

IN THE STATE OF KANSAS
SEVENTH JUDICIAL DISTRICT -- DOUGLAS COUNTY, KANSAS

KANSAS APPLESEED CENTER FOR
LAW AND JUSTICE, INC. et al.,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity
as the Kansas Secretary of State et al.,

Defendants.

Case No. DG-2025-CV-000206

**DEFENDANT SCHWAB'S EMERGENCY MOTION TO STAY OR SUSPEND
TEMPORARY INJUNCTION PENDING APPEAL**

Under K.S.A. 60-262(c), Defendant Scott Schwab (hereinafter, "the Secretary") respectfully moves the Court to stay or suspend this Court's July 16, 2026, Order temporarily enjoining K.S.A. 25-1132(b), as amended by S.B. 4 (2025).

Plaintiffs wage a state facial constitutional attack against S.B. 4, a law the Kansas legislature passed in March 2025 to require that all advance voting ballots must be received in the county election office or polling place no later than the close of the polls on Election Day. This law, which went into effect January 1, 2026, amends K.S.A. 25-1132(b) to eliminate the three-day grace period for county election offices to accept advance mail ballots.

On July 16, 2026, this Court temporarily enjoined S.B. 4. (Dkt. Index #99.) That same day, the Secretary filed a Notice of Appeal. (Dkt. Index #100.) Under K.S.A. 60-262(c), the Secretary now moves this Court to stay or suspend the temporary injunction during the Secretary's appeal of the same so that the duly enacted statute remains in place during the pendency of the Secretary's appeal. A stay is appropriate in light of the well-recognized principle that courts should not alter election rules on the eve of an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 1 (2006). Voting has already begun in the August primary election, with 46,127 ballots having been mailed out and

hundreds of votes having already been cast as of July 16. It is inappropriate to upset election procedures this late in the game, which will only sow electoral confusion and undermine confidence in the election. Furthermore, a stay is necessary because this Court's Order disregards its lack of authority to enjoin an election law statute on a state-wide basis in the absence of proper defendants.

I. Legal Standards

Kansas law provides that “[w]hile an appeal is pending from an interlocutory order . . . that grants, dissolves or denies an injunction, the court may suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” K.S.A. 60-262(c). Further, under K.S.A. 60-262(e) “[t]he court must not require a bond, obligation or other security from the appellant when granting a stay on an appeal by the state, its officers or its agencies or on an appeal directed by a department of the state.”

A stay of the temporary injunction preserves the status quo of conducting elections under Kansas’ duly enacted statute during the appeal. *See Arizona Secretary of State’s Office v. Feldman*, 580 U.S. 977 (2016) (Kennedy, J, in chambers) (granting stay of Ninth Circuit’s preliminary injunction barring enforcement of a new criminal law associated with voting pending resolution of the case by that circuit); *K.C. v. Individual Members of Med. Licensing Bd. of Indiana*, 121 F.4th 604, 613 (7th Cir. 2024) (“Indiana’s law would have gone into effect had the district court not entered its injunction, so the stay allowed the state to enforce SEA 480 while this appeal proceeded.”); *Golden Gate Rest. Ass’n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116-17 (9th Cir. 2008) (“[G]ranting a stay in this case would, in a real sense, preserve rather than change the status quo. In the absence of the district court injunction on December 26, 2007, the provisions of the Ordinance that were scheduled to go into effect on January 1, 2008, would now be part of

the status quo.”), *overruled on other grounds by Nken v. Holder*, 556 U.S. 418 (2009). Moreover, even if this Court disagrees with the Secretary’s argument that a stay preserves the “status quo,” courts reviewing preliminary injunctions enjoining implementation of a new law have granted motions for stays without weighing whether a stay would disturb or preserve the status quo. *See Id.* at 1117 (citing, as examples, *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244-53 (6th Cir.2006); *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997)). “In this context, the status quo is that which the People have wrought, not that which . . . judges impose upon them.” *Camblos*, 116 F.3d at 721.

Kansas courts have not addressed the specific factors a court should consider in determining whether to suspend or stay a temporary injunction under K.S.A. 60-262. When faced with a lack of binding authority, Kansas courts often look to cases interpreting the parallel federal rules of procedure for persuasive guidance. *E.g. Reed v. Chaffin*, 205 Kan. 815, 819, 473 P.2d 102 (1970); *In re Est. of Fechner*, 56 Kan. App. 2d 519, 527, 432 P.3d 93 (2018). Because K.S.A. 60-262(c) is substantially similar to Fed. R. Civ. P. 62, federal guidance is persuasive here. *See* 4 Gard, Casad, Mulligan, *Kansas Law and Practice: Kansas C. of Civ. Proc. Annot. § 60-262* (5th ed. 2025) (stating K.S.A. 60-262 “is substantially similar to Federal Rule 62, except the Kansas rule has no counterparts of Federal Rule 62(f) or the last sentence of Federal Rule 62(c),” neither of which are at issue here). Under federal law, in determining whether a stay is warranted pending appeal, a court considers the following factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

“There is substantial overlap between these and the factors governing preliminary injunctions, not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.” *Id.* (internal quotation omitted). The first two factors set out above are the most critical. *Id.*

II. The *Nken* Factors Strongly Favor a Stay

(1) The Secretary is Likely to Succeed on the Merits

As discussed in the Secretary’s Response to Plaintiffs’ Motion for Temporary Injunction¹ and Proposed Order denying the same, the Secretary is likely to succeed on the merits. The Secretary incorporates those documents by reference and includes copies of the same as Exhibits A and B to this Motion.² As discussed in more detail therein, Plaintiffs argue that S.B. 4 – which eliminates the three-day post-Election Day grace period for accepting mail ballots, returning Kansas to the practice it employed for nearly 150 years prior to a brief eight-year experiment with a grace period and realigning Kansas with the 35 other states that eschew grace periods³ – contravenes Kansans’ right to vote, equal protection, and due process under the State Constitution. These legal theories cannot succeed.

Under the separation of powers doctrine and longstanding Kansas Supreme Court precedent, Kansas courts “presume a statute to be constitutional, resolve all doubts in favor of a statute’s validity, and require that a statute must clearly violate the constitution before it may be

¹ Dkt. Index #77.

² The Secretary also includes as exhibit C the documentation showing the Secretary’s Proposed Order was accepted by the Douglas County Court for filing on March 2, 2026.

³ See <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (National Conference of State Legislature Table) (listing specific statute of each state that requires Election Day receipt of advance mail ballots) (last visited July 16, 2026).

struck down.” *Kan. Nat’l Educ. Ass’n v. State*, 305 Kan. 739, 749-50, 387 P.3d 795 (2017); *accord Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021). Kansas has long applied this principle in the election context. *See Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177, 180 (1936) (“No statute should be declared unconstitutional unless the infringement of the superior law is clear, beyond substantial doubt.”) (quotation omitted).

Furthermore, to prevail on the merits of their *facial* challenge, Plaintiffs must “establish that *no set of circumstances exists under which the Act would be valid.*” *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)) (emphasis added). “The fact that the [challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Court has] not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *Id.* (quoting *Salerno*, 481 U.S. at 745) (cleaned up). Despite this controlling authority, this Court’s Order holds the longstanding test for facial challenges does not apply, citing *City of Los Angeles, CA. v. Patel*, 576 U.S. 409, 418 (2015) and *State v. Ryce*, 303 Kan. 899, 915, 368 P.3d 342, 354 (2016), *adhered to on reh’g*, 306 Kan. 682, 396 P.3d 711 (2017). But this overlooks that *Ryce* explicitly cabined its holding: “when it comes to *Fourth Amendment challenges*, the ‘no set of circumstances’ test becomes more focused.” 303 Kan. at 915 (emphasis added).

More recently, both Kansas appellate courts have reiterated the no-set-of-circumstances test. *State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025); *State v. Hall*, 65 Kan. App. 2d 369, 371-72, 564 P.3d 786 (2025), *rev. denied* June 27, 2025. This Court is duty bound to adhere to this precedent. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022).

A. Equal Protection

This Court finds Plaintiffs are likely to succeed on an equal protection claim under the Kansas Constitution's Bill of Rights, §§ 1 and 2 and *LWV II*. As previously argued, Plaintiffs' Section 1 claims are foreclosed by *LWV II*, 318 Kan. at 793-94.

Further, with respect to Section 2, this Court overlooks that Kansas courts have long held that the scope and application of the Kansas Constitution's equal protection rights is identical to that of the U.S. Constitution. *Rivera v. Schwab*, 315 Kan. 877, 893-94, 512 P.3d 168 (2022) (Section 2 of Kansas Constitution's Bill of Rights is "coextensive" with equal protection guarantees of the Fourteenth Amendment). *Rivera* explained that the Court's decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did *not* alter Kansas' "historical and fundamental interpretation of the scope of equal protection found in section 2." *Rivera*, 315 Kan. at 894. To the contrary, the Court in *Rivera* reiterated that "section 2 is 'given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.'" *Id.* (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917)). "Put even more clearly," *Rivera* held, "the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution." 315 Kan. at 894. And if there were any doubt regarding *Rivera*'s continued application, in *LWV II*, the Supreme Court *quoted from Rivera* in explaining that Section 2 of the Kansas Constitution Bill of Rights is to be read coextensively with the U.S. Constitution. *LWV II*, 318 Kan. at 805.

i. — The Governing Legal Standard for Equal Protection Claims

This Court did not find any suspect class was at issue for purposes of equal protection. Instead, this Court held S.B. 4 failed to comply with the standard articulated in *LWV II*:

Equal protection requires similarly situated individuals should be treated alike. It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. To comply with equal protection in the context of providing “proper proofs” of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment. *LWV II*, 318 Kan. at 805 (internal quotations and citations omitted).

In holding Plaintiffs were substantially likely to prevail, this Court adopted Plaintiffs’ theory that *LWV II* articulated a “results-based” test. (Dkt. Index #99, p. 27.) But this represents a fundamental shift – *sub silentio* no less – in how both the U.S. and Kansas Supreme Courts have long interpreted the requirements to prevail on an equal protection claim.

This Court first finds the Election Day deadline subjects voters to arbitrary and disparate treatment. (Dkt. Index # 99, p. 27-35.) But under the *LWV II* standard, S.B. 4’s Election Day ballot receipt deadline is a uniform, objective standard under which no voter is subject to arbitrary and disparate treatment. 318 Kan. at 805. This legislation is a quintessential, neutrally applied statute that is administered identically (and objectively) to every voter. There are no individualized determinations to be made. No category of the electorate is treated differently than any other. The law applies equally to everyone.

Next, this Court finds Plaintiffs are likely to prove that S.B. 4’s “lack of uniformity creates an independent violation of equal protection principles.” (Dkt. Index # 99, p. 36.) In reaching this conclusion, the Court relies on the Kansas Supreme Court’s use of the phrase “achieve reasonable uniformity” in *LWV II*, 318 Kan. at 807. But the Supreme Court was simply describing the test to be applied on remand for evaluating the regulations governing the signature verification process for advance mail ballots – which had not yet been analyzed in the case and which the plaintiffs alleged utilized a standard that was not reasonably uniform among the counties. It is inconceivable that the Supreme Court was jettisoning fifty years of consistent equal protection jurisprudence with

no explanation whatsoever. Under that long line of equal protection case law, a rational basis standard must be applied in a manner that affords substantial deference to the State. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 193-94, 273 P.3d 709 (2012). None of this Court’s policy objections to S.B. 4 equate to an equal protection violation. *See USD No. 380 v. McMillen*, 252 Kan. 451, 461, 845 P.2d 676 (1993) (“[I]f a legislative enactment is constitutional, it is not for this court to set policy or to substitute its opinion for that of the legislature no matter how strongly individual members of the court may personally feel on the issue.”).

There can be no dispute that the Election Day ballot receipt deadline implemented by S.B. 4 applies in a neutral, even-handed manner to all Kansas voters. *Every voter* who opts to vote by mail must return the ballot to the county election office or a polling place no later than 7:00 PM on Election Day. No exceptions. “Equal protection requires similarly situated individuals should be treated alike.” *LWV II*, 318 Kan. at 805 (quotation omitted). “It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Id.* (quotation omitted). All that is necessary for the State to show is that the law in question is “being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment.” *Id.* Moreover, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” *Id.* (citing *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618 (1884)). This is all the more true in light of Plaintiffs’ *facial* challenge.

B. Due Process

This Court next holds there is a substantial likelihood that S.B. 4 violates Plaintiffs' due process rights under Section 18 of the Kansas Constitution's Bill of Rights because there is no right to cure a late-arriving ballot.

As a threshold matter, due process rights are implicated only when there has been a deprivation of life, liberty, or property. *Interest of A.S.*, 319 Kan. 396, 402-03, 555 P.3d 732 (2024). "In the absence of a protected property or liberty interest, there can be no due process violation." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 544, 216 P.3d 158 (2009). Here, as federal appellate courts have held, there is no liberty interest in voting by mail, let alone in a grace period. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 231 (5th Cir. 2020) (no liberty interest in right to vote); *New Ga. Project, v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (same); *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (same). Invoking *Raetzl v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 3d 1354 (D. Ariz. 1990), this Court disregards these decisions. (Dkt. Index # 99, p. 43-44.) But the Fifth Circuit explained in detail why that decision was wrongly decided and why no federal appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

This Court also relies on *LWV II*, where the Kansas Supreme Court remanded the plaintiffs' due process challenge to the State's signature verification requirements for advance mail ballots for the purpose of determining if voters are provided "reasonable notice" of their signature mismatch and "an opportunity to be heard at a meaningful time and in a meaningful manner" in order to contest the preliminary mismatch assessment. 318 Kan. at 807. But the Supreme Court never addressed the liberty issue in its majority opinion and there is no precedential value to an opinion that did not explicitly address an issue.

In any event, there is a clear distinction between an Election Day ballot receipt deadline and the signature verification requirement at issue in *LWV II*. Plaintiffs argue that the due process defect with S.B. 4 is that, if a ballot fails to arrive by Election Day, it can never be validly counted; there is no possibility of cure. An Election Day receipt deadline, however, does not implicate the type of individualized, discretionary determinations that can trigger due-process scrutiny. Unlike signature-verification processes or case-specific eligibility judgments – where election officials assess voter-specific information and thus must be guided by adequate procedural safeguards – an across-the-board receipt deadline is a neutral, bright-line rule that applies equally to every voter. There is no individualized decision to review, no adjudicative process to second guess, and no risk of an erroneous deprivation dependent on administrative discretion.

This Court also relies on the three-part balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), but our Supreme Court rejected that theory when formulating the standard for due process challenges involving electoral mechanics in *LWV II*. The Court highlighted that the legislature’s broad constitutional authority to require “proper proofs” under Article 5 means the State must enjoy great latitude in implementing that process. *LWV II*, 318 Kan. at 805-06. Further, the U.S. Supreme Court has directed that due process attacks on voting processes are best analyzed under a balancing test along the lines of *Anderson-Burdick*, see *Richardson*, 978 F.3d at 234, and the Kansas Supreme Court construes Sections 2 and 18 of the State Constitution as “coextensive” with their federal counterparts. *Rivera*, 315 Kan. at 894; *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019). That means *Eldridge* has no role here. *Richardson*, 978 F.3d at 235 (quotations omitted). This no doubt explains why every federal appellate court to address the issue has reached the same conclusion. See *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194-95 (9th Cir. 2021) (*Hobbs 2021*); *Memphis A. Philip Randolph Inst., v. Hargett*, 978 F.3d 378, 387-391 (6th Cir.

2020); *New Ga. Project*, 976 F.3d at 1282. *See also Common Cause Indiana v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex. It is rational to require absentee votes to be received by Election Day, just as in-person voting ends on Election Day.”).

C. Right to Vote

Under *LWV II*, “to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage.” *Id.* at 801. In this case, there is *no* additional qualification on any voter. The law simply imposes a neutrally applicable Election Day receipt deadline for mail ballots. There is nothing problematic, let alone unconstitutional, about that. As the Supreme Court held in *LWV II*, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” 318 Kan. at 804.

Unsurprisingly, federal appellate courts addressing this issue have unanimously reversed district court decisions enjoining Election Day ballot receipt deadlines. For example, in staying a lower court’s injunction of Arizona’s law requiring early voters to sign their ballots by 7:00 p.m. on Election Day, the Ninth Circuit held: “All ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion.” *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020) (*Hobbs 2020*); *see also Common Cause Ind.*, 977 F.3d at 664-

65 (“That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.”); *New Ga. Project*, 976 F.3d at 1281 (“Georgia’s Election Day deadline does not implicate the right to vote at all. Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots.”); *cf. Carson v. Simon*, 978 F.3d 1051, 1059-60 (8th Cir. 2020) (state court consent decree extending deadline for counting absentee ballots beyond Election Day violated U.S. Constitution’s Electors Clause). The rationale underlying these cases is especially applicable here considering Kansas provides a myriad of other ways to vote, including methodologies that accommodate the voters upon whom Plaintiffs focus. *See Brnovich, v. Democratic Nat’l Comm.*, 594 U.S. 647, 671 (2021) (“[W]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.”). In short, S.B. 4 imposes no unconstitutional burden on Plaintiffs’ right to vote. For all these reasons, Plaintiffs are not substantially likely to succeed on the merits of this claim.

(2) The State will suffer irreparable harm without a stay

“Prohibiting the State from enforcing a statute properly passed as part of its broad authority to regulate elections, particularly where the State has shown a strong likelihood that the statute is not constitutionally infirm, would irreparably harm the State.” *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Absent a stay, “the State will, in effect, be precluded from applying its duly enacted legislation regarding election procedures.” *Id.* Unless a statute is unconstitutional, which, as discussed above, S.B. 4 is plainly not, “barring the State from conducting this year’s elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] the State.”

Abbott v. Perez, 585 U.S. 579, 602 (2018). See also *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (same).

Additionally, the State suffers irreparable harm because this Court purported to enjoin S.B. 4 on a state-wide basis in the absence of proper defendants against which such an injunction can issue, creating confusion among county election officials as to whether they should follow the Election Day deadline in current law or this Court's injunction, which they are not parties to. Kansas law mandates that any injunction be specific and "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise." K.S.A. 60-906. This limitation is consistent with traditional principles of equitable relief, as injunctions are designed to provide complete relief to the plaintiffs before the court and not to regulate the conduct of nonparties. *Trump v. CASA, Inc.*, 606 U.S. 831, 851-52 (2025) (explaining that universal injunctions improperly protect nonparties and that "complete relief" is relief administered "between the parties," with any benefit to others only incidental).

Plaintiffs have sued only the Secretary of State and Douglas County Clerk in this lawsuit. No other county election official is named. As explained in the Secretary's Proposed Order Denying Plaintiffs' Motion for Temporary Injunction, by explicit statutory command, the Secretary has no operational control over county election officers. The legislature has deliberately established a highly decentralized electoral framework. Kansas law provides that "[e]ach county election officer shall be the sole public officer responsible for planning, conducting and coordinating elections held within such officer's county," and shall be "responsible for ensuring those elections comply with federal and state law and rules and regulations." K.S.A. 25-126(b). The Secretary, meanwhile, merely is responsible for "assisting and advising county election

officers in conducting elections in compliance with federal and state laws and rules and regulations.” K.S.A. 25-126(a).

Kansas administrative rules further reinforce county-level responsibility for acceptance and counting of advance voting ballots. For example, K.A.R. 7-36-5 provides “[e]ach county election officer shall adopt procedures to ensure that ballots received after the time the polls close on election day shall not be counted.” Thus, the act of enforcement at issue – accepting ballots received after Election Day – is implemented locally through county procedures and personnel, not through statewide operational control by the Secretary. This Court’s order did not even attempt to explain its authority to enjoin nonparties to this lawsuit.

Ultimately, regardless of the scope of this Court’s injunction, “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” (alteration in original) *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))). “A decision of that moment warrants cautious review” and favors a stay pending appeal. *Doe v. Gonzales*, 546 U.S. 1301, 1308-09 (2005) (Ginsburg, J., in chambers).

(3) The Remaining Factors Favor a Stay

“[A]lthough the remaining factors of injury to other parties and the public’s interest generally warrant lesser consideration than those of likelihood of success and irreparable harm,” they likewise weigh heavily in favor of granting a stay in this case. See *Org. for Black Struggle*, 978 F.3d at 609. Those factors are: whether issuance of the stay will substantially injure the other parties interested in the proceeding and where the public interest lies. *Nken*, 556 U.S. at 434.

Time and time again, federal appellate courts have granted stays under similar circumstances, as it is indisputable that “[t]he public has an interest in the fair and orderly operation of elections[.]” 978 F.3d at 609. For example, the Eighth Circuit, relying heavily on an earlier decision from the Eleventh Circuit, granted a stay pending appeal where the district courts granted plaintiffs a preliminary injunction against enforcement of a Missouri statute on equal protection grounds. Plaintiffs argued the statute treated mail-in ballots differently than absentee ballots, requiring that the former be returned by mail only while the latter could be returned by mail or in-person. The district court entered a preliminary injunction requiring the State to allow mail-in ballots to be received in the same method as absentee ballots. The Missouri Secretary of State moved the district court for a temporary administrative stay to allow a ruling on a stay pending appeal, which the district court granted. The Eighth Circuit likewise granted a stay pending appeal. *Id.* at 606-07.

With respect to the public’s interest, the Eighth Circuit reasoned, “the State’s ‘interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud,’ further serve the public’s interest, as ‘confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy[.]” *Id.* at 609 (cleaned up) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Raffensperger*, 976 F.3d at 1284). And, regarding harm to other parties, the Court explained, “there can be little harm to other parties where, . . . ‘a stay preserves the status quo and promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules.’” *Id.* (quoting *Raffensperger*, 976 F.3d at 1284). *See also Raffensperger*, 976 F.3d at 1279 (granting a stay of a district court decision extending ballot receipt deadline during COVID-19 pandemic, reasoning, *inter alia*, plaintiffs would suffer no irreparable injury due to the stay as “these plaintiffs may

submit their absentee ballots (on time) or take advantage of any of the other avenues that Georgia has made available to ensure that voters are able to cast their ballots”).

The Seventh Circuit reached the same conclusion in *Lawson*, 977 F.3d at 664-65. There, the district court found Indiana’s Election Day ballot-receipt deadline unconstitutional “on the ground that the SARS-CoV-2 pandemic, which has led to more use of mail-in voting nationwide, creates a risk that ballots mailed close to Election Day will not be received on time.” *Id.* at 664. The district court issued an injunction requiring the state to count ballots received ten days after Election Day. *Id.* The Seventh Circuit rejected that reasoning, explaining, “[t]hat some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.” *Id.* at 664-65.

Regarding the public’s interest, the Seventh Circuit held, “[c]ounting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest.” *Id.* at 665. And, with respect to injury to other parties, the Court explained, “[p]eople who worry that mail will be delayed during the pandemic can protect themselves by using early in-person voting or posting their ballots early.” *Id.* at 665. Further, even during a pandemic, the Court recognized “those who act at the last minute assume risks[.]” *Id.* Ultimately, the Court granted the State’s request for a stay and summarily reversed the district court’s injunction. 977 F. 3d at 666.

Continuing this refrain, the Ninth Circuit granted a motion for stay pending appeal when the district court enjoined Arizona’s Election Day ballot-signature deadline. *Hobbs 2020*, 976 F.3d at 1086. The Court recognized the irreparable harm to the State’s interest “where a court order ‘barr[ed] the State from conducting this year’s elections pursuant to a [constitutionally permissible] statute enacted by the Legislature.’” *Id.* (quoting *Abbott*, 585 U.S. at 602-03). In

contrast, the Plaintiffs faced “only the ‘minimal’ burden of ensuring that voters sign their ballot affidavits by 7:00 PM on Election Day[.]” *Id.* at 1097.

