IN THE STATE COURT OF KANSAS
DISTRICT COURT OF DOUGLAS COUNTY

KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., LOUD LIGHT, DISABILITY RIGHTS CENTER OF KANSAS, DOROTHY NARY, MARTHA HODGESMITH, ROBERT MIKESIC, and BENJAMIN SIMONS, Plaintiffs, v. SCOTT SCHWAB, in his official capacity as the Kansas Secretary of State, and JAMIE SHEW, in his official capacity as Douglas County Clerk, Defendants.	Original Action No. DG-2025-CV-000206

PLAINTIFFS' OPPOSITION TO DEFENDANT SCHWAB'S MOTION TO DISMISS

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INTRODUCTION

Secretary of State Scott Schwab's motion to dismiss Plaintiffs' challenge to Senate Bill 4 ("SB 4")—which will require Kansas election officials to reject *all* ballots received after election day, even if voted and postmarked before—is remarkable in several ways. To start, it repeatedly pushes for standards that were considered and rejected by the Kansas Supreme Court just last year in a case challenging a different voting law, in which the Secretary was also the lead defendant. This Court, of course, must follow Kansas precedent. As a result, it may disregard much of the Secretary's motion, which is largely focused on attempting to convince the Court to adopt and apply other standards entirely. While the Secretary claims that his preferred standards are those used by federal courts, he misapplies those standards, too. In other words, under the appropriate application of *any* recognized standard, the Secretary's motion to dismiss must be denied.

The Secretary's federal preemption argument fares no better. A majority of states have laws that allow election officials to count mail ballots filled out by voters by election day but received by election officials sometime afterwards—many of which have been on the books for decades. Yet the Secretary argues that *all* of those laws are preempted by federal statutes that do nothing other than set a uniform federal election day. In reality, the federal election day statutes are entirely silent on the issue and—with a single exception that is notable not only for its diametrically different result, but its fatally flawed reasoning—every court to consider the issue has rejected the Secretary's argument. The solitary court to hold to the contrary did so only by ignoring the plain text of statutes, improperly construing federal law explicitly acknowledging and incorporating post-election day ballot receipt deadlines, and misreading the long and widespread history of states counting ballots received after election day. This Court should not adopt these indefensible errors.

The Secretary's motion is also completely divorced from the factual reality in Kansas.

Indeed, it is at odds even with the Secretary's own repeated—and recent—public statements about the disenfranchisement risk that Kansas voters face when they return their advance ballots by mail because of persistent and worsening issues with USPS delivery in the state. The three-day post-election grace period that was previously in place saved thousands of ballots from rejection—including, as the Secretary's Office reported to the Legislature earlier this year—2,100 votes that would have otherwise been thrown out in the 2024 general election. Yet, the Secretary now tells this Court that eliminating that safety valve will impose *no meaningful burden* on Kansas voters. This is not credible. But even more to the point, it is contradicted by the facts alleged in copious detail in the Amended Petition. At this stage, the Court must accept those allegations as true.

The Court should deny the motion.

BACKGROUND

I. Advance voting has a long history in Kansas, which for years has accepted mail ballots received within three days of the election, to avoid disenfranchising voters.

Kansas has long guaranteed its citizens the right to cast an advance ballot by mail. Am. Pet. ¶¶ 32-33. It is a right widely used and relied upon to participate in the franchise, with hundreds of thousands of Kansans using advance ballots to vote in recent elections. *Id.* ¶ 36. Initially, Kansas imposed an election day receipt deadline for advance ballots, discarding them if they arrived in the mail afterwards, even if cast by the voter by or before election day. *Id.* ¶ 37. But, in 2017, it revisited that position, recognizing that worsening postal delays meant that the election day receipt deadline was causing many lawful, qualified voters to have their ballots rejected. *See id.* ¶¶ 37-43. To address that problem, the Legislature enacted a law directing election officials to count advance ballots postmarked by election day as long as they were received by "the last delivery of mail" on the third day following the election. K.S.A. 25-1132(b). Backed by the support of then-Secretary of State Kris Kobach, the law was adopted nearly unanimously—with the Senate voting to pass it

40-0 and the House 123-1. Am. Pet. ¶ 2.

In the years since, postal delays in Kansas have only worsened. A 2024 USPS audit concluded that its Kansas-Missouri district was the third worst-performing mail district in the nation (out of fifty). *Id.* ¶ 59. USPS has closed processing centers in the state, limited weekend processing, and rerouted much of Kansas's mail to facilities in Texas, Nebraska, or Missouri. *Id.* ¶¶ 40-41. As a result, its on-time delivery rates in Kansas have plummeted: in the first quarter of 2025, *only 61 percent* of first-class mail that USPS anticipated would take three to five days to deliver was actually delivered within that timeframe—a decline from an already-low 78 percent just two years earlier. *Id.* ¶ 62. These delays led Secretary Schwab to quip in the lead-up to the 2024 elections that the "Pony Express is more efficient at this point" and to raise the alarm about ballots "failing to reach the county election office on time, even when voters have mailed them timely." *Id.* ¶¶ 63, 66. Defendant Douglas County Clerk Jamie Shew similarly remarked, "We often joke we could walk to people's houses faster than [a ballot] gets there by mail." *Id.* ¶ 72.

II. SB 4 eliminated Kansas's three-day grace period, imposing a strict election day receipt deadline.

The Legislature responded to this crisis, not by moving to protect voters against disenfranchisement, but by *repealing* the grace period entirely with SB 4. *Id.* ¶ 6; *see* 2025 Kan. Sess. Laws 33. Governor Kelly vetoed the bill, explaining that "[t]he three-day grace period . . . was a bipartisan solution approved by the Legislature in 2017 to address [mail] delays . . . particularly in rural areas. The goal was to ensure that all Kansans had their votes counted, no matter where they lived." Am. Pet. ¶ 95. She described SB 4 as "an attack on rural Kansans who want to participate in the electoral process guaranteed by our Constitution," and stated: "I will not sign legislation that deprives Kansans from having their vote counted." *Id.* The Legislature nevertheless overrode the veto. *Id.* ¶ 96.

When SB 4 goes into effect on January 1, 2026, election officials will be required to reject ballots cast by eligible voters and postmarked by election day, unless they are delivered by 7 p.m. on election day. *Id.* ¶ 6. The result will be that thousands of Kansans who timely vote their advance ballots will have them entirely discarded. In the 2020 general election, the Secretary's office reported that *over 32,000 ballots* arrived at county election offices during the three days after election day and were counted due to the then-existing grace period. *Id.* ¶ 3; *see also id.* ¶ 48 (in 2024 general election, 2,110 ballots were counted because they arrived in that period). Had SB 4 been the law, all of those ballots would have been rejected, and all of those voters disenfranchised.

Although all voters are vulnerable to disenfranchisement as a result of SB 4, certain types of voters are significantly more at risk. Rural voters' ballots have been more than twice as likely to arrive within the three days after election day than non-rural voters' ballots. *See id.* ¶ 87. Voters who are away from home, including many students, are often not able to appear in person to vote and their mail—both coming from and going to election officials—is more likely to be delayed. *Id.* ¶ 83. Many Kansans with disabilities and elderly voters face challenges with mobility or in accessing transportation that limit other opportunities to vote. *Id.* ¶¶ 88, 91. All stand to be disproportionately affected either because they are heavily reliant on advance voting, or because their mail is less likely to be delivered in a timely manner, or both.

Further ensuring that SB 4 will disenfranchise voters even when they are diligent in mailing their advance ballots are Kansas's unique restrictions on when election officials may begin sending out ballots to voters. In most states, mail ballots are sent to voters *at least* 30 or 45 days in advance of election day. *Id.* ¶ 9. But in Kansas, election officials are *prohibited* from mailing advance ballots to voters until 20 days before election day. *Id.*; *see* K.S.A. 25-1123(a). With the enactment of SB 4, Kansas has the shortest window for absentee voting in the country. Am. Pet. ¶¶ 50-51.

III. SB 4 threatens Plaintiffs with significant irreparable harms.

The Individual Plaintiffs are registered Kansas voters who rely on advance voting by mail and have characteristics that make them more vulnerable to disenfranchisement because of SB 4:

- ***Dot Nary*** has been a resident of Douglas County since 1997 and has voted there ever since. *Id.* ¶ 26. She is 69 years old, uses a wheelchair, would have great difficulty voting in person, and has recently experienced mail delays of up to 11 days. *Id.*

- ***Martha Hodgesmith*** is 73 years old and has voted in Kansas since 1972, but has mobility issues from post-polio syndrome, uses a walking stick, and suffers increasing difficulty voting in person. *Id.* ¶ 27.

- ***Bob Mikesic*** has voted in Kansas since 1983; he uses a wheelchair, cannot readily vote in person, and has seen lengthy delays in the delivery of his medications by mail. *Id.* ¶ 28.

- ***Benjamin Simons***, an Oklahoma State University student and Kansas registered voter, was unable to vote in 2022 after his advance ballot failed to arrive on time; to address this in the 2024 general election, his mother took the extraordinary step of driving his ballot all the way from Kansas to Oklahoma, and then back, to ensure his vote would count. *Id.* ¶ 29.

Organizational Plaintiffs are also directly injured by SB 4, both because the law will harm the communities that they exist to serve, and also because it will force them to divert finite resources away from mission-critical activities:

- ***Kansas Appleseed Center for Law and Justice, Inc. ("Kansas Appleseed")*** is a nonprofit, nonpartisan organization dedicated to helping Kansans build thriving, inclusive, and just communities, including through voter engagement and education. *Id.* ¶ 17. Their voter engagement work focuses on education and turnout of underrepresented populations, including voters experiencing food insecurity, rural voters, and voters who are members of minority populations. *Id.* ¶ 18.

- ***Loud Light*** is a nonprofit, nonpartisan organization, whose mission is to engage, educate, and empower individuals from underrepresented populations, in particular young voters—many of whom are students and voting away from home—to become active in the political process. *Id.* ¶ 20. To further that mission, Loud Light engages voters in person and online, including by conducting voter drives and presentations on voting on college campuses and sending educational mailers to young voters. *Id*.

- ***The Disability Rights Center of Kansas ("Disability Rights Center")*** is a nonprofit, nonpartisan organization dedicated to fighting for equality, law, and justice for Kansans with disabilities. *Id.* ¶ 22. As the only "Protection and Advocacy" system for Kansas, the Disability Rights Center is required under federal law to work to "ensure full participation

in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places." *Id.* ¶ 23.

SB 4 will force each of the Organizational Plaintiffs to divert resources to educating voters about SB 4's ballot rejection rule and to working with voters to attempt to ameliorate its threatened harms, at the expense of other mission-critical voter engagement and education work—and, in the case of the Disability Rights Center, at the expense of its direct services to Kansans with disabilities. *Id.* ¶¶ 19, 21, 23-24.

