delay. As we said in *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976):
>
> 'Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory and fractionalized appeals are discouraged, and are the exceptions and not the rule.'
>
> We do not think the legislature contemplated appeals in original eminent domain proceedings when it enacted K.S.A. 60–2102(a)(3). We conclude that this appeal does not lie under that statute." *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 682, 683 P.2d 1247 (1984).

Similarly, all partition actions under K.S.A. 60–1003 inherently involve title to real estate. If parties were permitted to appeal every interim order in a partition action, the "proceedings would be subject to interminable interruption and delay." 235 Kan. at 682.

For these reasons, the court concludes the order granting partition lacks any semblance of finality and therefore is not appealable under K.S.A. 60–2102(a)(3). In the absence of evidence establishing any other basis for this court's jurisdiction, the appeal must be dismissed.

***4** Appeal dismissed.

All Citations

158 P.3d 375 (Table), 2007 WL 1530113

394 P.3d 902 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Bradley A. PISTOTNIK and Brad Pistotnik Law, P.A., Appellees,
v.
Brian D. PISTOTNIK, Affiliated Attorneys of Pistotnik Law Offices, P.A., and Pistotnik Law Offices, LLC, Appellants.

No. 115,715
|
Opinion filed May 19, 2017

Appeal from Sedgwick District Court; TIMOTHY H. HENDERSON, Judge.

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Before Green, P.J., Standridge and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Brian D. Pistotnik appeals the district court's decision to deny his motion to terminate the receivership it ordered after dissolving Affiliated Attorneys of Pistotnik Law Offices, P.A. (AAPLO), an association which Brian owned with his brother, Bradley A. Pistotnik. Brian argues the court should have terminated the receivership because the parties contemplated termination in their settlement agreement and because the facts and circumstances of the case no longer necessitate the receivership. Finding no abuse of discretion, we affirm the district court's decision.

FACTS

Brian and Brad were each 50% shareholders of the law firm AAPLO. On June 19, 2014, Brad filed a petition seeking dissolution of AAPLO. Brian answered the lawsuit and asserted several counterclaims against Brad. Brad answered Brian's counterclaims and included additional claims against Brian. The numerous claims between the brothers were the subject of lengthy litigation, most of which is not relevant to this appeal.

Brad filed a motion for dissolution of AAPLO and appointment of receiver on November 3, 2014. The district court issued an order on January 15, 2015, dissolving AAPLO and placing it in receivership. The court appointed attorney David Rapp to serve as the receiver to wind up the affairs of AAPLO. See K.S.A. 17-6808 (appointment by court and power of receiver for dissolved corporations). Rapp filed his oath as receiver on January 28, 2015, and filed his bond on February 11, 2015.

During the course of the receivership, Rapp worked under the authority of the district court to marshal AAPLO's assets, collect its debts, and evaluate claims made by or against AAPLO or its shareholders. The receiver also oversaw the litigation of certain claims in which AAPLO asserted attorneys' liens for predissolution cases, which are referred to as the *Consolver* and *Hernandez* cases. Former AAPLO clients additionally filed counterclaims against Brad (in *Consolver II*) and Brian (in *Hernandez*).

On July 16, 2015, Brian and Brad met with a mediator, who assisted them in settling their claims against each other and agreeing to a mutual release. The mediator read the terms of the settlement agreement into the court's record the same day. Brian and Brad confirmed that the terms of their agreement were correctly recited by the mediator into the record. Relevant to the issue on appeal, the settlement agreement included the following provision:

> "[THE MEDIATOR]: Judge, this is what I believe the settlement agreement to be between the parties. The receivership will be closed as soon as possible. There's been a lawsuit filed recently naming the old—I'm not going to call it AAPLO—I'm just going to say the old law firm as a defendant, which may require some action by the receiver. These parties

> agree that it should be closed as soon as possible."

In accordance with their agreement, Brad's attorneys drafted a written settlement agreement and mutual release that incorporated the terms of the mediated agreement and then presented the draft to Brian for signature. On October 13, 2015, Brad filed a motion to enforce the settlement agreement, asking the court to order that Brian sign the written agreement. On October 16, 2015, Brian filed a separate motion to enforce the terms of the settlement agreement and terminate the receivership, or in the alternative to stay the receivership. Brian complained that after the July 16, 2015, settlement agreement was reached, Brad filed a claim against AAPLO for indemnity in *Consolver II*. Brian alleged that because Brad was aware of that case prior to agreeing to release all claims against the receivership on July 16, 2015, Brad breached the terms of the settlement agreement and his claim for indemnity should be rejected.

***2** The district court held a hearing on October 29, 2015, regarding the competing motions and heard argument from the parties on issues pertaining to the interpretation of the settlement agreement. The court ultimately allowed Brad to make an indemnity claim against AAPLO in *Consolver II* and ordered the receiver to oversee that litigation. The court then granted Brad's motion to enforce the settlement agreement. Noting several objections, Brian signed the written settlement agreement on November 12, 2015. Relevant to the sole issue on appeal, the written agreement stated:

> "8. CLOSING OF THE RECEIVERSHIP. The Receivership shall be closed as soon as practicable. It is understood that a suit has recently been filed in which the RECEIVER has been named as a defendant, which may require some action by the RECEIVER."

On December 8, 2015, the district court entered a journal entry dismissing the parties' claims against each other with prejudice. The order stated: "[T]his action shall remain open until the Receiver, David Rapp, winds up the affairs of Affiliated Attorneys of Pistotnik Law Offices, P.A., and provides his final report to the Court pursuant to K.S.A. 17–6808."

On February 11, 2016, Brian filed a motion to terminate the receivership. The district court heard argument on the motion on February 24–25, 2016, along with other issues pertaining to the ongoing wind up of AAPLO. On March 31, 2016, the court issued an order in which it denied the motion to terminate the receivership, but strictly limited the receiver's work. The order stated, in relevant part:

> "2. At the time of the hearing, there were four cases outstanding for AAPLO: *Consolver I*, *Consolver II*, and two *Hernandez* cases, all involving attorneys' liens. There is a potential for future litigation concerning these cases. The Receiver does not believe the receivership needs to stay open for these cases. The Court shares that observation and notes that Brian Pistotnik made a very fair point when he indicated that four or five years from now there may be liability for the corporation and we do not need to keep a receiver open for those purposes.
>
> "3. The Receiver does believe, however, as does the Court, that the receivership needs to remain open to complete the 2015 taxes and may need to stay open for the 2016 taxes.
>
> "4. The Court's primary concern about closing the receivership is that throughout the life of this case, the Court had concluded that the matter was resolved. However, such closure never came to fruition. The Court is mindful of the expenses to the parties that a receivership creates. The Court is equally mindful that much of these expenses are the result of issues raised by the parties to the Receiver.
>
> "5. The Receiver has performed admirably, and the Court has no concerns about the work done by the Receiver.
>
> "6. The Receiver is to complete the work necessary for the 2015 taxes. Once those tax returns are filed, the Court orders that the Receiver shall not work this case in any further manner without further Court order (with the exception of 2016 taxes, as discussed below). The Court will consider any motion allowing the Receiver to work the case filed by the parties or the Receiver for future actions. Absence of issuance of such an order, there is not to be any further work on the receivership. The Court cautions the parties that it reserves the right to assess the cost of future work done by the Receiver to the party seeking the Receiver's involvement from this point forward. The Receiver may work the receivership concerning 2016

AAPLO taxes without further order of the Court. Once the 2016 taxes are paid, it is the Court's intention to close the receivership. The Court is not terminating and winding up the Receivership at this time, but is limiting its future work as outlined above.

***3** "IT IS SO ORDERED."

Brian timely appealed the district court's order on April 15, 2016.

After the district court's March 31, 2016, order in this case, Rapp, in his capacity as receiver of AAPLO, was served with a counterclaim in the *Hernandez* lawsuit. On August 11, 2016, Rapp filed a motion in the district court seeking authorization to participate in the defense of the *Hernandez* litigation asserted against AAPLO. The district court granted the motion and authorized Rapp "to participate in the defense of the above identified Counterclaim, but direct[ed] that the Receiver minimize his participation to the extent reasonably possible." The order also provided that the parties could terminate the receivership as matters progressed "only if both parties consent."

ANALYSIS

Motion to terminate receivership

Brian argues the district court erred when it denied his motion to terminate the AAPLO receivership, citing two reasons the receivership should have been be closed. First, he argues the parties agreed to terminate the receivership and the court erred in failing to enforce that agreement. Second, he contends that under the facts and circumstances of this case, there was no reason for the court to keep the receivership open. In response to Brian's argument, Brad contends the agreement did not require the district court to immediately close the receivership, the court had discretion to keep the receivership open, and there are pending matters for the receiver to address before the receivership may be completed.

When a corporate entity is dissolved, the district court may, upon application, appoint a receiver of the corporation. K.S.A. 17–6808. The receiver's duties are defined by statute:

> "[T]o take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation." K.S.A. 17–6808.

The powers of the receiver continue "as long as the court shall think necessary for the purposes aforesaid." K.S.A. 17–6808.

This court reviews the district court's decisions regarding the appointment and retention of a receiver for abuse of discretion. See *Insche v. Mid–Continent Development Co.*, 94 Kan. 370, 382, 146 P. 1014 (1915) (retention of receiver reviewed for abuse of discretion); see also *City of Mulvane v. Henderson*, 46 Kan. App. 2d 113, 118, 257 P.3d 1272 (2011) (appointment of receiver reviewed for abuse of discretion). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable or when the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances. *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009); *Rose v. Via Christi Health System, Inc.*, 276 Kan. 539, Syl. ¶ 1, 78 P.3d 798 (2003).

> ***4** "Under an abuse of discretion standard, a district court's decision is protected if reasonable persons could differ upon the propriety of the decision, as long as the discretionary decision is made within and takes into account the applicable legal standards." *Harrison v. Tauheed*, 292 Kan. 663, Syl. ¶ 2, 256 P.3d 851 (2011).

The burden of showing an abuse of discretion is on the party claiming error. *Miller v. Glacier Development Co., LLC*, 284 Kan. 476, 498, 161 P.3d 730 (2007).

Brian first argues that the district court abused its discretion by failing to enforce the parties' settlement agreement, which he contends primarily required closing the receivership. Brad contends that Brian overstates the nature of the parties' agreement with respect to the termination of the receivership and that the district court is in any case not bound by the parties' agreement to terminate the receivership.

Brian makes two conflicting contract interpretation arguments. First, he urges us to look to the plain language of the verbal agreement and written agreement and contends "both agreements clearly state that the parties agreed to close the receivership." Alternatively, Brian argues that the termination provision in the written agreement is ambiguous because it fails to clearly define when and how the receivership will be closed, and such an ambiguity should

be resolved against Brad since his attorneys drafted that agreement. The interpretation of a written instrument is a question of law, over which this court exercises unlimited review. *Prairie Land Elec. Co–Op. v. Kansas Elec. Power Co–Op.*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). "Whether a written instrument is ambiguous is a matter of law subject to de novo review." *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 921, 46 P.3d 1120 (2002).

> "The primary rule in interpreting written contracts is to ascertain the intent of the parties. If the terms of the contract are clear, there is no room for rules of construction, and the intent of the parties is determined from the contract itself. [Citation omitted.] ... Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning. [Citation omitted.] Put another way: 'Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.' [Citation omitted.] Before a contract is determined to be ambiguous, the language must be given a fair, reasonable, and practical construction. [Citation omitted.]" *Liggatt*, 273 Kan. at 921.

The intent of the parties can be determined from the plain language of the agreements. The verbal agreement states that "[t]he receivership will be closed as soon as possible." Similarly, the written agreement provided that "[t]he Receivership shall be closed as soon as practicable." The agreements plainly did not require immediate termination of the receivership.

The language "as soon as possible" and "as soon as practicable" does not render the provision ambiguous, as the meaning of those provisions is not doubtful or contradictory. See *Liggatt*, 273 Kan. at 921. The context of the agreement is an ongoing wind up of a corporation. Looking at the provisions themselves, they contemplated that the receiver had pending responsibilities prior to winding up AAPLO: the verbal agreement stated "[t]here's been a lawsuit filed recently naming ... the old law firm as a defendant, which may require some action by the receiver," and the written agreement stated "[i]t is understood that a suit has recently been filed in which the RECEIVER has been named as a defendant, which may require some action by the RECEIVER." The provisions did not contemplate immediate termination but anticipated that the receiver would have to wind up the outstanding litigation.