Further, this Court’s order causes additional confusion by stating ballots may be counted if “postmarked or otherwise indicated by the United States Postal Service to have been mailed on or before the close of the polls.” (See Dkt. Index #99, p. 54. It is unclear what the Court means by the italicized language. But even if clarified, ballots do not always arrive with a postmark. In the 2024 general election, for example, 104 ballots were received after Election Day without a postmark and therefore could not be counted. (See Dkt. Index #71, Pls.’ Ex. 14 at 1.) By contrast, when ballots must be received by the close of polls on Election Day, the absence of a postmark is immaterial. This competing policy consideration underscores why the public interest favors preserving the Legislature’s chosen policy pending appellate review.

(4) Timing Favors a Stay

On its own, the analysis above supports a stay. Timing also favors a stay, as enjoining an election law close to an election is especially problematic. The United States Supreme Court has “repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. 424, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (collecting cases). Simply stated, the traditional test for a stay as articulated in *Nken* “does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state’s election law in the period close to an election.” *Merrill v. Milligan*, ____ U.S. ____, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J. concurring) (citing *Purcell*, 549 U.S. at 1). Instead, under *Purcell*, “in addition to the harms attendant upon issuance or nonissuance of an injunction,” courts must weigh considerations specific to election cases.” 549 U.S. at 4. “Even seemingly innocuous late-in-the-day judicial alterations to state election laws can

interfere with administration of an election and cause unanticipated consequences.” *Democratic Nat’l Comm. v. Wis. State Legislature*, ___ U.S. ___, 141 S. Ct. 28, 31, 208 L.Ed.2d 247 (2020) (Kavanaugh, J., concurring).

Although this case proceeds in state court, the policy rationale for staying orders altering election statutes close to an election applies equally here. *See Liddy v. Lamone*, 398 Md. 233, 251, 919 A.2d 1276 (2007) (“[T]his Court is faced with the same quandary as the *Purcell* Court and must contemplate the ‘considerations specific to election cases,’ *i.e.* the potential harm to the appellees and, more important, to the electorate[.]”). “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell*, 549 U.S. at 4-5. When an election is rapidly approaching, the public interest is well served by preserving [the State’s] existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure . . . at the eleventh hour.” *Hobbs 2020*, 976 F.3d at 1086.

As discussed throughout this lawsuit, counties began sending advanced ballots on July 15, 2026, or 20 days before the election. Those ballots contain instructions comporting with current Kansas law, stating ballots must be returned by 7 p.m. on Election Day. Due to the time constraints at issue due to the ongoing election, the Secretary respectfully requests this Court rule on the instant motion today. If this Court does not immediately grant a stay, the Secretary will also be filing an emergency motion for relief in the appellate courts under K.S.A. 60-262(f) (1) and (2).

III. REQUESTED RELIEF

Under K.S.A. 60-262(c), the Secretary respectfully requests this Court enter an order staying the temporary injunction pending appeal.

Respectfully Submitted,

By: /s/ Ashley N. Jarmer
Bradley J. Schlozman (KS Bar #17621)
Krystle M. S. Dalke (KS Bar #23714)
HINKLE LAW FIRM LLC
1617 North Waterfront Parkway, Suite 400
Wichita, KS 67206
Tel.: (316) 267-2000
Fax: (316) 660-6596
Email: bschlozman@hinklaw.com
Email: kdalke@hinklaw.com

Ashley N. Jarmer (KS Bar #24722)
HINKLE LAW FIRM LLC
8711 Penrose Lane, Suite 400
Lenexa, KS 66219
Tel.: (913) 345-9205
Fax: (913) 345-4832
Email: ajarmer@hinklaw.com

CERTIFICATE OF SERVICE

I certify that on July 17, 2026, I authorized the electronic filing of the foregoing with the Clerk of the Court using the eFlex filing system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list.

By: /s/ Ashley N. Jarmer

Exhibit A

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**IN THE STATE OF KANSAS
SEVENTH JUDICIAL DISTRICT -- DOUGLAS COUNTY, KANSAS**

KANSAS APPLESEED CENTER FOR
LAW AND JUSTICE, INC. et al.,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity
as the Kansas Secretary of State et al.,

Defendants.

Case No. DG-2025-CV-000206

**SECRETARY SCHWAB'S PROPOSED ORDER DENYING PLAINTIFFS' MOTION
FOR TEMPORARY INJUNCTION**

This matter is before the Court on Plaintiffs' Motion for Temporary Injunction. The Court convened a non-evidentiary hearing on Plaintiffs' motion on January 27, 2026, after all parties agreed to forego the presentation of any evidence in connection with the motion. Plaintiffs and Defendant Schwab (the "Secretary") appeared through counsel. Defendant Shew took no position on Plaintiffs' motion and, with the Court's permission, did not appear. After hearing argument and being otherwise fully advised on the premises, the Court finds, concludes, and orders as follows:

I. Factual Background

A. Nature of the Action

1. On May 5, 2025, Plaintiffs Kansas Appleseed Center for Law and Justice, Inc.; Loud Light; and Disability Rights Center of Kansas filed a civil Petition for declaratory and injunctive relief against Defendant Scott Schwab, in his official capacity as the Kansas Secretary of State, and Defendant Jamie Shew, in his official capacity as the Douglas County Clerk.

2. On June 9, 2025, the organizational Plaintiffs and newly added individual Plaintiffs Dorothy Nary, Martha Hodgesmith, Robert Mikesic, and Benjamin Simons¹ filed a First Amended Petition for declaratory and injunctive relief against Defendants.

3. More than seven months after commencing their lawsuit, Plaintiffs filed this motion for a temporary injunction on December 9, 2025.

4. Plaintiffs wage a state facial constitutional attack against S.B. 4 (2025), a law the Kansas legislature passed in March 2025 (via gubernatorial veto override) to require that all advance voting ballots must be received in the county election office or polling place no later than the close of the polls. This law, which went into effect January 1, 2026, amends K.S.A. 25-1132(b) to eliminate the three-day grace period for county election offices to accept advance mail ballots.

5. This is the same deadline Kansas had in large measure for nearly 150 years, until 2017 when the legislature amended the statute to allow ballots to be received up to three days after Election Day if they were postmarked no later than Election Day. Having returned to its pre-2017 election methodology, Kansas is now one of 36 states in the country requiring ballots to be received by the close of the polls.²

6. Plaintiffs allege that the State's reversion to its longstanding Election Day deadline rule will have a disparate impact on rural and disabled voters who, they contend, rely heavily on the U.S. Postal Service ("USPS") to deliver their ballots. Plaintiffs contend that the USPS's poor track record on timely delivery of mail means that the elimination of the three-day grace period violates their equal protection, due process, and voting rights under the Kansas Constitution.

¹ The Court recently granted Plaintiffs' Motion to Dismiss Benjamin Simons without prejudice.

² See <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (National Conference of State Legislature Table) (listing specific statute of each state that requires Election Day receipt of advance mail ballots).

B. History of Mail Voting in Kansas

7. Kansas has had some form of mail voting for roughly 158 years. As described in detail below, these absentee voting laws evolved over time but were always extremely restrictive as to who could avail themselves of the opportunity to vote at any time other than Election Day. The State's absentee voting rules – the history of which is summarized in *Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177 (1936), where the Kansas Supreme Court upheld their constitutionality – were the historical predecessors to Article 12 of Chapter 25 of today's Kansas Election Code.

8. Critically, however, the *absentee* voter laws are fundamentally distinct from the no-excuse *advance* voting laws that the legislature introduced in 1995, which are set forth in Article 11 of Chapter 25 of the Kansas Election Code and are now at issue in this case.

9. As the Supreme Court recounted in *Lemons*, the first absentee voting rights were introduced in the form of an 1864 constitutional amendment allowing members of the military to vote while outside the State on official duty. 144 Kan. at 819-20. The amendment empowered the legislature to sort out the mechanics. *Id.* at 820. In response, legislators adopted a bill essentially directing that a polling place be set up wherever the regiment was stationed and that poll books and ballots be transmitted via mail to the camp so that soldiers who were otherwise registered to vote could cast their absentee ballots. 1864 Sess. Laws, Ch. 59, §§ 3-10, at pp. 102-04. The cast ballots were then to be mailed back to the Secretary of State in Topeka. *Id.* at in Topeka. *Id.* at § 10, at p. 104.

10. The legislature subsequently amended the law in 1868 to extend absentee voting rights to all qualified electors who were employed in the militia or volunteer service of the State or federal government. *Lemons*, 144 Kan. at 825; 1868 Sess. Laws, Ch. 36, § 45, at p. 415. The law expanded again in 1901 to cover railroad employees who were unavoidably absent from their

township or ward on Election Day. *Lemons*, 144 Kan. at 825. And in 1911, legislators broadened its reach to encompass any qualified elector necessarily absent from his county on Election Day. *Id.*

11. Prior to 1919, all absentee ballots had to be returned to the county election office or Secretary of State *no later than Election Day*. In 1919, however, the legislature loosened this rule to allow voters eligible to vote via absentee ballot to return such ballot via mail to the county clerk or Secretary of State by the tenth day after the election. *See* S.B. 314, 38th Leg., Session 250, Ch. 189, §§ 1, 6 (1919).

12. But the legislature later repealed this law in 1943, at which point it required that the absentee ballots had to be received by the county clerk or Secretary of State by 9:00 a.m. on the day before Election Day. *See* H.B. 333, 50th Leg., Session 281, Ch. 159, § 6 (1943).

13. In 1967, the legislature substantially revised its absentee voting laws. *See* S.B. 391, 1967 Sess. Laws, Ch. 208, at pp. 402-08. Section 6 of the bill restricted absentee voting to those individuals who are to “be absent from the county in which [they] reside[]” on Election Day. The legislature further mandated in Section 9(b) that all absentee ballots had to be received at the county election office no later than 12:00 p.m. on the day before Election Day. *Accord* 1968 Sess. Laws, Ch. 406, § 144, at pp. 913-14.

14. In the ensuing years, the legislature further modified the absentee voting laws to expand the individuals who could vote absentee. For example, it adopted a statute in 1972 designed to implement a recent constitutional amendment to Article 5, Section 1 – which was adopted by the electorate to ensure compliance with the federal Voting Rights Act of 1970, Pub. L. No. 91-285, § 202 (codified at 52 U.S.C. § 10502(d)), which limited durational residency requirements and mandated that “each State shall provide by law for the casting of absentee ballots for President

and Vice President . . . by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election.” But the legislature reiterated the due date for such absentee ballots as 12:00 p.m. on the day before Election Day. *See* S.B. 441, 1972 Sess. Laws, Ch. 134, § 4(d), at pp. 525-26.

15. In 1973, the legislature amended the law to allow absentee ballots to be received at the county election office at any time prior to the close of the polls. *See* H.B. 1132, 1973 Sess. Laws, Ch. 154, § 2(d), at pp. 554-55. *Accord* H.B. 3107, 1976 Sess. Laws, Ch. 183, § 1(d), at p. 705.

16. The legislature modified the absentee voting laws several more times to make more individuals eligible to vote absentee who were “unable to vote at [their] polling place on [Election Day]” due to the basis for the exception – e.g., sickness or physical disability (H.B. 2793, 1978 Sess. Laws, Ch. 140, § 1(b), at p. 620); religious belief or practice (S.B. 863, 1980 Sess. Laws, Ch. 109, § 1(b), at p. 497); poll worker on Election Day (S.B. 341, 1981 Sess. Laws, Ch. 157, § 1(c), at p. 669). But the deadline for submitting such ballots did not change. Until 2017, it remained the close of polls on Election Day.

C. Advance Mail Voting

17. In 1995, the legislature greatly expanded the use of mail voting by adopting no-excuse advance mail voting in which citizens can vote early via the mail even if they are not absent from the State. *See* 1995 Kan. Sess. Laws, ch. 192, § 17. Advance voting is governed by its own chapter in the State Election Code. *See* K.S.A. 25-1114 *et seq.*

18. Kansas voters may request an advance mail ballot by filling out an advance ballot application. Voters may submit their applications to the county election office as early as ninety days before the election and as late as seven days before the election. K.S.A. 25-1122(f)(1)(B).

19. If a voter has submitted an advance mail ballot application more than twenty days before the election, the county election office mails an advance ballot to the voter on the twentieth day before the election. K.S.A. 25-1123(a). Applications received after this time must be processed within two days of receipt. *Id.* Plaintiffs presented no evidence that county election officials were not mailing advance ballots to voters within this time frame.

20. Voters with a permanent disability or illness may request to be placed on the State's permanent advance mail voter list, K.S.A. 25-1122(h), and do not have to apply for an advance mail ballot. Instead, county election officials will automatically send the advance mail ballots to such voters twenty days before the election.

21. Douglas County, in fact, automatically sends advance ballot applications to *all registered voters* in advance of every even-numbered-year general election.

22. Prior to 2017, all advance mail ballots had to be received by the close of the polls on Election Day in order to count.

23. In 2017, however, the legislature enacted H.B. 2158, which permitted advance mail ballots postmarked by Election Day to be counted if they arrived within three days of the election.

24. Over the next eight years, the processing time and handling of ballots by the USPS continued to be an issue, with many ballots containing an illegible postmark or lacking a postmark altogether.

25. In 2025, the legislature adopted S.B. 4, which removed the three-day grace period and restored the Election Day ballot receipt deadline that had been in effect for most of the State's

history. With the passage of this law, Kansas is now (once again) one of 36 states in the country requiring ballots to be received by the close of the polls on Election Day.

D. Additional Voting Options in Kansas

26. In addition to being able to vote by mail (without any required excuse), Kansas voters today can vote in person on either Election Day or up to twenty days before the election at an advance voting site. *See* K.S.A. 25-1123(a), 1122(g)(1). All polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and the Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA).

27. The State also mandates curbside voting so that voters do not have to exit their vehicles. K.S.A. 25-2909(d). With curbside voting, election officials hand-deliver a ballot to the voter in the precinct's parking lot and then personally transmit the ballot back into the polling place once it has been cast.

28. Voters may also direct any third party of their choice to return their cast ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

29. If a voter has requested an advance mail ballot and either did not receive it in time to vote and return it, or simply misplaced it, the voter may request a provisional replacement ballot from the county election officer. K.S.A. 25-1122(f). Such voters may also vote in person at the polling place via a provisional ballot. K.S.A. 25-2908(f). *See also* Pls.' Ex. 16.

E. Plaintiffs' Evidence and Statistics

30. Plaintiff Dorothy Nary suffers from spina bifida and claims that she has limited mobility and other health issues making it difficult to vote in person. Pls.' Ex. 5 (Nary Decl.) at ¶ 9. Ms. Nary claims to have observed mail delays in Douglas County and references an 11-day mail delay in delivery of Valentine's Day cards she sent to nearby friends. *Id.* at ¶ 10. Although she has

previously voted by advance mail ballot and plans to vote by advance mail ballot in the 2026 election, *id.* at ¶ 4, she does not allege to have suffered any mail delays or disenfranchisement in her prior voting practices.

31. Plaintiff Martha Hodgesmith suffers from post-polio syndrome and claims that she has difficulty voting in person due to her mobility issues. Pls.' Ex. 6 (Hodgesmith Decl.) at ¶¶ 9-10. However, she does not allege any prior experience with mail delays or issues with advance mail voting in her declaration.

32. Plaintiff Robert Mikesic typically votes by advance mail ballot and intends to vote by mail in the upcoming 2026 election. Pls.' Ex. 7 (Mikesic Decl.) at ¶ 4. Mr. Mikesic claims that his advance mail ballot for the November 2025 municipal election did not arrive until after the election was over. *Id.* at ¶¶ 5-6. But Plaintiffs do not provide evidence on what occurred to cause the delay – whether it was the mail or a mishap at the election office. Regardless, Mr. Mikesic was able to vote in person without issue during the November 2025 election. *Id.* at ¶ 5.

33. In 2020, when the COVID pandemic was at the forefront of the minds of most Kansans, the Secretary of State's Office reported that 32,367 advance mail ballots arrived at county election offices during the three-day grace period. Plaintiffs do not present any evidence as to when these 32,367 ballots were mailed.

34. During the 2022 general election, across the entire State of Kansas (i.e., all 105 counties), approximately 1,000 ballots were postmarked by Election Day and received during the grace period and thus properly counted. Pls.' Ex. 13.

35. The 2024 general election saw a significantly lower rate of advance mail voting as compared to 2020, with only 2,110 ballots (or 1.4% of timely postmarked ballots) arriving during

the three-day grace period after Election Day. Plaintiffs do not present any evidence as to when these 2,110 ballots were mailed. Pls.’ Ex. 1 at ¶¶ 36, 37.

36. Plaintiffs’ expert, Dr. Michael Herron, opines that some rural counties have higher percentages of mail ballots arriving during the grace period than other counties. Pls.’ Ex. 1 at ¶ 49.

37. Dr. Herron concedes, however, that the data upon which he relies is *not statistically significant* and based on “suggestive evidence.” Pls.’ Ex. 1 at ¶ 63 (“The conventional confidence level that one often finds in empirical research requires that an estimate have a p-value of 0.05 or lower to be considered statistically significant. The p-value associated with the slope estimate in Figure 4 is . . . slightly larger than 0.05. I conclude, therefore, that there is suggestive evidence from Figure 4 and Table 6 that, the more rural a Kansas County, the greater the county’s grace period rate in the 2024 general election, all things equal.”). While Dr. Herron attempted to back away from this statement through a “Supplemental Declaration,” this was a procedurally improper tactic by the Plaintiffs. Regardless, even if the Court were to consider it, it would not change the outcome of this motion. Indeed, the sample sizes he cites are so tiny that they have no statistical significance.

38. Plaintiffs also highlight transit times in Douglas County for the 2024 primary. They claim that in the August 6, 2024 primary, county election officials rejected more than 200 ballots that arrived more than three days after the election, even though the ballots had been postmarked in July. Their “proof” on this point consists of a single hearsay comment – in the form of a newspaper article that attributes the statistic to a purported non-quote comment from Defendant Shew. Pls.’ Reply Br. at 4 (quoting Pls.’ Ex. 16). This is inadmissible hearsay. *See State v. Hunter*, 241 Kan. 629, 637, 740 P.2d 559 (1987) (“A newspaper article. . . is actually a statement by a reporter of a purported statement made by the witness testifying . . . and thus fits the classical

definition of hearsay.”). It also passing strange, but ultimately quite revealing, that rather than point to any data from their expert witness or the Ballot Scout software (which, as discussed below, supposedly details the date on which advance ballots were mailed by both the county and voters), Plaintiffs opted to point only to a vague hearsay comment in a newspaper article.

39. Indeed, Plaintiffs present no evidence as to when exactly these 200 ballots were mailed in July 2024. Nor do they indicate *where* the ballots were postmarked. For example, many voters in Douglas County are likely students at the University of Kansas and may well have mailed their ballots from locations throughout the United States (or even beyond). Plaintiffs affirmatively chose not to call Mr. Shew at the temporary injunction hearing to shed light on this issue. Yet they bear the burden of proof and have failed to prove anything.

40. In 2024, Douglas County used an analytical tool called “Ballot Scout” to track mail ballots through the USPS. Douglas County is the only county in Kansas that uses this tool. Pls.’ Ex. 1, at ¶ 124.

41. Ballot Scout’s terms and conditions explicitly state, “We make no warranties or representations about the Site or the Services, including but not limited to *accuracy, completeness, timeliness, or reliability.*”³ (Emphasis added.)

42. Ballot Scout’s FAQs further point out that the system depends on ballot scans by the USPS, and “[o]ftentimes certain postal facilities may not have the scanning equipment to continue scanning the ballot or the USPS may be sorting the ballot in a way that does not move the ballot through the relevant scanning machines.”⁴

³ *Ballot Scout Terms of Service*, BALLOT SCOUT, <https://www.ballotscout.org/terms> (last visited Feb. 13, 2026).

⁴ *Ballot Scout FAQ*, BALLOT SCOUT, <https://www.ballotscout.org/faq-en> (last visited Feb. 13, 2026).

43. Although citing extensively to this software, Dr. Herron's declaration does not even attempt to establish Ballot Scout's reliability, completeness, or error rate; he simply parrots the company's description of its product and then relies on a subset of advanced ballots which purport to have been tracked in both directions by this program. *See* Pls.' Ex. 1 at ¶ 124 n.31, ¶¶ 125-36.

44. Plaintiffs presented no live testimony or sworn statement from either a Douglas County Election Official or a Ballot Scout representative describing the meaning and purported significance (or lack thereof) of the Ballot Scout data.

45. In any event, according to Dr. Herron's analysis of the Ballot Scout data, only *four* ballots in the 2024 primary spent more than 17 days in total transit time, meaning "between the Douglas County elections office, voters, and back." Pls.' Ex. 1, Table 21 and ¶¶ 150, 152; *see also id.* at ¶ 140 (explaining "total transit time"). Not a single ballot spent more than 19 days in total transit. *Id.* Fifty-one of the 583 mail ballots (roughly 8.7%) had a total transit time of 15 days or more. *Id.*

46. Meanwhile, according to Dr. Herron, in the 2024 General Election, *no* Douglas County advance mail ballots spent more than 15 days in total transit. *See* Pls.' Ex. 1, Table 17 and ¶¶ 140-41. In other words, all advance mail ballots tracked through the USPS with Ballot Scout in Douglas County were received within 15 days and would not have needed to rely on a grace period to be counted. Out of 3,731 advance mail ballots, only two ballots took longer than 12 days in transit between the Douglas County elections office, voters, and back. *Id.*

47. At the hearing, Plaintiffs' counsel referenced data from the 2022 general election, stating a little over 130,000 Kansas voters participated in the election using an advance ballot, with approximately 1,000 ballots (0.77%) arriving during the grace period. Plaintiffs' counsel then speculated that the upcoming 2026 election will have similar characteristics as the 2022 election.

Inexplicably, Plaintiffs' counsel used Douglas County's 2024 *primary* data on *one-way* mail transit times (according to Ballot Scout) – found in Pls.' Ex. 1, Tables 19-20 – to project that roughly 30,000 (or 23%) advance ballots will take seven days or longer to travel one way, over 15,000 (or 12%) advance ballots will take ten days or longer, and about 6,500 (5%) advance ballots will take 15 days or longer. *See* Def. Schwab's Ex. A (Jan. 27, 2026 hearing transcript) at pp. 65-68.

48. Even under these fabricated projections, Plaintiffs admit that some of these ballots might arrive by Election Day. But more importantly, Plaintiffs attempt to extrapolate sweeping conclusions regarding 2026 advanced mail voting total transit times by combining 2022 state-wide advanced voting numbers with incomplete (and unverified) 2024 *one-way* transit data from a primary election in a single county. In doing so, Plaintiffs grossly overstate what this data shows. This type of impermissible inference stacking based on cherry-picked and incomplete data is not permissible from an expert, much less Plaintiffs' counsel.

49. In February 2025, the Deputy Secretary of State testified before the legislature that approximately 97% of all ballots cast are counted and reported on election night. Pls.' Ex. 14. Roughly 2.5% of all ballots counted are provisional ballots that are added to the count at the county canvass. *Id.* In addition, 0.25% are advance mail ballots received on or before Election Day. Just 0.25% of all ballots counted are advance mail ballots received within the 3-day grace period. *Id.*

II. Legal Standard for Temporary Injunctions

Plaintiffs are not entitled to a temporary injunction, which is “an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). It is intended to “merely preserve[] the status quo until a final determination of a controversy can be made.” *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007) (quotation and emphasis omitted).