LEGAL STANDARD

"Kansas is a notice-pleading state." *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330, 338 (2019) (quoting *Berry v. Nat'l Med. Servs., Inc.*, 292 Kan. 917, 918, 257 P.3d 287, 289 (2011)). As such, the Kansas Supreme Court has emphasized the standard in Kansas is easier for plaintiffs to meet than the federal plausibility standard on a motion to dismiss. *See id.* Thus, the granting of such motions "has not been favored by [Kansas] courts." *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140, 143 (2001). Further, "[w]hen reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, this court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably [be] drawn from the facts alleged in the petition." *Berry*, 292 Kan. at 918. "The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory." *Minjarez-Almeida v. Kan. Bd. of Regents*, 63 Kan. App. 2d 225, 233, 527 P.3d 931, 934 (2023) (cleaned up). "Judicial skepticism must be exercised when the motion is made before the completion of discovery." *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364, 366-67 (2008).

ARGUMENT

The Court should deny the motion to dismiss. The vast majority of the arguments pressed by the Secretary are not only at odds with Kansas precedent, they are contrary to the conclusions

of the Kansas Supreme Court and Court of Appeals in recent litigation where the Secretary advocated for many of these same positions. Undaunted, he tries yet again, but this Court is bound by those decisions. Moreover, they were right: the Secretary's arguments are without merit.

First, the Plaintiffs have standing. The Secretary's arguments to the contrary focus almost exclusively on the Organizational Plaintiffs and cannot be reconciled either with Kansas standing precedent, or even with the more demanding Article III standard applied by federal courts. The Court of Appeals recently found that two of the exact Plaintiffs in this litigation had standing to challenge a different restrictive voting law based on similar allegations. The Kansas Supreme Court left that decision undisturbed on review and implicitly affirmed it when it remanded that matter to the trial court for further proceedings on the merits. These decisions were consistent with decisions of federal courts across the country, which have similarly and repeatedly found that Plaintiffs just like these have standing to challenge similar laws.

Second, the Secretary's federal preemption argument has been rejected by every court to consider it, save one, in a decision that erred at every turn on its way to an outlier conclusion that would invalidate ballot receipt deadline rules in a majority of states. To reach that conclusion, the court ignored the federal statutes' plain text (which say nothing indicating any intent to preempt state laws that allow election officials to count ballots cast by voters by election day but received in the mail sometime after), misconstrued other federal statutes that explicitly acknowledge and incorporate post-election day ballot receipt deadlines, and ignored more than a century of history of numerous states counting at least some categories of ballots received after election day.

Lastly, the Secretary argues that Plaintiffs do not state claims for relief under the Kansas Constitution, but to accept these arguments the Court has to both disregard the standards announced by the Kansas Supreme Court just last year and accept the Secretary's contrary version

of the facts. Under any possibly applicable standard, Plaintiffs' well-pleaded Amended Petition survives a motion to dismiss. The Court should deny the Secretary's motion in its entirety.

I. Plaintiffs have standing.

The Secretary claims Plaintiffs lack standing, but his arguments focus almost entirely on the Organizational Plaintiffs, devoting only a single, off-handed, and generalized sentence to the Individual Plaintiffs' standing. The Secretary is wrong on all accounts. As Kansas voters subject to SB 4's election day cut-off, each of the Individual Plaintiffs have standing on that ground alone, even before the Court considers their unique vulnerabilities to disenfranchisement under the law. As for the Organizational Plaintiffs, each has more than adequately alleged that they will suffer harm from SB 4 both directly as organizations and on behalf of the constituents they serve—indeed, recent Kansas precedent requires this conclusion.

A. The Individual Plaintiffs have standing.

Kansas courts apply a more forgiving standard for standing than federal courts, requiring only two elements: (1) "a cognizable injury," and (2) "a causal connection between the injury and the challenged conduct." *Hodes & Nauser, MDs, P.A. v. Stanek*, 318 Kan. 995, 1002, 551 P.3d 62, 70 (2024). "A cognizable injury exists when a party has suffered or faces an actual or threatened injury from the challenged conduct." *State v. Stubbs*, 320 Kan. 568, 574, 570 P.3d 1209, 1217 (2025). Accordingly, if an individual is regulated by an allegedly unconstitutional law, they have standing to challenge it. *See, e.g.*, *State v. Possemato*, 408 P.3d 502 (Kan. Ct. App. 2018). Thus, in the context of voting regulations, any registered voter will have standing to challenge a law that regulates how they may cast a ballot. Indeed, this is true even under the more demanding standard applied by federal courts under Article III of the U.S. Constitution. *See, e.g.*, *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1198 (N.D. Ala. 2020) ("[A] voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote."); *see also*

New Georgia Project v. Raffensperger, 484 F. Supp. 3d 1265, 1285 (N.D. Ga. 2020); *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1266 (N.D. Fla. 2020); *Jones v. U.S. Postal Serv.*, 488 F. Supp. 3d 103, 122-23 (S.D.N.Y. 2020).

The Individual Plaintiffs plainly have standing under these principles. Each is a Kansas registered voter who relies on the mail to vote by advance ballot. Am. Pet. ¶¶ 26-29. They are thus directly regulated by SB 4, and have standing to challenge it. The Court need not consider the question further, but that conclusion is also required by a straightforward application of Kansas's two-element test for standing. *First*, SB 4 causes the Individual Plaintiffs to suffer a "cognizable injury," *Stubbs*, 320 Kan. at 574, because it reduces the amount of time that Plaintiffs have to return their ballots and have them counted. Plaintiffs will now need to either mail their ballot earlier than they otherwise would have (affording them less time to evaluate their electoral choices) or choose a different means of voting, both of which would constitute a cognizable injury for *any* voter. *See Nielsen*, 469 F. Supp. 3d at 1266 ("[S]ome voters legitimately wish to vote closer in time to election day. A rule that significantly restricts a voter's ability to vote when the voter wishes inflicts an injury in fact."); *Jones*, 488 F. Supp. 3d at 123 (voters have standing when they vote in person rather than by mail due to the prospect that mail delays could result in their ballot not being counted).[1] *Second*, SB 4 is the indisputable cause of these injuries: but for that law, the Individual Plaintiffs would have additional time to mail their ballots and have them count, and

[1] The Amended Petition goes even further and explains in detail why the specific circumstances of the Individual Plaintiffs make them particularly susceptible to disenfranchisement under SB 4. *See* Am. Pet. ¶ 26 (explaining Ms. Nary uses a wheelchair and has mobility issues that prevent her from voting in person); *id.* ¶ 27 (Ms. Hodgesmith, who has post-polio syndrome, has mobility issues that have made it increasingly difficult for her to vote in person); *id.* ¶ 28 (Mr. Mikesic, who uses a wheelchair and is on the permanent absentee voting list, cannot easily vote in person); *id.* ¶ 29 (Mr. Simons is enrolled at Oklahoma State University, making it impractical for him to vote in person). Each is particularly dependent on being able to vote by mail using an advance ballot and SB 4 substantially increases the likelihood that their ballots will be rejected.

they would not be at heightened risk of disenfranchisement. Thus, there is "a causal connection between the injury and the challenged conduct." *Hodes & Nauser*, 318 Kan. at 1002.

B. The Organizational Plaintiffs have standing.

Since the Individual Plaintiffs have standing the Court need not consider whether the Organizational Plaintiffs also have standing; it is enough that one plaintiff has established standing for the matter to proceed. *See Gannon v. State*, 298 Kan. 1107, 1131, 319 P.3d 1196, 1215 (2014); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977) (same, under federal law). However, the Organizational Plaintiffs also have standing on two separate and independent grounds. First, they have standing in their own right because SB 4 will harm their organizations directly, including by making it harder for them to accomplish mission-critical work. Second, they have associational standing on behalf of the constituents they serve, who are at risk of being disenfranchised by SB 4's new ballot rejection rule.

1. The Organizational Plaintiffs have standing in their own right because SB 4 injures them directly as organizations.

Kansas courts have recognized that "[a]n organization may assert standing in its own right if it can establish a cognizable injury and a causal connection between the injury and the challenged conduct." *League of Women Voters v. Schwab ("LWV CoA")*, 63 Kan.App.2d 187, 203, 525 P.3d 803, 819 (2023); *aff'd in part, rev'd in part on other grounds*, 318 Kan. 777, 549 P.3d 363 (2024). It is accordingly "sufficient" for an organization challenging a voting law to allege it will "have to divert resources from [its] other voter assistance activities . . . to prevent voters from being disenfranchised." *Id.* at 204. Here, each of the Organizational Plaintiffs make such allegations, and those allegations must be accepted as true at this stage in the proceedings. *Berry*, 292 Kan. at 918.

- SB 4 will force ***Kansas Appleseed*** to divert resources to educating voters about the new ballot rejection rule and to encouraging voters to return their advance ballots as soon as possible to minimize the risk of being disenfranchised. Am. Pet. ¶ 19. If the risk of mailed ballots being rejected is too high, Kansas Appleseed will need to recommend that voters

who are able to vote in person should do so. That would be a marked shift from Kansas Appleseed's prior voter engagement strategy. *See id.* ¶ 18. And these diverted resources will come at the expense of Kansas Appleseed's existing mission-critical voter registration and engagement work, including its efforts to educate voters about candidates, issues on the ballots, and ways to vote. *Id.* ¶ 19. Moreover, because Kansas Appleseed is dedicated to serving vulnerable communities, such as voters who experience food insecurity, and rural and minority voters, *id.* ¶ 18, SB 4 directly harms Kansas Appleseed's core mission of engaging these voters, turning them out, and enabling them to voice their support at the ballot box for issues important to Kansas Appleseed and its constituents. *See id.* ¶¶ 17-19.

- Because ***Loud Light*** is dedicated to serving young voters—who disproportionately rely on advance voting, *id.* ¶¶ 8, 83—SB 4 directly harms Loud Light's core mission of encouraging young voters to vote by mail, ensuring that their votes are counted, and empowering them to voice their support at the ballot box for issues important to Loud Light and its constituents. *See id.* ¶¶ 20-21. Because many of the young people Loud Light serves attend college away from their county of residence, voting by mail is the only option reasonably available to them. *Id*. As a result, Loud Light will have to divert additional resources towards targeting these voters to educate them about the new ballot rejection rule. *Id*. Likewise, Loud Light will be forced to encourage those who can to vote in person if at all feasible, marking not only a stark shift from their current voter education and get-out-the-vote strategy, but also essentially forcing Loud Light to create a two-tiered approach to voter education and turnout. *See id.* This will require resources and come at the expense of Loud Light's existing voter engagement work, such as voter registration drives and creating multi-media content to educate voters. *Id.*

- SB 4 will force the ***Disability Rights Center*** to divert finite resources to educating voters about SB 4's ballot rejection rule and encouraging them to return their advance ballots as soon as possible or attempt to vote in person instead, which is often a serious difficulty for individuals with disabilities and, for many, may require the assistance of the Disability Right Center, in addition to working a drastic change in its programming, which is currently focused on encouraging voting by mail. *Id.* ¶¶ 22-25. These efforts would come at the expense of the organization's existing work providing direct services to Kansans with disabilities, such as legal services in responding to civil and disability rights violations and advocacy work for those who are denied health and long-term care services that they require. *Id.* SB 4's impacts will be particularly hard felt for the populations the Disability Rights Center serves because many Kansans with disabilities have no realistic alternative to voting by mail. *Id.* ¶ 24. SB 4 will thus directly harm the Disability Rights Center's core mission of fighting for equality, law, and justice for people with disabilities—a mission informed by federal law, which charges the Disability Rights Center, as the only Protection and Advocacy organization in Kansas, with working to "ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places." *Id.* ¶ 23.