***5** Because the provisions are not ambiguous, it is not proper to interpret the provision against the drafter of the agreement. See *Thoroughbred Associates, LLC v. Kansas City Royalty Company, LLC*, 297 Kan. 1193, 1206, 308 P.3d 1238 (2013) ("When ambiguity appears, the language is interpreted against the party who prepared the instrument."). In any case, the written agreement simply formalized the parties' earlier verbal agreement, and the two provisions are almost identical. There is no reason for this court to interpret the meaning of the agreement to terminate the receivership against Brad.

As Brad contends, the district court is not bound by the agreement of the parties to terminate a receivership, even if that is what the parties agreed. Indeed, the receiver serves at the discretion of the court. The receivership may continue "as long as the court shall think necessary" to do all acts that might be done by the corporation necessary for the final settlement of unfinished business of the corporation. K.S.A. 17–6808; see also *Shaw v. Robison*, 537 P.2d 487, 490 (Utah 1975) ("A receivership is an equitable matter and is entirely within the control of the court. The fact that the parties requested a termination of the matter in the midst of the proceedings does not compel the court to 'about face' and cease all matters instanter.").

> "The decision on whether to terminate a receivership turns on the facts and circumstances of each case. In determining whether to continue a receivership or discharge the receiver, the court will consider the rights and interests of all parties concerned and will not grant an application for discharge merely because it is made by the party at whose instance the appointment was made. Similarly, the fact that the parties request a termination of receivership in the midst of the proceedings does not compel the court to cease all matters instantly though a court may agree to discharge a court-appointed receiver upon the agreement of all parties." 65 Am. Jur. 2d Receivers § 146.

The district court did not abuse its discretion in denying Brian's motion to terminate the receivership based on the parties' agreement that the receivership would be terminated as soon as possible.

In his next argument, Brian points to several facts and circumstances that he argues required the receivership to be terminated. First, he alleges the settlement agreement resolved all outstanding issues with the wind up of AAPLO —how the receiver would handle AAPLO's assets and debts, how the parties would pay the expenses of filing tax returns, and how the parties would divide expenses and recovery regarding the *Consolver I* case. Second, he notes that the receiver admitted he was not actively involved in *Consolver*

I and *Consolver II* and that the parties could file the taxes on their own if the court relieved him of his duties. Finally, Brian argues the continuation of the receivership is depleting AAPLO's assets which would otherwise be distributed to the shareholders. In short, Brian alleges that the purpose of the receivership is complete, and the district court abused its discretion in keeping it open. He argues that a receiver is not necessary for the filing AAPLO's taxes, which is a function performed by AAPLO's accountant.

Brian acknowledges that the receiver was named on behalf of AAPLO as a counterclaim defendant in *Hernandez* after the district court's March 31, 2016, order, and the court has approved the receiver to oversee that litigation. Although Brian asserts his malpractice insurer is handling the defense of the case, he fails to acknowledge that the receivership is the only entity that can act on behalf of AAPLO as a dissolved corporation. As such, the receiver must not only communicate with the attorneys representing AAPLO in the *Hernandez* litigation but also is solely responsible for making decisions on the corporation's behalf to resolve that claim.

***6** The district court exercised its discretion to deny Brian's motion to terminate the receivership after taking into consideration the facts and circumstances Brian raises now on appeal. The court's March 31, 2016, order denying Brian's motion to terminate the receivership stayed the receiver's work except to complete the work necessary for the filing of AAPLO's 2015 and 2016 taxes. The court specified that the limitation on the receiver's work was in response to concerns about expenses incurred by continuing the receivership. The court specifically noted its agreement with Brian's position that the receivership did not need to remain open indefinitely to handle any future litigation filed against AAPLO. The court provided a method for the receiver to be involved in unforeseen issues that may arise during the wind up of the corporation but only upon application to the court and permission granted.

The district court has discretion to continue the receivership "as long as the court shall think necessary" for the receiver to complete its work. K.S.A. 17–6808. The powers of the receiver include "all ... acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation." K.S.A. 17–6808. Filing AAPLO's 2016 taxes to complete the wind up of the corporation is squarely within the receiver's powers. At the time of the district court's order, the final wind up of the corporation was not complete. The district court was not "beyond the limits of permissible choice under the circumstances" of this case. See *Rose*, 276 Kan. 539, Syl. ¶ 1.

The district court's decision was made within the applicable legal standards. See *Harrison*, 292 Kan. 663, Syl. ¶ 2. Reasonable persons could agree that the receivership should have been continued on a limited basis so that the receiver could oversee filing of the 2016 taxes and could be available to take care of any unresolved issue that arose as the wind up was completed. As such, the district court's decision to deny Brian's motion to terminate the receivership and to maintain the receivership in a limited fashion through the filing of the 2016 taxes was not an abuse of discretion.

Indemnity claim

Brian contends that Brad breached the terms of the settlement agreement by making a claim against the receivership for indemnity in the *Consolver II* lawsuit. On appeal, Brian asks us for an order prohibiting Brad from making additional claims against the receivership. Because Brian appeals only from the district court's decision to deny his motion to terminate the receivership, we lack jurisdiction to consider the indemnity issue he now raises. See *State v. Herman*, 50 Kan. App. 2d 316, 327, 324 P.3d 1134 (2014) ("An appellate court may not properly exercise jurisdiction over an appeal that has not been taken in conformity with that statutory grant."). As we stated in our order dated June 16, 2016: "This appeal is limited to the question of whether the district court erred by refusing to wind up the receivership. Under K.S.A. 2015 Supp. 60–2102(a)(3), this is the only statutory jurisdiction which exists."

Affirmed.

All Citations

394 P.3d 902 (Table), 2017 WL 2210776

2022 WL 2357395
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

VOTEAMERICA, et al., Plaintiffs,
v.
Brad RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, et al., Defendants,
and
Republican National Committee, et al., Intervenor Defendants.

CIVIL ACTION NO. 1:21-CV-01390-JPB
|
Signed June 30, 2022

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ORDER

J. P. BOULEE, United States District Judge

1 Before the Court is VoteAmerica, Voter Participation Center ("VPC") and Center for Voter Information's ("CVI") (collectively "Plaintiffs") Motion for Preliminary Injunction ("Motion"). ECF No. 103. After due consideration of the briefs, accompanying evidence and oral argument, the Court finds as follows:

I. BACKGROUND

A. Procedural History

Plaintiffs challenge certain provisions of Georgia Senate Bill 202 ("SB 202") on First Amendment grounds. SB 202 governs election-related processes and was signed into law by Governor Brian Kemp on March 25, 2021.

On April 7, 2021, Plaintiffs filed suit against Brad Raffensperger, in his official capacity as the Georgia Secretary of State; Rebecca Sullivan, in her official capacity as the Vice Chair of the State Election Board; and David Worley, Matthew Mashburn and Anh Le, in their official capacities as members of the State Election Board (collectively "State Defendants").[1] The Court permitted the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee and Georgia Republican Party, Inc. (collectively "Intervenor Defendants") to intervene in this action.

Both State Defendants and Intervenor Defendants moved to dismiss Plaintiffs' Complaint, but the Court denied the motions on December 9, 2021. Discovery opened thereafter and is ongoing.

On April 26, 2022, Plaintiffs filed the instant Motion, asking the Court to enjoin the following three provisions of SB 202: (1) the Prefilling Provision, (2) the Anti-Duplication Provision and (3) the Disclaimer Provision (collectively the "Ballot Application Provisions"). The challenged provisions pertain to the distribution of absentee ballot application forms by third parties.

Briefing on the Motion closed on June 6, 2022, and the parties presented oral argument and evidence on June 9 and 10, 2022.

B. The Parties

VoteAmerica is a nonpartisan, nonprofit organization whose mission is to "engage eligible voters throughout the country in the electoral process, with an emphasis on voting absentee." ECF No. 103 at 7; *see also* McCarthy Decl. ¶ 2, ECF No. 103-4. VoteAmerica provides online resources for voting, including an absentee ballot application tool. The tool allows voters to submit their personal information online and receive a prefilled absentee ballot application form that they can complete and send to their local election office. McCarthy Decl. ¶ 7, ECF No. 103-4.

VPC and CVI are also nonpartisan, nonprofit organizations. Lopach Decl. ¶¶ 2-3, ECF No. 103-3. Their mission is to "encourage the political participation of historically underrepresented groups" by providing members of those groups with voter resources, including vote-by-mail information. ECF No. 103 at 8; Lopach Decl. ¶¶ 2-7, ECF No. 103-3. Their core message is that "absentee voting is reliable and trustworthy," ECF No. 103 at 13; *see also* McCarthy Decl. ¶¶ 2-5, ECF No. 103-4; Lopach Decl. ¶¶ 7-10, ECF No. 103-3, and that "all eligible voters should participate in the political process," ECF No. 103 at 18. VPC and CVI further their mission in part by sending absentee ballot application forms to prospective voters. ECF No. 103 at 18.

***2** Prior to the enactment of SB 202, Plaintiffs could send prospective voters an unlimited number of absentee voter application forms. VPC and CVI prefilled the absentee ballot applications with prospective voters' personal identification information, such as name and address, before sending the applications to the voters. Tr. 43:21-44:3, June 9, 2022, ECF No. 129 (hereinafter "Tr. Day 1"). VPC and CVI obtained this information from the state's voter registration records. *Id.* The package mailed to prospective voters included cover information that urged the recipients to vote absentee. ECF No. 103 at 19. For example, cover letters exclaimed that the recipients' votes matter and that voting by mail "is EASY." *Id.*

VPC and CVI contend that, based on their experience and research, voters are more likely to return the ballot application form when it is prefilled with their personal information, and the applications are less likely to be rejected by election officials for scrivener errors, illegible handwriting, etc. Tr. 65:8-66:1, Day 1.

C. The Ballot Application Provisions [2]

The Ballot Application Provisions changed Georgia law regarding the distribution of absentee ballot application forms by third parties.

1. The Prefilling Provision

The Prefilling Provision provides that "[n]o person or entity ... shall send any elector an absentee ballot application that is prefilled with the elector's required information." O.C.G.A. § 21-2-381(a)(1)(C)(ii). Failure to comply with this provision could result in misdemeanor or felony charges. *See id.* §§ 21-2-598, 21-2-562(a).

VPC and CVI seek an injunction against the enforcement of the Prefilling Provision because they argue that it "restricts the content of [their] communications; interferes with their models for voter engagement, assistance, and association; and curtails the most effective means of conveying their speech." ECF No. 103 at 14. They explain that prospective voters are more likely to return ballot application forms that are prefilled, and those application forms are less likely to be rejected by election officials. Therefore, the prohibition on sending prefilled forms diminishes the effectiveness of their work. [3]

2. The Anti-Duplication Provision

The Anti-Duplication Provision states that "[a]ll persons or entities ... that send applications for absentee ballots to electors in a primary, election, or runoff shall mail such applications only to individuals who have not already requested, received, or voted an absentee ballot in the primary, election, or runoff." O.C.G.A. § 21-2-381(a)(3)(A). According to VPC and CVI, this provision requires them to compare their mail distribution lists with the most recent information available from the Secretary of State's office and cull from their mailing lists the names of electors who have already requested, been issued or voted an absentee ballot. McCarthy Decl. ¶¶ 25-30, ECF No. 103-4; Lopach Decl. ¶¶ 51-60, ECF No. 103-3. Failure

to comply with the Anti-Duplication Provision may result in fines of up to $100 "per duplicate absentee ballot application," O.C.G.A. § 21-2-381(a)(3)(B), and criminal penalties, including confinement of up to twelve months, *see id.* §§ 21-2-598, 21-2-603, 21-2-599. However, the statute provides a safe harbor for any entity that "relied upon information made available by the Secretary of State within five business days prior to the date" the applications were mailed. *Id.* § 21-2-381(a)(3)(A).

***3** VPC and CVI challenge the Anti-Duplication Provision because they contend that it is "logistically impossible" to remove duplicates from the voter roll and print and mail applications within the five-day safe harbor. ECF No. 103 at 11; *see also* Lopach Decl. ¶¶ 33, 56, ECF No. 103-3. They explain that during the 2020 election cycle, they mailed more than eleven million absentee ballot applications in up to five waves, Tr. 38:4-10, Day 1, and preparation for each bulk mailing typically required several weeks of lead time, Lopach Decl. ¶¶ 33, 56, ECF No. 103-3.