“Because the issuance of an injunction is contrary to delaying a decision until there is a fair opportunity to hear all the merits of the case, [Kansas] courts require extraordinary evidence to support such an order.” *State ex rel. Kobach v. Harper*, 65 Kan. App. 2d 680, 687, 571 P.3d 6 (2025). To obtain temporary injunctive relief, Plaintiffs bear the heavy burden of establishing *all* of the following elements: (1) they are substantially likely to succeed on the merits; (2) there is a reasonable probability that they will suffer irreparable future injury; (3) they lack an adequate legal remedy such as damages; (4) their threatened injury outweighs the injury that the defendant will suffer under the injunction; and (5) the injunction would not be adverse to the public interest. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012); *Schuck v. Rural Tel. Serv. Co., Inc.*, 286 Kan. 19, 24, 180 P.3d 571 (2008). This extraordinary remedy must be “used sparingly.” *Harper*, 65 Kan. App. 2d at 687.

III. Plaintiffs have no Substantial Likelihood of Success

At a minimum, Plaintiffs must show a “substantial likelihood of eventually prevailing,” which means they have “the burden to establish that [they are] more likely than not to prevail.” *Harper*, 65 Kan. App. 2d at 702. “This standard ensures that temporary relief is granted only when there is a significant chance of success, thereby protecting the interests of both parties until a final decision can be made.” *Id.* at 702-03.

Plaintiffs argue that S.B. 4 – which eliminates the three-day post-Election Day grace period for accepting mail ballots, returning Kansas to the practice it employed for nearly *150 years* prior to a brief eight-year experiment with a grace period and realigning Kansas with the 35 other states that eschew grace periods – contravenes Kansans’ right to vote, equal protection, and due process under the State Constitution. This legal theory cannot succeed.

A. Kansas courts presume statutes are constitutional and Plaintiffs' facial attack requires a showing that no set of circumstances exist under which S.B. 4 is valid

Under the separation of powers doctrine and longstanding Kansas Supreme Court precedent, Kansas courts “presume a statute to be constitutional, resolve all doubts in favor of a statute’s validity, and require that a statute must clearly violate the constitution before it may be struck down.” *Kan. Nat’l Educ. Ass’n v. State*, 305 Kan. 739, 749-50, 387 P.3d 795 (2017); *accord Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021). “Courts may not ‘sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.’” *Christopher v. State ex rel. Kansas Juv. Just. Auth.*, 36 Kan. App. 2d 697, 709, 143 P.3d 685 (2006) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Accordingly, a “court should not strike down a statute unless the infringement of the superior law is clear beyond a reasonable doubt.” *Hall v. Dillon Cos., Inc.*, 286 Kan. 777, 789, 189 P.3d 508 (2008). Kansas has long applied this principle in the election context. *See Lemons*, 144 Kan. 813, 63 P.2d at 180 (“No statute should be declared unconstitutional unless the infringement of the superior law is clear, beyond substantial doubt.”) (quotation omitted).

The already difficult road Plaintiffs must travel to prevail in this case is even more arduous due to the *facial* nature of their claims. Plaintiffs are waging a wholesale constitutional challenge to S.B. 4. This requires them to “establish that *no set of circumstances exists under which the Act would be valid.*” *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)) (emphasis added). “The fact that the [challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Court has] not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *Id.* (quoting *Salerno*, 481 U.S. at 745) (cleaned up). Such claims are highly disfavored because they typically rest on speculation, run contrary to the principle of

judicial restraint, and threaten to short-circuit the democratic process by preventing laws representing the will of the people from being implemented. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008); *State v. Bollinger*, 302 Kan. 309, 318-19, 352 P.3d 1003 (2015).

“A facial challenge is ‘an attack on a statute itself as opposed to a particular application’ of that law.” *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019) (quoting *Los Angeles v. Patel*, 576 U.S. 409, 415 (2015)). It thus does not necessitate any findings of fact and, instead, presents a question of law. *Id.* By contrast, “as its name suggests, an as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as-applied challenge necessarily requires findings of fact.” *Id.* at 6 (citations omitted). The nature of Plaintiffs’ facial claims renders them ideally suited for resolution at the motion to dismiss stage of the case. This Court must simply assume that everything Plaintiffs have pled is true and then determine whether Plaintiffs are entitled to relief based on those allegations.

Plaintiffs argue that the “no-set-of-circumstances” test for facial statutory challenges does not apply because *League of Women Voters v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) (“*LWV II*”) did not discuss it when addressing a challenge to a signature verification requirement. This overlooks hornbook law on stare decisis. “The rule of stare decisis may not be extended to cover implications from what was decided in a former case, and thus, a case is not binding precedent if its holding is only implicit or assumed, or the issue was decided sub silentio.” 21 C.J.S. Courts § 218 (2025). In other words, “Constitutional rights are not defined by inferences from opinions which did not address the question at issue.” *Texas v. Cobb*, 532 U.S. 162, 169 (2001); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”). “In order for a decision

to be given stare decisis effect with respect to a particular issue, that issue must have been *actually decided* by the court.” *United Food & Com. Workers Union, Loc. 1564 of New Mexico v. Albertson’s, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000) (emphasis added) (citation omitted).

Moreover, just recently, both the Kansas Supreme Court and Court of Appeals reiterated the no-set-of-circumstances test. *State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025) (“A successful facial challenge generally requires a litigant to establish that the law is unconstitutional in all its applications. Thus, for the State to prevail in a facial challenge, it need only demonstrate that the law is constitutional in at least some applications.”); *State v. Hall*, 65 Kan. App. 2d 369, 371-72, 564 P.3d 786 (2025) (holding that to prevail on a challenge under section 4 of the Kansas Constitution Bill of Rights, a criminal defendant must show that “no application of [the statute] could survive constitutional review under section 4 – a formidable legal task even with a fundamental right”), *rev. denied* June 27, 2025. This Court has no choice but to adhere to this precedent. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022) (“Courts are duty bound to follow this court’s precedent absent an indication that we are departing from that precedent[.]”).

B. Deferential Review is Constitutionally Mandated

1. – Article 4, Section 1 Confers Vast Discretion on Legislature

The Kansas Constitution expressly assigns to the legislature all decisions regarding the specific voting methodology to be used in state elections. Kan. Const. art. 4, § 1 (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added); *see also id.* art. 1, § 1 (in “elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly *in such manner as is prescribed by law*”) (emphasis added). The Kansas Supreme Court recently reinforced the scope of this provision. *See LWV II*, 318 Kan. at 797 (“Where popular elections are required – by either

statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.”) (citing Kan. Const. art. 4, § 1).

Just as is true of Article 5, § 4, which authorizes the legislature to require “proper proofs” to ensure that the right of suffrage extends only to eligible voters, *LWV II*, 318 Kan. at 801-02, the exclusive delegation to the legislature in Article 4, § 1 necessarily confers upon lawmakers the power to select *any reasonable* mode of voting for state elections. “[U]nless that power is abused the courts may not interfere.” *Id.* at 801 (quoting *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618 (1884)); *see also Sawyer v. Chapman*, 240 Kan. 409, 412, 729 P.2d 1220 (1986) (as long as voting is by ballot and the person casting vote may do so in secrecy, Article 4, § 1 empowers the legislature to “adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary”) (quoting *Taylor v. Bleakley*, 55 Kan. 1, 39 P. 1045, 1050 (1895)).

As the Kansas Supreme Court explained in *LWV II*, there can be no fundamental right to vote that is divorced from “concrete and specific provisions of the Constitution or statutes.” 318 Kan. at 800. It is an “enumerated political right.” *Id.* And neither the Kansas nor U.S. Constitution confers any right to vote by mail. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969) (any fundamental right to vote under the Federal Constitution is directed at the ability to *generally cast a ballot*, not the right to do so in the voter’s preferred manner, such as by mail); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.”); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (“[A]s long as the state

allows voting in person, there is no constitutional right to vote by mail.”); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (affirming dismissal of complaint for failure to state a claim where working mothers argued that because it is a hardship for them to vote in person on election day, the U.S. Constitution required Illinois to allow them to vote by absentee ballot, reasoning, “at bottom the plaintiffs are arguing that the Constitution requires all states to allow unlimited absentee voting, and the argument ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution”).

2. – References to “Absentee Ballots” in Article 5, Section 1 are Irrelevant

Before turning to Plaintiffs’ substantive claims, an aside is warranted to address a point of apparent confusion in one of their arguments. Plaintiffs have frequently invoked the term “absentee ballots,” including a reference to Art. 5, § 1 of the Kansas Constitution. That term, however, has no relevance here. Nothing in that provision touches the issue of *advance voting*. Absentee voting and advance voting are two entirely distinct concepts. Indeed, the Kansas Election Code (which is codified in Chapter 25 of the Kansas Statutes Annotated) has entirely separate Articles on these two voting methodologies. “Advance voting” is governed by Article 11, while “absentee voting” is governed by Article 12.

The Constitution’s reference to “absentee” simply underscores that citizens may vote absentee if they have either moved out of Kansas just before a Presidential election or moved out of their voting area (yet still reside in Kansas) prior to any election. The language was adopted in an amendment approved by the electorate on April 6, 1971, and was designed to implement a new requirement of the Voting Rights Act of 1970, Pub. L. No. 91-285, § 202 (codified at 52 U.S.C. § 10502(d)), which limited durational residency requirements and mandated that “each State shall provide by law for the casting of absentee ballots for President and Vice President . . . by all duly

qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election.” See Kan. Legislature, 1971 Report of Special Comm. on Party Convention Nominations and Election Law Changes, at 178-79 (Dec. 1971) (“The committee concludes that changes are necessary in order to implement the recent amendment to [Art. 5, § 1] . . . making other changes regarding the right to vote of those who have recently moved, in part necessitated by the federal voting rights act amendments of 1970.”).

The references to “absentee voting” in the Kansas Election Code are targeted exclusively at members of the armed services, their families, and citizens residing overseas. See K.S.A. 25-1215 *et seq.* This is not a mistake. These provisions reflect the State’s implementation of the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311. Nothing in the amendment of Art. 5, § 1 was intended to restrict the legislature’s Article 4, § 1 authority – beyond the limits identified in Art. 5, § 1 itself, of course – to regulate the process for casting and receiving ballots or to require *mail voting* at all.

The concept of “advance voting” was not even introduced until 1995, when the legislature adopted a new standalone chapter of the election code to allow for no-excuse advance voting (i.e., no requirement that the voter be outside the State or county of his/her residence on Election Day, or unable to vote at his/her assigned polling place due to some specified circumstance). See 1995 Kan. Sess. Laws ch. 192, § 17 (codified at K.S.A. 25-1114 *et seq.*). Plaintiffs’ attempt to conflate advance and absentee voting makes no sense. Indeed, if the concept of advance voting was already incorporated into absentee voting as Plaintiffs suggest, there would have been no need for the legislature to amend the Election Code to implement advance voting in 1995. In short, this Court

has no constitutional authority to interfere with the legislature's policy choices in structuring the scope of such advance voting.

C. Plaintiffs' Equal Protection Claim Fails as a Matter of Law

Plaintiffs first claim a violation of equal protection under Sections 1 and 2 of the Kansas Constitution's Bill of Rights. Plaintiffs contend that the absence of a grace period for receiving advance mail ballots has a disparate impact on "voters living in rural areas and voters who are temporarily away from Kansas" because (i) such voters allegedly tend to rely more heavily on voting by mail than other Kansans, and (ii) the USPS's on-time delivery track record is not at levels Plaintiffs and some Kansas state officials deem acceptable. Am. Pet. ¶¶ 10-11, 29, 59-74, 87, 106. Plaintiffs similarly allege that the elimination of the grace period violates the equal protection rights of disabled voters whose mobility issues necessitate that they vote by mail. *Id.* at ¶¶ 8, 26-28, 88-91. Plaintiffs argue the USPS's slow delivery times will make it difficult for these voters to ensure that their mailed ballots are received at the county election office by the close of polls on Election Day.

1. – Plaintiffs fail to State an Equal Protection Claim under Section 1

Plaintiffs' Section 1 claims are foreclosed by *LWV II*. There, the majority held the "right to vote" is not an unenumerated 'natural right' protected by section 1 of the Kansas Constitution Bill of Rights. Rather, suffrage is universally understood as a political right." 318 Kan. at 793 (collecting cases). Accordingly, the Supreme Court held, "the Court of Appeals erred when it analyzed the question under our existing section 1 jurisprudence." *Id.* at 793-74. Justice Rosen's dissent echoed this holding. *Id.* at 813 (Rosen, J., dissenting) ("The majority concludes voting is a political right, not a natural one, so section 1 offers it no protection. I agree.").

2. – Section 2 is Coextensive with Fourteenth Amendment of U.S. Constitution

With respect to Plaintiffs’ Section 2 equal protection claim, Kansas appellate courts have long held that the scope and application of the Kansas Constitution’s equal protection rights is identical to that of the U.S. Constitution. *Rivera v. Schwab*, 315 Kan. 877, 893-94, 512 P.3d 168 (2022) (Section 2 of Kansas Constitution’s Bill of Rights is “coextensive” with equal protection guarantees of the Fourteenth Amendment). Nevertheless, Plaintiffs urge this Court to interpret the State Constitution’s equal protection guarantees in Section 2 more broadly than the parallel clause in the Federal Constitution. When forced to grapple with *Rivera* at oral argument before this Court, Plaintiffs argued that it does not apply here because it involved political gerrymandering and vote allegations in redistricting. *Rivera*, however, contains no such limitation.

Rivera explained that the Court’s decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did *not* alter Kansas’ “historical and fundamental interpretation of the scope of equal protection found in section 2.” *Rivera*, 315 Kan. at 894. To the contrary, the Court in *Rivera* reiterated that “section 2 is ‘given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.’” *Id.* (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917)). “Put even more clearly,” *Rivera* held, “the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution.” 315 Kan. at 894. And if there were any doubt regarding *Rivera*’s continued application, in *LWV II*, the Supreme Court *quoted from Rivera* in explaining that Section 2 of the Kansas Constitution Bill of Rights is to be read coextensively with the U.S. Constitution. *LWV II*, 318 Kan. at 805.

3. – The Governing Legal Standard for Equal Protection Claims

In *LWV II*, our Supreme Court addressed an equal protection challenge to Kansas’ signature verification requirement for advance mail ballots and articulated the applicable standard generally governing equal protection challenges attacks on election integrity laws:

Equal protection requires similarly situated individuals should be treated alike. It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. To comply with equal protection in the context of providing “proper proofs” of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment. *LWV II*, 318 Kan. at 805 (internal quotations and citations omitted).

LWV II thus provides the starting point for determining the proper equal protection standard here.⁵ Plaintiffs argue this is a “results-based” test that radically transformed equal protection jurisprudence. They maintain that, because disabled and rural voters tend to vote via mail more than other members of the Kansas electorate, the elimination of a grace period would deprive such voters of their right to equal protection under the law. If adopted, this theory would represent a fundamental shift – *sub silentio* no less – in how both the U.S. and Kansas Supreme Courts have long interpreted the requirements to prevail on an equal protection claim. This Court cannot take that leap.

Nor is there any legal basis for treating rural residents or disabled voters as suspect classes for purposes of equal protection. *See Guttman v. Khalsa*, 669 F.3d 1101, 1116 (10th Cir. 2012);

⁵ In addition to the *LWV II* test, Plaintiffs argue that strict scrutiny applies. But *LWV II* categorically rebuffed that contention. 318 Kan. at 808. Plaintiffs insist that because this case involves the regulation of voting, a more muscular standard of review must apply. Again, that theory was rejected in *Rivera* and *LWV II*. As the Supreme Court explained, there is no unenumerated right to vote divorced from “concrete and specific provisions of the Constitution or statutes.” *LWV II*, 318 Kan. at 799-800; *accord Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (“[T]he right to vote, *per se*, is not a constitutionally protected right.”). It is instead an “enumerated political right,” *LWV II*, 318 Kan. at 800, and the legislature may select any reasonable mode of voting and appropriate prophylactics to safeguard the integrity of the electoral process. *Id.* at 801.

Dunn v. Penfield, 2024 WL 1723705, at *11 (D.S.D. Jan. 22, 2024). This is critical because if no suspect class is at issue, “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Guttman*, 669 F.3d at 1116. “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.” *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001). The same is true for individuals living outside urban centers. In sum, whatever rights voters have to cast their ballot via mail are a matter of legislative grace. Plaintiffs’ public policy arguments do not alter the applicable standard of review. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (refusing to elevate the level of scrutiny for laws affecting the mentally disabled, despite changing social attitudes, indicating that levels of scrutiny are doctrinal and not responsive to cultural shifts alone).

In the absence of proof that a challenged statute was adopted with a *discriminatory purpose targeted at a suspect class*, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976) – which is clearly not present here – the law is reviewed under a rational basis standard. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). The fact that the law might have a disparate impact on particular individuals (or even a suspect class) does not suffice to trigger an equal protection violation. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *accord Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308, *supplemented*, 279 Kan. 817, 112 P.3d 923 (2005) (“In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose.”); *Crawford v. Kan. Dep’t of Rev.*, 46 Kan. App. 2d 464, 468, 263 P.3d 828 (2011) (“Evidence that similarly situated persons were treated differently is not, in and of itself, sufficient to establish an equal protection violation; an element of intentional or purposeful discrimination must also be present.”) (citing *Snowden v.*

Hughes, 321 U.S. 1, 8 (1944), and *Pork Motel, Corp. v. Kan. Dep't of Health & Env't*, 234 Kan. 374, 387, 673 P.2d 1126 (1983)). “The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Feeney*, 442 U.S. at 272.

Under the *LWV II* standard, S.B. 4’s Election Day ballot receipt deadline is a uniform, objective standard under which no voter is subject to arbitrary and disparate treatment. 318 Kan. at 805. Plaintiffs allege no intentional discrimination from S.B. 4, nor could they. This legislation is a quintessential, neutrally applied statute that is administered identically (and objectively) to every voter. There are no individualized determinations to be made. No category of the electorate is treated differently than any other. The law applies equally to everyone. While Plaintiffs focus on the Kansas Supreme Court’s use of the phrase “achieve reasonable uniformity” in *LWV II*, 318 Kan. at 807, and suggest some sort of disparate impact test might be at play, this Court must reject their attempt to isolate this phrase out of context. The Supreme Court was simply describing the test to be applied on remand for evaluating the regulations governing the signature verification process for advance mail ballots – which had not yet been analyzed in the case and which the plaintiffs alleged utilized a standard that was not reasonably uniform among the counties. It is inconceivable that the Supreme Court was jettisoning fifty years of consistent equal protection jurisprudence with no explanation whatsoever.

Under that long line of equal protection case law, where there is nary a suggestion that the law was adopted for a discriminatory purpose, a rational basis standard must be applied in a manner that affords substantial deference to the State. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 193-94, 273 P.3d 709 (2012). Plaintiffs argue that the law would be fairer if mail ballots could be disseminated earlier than twenty days prior to the election, and if timely postmarked ballots could be received up to a week after the election. But even assuming these one-sided policy arguments

are correct, the State has no legal obligation to choose a “better” or less burdensome method for pursuing its policy objectives. “[T]he relationship between the classification and the legislative objective it serves need not be narrowly tailored to the objective. A rational connection between the two will suffice.” *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 370, 361 P.3d 504 (2015). “Relevance is the only relationship required between the classification and the objective.” *Id.* (quotation and alteration omitted). In other words, the “standard is met so long as the statute produces effects that advance, rather than retard or have no bearing on, the attainment of the objective.” *Id.* (quotations omitted); accord *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (“The equal protection obligation . . . is not an obligation to provide the best governance possible. This is a necessary result of different institutional competences, and its reasons are obvious.”).

None of Plaintiffs’ policy objections to S.B. 4 equate to an equal protection violation, much less one requiring this Court to facially invalidate a duly enacted statute. The Kansas legislature’s decision to bring the State back into alignment with 35 other states – returning to a requirement that ruled the day in Kansas for roughly 150 years, other than a grace period allowance for certain military voters in the 1920s and 1930s, and the brief 2017-2025 grace period experiment at issue here – may or may not accord with the policy preferences of the full electorate. But that is simply immaterial to the constitutional analysis. See *USD No. 380 v. McMillen*, 252 Kan. 451, 461, 845 P.2d 676 (1993) (“[I]f a legislative enactment is constitutional, it is not for this court to set policy or to substitute its opinion for that of the legislature no matter how strongly individual members of the court may personally feel on the issue.”). Additionally, this Court rejects the notion that the Kansas Constitution imposes a one-way ratchet – that the legislature, after briefly experimenting with a change to its electoral mechanics, can never revert to the original procedures.

There can be no dispute that the Election Day ballot receipt deadline implemented by S.B. 4 applies in a neutral, even-handed manner to all Kansas voters. *Every voter* who opts to vote by mail must return the ballot to the county election office or a polling place no later than 7:00 PM on Election Day. No exceptions. “Equal protection requires similarly situated individuals should be treated alike.” *LWV II*, 318 Kan. at 805 (quotation omitted). “It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Id.* (quotation omitted). All that is necessary for the State to show is that the law in question is “being applied with reasonable uniformity so that no voter is subject to arbitrary and disparate treatment.” *Id.* Moreover, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” *Id.* (citing *Butts*, 31 Kan. at 555-56). This is all the more true in light of Plaintiffs’ *facial* challenge. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (to succeed in a facial attack, plaintiffs must establish that “no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.”); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (“A facial challenge must fail where the statute has a plainly legitimate sweep.”) (quotations omitted).

S.B. 4 imposes *no* legitimate burden – let alone a *severe* burden – on any voter in the State. Kansas voters have myriad options for exercising the franchise. In addition to voting by mail, they can vote in person on either Election Day or up to twenty days before the election at an advance voting site. K.S.A. 25-1123(a), 1122(g)(1). All such polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA). The State even mandates curbside voting so that voters do not have to exit their vehicle; election officials literally will bring

a ballot to the voter in the precinct's parking lot. K.S.A. 25-2909(d). Voters may also direct a third party to return their ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

As for voting by mail, it is still freely available. Counties begin processing advance mail ballot applications ninety days before the election, K.S.A. 25-1122(f)(1)(B), and then mail advance ballots to voters beginning twenty days before the election. K.S.A. 25-1123(a). Voters with a permanent disability or illness may be placed on the permanent advance mail voter list, K.S.A. 25-1122(h), and do not even have to apply for an advance mail ballot; their ballot will be automatically sent to them twenty days before the election. Anyone not on the permanent list, meanwhile, must have their advance ballot application processed within two days of receipt. K.S.A. 25-1123(a). Douglas County, in fact, *automatically sends advance ballot applications to all registered voters* in advance of every even-numbered-year general election.

While Plaintiffs lament the USPS's delivery pace, that is *legally irrelevant*. First, the legislature has no constitutional obligation to even allow mail voting. The fact that it does so does not constrain it from imposing conditions (including an Election Day receipt deadline) on the practice. Second, Kansas cannot be held to violate an elector's equal protection rights just because some third-party over whom the State has no control – the USPS – is not exactly a model of operational efficiency. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (State must not be held responsible under Fourteenth Amendment for conduct it cannot control).