The Kansas Court of Appeals' recent decision in *League of Women Voters v. Schwab* is controlling. There, several organizational plaintiffs (including Kansas Appleseed and Loud Light)

challenged a Kansas voting law under the State Constitution's protections for equal protection, due process, and the right to vote. *LWV CoA*, 63 Kan. App. 2d at 192-93. The Secretary argued—just as he does here—that they did not have standing. *Id.* at 201-04. The court rejected the Secretary's argument, noting that the organizational plaintiffs "alleged that they encourage advance voting and that they will have to divert resources from their other voter assistance activities to ballot cure programs to prevent voters from being disenfranchised by the" challenged law, and found that "[t]hese are sufficient allegations to establish their standing at" the motion to dismiss stage. *Id.* at 204; *see also id.* at 203 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)) (concluding that "[i]t is generally accepted that an organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action").

The Secretary petitioned the Kansas Supreme Court for review arguing that the Court of Appeals got it wrong on both standing and the merits. The Supreme Court agreed to hear the case and ultimately remanded the matter back to the trial court for proceedings on the merits of plaintiffs' equal protection and due process claims. *League of Women Voters of Kansas v. Schwab ("LWV")*, 318 Kan. 777, 807, 549 P.3d 363, 384 (2024). In doing so, it did not disturb the Court of Appeals' standing decision. Nevertheless, on remand, the Secretary argued again that the organizational plaintiffs lacked standing, but the district court rejected that argument as inconsistent with the Supreme Court's mandate and directions on remand, which "did not demand an analysis of Plaintiffs' standing" but rather focused on "the merits of Plaintiffs' due process and equal protection arguments," which would not have been "necessary if the Supreme Court doubted for a moment, after being apprised of the issue, that Plaintiffs had standing." Order at 8, *League of Women Voters of Kan. v. Schwab*, No. 2021-CV-299 (Dist. Ct. Shawnee Cty., Mar. 27, 2025).

In arguing here that the Organizational Plaintiffs lack standing, the Secretary pretends this recent precedent and history do not exist. Nor does he identify *any* Kansas authority that supports his position. Instead, the Secretary urges this Court to reject Plaintiffs' claims at the threshold based on his misplaced reliance on the U.S. Supreme Court's decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine* ("*FDA*"), 602 U.S. 367 (2024). This is untenable for several reasons. *First*, the Kansas Supreme Court has repeatedly disavowed binding reliance on the federal standing standard—including in recent cases in which the Secretary has raised effectively the same arguments that he attempts again here. *See League of Women Voters of Kan. v. Schwab*, 317 Kan. 805, 813, 539 P.3d 1022, 1028 (2023) ("The test for standing in Kansas differs from the federal standard."); *see also Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 679-80, 359 P.3d 33, 50 (2015) ("This court has occasionally cited to the federal constitutional standing requirements. But we have not explicitly abandoned our traditional state test in favor of the federal model . . . [and] do not feel compelled to abandon our traditional two-part analysis as the definitive test for standing in our state courts.") (citation omitted). The Court has instead insisted on "maintain[ing] the independence" of Kansas standing law, which imposes *less demanding* requirements on plaintiffs than the federal test. *Stubbs*, 320 Kan. at 576-77. Accordingly, *FDA* does not control here.

Second, even as a matter of federal law, the Secretary misreads *FDA*. There, plaintiff medical associations challenged FDA regulations of mifepristone (a pill used to induce abortions), but were "mere bystander[s]" who did not prescribe, manufacture, or advertise mifepristone or sponsor a competing drug. 602 U.S. at 369. The plaintiffs argued they had standing simply because they incurred costs to oppose the FDA's regulations of mifepristone, claiming "standing exists when an organization diverts its resources in response to a defendant's actions." *Id.* at 395. The

Court found that its longstanding precedent required more: an organizational plaintiff cannot simply "spend a single dollar opposing those policies" they dislike, but also must show that the defendant's "actions directly affected and interfered with [plaintiff's] core business activities." *Id.* In other words, *FDA* did not meaningfully change the *federal* test for standing—it just confirmed that, under that long-standing test, the plaintiffs in that case lacked standing.

Federal courts after *FDA* have continued to find civic organizations like the Plaintiffs here have standing to challenge voting laws that force them to divert resources from core organizational activities in scenarios indistinguishable from the ones presented here. *See, e.g.*, *RNC v. N.C. State Bd. of Elections*, 120 F.4th 390, 397 (4th Cir. 2024) (distinguishing *FDA* and finding organization had standing to challenge voting law based on diversion of resources impairing its "core mission" of organizing voters and encouraging them to vote); *League of United Latin Am. Citizens v. Exec. Off. of the President ("LULAC")*, 780 F. Supp. 3d 135, 189 (D.D.C. 2025) (distinguishing *FDA* and finding standing where organizations alleged the challenged conduct would force them to "update educational information that they provide to prospective voters," and require them "to invest additional resources in training their staff and volunteers"); *March for Our Lives Idaho v. McGrane*, 749 F. Supp. 3d 1128, 1138-39 (D. Idaho 2024) (distinguishing *FDA* and finding standing where organization alleged challenged voting law would require it to divert resources, harming its core mission because it was "in the 'business' of educating and registering voters—not merely gathering information and advocating against the law"). Plaintiffs alleged just that here, which is all that is required at the motion to dismiss stage.

2. The Organizational Plaintiffs also have associational standing based on SB 4's harms to the constituents they serve.

Separate from their direct injuries, the Organizational Plaintiffs each have standing based on SB 4's harms to their constituents. To assert associational standing, an organization must (1)

have constituents who have standing in their own right; (2) the interests it seeks to protect must be germane to its organizational purposes; and (3) neither the claim asserted nor the relief requested can require its constituents' participation. *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360, 369 (2013). The Secretary does not contest that the second or third elements are not met.

Each of the Organizational Plaintiffs satisfy this standard because they have constituents who would have standing in their own right for the same reasons that the Individual Plaintiffs have standing: they are Kansas voters who will be subject to SB 4's ballot rejection requirement. Even more, the specific communities served by the Organizational Plaintiffs are particularly susceptible to being disenfranchised by the new rule. ***Kansas Appleseed*** serves underrepresented communities, including those living in rural areas who are particularly likely to experience mail delays, and be disenfranchised as a result of SB 4. *See* Am. Pet. ¶¶ 18-19, 87. ***Loud Light*** also serves underrepresented communities, particularly young Kansans, *id.* ¶ 20, many of whom are more vulnerable to disenfranchisement under SB 4, including those who live away from home and rely on voting by mail to participate in the franchise, Am. Pet. ¶¶ 20-21, 29, 83. And the ***Disability Rights Center*** serves Kansans with disabilities—including under its federal mandate as the only Protection and Advocacy organization in Kansas—who often suffer from mobility challenges requiring them to vote by mail and so are disproportionately likely to be disenfranchised by SB 4. Am. Pet. ¶¶ 22-25, 88-89. In fact, federal courts have specifically found that similar Protection and Advocacy organizations with a "statutory mission and focus" have associational standing to sue on behalf of their constituents. *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003).

The Secretary nevertheless insists that the Organizational Plaintiffs lack standing, claiming each "must identify at least one member by name who would have standing to sue in his/her own right." Mem. at 26. Here, again, the Secretary asks the Court to assume that Kansas's standing

requirements are more demanding than they actually are, relying on federal court opinions and not Kansas court opinions. Indeed, the Secretary fails to cite a single Kansas case requiring that an individual be named at the pleading stage. Moreover, the Secretary neglects to mention that the only reported Kansas Supreme Court opinion that discusses the federal case that the Secretary relies upon—*Summers v. Earth Island Institute*, 555 U.S. 488 (2009)—reiterates that "the federal decisions *do not control* our interpretation of the judicial power clause of Article 3, § 1 of the Kansas Constitution," *Sierra Club*, 298 Kan. at 38 (emphasis added).

Even if *Summers* were pertinent here (and it is not), federal decisions make clear that it does not universally impose the rule that the Secretary claims. Instead, it is enough that the facts alleged indicate that some constituent of the organization will be adversely impacted by the challenged law—there is no need to identify exactly who that will be—particularly at this stage. *See, e.g.*, *Mi Familia Vota v. Fontes*, 129 F.4th 691, 708 (9th Cir. 2025) ("[W]hen it is clear and not speculative that a member of a group will be adversely affected by a challenged action and a defendant does not need to know the identity of a particular member to defend against an organization's claims, the organization does not have to identify particular injured members by name."); *LULAC*, 780 F. Supp. 3d at 190 (similar); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 730 (S.D. Ohio 2020) ("While Organizational Plaintiffs may not be able to identify in advance who will be affected, they have met their burden of demonstrating that some members inevitably will be affected."); *Richardson v. Tex. Sec'y of State*, No. SA-19-cv-00963-OLG, 2019 WL 10945422, at *6 (W.D. Tex. Dec. 23, 2019) (finding associational standing established at motion to dismiss stage where allegations do not identify individual members but "make clear that the membership of these organizations is comprised in significant part by individuals who are likely to be impacted by the relevant policies at issue").

Finally, the Secretary argues that the Organizational Plaintiffs cannot have standing based on harm to their constituents because they do not have formal memberships and only interact with "random" people. Mem. at 24-25. This is both a misstatement of law and a mischaracterization of the facts. For over 40 years, courts across the country have found that non-membership organizations can assert standing on behalf of their constituencies, even if they are not technically "members." *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 280 (3d Cir. 2014) (rejecting "formalistic" view of membership); *see also Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096-97 (9th Cir. 2021); *Flyers Rts. Educ. Fund, Inc. v. U.S. Dep't of Transp.*, 957 F.3d 1359, 1362 (D.C. Cir. 2020); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999); *Disability Rts. Pa. v. Pa. Dep't of Human Servs*., No. 1:19-CV-737, 2020 WL 1491186, at *7 (M.D. Pa. Mar. 27, 2020). It is sufficient that the Organizational Plaintiffs "serve[] a specialized segment of the State's . . . community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation." *Hunt*, 432 U.S. at 344; *see* Am. Pet. ¶ 18 (Kansas Appleseed focuses voter engagement work on underserved communities such as those experiencing food insecurity and rural and minority communities), ¶ 20 (Loud Light seeks to empower underrepresented populations, particularly young voters), ¶ 22 (Disability Rights Center serves Kansans with disabilities). These principles apply with even greater force for the Disability Rights Center because it has a "statutory mission and focus" of serving people with disabilities in Kansas as a federally-mandated Protection and Advocacy organization. *Or. Advoc. Ctr.*, 322 F.3d at 1110 (finding associational standing for Protection and Advocacy organization tasked by federal law with serving mentally ill criminal defendants and rejecting as "overly formalistic" the argument that those constituents were not effectively members, reasoning instead that they were "the functional equivalent of members for purposes of

associational standing"); *see also Laflamme v. New Horizons, Inc*., 605 F. Supp. 2d 378, 397 (D. Conn. 2009) (finding associational standing for Protection and Advocacy organization and explaining the "greater weight of authority" supports associational standing for such organizations (citing cases)).