VPC and CVI insist that it is equally untenable to cull duplicates after the packages are printed because that task would entail manually searching up to two million mailers stored on pallets to identify and remove packages addressed to voters who have already requested, been issued or voted an absentee ballot. Tr. 61:10-62:9, Day 1. They underscore that this task is even more daunting because the mailers are arranged by zip code and postal carrier route, rather than in alphabetical order.[4] *Id.* at 61:24-62:2.

Additionally, VPC and CVI assert that removing mailers from a completed print run will likely result in increased mailing rates because the rates are tiered according to the size of the batch, and certain bulk discounts may no longer apply. *Id.* at 62:10-14.

Given these logistical difficulties, VPC and CVI intend to send only one wave of mailers this election cycle as close as possible to August 22, 2022, which is the first day that voters may request a ballot application form. *Id.* at 63:2-10. They argue that, even though voter communications are "less effective earlier in an election season" and sending "multiple waves increase[s] the effectiveness of their communications," ECF No. 103 at 12; *see also* Lopach Decl. ¶¶ 34, 54, ECF No. 103-3, this course of action is necessary to avoid sending duplicate forms in violation of the Anti-Duplication Provision and incurring the concomitant fines, Tr. 63:15-64:2, Day 1.

In sum, VPC and CVI conclude that the Anti-Duplication Provision will "force [them] to drastically alter their civic engagement communications in Georgia in 2022."[5] ECF No. 103 at 11.

3. The Disclaimer Provision

The Disclaimer Provision mandates that "[a]ny application for an absentee ballot sent to any elector ... shall utilize the form of the application made available by the Secretary of State and shall clearly and prominently disclose on the face of the form" the following language (the "Disclaimer"):

> This is NOT an official government publication and was NOT provided to you by any governmental entity and this is NOT a ballot. It is being distributed by [insert name and address of person, organization, or other entity distributing such document or material].

O.C.G.A. § 21-2-381(a)(1)(C)(ii). Failure to include this Disclaimer may result in criminal penalties. *Id.* §§ 21-2-598, 21-2-603, 21-2-599.

Plaintiffs challenge the Disclaimer Provision on two grounds. First, they contend that the first statement of the Disclaimer ("[t]his is NOT an official government publication") is factually inaccurate because the ballot application form onto which Plaintiffs must affix the Disclaimer is indeed the official ballot application form promulgated by the Georgia Secretary of State. In Plaintiffs' view, the form ***is*** an "official government publication," *see* Tr. 66:14-67:9, Day 1, and stating to the contrary is "wrong, false, misleading and a lie," *id.* at 143:18.[6]

***4** Second, Plaintiffs assert that the third statement of the Disclaimer ("this is NOT a ballot") is confusing, and the Disclaimer's overall successive use of the capitalized word "NOT" portrays Plaintiffs as an "untrusted source." *Id.* at 66:17. Plaintiffs reason that the language will discourage recipients from using the application forms, *id.* at 145:1-21, or from voting at all, *id.* at 66:14-67:9. Plaintiffs therefore conclude that the Disclaimer Provision renders their efforts

less effective and detracts from their mission.[7] *See id.* at 66:14-67:9.

During oral argument, Plaintiffs clarified that at this stage of the litigation, they wish to focus on the first and third statements in the Disclaimer: "[t]his is NOT an official government publication" and "this is NOT a ballot." *Id.* at 219:1-221:8, Day 2. They maintain that the Court may enjoin the enforcement of these statements, leaving the remainder of the Disclaimer intact.

D. State Defendants' Justifications for the Challenged Provisions

State Defendants argue that the Ballot Application Provisions are justified because they were enacted in response to the numerous complaints State Defendants received from the public regarding absentee ballot applications sent by third-party organizations. *See* ECF No. 113 at 8. Some complaints concerned (i) applications prefilled with incorrect voter information; (ii) receipt of duplicate application forms; (iii) confusion over whether the applications were ballots or whether recipients of multiple applications could cast more than one vote; (iv) the identity of the sender of the application forms; and (v) whether recipients were required to return the forms. *Id.* at 8-10. State and county election officials spent a significant amount of time fielding calls from the public regarding these concerns. Tr. 43:20-44:1, Day 2.

Apart from the specific complaints, some recipients completed and returned the ballot application forms even though they did not intend to vote absentee. ECF No. 113 at 9. This caused election officials to divert finite resources to process redundant applications or to cancel them on election day when voters who had inadvertently submitted an absentee ballot application form arrived to vote in person. *Id.*

State Defendants assert that the Ballot Application Provisions were enacted to address these issues: the Prefilling Provision was designed to address the issue of incorrectly prefilled applications; the Anti-Duplication Provision was designed to minimize voter confusion and the administrative disruption caused by duplicate absentee ballot application forms sent by third parties; and the Disclaimer Provision was designed to address overall voter confusion and the resulting burdens on election officials. *Id.* at 10-11.

***5** With respect to the first statement of the Disclaimer ("[t]his is NOT an official government publication"), State Defendants maintain that they intended to communicate to application recipients that they are not required to complete and return the forms they receive. Tr. 42:7-43:7, Day 2. State Defendants assert that the third statement of the Disclaimer ("this is NOT a ballot") aimed to address the common misimpression that the form is a ballot. *See id.* at 44:5-45:1.

II. DISCUSSION

A. Preliminary Injunction Standard

A plaintiff seeking preliminary injunctive relief must show the following:

> (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Sofarelli v. Pinellas Cnty., 931 F.2d 718, 723-24 (11th Cir. 1991) (quoting *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983)). "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establish[es] the burden of persuasion as to each of the four prerequisites." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (internal punctuation omitted) (quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). Granting a preliminary injunction is thus the exception rather than the rule. *See id.*

1. Likelihood of Success on the Merits

A plaintiff seeking preliminary injunctive relief must show a substantial likelihood that he will ultimately prevail on the merits of his claim. *Sofarelli*, 931 F.2d at 723. This factor is generally considered the most important of the four factors, *see Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir.

1986), and failure to satisfy this burden—as with any of the other prerequisites—is fatal to the claim, *see Siegel*, 234 F.3d at 1176.

Because Plaintiffs contend that the Ballot Application Provisions infringe on their freedom of speech and expression, the Court begins its analysis of this prong with a general overview of the available First Amendment protections.

The First Amendment provides that Congress "shall make no law ... abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."[8] U.S. Const. amend. I. As reflected in the text of the amendment, the First Amendment guarantees not only freedom of speech, *see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988), but also "the right of citizens to associate ... for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997).

First Amendment protection of speech "includes both the right to speak freely and the right to refrain from speaking at all." *McClendon v. Long*, 22 F.4th 1330, 1336 (11th Cir. 2022) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Protection of associational rights turns on "collective effort" with others "in pursuit of a wide variety of ... ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

***6** Importantly, First Amendment protections exist against the reality that "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358. When election regulations are in tension with constitutional rights, the United States Supreme Court requires lower courts to balance the character and magnitude of the asserted injury against the state's justifications for imposing the election rule. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). This approach is commonly referred to as the "*Anderson-Burdick*" framework, named after *Anderson* and *Burdick v. Takushi*, 504 U.S. 428 (1992), where the Supreme Court reiterated and refined the standard it first enunciated in *Anderson*.

The *Anderson-Burdick* framework is, however, inapplicable where the election statute directly regulates core political speech and does not merely "control the mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). If the regulation at issue directly controls speech, courts must employ whatever level of scrutiny corresponds to the category of speech. *See id.* at 345-46.

In accordance with the foregoing principles, the decision process this Court must use to evaluate Plaintiffs' claims requires the Court to consider (i) what category of speech is at issue here;[9] (ii) what protections are available for the category of speech and what level of scrutiny or analytical framework applies; (iii) whether the Ballot Application Provisions implicate that category of speech; (iv) whether the *Anderson-Burdick* framework or some other level of scrutiny is appropriate; and (v) whether the provisions ultimately pass muster under the applicable framework or level of scrutiny. Therefore, the Court finds it helpful to structure its analysis around these questions.

a. What Category of Speech Is at Issue; What Protections Are Available; and Whether the Ballot Application Provisions Implicate That Category of Speech

The First Amendment protects several categories of speech and expression, and the Supreme Court's decisions in this area have created a "rough hierarchy" of available protections. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992). "Core political speech occupies the highest, most protected position" in the hierarchy, while obscenity and fighting words receive the least protection. *See id.* Other categories of speech rank somewhere between these poles. *See id.*

The Court's analysis will address only the following categories of speech, which are relevant to the arguments raised in this case: core political speech, expressive conduct, associational rights and compelled speech.

i. Core Political Speech

The Supreme Court has found that "interactive communication concerning political change ... is appropriately described as 'core political speech.' " *Meyer v. Grant*, 486 U.S. 414, 422 (1988). In *Meyer*, the Supreme Court was asked to decide whether the circulation of a petition

constituted core political speech and therefore was afforded the highest level of protection under the First Amendment. *Id.* at 416. The Court reasoned that circulating a petition necessarily "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. This, "in almost every case[, would] involve an explanation of the nature of the proposal and why its advocates support it." *Id.* As such, a restriction limiting who could circulate petitions would impede political expression and limit the quantum of speech available on the topic of the petition. *Id.* at 422-23. The Supreme Court therefore determined that the statute restricted core political speech and "trenche[d] upon an area in which the importance of First Amendment protections is 'at its zenith.' " *Id.* at 425. The Court emphasized that the state's burden to justify the law in that circumstance was "well-nigh insurmountable." *Id.*

***7** In short, the Supreme Court's First Amendment jurisprudence defines core political speech as the discussion of public issues and the exchange of ideas for bringing about political and social change and reserves the highest level of protection for such speech. *See McIntyre*, 514 U.S. at 346. Thus, a law that burdens core political speech is subject to strict scrutiny and will be upheld "only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347.

Here, Plaintiffs argue that their application distribution program constitutes core political speech because the application forms are "characteristically intertwined" with the pro-absentee voting message in the accompanying cover information. ECF No. 103 at 18 (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). Plaintiffs conclude that the Ballot Application Provisions directly regulate their core political speech by restricting to whom and the manner in which they can distribute ballot application packages.

State Defendants counter that Plaintiffs' advocacy occurs only through the cover information included with the ballot application forms, not through the ballot applications themselves. ECF No. 113 at 13. State Defendants contend that the Ballot Application Provisions do not regulate Plaintiffs' cover information and concern only whether the forms can be prefilled with voters' personal information, how the voter roll may be used to identify potential recipients and what information must be included in the required Disclaimer affixed to the form. *See id.* at 14-15.

Plaintiffs' argument that their application distribution program constitutes core political speech does not square with the line of cases that the Supreme Court has ruled implicates political speech. For example, both *Meyer* and *Buckley v. American Law Constitution Foundation, Inc.*, 525 U.S. 182 (1999), which Plaintiffs cite, involved circulating petitions expressing a desire for political change. The Supreme Court concluded that the circumstances in *Meyer* involved core political speech because the act of circulating a petition necessarily requires a discussion of the nature of the proposal, the merits of the proposed change and why advocates support it. *See* 486 U.S. at 421; *see also Buckley*, 525 U.S. at 199 (noting the substantial nature of communications between petition circulators and their targets).

In contrast, distributing forms prefilled with a prospective voter's own personal information and the ability to send an essentially unlimited number of forms to a prospective voter do not require the type of interactive debate and advocacy that the Supreme Court found constituted core political speech in *Meyer*.

Moreover, Plaintiffs are not prohibited from engaging in any of the persuasive speech regarding absentee voting that is reflected in their cover communication. To the contrary, they can engage in those communications as often as—and in whatever form—that they desire.

As State Defendants point out, the Prefilling and Anti-Duplication Provisions simply prohibit Plaintiffs from inserting personal identification information on applications and from sending applications to prospective voters who have already requested or received one. These actions relate to the administrative mechanisms through which eligible voters request and receive an absentee ballot. The actions do not embody core political speech.