Third, with a modicum of diligence, all voters can ensure that their ballots are counted. If a voter knows it could potentially take as much as a week or ten days for his mailed ballot to reach the county election office, then that voter simply needs to send it in early rather than waiting close to Election Day. As the U.S. Supreme Court pointed out in rejecting a request to extend a ballot

receipt deadline, voters who request a ballot at the last minute (and thus risk it not being counted) suffer the typical burden of a late-requesting voter, *not a burden imposed by state law*. *RNC v. DNC*, 589 U.S. 423, 425 (2020). An election deadline is not unconstitutional merely because an individual “fail[ed] to take timely steps to effect[uate]” his vote. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *accord DNC v. Wisc. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (rejecting all of the same arguments Plaintiffs advance in this case, noting state’s interest in enforcing Election Day ballot receipt deadline, and holding that voters who delay the submission of their ballot have no right to demand that it be counted); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (“Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting. ... And the burden on a voter to ensure that a ballot is postmarked by Election Day is not meaningfully smaller than the burden of, say, dropping the ballot in a drop box at one’s polling place on Election Day.”); *accord Mays v. LaRose*, 951 F.3d 775, 782-91 (6th Cir. 2020) (plaintiffs are no more burdened than any elector when they fail to take steps necessary to ensure the timely return of their ballots); *Ail. for Retired Ams. v. Sec’y of State*, 240 A.3d 45, 51-55 (Me. 2020) (same); *cf. Tully v. Okeson*, 977 F.3d 608, 615-18 (7th Cir. 2020) (requiring voters to vote in person during COVID-19 pandemic did not contravene Equal Protection Clause). In short, there is no constitutional right to procrastination.

Meanwhile, the federal district court cases Plaintiffs cite in support of their position offer them no refuge. Even assuming those cases were properly decided, they involved “as-applied” challenges to election officials’ refusal to accept and count timely-postmarked, but late-arriving ballots *in electoral ecosystems that included a grace period*. See *DCCC v. Kosinski*, 614 F.Supp.3d 20, 56 (S.D.N.Y. 2022); *Gallagher v. N.Y. State Bd. of Elections*, 477 F.Supp.3d 19, 46-48

(S.D.N.Y. 2020). None suggested a State would have to accept late-arriving ballots *where the law provided no grace period*. Never has the equal protection clause been held to impose such a requirement.

Plaintiffs' citations to *Bush v. Gore*, 531 U.S. 98 (2000), and *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506 (1971), are likewise inapposite. In *Bush*, the U.S. Supreme Court invalidated the Florida Supreme Court's mandated recount of the 2000 presidential election as lacking "sufficient guarantees of equal treatment" because the recount directive failed to provide *any* standard for election officials to use when determining the intent of the voter. 531 U.S. at 106-07. In the absence of such a uniform standard, Florida counties employed "varying standards to determine what was a legal vote," resulting in recount outcomes that were "markedly disproportionate to the difference in population between the counties." *Id.* at 107. Here, by contrast, S.B. 4 is indisputably administered in an even-handed and objective manner. All voters play by the same rules.

As for *Moore*, it involved an analysis of the Kansas Constitution's one-subject rule for constitutional amendments in Article 14, Section 1, and an assessment of whether an individual voter has standing to challenge the Secretary of State's decision to submit a proposed amendment to the electorate for approval. *Moore*, 207 Kan. at 645-46. That opinion has nothing to do with the instant action.

A recent decision of the Michigan Court of Appeals turning away a state constitutional challenge (including on equal protection grounds) to an Election Day receipt deadline for absentee ballots is particularly illuminating. See *League of Women Voters v. Sec'y of State*, 959 N.W.2d 1 (Mich. Ct. App.), *appeal denied*, 946 N.W.2d 307 (Mich. 2020). The court explained that the receipt deadline is a facially nondiscriminatory law equally applicable to all voters who choose to

vote absentee by mail. *Id.* at 15. “Although mail may be processed more expeditiously in some areas and less expeditiously in others, the Legislature has opted to impose a received-by deadline rather than a mailed-by deadline for absent-voter ballots. That determination was a policy decision, and the [State Constitution] grants the Legislature the authority to provide for a system of absentee voting.” *Id.* And while all deadlines carry the possibility that a voter’s ballot will arrive too late to be counted, the court noted, “there must be a deadline – at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision.” *Id.* at 12.

If – as the U.S. Supreme Court has held – the obligation of voters to travel across town to the DMV and gather documents for a photo ID “does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting,” *Crawford*, 553 U.S. at 198, then surely insisting that a voter either arrange for a third party to deliver his ballot, mail the ballot in early enough to account for potentially slow USPS delivery, or simply vote in person is not so severe a burden as to contravene any constitutional rights.

4. – Plaintiffs’ Evidence of USPS Slow Delivery Times Is Irrelevant

Although the threshold legal shortcomings in Plaintiffs’ motion are sufficient to dispose of their request for injunctive relief, the Court will nevertheless address Plaintiffs’ allegations about USPS delays in certain Kansas counties. Noting that 2,110 (or 1.4%) of the (timely postmarked) mail ballots counted statewide in the 2024 General Election arrived during the then-operative three-day grace period, Pls.’ Ex. 1 at ¶¶ 36, 37, and pointing to the higher grace-period-receipt numbers in certain rural counties, *id.* at ¶ 49, Plaintiffs posit that none of these votes would have counted (and voters would thus be “disenfranchised”) under S.B. 4. This argument is flawed on multiple levels.

First, the basic premise of Plaintiffs' argument is a logical fallacy. It assumes voters would behave identically under the new statute as they did when the grace period was in effect. That is obviously unsound. When the law sets a clear deadline, voters adapt their conduct to meet it. The elimination of the grace period does not demonstrate disenfranchisement under the new law; it merely reflects how voters behaved when the grace period existed. Courts do not evaluate election regulations based on such static and unrealistic assumptions about human behavior. The Kansas Constitution does not require states to preserve outdated rules simply because some voters previously relied on them.

Second, as explained above, Plaintiffs' cherry-picked and incomplete data does not support the extraordinary relief they seek. Contrary to their fabricated projections for the 2026 general election, Plaintiffs' own expert's declaration shows that the vast majority (if not all) of advance mail ballots will be timely received on or before Election Day. Indeed, *no* ballot from the Douglas County 2024 primary spent more than 19 days in total transit time, *no* ballot from the 2024 general election spent more than 15 total days in total transit time, and only *two* ballots from the 2024 general election spent more than 12 total days in total transit. *See* Pls.' Ex. 1, Tables 17 and 21 and ¶¶ 140 and 154.

Third, the rural county grace-period-receipt percentages trumpeted by Plaintiffs' expert in his affidavit – Pls.' Ex. 1 at ¶ 49 – contains no data on when those ballots were mailed, only when they were received. Fourth, and relatedly, these percentages are based on such small numbers of ballots that they reveal nothing useful in terms of a county-to-county comparison. The tiniest fluctuations can completely change the numbers. *See Brnovich v. DNC*, 594 U.S. 647, 671 (2021) (“[T]he mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any

disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified.”) (citing *Frank v. Walker*, 768 F.3d 744, 752 n.3 (7th Cir. 2014)); *Lemons v. Bradbury*, 538 F.3d 1098, 1106-07 (9th Cir. 2008) (minor deviations in the signature rejection rates of different counties do not constitute an equal protection violation).

Plaintiffs’ expert *concedes* that the data upon which he relies is *not statistically significant*. See Pls.’ Ex. 1 at ¶ 63 (“The conventional confidence level that one often finds in empirical research requires that an estimate have a p-value of 0.05 or lower to be considered statistically significant. The p-value associated with the slope estimate in Figure 4 is . . . slightly larger than 0.05.”).⁶ He thus retreats to claiming that there is merely “suggestive evidence” to support his point, but this is not the kind of evidence on which a temporary injunction can be grounded.

Fifth, Plaintiffs rely on an analytical tool called “Ballot Scout” – which purports to track mail ballots through the Postal Service – to argue that delivery in Douglas County is often plagued by delays, a problem that manifested itself in 2024. Douglas is the only county in Kansas that uses this tool and Plaintiffs offer no comparative data. Data from a single county cannot support a claim for statewide injunctive relief. Moreover, not only has this software never (so far as the Court is aware) been deemed sufficiently reliable to be admitted as proof of mailing or receipt date in any court case, but the manufacturer itself publicly confesses its limited utility. While it may assist voters in tracking their ballots, Ballot Scout’s terms and conditions explicitly state, “We make no warranties or representations about the Site or the Services, including but not limited to *accuracy, completeness, timeliness, or reliability*.” (Emphasis added.) Ballot Scout’s FAQs further point out

⁶ He also acknowledges that his chart purporting to show greater grace period rates in rural counties often fails to support his theory. See Pls.’ Ex. 1 at ¶ 58 (“Aggregating counties by [Rural-Urban Continuum Code, as Table 5 does,] loses information.”). Indeed, the Court notes in his Table how many data plots are *below* the line in the State’s more rural counties.

that the system depends on ballot scans by the USPS, and “[o]ftentimes certain postal facilities may not have the scanning equipment to continue scanning the ballot or the USPS may be sorting the ballot in a way that does not move the ballot through the relevant scanning machines.”

Even Plaintiffs’ expert does not attempt to establish the product’s reliability, completeness, or error rate; he simply parrots the company’s description of its product and then relies on a subset of advanced ballots which purport to have been tracked in both directions by this program. *See* Pls.’ Ex. 1 at ¶ 124 n.31, ¶¶ 125-36. Although the rules of evidence are less strictly applied in a temporary injunction hearing than in a final trial, *Wyatt v. Mickey*, 126 Kan. 690, 217 P. 304, 306 (1928), they are not irrelevant. “[W]hen the primary evidence introduced [to support a preliminary injunction] is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for a preliminary injunction.” 11A Charles A. Wright et al., *Federal Practice and Procedure: Civil* § 2949 (3d. ed. 2025).

Putting Plaintiffs’ evidentiary deficiencies to the side, nothing in their expert’s analysis justifies a facial invalidation of S.B. 4. Assuming the accuracy of the mail transit figures in Plaintiffs’ expert Declaration – an assumption to which Plaintiffs are not entitled, particularly considering they did not disclose any of the underlying data used to prepare those tables and statistics and chose not to call their expert as a witness at the hearing – no unconstitutional burdens are evident. For example, Table 17 in Ex. 1 of the expert’s report (and the accompanying ¶¶ 140-41) shows the purportedly *roundtrip* transit time for a mail ballot from the time it leaves the county election office and arrives in the voter’s mailbox, and then from the time a voter mails it back until it arrives in the county election office for the 2024 General Election. Only 58 of the county’s 3,731 mail ballots (or a mere 1.6%) took 10 days or longer in *total transit time*. And only two took 13 days or longer. That means if a voter promptly requests an advance mail ballot – which can be

requested as early as 90 days before the election, and which the county mails as early as 20 days before the election, including *automatically* to everyone on the permanent disabled list, *see* K.S.A. 25-1122(f)(1)(B), (h) and K.S.A. 25-1123(a) – and mails that ballot back without delay, there is *ample* time for it to be received at the election office by Election Day and counted. Voters, in fact, would have at least a week to spare.

Plaintiffs also highlight the roundtrip transit times in Douglas County for the 2024 Primary Election. Assuming the data's validity, 51 of the 583 mail ballots (roughly 8.7%) had a total transit time of 15 days or more. But that does not move the needle. While those figures may not win the Postal Service any performance awards, Table 21 in Ex. 1 (and the accompanying ¶ 152) ultimately shows that if voters promptly return their mail ballots back to the election office following receipt, there is always enough time for their ballots to be delivered by Election Day. Plaintiffs' own evidence reveals that only *four* ballots in the 2024 primary spent more than 17 days in total transit to and from the Douglas County election office. And not a single ballot spent more than 19 days in transit.⁷

Finally, Plaintiffs point to various statements from both the Secretary and Defendant Shew (often filled with hyperbole and sarcasm) critical of the Postal Service's delivery performance in Kansas. (Mot. at 3, 11). None of this establishes a constitutional violation. These are merely policy arguments from officials outside of the legislative branch. Plus, the testimony of the Secretary's General Counsel, Clay Barker, before the House Committee on Elections discussed arguments

⁷ Plaintiffs also reference the number of voters in Sedgwick County who request advance mail ballots to be sent to locations thousands of miles away. Kansas law accommodates those requests. K.S.A. 25-1123(a)(2). But the relevance of this point is lost on the Court. The State is obviously not expected to adopt a system that guarantees the same speed of mail delivery for voters who have their ballot sent to an address in Sedgwick County as elect to have their ballots sent to far flung corners of the country (or world for that matter).

both *for* and *against* eliminating the grace period. In *support* of requiring an Election Day deadline, he noted:

- “Allowing ballots not in the possession of election officers at close of polls to be counted creates public doubt, undermining confidence in the election system. Currently only 18 states have a grace period after the election during which mail ballots may be received and counted.”
- “Voters who rely on the 3-day period may not have their ballots counted because of slow delivery or lack of postmark.”
- “With the ability to drop off or have someone else carry a mail ballot to an election office, polling place (early or election day) or remote box, voters have available means to submit mail ballots by close of polls.”
- “It reduces administrative burden on election staff.” (Pls.’ Ex. 14 at 1-2).

A recent piece from no less than the *New York Times* Editorial Board further highlights the limited utility of grace period for advance mail ballots. *See How California is Damaging Faith in Government*, N.Y. TIMES, Feb. 19, 2026. *See* Exhibit B.⁸ There, the editors discussed the harm to the nation from California’s policies permitting mail ballots to arrive after Election Day. The editors explained that California’s decision to adopt a three-day grace period, later extended to seven days, had actually proved counterproductive. Because human beings tend to procrastinate until a deadline, the editors noted, more voters ultimately ended up mailing their ballots later in the cycle, undermining the law’s effectiveness:

Consider: In 2012, when ballots had to be received by Election Day, 0.5 percent of ballots were rejected because of lateness – and the share was an identical 0.5 percent in 2022, when the grace period was seven days. How could that be? As any college student (or journalist) knows, human beings tend to procrastinate until a deadline. The longer grace period led more voters to mail their ballots later.

...

⁸ It is also available at https://www.nytimes.com/2026/02/19/opinion/california-elections-vote-count-slow.html?campaign_id=39&emc=edit_ty_20260219&instance_id=171312&nl=opinion-today®i_id=117282&segment_id=215501&user_id=a462c74aa213c4ec35f6455e8ce59445.

California's leaders are making a mistake that Democrats have made in a range of policy areas over the past decade. In the name of laudable goals like equity and access, they have adopted policies that may initially sound sensible – in this instance, trying to protect every mail-in ballot – but that end up being counterproductive because they undermine the government's effectiveness. *Id.*

The *New York Times* house editors lamented this result, recognizing that “[w]hen elections are quickly decided it builds confidence in the democratic process. When uncertainty lingers for days, Americans wonder why government today can often seem less competent than it once was.” *Id.* The editors encouraged California to bring its “elections out of the pre-telegraph era and back into the 21st Century,” where “the rapid resolutions of U.S. elections was the norm.” *Id.* Suffice to say, when even a natural ally like the *New York Times* repudiates Plaintiffs’ theory, the weakness in their position is illuminated with particular intensity.

The United States Supreme Court has long recognized that “individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.” *Whalen v. Roe*, 429 U.S. 589, 597 (1977). “To staid experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.” *Id.* at 597 n.20 (quotation omitted). Furthermore, “[u]nder the Kansas Constitution, the primary lawmaking body is the legislature.” *Woodruff v. City of Ottawa*, 263 Kan. 557, 561, 951 P.2d 953 (1997). “Courts must respect legislative expressions when determining or forming public policy.” *Id.* This is especially true here, where the Kansas Constitution delegates the mode, form, and rules governing elections to the legislature. *LWV II*, 318 Kan. at 797. The bottom line is that “the question of the wisdom, justice, or expediency of the legislation is for the legislature and not for the courts.” *Bolz v. State Farm Mut. Auto. Ins. Co.*, 274 Kan. 420, 424, 52 P.3d 898 (2002).

5. – Plaintiffs Claims Also Fail Under *Anderson-Burdick* Type Balancing

Even if this Court were to find the reasonableness standard applied by the Kansas Supreme Court in *LWV II* or the general rational basis test for equal protection claims not involving suspect classes inapplicable, a balancing test along the lines of the *Anderson-Burdick* standard utilized by the federal judiciary would govern and the Court would reach the same result. Under this standard, courts “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the state as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982)). “[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the challenged law is exposed to far less searching review that is “closer to rational basis and the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434); *Fish v. Schwab*, 957 F.3d 1105, 1124-25 (10th Cir. 2020) (same).

For all the reasons this Court previously stated, elimination of the three-day grace period does not legally burden Plaintiffs’ equal protection rights under the Kansas Constitution. Moreover, the burden of a nondiscriminatory law is analyzed *categorically* under *Anderson-Burdick*, without consideration of “the peculiar circumstances of individual voters.” *Crawford*, 553 U.S. at 206 (Scalia, J., concurring); *cf. id.* at 190 (plurality opinion) (noting that *Burdick* held that reasonable, nondiscriminatory election law imposed only a minimal burden despite preventing

“a significant number of voters from participating in Hawaii elections in a meaningful manner”) (cleaned up); *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020) (“One less-convenient feature does not an unconstitutional system make.”); *Memphis A. Philip Randolph Instit. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) (same).

6. – Kansas’ Interests in S.B. 4 are Legitimate and Strong

When – as is true of an Election Day ballot receipt deadline – “the alleged burdens are not severe, a compelling state interest is not required.” *New Ga. Project*, 976 F.3d at 1282 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Even so, Kansas has very compelling interests in such a law. First, there is the need to remain compliant with the Federal Election Day statutes described in Section III.F below. Second, eliminating the grace period ensures prompt tabulation of all votes and facilitates public confidence in the finality of results. Close elections are a regular feature of down-ballot races in every state (including Kansas), and a grace period for mail ballots means the outcome can teeter back and forth every day based on what mail arrives into the election office.⁹ Delayed counting of ballots received days after the election fuels mistrust and speculation, especially in tight contests. Third, enforcing an Election Day ballot receipt deadline simplifies logistics and enhances efficiency. Processing late-arriving mail ballots necessitates additional manpower, resources, and contingency planning, all of which complicate election administration. Fourth, eliminating the grace period helps prevent election fraud. Mail ballots arriving late are harder to verify, raising concerns about post-election tampering. This is especially true when the USPS has failed to include a postmark on the ballot. The revised law will avoid problems potentially arising from missing, unclear, or even altered postmarks.¹⁰ *See RNC v.*

⁹ The Public Interest Legal Foundation has prepared a “Tied Election Chart” that catalogues many of these elections. *See* <https://publicinterestlegal.org/tied-elections/>.

¹⁰ The Kansas Legislature received testimony on these interests during its consideration of S.B. 4. *See* Written Testimony of the Public Interest Legal Foundation, Opportunity Solutions Project, and Honest

Aguilar, 2024 WL 4601602, at *2-4 (Nev. Oct. 28, 2024) (ordering mail ballots received after Election Day to be accepted despite a missing or indeterminate postmark).

All of these interests have been recognized as powerful and “more than enough to uphold [the State’s] reasonable ballot-receipt restriction” and “justify the deadline.” *New Ga. Project*, 976 F.3d at 1282; *accord Common Cause Ind.*, 977 F.3d at 664-66; *All. for Retired Ams.*, 240 A.3d at 52-55. Moreover, the State is not required to provide any “elaborate, empirical verification of the weightiness of [its] asserted justifications.” *Timmons*, 520 U.S. at 364. The fact that Kansas, so far as we know, has been lucky enough to avoid systemic fraud from mail ballots does not mean it is constrained from adopting this type of prophylactic measure. *See id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (“Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.”)). In sum, Plaintiffs’ equal protection claim falls well short of the mark. The Court thus declines Plaintiffs’ request for temporary injunctive relief.

D. Plaintiffs’ Due Process Claim Fails as a Matter of Law

Plaintiffs next claim that Kansas’ imposition of a neutrally applicable Election Day ballot deadline violates their due process rights under Section 18 of the Kansas Constitution’s Bill of Rights. This claim, too, lacks merit.

As a threshold matter, due process rights are implicated only when there has been a deprivation of life, liberty, or property. *Interest of A.S.*, 319 Kan. 396, 402-03, 555 P.3d 732 (2024). “In the absence of a protected property or liberty interest, there can be no due process violation.” *Landmark Nat’l Bank v. Kesler*, 289 Kan. 528, 544, 216 P.3d 158 (2009). Here, as federal appellate courts have uniformly held, there is no liberty interest in voting by mail, let alone in a grace period.

Elections Project (available at https://www.kslegislature.gov/li/b2025_26/measures/S.B.4/testimony); *see also* Oral Testimony at <https://www.youtube.com/live/dOAuHaYvxik?si=akvLMq038V8c1f6R>.

See *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 231 (5th Cir. 2020) (no liberty interest in right to vote); *New Ga. Project*, 976 F.3d at 1282 (same); *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (same). Invoking *Raetzl v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 3d 1354 (D. Ariz. 1990), Plaintiffs urge the Court to disregard these decisions. But the Fifth Circuit explained in detail why that decision was wrongly decided and why no appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

Plaintiffs also rely on *LWV II*, where the Kansas Supreme Court remanded the plaintiffs’ due process challenge to the State’s signature verification requirements for advance mail ballots for the purpose of determining if voters are provided “reasonable notice” of their signature mismatch and “an opportunity to be heard at a meaningful time and in a meaningful manner” in order to contest the preliminary mismatch assessment. 318 Kan. at 807. But the Supreme Court never addressed the liberty issue in its majority opinion and, as discussed above, there is no precedential value to an opinion that did not explicitly address an issue.¹¹

In any event, Plaintiffs fail to recognize the distinctions between an Election Day ballot receipt deadline and the signature verification requirement at issue in *LWV II*. Plaintiffs argue that the due process defect with S.B. 4 is that, if a ballot fails to arrive by Election Day, it can never be validly counted; there is no possibility of cure. An Election Day receipt deadline, however, does not implicate the type of individualized, discretionary determinations that can trigger due-process scrutiny. Unlike signature-verification processes or case-specific eligibility judgments – where election officials assess voter-specific information and thus must be guided by adequate procedural safeguards – an across-the-board receipt deadline is a neutral, bright-line rule that applies equally to every voter. There is no individualized decision to review, no adjudicative process to second

¹¹ Plaintiffs reference a comment by Justice Rosen – *in his dissent* – about the presence of a liberty interest. Am. Pet. ¶ 113. The majority, however, never said anything of the sort.

guess, and no risk of an erroneous deprivation dependent on administrative discretion.

To recast a uniform statutory deadline as a due-process problem would effectively grant courts a roving commission to revise election laws whenever litigants dislike the policy choices of the legislature. Such an approach collapses the line between permissible policy disagreements and constitutional violations, inviting judicial intrusion into core legislative functions and destabilizing the predictable administration of elections. Under no plausible reading of *LWV II* can it be said that the Kansas Supreme Court intended such a result. Instead, here, due process is satisfied once the legislature provides reasonable notice of the ballot receipt deadline, explains the procedures to cast a valid ballot by mail, and provides a fair opportunity to comply on or before Election Day.