II. Federal law does not preempt state laws that allow election officials to count mail ballots voted by election day but received in the mail thereafter.

The Secretary next contends that Plaintiffs' claims are preempted by the federal election day statutes, which he claims only permit states to count ballots received by election day, *see* Mem. at 4-8, but this reading cannot be squared with the statutory text, historical practice, legislative purpose, or other federal laws, and—not surprisingly—has been rejected by every court to consider it, save a single outlier whose opinion is riddled with clear legal errors. This Court should decline the Secretary's invitation to be the first to embrace that facially flawed legal reasoning.

A. The election day statutes do not speak to ballot receipt deadlines and therefore do not preempt them.

The U.S. Constitution's Elections Clause charges states with setting the "Times, Places and Manner" of holding federal elections in the first instance, reserving for Congress the right to "by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1; *see also id.* art. II, § 1, cl. 4; *id.* § 1, cl. 2 (same, for presidential electors). Exercising its authority under the Elections Clause, Congress has long set the Tuesday after the first Monday every other November as the "day for the election" of federal candidates. 2 U.S.C. § 7 (Representatives); *see also id.* § 1 (Senators); 3 U.S.C. § 1 (President and Vice President) (together, the "election day statutes").

The Secretary argues that these statutes preempt any state law that permits the counting of ballots received by mail after election day, even if the ballot was cast and sent by the voter on or even well before election day, *see* Mem. at 4-8, but that position finds no support in the text of the election day statutes—or in anything else. As the Supreme Court has explained, by setting a day

for the "election" of federal officers, Congress merely set a deadline for the "act of choosing a person to fill an office" by the electorate. *Foster v. Love*, 522 U.S. 67, 71 (1997) (quoting N. Webster, *An Am. Dictionary of the Eng. Language* 433 (Charles Goodrich & N. Porter eds. 1869)); *see also Newberry v. United States*, 256 U.S. 232, 250 (1921) (defining "election" as the "final choice of an officer by the duly qualified electors"). The election day statutes do not say anything about how ballots must be counted at all, and they are also entirely "silent on methods of determining the timeliness of ballots." *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020). Indeed, they do not restrict in any way the myriad of activities necessary to complete the election process that occur both on the county and state (and sometimes national) level after voters submit their ballots. *See Millsaps v. Thompson*, 259 F.3d 535, 546 n.5 (6th Cir. 2001) (detailing a host of official action that occurs "to confirm or verify" election results "well beyond federal election day," including county election officials meeting to verify and certify the results announced on election day, preserve pollbooks and ballots, and transmit certified results and other materials to other officials to certify the final results).

State election laws that allow election officials to count ballots that were completed by voters and relinquished to the custody of the USPS by election day are entirely consistent with the plain language of the federal election day statutes because the voters have made their final "choice" by election day; all that follows is the administrative mechanisms of elections that are not addressed and are clearly not prohibited by anything in the federal election day statutes. Because Congress' power to preempt state law on federal elections extends only "so far as it is exercised, and no farther," *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (quotation omitted), that silence is dispositive. The statutes simply do not "communicate" any "pre-emptive intent" towards ballot receipt laws that allow for the counting of ballots that were mailed on or

before election day and arrive shortly afterward. *Id.* at 14. Thus, "as other courts have noted, . . . the text of the Election Day statutes require only that all votes are cast by Election Day, not that they are received by that date." *California v. Trump*, 786 F. Supp. 3d 359, 388 (D. Mass. 2025) (citing cases, cleaned up).

The Secretary's distorted reading of the election day statutes also flies in the face of widespread state practice of counting at least some ballots received after election day dating back to the Civil War. As the U.S. Supreme Court has emphasized, "historical practice [is] particularly pertinent when it comes to the Elections" Clause. *Moore v. Harper*, 600 U.S. 1, 32 (2023). Sixteen states, plus the District of Columbia and several territories, have laws on the books to count all mail ballots postmarked by but received within sometime after election day.[2] At least fourteen more states allow for post-election day receipt of ballots cast by overseas military voters—meaning the majority of states allow for counting of at least some ballots received after election day. *See RNC v. Wetzel*, 132 F.4th 775, 780 (5th Cir. 2025) (Graves, J., dissenting from denial of rehearing en banc). This practice has a strikingly long pedigree—including here in Kansas. During the Civil War, several states enacted laws to permit soldiers to cast ballots in the field on election day, with their ballots then being sent back to their home state and counted later. *See* Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 317-18 (1915). Similarly, during World War I, states (including Kansas) allowed for military ballots to be returned "before the tenth day following [the] election." Kan. Rev. Stat. 25-1106 (Chester I. Long, et al., eds. 1923). The same

[2] *See* Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots, National Conference of State Legislatures (last accessed Nov. 10, 2025), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots. Notably, many of these states accept ballots receipt deadlines well beyond Kansas's previously-approved three-day window. *E.g.*, 10 Ill. Comp. Stat. 5/19-8(c), 5/18A-15(a) (14 days); Was. Rev. Code §§ 29A 40.091, 29A.60.190 (at least 14 days); Alaska Stat. § 15.20.081(e) (10 days); Cal. Elec. Code § 3020(b) (seven days); N.Y. Election Law § 8-412(1) (seven days).

was true during World War II. *See* Bill to Amend the Act of Sept. 16, 1942: Hr'g on H.R. 3436 Before the H. Comm. on Election of President, Vice President & Representatives in Congress, 78th Cong. 100, 102 (Oct. 26, 1943) (identifying eight states including Kansas with post-election day ballot receipt deadlines in 1943). Despite this longstanding practice, "Congress has never stepped in and altered the rules"—itself "powerful evidence" against any claimed preemption. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009); *see also Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 736 (N.D. Ill. 2023), *aff'd on other grounds*, 114 F.4th 634 (7th Cir. 2024), *cert. granted*, 145 S. Ct. 2751 (2025) (certiorari granted on standing).

Congress has been well aware of these laws and not only has it *not* stepped in to preempt or alter them, it has *affirmatively incorporated* them into federal law. For example, the plain language of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), which regulates ballots cast by military and overseas voters, explicitly incorporates "*the deadline for receipt of the State absentee ballot under State law.*" 52 U.S.C. § 20303(b)(3) (emphasis added); *see also id.* § 20304(b)(1). When Congress passed UOCAVA, it was aware that "[t]welve [states] ha[d] extended the deadline for the receipt of voted ballots to a specific number of days after the election." *Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393*, 99 Cong. 21 (Feb. 6, 1986) (Statement of Henry Valentino, Director, Federal Voting Assistance Program). The UOCAVA House Report even praised states that permitted ballots to be received "a specified number of days *after election day*" as "aid[ing] in protecting the voting rights" of military and overseas voters. H.R. Rep. 99-765 at 8 (1986) (emphasis added). Congress again incorporated state deadlines for ballot receipt in the 2009 Military and Overseas Voter Empowerment ("MOVE") Act, which requires federal officials to help "facilitate the delivery" of UOCAVA ballots to ensure their delivery "to the appropriate election officials . . . not later than the date by which an absentee

ballot must be received in order to be counted in the election." 52 U.S.C. § 20304(b)(1). Congress has even amended one of the election day statutes—3 U.S.C. § 1, governing elections for President and Vice President—as recently as 2022 without adding a ballot receipt deadline. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat 4459 (2022). Why would Congress do this if federal law *required* ballots to be received by election day—particularly since Congress well knew that incorporating state deadlines meant permitting post-election-day deadlines? The Secretary provides no answer. Nor can he: "These longstanding efforts by Congress . . . to ensure that ballots cast by Americans living overseas are counted, so long as they are cast by Election Day, strongly suggest that statutes [with ballot receipt deadlines after election day] are compatible with the Elections Clause." *Bost*, 684 F. Supp. 3d at 737; *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.").

Finally, the legislative purpose also confirms that Congress did not mean to preempt state laws on ballot receipt deadlines with the election day statutes. Legislating at a time when states held elections on different dates, Congress had twin aims in passing those statutes: preventing an early election in one state from influencing "later voting" in another state, and preventing citizens from being "forced to turn out on two different election days." *Foster*, 522 U.S. at 73. Neither has anything to do with ballot receipt deadlines because even with a post-election-day receipt deadline, ballots must still all be *cast* by or before election day, so there is no possibility that allowing post-election-day receipt of ballots would influence "later voting" in Kansas or elsewhere. Nor would counting ballots received after election day force citizens "to turn out on two different election days"—the ballot receipt deadline has nothing to do with how many elections are held in a year,

and if anything, Congress's desire to avoid burdening citizens in exercising their right to vote is consistent with permitting mail ballots to be received and counted after election day. In short, the election day statutes were simply not meant to "make or alter" ballot receipt deadlines, U.S. Const. art. I, § 4, cl. 1, and cannot be read to preempt state laws permitting post-election day receipt of ballots cast by mail.

B. The Fifth Circuit's outlier decision in *Wetzel* is wrong and should not be followed here.

Declining to grapple with any of these serious issues, the Secretary largely punts his analysis to an opinion from the Fifth Circuit, which held last year that the statutes preempted Mississippi's grace period for receiving mail ballots. *See RNC v. Wetzel*, 120 F.4th 200 (5th Cir. 2024), *cert. granted sub nom. Watson v. RNC*, No. 24-1260 (U.S. Nov. 10, 2025). But that decision is a deeply flawed outlier; every single other court that has considered whether the election day statutes preempt ballot receipt deadlines concluded they plainly do not, as should this Court. *See California*, 786 F. Supp. 3d at 386 (rejecting *Wetzel*'s read of the election day statutes); *Bost*, 684 F. Supp. 3d at 736 (holding election day statutes did not preempt Illinois law allowing ballots postmarked by election day to be counted if received up to fourteen days thereafter); *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d at 372-73 (holding election day statutes did not preempt New Jersey law allowing ballots lacking a postmark to be counted if received within 48 hours after polls close); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 353-54 (3d Cir. 2020) ("Federal law does not provide for when or how ballot counting occurs," and extended receipt deadlines and the Election Day statutes "can, and indeed do, operate harmoniously."), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (vacated as moot); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 368 n.23 (Pa. 2020) (concluding election

day statutes are consistent with extended ballot receipt deadlines).[3] In fact, the Fifth Circuit's outlier holding on this issue may soon be relegated to the dustbin: on the same day that Plaintiffs filed this brief, the U.S. Supreme Court granted Mississippi's petition for certiorari seeking to reverse the Fifth Circuit. Order List, *Watson v. RNC*, No. 24-1260 (U.S. Nov. 10, 2025).

Though the problems with *Wetzel* are legion, its most glaring flaw is its failure to engage with the federal election day statutes' actual text. Burying its exceedingly brief analysis of that text in a footnote, the Fifth Circuit lamented that the dictionary definitions of "election"—the key term in the statutes—"shed no light" on the issue at hand because they "make no mention of deadlines or ballot receipt." *Wetzel*, 120 F.4th at 206 n.5. But *that is the point*: Congress's command that the "election" occur on a particular date says *nothing* about ballot receipt deadlines. And since Congress's power to preempt state laws under the Elections Clause extends only "so far as it is exercised, and no farther," *Inter Tribal Council of Ariz.*, 570 U.S. at 9, the election day statutes' silence on this issue means they cannot preempt state laws that allow election officials to count ballots voted by election day but received in the mail sometime thereafter.