Plaintiffs' reliance on *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), is similarly misplaced. The ordinance in that case prohibited charitable organizations from soliciting donations if they did not use at least seventy-five percent of the donations " 'directly for the charitable purpose of the organization.' " *Id.* at 622 (citation omitted). The Supreme Court's finding that the ordinance restricted core political speech was based in part on the "reality" that on-the-street or door-to-door solicitations are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Id.* at 632.

***8** *Schaumburg* is different from the circumstances here because the cover information and application forms that Plaintiffs send are not inextricably linked or "characteristically intertwined." Each can exist and be sent without the other. Since the Ballot Application Provisions do not restrict Plaintiffs from sending their cover information, they are not restricted from sharing their pro-absentee voting message.

For these reasons, the Court finds that Plaintiffs have not shown that the Ballot Application Provisions restrict core political speech.

ii. Expressive Conduct

Although the First Amendment, on its face, forbids only the abridgment of "speech," the Supreme Court has recognized that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope' " of First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). To make this determination, the Supreme Court looks at whether the plaintiff intended " 'to convey a particularized message' " ***and*** whether it is likely that " 'the message would be understood by those who viewed it.' " *Id.* (quoting *Spence*, 418 U.S. at 410-11).

The Supreme Court has classified a range of activities as expressive conduct. *See, e.g., Spence*, 418 U.S. at 409 (superimposing a peace sign on a flag to convey the message that America stood for peace); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (engaging in a sit-in demonstration to protest segregation); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (contributing funds to a political campaign). While "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), Supreme Court precedent is clear that First Amendment protection extends only to conduct that is "***inherently*** expressive." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) (emphasis added).

Indeed, the Supreme Court has rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court explained in *Rumsfeld* that "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, 547 U.S. at 66.

Rumsfeld involved a challenge to a statute that penalized schools for refusing to allow United States military recruiters to interview on their campuses due to the military's policy on homosexuals serving in the military. *Id.* at 51. The Supreme Court found that the schools' prohibition of military recruiters was not inherently expressive because an observer would not know whether the recruiters were interviewing off campus due to personal preference, lack of space or some other innocuous reason. *Id.* at 66. The Court pointed out that the necessity of "explanatory speech" to elucidate why military recruiters were absent from campus was "strong evidence" that the speech was not "so inherently expressive" as to qualify for First Amendment protection. *Id.* In other words, the "expressive component of [the] ... school's actions [was] not created by the conduct itself but by the speech that accompanie[d] it." *Id.*

The *Rumsfeld* opinion relied in significant part on the analysis in *O'Brien*, where the Supreme Court recognized that some forms of symbolic speech warrant First Amendment protection. *See* 391 U.S. at 376. In *O'Brien*, the plaintiff burned his Selective Service registration certificate on the steps of a courthouse to communicate his antiwar beliefs. *See id.* at 369. Although the Supreme Court did not decide whether the plaintiff's conduct constituted expressive conduct protected by the First Amendment, it dismissed the argument that conduct is necessarily protected if the actor intends to express an idea. *See id.* at 376.

***9** In short, conduct that lacks inherent expression is not transformed into protected First Amendment speech merely because it is combined with another activity that does involve protected speech. When conduct is deemed sufficiently expressive and thereby deserving of First Amendment protection, the state's asserted interest in regulating the conduct is subject to "the most exacting scrutiny." *Johnson*, 491 U.S. at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

Here, Plaintiffs maintain that mailing absentee voter application packages is inherently expressive conduct protected by the First Amendment. ECF No. 103 at 19. They argue that this conduct personifies political advocacy

of a controversial viewpoint that "absentee voting is safe, accessible, and beneficial." *See id.* at 19.

While State Defendants concede that Plaintiffs' cover information may fairly be described as political advocacy, they disagree that the distribution of ballot application forms is expressive conduct. *See* ECF No. 113 at 15.

Intervenor Defendants additionally contend that the conduct of sending an application form is not expressive because it is not likely that the recipient will understand Plaintiffs' message. ECF No. 114 at 12. Intervenor Defendants insist that most recipients will view the application package as any other mass mailing that arrives in their mailboxes or possibly perceive other messages, including a conclusion that they are being targeted because they may be more likely to vote for a given candidate. *See id.*

As an initial matter, the Court finds that Plaintiffs' conduct in distributing applications is clearly distinguishable from conduct such as burning a flag and participating in a demonstration sit-in, which the Supreme Court has explicitly found to embody expressive conduct.

Further, this Court finds that combining speech (in the cover information) with the conduct of sending an application form, as Plaintiffs do here, is not sufficient to transform the act of sending the application forms into protected speech. Plaintiffs' pro-absentee voting message is not necessarily intrinsic to the act of sending prospective voters an application form. As Intervenor Defendants suggest, without the accompanying cover information, the provision of an application form could mean a number of things to a recipient. For example, some voters likely perceived the state's decision to send absentee ballot applications to all eligible voters during the 2020 primary elections, Tr. 63:14-16, Day 2, as merely a convenience offered to citizens in light of the pandemic. This Court cannot say that the state's conduct in sending those forms would necessarily have been understood as communicating a pro-absentee voting message.

As in *Rumsfeld*, the expressive component of sending application packages in this case is not created by the conduct itself but by the included cover information encouraging the recipient to vote. The necessity of the cover message is "strong evidence" that the conduct of sending an application form is not so inherently expressive as to qualify for First Amendment protection.

Based on the foregoing analysis, the Court finds that Plaintiffs have not shown that the act of sending ballot application packages is expressive conduct subject to First Amendment protections. [10]

iii. Associational Rights

***10** The First Amendment protects the "right to associate with others" for a variety of purposes. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Such protection exists because the "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also NAACP v. Button*, 371 U.S. 415, 430 (1963) (recognizing "the kind of cooperative, organizational activity" that arises from an association formed " 'for the advancement of beliefs and ideas' " (quoting *Patterson*, 357 U.S. at 460)).

Opinions in cases like *Roberts, Patterson* and *Button* demonstrate that the cornerstone of associational rights is cooperative advocacy. The Supreme Court has therefore refused to recognize associational rights where the parties were strangers to one another and were not members of a particular organization. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (finding that the hundreds of teenagers who patronized a dance hall on a certain night did not have expressive associational rights because they were not members of an organization; they did not engage in the type of collective effort that typically supports associational rights; and most were just strangers who were willing to pay a fee for admission).

The right to associate for expressive purposes is also not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see also Buckley*, 424 U.S. at 25 (stating that "significant interference" with associational rights may be constitutional "if the [s]tate demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms" (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975))).

The record here shows that Plaintiffs send application forms to strangers whose information they obtain from the state's

voter roll. While it is undisputed that Plaintiffs' overall program involves advocacy work, there is no evidence of the type of two-way engagement that characterizes cases like *Button*.

The circumstances here are more akin to those in *Stanglin*, where the Supreme Court declined to find associational rights for strangers who merely patronized a dance club and were not engaged in any type of joint advocacy. 490 U.S. at 24-25.

Accordingly, the Court finds that Plaintiffs have not shown that the Ballot Application Provisions restrict their associational rights.

iv. Compelled Speech [11]

First Amendment protection of speech encompasses "the decision of both what to say and what ***not*** to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). For example, in *McClendon v. Long*, a Georgia sheriff placed signs in the front yards of registered sex offenders (without their consent and despite their objections) warning the public not to trick or treat at the home. 22 F.4th 1330, 1333-34 (11th Cir. 2022). Because the sheriff used private property to disseminate "his own ideological message," the Eleventh Circuit Court of Appeals found that the signs were a "classic example of compelled government speech" prohibited by the First Amendment. *Id.* at 1337.

***11** Similarly, in *National Institute of Family and Life Advocates v. Becerra* (hereinafter "*NIFLA*"), the Supreme Court found that the State of California improperly compelled a crisis pregnancy center to speak by requiring it to notify patients of alternate reproductive services such as abortion, even though such services were antithetical to its mission. 138 S. Ct. 2361, 2371 (2018).

In these cases, the courts focused in part on the fact that the compelled messages altered the content of the plaintiffs' speech and forced them to convey a message that they would not otherwise communicate. Therefore, the statutes were subject to heightened scrutiny. *See, e.g., McClendon*, 22 F.4th at 1338 (concluding that the compelled signs at issue were subject to strict scrutiny review and would be constitutional only if they represented a "narrowly tailored means of serving a compelling state interest").

However, the state's burden of proof appears to be lower in cases involving compelled disclaimers. In the campaign finance context, the Supreme Court has stated that disclaimer requirements are subject to only exacting scrutiny review. *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010); *see also Riley*, 487 U.S. at 798 (finding that a state statute compelling disclosure of information was subject to "exacting First Amendment scrutiny"). Thus, a disclaimer "may burden the ability to speak" so long as it has a "substantial relation" to a "sufficiently important" government interest. *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). The level of scrutiny is lower because a "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.

In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court recently confirmed that the exacting scrutiny standard is applicable in election-related cases outside the campaign finance disclosure context. 141 S. Ct. 2373, 2383 (2021). The Court clarified that under this standard, a "substantial relation" between the statute and the government's interest "is necessary but not sufficient." *Id.* at 2384. The challenged rule must also "be narrowly tailored to the interest it promotes, even if [the rule] is not the least restrictive means of achieving that end." *Id.*

Further, a perfect fit between the state's interest and the regulation is not required. *Id.* Rather, a court must look for reasonableness and scope " 'in proportion' " to the interest served. *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014)).

In this case, Plaintiffs contend that the Disclaimer Provision violates their First Amendment rights by compelling them to convey a misleading message to prospective voters. ECF No. 103 at 33. They also assert that the Disclaimer is an improper content-based regulation of speech. *Id.* As such, they argue that the Disclaimer Provision should be subject to strict scrutiny.

State and Intervenor Defendants agree that the Disclaimer Provision impacts Plaintiffs' First Amendment speech rights in some way, but they dispute the significance of the impact. State Defendants argue that the Disclaimer Provision does not require Plaintiffs to change their message or to convey the government's own message. Therefore, State Defendants analogize the Disclaimer Provision to those found in campaign disclosure cases, wherein the Supreme Court has applied only exacting scrutiny review.

***12** Intervenor Defendants, on the other hand, argue that the Disclaimer Provision only requires Plaintiffs to include specified language on the ballot application forms they distribute. Intervenor Defendants therefore conclude that the Disclaimer Provision is an election regulation, not a regulation of speech, and the *Anderson-Burdick* framework should apply.

The Court agrees that the manner of speech compelled in this case (factual information regarding the nature of the application form) is quite different from the manner of speech compelled in cases like *McClendon* (a sheriff's yard sign warning the public not to trick or treat at a registered sex offender's home) and *NILFA* (a statute requiring a crisis pregnancy center to disclose the availability of alternate reproductive care, including abortions). In *McClendon* and *NILFA*, the plaintiffs were required to convey the government's own message, which directly altered whatever message the plaintiffs communicated or would have refrained from communicating. It therefore makes sense that the Supreme Court employed a heightened level of scrutiny in those cases.

In this case, pretermitting Plaintiffs' contention that the first statement of the Disclaimer is factually incorrect, the Disclaimer says nothing (whether complementary or contradictory) regarding the pro-absentee voting message Plaintiffs wish to convey. It simply presents information designed to reduce voter confusion regarding absentee ballot applications provided by third parties and to relieve election officials of the administrative burdens resulting from such confusion.

For these reasons, the Court finds that the Disclaimer constitutes compelled speech but is more analogous to the disclaimers in *Citizens United* and *Americans for Prosperity*. Therefore, it would be subject to exacting scrutiny if that type of analysis were applicable here.

The Court will next address whether the *Anderson-Burdick* framework or the First Amendment levels of scrutiny apply here.

b. Whether the *Anderson-Burdick* Framework Is Appropriate Here

The Supreme Court has recognized that " 'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). But election schemes "inevitably affect[ ]" First Amendment rights. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The Supreme Court therefore developed the *Anderson-Burdick* framework as a balancing test to manage these competing interests and rights. *See Burdick*, 504 U.S. at 433. It explained that subjecting every voting regulation to strict scrutiny "would tie the hands of [s]tates seeking to assure that elections are operated equitably and efficiently." *Id.*

The *Anderson-Burdick* framework requires courts to carefully weigh the relative interests of the state in imposing election-related regulations against the alleged constitutional injury and the extent to which it is necessary to burden the plaintiff's rights. *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. Courts routinely employ the *Anderson-Burdick* framework to decide First Amendment challenges to election laws. *See, e.g., Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-15 (1986) (employing the *Anderson-Burdick* framework to decide a freedom of association challenge to an election law governing voter access to a primary election); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (relying on the *Anderson-Burdick* framework to decide a challenge to a rule governing nomination of candidates); *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014) (reiterating, in the context of a ballot access case, that First Amendment challenges to a state's election laws are governed by the *Anderson-Burdick* framework); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1289 (N.D. Ga. 2020) (stating, in reference to a ballot application notification statute, that courts apply the *Anderson-Burdick* framework "[w]hen considering the constitutionality of an election law").