Plaintiffs nevertheless propose a three-part balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), but our Supreme Court rejected that theory when formulating the standard for due process challenges involving electoral mechanics in *LWV II*. The Court highlighted that the legislature's broad constitutional authority to require "proper proofs" under Article 5 means the State must enjoy great latitude in implementing that process. *LWV II*, 318 Kan. at 805-06. Further, the U.S. Supreme Court has directed that due process attacks on voting processes are best analyzed under a balancing test along the lines of *Anderson-Burdick*, see *Richardson*, 978 F.3d at 234, and the Kansas Supreme Court construes Sections 2 and 18 of the State Constitution as "coextensive" with their federal counterparts. *Rivera*, 315 Kan. at 894; *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019). That means *Eldridge* has no role here:

The flaw in using *Eldridge* is that election laws, by nature, inevitably affect the individual's right to vote. Under *Eldridge*, however, courts may accord the private interest at stake, namely the right to vote, significant weight. Therefore, the *Eldridge* test would inevitably result in courts' weighing the pros and cons of various balloting systems, thereby tying the hands of States seeking to assure that elections are operated equitably and efficiently. Unlike *Eldridge*, the *Anderson / Burdick* approach recognizes that the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. Because

Anderson/Burdick – unlike *Eldridge* – appropriately accounts for the state’s interest in regulating voting, it provides the appropriate test for procedural due process claims challenging election laws.

Richardson, 978 F.3d at 235 (cleaned up) (quotations omitted).

This no doubt explains why *every* federal appellate court to address the issue has reached the same conclusion. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194-95 (9th Cir. 2021) (rejecting use of *Eldridge* test in election law challenges); *Memphis A. Philip Randolph Inst.*, 978 F.3d at 387-391 (same); *New Ga. Project*, 976 F.3d at 1282 (refusing to apply *Eldridge* in constitutional attacks on voting law because doing so “would stretch concepts of due process to their breaking point”). *See also Lawson*, 977 F.3d at 664 (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex. It is rational to require absentee votes to be received by Election Day, just as in-person voting ends on Election Day.”).

In any event, whether or not there is a liberty interest in mail voting is irrelevant. Plaintiffs’ due process cause of action fails either way. Judge Lagoa described the point in her concurrence in *New Georgia Project*, a case in which the Eleventh Circuit rejected the identical theory Plaintiffs advance here. As she explained, “[e]ven if Plaintiffs are being deprived of that [liberty] interest, they are being deprived of it by *legislative* action, not by *adjudicative* action.” *New Ga. Project*, 976 F.3d at 1288 (Lagoa, J., concurring). The Supreme Court has long distinguished between the two when deciding what due process requires. *Id.* For this reason, Judge Lagoa underscored, the traditional *Mathews v. Eldridge* test that Plaintiffs urge the Court to adopt (Am. Pet. ¶ 111) has no role to play in this context:

When a state deprives persons of liberty or property through *legislative* action—an action passed by the legislative process that applies “to more than a few people”—then “the affected persons are not entitled to *any* process beyond that provided by the legislative process.” *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020) (emphasis in original) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); see also *Bi-Metallic*, 239 U.S. at 445 (“General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”)). On the other hand, when a state deprives persons of a liberty interest through an *adjudicative* action—an action that concerns only a “relatively small number of persons” who are “exceptionally affected, in each case upon individual grounds”—then the affected individuals may be entitled to additional process above and beyond that provided by the legislative process. *Bi-Metallic*, 239 U.S. at 446. Only in the latter situation do courts apply the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Id. at 1288-89 (cleaned up).

Kansas’ Election Day ballot receipt deadline is a law of “general applicability which affects all [Kansans] equally.” *Id.* at 1289. It was adopted by the legislature as part of its basic legislative function. Thus, “even if Plaintiffs are being deprived of a constitutionally protected liberty interest, they are being deprived of that interest by *legislative* action.” *Id.* There is no individualized determination required before a late-arriving ballot will be rejected under the law. Nor is any individualized determination due. *Id.* The only “process” to which Kansas voters are entitled “before their late-arriving ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case.” *Id.*

Even if procedural due process were relevant, there is no process deficiency. Not only is the electorate fully apprised of the receipt deadline when submitting mail ballots, but voters are afforded myriad other reasonable options for exercising the franchise. As the Tenth Circuit observed, deadlines in the election process “will invariably burden some voters . . . for whom the earlier time is inconvenient,” but these burdens are assessed in light of “a state’s legitimate interest in providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party v.*

Cox, 892 F.3d 1066, 1077 (10th Cir. 2018); *see also Burdick*, 504 U.S. at 438 (“Reasonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth.”). In the context of mail-in voting, once the State has provided reasonable notice of the ballot deadline, explanation of the procedures to cast a valid ballot by mail, and a fair opportunity to comply on or before Election Day, due process is satisfied.

S.B. 4 simply imposes a due date for the receipt of ballots in the event a voter opts to vote by mail. Plaintiffs argue the elimination of the grace period “is neither a reliable nor a fair way to administer voting by mail.” Am. Pet. at ¶ 114. Putting aside the fact that 35 other states employ the same rule (as did Kansas itself for nearly all of its history), Plaintiffs are asserting a *policy-grounded* argument that does not come within the vicinity of stating a due process claim. Whether a grace period is beneficial or problematic (or a combination of the two) is not for the judiciary to decide. It is a legislative judgment, one which our State Constitution explicitly assigns to the discretion of the legislature.

The Court notes that Plaintiffs’ expansive theory is virtually unbounded. If they were to prevail, even the current grace period would be inadequate. Further, any time a single voter missed a ballot receipt deadline, that individual voter could seek an individualized determination of whether this violated due process under *Eldridge*. The Kansas Constitution imposes no such requirements. Accordingly, the Court declines to grant injunctive relief on this claim.

E. Right to Vote

In their final claim, Plaintiffs allege that S.B. 4 contravenes their right to vote under Article 5, Section 1 of the Kansas Constitution as well as Sections 1 and 2 of our Constitution’s Bill of Rights. Plaintiffs’ Amended Petition acknowledges that their claims grounded in Sections 1 and 2

of the Bill of Rights are foreclosed by *LWV II*. But Plaintiffs nevertheless argue that they still have a viable right to relief under Article 5, Section 1.

Plaintiffs aver that Article 5, Section 1 mandates that their right to vote theory be reviewed under a strict scrutiny standard. They insist that this provision does not address proper proofs, it stands alone. And any voting regulation that does not involve proper proofs, Plaintiffs contend, must survive the highest form of scrutiny. This Court rejects these arguments for multiple reasons.

First, this argument ignores *LWV II*, where the Kansas Supreme Court clearly set forth the standard for evaluating a challenge to a voting law pursuant to Article 5, Section 1. The Court explained that strict scrutiny does not apply to such a claim. *LWV II*, 318 Kan. at 802. Instead, “to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage.” *Id.* at 801. Plaintiffs argue that S.B. 4 is an extra-constitutional qualification, but they never state what the additional qualification is. Nor could they. The kind of extra-constitutional qualifications sufficient to invalidate a law under Article 5, Section 1, include, for example, a requirement to be up-to-date on all tax obligations, *see State v. Doane*, 98 Kan. 435, 158 P. 38, 40 (1916), certain residency requirements, *see id.*, and a party affiliation declaration mandate for the general election. *See State ex rel. Smith v. Beggs*, 126 Kan. 811, 814-15, 271 P. 400 (1928).

In this case, there is *no* additional qualification on any voter. The law simply imposes a neutrally applicable Election Day receipt deadline for mail ballots. There is nothing problematic, let alone unconstitutional, about that. As the Supreme Court held in *LWV II*, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” 318 Kan. at 804. *Accord*

Butts, 31 Kan. at 554 (“Requiring a party to be registered is not in any true sense imposing an additional qualification any more than requiring a voter to go to a specific place for the purpose of voting[.]”); *Lawson*, 977 F.3d at 664-65 (“Deadlines are essential to elections, as to other endeavors such as filing notices of appeal or tax returns. That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.”).

Second, Plaintiffs’ theory ignores Article 4, Section 1, in which the Constitution confers broad discretion on the legislature to regulate the structure and administration of elections. *See id.* (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added). As the Supreme Court recently noted, “Where popular elections are required – by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.” *LWV II*, 318 Kan. at 797. The vast delegation of authority in Article 4, Section 1, to select any reasonable mode of voting for state elections necessarily warrants great deference. Indeed, such principle follows naturally from *LWV II*’s adoption of a highly deferential standard for another constitutionally delegated electoral power to the legislature – the right to impose “proper proofs” pursuant to Article 5, § 4 – an authority deemed to encompass “any *reasonable* provision for ascertaining who is entitled to vote.” *LWV II*, 318 Kan. at 801.

Third, an Election Day ballot receipt deadline *does* functionally operate as a “proper proof” within the meaning of Article 5, Section 4. Part of the purpose behind S.B. 4 was the legislators’ concern that mail ballots were arriving after Election Day with no postmark, a postmark so smudged or illegible that it was impossible to reliably determine the date of mailing, or a stamp from a private postage meter (or similar business device) on which the date could be manipulated

with ease. That meant that officials often had no dependable way to determine whether the voter had acted within the authorized voting window. By requiring that ballots be received by Election Day, S.B. 4 helps ensure that only those voters who exercised their right to vote within the time prescribed by law are included in the count, thereby safeguarding both voter eligibility requirements and the integrity of the electoral process.

Fourth, Article 5, Section 1 merely states that “every citizen of the United States who has attained the age of eighteen and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector.” It is silent on the legislature’s authority to impose rules (or to delegate power to the Executive Branch to adopt regulations) to facilitate and maintain the integrity of the electoral process. That is why, as the Court in *LWV II* explained, the Constitution must be interpreted under the “principle that a specific provision controls over a more general one.” *LWV II*, 318 Kan. at 797. And the specific provisions in Article 4, Section 1 and Article 5, Section 4 offer the critical details. *Id.* (“[W]hile setting forth the specific and required qualifications for all electors in the Constitution, the people empowered the Legislature to ‘provide by law for proper proofs of the right of suffrage.’ See Kan. Const. art. 5, §§ 1, 4.”).

Fifth, the idea that substantial latitude and flexibility govern every election integrity law that targets voter eligibility, but anything outside that realm must be subjected to strict scrutiny – where the legislature can hardly act without turning the tightest corners and having a state court second-guess (and ultimately micromanage) its actions – is untenable. If anything, the legislature should enjoy even greater autonomy in these areas. In fact, it does, by virtue of Article 4, Section 1 discussed above.

At the end of the day, Plaintiffs’ right to vote claim is grounded in one-sided public policy arguments in favor of a grace period. But a robust policy debate does not a constitutional violation

make. “In the end, as a legal matter, it is just not enough to conclude that if some ballots are likely to be rejected because of a rule, the burden on many voters will be severe.” *New. Ga. Project*, 976 F.3d at 1281 (quotation omitted).

Plaintiffs also overlook the fact that Kansas’ advance voting statutes flow from the bedrock principle that under our State Constitution, whether to allow advanced voting *at all* is a legislative decision. Kan. Const. Art. 4, § 1 (“All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.”). Plaintiffs contend that while a state need not authorize voting by mail at all, once it does, it may not curtail that option in ways that disproportionately affect certain voters. But that argument mistakes policy discretion for constitutional compulsion. The Constitution does not embrace an “in for a penny, in for a pound” approach to election administration. A state’s choice to permit mail voting does not strip it of the authority to define the contours under which that method will operate or to revise those conditions over time. States remain free to regulate optional voting mechanisms, including receipt deadlines, subject only to the governing constitutional framework.

Under Plaintiffs’ reasoning, Kansas’ election system operated unconstitutionally for most of 158 years since some form of mail voting has been permitted. The Court is unpersuaded. At no time has the absence of a grace period ever even been challenged before now. *See Chiafalo v. Washington*, 591 U.S. 578, 592-93 (2020) (“Long settled and established practice may have great weight in a proper interpretation of constitutional provisions” about the operation of government) (quotation omitted). While this latest legislative development may not comport with Plaintiffs’ policy preferences, the idea that the legislature, after briefly experimenting with a change to its electoral mechanics, can never revert to the original procedures – is without constitutional support.

Nor are Plaintiffs on solid ground in their effort to characterize Kansas' 20-day advance voting window as "the most restrictive in the country." In reality, of the states that allow no-excuse advance voting (which at least 14 do not),¹² Colorado, Iowa, and Utah have similar deadlines. *See* Colo. Rev. Stat. § 1-7.5-107(3)(a)(I) and (4)(b)(II) (ballots must be mailed not sooner than 22 days and no later than 18 days before Election Day; ballot must be received by Election Day); Iowa Code Ann. §§ 53.8(1) and 53.17(1) (ballots must be mailed not more than 20 days before Election Day; ballots must be received by Election Day); Utah Code Ann. §§ 20A-3a-202(2)(a) and 20A-3a-204 (3)(a) (ballots must be mailed no sooner than 21 days before election and must be received by Election Day).

Unsurprisingly, federal appellate courts addressing this issue have unanimously reversed district court decisions enjoining Election Day ballot receipt deadlines. For example, in staying a lower court's injunction of Arizona's law requiring early voters to sign their ballots by 7:00 p.m. on Election Day, the Ninth Circuit held: "All ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020); *see also Common Cause Ind.*, 977 F.3d at 664-65 ("That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits."); *New Ga. Project*, 976 F.3d at 1281 ("Georgia's Election Day deadline does not implicate the right to vote at all. Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots."); *cf. Carson v. Simon*, 978 F.3d 1051, 1059-60 (8th Cir. 2020) (state court consent decree extending deadline for counting absentee ballots beyond Election

¹² *See* <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee>.

Day violated U.S. Constitution's Electors Clause). The rationale underlying these cases is especially applicable here considering, as noted above, Kansas provides a myriad of other ways to vote, including methodologies that accommodate the voters upon whom Plaintiffs focus. *See Brnovich*, 594 U.S. at 671 (“[W]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.”).

In short, S.B. 4 imposes no unconstitutional burden on Plaintiffs' right to vote. For all these reasons, Plaintiffs are not substantially likely to succeed on the merits of this claim.

F. Plaintiffs' Claims are Preempted by Federal Law

Finally, Plaintiffs' claims are also all preempted by federal law, specifically, the so-called Election Day statutes described below. The Supremacy Clause dictates that a valid federal law is “the supreme Law of the Land[.]” U.S. Const. art. VI, cl. 2. If a plaintiff's claim rests on a state law that is preempted by federal law, then the claim fails as a matter of law. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128 (10th Cir. 2007) (recognizing that all preempted state law is “without effect”). The grace period Plaintiffs demand would allow mail-in ballots to be accepted after the federally-prescribed Election Day for selection of the President and members of Congress. As the Fifth Circuit recently explained, such a grace period cannot be reconciled with the federal Election Day statutes. *RNC v. Wetzel*, 120 F.4th 200 (2024), *cert. granted* 146 S. Ct. 355. Indeed, this issue is fundamental to the entire federal electoral process. *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

The Federal Constitution's Elections Clause, found in Art. I, § 4, cl. 1, provides that states shall prescribe the “Times, Places and Manner” of congressional elections, “but the Congress may at any time by Law make or alter such Regulations. . . .” Similarly, the Electors Clause, found in

Art. II, § 1, cl. 4, empowers Congress to set the time for choosing presidential electors. These Clauses collectively entrust Congress with final say over the rules governing federal elections. State election regulations, whether enacted by the legislature or mandated by state constitutions or courts, must yield to conflicting federal requirements. *Foster v. Love*, 522 U.S. 67, 69 (1997).

By statute, Congress has fixed the date of federal general elections as the Tuesday following the first Monday in November in applicable years by enacting three separate statutes: 2 U.S.C. § 7 (“The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress”); 2 U.S.C. § 1 (providing for U.S. Senators to be chosen at the regular November election coincident with the House elections); 3 U.S.C. § 1 (“The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.”). Election Day, meanwhile, is defined as “the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 21.¹³ These statutes, known as the Election Day statutes, create a uniform Election Day for Congress and the Presidency that is required throughout the country. *Foster*, 522 U.S. at 70. Their purpose is to limit states’ ability to influence voting by allowing varying election days. *Foster*, 522 U.S. at 73-74.

In *Foster*, the Supreme Court struck down Louisiana’s open primary statute for congressional elections because it allowed the final selection of a candidate to occur in October. *Id.* at 72. Under Louisiana law, if one candidate won by a majority in the October primary, then no further action took place to elect the official on Election Day in November. *Id.* at 70. Louisiana’s

¹³ Prior to 2022, the definition of Election Day was embedded in 3 U.S.C. § 1. Congress amended the statute, however, in 2022 in the Electoral Count Reform Act, part of the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328), and shifted the definition to 3 U.S.C. § 21.

law “clearly violate[d]” the federal Election Day statutes because in speaking of “‘the election’ of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make the final selection of an officeholder;” and by establishing “‘the day’ on which these actions must take place, the statutes simply regulate the time of the election” *Id.* at 71-72. Importantly, the *Foster* Court 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. *Id.*

The same principles announced in *Foster* are applicable here. A state law permitting mail-in ballots to be accepted after Election Day runs afoul of Congress’ directive for a uniform Election Day and contravenes the State’s federally mandated obligation to complete the voting process by receiving all ballots by the close of the polls on that day. If an election is consummated only after additional mail-in ballots trickle in days later, Election Day has effectively been extended beyond the day Congress fixed, and the federal requirement of finality is undermined.

In *Wetzel*, the Fifth Circuit addressed a Mississippi law allowing state officials to accept and count mail-in ballots received during a five-day grace period. 120 F.4th at 204. The court noted that the “upshot” of the federal Election Day statutes is that they require all elections for Congress and the Presidency to be held on a single day. *Id.* Looking at *Foster* for guidance, the court considered three definitional elements in connection with the term “election”: (1) official action; (2) finality; and (3) consummation. *Id.* at 206-07.

With respect to “official action,” the court recognized that the “election” of a member of Congress “plainly refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder.” *Id.* at 207 (quoting *Foster*, 522 U.S. at 71). That is, a ballot is only “‘cast’ when the State takes custody of it.” *Id.* As to “finality,” Supreme Court precedent provides

that the word “election” indicates a “final choice of an officer by the duly qualified electors.” *Id.* (quoting *Newberry v. United States*, 256 U.S. 232, 250 (1921)). “A voter’s *selection* of a candidate differs from the public’s *election* of the candidate[.]” and it is nonsensical to claim an electorate has officially elected an officeholder before all voters’ selections (i.e., properly cast ballots) are received. *Id.* This means that “the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen.” *Id.*

Lastly, “consummation” of the election cannot occur prior to or after the federal Election Day. *Id.* at 208-09. The Fifth Circuit focused on the action of *receipt*, not *counting*, of the ballots in the ballot box to consummate the election. *Id.* It is commonplace for ballots to be counted after Election Day. “*Receipt* of the last ballot, by contrast, constitutes consummation of the election, and it must occur on Election Day.” *Id.* at 209. Based on this reasoning, the court held Mississippi’s grace period conflicted with, and was preempted by, federal law. *Id.* at 215.

The same conflict would exist here if Kansas election officials were forced to accept mail-in ballots delivered after Election Day. The fact that Plaintiffs attempt to ground their claims in the Kansas Constitution is irrelevant. The Supremacy Clause applies to “any Thing in the Constitution or Laws of any State” that conflicts with federal law. U.S. Const. art. VI, cl. 2. To the extent that the Kansas Constitution, as capaciously and unreasonably interpreted by Plaintiffs, requires extending federal elections beyond the timeline set by Congress in the Election Day statutes, such a state constitutional mandate would be without effect. *See Emerson*, 503 F.3d at 1128-29.

Conflict preemption exists where “compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377

(2015) (quotation omitted). The State cannot simultaneously enforce a policy requiring that mail-in ballots be counted if they are received after Election Day (as Plaintiffs insist), while also maintaining legal fidelity to the federal Election Day statutes discussed above. Faced with this conflict, compliance with both state and federal law would be impossible. As such, the state law must yield. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (Elections Clause makes Congress' regulations paramount, and any conflicting state rule is preempted and "ceases to be operative[]").

IV. Plaintiffs Cannot Establish Irreparable Harm

Not only have Plaintiffs failed to establish a likelihood of success on the merits, but they also cannot demonstrate a reasonable probability that they will suffer irreparable harm in the absence of an injunction. Under this standard, "purely speculative harm will not suffice." *Harper*, 65 Kan. App. 2d at 691. And the path Plaintiffs must travel here is more difficult still because of the facial nature of their constitutional attack.

Plaintiffs point to a few voters who have allegedly experienced very slow mail delivery. For one voter, it was a Valentine's Day card. For another, it was an advance mail ballot in connection with a municipal election. But whether one resides in an urban or rural community, it is safe to say that virtually *every American* at one point or another in their lives has received a piece of mail that spent multiple weeks or longer winding its way through the postal system prior to delivery. Such isolated incidents cannot justify the facial invalidation of a neutrally applicable statute. Constitutional law is not developed through anecdotes.

Plaintiffs cite no case law holding that a duly enacted Election Day ballot receipt deadline establishes irreparable harm, and the Court is unaware of any. In support of their argument, Plaintiffs invoke (i) a vacated – and subsequently reversed – decision of the Court of Appeals

discussing organizational standing, *League of Women Voters v. Schwab*, 63 Kan. App. 2d 187, 525 P.3d 803 (2023), and (ii) a federal district court case alleging violations of the National Voter Registration Act, *League of Women Voters v. Ashcroft*, 336 F. Supp. 3d 998 (W.D. Mo. 2018). But neither case is relevant to this dispute. The Kansas Court of Appeals recently criticized the very tactic Plaintiffs employ here – seeking to establish irreparable harm by “cherry-picking a case because of one sentence in the opinion that may support a party’s cause.” *Harper*, 65 Kan. App. 2d at 698. Plaintiffs suffer no irreparable harm from S.B. 4. To the contrary, it is the *State* which suffers irreparable injury when a court enjoins a duly enacted ballot receipt deadline.

Plaintiffs’ extensive delay in pursuing this temporary injunction reinforces that S.B. 4 poses no actual threat to them. *See Noble v. Butler*, 25 Kan. 645, 651 (1881) (“Courts of equity require that persons shall themselves exercise reasonable diligence in the protection of their rights, and that they shall not depend slothfully upon the action of courts of equity.”); 11A Charles A. Wright et al., *Federal Practice and Procedure: Civil* § 2948.1 (3d. ed. 2025) (“A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.”); *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (although “there is no categorical rule that delay bars the issuance of an injunction,” such delay “cuts against finding irreparable injury”). The legislature passed S.B. 4 on March 25, 2025. Plaintiffs filed their Petition challenging it on May 5, 2025, and did not request temporary injunctive relief until *more than seven months later*. They clearly felt no sense of urgency.

V. An Injunction Would be Adverse to the Public Interest

The requirements to establish that the threatened injury to the plaintiff outweighs the harm to the defendant and that the injunction will not be adverse to the public interest merge when the

government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The U.S. Supreme Court has recognized that unless a statute is unconstitutional, a state experiences serious and irreparable harm when a court “bar[s] the State from conducting this year’s elections pursuant to a statute enacted by the Legislature.” *Abbott v. Perez*, 585 U.S. 579, 603 (2018). The Ninth Circuit echoed this sentiment in granting Arizona’s request for a stay of the lower court’s temporary injunction of that state’s Election Day signature deadline. *See Hobbs*, 976 F.3d at 1086; *accord New Ga. Project*, 976 F.3d at 1283.

The “inability to enforce [the Legislature’s] duly enacted plans clearly inflicts irreparable harm on the State.” *Abbott*, 585 U.S. at 603 n.17. Counting mail-in ballots received after the statutory deadline injures the State because it “necessarily means that otherwise invalid ballots will be entered in the vote totals that determine whether the Electors will be elected or not.” *Carson*, 978 F.3d at 1061 (quotation omitted) (cleaned up). Simply stated, “[t]he counting of votes that are of questionable legality threatens irreparable harm.” *Id.* (quotation omitted). *See also Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025) (“any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury”) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)); *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1254 (10th Cir. 2017) (“When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.”) (quotation omitted).