The Fifth Circuit instead grounded its analysis in a peculiar definition of "cast" (a term not used in the statutes). Relying chiefly on an eighty-year-old decision from the Montana Supreme Court, *Wetzel* held that a ballot is not "cast" until it is received by an election official. *See Wetzel*, 120 F.4th at 207-08 (holding "a ballot is 'cast' when the State takes custody of it" (citing *Maddox v. Bd. of State Canvassers*, 116 Mont. 217, 149 P.2d 112 (1944)). But the Montana decision in turn

[3] In addition, the district court in *Wetzel* concluded in a lengthy and well-reasoned opinion that "case authority as well as the legislative history, combined with the Framers' intention in drafting the Elections and Electors Clauses, Supreme Court precedent, and Congress's enactment of UOCAVA support a finding that Mississippi's statute operates consistently with and does not conflict with the Electors Clause or the election-day statutes." *RNC v. Wetzel*, 742 F. Supp. 3d 587, 601 (S.D. Miss. 2024), *rev'd* 120 F.4th 200 (5th Cir.).

was based on Montana law at the time—specifically, a state law that expressly *defined* casting a ballot to require depositing it with election officials; nothing in that decision suggested that there was any *federal* requirement to consider ballots cast when received, rather than when sent. *See Maddox*, 116 Mont. at 115 ("[S]ince the *state law* provides for voting by ballots deposited with the election officials, that act must be completed on the day designated by state and federal laws." (emphasis added)). And ironically, *Maddox* is no longer good law in Montana; the state now allows for post-election day receipt of certain military-overseas ballots in its state elections code. *See* Mont. Code §§ 13-21-206(1)(c); 13-21-226(1).

Nor can *Wetzel's* puzzling understanding of "cast" find support in dictionary definitions of the term, which focus on when an object left its sender, not when it was received—for instance, to "throw," "project," "hurl," "pitch," "toss," or "deposit."[4] A fisherman casts a line; only later does the line land on the water—or get blown away by the wind. *See Republican Nat'l Comm. v. Wetzel*, 132 F.4th 775, 780 (5th Cir. 2025) (Graves, J., dissenting from denial of rehearing en banc). Likewise, a voter casts a ballot by marking it and depositing it in the mail; only later is it received by election officials. As Kansas courts have long recognized, a vote may be "*cast* when the ballot is marked . . . [and] placed in envelopes and *mailed* on election day." *Burke v. State Bd. of Canvassers*, 107 P.2d 773, 778 (Kan. 1940) (emphasis added). In sum, under post-election receipt deadlines like those that have long existed in Kansas and elsewhere, all ballots are "cast" by election day, consistent with the election day statutes. When they may be received is another matter, not governed by those statutes.

Wetzel's errors extend beyond its deeply flawed textual analysis. As for historical practice, the Fifth Circuit's bold assertion that "[f]or over a century after Congress established a uniform

[4] *See Cast*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/cast_v.

federal Election Day, States understood those statutes to mean what they say: that ballots must be received no later than" election day, 120 F.4th at 209, simply cannot be squared with over one-and-one-half centuries of history in which states permitted at least some ballots to be received after election day and still count, *see supra* Argument § II.A. *Wetzel* tried to brush aside that history by claiming voting in the field during the Civil War "simultaneously involved receipt by election officials." 120 F.4th at 210. That is wrong: while some states deputized military officers as election officials for field voting, others did not. Nevada, Rhode Island, and Pennsylvania all allowed ballots to be placed under the charge of high commanding officers without any such designation and they were not received by election officials until later. 1866 Nev. Stat. 215; Benton, Voting in the Field: A Forgotten Chapter of the Civil War 171-73, 186-87, 190 (1915). *Wetzel* also fails to account for the many decades of states permitting post-election day ballot receipt *after* the Civil War, including by Kansas during World War I and II. *See* Kan. Rev. Stat. 25-1106 (Chester I. Long, et al., eds. 1923) (permitting military ballots to be received up to ten days after election day); Bill to Amend the Act of Sept. 16, 1942: Hr'g on H.R. 3436 Before the H. Comm. on Election of President, Vice President, & Representatives in Congress, 78th Cong. 100, 102 (Oct. 26, 1943) (identifying eight states including Kansas with post-election day ballot receipt deadlines in 1943).

The Fifth Circuit also crucially erred in its analysis of other federal statutes and their relevance to interpreting the election day statutes. For example, the court claimed UOCAVA is "silent on the deadline for ballot receipt," *Wetzel*, 120 F.4th at 211, but that is demonstrably wrong. UOCAVA twice incorporates a "deadline for receipt of the State absentee ballot under State law," 52 U.S.C. § 20303(b)(3), (e)(2), and elsewhere incorporates "the date by which an absentee ballot must be received in order to be counted in the election," *id.* § 20304(b)(1). Neither of those phrases makes sense if federal law already supplies a universal "deadline for receipt." Because federal law

does not supply such a default deadline, Congress prudently chose to employ already existing state laws—including those permitting the deadline for receipt after election day—of which it was well aware. *See* Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393, 99 Cong. 21 (Feb. 6, 1986) (Statement of Henry Valentino, Director, Federal Voting Assistance Program).

C. *Foster v. Love* does not support the Secretary's position.

The Secretary also incorrectly argues that the Supreme Court in *Foster v. Love* supports his reading of the election day statutes. Specifically, the Secretary claims that that decision "recognized that Congress intended all steps necessary to choose the elected official – the casting of ballots by voters and the acceptance/receipt of the ballots by election officials – to occur within the single, congressionally fixed Election Day." Mem. at 6. Not so. *Foster* held simply that the election day statutes preempted a Louisiana law that allowed for the completion of the election of members of Congress in a primary held in October—that is, *before* the federal election day—"without any action to be taken on federal election day." *Foster*, 522 U.S. at 68-69. The Secretary attributes to *Foster* the idea that the statutes require "acceptance/receipt of the ballots by election officials" on election day, Mem. at 6, but that is a figment of his imagination; nowhere does the decision reference or discuss the idea of ballots being received after election day.

If anything, *Foster* cuts against the Secretary's reading of the election day statutes. The Court held that "election" refers to "the combined actions of voters and officials meant to make a *final selection* of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added). A rule that allows States to accept ballots cast by election day but received in the mail sometime thereafter comports with this understanding: the "final selection" by the voters is made by election day—all votes have been cast, and the candidate's "electoral fate is sealed." *California*, 786 F. Supp. 3d at 386. After election day, only ministerial tasks such as processing, receiving, and tabulating ballots remain. The Secretary never grapples with why, under his read of the election day statutes—where all

election activities must conclude on election day—ballots sent by mail must be *received* by election day, but all ballots may still be *processed* and *tabulated* after. *But see Millsaps*, 259 F.3d at 546 n.5. He instead selectively picks one post-election day activity (receiving already-cast ballots) and treats it differently than all the others (processing and tabulating ballots), with no support in the election day statutes' text or in historical practice. And of course, any reading of the statutes that would require the tabulating of ballots to conclude on election day would be absurd: States often take days or even weeks to complete their final tabulation of all votes cast, and requiring them to stop the count on election day would throw elections into chaos. Congress certainly never intended such a result in enacting the election day statutes, defeating the Secretary's preemption defense.

III. Plaintiffs have stated cognizable claims under the Kansas Constitution.

As Plaintiffs allege in detail in the Amended Petition, SB 4 will subject Kansas voters to arbitrary and disparate treatment in violation of the Kansas Constitution's equal protection guarantees, reject ballots without the possibility of cure in violation of its due process protections, and disenfranchise thousands in violation of its protections of the right to vote. Plaintiffs plead these claims under the applicable legal standards recently enunciated by the Kansas Supreme Court in *LWV*, and their allegations easily clear the notice-pleading requirement that they "give the defendant fair notice of . . . the plaintiffs' claim . . . and the ground upon which it rests." *Minjarez-Almeida*, 63 Kan. App. 2d at 233. Nevertheless, the Secretary insists Plaintiffs fail to state a claim, but his arguments largely focus on attempting to convince this Court to adopt different legal standards than those embraced by the Kansas Supreme Court in *LWV*. The Court can and should reject these arguments out of hand.

A. SB 4 violates the Kansas Constitution's guarantee of equal protection.

Plaintiffs have more than adequately alleged a claim that SB 4's ballot rejection rule

violates the Kansas Constitution's guarantee of equal protection. Kan. Const. Bill of Rts. §§ 1-2. Just last year, the Kansas Supreme Court set out the relevant standard for such claims as it relates to voting laws in particular. As the Court held, such laws "must be capable of being applied with reasonable uniformity upon objective standards *so that no voter is subject to arbitrary and disparate treatment*." *LWV*, 318 Kan. at 805 (emphasis added). The test is results-based: under "the proper legal standard," the question is whether a voting law "*achieve*[*s*] reasonable uniformity on objective standards." *Id.* at 807 (emphasis added); *see also id*. at 834 (explaining that those principles require that "the likelihood of having a ballot discarded . . . must be the same in Wyandotte County as in Gove County") (Biles, J., concurring in part and dissenting in part).

The Amended Petition sets out a straightforward equal protection claim under this controlling standard, alleging facts that provide fair notice of Plaintiffs' claim under that standard. *See Minjarez-Almeida*, 63 Kan. App. 2d at 233. Voting by mail plays a crucial role in Kansas elections, with hundreds of thousands relying on USPS to deliver their ballots in recent elections. Am. Pet. ¶ 36. But on-time delivery for mail in Kansas has plummeted in recent years. *Id.* ¶ 55. A USPS audit in 2023 confirmed "significant mail processing delays" at the regional Kansas City Processing and Distribution Center, and a 2024 audit "again found significant mail delays," and ranked the Kansas-Missouri USPS district as "the third worst-performing mail district in the nation (out of fifty districts). *Id.* ¶¶ 58-59. In the first quarter of 2023, USPS delivered only 78 percent of first-class, three-to-five-day service standard mail in the district on time, and by the first quarter of 2025, *that figure had declined to just 61 percent*. *Id.* ¶ 62.

Those delays have real consequences for Kansans trying to vote by mail. In 2020, *more than 32,000* advance ballots arrived after election day but within the then-existing three-day grace period. *Id.* ¶ 47. In the 2024 general election (which had lower rates of advance mail voting), more

than 2,100 ballots arrived within three days of election day. *Id.* ¶ 48. If the grace period had not been in effect, those ballots would not have been counted. A particularly stark example of the effect of postal delays occurred more recently: in Douglas County alone, more than 200 ballots had to be rejected because they arrived more than three days after the August 6, 2024 primary, *even though the ballots had been postmarked in July*. *Id.* ¶ 70.