***13** The Supreme Court has, however, declined to apply the *Anderson-Burdick* framework in cases that concern "pure speech" as opposed to the "mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). In *McIntyre*, the Supreme Court concluded that the exacting scrutiny level of review applied to the plaintiff's challenge of a statute that prohibited the anonymous distribution of documents designed to influence voters in an election. *Id.* at 347. The Court reasoned that the *Anderson-Burdick* framework did not apply because the

ordinance did not merely impact speech incident to the ordinance's regulation of election procedure. *Id.* at 345-46. It directly regulated "the essence of First Amendment expression." *Id.* at 347. Therefore, the ordinance fell outside the scope of the *Anderson-Burdick* framework.

It is important to note that no bright line separates an election regulation that incidentally burdens speech and one that directly regulates speech. Courts must conduct a case-specific inquiry to determine whether the facts support an *Anderson-Burdick* analysis or are more appropriate for a traditional First Amendment scrutiny test.

Given the Court's conclusion above that Plaintiffs have not shown that the Prefilling and Anti-Duplication Provisions restrict speech, the Court finds that those provisions are more appropriately categorized as rules governing the "mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. As such, the Court will employ the *Anderson-Burdick* framework to determine Plaintiffs' challenge to the Prefilling and Anti-Duplication Provisions.

The Court likewise finds that the *Anderson-Burdick* framework applies to Plaintiffs' challenge to the Disclaimer Provision. Although, as the Court found above, the Disclaimer Provision burdens Plaintiffs' First Amendment rights, the Disclaimer Provision is not a direct regulation of speech similar to the ordinance in *McIntyre*. It does not prohibit Plaintiffs from conveying their message and merely establishes what information Plaintiffs must affix to application forms they send to third parties. Accordingly, the Disclaimer Provision can more appropriately be described as a regulation that governs the mechanics of an election process.

The Court now considers whether the Ballot Application Provisions are constitutional under the *Anderson-Burdick* analysis.

c. Evaluation of the Ballot Application Provisions Under the *Anderson-Burdick* Framework

The *Anderson-Burdick* framework requires courts to: (i) "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (ii) "identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule"; (iii) "determine the legitimacy and strength of each of those interests"; and (iv) "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. The analysis is not a "litmus-paper test" and instead requires a " 'flexible' " approach. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Anderson*, 460 U.S. at 789). Any "[d]ecision ... is very much a matter of degree, very much a matter of considering the facts and circumstances behind the law, the interests which the [s]tate claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer*, 415 U.S. at 730 (internal citations and punctuation omitted). Ultimately, "there is 'no substitute for the hard judgments that must be made.' " *Anderson*, 460 U.S. at 789-90 (quoting *Storer*, 415 U.S. at 730).

If a court finds that a plaintiff's rights "are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when [the law] imposes only reasonable, nondiscriminatory restrictions ..., the [s]tate's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal citations and punctuation omitted); *see also Common Cause*, 554 F.3d at 1354-55 (stating that where the burden is slight, "the state interest need not be 'compelling ... to tip the constitutional scales in its direction' " (alteration in original) (quoting *Burdick*, 504 U.S. at 439)). Thus, the balancing test ranges from strict scrutiny to rational basis analysis, depending on the circumstances of the case. *See Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992).

***14** In any event, even a slight burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Lastly, "a [s]tate may not choose means that unnecessarily restrict constitutionally protected liberty." *Anderson*, 460 U.S. at 806 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)).

i. The Prefilling and Anti-Duplication Provisions

Since the Court has already found that the Prefilling and Anti-Duplication Provisions do not implicate Plaintiffs' First Amendment rights, it follows that the magnitude of the alleged injury is not severe. As a result, State Defendants have to show only that the provisions are reasonable and supported by important regulatory interests.

The record shows that the government designed the Prefilling Provision to address the concerns and confusion that arise when voters receive prefilled applications with incorrect identification information.

The Anti-Duplication Provision was designed to address the confusion and administrative burden that occurs when voters receive multiple ballot applications. Rather than altogether prohibit the distribution of application forms by third parties, as some states have done, the Georgia legislature struck a balance. It required third parties to consult the state voter roll and refrain from sending duplicate applications to voters who have already requested, received or voted an absentee ballot. The legislature also provided a safe harbor for entities who relied on information made available by the Secretary of State within five business days prior to the date the applications were mailed.

To be sure, avoiding voter confusion and administering effective elections are important regulatory interests. *See Storer*, 415 U.S. at 730 (recognizing the importance of fair, honest and orderly elections). Thus, State Defendants have demonstrated sufficient reasons for enacting the Prefilling and Anti-Duplication Provisions.

Moreover, the Prefilling and Anti-Duplication Provisions appear to be reasonable and nondiscriminatory methods of achieving the state's goals. This is especially true where State Defendants elected not to impose an outright ban on third-parties' distribution of absentee ballot applications and instead chose to regulate only the specific parts of the process that are problematic.

In all, it is not the role of the courts to dictate election policy to legislatures. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Elected officials should be permitted leeway to address potential deficiencies in the electoral process, so long as the response is reasonable and does not impose a severe burden on constitutionally protected rights. *See id.*

Based on the foregoing analysis under the *Anderson-Burdick* framework, the Court finds that Plaintiffs have not shown a substantial likelihood of success on the merits of their claim as to the Prefilling and Anti-Duplication Provisions.

ii. The Disclaimer Provision

As stated above, the parties agree that the Disclaimer Provision impacts First Amendment speech rights in some way. Thus, this Court must balance the magnitude of the injury against the strength of the government's interests as well as consider the extent to which the Disclaimer is necessary.

***15** Plaintiffs contend that the Disclaimer Provision compels them to disseminate false or, at the very least, misleading information, which portrays them as an untrusted source and is contrary to the pro-absentee voting message that they wish to convey. Plaintiffs argue that this type of forced communication strikes at the heart of First Amendment freedoms and warrants the highest level of scrutiny.

On the other hand, State Defendants argue that Plaintiffs have not demonstrated the alleged harm of the Disclaimer. State Defendants also point to the voter confusion and burden on election officials that result from third-party ballot application programs, including questions regarding the source of the forms and the misperception that the application form is itself a ballot or that recipients must return it. State Defendants assert that the Disclaimer Provision addresses these issues by affirmatively stating that (i) the application form is not published by the government, (ii) it is not provided by the government and (iii) it is not a ballot.

It is undisputed that the last two statements of the Disclaimer are true: a third party is responsible for sending the application form to the prospective voter, and the application form is the mechanism for requesting a ballot, not a ballot itself. [12] The main dispute relates to whether the first statement is true, false or otherwise confusing.

The Court understands Plaintiffs' argument that the Disclaimer is internally inconsistent. Specifically, Plaintiffs point out that the application form made available on the Secretary of State's website bears the Secretary of State's seal and includes a header that states it is an "Application for Official Absentee Ballot" at the same time that the first statement of the Disclaimer declares that the form is "NOT an official government publication." If a recipient understands "government publication" to refer to the source of the form, *see Official Publication*, Black's Law Dictionary (11th ed. 2019) ("book, pamphlet, or similar written statement issued by a government authority"), then the first statement of the Disclaimer will be confusing. [13]

Although the Court finds that a recipient could reasonably be confused by the Disclaimer, the record currently does not establish what harm may result from this potential confusion. Dr. Green's cursory survey of only five potential Georgia voters found one person who was reluctant to use the form based on the Disclaimer. Tr. 225:18-226:5, Day 1. That person initially stated that he would complete the form, and only after the researcher prodded him with a question regarding the specifics of the Disclaimer did he say that he would throw the form in the "trash." *Id.* at 226:1. In any event, Dr. Green conceded that this type of qualitative study cannot establish what proportion of absentee ballot applications would not be returned as a result of the Disclaimer. *See* ECF No. 103-5 at 8.

***16** Balancing this lack of evidence of significant harm against the state's compelling interests in avoiding voter confusion and ensuring the smooth administration of its elections, the Court finds that the Disclaimer Provision is justified. Although the Court's conclusion could change after a trial on the merits where the burden will be different and the evidence will be more developed, the Court cannot at this time (and on this record) find that Plaintiffs have shown a substantial likelihood of success on the merits of their claim with respect to the first statement of the Disclaimer. [14]

d. Whether and How the First Amendment Scrutiny Levels Apply

As the Court's analysis herein indicates, the *Anderson-Burdick* framework applies to each of the Ballot Application Provisions. However, Plaintiffs argue that the *Anderson-Burdick* framework is inapplicable here, and they urge the Court to employ the strict scrutiny test across the board. *See* ECF No. 103 at 32-33.

Intervenor Defendants advocate for rational basis review with respect to the Prefilling and Anti-Duplication Provisions but contend that the *Anderson-Burdick* framework is appropriate with respect to the Disclaimer Provision. *See* ECF No. 114 at 11, 16.

State Defendants agree with Intervenor Defendants that rational basis review should apply to the Prefilling and Anti-Duplication Provisions but argue in their brief that exacting scrutiny is the correct standard to apply to the Disclaimer Provision. *See* ECF No. 113 at 26.

To account for these disagreements, the Court will also consider the constitutionality of the Ballot Application Provisions under the scrutiny levels applicable to First Amendment cases.

i. The Prefilling and Anti-Duplication Provisions

Because the Court found that the Prefilling and Anti-Duplication Provisions do not regulate speech, those provisions are subject only to rational basis review. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that if a law does not burden a fundamental right, it will survive scrutiny as long as "it bears a rational relation to some legitimate end").

"A statute is constitutional under rational basis scrutiny so long as 'there is ***any reasonably conceivable state of facts*** that could provide a rational basis for the' statute." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)). Such "leniency ... provides the political branches the flexibility to address problems incrementally and to engage in the delicate line-drawing process of legislation without undue interference from the judicial branch." *Haves v. City of Miami*, 52 F.3d 918, 923-24 (11th Cir. 1995). Courts must accept the "legislature's generalizations" regarding the impetus for a statute "even when there is an imperfect fit between means and ends" or when the statute causes " 'some inequality.' " *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

The Court's *Anderson-Burdick* framework analysis herein demonstrates that the Prefilling and Anti-Duplication Provisions are rational and reasonable in light of the state's goals of avoiding voter confusion and reducing the administrative burden on election officials. The Prefilling and Anti-Duplication Provisions thus survive rational basis scrutiny.

Accordingly, even assuming that the First Amendment scrutiny levels are relevant here, Plaintiffs have not shown a substantial likelihood of success on the merits of their claim as to the Prefilling and Anti-Duplication Provisions.

ii. The Disclaimer Provision

***17** Given the Supreme Court's guidance in *Americans for Prosperity* that "compelled disclosure requirements are

reviewed under exacting scrutiny" and that such analysis is applicable in other election-related settings, the Court will employ exacting scrutiny review here. 141 S. Ct. 2373, 2383 (2021).

"[E]xacting scrutiny requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest' and that the disclosure requirement be narrowly tailored to the interest it promotes." *Id.* at 2385 (citation omitted) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). Narrow tailoring in this context means that the government must endeavor to balance the restriction against the interests it seeks to advance, even if the solution it selects is not the least restrictive means of achieving the end. *See id.* at 2384. Thus, " 'fit matters.' " *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014)). The fit need not be " 'perfect' " or represent " 'the single best disposition,' " but it must be " 'reasonable,' " and its scope must be " 'in proportion to the interest served.' " *Id.* (quoting *McCutcheon*, 572 U.S. at 218).