As explained above, the State has compelling interests in an Election Day ballot receipt deadline, including complying with federal Election Day statutes, ensuring prompt tabulation of all votes, facilitating public confidence in the finality of results and the integrity of the electoral process, simplifying logistics, enhancing efficiency, and preventing fraud. S.B. 4 helps effectuate

these goals. While Plaintiffs raise policy objections to the statute, they are unable to demonstrate anything constitutionally infirm with the law.

VI. The Court Lacks Authority to Issue a Statewide Injunction

Even if the Court were to issue an injunction, its scope and impact would be significantly limited. Kansas law mandates that any injunction be specific and “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise.” K.S.A. 60-906. This limitation is consistent with traditional principles of equitable relief, as injunctions are designed to provide complete relief to the plaintiffs before the court and not to regulate the conduct of nonparties. *Trump*, 606 U.S. at 851-52 (explaining that universal injunctions improperly protect nonparties and that “complete relief” is relief administered “between the parties,” with any benefit to others only incidental).

Plaintiffs have sued only the Secretary of State and Douglas County Clerk in this lawsuit. No other county election official is named. By explicit statutory command, the Secretary has no operational control over county election officers. The legislature has deliberately established a highly decentralized electoral framework. Kansas law provides that “[e]ach county election officer shall be the sole public officer responsible for planning, conducting and coordinating elections held within such officer’s county,” and shall be “responsible for ensuring those elections comply with federal and state law and rules and regulations.” K.S.A. 25-126(b). The Secretary, meanwhile, merely is responsible for “assisting and advising county election officers in conducting elections in compliance with federal and state laws and rules and regulations.” K.S.A. 25-126(a).

Kansas administrative rules further reinforce county-level responsibility for acceptance and counting of advance voting ballots. For example, K.A.R. 7-36-5 provides “[e]ach county

election officer shall adopt procedures to ensure that ballots received after the time the polls close on election day shall not be counted.” Thus, the act of enforcement at issue – accepting ballots received after Election Day – is implemented locally through county procedures and personnel, not through statewide operational control by the Secretary.

Accordingly, any injunction issued by the Court would lack statewide impact and apply only to Douglas County. Given this limited application, the Court finds that issuing an injunction would create an inconsistency among county election offices due to potentially varying receipt deadlines and have a negative impact on advance mail voters.

VII. Conclusion

Plaintiffs have failed to meet their high burden to justify the issuance of a temporary injunction facially invalidating an Election Day receipt deadline. Plaintiffs have not demonstrated a likelihood of success on the merits, nor have they shown a reasonable probability that they will suffer an irreparable future injury, let alone one that outweighs the injuries to the State and the public in having a fair and orderly election administered with certainty and finality on Election Day.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs’ Motion for Temporary Injunction is DENIED.

DATE: _____

The Honorable Carl Folsom III
Division 7, Douglas County District Court

Submitted by:

By: /s/ Bradley J. Schlozman

Bradley J. Schlozman (KS Bar #17621)

Krystle M. S. Dalke (KS Bar #23714)

HINKLE LAW FIRM LLC

1617 North Waterfront Parkway, Suite 400

Wichita, KS 67206

Tel.: (316) 267-2000

Fax: (316) 660-6596

Email: bschlozman@hinklaw.com

Email: kdalke@hinklaw.com

Ashley N. Jarmer (KS Bar #24722)

HINKLE LAW FIRM LLC

8711 Penrose Lane, Suite 400

Lenexa, KS 66219

Tel.: (913) 345-9205

Fax: (913) 345-4832

Email: ajarmer@hinklaw.com

Kris W. Kobach (KS Bar #17280)

Kansas Attorney General

120 S.W. 10th Street, Suite 200

Topeka, KS 66610

Tel: (785) 235-2218

Email: kris.kobach@ag.ks.gov

Attorneys for Defendant Scott Schwab

CERTIFICATE OF SERVICE

I certify that on March 2, 2026, I authorized the electronic filing of the foregoing with the Clerk of the Court using the eFlex filing system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list.

By: /s/ Bradley J. Schlozman

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EXHIBIT A

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1 permanent advance voting list. A lot of voters don't
2 know that they're going to need an advance ballots
3 until closer to the election. Frankly, a lot of voters
4 don't even know there's an election until closer to the
5 election. And Kansas allows voters to request mail
6 ballots up until seven days before the election. For
7 the voter who does what Kansas law invites them to do
8 and requests that ballot on the seventh day, under the
9 Secretary of State's own public statements and
10 directions to voters there's just no way they're
11 getting that ballot back and forth in time. Even for
12 the voter who requests it another week before the
13 deadline -- so we're two weeks out, 14 days here --
14 it's going to have some real problems. If you take the
15 Secretary of State's seven days as a rule of thumb,
16 well they're not going to make it either, right?
17 Because immediately you're going to run out of that
18 time.

19 Another thing that can delay getting the absentee
20 ballot is that unless you're on the advance -- the
21 permanent advance ballot list, Kansas does signature
22 verifications of advance ballot applications. So they
23 look at your ballot and decide that the signatures
24 don't match that could be another couple days until
25 that gets resolved, or more. And if we look at the

1 evidence from the 2024 Douglas primary, we know that
2 for nearly a quarter of the advance voters -- this
3 23 percent -- seven days was likely not enough.
4 23 percent of ballots took seven days or longer to
5 travel one way. For 12 percent of these voters, seven
6 days definitely wasn't enough; 12 percent took 10 days
7 or longer. And for five percent took 15 days or
8 longer. Those voters are just not going to make it. I
9 mean, there's just no way with the timeline that we're
10 dealing with. As Your Honor has pointed out, more than
11 200 ballots in Douglas County arrived after the grace
12 period despite having been sent by at least day six
13 here. Because what we know about them is that they
14 were postmarked in July and then the election fell here
15 and they didn't arrive until here because the grace
16 period was still in place.

17 Now that election was a small election and it was
18 limited to one urban county. We know a few things that
19 I think should color our view going forward as we
20 anticipate the likely broader impacts of SB 4 across
21 the state and in a bigger election. First: Urban
22 counties have faster mail than rural counties. We know
23 that. And second: Mail delivery has gotten even worse
24 since the 2024 Douglas election. Even so, we know that
25 every election within that better mail universe we had

1 thousands and thousands of ballots -- or we had
2 thousands of ballots -- sorry, that arrived during the
3 grace period and were only saved but for the grace of
4 the grace period.

5 Another thing I think we need to think about when
6 we're thinking about these statistics and those
7 thousands of numbers is that they cannot and they do
8 not reflect the voters who got their ballot and they
9 decided it was just too late to send it back, either
10 because they heard the secretary saying you need seven
11 days and they were like "I don't have seven days." Or
12 like Mr. Mikesic, who didn't get his ballot until after
13 election day. Or our college voter Ben Simon, who was
14 out of state and didn't get his ballot in time to send
15 it back. So there's going to be a number of voters
16 with some attrition here. So we should assume that all
17 of the numbers we've seen so far of thousands of voters
18 being disenfranchised -- sorry, thousands of voters who
19 would have been disenfranchised if the grace period did
20 not exist is going to be a conservative number.

21 And if we were to say, you know, take these
22 percentages from this -- again, not a lot of voters.
23 In a small election like that, the voters tend to be
24 actually more motivated to vote -- and in a urban
25 county, and try to imagine what it would look like in a

1 statewide election like the one Kansas is going to have
2 in November 2026. We have -- we can do a little bit of
3 math. So in 2022, a little over 130,000 Kansas voters
4 participated in that election using an advance ballot.
5 And I picked 2022 because I think it's probably
6 Kansas's most recent large election that has similar
7 characteristics to the one we're going to see later
8 this year. So if we see anything like what we saw in
9 Douglas County -- if we see 23 percent of ballots
10 taking seven days or longer, 12 percent ten days or
11 longer, 5 percent 15 days or longer -- we are talking
12 about roughly 30,000 advance ballots taking seven days
13 or longer to travel one way, over 15,000 taking ten
14 days or longer and about 6,500 to be taking 15 days or
15 longer. Now some of those ballots may arrive. But,
16 like, the ones that do it's just going to be dumb luck.
17 So those are, I think, the -- this is, I think,
18 what the evidence shows. When you hear the Secretary
19 of State say "Just adapt" I think you have to ask how
20 exactly are voters supposed to adapt? And I think the
21 reality is is Kansas has a very, very weak situation.
22 It has some of the absolute worst mail in the country,
23 and with SB 4 it now has the narrowest window in which
24 to participate in elections by advance voting, despite
25 the fact that it's inviting voters to engage in advance

EXHIBIT B

RETRIEVED FROM DEMOCRACYDOCKET.COM

THE EDITORIAL BOARD

How California Is Damaging Faith in Government

Feb. 19, 2026

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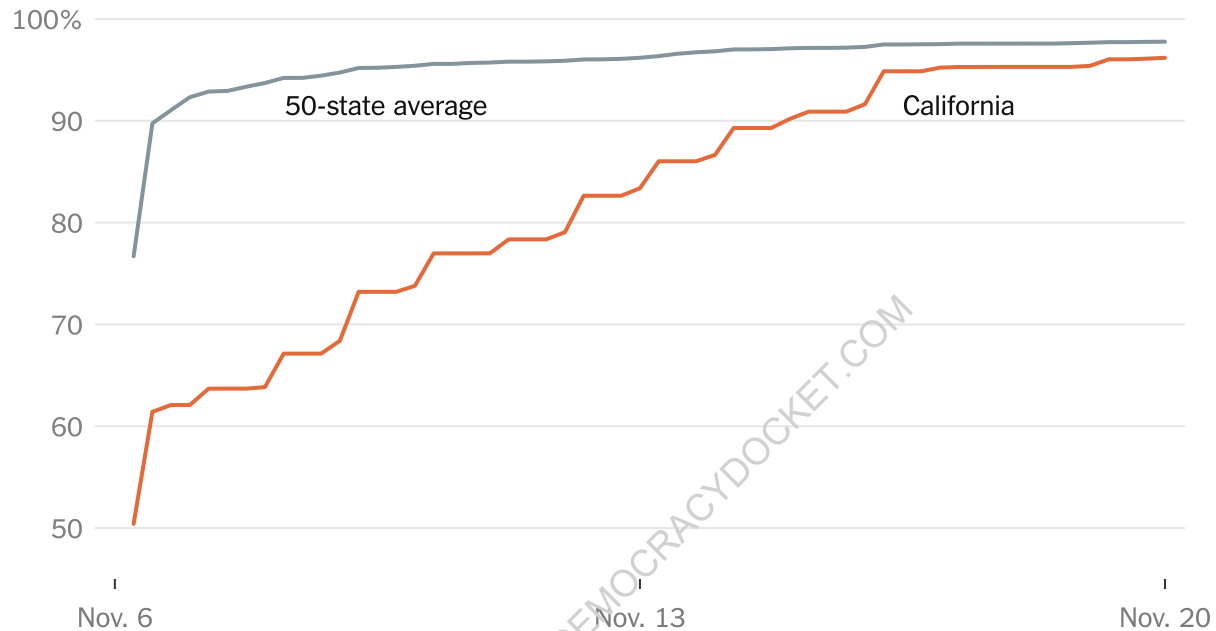
Long before the existence of modern technology — before the internet or even television — Americans quickly learned the results of major elections. By the late 1800s, telegraphs made it possible for people to read results in the next day's newspapers. By the 1920s, radio networks reported outcomes on election night. Even in close races, with a notable exception of the Bush versus Gore contest of 2000, American voters usually knew within a day who had won the presidency, control of Congress and most other major offices. For more than a century, the rapid resolution of U.S. elections was the norm.

No longer. In each of the past three congressional election cycles, Americans waited at least a week to find out whether Democrats or Republicans controlled the House of Representatives. The main reason has been California, the nation's most populous state, home to 52 House districts. It allows mail-in ballots to arrive up to

seven days after Election Day and counts ballots with agonizing slowness. After this year's midterms, the country may once again spend days waiting for California.

California's go-slow approach to vote counting

Percentage of ballots reported during the two weeks after Election Day 2024



Source: The New York Times

California adopted its rules with the admirable intention of maximizing voting access. But the system has failed. Its benefits are close to nil: Turnout in California has fallen further behind the national average since the state changed its rules. And the costs of the new system are real. When elections are quickly decided, it builds confidence in the democratic process. When uncertainty lingers for days, Americans wonder why government today can often seem less competent than it once was.

California's delays also play into the hands of bad-faith political leaders, including President Trump, who lie about vote counting and fraud to sow doubt in any election outcome they do not like. (For example, the speaker of the House, Mike Johnson, claimed that ballots counted after Election Day in 2024 in California

“magically whittled away” the leads of three Republican candidates.) To be clear: Only the people who tell these lies are responsible for them. But California is playing into the hands of the misinformation peddlers for no good reason.

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Several other states also sometimes take days to count their votes, including Arizona, Nevada, New York and Washington. They and California are outliers compared with other states and other high-income democracies, which count ballots both quickly and accurately. Lawmakers in these outlier states should change their systems to resolve elections quickly. Ideally, lawmakers would act in time for this year’s congressional elections. If they are unable to, they should make the changes before the 2028 elections.

California’s slow counting of votes has its roots in a 2014 law. Until then, the state required mail-in ballots to arrive by Election Day. That year, California introduced a three-day grace period for any ballots postmarked by Election Day, in response to the closing of some U.S. Postal Service facilities. The state has since extended the period to seven days. The goal is to ensure that even a highly unusual mail delay does not disenfranchise anybody.

The changes have not accomplished that goal. Consider: In 2012, when ballots had to be received by Election Day, 0.5 percent of ballots were rejected because of lateness — and the share was an identical 0.5 percent in 2022, when the grace period was seven days. How could that be? As any college student (or journalist) knows, human beings tend to procrastinate until a deadline. The longer grace period led more voters to mail their ballots later.

California exacerbates the problem by using an onerous process for confirming signatures on mail-in ballots and taking days to count many votes. As a result, outcomes remain unclear for days. In other states that count votes slowly, the

details vary, but they all involve mail-in or drop-off ballots.

The crucial point is that none of these systems is superior to those in the many states that count their ballots rapidly. Slow-counting states do not have higher turnout, on average. Nor do they have more secure elections; voter fraud is extremely rare nationwide.

California's leaders are making a mistake that Democrats have made in a range of policy areas over the past decade. In the name of laudable goals like equity and access, they have adopted policies that may initially sound sensible — in this instance, trying to protect every mail-in ballot — but that end up being counterproductive because they undermine the government's effectiveness. The slow counting of votes is a classic example of the perfect being the enemy of the good.

Defenders of the system argue that it would be a mistake to change the rules in response to baseless Republican conspiracy theories. Some California officials have gone so far as to suggest they do not care that Americans must wait days to learn election outcomes. National impatience is “not our problem,” California's secretary of state, Shirley Weber, said in 2024.

Neither of these arguments is valid. It makes no sense to cling to a subpar system because it happens to be subject to unfair fearmongering. When Mr. Trump's critics automatically adopt the opposite stance of his, even when it is wrong on the merits, they often end up doing him a political favor.

Several states offer better models, with Colorado having arguably the best. Like California, Colorado mails every registered voter a paper ballot weeks before Election Day. It then gives its citizens many options for returning the ballots. The state encourages voters to take their ballots to one of more than 400 drop boxes, which are open 24 hours a day for more than two weeks, or mail back the ballots, as long as they arrive by 7 p.m. on Election Day. People can also vote the traditional way, at a polling place.

Colorado offers an eight-day grace period for some voters, such as military troops stationed outside the state. Yet their share of the vote is so small that they affect only the closest of races, which would probably be subject to a weekslong recount anyway. Colorado gets the balance right: easy access to voting, without orienting the entire system around a tiny number of voters who might theoretically be subject to an extreme postal delay.

Colorado's results are impressive. In 2014, the first elections after it adopted its system, turnout jumped nearly three percentage points even as nationwide turnout fell more than four percentage points. In 2024, 73 percent of eligible Colorado residents voted — a higher share than in California (62 percent), Arizona, Nevada, New York or Washington. Colorado also counts ballots quickly, and the outcome of almost every race is clear on election night.

Some California officials have claimed that their state's large population makes it impossible for them to be so efficient, but that is as unpersuasive as their other excuses. Larger states have more tax dollars available for election administration. Florida, for example, counted 99 percent of its votes by the end of election night in 2024.

Gov. Gavin Newsom of California has recently begun to speak out about the importance of Democratic-run states offering a counterpoint to the chaotic, antidemocratic approach of the Trump administration. He has said that California should provide “a policy blueprint for others to follow,” and he has taken promising, if tentative, steps on housing construction and other areas. No doubt, his motives are partly personal, intended to help his presidential ambitions. So be it. Personal ambition sometimes inspires productive change.

Here, then, is one more item for Mr. Newsom's agenda in his final year as governor: Bring California's elections out of the pretelegraph era and back into the 21st century.

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Exhibit B

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**IN THE STATE OF KANSAS
SEVENTH JUDICIAL DISTRICT -- DOUGLAS COUNTY, KANSAS**

KANSAS APPLESEED CENTER FOR
LAW AND JUSTICE, INC. et al.,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity
as the Kansas Secretary of State et al.,

Defendants.

Case No. DG-2025-CV-000206

**SECRETARY SCHWAB'S PROPOSED ORDER GRANTING MOTION TO DISMISS
FOR LACK OF STANDING AND FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED**

This matter comes before the Court on Defendant Scott Schwab's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and for Lack of Standing. (Dkt Index 44). On January 27, 2026, the Court held a hearing on the motion and took the matter under advisement. Having reviewed the parties' briefing and analyzed the governing law, the Court finds the motion must be granted. Whatever the Court may think about the wisdom of the legislature's decision to eliminate the three-day grace period for accepting advance mail ballots after Election Day, the Court has no warrant to facially invalidate it based on the policy-laden objections advanced by Plaintiffs. The law is plainly constitutional, and that is where the debate in the judicial branch ends.

I. INTRODUCTION

Plaintiffs wage a state facial constitutional attack against S.B. 4 (2025), a law the Kansas legislature passed in March 2025 (via gubernatorial veto override) to require that all advance voting ballots must be received in the county election office or polling place no later than the close

of the polls. *See* K.S.A. 25-1132. This is the same deadline Kansas had for nearly 150 years, until 2017 when the legislature amended the statute to allow ballots to be received up to three days after Election Day if they were postmarked no later than Election Day.¹ After this brief experiment with a three-day grace period encompassing four general elections, the legislature opted to return to the Election Day deadline. Once the law took effect on January 1, 2026, Kansas became one of 36 states in the country requiring ballots to be received by the close of the polls.²

Plaintiffs now allege that the State's return to its previous rule will have a disparate impact on rural and disabled voters who, they contend, rely heavily on the U.S. Postal Service ("USPS") to deliver their ballots. According to Plaintiffs, the USPS's poor track record on timely delivery of mail means that the elimination of the three-day grace period violates their equal protection, due process, and voting rights under the Kansas Constitution.

The problem with Plaintiffs' Amended Petition, and the predominant reason why it fails to state a claim upon which relief can be granted, is that it effectively amounts to an effort to inject the Court into a divisive public policy dispute. There are legislators, election officials, and citizens on both sides of the debate. But it is not the role of the judiciary to pick sides in this fight.

The mechanics of our State's electoral process is a matter textually committed to the sound discretion of the legislature. *See* Kan. Const. art. 4, § 1. While the challenged statute must comply with state constitutional guarantees, the Kansas Supreme Court has made clear that the Judicial

¹ In 1919, the legislature adopted a bill that allowed eligible Kansas voters who were members of the military or employed by the federal government and whose service required them to be absent from the state on Election Day to vote via mail ballot, which had to be received by the county clerk or Secretary of State by the tenth day after the election. *See* S.B. 314, 38th Leg., Session 250, Ch. 189, §§ 1, 6 (1919). The legislature later repealed this law in 1943, at which point it required that the absentee ballots for such voters be received by the county clerk or Secretary of State no later than 9:00 a.m. on the day before Election Day. *See* H.B. 333, 50th Leg., Session 281, Ch. 159, § 6 (1943).

² *See* <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (National Conference of State Legislature Table) (listing specific statute of each state that requires Election Day receipt of advance mail ballots).

Branch must afford substantial deference to the legislature in this area. *See League of Women Voters v. Schwab*, 318 Kan. 777, 797-806, 549 P.3d 363 (2024) (“*LWV II*”). As long as the legislature’s statutory enactment is *reasonable*, it will pass muster under the Kansas Constitution. That is the case here. None of the Plaintiffs are members of a suspect class, no fundamental rights are at stake, and the State has legitimate and strong interests in an Election Day ballot receipt deadline.

Moreover, the hill Plaintiffs must climb to prove their claims is particularly steep given the facial nature of their constitutional attack. *See State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) (“A facial challenge to the constitutionality of legislation is ‘the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*’”) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)) (emphasis added). That obstacle is ultimately insurmountable here. Plaintiffs present multiple public policy arguments in favor of a grace period. But those do not equate to a constitutional violation.

Equally problematic for Plaintiffs is that they have no standing to pursue their claims. For both the individual and organizational Plaintiffs, they cannot demonstrate an imminent and non-speculative injury to their constitutional rights. Their theories might have borne fruit prior to recent changes in organizational standing jurisprudence. But no longer. Accordingly, the Court hereby GRANTS Defendants’ motion to dismiss for lack of jurisdictional standing pursuant to K.S.A. 60-212(b)(1) and failure to state a claim pursuant to K.S.A. 60-212(b)(6).

II. STANDARDS OF REVIEW

A. *K.S.A. 60-212(b)(1): Lack of Standing*

“[S]tanding is a component of subject matter jurisdiction,” *State v. Ernesti*, 291 Kan. 54, 60, 293 P.3d 40 (2010), and it may be raised at any time by a party or the Court. *State v. Patton*, 287 Kan. 200, 205, 195 P.3d 753 (2008). Plaintiffs must demonstrate that they have standing to raise their claims before they can proceed. *League of Women Voters v. Schwab*, 317 Kan. 805, 813, 539 P.3d 1022 (2023) (*LWV I*). “Both the general issue of jurisdiction and the more specific issue of standing are issues of law.” *Ernesti*, 291 Kan. at 60 (citing *Mid-Continent Specialists, Inc. v. Capital Homes*, 279 Kan. 178, 185, 106 P.3d 483 (2005)).

The Secretary asserts a facial challenge to Plaintiffs’ standing, meaning he questions the sufficiency of the Amended Petition’s allegations concerning subject matter jurisdiction. *See United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (describing the nature of a facial attack on subject matter jurisdiction). While the Court must accept Plaintiffs’ allegations as true when evaluating such a motion at this phase of the proceedings, *Bd. of Cnty. Comm’rs of Sumner Cnty. v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008), Plaintiffs maintain the burden of establishing standing at all times. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). If the “court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it.” *Chelf v. State*, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011). Nor is standing issued in bulk. Rather, a “plaintiff must demonstrate standing for each claim he seeks to press.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (citation omitted).