The Amended Petition also details the many instances in which *Secretary Schwab himself* has recognized the seriousness of these delays and their disenfranchising effects. In the lead-up to the 2024 general election, the Secretary penned a heated letter to USPS saying that he was "extremely concerned" that mail delays, which in Kansas could last "weeks," would disenfranchise voters who "timely" mailed their ballots, Am. Pet. ¶¶ 63-65; he lambasted USPS on social media, claiming that the "Pony Express is more efficient at this point," *id.* ¶ 66; and he publicly warned voters that postal delays in Kansas meant voting by mail came with the "highest risk" that the ballot would not be counted, *id.* ¶ 68.

Others in the Secretary's office expressed similar concerns, telling USPS officials that "*[a]ctual elections are being determined by these delays*," which is why they are "so upset." *Id.* ¶ 69 (emphasis added). In fact, just *two days* after he filed the present motion to dismiss, the Secretary warned Kansas voters *not* to submit ballots through the mail in the November 2025 municipal elections due to the unacceptable risk of delays.[5] And these are all concerns that arose under the three-day grace period—SB 4 will make the problem worse when it goes into effect in January. At that time, just as now, *actual elections will be determined by these mail delays*—but with SB 4, the Legislature ensures that those election outcomes will not include the views of voters

[5] Maddy Terril, *Kansas Secretary of State urges in-person voting ahead of the general election*, KAKE (Oct. 22, 2025), https://www.kake.com/home/kansas-secretary-of-state-urges-in-person-voting-ahead-of-the-general-election/article_c0bb673c-d1b3-467b-b5c9-6690036de5d0.html.

arbitrarily disenfranchised because their ballots arrive after election day.

While this is no doubt a national problem, which many states have moved to solve with laws that allow election officials to count ballots cast before but received within some window after election day, the problems are especially acute in Kansas because it does not permit election officials to mail advance ballots to voters until 20 days before the election, creating the shortest turn-around period for mail voting in the country. Am. Pet. ¶¶ 49-51; *see* K.S.A. 25-1123(a). During that 20-day window, a ballot must go through the mail twice: first from the election office to a voter, and then back. In many cases, that mail *will leave the state* even if it is mailed from a Kansas address to another Kansas address. Am. Pet. ¶ 56. It is thus not surprising that Kansas officials recommend allowing seven days for each leg of that journey, *see id.* ¶ 52, creating an exceedingly narrow window for voters to actually receive and cast their ballot, which narrows harrowingly with any delay at any point in the process. *Id.* ¶¶ 64, 72-74. For voters who request their ballot after the 20-day window has begun, it is often simply impossible for them to be reasonably confident that their ballot will be received on time, even if they send it back to election officials as soon as they receive it. *Id.* ¶ 53.

Thus, with SB 4 the Legislature has created an untenably short window to vote, which, when combined with postal services that are among the worst in the country, is sure to disenfranchise large numbers of lawful voters, due to no fault of their own. Under this new regime, whose vote gets counted will depend on entirely arbitrary factors such as where they happen to be located when they mail their ballot and how diligent USPS was that day. In other words, "[a] voter's right to vote . . . may hinge on random chance." *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 48 (S.D.N.Y. 2020). This is the very definition of "arbitrary and disparate treatment," *LWV*, 318 Kan. at 805. And, as other courts have held, rejecting ballots due to arbitrary

postal delays does not comport with equal protection. *See, e.g.*, *DCCC v. Kosinski*, 614 F. Supp. 3d 20, 56-58 (S.D.N.Y. 2022) (providing injunctive relief in challenge to state law that excluded mail ballots without postmarks that arrived two or more days after election day); *Jones*, 488 F. Supp. 3d at 130 ("Nonuniform mail service . . . make[s] it less likely that absentee voters in certain areas will cast votes that count, due in substantial part to failures in the Postal Service's Election Mail operations.").

In addition to demonstrating arbitrary rejection of ballots based on factors outside a voter's control, the Amended Petition also alleges that this arbitrary treatment occurs in unfair and non-uniform ways across Kansas and will impact some groups of voters more than others. *See, e.g.*, Am. Pet. ¶¶ 8, 86-91 (alleging voters who are elderly, disabled, or live in rural areas or out of state are more susceptible to disenfranchisement under SB 4). That lack of uniformity creates an independent violation of equal protection principles. *See LWV*, 318 Kan. at 807 (equal protection requires that a voting law "achieve reasonable uniformity"); *see also, e.g.*, *Bush v. Gore*, 531 U.S. 98, 107 (2000) (finding an equal protection violation when different counties used different standards to determine whether to count a ballot). For example, the Amended Petition notes testimony before the Legislature that rural votes were more than twice as likely to be counted because of the three-day grace period than non-rural votes, and that in some counties, 10 to 12% of advance mail ballots arrived during that grace period, meaning that those voters would have been disenfranchised under SB 4. Am. Pet. ¶ 87; *see Gallagher*, 477 F. Supp. 3d at 47 (finding equal protection violation after noting that mail ballots in New York City were substantially more likely to be rejected for lack of a postmark in Brooklyn compared to Manhattan or Queens).[6]

[6] Because SB 4 violates the "arbitrary and disparate treatment" standard set out in *LWV*, there is no need for the Court to consider any other standard of review. However, SB 4 is *also* subject to strict scrutiny. As discussed in detail below, Kansas courts have long held that burdens on the right

For all of these reasons, the Amended Petition more than adequately states a claim that SB 4's ballot rejection rule will lead to "arbitrary and disparate treatment" of voters, *LWV*, 318 Kan. at 805, and will fail to "achieve reasonable uniformity" in whose votes are counted, *id.* at 807. While initially conceding that the *LWV* standard applies, Mem. at 9, 13, the Secretary quickly pivots to asking the Court to apply some *other* standard, variously suggesting rational basis review, another form of deferential review focused solely on "reasonableness," and finally the *Anderson-Burdick* framework applied by federal courts to federal constitutional questions. Mem. at 9-13. But there is no ambiguity about how the Court should analyze the equal protection claim in this case: it is clearly set forth in *LWV*. *See, e.g.*, *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). That binding decision forecloses the Secretary's arguments for any other standard of review. *See Heartland Presbytery v. Presbyterian Church of Stanley, Inc.*, 53 Kan. App. 2d 622, 645, 390 P.3d 581, 596 (2017).

Even aside from *LWV*, the Secretary misreads the law. Take, for example, his argument that rational basis review should apply because SB 4 purportedly does not target a suspect class and was not enacted with a discriminatory purpose. The Court in *LWV* already held the "arbitrary

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to vote are subject to strict scrutiny. *See infra* Argument § III.C. Moreover, the Kansas Supreme Court in *LWV* did not address whether strict scrutiny applied to *equal protection* claims concerning the fundamental right to vote. *See* 318 Kan. at 799-803. Because *LWV* did not overrule any prior precedent, strict scrutiny continues to apply to voting regulations that trigger equal protection scrutiny. *See* 318 Kan. at 799 (majority op.) ("Today's decision does not conflict with any of our past precedent[.]"); *id.* at 832 (Biles, J., concurring in part and dissenting in part) ("*The majority opinion does not overrule prior caselaw*." (emphasis in original)). Consequently, the Secretary's motion to dismiss the equal protection claim can only succeed if SB 4 survives *both* the *LWV* test and strict scrutiny. For the reasons discussed above, SB 4 cannot stand under *LWV*, and for the same reasons discussed in the analysis of Count III, it cannot survive strict scrutiny. *See infra* Argument § III.C.

and disparate" treatment standard—*not* rational basis review—applies to equal protection challenges to voting laws. 318 Kan. at 805. But even putting that aside, the two factors the Secretary lists (targeting a suspect class or having a discriminatory purpose) are not the only triggers for applying a more searching review than rational basis, as Kansas case law makes clear. *See, e.g.*, *Farley*, 241 Kan. at 669-70 (explaining strict scrutiny applies both to cases involving suspect classes *and* cases involving "fundamental rights," which "include voting"). When a law *regulates voting*, equal protection principles require a substantially more rigorous review than the rational basis standard. Thus, laws burdening voting "must be carefully and meticulously scrutinized"—without any requirement that they target a subject class or have a discriminatory purpose. *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506, 511 (1971). Likewise, the caselaw cited by the Kansas Supreme Court in *LWV* confirms that equal protection demands more rigorous judicial scrutiny than mere rational basis review. *See* 318 Kan. at 806 (citing *Bush*, 531 U.S. at 104-05) (holding Florida recount procedures that subjected voters to "arbitrary and disparate treatment" violated equal protection, with no discussion of suspect classes or discriminatory intent); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding state law requiring voters to have resided in their county for one year and three months violated equal protection); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding equal protection required state legislative district to be drawn based on population to ensure all voters had equal representation); *see also Jones*, 488 F. Supp. 3d at 130 ("[T]he Supreme Court has consistently declined to require a showing of discriminatory purpose in the context of one person, one vote cases").[7]

[7] The federal case law the Secretary cites to support rational basis review does not deal with voting and is entirely inapplicable. *See* Mem. at 11-12 (citing *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) (claim relating to cable TV transmission rights); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (sex discrimination claim); *Washington v. Davis*, 426 U.S. 229 (1976)

The Secretary next argues that the Kansas Constitution gives essentially unfettered discretion to the Legislature in regulating voting, which (according to the Secretary) means the Court must uphold any law relating to the mechanics of voting so long as it is "reasonable." Mem. at 9-10. Again, that is not the standard: *LWV* made clear that voting laws violate equal protection if they subject voters to "arbitrary and disparate" treatment. 318 Kan. at 805. Further, setting aside that a voting law that arbitrarily disenfranchises thousands of voters is hardly "reasonable," the provision of the Kansas Constitution that the Secretary cites does not go nearly as far as he suggests. It says only that "[a]ll elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide." Kan. Const., art. IV, § 1. That provision quite plainly does *not* allow the Legislature to violate *other* provisions of the Kansas Constitution, including its guarantees of equal protection. *See* Kan. Const. Bill of Rts. §§ 1-2. The Kansas Supreme Court made this very point in *LWV*, noting that the Court's analysis "cannot end" after finding that a law regulating ballot verification was consistent with the Legislature's power to provide for "proper proofs of the right of suffrage" enumerated in Article V, § 4. *LWV*, 318 Kan. at 802, 805. To the contrary, simply because a law is consistent with that delegated power to the legislature, that "does not mean that any regime of proper proofs is permissible," since "the Legislature still must comply with other constitutional guarantees such as those of equal protection." *Id.* at 805.

For his third try to find a more forgiving standard to supplant *LWV*'s arbitrary and disparate treatment test, the Secretary turns to federal law, arguing that SB 4 would pass muster under *Anderson-Burdick*, a balancing test federal courts use to evaluate right-to-vote claims brought under the *federal* Constitution. *See* Mem. at 12-13. But as the Court of Appeals recognized in *LWV*

(racial discrimination claim); *Guttman v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012) (disability claim)).