Based on the Court's above *Anderson-Burdick* analysis of the Disclaimer Provision, the Court concludes that there is a "substantial relation" between the language of the Disclaimer and the state's interests in reducing voter confusion and ensuring the effective and efficient administration of its elections. The fit is certainly not perfect, as evidenced by the potentially confusing information conveyed by the first statement of the Disclaimer. Also, the Disclaimer is likely not the narrowest possible solution to the problems the state identified.

Nevertheless, whatever infirmities may exist in the government's choice of words, Plaintiffs have not sufficiently demonstrated that the alleged harm of the Disclaimer is so severe as to outweigh the compelling interests at stake. Indeed, as the Court highlighted above, Plaintiffs' evidence regarding the Disclaimer's impact is unpersuasive. Consequently, the Court finds that the Disclaimer reasonably fits and is in proportion to the interests its serves. The Disclaimer Provision therefore survives exacting scrutiny review.

In sum, whether the Court employs the *Anderson-Burdick* framework or the First Amendment exacting scrutiny test, it remains that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their Disclaimer Provision claim.

2. Irreparable Harm

"A showing of irreparable injury is 'the sine qua non of injunctive relief.' " *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). Even if a plaintiff can show a substantial likelihood of success on the merits, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id.*; *see also City of Jacksonville*, 896 F.2d at 1285 (declining to address all elements of the preliminary injunction test because "no showing of irreparable injury was made").

The irreparable injury sufficient to satisfy the burden "must be neither remote nor speculative, but actual and imminent." *Siegel*, 234 F.3d at 1176 (quoting *City of Jacksonville*, 896 F.2d at 1285). In the context of constitutional claims, it is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also City of Jacksonville*, 896 F.2d at 1285-86 (noting that an ongoing violation of First Amendment rights constitutes irreparable injury).

***18** In light of the Court's finding that Plaintiffs have not shown that they are substantially likely to succeed on the merits of their claims, the Court need not (and does not) address the irreparable injury prong of the preliminary injunction test. *See Siegel*, 234 F.3d at 1176 (stating that a preliminary injunction may not to be granted unless the movant clearly establishes "each of the four prerequisites").

3. Balance of the Equities and the Public Interest

The Court is likewise not required to address the balance of the equities and the public interest prongs of the preliminary injunction test but provides the following analysis as additional support for its finding here.

The balance of the equities and the public interest factors are intertwined in the context of an election because "the real question posed ... is how injunctive relief ... would impact the public interest in an orderly and fair election, with the fullest voter participation possible and an accurate count of the ballots cast." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018). Courts therefore consider these two

factors in "tandem." *See, e.g., id.* (merging the analysis of the third and fourth prongs of the preliminary injunction test); *see also Black Voters Matter Fund v. Raffensperger*, No. 1:20-CV-1489, 2020 WL 2079240, at *2 (N.D. Ga. Apr. 30, 2020) (same); *Martin v. Kemp*, No. 1:18-CV-4776, 2018 WL 10509489, at *3 (N.D. Ga. Nov. 2, 2018) (same).

The Court's analysis of the balance of the equities and public interest factors will focus on the considerations outlined in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The Supreme Court has recognized that while it would be "the unusual case" in which a court would not act to prevent a constitutional violation, "under certain circumstances, such as where an impending election is imminent and a [s]tate's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Although the election in *Reynolds* was not imminent, and that case does not necessarily have broad application to cases like the one at bar, *Reynolds* helped further the principle of exercising judicial restraint where an injunction could hamper the electoral process.

In subsequent opinions, the Supreme Court identified specific factors that could militate against granting election-related injunctive relief close to election day. For example, in *Fishman v. Schaffer*, the Court focused on factors such as unnecessary delay in commencing a suit and relief that "would have a chaotic and disruptive effect upon the electoral process" as grounds for denying a motion for injunctive relief close to an election. 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers).

This principle of restraint has continued to develop over the years, and the Supreme Court's opinion in *Purcell* is now frequently cited for the proposition that a court should ordinarily decline to issue an injunction—especially one that changes existing election rules—when an election is imminent. 549 U.S. at 5-6. The *Purcell* court reasoned that such a change could be inappropriate because it could result in "voter confusion and [the] consequent incentive to remain away from the polls." *Id.* at 4-5.

The Supreme Court has reiterated this directive on many occasions. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (finding that an injunction "at the last minute" would "violate *Purcell*'s well-known caution against federal courts mandating new election rules").

***19** Most recently, Justice Kavanaugh stated in a concurring opinion in *Merrill v. Milligan* that *Purcell* concerns can be overcome by establishing that

> (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). Considering the reasoning in *Purcell* and Justice Kavanaugh's opinion in *Merrill*, the Eleventh Circuit recently stayed an injunction in *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, 32 F.4th 1363, 1375 (11th Cir. 2022). The court's decision relied in part on the fact that voting in the next election was set to begin in less than four months and that the injunction implicated aspects of the election machinery that were already underway. *Id.* at 1371. The court also observed that "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Id.* (alteration in original) (quoting *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring)).

Plaintiffs are, however, correct that *Purcell* does not function as a bright line rule. *Cf. Riley v. Kennedy*, 553 U.S. 406, 426 (2008) (noting that "practical considerations ***sometimes*** require courts to allow elections to proceed despite pending legal challenges" (emphasis added)); *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, R., and Pryor, J., concurring) ("*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists."); *Nampby v. DeSantis*, 493 F. Supp. 3d 1130, 1141 (N.D. Fla. 2020) (noting that *Purcell* did not "create a per se rule" prohibiting the issuance of an

injunction against voting laws on the eve of an election). Rather, courts must engage with the facts and specific circumstances of the case to reach a decision. *See Purcell*, 549 U.S. at 4-5.

Here, State and Intervenor Defendants argue that the Court should withhold relief under *Purcell* because Plaintiffs unduly delayed in bringing the Motion.

Plaintiffs respond that they filed their Complaint close in time to the passage of SB 202, and the timing of their Motion makes sense within the procedural posture of this case—the Motion was filed after the Court's decision on State and Intervenor Defendants' motions to dismiss and after the parties had an opportunity to engage in some discovery. The Court notes that cases discussing undue delay in connection with the *Purcell* doctrine usually refer to the timing of the complaint. *See, e.g., Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

In any event, the key issue here is whether an injunction at this stage of the current election cycle would cause further voter confusion. SB 202 is already the law, and an injunction with respect to the Disclaimer Provision, for example, would not merely preserve the status quo. It would change the law while the election machinery is already grinding. Third parties who may not be aware of these proceedings are presumably already preparing to distribute ballot application forms bearing the current Disclaimer. A ruling requiring a different disclaimer could cause two different application forms to be in circulation. Prospective voters who receive both versions of the form could be confused by the conflicting statements. The Court is also mindful of unintended consequences of late-breaking changes to the law. *See League of Women Voters*, 32 F.4th at 1371.

***20** While the Court agrees that the *Purcell* consideration is arguably less significant in this case because the challenged provisions affect primarily back-of-the-house activity undertaken by third-party organizations, the Court finds that some risk does exist, and that risk indicates that the balance of the equities and the public interest weigh against entering a preliminary injunction in this case.

III. CONCLUSION

For all the reasons set forth in this opinion, Plaintiffs have not satisfied their burden on at least three of the four prongs of the preliminary injunction test (likelihood of success on the merits, balance of the equities and public interest). The Court did not reach the fourth prong (irreparable harm). Accordingly, the Court finds that a preliminary injunction is not warranted here. Plaintiffs' Motion (ECF No. 103) is **DENIED** in all respects.

SO ORDERED this 30th day of June, 2022.

All Citations

Slip Copy, 2022 WL 2357395

Footnotes

1 Pursuant to Federal Rule of Civil Procedure 25(d), State Election Board members Edward Lindsay (who succeeded Rebecca Sullivan), Sara Ghazal (who succeeded David Worley) and Janice Johnston (who succeeded Anh Le) were automatically substituted as Defendants in this action upon their appointments to the State Election Board.

2 VoteAmerica's claims regarding the Prefilling and Anti-Duplication Provisions appear to be moot for the purposes of this Motion. VoteAmerica initially believed that its operations would be impacted by the Prefilling and Anti-Duplication Provisions, but State Defendants confirmed during the preliminary injunction hearing that those provisions do not apply to VoteAmerica's absentee ballot application tool. Tr. 38:25-39:15, June 10, 2022, ECF No. 130 (hereinafter "Tr. Day 2").

3 Plaintiffs' expert, Dr. Donald P. Green, testified that "the net effect of [the Prefilling Provision] is that groups such as the Plaintiffs must waste money sending *more* unfilled forms in an attempt to generate the same number of vote-by-mail requests." ECF No. 103-5 at 9. During the preliminary injunction hearing, State

Defendants moved to exclude Dr. Green's opinions on the ground that they do not satisfy the Federal Rule of Evidence 702 standard for expert testimony. Tr. 205:7-12, Day 1; *see also* Tr. 215:21-216:7, Day 2. State Defendants' oral motion reiterated arguments that they mentioned in their brief. Because the arguments regarding the validity of Dr. Green's opinions have not been adequately developed for the Court, the Court defers ruling on State Defendants' motion to exclude. The Court considers Dr. Green's opinions only for the purposes of this Motion.

4 State Defendants, however, presented evidence that some of these difficulties could potentially be avoided by using a different vendor. *See, e.g.*, Tr. 138:5-12, Day 2.

5 Dr. Green opined that the Anti-Duplication Provision will "severely attenuate or altogether eliminate" Plaintiffs' absentee ballot application communications. ECF No. 103-5 at 11.

6 Contrary to Plaintiffs themselves, their expert testified that the portion of the Disclaimer stating that the application form is not an "official government publication" is "[t]rue." Tr. 215:23-216:51, Day 1. Dr. Green explained that the form Plaintiffs mail to prospective voters is "identical" to the official publication but that it is not the actual publication. *Id.* at 216:1.

7 Dr. Green opined that the Disclaimer would "likely ... create confusion among voters" and make prospective voters "reluctant to fill out an otherwise innocuous form." ECF No. 103-5 at 6, 7. He based his opinion in part on a qualitative semi-structured interview of five potential voters in Georgia and on his "decades" of experience "studying public opinion[,] ... conducting randomized trials and reading about randomized trials involving things like voter turnout and absentee voting or registration." Tr. 228:10-16, Day 1. While Dr. Green concedes that the type of qualitative study he employed to analyze the Disclaimer Provision cannot establish what proportion of absentee ballot applications would not be returned as a result of the Disclaimer, he emphasized that the study "clearly indicates" that the Disclaimer "can cause hesitancy to complete an otherwise acceptable form." ECF No. 103-5 at 8.

8 The First Amendment was made applicable to the states through the Fourteenth Amendment. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988).

9 The Court's reference to "speech" generally refers to First Amendment speech and association rights.

10 Implicit in this Court's finding that the Prefilling and Anti-Duplication Provisions do not restrict speech or protected conduct is the conclusion that they are likewise not content-based restrictions of speech. The Court therefore does not address Plaintiffs' argument in this regard.

11 It is clear that the Prefilling and Anti-Duplication Provisions do not compel Plaintiffs to convey any message, and Plaintiffs do not argue that those provisions compel speech. Therefore, the Court's compelled speech analysis applies only to the Disclaimer Provision.

12 Plaintiffs contend that the Secretary of State could easily include the third statement of the Disclaimer on the required application form if it desired to do so.

13 The Secretary of State's General Counsel had some concern regarding the clarity of this statement in the Disclaimer. Tr. 93:21-95:20, Day 2. He provided language for a bill that would have amended the Disclaimer to delete the statement, but the legislature did not pass the bill. *Id.* Also, Plaintiffs' own expert conceded that the statement is true, apparently based on the interpretation that the specific application provided by third parties is "identical" to but is not the actual government publication. Tr. 215:23-216:16, Day 1. The Court agrees that this is one plausible interpretation of the statement. *See Publication*, Merriam-webster.com,

https://www.merriam-webster.com/dictionary/publication (last visited June 27, 2022) ("the act or process of publishing"). The differing views underscore the potential for confusion here.

14 For the same reasons, the Court finds that Plaintiffs have not shown a substantial likelihood of success on the merits of their claim with respect to the third statement of the Disclaimer.

End of Document

2022 WL 2389566
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

VOTE.ORG, Plaintiff----Appellee,

v.

Jacquelyn CALLANEN, Et al. Defendants,

v.