B. K.S.A. 60-212(b)(6): Failure to State a Claim

When presented with a motion to dismiss under K.S.A. 60-212(b)(6) challenging the legal sufficiency of a claim, the question must be decided from the well-pleaded facts set forth in the plaintiff's petition. *Grindsted Prods., Inc. v. Kansas Corp. Comm'n*, 262 Kan. 294, 302, 937 P.2d 1 (1997). Although the Court "must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom[,] the Court is not "required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself." *Id.* at 303. In other words, a plaintiff's causes of action must set forth a legal violation, not speculative harm. Indeed, the purpose of a motion to dismiss under K.S.A. 60-212(b)(6) is to dismiss legally insufficient pleadings that fail to state a valid claim or afford the plaintiff relief, even though everything contained in the petition is presumed true. *Hokanson v. Lichtor*, 5 Kan. App. 2d 802, 810, 626 P.2d 214 (1981).

III. PLAINTIFFS LACK STANDING

Unlike the U.S. Constitution, the Kansas Constitution contains no "case or controversy" language. Kansas courts, however, have adopted such a limitation pursuant to both the Judicial Power Clause in the Kansas Constitution at Article 3, § 1 and the separation of powers doctrine inherent in the State's constitutional framework. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 895-96, 179 P.3d 366 (2008).

To establish standing under Kansas' traditional two-part test, a party must demonstrate that (i) it has "suffered a cognizable injury" and (ii) there is "a causal connection between the injury and the challenged conduct." *LWVI*, 317 Kan. at 813 (quoting *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021)). A cognizable injury – i.e., an injury-in-fact – is present when a plaintiff

shows that it has already sustained, or will suffer, “some actual or threatened injury as a result of the challenged conduct.” *Id.* (quotation and internal alterations omitted). But abstract or inchoate injuries will not suffice. “The injury must pose ‘adverse legal interests that are immediate, real, and amenable to conclusive relief.’” *Id.* (quoting *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015)).

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

As a threshold matter, Plaintiffs incorrectly maintain the Secretary’s standing arguments are foreclosed by the Court of Appeals’ decision in *League of Women Voters v. Schwab*, 63 Kan. App. 2d 187, 525 P.3d 803 (2023), the predecessor to the Supreme Court’s decision in *LWV II*. (Pls.’ Resp. at 7, 11-12). This argument fails for two reasons. First, “[i]f a petition for review is granted, the Court of Appeals decision has no force or effect.” Sup. Ct. R. 8.03(k). Second, the Supreme Court never addressed the issue of standing in *LWV II*. It is well settled that the existence of “unaddressed jurisdictional defects” – including standing – has no precedential effect. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). “[I]f an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed.” *United Food & Com. Workers Union, Local 1564 of New Mexico v. Albertson’s, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000) (citations omitted). Unaddressed claims simply do not bind a lower court. *See Kan. Fire & Safety Equip. v. City of Topeka*, 317 Kan. 418, 434, 531 P.3d 504 (2023) (rejecting

tenants’ theory that appellate courts had already rendered “an implicit finding that jurisdiction was proper” by “issu[ing] decisions on the merits in the previous appeal”).

A. The Individual Plaintiffs Lack Standing

Plaintiffs’ overarching theory for injury is that if the voters they purport to represent opt to vote by mail, their ballot *might not arrive* by the close of polls on Election Day. But claiming that some voters’ ballots *might* not arrive in time (a matter, incidentally, over which voters themselves have substantial control) is entirely speculative in nature and cannot establish an injury-in-fact for standing. An injury-in-fact must be “immediate” and “real.” *LWW I*, 317 Kan. at 813. An “allegation of *possible* future injury” is insufficient to constitute a “certainly impending” threatened injury. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

Although the Amended Petition includes several individual Plaintiffs who claim to rely on the mail to vote, Am. Pet. at ¶¶ 26-29, and at least one alleges that he was unable to get his vote to the county election office in time (even with a grace period) in 2022, *id.* at ¶ 29, those historical events do not confer standing upon Plaintiffs to attack the current law. *See O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”), *cited with approval in Baker v. Hayden*, 313 Kan. 667, 678, 490 P.3d 1164 (2021).

The individual Plaintiffs additionally argue they will be injured by S.B. 4 because they will have less time to return their advance mail ballots, thereby requiring them to vote earlier or choose a different means of voting. But an inability to procrastinate or personal fear of mail delays are not cognizable injuries. Again, an injury must pose “adverse legal interests that are immediate, real, and amenable to conclusive relief.” *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 678.

Further, contrary to Plaintiffs' claims, the challenged law does not regulate *how* individual Plaintiffs can cast their ballot. Individual Plaintiffs remain fully able to vote in any method they choose, including by mail. If they are concerned about the timeliness of the USPS (a third party not controlled by the State), they may choose to mail their advance mail ballot a few days earlier, vote in person, utilize state-mandated curbside voting, or direct a third party to return their ballot to a county election office, polling place, or drop box. They have not, however, been injured in the kind of immediate or real way sufficient to establish standing.

Finally, although the arguments above are dispositive, the Amended Petition also fails to allege that any of the individual Plaintiffs are rural voters – the group Plaintiffs insist is prejudiced by the grace period's elimination. Instead, all reside in Douglas County, which Plaintiffs concede is “one of the state’s most populous counties.” Am. Pet. at ¶¶ 5, 15, 16, 26-28.³ “Generally, parties to a suit must assert their own legal rights and interests rather than those of third parties.” *Steckline Commc’ns, Inc. v. J. Broad. Grp. of Kan., Inc.*, 305 Kan. 761, 767, 388 P.3d 84 (2017). Any claims related to rural voters thus must be dismissed because these claims are “generalized grievance” that do not affect the individual Plaintiffs in a “personal and individual way.” *Gannon*, 298 Kan. at 1123 (quotations omitted) (cleaned up).

B. The Organizational Plaintiffs Lack Standing

In the case of an organization, legal standing may arise in two different contexts. First, the organization may enjoy standing as a representative of its members, generally referred to as “associational standing.” See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). Alternatively, the organization may have standing in its own right, typically known as

³ Plaintiff Benjamin Simons was dismissed from this action at his request. (Dkt Index 67, 75.)

“organizational standing.” See *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Plaintiffs fail to meet their burden to establish either associational standing or organizational standing.

1. – Plaintiffs Lack Associational Standing

The associational standing rule is an exception to the general rule that a plaintiff may not ordinarily assert the rights of others. See *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Ternes v. Galichia*, 297 Kan. 918, 922, 305 P.3d 617 (2013) (“A party generally must assert its own legal rights and interests and may not base its claim to relief on the legal rights or interests of third parties.”) (citing *Kowalski*, 543 U.S. at 129); *State ex rel. State Bd. of Healing Arts v. Beyrle*, 269 Kan. 616, 624, 7 P.3d 1194 (2000) (“[T]he constitutionality of governmental action can only be challenged by a person directly affected and such challenge cannot be made by invoking rights of others[.]”) (quotation omitted). This rule is rooted in the principle that only the party with a cognizable injury “has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.” *Kowalski*, 543 U.S. at 129. When a plaintiff asserts standing on behalf of a third party, therefore, two additional elements must be met: (i) the party asserting the right must have a close relationship with the person who possesses the right; and (ii) there must be a hindrance to the possessor’s ability to protect his own interests. *Id.* at 130.

For an association to have standing to sue on behalf of its members, a three-prong test – first invoked by the U.S. Supreme Court in *Hunt*, 432 U.S. at 343, and repeatedly embraced by the Kansas Supreme Court thereafter – must be satisfied: (i) the association’s members must have standing to sue individually; (ii) the interests that the association seeks to protect must be germane to its purpose; and (iii) neither the claim asserted nor the relief requested requires the participation

of individual members. *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017) (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)).

The organizational Plaintiffs lack associational standing for the same reasons individual Plaintiffs lack standing. None of their constituents have suffered a cognizable injury. Moreover, “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved[.]’” *Sierra Club*, 298 Kan. at 35 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

a. Loud Light and Kansas Appleseed lack associational standing

The first prong of the associational standing test asks whether the Plaintiffs’ “members” have standing to sue in their own right. *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1126, 307 P.3d 1255 (2013). Plaintiffs Loud Light and Kansas Appleseed Center for Law and Justice (“Appleseed”) falter at the outset as neither has members or anything close to them. Thus, to assert associational standing on behalf of others, Loud Light and Appleseed each must demonstrate that the individuals they seek to represent are *effectively* “members,” as that term is understood with respect to membership organizations.

The seminal case regarding associational standing by non-membership organizations is *Hunt*. *Hunt* involved a Washington state commission that was controlled by Washington state apple growers and dealers and whose primary purpose was to promote and protect the State’s apple industry. 432 U.S. at 336-37. In a challenge to a North Carolina statute which affected those interests, the commission met the traditional three-part associational standing requirements except, that as a non-membership organization, it lacked “members” on whose behalf to assert a claim. *Id.* at 342. The Supreme Court held that the commission, despite lacking “members” in the

“traditional trade association sense,” could assert associational standing on behalf of non-members because the organization demonstrated the non-members possessed an “indicia of membership” with the organization. *Id.* at 344. The Court reasoned that, since the growers and dealers “alone elect the members,” “alone may serve on the Commission,” and “alone finance its activities, including the costs of th[e] lawsuit, through assessments levied on them,” *id.*, the Commission effectively “represents the State’s growers and dealers and provides the means by which they express their collective views and protect their collective interests.” *Id.* at 345.

Loud Light and Appleseed are not membership organizations, nor is there an “indicia of membership” with respect to the individuals whose interests the two entities purport to represent. The Amended Petition does not allege any actual relationship with voters that would give rise to associational standing. Rather, Loud Light and Appleseed claim their interactions with random members of the public whom they target – many times merely a passing encounter – is enough to establish associational standing. *See* Am. Pet. at ¶ 20 (Loud Light “builds coalitions within the community to advocate for . . . changes for youth”); *id.* at ¶ 17 (Appleseed “works with community partners to understand the root causes of problems, supports strong grassroots coalitions, advocates for comprehensive solutions, and educates and engages voters across the state.”). No conceivable indicia of membership flows from such activities. Nowhere in the Amended Petition, for example, do Appleseed or Loud Light allege that any of these unidentified partners or individuals they claim to represent elect leadership in either organization, serve on the boards of either organization, or finance the organizations through something akin to dues.

Nor would it matter if the organizations tailored their message to these strangers. There is no legal support for finding associational standing from such conduct. Modifying an organization’s activities to more effectively target its audience is not the same as an organization representing its

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

b. Plaintiffs cannot satisfy the Hunt test for associational standing

As for Plaintiff Disability Rights Center of Kansas ("DRCK"), it is ultimately irrelevant whether it is a membership organization or has indicia of membership. The reason is that, as is true of the other organizational Plaintiffs, it cannot meet *Hunt*'s test for associational standing in the context of a challenge to Kansas' Election Day ballot receipt requirement.

Most critically, as previously discussed, Plaintiffs cannot demonstrate that any member (or individual with some indicia of membership) would have individual standing. Standing at this stage requires allegations of a cognizable injury that is causally connected to the challenged law. *LWV I*, 317 Kan. at 813. An organization must identify at least one member by name who would have standing to sue in his/her own right to establish the first element of the *Hunt* test. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990).

Plaintiffs cannot do so for all the reasons set forth in Section III.A. above. Nor is standing salvaged by the fact that this issue arises in the context of a motion to dismiss. The issue is not about viewing facts pled in the light most favorable to Plaintiffs. The issue is Plaintiffs' failure *to allege any facts at all* demonstrating a concrete and imminent injury sufficient to meet their burden for standing. Speculative claims of future hypothetical injuries do not constitute a concrete injury that permits standing.

2. – Plaintiffs Lack Organizational Standing

Plaintiffs likewise have no organizational standing to pursue their claims. To demonstrate organizational standing, an entity must show that (i) it suffered its own cognizable injury and (ii) there is a causal connection between such injury and the challenged conduct. *Gannon*, 298 Kan. at 1127. In other words, the organization must meet the same standards for standing that apply to individuals. *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 393-94 (2024) (“*FDA*”). This is no small task. As the U.S. Supreme Court recently explained, “like an individual, an organization may not establish standing simply based on the intensity of the litigant’s interest or because of strong opposition to the government’s conduct, no matter how longstanding the interest and no matter how qualified the organization.” *Id.* at 394 (internal quotations omitted). The organization “must show far more than simply a setback to the organization’s abstract social interests.” *Id.* (quotation omitted). Plaintiffs ask this Court to disregard *FDA* on the grounds that the requirements for standing are not the same under federal and Kansas law. But the standing issues addressed in *FDA* – injury-in-fact and causation – are identical under the two laws. The fact that Kansas, unlike federal law, does not include a redressability requirement in its standing analysis – an issue not even present here – is irrelevant.

Plaintiffs ground their organizational standing argument on a diversion of resources theory. *See* Am. Pet. at ¶ 19 (Kansas Appleseed); ¶ 21 (Loud Light); ¶ 23 (DRCK). These Plaintiffs allege they will now have to divert time and resources to develop and execute programs to educate voters and combat the speculative harms allegedly flowing from the statute. But Plaintiffs “cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.” *Clapper*, 568 U.S. at 402. For the same reasons that Plaintiffs lack associational standing, they also lack organizational standing.

Historically, many plaintiffs invoking a diversion of resources argument for organizational standing have relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). But the U.S. Supreme Court recently rejected the “expansive” reading of that decision that many lower courts had embraced. The Supreme Court held that an entity cannot establish organizational standing merely by incurring costs to oppose a government regulation or policy or expending time and resources “to the detriment of other spending priorities.” *FDA*, 602 U.S. at 394. In other words, the Court noted, it is “incorrect” that *Havens Realty Corp.* stands for the proposition that “standing exists when an organization diverts its resources in response to a defendant’s actions.” *Id.* at 395.⁴ The Court explained that, were the rule otherwise, “all the organizations in America would have standing to challenge almost every federal policy they dislike, provided they spend a single dollar opposing those policies.” *Id.*

As Judge Brennan recently explained in his concurrence in *Wisconsin Voter Alliance v. Millis*, 2026 WL 370269 (7th Cir. Feb. 10, 2026), the Supreme Court fundamentally altered the *Havens* organizational standing test in two ways in its *FDA* opinion. First, two types of spending

⁴ The Court even went so far as to subtly and indirectly cast doubt on the precedential value of its *Havens* decision. *See FDA*, 602 U.S. at 396 (“*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context.”).

now qualify as “manufactured” standing, which will not suffice to create jurisdiction. *Id.* at *9. Not only does an organization’s “public advocacy” against government action not confer standing, but neither do costs that are “incurred as part of public education efforts, including collecting and distributing information so that the associations can better inform their members and the public about risks of a challenged government action.” *Id.* (quoting *FDA*, 602 U.S. at 394) (cleaned up). Second, and most importantly, “the paradigmatic *Havens* injury is now a direct, non-financial injury to the organization’s ‘core business activities’ (like lying to a plaintiff) – not a self-inflicted harm caused by redirecting resources.” *Id.* (quoting *FDA*, 602 U.S. at 395).

Plaintiffs’ education and outreach activities here are not materially different than what the medical associations did in *FDA* in incurring additional costs and diverting resources to engage in public advocacy and education about FDA policies regarding abortion medication. The Supreme Court deemed the medical associations’ activities an inadequate basis for organizational standing and the same holds true for Plaintiffs’ activities here.

Whatever might be said about the merits of the Court of Appeals’ standing analysis in *LWW II* prior to *FDA*, the panel’s reasoning is now without legal foundation. As the Supreme Court pointed out, “an organization that has not suffered a concrete injury caused by a defendant’s action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant’s action. An organization cannot manufacture its own standing in that way.” *FDA*, 602 U.S. at 394; *see also Clapper*, 568 U.S. at 416 (A plaintiff cannot obtain organizational standing by simply presenting a “repackaged version of [its] first failed theory of [associational] standing.”).

The Seventh Circuit recently applied these principles in rejecting standing arguments from an organization dedicated to advancing election integrity. In holding the organization failed to

allege an injury in fact, the Court reasoned that an organization must do more than argue that the “government entity frustrates its ‘abstract social interests,’” even if those government actions are important to the organization’s mission. *Millis*, 2026 WL 370269, at *7 (quoting *FDA*, 602 U.S. at 393-94). Here, as in *Millis*, nothing prevents the Plaintiff organizations “from educating voters, raising public concern about the [legislature’s] tactics, or putting pressure on the legislature to reform the law governing election disputes.” *Id.* at *7. Because Plaintiffs fail to state a claim that the legislature’s “actions threaten the integrity of [these organization’s] “advocacy business,” they “cannot establish organizational standing.” *Id.*; *see also id.* at *12-13 (Brennan, C.J., concurring) (further explaining that prior standing precedent relying on *Havens Realty*’s diversion of resources theory no longer fits with Supreme Court precedent).

Because the voter outreach programs Plaintiffs reference in their Amended Petition have been part of these entities’ respective missions for many years, the fact that they might infuse additional resources into such activities does not mean that they have suffered a legal injury. An “organization does not automatically suffer a cognizable injury in fact by diverting resources in response to a defendant’s conduct.” *La. Fair Hous. Action Ctr., Inc. v. Azalea Garden Props., LLC*, 82 F.4th 345, 353 (5th Cir. 2023) (quotation omitted). Rather, the legal injury “comes when that diversion of resources concretely and perceptibly *impairs the organization’s ability to carry out its purpose.*” *Id.* (citations and internal alterations omitted) (emphasis added). In other words, the critical focus for standing purposes in the context of a diversion of resources theory is “not the drain on the organization’s resources,” but is instead on the “organization’s ability to carry out its mission.” *Id.* *See also NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 238-39 (5th Cir. 2010) (diversion of resources to activities cannot support organizational standing if such activities do not differ from plaintiff’s routine activities or projects); *Clark v. Edwards*, 468 F. Supp. 3d 725, 748 (M.D. La.

2020) (“Injury does not arise because of their desire or preference for a different scheme of absentee by mail voting, nor because they adjust their organization’s activities in response to . . . changes to the law. The law is not static. It cannot follow that every change in voting laws that causes voting advocacy groups to ‘check and adjust’ is an injury.”).

RNC v. Burgess, 2024 WL 3445254 (D. Nev. July 17, 2024), illustrates this point. After Nevada extended the deadline by which mail ballots must be received at the county election office, the RNC sued and asserted as its basis for standing a diversion-of-resources theory that it would now have to spend more “money on mail ballot chase programs and post-election activities.” *Id.* at *4. The court rejected this contention, holding that “[a]ny diversion of resources to an Election Day ‘mail ballot chase’ program appears to be nothing more than ‘business as usual’ for Organizational Plaintiffs.” *Id.* The court explained that “[e]ngaging in the same mail ballot collection push with slightly different timing is a continuation of existing advocacy, not an affirmative diversion of resources.” *Id.* (citations omitted). Here, the organizational Plaintiffs’ educational activities and mission remain unaltered. Nothing about this new law, other than Plaintiffs’ policy objections to it, interferes with their ability to carry out their mission. In sum, Plaintiffs have neither associational nor organizational standing to pursue their claims.

IV. PLAINTIFFS’ CONSTITUTIONAL CLAIMS FAIL AS A MATTER OF LAW

A. Plaintiffs’ Facial Attack on S.B. 4 Cannot Survive the K.S.A. 60-212(b)(6) Standard

Under the separation of powers doctrine and longstanding Kansas Supreme Court precedent, Kansas courts “presume a statute to be constitutional, resolve all doubts in favor of a statute’s validity, and require that a statute must clearly violate the constitution before it may be struck down.” *Kan. Nat’l Educ. Ass’n v. State*, 305 Kan. at 749-50; *accord Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021). “Courts may not ‘sit as a superlegislature to judge the wisdom

or desirability of legislative policy determinations.” *Christopher v. State ex rel. Kansas Juv. Just. Auth.*, 36 Kan. App. 2d 697, 709, 143 P.3d 685 (2006) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Accordingly, a “court should not strike down a statute unless the infringement of the superior law is clear beyond a reasonable doubt.” *Hall v. Dillon Cos., Inc.*, 286 Kan. 777, 789, 189 P.3d 508 (2008). Kansas has long applied this principle in the election context. *See Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177, 180 (1936) (“No statute should be declared unconstitutional unless the infringement of the superior law is clear, beyond substantial doubt.”) (quotation omitted).

The already difficult road Plaintiffs must travel to prevail in this case is even more arduous due to the *facial* nature of their claims. Plaintiffs are waging a wholesale constitutional challenge to S.B. 4. This requires them to “establish that *no set of circumstances exists under which the Act would be valid.*” *Jones*, 313 Kan. at 931 (quoting *Salerno*, 481 U.S. at 749) (emphasis added). “The fact that the [challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Court has] not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *Id.* (quoting *Salerno*, 481 U.S. at 745) (cleaned up). Such claims are highly disfavored because they typically rest on speculation, run contrary to the principle of judicial restraint, and threaten to short-circuit the democratic process by preventing laws representing the will of the people from being implemented. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008); *State v. Bollinger*, 302 Kan. 309, 318-19, 352 P.3d 1003 (2015).

“A facial challenge is ‘an attack on a statute itself as opposed to a particular application’ of that law.” *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019) (quoting *Los Angeles v. Patel*, 576 U.S. 409, 415 (2015)). It thus does not necessitate any findings of fact and,

instead, presents a question of law. *Id.* By contrast, “as its name suggests, an as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as-applied challenge necessarily requires findings of fact.” *Id.* at 6 (citations omitted). The nature of Plaintiffs’ facial claims renders them ideally suited for resolution at the motion to dismiss stage of the case. This Court must simply assume that everything Plaintiffs have pled is true and then determine whether Plaintiffs are entitled to relief based on those allegations.

Plaintiffs argue that the “no-set-of-circumstances” test for facial statutory challenges does not apply because *LWV II* did not discuss it when addressing a challenge to a signature verification requirement. This overlooks hornbook law on stare decisis. “The rule of stare decisis may not be extended to cover implications from what was decided in a former case, and thus, a case is not binding precedent if its holding is only implicit or assumed, or the issue was decided sub silentio.” 21 C.J.S. Courts § 218 (2025). In other words, “Constitutional rights are not defined by inferences from opinions which did not address the question at issue.” *Texas v. Cobb*, 532 U.S. 162, 169 (2001); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”). “In order for a decision to be given stare decisis effect with respect to a particular issue, that issue must have been *actually decided* by the court.” *United Food & Com. Workers Union*, 207 F.3d at 1200 (emphasis added) (citation omitted).

Moreover, just recently, both the Kansas Supreme Court and Court of Appeals reiterated the no-set-of-circumstances test. *State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025) (“A successful facial challenge generally requires a litigant to establish that the law is unconstitutional in all its applications. Thus, for the State to prevail in a facial challenge, it need only demonstrate that the law is constitutional in at least some applications.”); *State v. Hall*, 65 Kan. App. 2d 369,

371-72, 564 P.3d 786, 790 (2025) (holding that to prevail on a challenge under section 4 of the Kansas Constitution Bill of Rights, criminal defendant must show that “no application of [the statute] could survive constitutional review under section 4 – a formidable legal task even with a fundamental right”), *rev. denied* June 27, 2025. This Court has no choice but to adhere to this precedent. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022) (“Courts are duty bound to follow this court’s precedent absent an indication that we are departing from that precedent[.]”).

B. Deferential Review is Constitutionally Mandated

1. – Article 4, Section 1 Confers Vast Discretion on Legislature

The Kansas Constitution expressly assigns to the legislature all decisions regarding the specific voting methodology to be used in state elections. Kan. Const. art. 4, § 1 (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added); *see also id.* art. 1, § 1 (in “elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly *in such manner as is prescribed by law*”) (emphasis added). The Kansas Supreme Court recently reinforced the scope of this provision. *See LWV II*, 318 Kan. at 797 (“Where popular elections are required – by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.”) (citing Kan. Const. art. 4, § 1).