CoA, Kansas courts have never applied that "federal test based on the federal Constitution" because it fails to account for the "unique" protections afforded by the Kansas Constitution. 63 Kan. App. 2d at 208; *see also Farley*, 241 Kan. at 671 ("[T]he Kansas Constitution affords *separate* . . . and *greater* rights than the federal Constitution." (emphasis added)). On review the Kansas Supreme Court likewise declined to do so—despite the Secretary's explicit request that the test be applied. *LWV*, 318 Kan. at 802, 806. And, the Secretary's attempt to revive this argument in his motion to dismiss here is doubly ill conceived, because *Anderson-Burdick* claims are inherently "fact-specific," making dismissal generally inappropriate. *Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000) (reversing dismissal of *Anderson-Burdick* claim because "the fact-specific nature of the relevant inquiry . . . obviates a resolution of this case on the basis of the complaint alone."); *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020) (similar). That is particularly so considering Kansas's notice-pleading requirement, which is *less* demanding on plaintiffs than the federal standard. *Williams*, 310 Kan. at 784. And, in any event, the Amended Petition sets forth numerous, detailed, and specific allegations—which the Court must accept as true at this stage—that SB 4 would impose substantial and disparate burdens on the right to vote in Kansas. Am. Pet. ¶¶ 55-95.

The Secretary's argument that the burdens imposed by rejecting otherwise valid ballots arriving after 7 p.m. on election day do not outweigh the State's interest in establishing the ballot rejection rule, Mem. at 13-18, is both an improper attempt to litigate this matter under the federal *Anderson-Burdick* standard and as a factual claim not properly adjudicated at the motion to dismiss stage. *See Rector*, 287 Kan. at 232.[8] Moreover, courts have rejected the contention that a state can

[8] This Court, of course, is required to accept the Plaintiffs' allegations in the Amended Petition as true at this stage. *Berry*, 292 Kan. at 918. This includes (among other things) Plaintiffs' allegations that SB 4 will make it more difficult for voters who live temporarily out of state (such as college students) to return their advance ballots before election day, Am. Pet. ¶ 83; that data analysis shows that ballots cast by rural voters are more than twice as likely to arrive within the grace period than

avoid equal protection scrutiny by offering multiple ways to vote, or by asserting that a voter could have put their ballot in the mail at an earlier time. *See, e.g.*, *Kosinski*, 614 F. Supp. 3d at 56-57 (holding rejection of mail ballots received more than two days after election day because USPS failed to apply postmarks resulted in disenfranchisement of voters "through no fault of their own" and thus "likely constitute[d] a severe burden on the right to vote"); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 126 (D.D.C. 2020) (rejecting government's argument that the possibility a voter could mail a ballot earlier resolves the equal protection problems resulting from issues with postal service). And the Secretary's litigation position about the relevant burdens caused by USPS delays is at odds with his many public admissions in which he decried the slowness of USPS service in Kansas and its resulting effect of causing otherwise eligible ballots to be rejected. *See supra* at 30.

At the end of the day, Plaintiffs have alleged that SB 4 will cause thousands of lawfully cast ballots to be rejected, disenfranchising thousands of Kansas voters. Am. Pet. ¶¶ 47-48. That is a severe and heavy burden. *See Gallagher*, 477 F. Supp. 3d at 43 (finding "exceptionally severe" burden when a "large number of ballots will be invalidated, and consequently, not counted based

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those cast by non-rural voters, *id.* ¶ 87; that Kansans with disabilities "heavily rely" on advance voting by mail because they often face "mobility challenges" that limit other opportunities to vote, *id.* ¶ 88; and that elderly voters with mobility issues or who are unable to drive will be severely burdened by SB 4, *id.* ¶ 91. The Individual Plaintiffs further illustrate the real burdens of SB 4. Dot Nary is 69 years old, uses a wheelchair, and has recently experienced mail delays of up to 11 days, *id.* ¶ 26; Martha Hodgesmith is 73 years old, has mobility issues from post-polio syndrome, uses a walking stick, and suffers increasing difficulty voting in person, *id.* ¶ 27; Bob Mikesic also uses a wheelchair, cannot easily vote in person, and has seen serious mail delays, *id.* ¶ 28; and Benjamin Simons, a college student at Oklahoma State University and registered voter in Kansas, was unable to vote in the 2022 election after his advance ballot failed to arrive on time, and to address this in the 2024 general election, his mother took the extraordinary step of driving his ballot all the way from Kansas to Oklahoma, and then back, to ensure his vote would count, *id.* ¶ 29. The Secretary's sterile suggestion that voters with just a "modicum of diligence" can "ensure that their ballots are counted" cannot be credited in light of the lived experiences of these Kansas voters, and so many others like them, who rely on advance voting by mail and would be severely burdened by SB 4's ballot rejection rule. Mem. at 15.

on circumstances entirely out of the voters' control"); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (explaining if a "statutory framework completely disenfranchises thousands of voters," it "amounts to a severe burden on the right to vote"); *cf. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (recognizing "the basic truth that even one disenfranchised voter—let alone several thousand—is too many"). And, at this stage, any dispute about the extent of that burden must be resolved in Plaintiffs' favor. *See Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210, 1212 (1996).

The Secretary cites a few cases in which courts rejected challenges to election day ballot receipt deadlines, *see* Mem. at 16-17, but they are not relevant here for several reasons. To start, the cited cases all involve federal challenges brought under the U.S. Constitution—but "the Kansas Constitution affords *separate*, adequate, and *greater* rights than the federal Constitution." *Farley*, 241 Kan. at 671; *see also Hodes & Nauser, MDs, P.A. v. Schmidt,* 309 Kan. 610, 624, 440 P.3d 461, 471 (2019) (Kansas Constitution protects rights that are "*distinct* from and *broader* than" the U.S. Constitution (emphasis added)). None were analyzed under the *LWV* test applicable here, and none had the unique confluence of facts that makes the problem in Kansas particularly dire: mail delays in Kansas are among the worst in the country, in part because USPS closures in the state force mail to travel to neighboring states for processing, Am. Pet. ¶¶ 56-62, a problem only exacerbated by Kansas having among the most restrictive periods for mail voting in the nation, *id.* ¶¶ 49-51 (explaining, without the grace period, Kansas's 20-day period for mailing voting will be the shortest period for voting by mail).

Finally, in a last-ditch effort to shirk responsibility, the Secretary claims that any mail delays affecting ballots are "*legally irrelevant*" because Kansas does not have to allow voting by mail at all and because the state is not responsible for USPS. Mem. at 15. But Kansas *does* allow

voting by mail, and having made that choice, it cannot maintain a mail voting system that violates equal protection. *See, e.g.*, *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 n.7 (9th Cir. 2003) ("[W]hen a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause."); *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (finding equal protection violation when state denied early voting to nonmilitary voters even though it was under no obligation to permit early voting at all). Thus, even federal courts have rejected the Secretary's proposed rule because it "would have severe ramifications for the democratic process." *Eakin v. Adams Cnty. Bd. of Elections*, 149 F.4th 291, 308 (3d Cir. 2025). It would effectively allow Kansas to "induce its citizens to vote by mail, yet proceed to discard countless ballots for any number of reasons unrelated to a voter's qualifications or the State's legitimate interests." *Id.* This Court should not read the Kansas Constitution to permit "such an outcome." *Id.* Doing so would be all the more inappropriate given that Kansas has long enshrined the right to vote by mail—both by statute and also, for presidential elections, in its *Constitution*, *see* Kan. Const. art V, § 7. Thus, it is not at all clear that Kansas could decide to jettison mail voting entirely.

B. SB 4 violates the Kansas Constitution's guarantee of due process.

SB 4 also violates the Kansas Constitution's guarantee of due process. *See* Kan. Const. Bill of Rts. § 18. Here, again, the Kansas Supreme Court articulated the standard that applies when a plaintiff challenges a voting restriction under the Kansas Constitution's guarantee of due process in its *LWV* decision last year: namely, that the State fails to provide adequate process if it rejects a ballot without providing the voter "reasonable notice" and an "opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies." *LWV*, 318 Kan. at 806. Plaintiffs have plainly stated a claim that SB 4 violates this standard.

Specifically, with the enforcement of SB 4, Kansas would provide voters neither notice

that their ballot arrived late, nor any opportunity to cure. This is plain from the law's very terms, which create a hard deadline: once a ballot fails to arrive by election day, it can *never* be validly counted; there is *no* possibility to cure. *See* Am. Pet. ¶ 97. Thus, under SB 4, a voter would not be able to get their late-arriving ballot to count by showing that they sent it well before election day, that they sent it the first day it was received from their county election office, or that they otherwise complied with and met all Kansas requirements to vote. This is so even though Kansas permits voters the opportunity to cure certain other defects up until the "final county canvass"—which can be up to 13 days after election day. K.S.A. 25-1124(b) (providing for opportunity to cure missing or mismatched signature on advance ballot); K.S.A. 25-3104 (providing for final canvass no later than 13 days after election day). SB 4 therefore violates the Kansas Constitution's guarantee of due process by providing *no* process whatsoever to affected voters.

The Secretary first responds that due process protections do not apply at all because Kansans have no liberty interest in voting. Mem. at 18; *but see Reynolds*, 377 U.S. at 554 ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *and to have their votes counted*." (emphasis added)). This represents yet another attempt to sidestep the *LWV* decision. Though the Secretary is correct that due process protection applies only when a property or liberty interest is at stake, *see Murphy v. Nelson*, 260 Kan. 589, 599, 921 P.2d 1225, 1233 (1996), his contention that there is no liberty interest in voting squarely contradicts *LWV*'s holding that the plaintiffs stated a viable due process claim against the voting law at issue there, which necessarily means the Court found that Kansans *do* have a protected liberty interest in voting. 318 Kan. at 807. The issue was cleanly presented in *LWV*: the Secretary had argued to the Court that the "*Court of Appeals erred by holding that there is a state-created liberty interest in voting by mail*." Pet. for Review 13, *League of Women Voters of Kan. v. Schwab*, No. 22-

125084-S (Kan. April 5, 2023). In rejecting the Secretary's arguments on these grounds and remanding to the district court to decide the claim on the merits, the Court clearly disagreed. *See also LWV*, 318 Kan. at 828 (Rosen, J., concurring in part and dissenting in part) ("The majority appears to agree the legislation denies a liberty interest."). That alone decides the issue. As with the Secretary's attempt to dodge *LWV*'s clear holding on equal protection, the Court should reject his attempt to avoid *LWV*'s holding on due process.[9]

The Secretary next claims that since SB 4 involves no "individualized determinations" of whether a vote counts and instead imposes an "across-the-board deadline," it is "legislative" and not "adjudicative" and due process thus does not apply. Mem. at 19-20. He cites no Kansas case to support that position, and nothing in *LWV* suggests its due process rule—that rejecting ballots requires reasonable notice and opportunity to cure—would fall to the side if the challenged law paints with a sufficiently broad brush to be called "legislative" rather than "adjudicative." Instead, the Secretary relies on a concurring federal court opinion to locate support for his proffered rule. Mem. at 19 (citing *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1288 (11th Cir. 2020) (Lagoa, J., concurring)). But even leaving aside that the Kansas Constitution affords "greater rights than the federal Constitution," *Farley*, 241 Kan. at 671, there is no reason in logic or precedent to exempt large swaths of Kansas voting and election laws from due process protection merely because the laws apply across the board rather than based on individualized determinations.[10]

[9] The Secretary's claim that *LWV* is not binding because it "never addressed the liberty issue," Mem. at 18, is a semantic ploy, divorced from logic. Though the Supreme Court's opinion may not have explicitly used the phrase "liberty interest," it repeatedly explained that the Kansas Constitution protects the "right of suffrage" and concluded that right is an enumerated right under Article V of the Kansas Constitution. 318 Kan. at 793-794, 800. By holding that the plaintiffs had stated a viable due process claim, the Court implicitly concluded that this right amounted to a protected liberty interest.