Ken Paxton, In His Official Capacity as the Attorney General of Texas; Lupe C. Torres, In His Official Capacity as the Medina County Elections Administrator; Terrie Pendley, In Her Official Capacity as the Real County Tax Assessor-Collector, Intervenor Defendants—Appellants.

No. 22-50536

FILED July 2, 2022

Appeal from the United States District Court for the Western District of Texas, USDC No. 5:21-CV-649, Jason Kenneth Pulliam, U.S. District Judge

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Autumn Hamit Patterson, Robert E. Henneke, Texas Public Policy Foundation, Austin, TX, Chance Weldon, Austin, TX, Intervenor Defendants—Appellants Lupe C. Torres, and Terrie Pendley.

Before Jones, Duncan, and Engelhardt, Circuit Judges.

Opinion

Edith H. Jones, Circuit Judge:

***1** Vote.org sued several county election administrators seeking to enjoin enforcement of a recently enacted Texas Election Code provision that, in practice, makes useless the web application it developed to allow Texas voters to register electronically. The district court granted a permanent injunction, concluding that Vote.org adequately showed that the provision violates both the Civil Rights Act and the Constitution. The defendants seek a stay pending appeal from this court. We conclude that the defendants have met their burden for such extraordinary relief and exercise our discretion to GRANT a stay pending appeal.

I.

In virtually every state, those eligible to vote must register before casting a ballot. To register in Texas, applicants need only "submit an application to the registrar of the county in which the [applicant] resides." Tex. Elec. Code § 13.002(a). That application "must be in writing and signed by the applicant." Tex. Elec. Code § 13.002(b).

Applicants have several ways to "submit" their application to the county registrar. Most straightforwardly, an applicant may submit the application directly to the county registrar by personal delivery or mail. Tex. Elec. Code § 13.002(a). Texas also designates as certain governmental offices, such as the Department of Public Safety and public libraries, as "voter registration agencies" and requires them to accept and deliver completed applications to the county registrar. Tex. Elec. Code §§ 20.001, 20.035. Further, counties may appoint volunteer "deputy registrars" to distribute and accept applications on the county registrar's behalf. Tex. Elec. Code §§ 13.038, 13.041. If an applicant submits an incomplete voter registration application, then the county registrar will notify the applicant and allow ten days to cure the deficiency. Tex. Elec. Code § 13.073.

In 2013, the Texas Legislature passed, and the Governor signed, legislation that expanded an applicant's options for submitting a voter registration application. The legislation allowed an applicant to transmit a registration form to the county registrar via fax, so long as they delivered or mailed a hardcopy of the application to the registrar within four days of the fax transmission. 2013 Tex. Sess. Law Serv. 1178. The application is considered submitted to the registrar "on the date the [fax] transmission is received ...." *Id.* The requirement that an applicant submit a copy of by personal

delivery or mail within four days was codified at Tex. Elec. Code § 13.143(d-2).

Vote.org is a non-profit, non-membership organization that seeks to simplify and streamline political engagement by, for example, facilitating voter registration. In 2018, Vote.org launched a web application that purported to allow a person to complete a voter registration application digitally. A user need only supply the required information and an electronic image of her signature and the web application would assemble a completed voter registration application. The web application would then transmit the completed form to a third-party fax vendor, who would transmit the form via fax to the county registrar, and another third-party vendor, who would mail a hardcopy of the application to the county registrar.

***2** During the 2018 election cycle, Vote.org piloted its web application in Bexar, Travis, Cameron, and Dallas counties. Other counties rejected its invitation to participate. The pilot program was an unmitigated disaster. Because of its poor design, many of the voter registration applications assembled using the web application contained signature lines that were blank, blacked out, illegible, or otherwise unacceptable. Moreover, the web application failed to fax many of the voter registration applications to the relevant registrar's office.

After encountering difficulties with the pilot program, the Cameron County Elections Administrator sought the Secretary of State's guidance on whether Vote.org's web application complied with the Texas Election Code. Because applications submitted using the web application lacked an original, "wet" signature, the Secretary of State's office advised that those applications were incomplete. Consequently, any applicant who submitted a voter registration application using Vote.org's web application needed to be notified and given an opportunity to cure the deficiency in accordance with Tex. Elec. Code § 13.073. The Secretary of State later issued a public statement to the same effect. Vote.org notified users of its web application that their applications would not be processed unless they cured the signature defect. [1] Vote.org stated that it was "truly, deeply, sorry for [the] inconvenience."

Several years later, during the 2021 Legislative session, Texas passed House Bill 3107, which clarified several provisions in the Election Code. 2021 Tex. Sess. Law Serv. 1469. Critically, the bill amended Tex. Elec. Code § 13.143(d-2) to specify that for "a registration application submitted by [fax] to be effective, a copy of the original registration application containing the voter's original signature must be submitted by personal delivery or mail" within four days. *Id.*

Vote.org then brought this lawsuit under 42 U.S.C. § 1983 against four county election officials seeking to enjoin § 13.143(d-2)'s wet signature requirement. Specifically, Vote.org argues that the wet signature requirement violates § 1971 of the Civil Rights Act of 1964, codified at 52 U.S.C. § 10101(a)(2)(B), because it is immaterial to an individual's qualification to vote. Vote.org also contends that the wet signature requirement unduly burdens the right to vote in violation of the First and Fourteenth Amendments. Attorney General Paxton and others intervened to defend § 13.143(d-2)'s constitutionality. After extensive discovery, the defendants and Vote.org filed competing motions for summary judgment.

The district court denied the defendants' motion and granted Vote.org's. Echoing an earlier ruling on a motion to dismiss for lack of jurisdiction, the district court held that Vote.org had organizational and statutory standing. As to the merits, the district court concluded that the wet signature requirement violates § 1971 because an original, wet signature is "not material" to an individual's qualification to vote. Whether a registration form mailed to the county registrar's office after being faxed contains a wet signature, the district court noted, is distinct from the material requirement that the form be "signed by the applicant." Furthermore, the district court reasoned, Vote.org showed that the county registrars do not use the wet signatures for any purpose, only electronically stored versions of the signatures, and Texas law does not enumerate a wet signature as one of the qualifications for voter registration. The district court also held that the wet signature requirement violates the First and Fourteenth Amendments. Importantly, the district court concluded as a threshold matter that the wet signature rule implicates the right to vote. Then, the district court weighed "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State" and concluded that there was "no valid justification" for the burden. Ultimately, the district court granted a permanent injunction.

***3** The defendants sought a stay pending appeal, which the district court denied. The defendants now seek the same relief from this court. Based on the standard and reasons articulated below, we conclude the defendants have met their burden and are entitled to a stay pending appeal.

II.

To determine if a party is entitled to a stay pending appeal, this court considers "(1) whether the applicant has made a strong showing of likelihood to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of a stay will substantially injure other interested parties; and (4) where the public interest lies." *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761, 173 L.Ed.2d 550 (2009)). Addressing first the defendants' likelihood of success on the merits and then the other stay factors, we conclude that the defendants have met their burden. We therefore exercise our discretion in granting a stay pending appeal.

A.

The defendants contend that they are likely to succeed on the merits for three reasons: Vote.org lacks standing; the wet signature requirement (a) does not deny anyone the right to vote and (b) is material to determining whether an individual is qualified to vote; and the wet signature requirement does not burden the right to vote and, even if it does, that burden is minimal and outweighed by the State's interests. We address each argument in turn.

i.

First, the defendants contend that Vote.org lacks standing. Article III specifies that the judicial power of the United States extends only to "Cases" and "Controversies." U.S. CONST. art. III, § 2. Standing doctrine implements the case-or-controversy requirement by insisting that the plaintiff "prove that he has suffered a concrete and particularized [injury in fact] that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 570 U.S. 693, 704, 133 S. Ct. 2652, 2661, 186 L.Ed.2d 768 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)). An organization suing on its own behalf, as Vote.org is here, must satisfy the same standard. [2] *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010).

***4** Even assuming that Vote.org has shown organizational injury from the diversion of resources, the defendants argue that Vote.org lacks third-party standing. Vote.org's lawsuit, the defendants assert, does not seek to vindicate its own rights, only the rights of Texans not before this court. The defendants are, without question, correct that Vote.org invokes the rights of Texas voters and not its own—an organization plainly lacks the right to vote. A party must ordinarily assert only "his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Supreme Court crafted a prudential exception to the traditional rule against third-party standing where "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S. Ct. 564, 567, 160 L.Ed.2d 519 (2004) (citing *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L.Ed.2d 411 (1991)). Otherwise, the Supreme Court has "not looked favorably upon third-party standing." *Id.*

Vote.org asserts that it fits within the prudential exception to the rule against third-party standing. It posits that it has a close relationship with some unknown subset of Texas voters that may in the future submit their voter registration applications via fax using the Vote.org web application because their right to submit those applications free from the burden imposed by the wet signature requirement is inextricable from Vote.org's platform. Furthermore, Vote.org hypothesizes that individual voters injured by the wet signature requirement are hindered by financial constraints and justiciability problems in protecting their own rights. We disagree. Vote.org's relationship with prospective users is no closer than the hypothetical attorney-client relationship rejected as insufficiently close to support third-party standing in *Kowalski*. 543 U.S. at 130-31, 125 S. Ct. at 568 (concluding that a "future attorney-client relationship with as yet unascertained" criminal defendants is not only not a close relationship but "no relationship at all"). Indeed, Vote.org's CEO explained that the organization does not "assist people in registering to vote," instead it designed technology that allows users to "register themselves to vote." Moreover, there is little doubt that voters injured by the wet signature requirement could protect their rights—voters and associations representing those voters bring such lawsuits all the time. *See, e.g., Tex. Democratic Party v. Hughs*, 860 F. App'x 874 (5th Cir. 2021) (lawsuit brought by same group of attorneys challenging wet signature requirement on behalf of

associations with eligible voter members). If Vote.org cannot prove that it meets the requirements for third-party standing, as seems probable, then the defendants must prevail.

The defendants alternatively contend that even if Vote.org could fit within the exception to the general prohibition on third-party standing, § 1983 contains no exception that allows a plaintiff to invoke a third-party's rights and therefore Vote.org lacks statutory standing for want of an arguable cause of action. Statutory standing turns on "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-128 n.4, 134 S. Ct. 1377, 1387, 1387 n.4, 188 L.Ed.2d 392 (2014). Section 1983, the defendants point out, specifies that state actors who subject a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable *to the party injured* ...." 42 U.S.C. § 1983(emphasis added). Thus, the defendants emphasize, the text seemingly precludes an action premised on the deprivation of another's rights. And here there is little doubt that Vote.org's lawsuit is derivative in that sense: The substantive claims both hinge on allegations that the wet signature requirement unlawfully infringes Texans' right to vote.

***5** Vote.org retorts that the defendants' position is contradicted by the weight of precedent. Less clear is what precedent. Of the cases Vote.org cites, some involve organizations bringing § 1983 claims but, with two exceptions, none appear to involve an organization suing only on its own behalf based on injuries to a third parties.[3] The two cases where courts allowed an organization to sue under § 1983 based on the infringement of another's rights did so without discussing the issue. *See Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011); *Common Cause v. Thomsen*, No. 19-cv-323, ---- F.Supp.3d ----, 2021 WL 5833971 (W.D. Wis. Dec. 9, 2021). The defendants' textual argument is powerful and Vote.org's response weak.[4] Without an arguable cause of action, Vote.org lacks statutory standing and the defendants appear poised for merits success on this basis too.

ii.

Second, the defendants argue that Vote.org is unlikely to prevail on its § 1971 claim because (1) no voter is deprived of the opportunity to vote by virtue of the wet signature requirement and (2) the wet signature requirement is material to determining whether an individual is qualified to vote.[5] Section 1971 provides:

> No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper related to any application, registration, or other act requisite to voting, if such error or omission in not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).

***6** The defendants contend that enforcement of the wet signature rule does not result in anyone being deprived of the right to vote because the Texas Election Code confers a right to cure and allows other means of registration.[6] Under the wet signature rule, an application submitted via fax and mailed without a wet signature is incomplete and must be rejected. Tex. Elec. Code § 13.073 requires the county registrar to notify any applicant whose voter registration application is rejected, explain the reason for the rejection, and allow the applicant ten days to cure the defect. And an applicant has many other means of registering, by mail or personal delivery, for instance. Texas Elec. Code § 13.002(a). Vote.org argues that the opportunity to cure is beside the point because if the applicant who desires to submit her application via fax does not eventually comply with a wet signature requirement, then the voter will not be registered and, consequently, will not be able to vote. But under Vote.org's theory an individual's failure to comply with *any* registration requirement would deprive that person of the right to vote. That proves too much. Voters that submit their applications via fax and mistakenly mail a copy without a wet signature are given a second bite at the apple. Indeed, the county registrar is *required* to notify the applicant in short order and allow ten days to cure. What is more, no applicant *must* comply with the wet signature requirement—there are plenty of alternative means to register. Thus, it is hard to conceive how the wet signature rule deprives anyone of the right to vote.

Next, the defendants argue that the wet signature requirement is material in determining whether an individual is qualified to vote. To be qualified to vote in Texas, an individual must, among other things, be "a registered voter." Tex. Elec. Code § 11.002(a)(6). And to register to vote in Texas an individual must submit a written and signed "application to the registrar of the county in which the [individual] resides ... by personal delivery, by mail, or by [fax] in accordance with Sections 13.143(d) and (d-2)." Tex. Elec. Code § 13.002(a)-(b). Section 13.143(d-2), in turn, requires that a voter registration application submitted via fax be subsequently mailed with the applicant's original, i.e. wet, signature. Tex. Elec. Code § 13.143(d-2). Texas's approved voter registration application displays the State's voting requirements immediately above the signature box and also that giving false information to procure a voter registration is criminal perjury. Requiring a wet signature on a voter registration application submitted via fax, the defendants emphasize, therefore ensures that an applicant has read, understood, and attested that he meets the qualifications for voting. Thus, the defendants conclude, not only is the wet signature requirement material in the sense that it is one of the ways an individual becomes qualified to vote but it is also material in the sense that it deters fraud, as I explain in the next section.

Vote.org contests the wet signature rule's materiality by pointing out that several election administrators admitted in depositions that the rule serves no purpose related to determining an applicant's qualifications to vote. Indeed, Vote.org stresses, county registrars accept any voter registration application with a wet signature without comparing or otherwise inspecting the signature other than to ensure the signature is present. Vote.org does not, however, contest the materiality of Tex. Elec. Code § 13.002(b)'s general requirement that an application "must be in writing and signed by the applicant."

It seems to us that Vote.org's position is logically inconsistent. For one, it is unclear how its argument squares with § 1971's text. In Texas, an individual is qualified to vote only if she is registered and to register via fax she must comply with the wet signature rule. Tex. Elec. Code §§ 11.002(a)(6), 13.002(a). Thus, to be qualified to vote she must mail her application to the county registrar with a wet signature. Moreover, the text of Tex. Elec. Code §§ 13.002(a) and 13.002(b) suggest that the general requirement that an application be "signed by the applicant" is no more or less material under § 1971 than the requirement that an application submitted by fax be "in accordance with" the wet signature requirement. In short, the two requirements fall or stand together under § 1971. Vote.org cannot logically maintain that the one is valid and the other not.

*7 Because the defendants can show that Vote.org's § 1971 claim is unlikely to succeed, they have also shown a strong likelihood of success on this front.

iii.

Finally, the defendants contend that Vote.org is unlikely to succeed on its constitutional claim under the First and Fourteenth Amendments. "Where a state election rule directly restricts or otherwise burdens an individual's First [or Fourteenth] Amendment rights, courts apply a balancing test derived from two Supreme Court decisions," *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992). *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). In applying the *Anderson-Burdick* framework, this court "must weigh the character and magnitude of the asserted injury" to voting rights under the First and Fourteenth Amendments "against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 387-88 (quoting *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063, and *Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570). "State rules that impose a severe burden" on voting rights "must be 'narrowly drawn to advance a state interest of compelling importance.' " *Id.* at 388 (quoting *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063). By contrast, State rules that impose lesser burdens "trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' " *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 1370, 137 L.Ed.2d 589 (1997)).

The defendants assert that the wet signature rule imposes at most a *de minimis* burden on the right to vote. Drawing an analogy to *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020) ("*LULAC*"), the defendants posit that the wet signature requirement is part of the Texas Legislature's expansion of the means for voter registration. *Id.* at 144 (concluding that "one strains to see how [the voting provision at issue] burdens voting at all" because it is "part of the Governor's *expansion* of opportunities to case" a ballot). And any burden on the right to vote, the defendants contend, is mitigated by the availability of numerous other

ways to register. Furthermore, the defendants stress that the wet signature requirement advances Texas's interests in (1) guaranteeing that the applicant attests to meeting the State's voting qualifications and (2) helping to deter and detect voter fraud.

As it did before the district court, Vote.org contends that the defendants err in characterizing the wet signature rule as part of an expansion of voting rights. *LULAC* is distinguishable, Vote.org contends, because it addressed a challenge to voting provisions adopted in quick succession. Here, by contrast, Texas first offered registration via fax in 2013 but then restricted access to that method of registration by adopting the wet signature rule in 2021. As to the State's interests, Vote.org asserts that the defendants fail to offer a coherent explanation that justifies the burden the wet signature rule places on voters. Texas's asserted interest in guaranteeing that an applicant attests to meeting the qualifications to vote is belied by the fact that Texas allows residents to use imaged signatures in many other similarly important contexts. And that Texas might compare a voter registration form against later registration or ballots if their authenticity is in question hardly shows why a *wet* signature is required. Critically, the district court found that "[a]t no time is an original, wet signature used to conduct a voter-fraud investigation."

***8** For at least two reasons the defendants are likely to succeed on this balancing test. First, the defendants are almost certainly correct that the wet signature rule imposes at most a very slight burden on the right to vote. Indeed, "one strains to see how it burdens voting at all." *LULAC*, 978 F.3d at 144. The wet signature requirement does not burden the right to vote in toto, it only affects the small subset of voter registration applicants that elect to register via fax. And even for those applicants, the burden is small. Second, the State's asserted interests are surely adequate to justify the slight burden imposed by the wet signature rule. "Any corruption in voter registration affects a state's paramount obligation to ensure the integrity of the voting process and threatens the public's right to democratic government." *Voting for Am., Inc.*, 732 F.3d at 394. Physically signing a voter registration form and thereby attesting, under penalty of perjury, that one satisfies the requirements to vote carries a solemn weight that merely submitting an electronic image of one's signature via web application does not. Thus, it is almost unquestionable that the wet signature requirement helps deter voter registration fraud. Moreover, actual evidence of voter registration fraud "has never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration." *LULAC*, 978 F.3d at 147. Accordingly, the defendants have shown a likelihood of success on this issue.

B.

Having concluded that the defendants have shown a strong likelihood of success on the merits, we address the remaining *Nken* factors; namely, "whether the applicant will be irreparably injured absent a stay"; "whether issuance of the say will substantially injure the other parties interested in the proceeding"; and "where the public interest lies." *Nken*, 556 U.S. at 426, 129 S. Ct. at 1756.

The defendants easily satisfy their burden to show that they will be irreparably injured absent a stay. When a "State is seeking to stay a preliminary injunction, it's generally enough to say" that " '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.' " *Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (quoting *Maryland v. King*, 567 U.S. 1301, 1301, 133 S. Ct. 1, 3, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers)). So it is here. *See LULAC*, 978 F.3d at 149; *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020). Vote.org's contrary arguments are unavailing.

The remaining two factors also weigh in the defendants' favor. Issuing a stay pending appeal will not substantially injure either Vote.org or other interested parties (i.e. voters in the four counties where the district court's injunction applies) because Vote.org cannot register to vote and individuals seeking to register to vote can simply comply with the wet signature requirement or else register in another way. Moreover, a stay simply maintains the status quo since at least 2018, when the Texas Secretary of State clarified that wet signatures are required for voter registration applications submitted via fax. Finally, where "the State is the appealing party," as it is here, "its interest and harm merge with the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). A temporary stay will, at a minimum, minimize confusion among voters and county registrars by making voter registration law uniform throughout the state in the crucial months leading up to the voter registration deadline. That result is plainly within the public's interest.

III.

The defendants' emergency motion for stay pending appeal is therefore GRANTED.

All Citations

--- F.4th ----, 2022 WL 2389566

Footnotes

1 Several groups sued the Secretary of State, arguing that requiring a wet signature on a voter registration application violates the Constitution and § 1971 of the Civil Rights Act. *Tex. Democratic Party v. Hughs*, 860 F. App'x 874, 876 (5th Cir. 2021) (per curiam). This court dismissed that lawsuit, concluding that the Secretary of State is an improper defendant under *Ex parte Young.*

2 Organizations can satisfy the standing requirement under two theories, "appropriately called 'associational standing' and 'organizational standing.' " *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Organizational standing requires the organization to establish its own standing premised on a cognizable Article III injury to the organization itself. *Id.* By contrast, associational standing "is derivative of the standing of the [organization's] members, requiring that they have standing and that the interests the [organization] seeks to protect be germane to its purpose." *Id.* Here, Vote.org asserts only the former theory. (Because it is a non-membership organization, Vote.org cannot contend that it has associational standing.) We are dubious whether Vote.org can show an injury sufficient to claim organizational standing in light of, e.g., *El Paso Cnty. v. Trump*, 982 F.3d 332, 344-45 (5th Cir. 2020); *City of Kyle*, 626 F.3d at 238-39. We are also dubious that its claims satisfy the traceability and redressability prongs of organizational standing, but we leave these issues to the merits panel.

3 *See, e.g., Ass'n of Am. Physicians & Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 553 (5th Cir. 2010) (concluding that association "was entitled to claim associational standing on behalf of its members ...."); *Anderson v. Ghaly*, No. 15-cv-5120, 2022 WL 717842, at *6 (N.D. Cal. Mar. 10, 2022) (holding that organizations alleged facts sufficient for both associational and organizational standing); *Tex. Democratic Party v. Hughs*, 474 F.Supp.3d 849, 855-857 (W.D. Tex. 2020) (same), *rev'd on other grounds* 860 F.App'x 874 (5th Cir. 2021); *Mercado Azteca, L.L.C. v. City of Dallas*, No. 3:03-cv-1145, 2004 WL 2058791, at *6 (N.D. Tex. Sept. 14, 2004) (claim involving cognizable discrimination harm to entity).

4 What is more, this court's precedents may preclude § 1983 actions premised on injuries to third parties. *Shaw v. Garrison*, 545 F.2d 980, 983 n.4 (5th Cir. 1977) (noting that this is "not an attempt to sue under the civil rights statutes for deprivation of another's constitutional rights" and that "[s]uch suits are impermissible."), *rev'd on other grounds*, 436 U.S. 584, 98 S. Ct. 1991, 56 L.Ed.2d 554 (1978); *but see Church of Scientology v. Cazares*, 638 F.2d 1272, 1276-80 (5th Cir. 1981) (allowing organization to pursue § 1983 claim based on injuries to organization's members without substantive discussion).

5 The defendants additionally assert that § 1971 does not create an implied cause of action or a private right enforceable in a § 1983 suit. Courts are divided on this point. *Compare Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022) (concluding that § 1971 does secure a private right enforceable under § 1983), *and Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (same), *with McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (holding otherwise). Of course, even if § 1971 provides an enforceable private right to individuals that does not mean Vote.org may invoke that right. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L.Ed.2d 309 (2002) (noting that part of the inquiry to determine if a statute grants a right enforceable under § 1983 is "whether or not a statute 'confer[s] rights on a *particular class of persons*.' " (emphasis added, quoting *California v. Sierra Club*, 451 U.S. 287, 294, 101 S. Ct. 1775, 1779, 68 L.Ed.2d 101 (1981))). Because we

need not resolve this issue to grant the defendants' motion for a stay pending appeal, we leave it for the merits panel to consider in the first instance.

6 A plausible argument can be made that § 1971 is tied to only voter registration specifically and not to all acts that constitute casting a ballot. For example, if a voter goes "to the polling place on the wrong day or after the polls have closed," is that voter denied the right to vote under § 1971? *Ritter v. Migliori*, —— U.S. ——, 142 S. Ct. 1824, 1824, —— L.Ed.2d —— (2022) (Alito, J., dissenting from denial of application for stay). It cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under § 1971. Otherwise, virtually every rule governing how citizens vote would is suspect. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*

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EXHIBIT B

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

[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. 875, 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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