[10] The Secretary also cites *Utah Republican Party v. Cox*, 892 F.3d 1066 (10th Cir. 2018), but that case concerned federal First Amendment, not due process claims.

To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). To determine the amount of process due, Kansas courts conduct a balancing test, weighing "(1) the individual interest at stake, (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *State v. Wilkinson*, 269 Kan. 603, 609, 9 P.3d 1, 5 (2000) (citing *Mathews*, 424 U.S. at 335). The due process problems posed by SB 4 would be readily solved by allowing ballots postmarked on or before election day to be counted so long as they are received within seven days of election day. Am. Pet. ¶ 115. At this pre-discovery stage of the case, where all factual inferences must be resolved in Plaintiffs' favor, *Berry*, 292 Kan. at 918, a seven-day grace period can be presumed to save nearly all the otherwise eligible votes of individuals whose ballots were postmarked on or before election day, eliminating nearly all the "risk of erroneous deprivation" of their liberty interests, *Wilkinson*, 269 Kan. at 609. Nor would it impose any meaningful administrative burden on the State, which has historically applied a grace period without incident and because Kansas is not required to canvass votes until thirteen days after the election. Am. Pet. ¶ 117. In light of those considerations and the importance of the interest at stake—the "fundamental" right to vote, *see Provance v. Shawnee Mission Unified Sch. Dist. No. 512*, 231 Kan. 636, 641, 648 P.2d 710, 714 (1982)—Plaintiffs have adequately pleaded that SB 4 violates due process, and that additional procedural protections are required by the Constitution.

C. SB 4 violates the Kansas Constitution's guarantee of the right of suffrage.

In Count III, the Amended Petition alleges that SB 4 violates Kansans' right to vote under the Kansas Constitution. *See* Kan. Const. art. V, § 1; Kan. Bill of Rts. §§ 1-2. The Secretary's discussion of Count III is limited to three sentences, which simply assert (without explanation)

that Count III is "foreclosed" by *LWV*. Mem. at 21-22.

The Secretary is wrong: Plaintiffs' right-to-vote claim is in no way inconsistent with *LWV*. That case concerned a law that requires election officials to attempt to confirm whether a voter's signature on a ballot matches the voter's signature on file. There, the Supreme Court held that challenges to legislative efforts to "provide by law for proper proofs of the right of suffrage," as set forth under Article 5, Section 4 of the Kansas Constitution, should be analyzed under the test in *State v. Butts* rather than the "tiered scrutiny analysis typically used" to evaluate restrictions on fundamental rights. *LWV*, 318 Kan. at 802. Analyzing *Butts*, the Court explained that the "proper proofs" contemplated by Article 5 "may include any reasonable provision for ascertaining who is entitled to vote—that is, who is a qualified elector under article 5." *Id.* at 801 (emphasis deleted). The Court then held that the signature verification law at issue did not violate the "proper proofs" test because it was reasonably geared to ensuring "voters are properly qualified." *Id.* at 802.

The *Butts* test for evaluating laws passed pursuant to Article V, Section 4 is not applicable to SB 4, because SB 4 has nothing to do with whether a voter is *qualified* to vote. SB 4 does not concern whether a voter submits a "proper proof" of their ability to vote; it simply mandates that election officials reject any ballots that arrives after 7 p.m. on election day, even from Kansans who are indisputably eligible to vote. The question here, then, is what test applies to SB 4, as a law that burdens the right to vote, and the answer is strict scrutiny. "Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right . . . must be carefully and meticulously scrutinized." *Moore*, 207 Kan. at 649. "Strict scrutiny . . . applies in cases involving . . . fundamental rights," and "fundamental rights recognized by the [U.S.] Supreme Court include voting." *Farley*, 241 Kan. at 669-70 (cleaned up); *see also Moore*, 207 Kan. at 649 (noting the right to vote is "fundamental," "is pervasive of other basic civil and political rights," and "is the

bed-rock of our free political system"); *Hodes & Nauser*, 309 Kan. at 663 ("The most searching of these standards—strict scrutiny—applies when a fundamental right is implicated.").

Contrary to the Secretary's unexplained assertion, *LWV* does not hold differently. As explained above, *LWV* announced a test to analyze laws passed to require "proper proofs" of a voter's eligibility, and SB 4 is not such a law. Moreover, the *LWV* Court took pains to confirm that it was *not* overruling any prior precedent, which would include the several Kansas Supreme Court cases holding that voting is a fundamental right, and that laws burdening fundamental rights are subject to strict scrutiny. *See* 318 Kan. at 799 (majority op.) ("Today's decision does not conflict with any of our past precedent[.]"); *id.* at 832 (Biles, J., concurring in part and dissenting in part) ("*The majority opinion does not overrule prior caselaw*." (emphasis in original)). Consequently, longstanding precedent of the Kansas Supreme Court demands that SB 4—as a law that burdens the fundamental right to vote—is subject to strict scrutiny.

For SB 4 to survive strict scrutiny, the Secretary must show that it both serves a "compelling state interest" and is "narrowly tailored to further that interest." *Hodes & Nauser*, 309 Kan. at 663. He cannot. The Secretary recites a laundry list of alleged interests, but since he bears the burden of showing that SB 4 is narrowly tailored to serve a compelling interest, that cannot sustain his motion to dismiss for failure to state a claim in the face of Plaintiffs' detailed allegations illustrating the serious burdens imposed by SB 4. *See VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 876 (D. Kan. 2021) (declining to "weigh the relative burdens" on plaintiffs' rights against the state's proffered interests at motion to dismiss stage and thus denying motion); *Brokamp v. D.C.*, No. CV 20-3574 (TJK), 2022 WL 681205, at *1 (D.D.C. Mar. 7, 2022) ("[A] strict-scrutiny claim cannot be resolved on a motion to dismiss because the government 'bears the burden . . . to prove the infringement is narrowly tailored to serve a compelling state interest'" (quoting *Smith v.*

District of Columbia, 387 F. Supp. 3d 8, 30 (D.D.C. 2019)); *Child v. Beame*, 412 F. Supp. 593, 609 (S.D.N.Y. 1976) ("[W]hether defendants, in going forward can establish . . . a 'compelling state interest' . . . [is] not [a] proper question[] on a motion to dismiss.").

Even if the Court were to evaluate the merits of the Secretary's asserted interests, they all fail. First, the Secretary claims that SB 4 is necessary to "remain compliant with the Federal Election Day statutes," Mem. at 16, but as explained above, those statutes do not require states to reject ballots cast by but received after Election Day. *See supra* Argument § II.

The Secretary next raises the specter of voter fraud, but the legislative record on SB 4 contained no evidence that Kansas's prior grace period facilitated fraud. Likewise, the Secretary fails to explain how the *deadline* for receiving mail ballots bears any relationship to fraud at all. Nor could he; in fact, the Secretary has previously rebuffed accusations that Kansas's elections suffer from voter fraud, *responding that the real harm to voters is USPS's failure to promptly deliver mail ballots*.[11] Indeed, a federal court recently found that "Schwab had publicly declared that the 2020 election in Kansas was successful, without widespread, systematic issues of voter fraud, intimidation, irregularities or voting problems," which "calls into question any purported legislative intent to root out fraud, promote efficiency or avoid voter confusion in Kansas elections." *VoteAmerica v. Schwab*, 790 F. Supp. 3d 1255, 1275 (D. Kan. 2025). In that case, the court also criticized the Secretary for presenting "no evidence of voter fraud effectuated through advance mail voting," finding instead that Kansas had "extremely effective" safeguards in preventing fraud in mail voting. *Id.* at 1278.

[11] *See* Grace Hills, *Kansas Secretary of State Scott Schwab works to build trust in elections in the face of skepticism*, Kansas Reflector (Sept. 15, 2024), https://kansasreflector.com/2024/09/15/kansas-secretary-of-state-scott-schwab-works-to-build-trust-in-elections-in-the-face-of-skepticism/.

With little elaboration, the Secretary name-drops several other purported interests: "simplif[ying] logistics," "enhanc[ing] efficiency," "prompt tabulation" of ballots, and avoiding "processing late-arriving mail ballots." Mem. at 16-17. But again, Kansas has had a grace period for years without any indication that these problems exist. In fact, the Kansas County Clerks and Election Officials organization publicly *opposed* SB 4 without any mention of the supposed need to eliminate a grace period to enhance "logistics" and "efficiency." Am. Pet. ¶¶ 84-85. And since ballots will be processed and counted after election day irrespective of the receipt deadline—and later-arriving ballots make up only a small portion of all ballots cast—SB 4 could do little to meaningfully promote the State's proffered interests in enhancing logistics and efficiency. Additionally, the Secretary's asserted interests in "prompt tabulation" of ballots and avoiding processing late-arriving mails ballots also cannot be reconciled with Kansas allowing the final canvass to occur up to 13 days after the election. *See* K.S.A. 25-3104. Nor does the Secretary explain how public confidence in elections would be advanced, rather than undermined, by rejecting thousands of ballots cast by eligible voters on or before Election Day. *See VoteAmerica*, 790 F. Supp. 3d at 1277 (rejecting the Secretary's proposed interests in election administration and voter confidence for lack of evidence and lack of narrow tailoring).

Furthermore, even assuming that any of the Secretary's asserted interests were "compelling," he nowhere attempts to show that SB 4 is "narrowly tailored" to those interests. *See Hodes & Nauser, MDs, P.A. v. Kobach*, 318 Kan. 940, 954, 551 P.3d 37, 48 (2024) ("[S]trict scrutiny requires the government action to be narrowly tailored in its furtherance of the compelling interest.").

Finally, even if *LWV* somehow intended to supplant strict scrutiny analysis entirely with the proper proofs test—and the opinion indicates the opposite—Plaintiffs have alleged in the

alternative that SB 4 would not survive the proper proofs test. *See* Am. Pet. ¶¶ 124-25 (arguing in the alternative that SB 4 would reject ballots for reasons unrelated to voter qualifications and so failed the proper proofs test under *LWV*).[12] Specifically, Plaintiffs alleged in the alternative that SB 4 imposes an extra-constitutional qualification on the right of suffrage. *See id*. As the Court in *LWV* explained: "If a law is shown to violate the *Butts* test—*i.e.*, if it imposes any additional de facto qualifications not explicitly set forth in article 5 on the right to become an elector—the law is unconstitutional." *LWV*, 318 Kan. at 802. To this, the Secretary offers no rebuttal.

CONCLUSION

The Court should deny Defendant Schwab's motion to dismiss.

Respectfully submitted this 10th day of November, 2025.

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[12] Finally, Plaintiffs preserve their argument that, to the extent the decision forecloses Plaintiffs' claims, *LWV* was wrongly decided and should be overruled. *See* Am. Pet. at 29 n.2.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 10, 2025, a true and correct copy of the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send notice of electronic filing to all counsel of record.

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