Just as is true of Article 5, § 4, which authorizes the legislature to require “proper proofs” to ensure that the right of suffrage extends only to eligible voters, *LWV II*, 318 Kan. at 801-02, the exclusive delegation to the legislature in Article 4, § 1 necessarily confers upon lawmakers the power to select *any reasonable* mode of voting for state elections. “[U]nless that power is abused the courts may not interfere.” *Id.* at 801 (quoting *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618

(1884)); *see also Sawyer v. Chapman*, 240 Kan. 409, 412, 729 P.2d 1220 (1986) (as long as voting is by ballot and the person casting vote may do so in secrecy, Article 4, § 1 empowers the legislature to “adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary”) (quoting *Taylor v. Bleakley*, 55 Kan. 1, 39 P. 1045, 1050 (1895)).

As the Kansas Supreme Court explained in *LWW II*, there can be no fundamental right to vote that is divorced from “concrete and specific provisions of the Constitution or statutes.” 318 Kan. at 800. It is an “enumerated political right.” *Id.* And neither the Kansas nor U.S. Constitution confers any right to vote by mail. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969) (any fundamental right to vote under the Federal Constitution is directed at the ability to *generally cast a ballot*, not the right to do so in the voter’s preferred manner, such as by mail); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.”); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (“[A]s long as the state allows voting in person, there is no constitutional right to vote by mail.”); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (affirming dismissal of complaint for failure to state a claim where working mothers argued that because it is a hardship for them to vote in person on election day, the U.S. Constitution required Illinois to allow them to vote by absentee ballot, reasoning, “at bottom the plaintiffs are arguing that the Constitution requires all states to allow unlimited absentee voting, and the argument ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution”).

2. – References to “Absentee Ballots” in Article 5, Section 1 are Irrelevant

Before turning to Plaintiffs’ substantive claims, an aside is warranted to address a point of apparent confusion in Plaintiffs’ briefing. At various points in the Amended Petition, Plaintiffs invoke the term “absentee ballots,” including a reference to Art. 5, § 1 of the Kansas Constitution. *See* Am. Pet. ¶¶ 22, 28, 32. That term, however, has no relevance here. Nothing in that provision touches the issue of *advance voting*. Absentee voting and advance voting are two entirely distinct concepts. Indeed, the Kansas Election Code (which is codified in Chapter 25 of the Kansas Statutes Annotated) has entirely separate Articles on these two voting methodologies. “Advance voting” is governed by Article 11 whereas “absentee voting” is governed by Article 12.

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

The references to “absentee voting” in the Kansas Election Code are targeted exclusively at members of the armed services, their families, and citizens residing overseas. *See* K.S.A. 25-1215 *et seq.* This is not a mistake. These provisions reflect the State’s implementation of the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311. In short, nothing in the amendment of Art. 5, § 1 was intended to restrict the legislature’s Article 4, § 1 authority – beyond the limits identified in Art. 5, § 1 itself, of course – to regulate the process for casting and receiving ballots or to require *mail voting* at all.

The concept of “advance voting” was not even introduced until 1995, when the legislature adopted a new standalone chapter of the election code to allow for no-excuse advance voting. *See* 1995 Kan. Sess. Laws ch. 192, § 17 (codified at K.S.A. 25-1114 *et seq.*). Plaintiffs’ attempt to conflate advance and absentee voting makes no sense. Indeed, if the concept of advance voting was already incorporated into absentee voting as Plaintiffs suggest, there would have been no need for the legislature to amend the Election Code to implement advance voting in 1995. In short, this Court has no constitutional authority to interfere with the legislature’s policy choices in structuring the scope of such advance voting.

C. Plaintiffs’ Equal Protection Claim Fails a Matter of Law

Plaintiffs first claim a violation of equal protection under Sections 1 and 2 of the Kansas Constitution’s Bill of Rights. Plaintiffs contend that the absence of a grace period for receiving advance mail ballots has a disparate impact on “voters living in rural areas and voters who are temporarily away from Kansas” because (i) such voters allegedly tend to rely more heavily on voting by mail than other Kansans, and (ii) the USPS’s on-time delivery track record is not at levels Plaintiffs and some Kansas state officials deem acceptable. Am. Pet. ¶¶ 10-11, 29, 59-74, 87, 106. Plaintiffs similarly allege that the elimination of the grace period violates the equal

protection rights of disabled voters whose mobility issues necessitate that they vote by mail. *Id.* at ¶¶ 8, 26-28, 88-91. Plaintiffs argue the USPS’s slow delivery times will make it difficult for these voters to ensure that their mailed ballots are received at the county election office by the close of polls on Election Day.

1. – Plaintiffs fail to State an Equal Protection Claim under Section 1

Plaintiffs’ Section 1 claims are foreclosed by *LWV II*. There, the majority held the “‘right to vote’ is not an unenumerated ‘natural right’ protected by section 1 of the Kansas Constitution Bill of Rights. Rather, suffrage is universally understood as a political right.” 318 Kan. at 793 (collecting cases). Accordingly, the Supreme Court held, “the Court of Appeals erred when it analyzed the question under our existing section 1 jurisprudence.” *Id.* at 793-74. Justice Rosen’s dissent echoed this holding. *Id.* at 813 (Rosen, J., dissenting) (“The majority concludes voting is a political right, not a natural one, so section 1 offers it no protection. I agree.”). Once again, this Court is duty-bound to follow Supreme Court precedent. *Patton*, 315 Kan. at 16. Plaintiffs thus fail to state a claim under Section 1 and this claim must be dismissed.

2. – Section 2 is Coextensive with Fourteenth Amendment of U.S. Constitution

With respect to Plaintiffs’ Section 2 equal protection claim, Kansas appellate courts have long held that the scope and application of the Kansas Constitution’s equal protection rights is identical to that of the U.S. Constitution. *Rivera v. Schwab*, 315 Kan. 877, 893-94, 512 P.3d 168 (2022) (Section 2 of Kansas Constitution’s Bill of Rights is “coextensive” with equal protection guarantees of the Fourteenth Amendment). Nevertheless, Plaintiffs urge this Court to interpret the State Constitution’s equal protection guarantees in Section 2 more broadly than the parallel clause in the Federal Constitution. When forced to grapple with *Rivera* at oral argument before this Court,

Plaintiffs argued that it does not apply here because it involved political gerrymandering and vote allegations in redistricting. *Rivera*, however, contains no such limitation.

Rivera explained that the Court's decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did *not* alter Kansas' "historical and fundamental interpretation of the scope of equal protection found in section 2." *Rivera*, 315 Kan. at 894. To the contrary, the Court in *Rivera* reiterated that "section 2 is 'given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.'" *Id.* (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917)). "Put even more clearly," *Rivera* held, "the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution." 315 Kan. at 894. And if there were any doubt regarding *Rivera*'s continued application, in *LWV II*, the Supreme Court *quoted from Rivera* in explaining that Section 2 of the Kansas Constitution Bill of Rights is to be read coextensively with the U.S. Constitution. *LWV II*, 318 Kan. at 805. Once again, this Court is duty bound to follow this precedent.

3. – The Governing Legal Standard for Equal Protection Claims

In *LWV II*, our Supreme Court addressed an equal protection challenge to Kansas' signature verification requirement for advance mail ballots and articulated the applicable standard generally governing equal protection challenges attacks on election integrity laws:

Equal protection requires similarly situated individuals should be treated alike. It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. To comply with equal protection in the context of providing "proper proofs" of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon

objective standards so that no voter is subject to arbitrary and disparate treatment. *LWV II*, 318 Kan. at 805 (internal quotations and citations omitted).

LWV II thus provides the starting point for determining the proper equal protection standard here.⁵ Plaintiffs argue this is a “results-based” test that radically transformed equal protection jurisprudence. (Resp. at 29). They maintain that, because disabled and rural voters tend to vote via mail more than other members of the Kansas electorate, the Amended Petition states a viable cause of action. This position would represent a fundamental shift – *sub silentio* no less – in how both the U.S. and Kansas Supreme Courts have long interpreted the requirements to prevail on an equal protection claim. This Court cannot take that leap.

Nor is there any legal basis for treating rural residents or disabled voters as suspect classes for purposes of equal protection. See *Guttman v. Khalsa*, 669 F.3d 1101, 1116 (10th Cir. 2012); *Dunn v. Penfield*, 2024 WL 1723705, at *11 (D.S.D. Jan. 22, 2024). This is critical because if no suspect class is at issue, “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Guttman*, 669 F.3d at 1116. “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.” *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001). The same is true for individuals living outside urban centers. In sum, whatever rights voters have to cast their ballot via mail are a

⁵ In addition to the *LWV II* test, Plaintiffs argue that strict scrutiny applies. But *LWV II* categorically rebuffed that contention. 318 Kan. at 808. Plaintiffs similarly insist that because this case involves the regulation of voting, a more muscular standard of review must apply. Again, that theory was rejected in *Rivera* and *LWV II*. As the Supreme Court explained, there is no unenumerated right to vote divorced from “concrete and specific provisions of the Constitution or statutes.” *LWV II*, 318 Kan. at 799-800; accord *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (“[T]he right to vote, *per se*, is not a constitutionally protected right.”). It is instead an “enumerated political right,” *LWV II*, 318 Kan. at 800, and the legislature may select any reasonable mode of voting and appropriate prophylactics to safeguard the integrity of the electoral process. *Id.* at 801. While Plaintiffs cite a statement from Justice Biles’ dissent in an effort to support their position, (Pls.’ Resp. at 33, n.6), they fail to mention that the majority rejected his interpretation. *Id.* at 799.

matter of legislative grace. Plaintiffs' public policy arguments do not alter the applicable standard of review. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (refusing to elevate the level of scrutiny for laws affecting the mentally disabled, despite changing social attitudes, indicating that levels of scrutiny are doctrinal and not responsive to cultural shifts alone).

In the absence of proof that a challenged statute was adopted with a *discriminatory purpose targeted at a suspect class*, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976) – which is clearly not present here – the law is reviewed under a rational basis standard. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The fact that the law might have a disparate impact on particular individuals (or even a suspect class) does not suffice to trigger an equal protection violation. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *accord Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308, *supplemented*, 279 Kan. 817, 112 P.3d 923 (2005) (“In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose.”); *Crawford v. Kan. Dep't of Rev.*, 46 Kan. App. 2d 464, 468, 263 P.3d 828 (2011) (“Evidence that similarly situated persons were treated differently is not, in and of itself, sufficient to establish an equal protection violation; an element of intentional or purposeful discrimination must also be present.”) (citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), and *Pork Motel, Corp. v. Kan. Dep't of Health & Env't*, 234 Kan. 374, 387, 673 P.2d 1126 (1983)). “The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Feeney*, 442 U.S. at 272.

Under the *LWV II* standard, S.B. 4's Election Day ballot receipt deadline is a uniform, objective standard under which no voter is subject to arbitrary and disparate treatment. 318 Kan. at 805. Plaintiffs allege no intentional discrimination from S.B. 4, nor could they. This legislation is a quintessential, neutrally applied statute that is administered identically (and objectively) to

every voter. There are no individualized determinations to be made. No category of the electorate is treated differently than any other. The law applies equally to everyone. While Plaintiffs focus on the Kansas Supreme Court's use of the phrase "achieve reasonable uniformity" in *LWV II*, 318 Kan. at 807, and suggest some sort of disparate impact test might be at play, this Court must reject their attempt to isolate this phrase out of context. The Supreme Court was simply describing the test to be applied on remand for evaluating the regulations governing the signature verification process for advance mail ballots – which had not yet been analyzed in the case and which the plaintiffs alleged utilized a standard that was not reasonably uniform among the counties. It is inconceivable that the Supreme Court was jettisoning fifty years of consistent equal protection jurisprudence with no explanation whatsoever.

Under that long line of equal protection case law, where there is nary a suggestion that the law was adopted for a discriminatory purpose, a rational basis standard must be applied in a manner that affords substantial deference to the State. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 193-94, 273 P.3d 709 (2012). Plaintiffs argue that the law would be fairer if mail ballots could be disseminated earlier than twenty days prior to the election, and if timely postmarked ballots could be received up to a week after the election. But even assuming these one-sided policy arguments are correct, the State has no legal obligation to choose a "better" or less burdensome method for pursuing its policy objectives. "[T]he relationship between the classification and the legislative objective it serves need not be narrowly tailored to the objective. A rational connection between the two will suffice." *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 370, 361 P.3d 504 (2015). "Relevance is the only relationship required between the classification and the objective." *Id.* (quotation and alteration omitted). In other words, the "standard is met so long as the statute produces effects that advance, rather than retard or have no bearing on, the attainment of the objective." *Id.* (quotations

omitted); accord *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (“The equal protection obligation . . . is not an obligation to provide the best governance possible. This is a necessary result of different institutional competences, and its reasons are obvious.”).

None of Plaintiffs’ policy objections to S.B. 4 equate to an equal protection violation, much less one requiring this Court to facially invalidate a duly enacted statute. The Kansas legislature’s decision to bring the State back into alignment with 35 other states – returning to a requirement that ruled the day in Kansas for roughly *150 years*, other than a grace period allowance for certain military voters in the 1920s and 1930s, and the brief 2017-2025 grace period experiment at issue here – may or may not accord with the policy preferences of the full electorate. But that is simply immaterial to the constitutional analysis. See *USD No. 380 v. McMillen*, 252 Kan. 451, 461, 845 P.2d 676 (1993) (“[I]f a legislative enactment is constitutional, it is not for this court to set policy or to substitute its opinion for that of the legislature no matter how strongly individual members of the court may personally feel on the issue.”). Additionally, this Court rejects the Plaintiffs’ wholly unsupported notion that the Kansas Constitution imposes a one-way ratchet – that the legislature, after briefly experimenting with a change to its electoral mechanics, can never revert to the original procedures.

There can be no dispute that the Election Day ballot receipt deadline implemented by S.B. 4 applies in a neutral, even-handed manner to all Kansas voters. *Every voter* who opts to vote by mail must return the ballot to the county election office or a polling place no later than 7:00 PM on Election Day. No exceptions. “Equal protection requires similarly situated individuals should be treated alike.” *LWV II*, 318 Kan. at 805 (quotation omitted). “It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Id.* (quotation omitted). All that is necessary for the

State to show is that the law in question is “being applied with reasonable uniformity so that no voter is subject to arbitrary and disparate treatment.” *Id.* Moreover, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” *Id.* (citing *Butts*, 31 Kan. at 555-56). This is all the more true in light of Plaintiffs’ *facial* challenge. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (to succeed in a facial attack, plaintiffs must establish that “no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.”); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (“A facial challenge must fail where the statute has a plainly legitimate sweep.”) (quotations omitted).

S.B. 4 imposes *no* legitimate burden – let alone a *severe* burden – on any voter in the State. Kansas voters have myriad options for exercising the franchise. In addition to voting by mail, they can vote in person on either Election Day or up to twenty days before the election at an advance voting site. K.S.A. 25-1123(a), 1122(g)(1). All such polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA). The State even mandates curbside voting so that voters do not have to exit their vehicle; election officials literally will bring a ballot to the voter in the precinct’s parking lot. K.S.A. 25-2909(d). Voters may also direct a third party to return their ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

As for voting by mail, it is still freely available. Counties begin processing advance mail ballot applications ninety days before the election, K.S.A. 25-1122(f)(1)(B), and then mail advance ballots to voters beginning twenty days before the election. K.S.A. 25-1123(a). Voters with a permanent disability or illness may be placed on the permanent advance mail voter list, K.S.A. 25-1122(h), and do not even have to apply for an advance mail ballot; their ballot will be automatically

sent to them twenty days before the election. Anyone not on the permanent list, meanwhile, must have their advance ballot application processed within two days of receipt. K.S.A. 25-1123(a). Douglas County, in fact, *automatically sends advance ballot applications to all registered voters* in advance of every even-numbered-year general election.

While Plaintiffs lament the USPS's delivery pace, that is *legally irrelevant*. First, the legislature has no constitutional obligation to even allow mail voting. The fact that it does so does not constrain it from imposing conditions (including an Election Day receipt deadline) on the practice. Second, Kansas cannot be held to violate an elector's equal protection rights just because some third-party over whom the State has no control – the USPS – is not exactly a model of operational efficiency. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (State must not be held responsible under Fourteenth Amendment for conduct it cannot control).

Third, with a modicum of diligence, all voters can ensure that their ballots are counted. If a voter knows it could potentially take as much as a week or ten days for his mailed ballot to reach the county election office, then that voter simply needs to send it in early rather than waiting close to Election Day. As the U.S. Supreme Court pointed out in rejecting a request to extend a ballot receipt deadline, voters who request a ballot at the last minute (and thus risk it not being counted) suffer the typical burden of a late-requesting voter, *not a burden imposed by state law*. *RNC v. DNC*, 589 U.S. 423, 425 (2020). An election deadline is not unconstitutional merely because an individual “fail[ed] to take timely steps to effect[uate]” his vote. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *accord DNC v. Wisc. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (rejecting all of the same arguments Plaintiffs advance in this case, noting state's interest in enforcing Election Day ballot receipt deadline, and holding that voters who delay the

submission of their ballot have no right to demand that it be counted); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (“Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting. ... And the burden on a voter to ensure that a ballot is postmarked by Election Day is not meaningfully smaller than the burden of, say, dropping the ballot in a drop box at one’s polling place on Election Day.”); *accord Mays v. LaRose*, 951 F.3d 775, 782-91 (6th Cir. 2020) (plaintiffs are no more burdened than any elector when they fail to take steps necessary to ensure the timely return of their ballots); *All. for Retired Ams. v. Sec’y of State*, 240 A.3d 45, 51-55 (Me. 2020) (same); *cf. Tully v. Okeson*, 977 F.3d 608, 615-18 (7th Cir. 2020) (requiring voters to vote in person during COVID-19 pandemic did not contravene Equal Protection Clause). In short, there is no constitutional right to procrastination.

Meanwhile, the federal district court cases Plaintiffs cite in support of their position offer them no refuge. As the Secretary noted in his reply brief, even assuming those cases were properly decided, they involved “as-applied” challenges to election officials’ refusal to accept and count timely-postmarked, but late-arriving ballots *in an electoral ecosystem that included a grace period*. See *DCCC v. Kosinski*, 614 F.Supp.3d 20, 56 (S.D.N.Y. 2022); *Gallagher v. N.Y. State Bd. of Elections*, 477 F.Supp.3d 19, 46-48 (S.D.N.Y. 2020). None suggested a State would have to accept late-arriving ballots *where the law provided no grace period*. Never has the equal protection clause been held to impose such a requirement.

Plaintiffs’ citations to *Bush v. Gore*, 531 U.S. 98 (2000), and *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506 (1971), are likewise inapposite. In *Bush*, the U.S. Supreme Court invalidated the Florida Supreme Court’s mandated recount of the 2000 presidential election as lacking “sufficient guarantees of equal treatment” because the recount directive failed to provide *any*

standard for election officials to use when determining the intent of the voter. 531 U.S. at 106-07. In the absence of such a uniform standard, Florida counties employed “varying standards to determine what was a legal vote,” resulting in recount outcomes that were “markedly disproportionate to the difference in population between the counties.” *Id.* at 107. Here, by contrast, S.B. 4 is indisputably administered in an even-handed and objective manner. All voters play by the same rules.

As for *Moore*, it involved an analysis of the Kansas Constitution’s one-subject rule for constitutional amendments in Article 14, Section 1, and an assessment of whether an individual voter has standing to challenge the Secretary of State’s decision to submit a proposed amendment to the electorate for approval. *Moore*, 207 Kan. at 645-46. That opinion has nothing to do with the instant action.

A recent decision of the Michigan Court of Appeals turning away a state constitutional challenge (including on equal protection grounds) to an Election Day receipt deadline for absentee ballots is particularly illuminating. *See League of Women Voters v. Sec’y of State*, 959 N.W.2d 1 (Mich. Ct. App.), *appeal denied*, 946 N.W.2d 307 (Mich. 2020). The court explained that the receipt deadline is a facially nondiscriminatory law equally applicable to all voters who choose to vote absentee by mail. *Id.* at 15. “Although mail may be processed more expeditiously in some areas and less expeditiously in others, the Legislature has opted to impose a received-by deadline rather than a mailed-by deadline for absent-voter ballots. That determination was a policy decision, and the [State Constitution] grants the Legislature the authority to provide for a system of absentee voting.” *Id.* And while all deadlines carry the possibility that a voter’s ballot will arrive too late to be counted, the court noted, “there must be a deadline – at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision.” *Id.* at 12.

If – as the U.S. Supreme Court has held – the obligation of voters to travel across town to the DMV and gather documents for a photo ID “does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting,” *Crawford*, 553 U.S. at 198, then surely insisting that a voter either arrange for a third party to deliver his ballot, mail the ballot in early enough to account for potentially slow USPS delivery, or simply vote in person is not so severe a burden as to contravene any constitutional rights.

4. – Plaintiffs Claims Also Fail Under *Anderson-Burdick* Type Balancing

Even if this Court were to find the reasonableness standard applied by the Kansas Supreme Court in *LWV II* or the general rational basis test for equal protection claims not involving suspect classes inapplicable, a balancing test along the lines of the *Anderson-Burdick* standard utilized by the federal judiciary would govern and the Court would reach the same result. Under this standard, courts “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the state as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982)). “[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the challenged law is exposed to far less searching review that is “closer to rational basis and the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434); *Fish v. Schwab*, 957 F.3d 1105, 1124-25 (10th Cir. 2020) (same).

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

As for Plaintiffs' claim that *Anderson-Burdick* entails a fact-bound inquiry unsuitable for a motion to dismiss, that is untrue. "When rational-basis review applies, it is downright routine for courts to dismiss constitutional challenges at the pleading stage." *Lichtenstein v. Hargett*, 83 F.4th 575, 601 (6th Cir. 2023). Likewise, courts "have not shied away from granting motions to dismiss under the *Anderson-Burdick* test even though it can require a fact-intensive balance of a law's burdens on voting rights against the state's precise justifications for the law." *Id.* (quotation omitted). *Accord Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072, 1085 n. 8 (9th Cir. 2024) ("[Plaintiff] suggests that dismissal is inappropriate because this case requires further development of the record before its claims may be evaluated under the *Anderson/Burdick* framework. We disagree. We routinely conduct the *Anderson/Burdick* analysis at the motion to dismiss stage."). And the two cases Plaintiffs cite for their contrary position say no such thing. *See Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020) (holding district court erred in granting summary judgment because the court erroneously found it was bound by precedent interpreting the same

statute under different facts); *Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000) (holding district court erred in granting motion to dismiss because facts in the complaint, if true, supported the party's claim).

When – as is true of an Election Day ballot receipt deadline – “the alleged burdens are not severe, a compelling state interest is not required.” *New Ga. Project*, 976 F.3d at 1282 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Even so, Kansas has very compelling interests in such a law. First, there is the need to remain compliant with the Federal Election Day statutes described in Section VI below. Second, eliminating the grace period ensures prompt tabulation of all votes and facilitates public confidence in the finality of results. Close elections are a regular feature of down-ballot races in every state (including Kansas), and a grace period for mail ballots means the outcome can teeter back and forth every day based on what mail arrives into the election office.⁶ Delayed counting of ballots received days after the election fuels mistrust and speculation, especially in tight contests. Third, enforcing an Election Day ballot receipt deadline simplifies logistics and enhances efficiency. Processing late-arriving mail ballots necessitates additional manpower, resources, and contingency planning, all of which complicate election administration. Fourth, eliminating the grace period helps prevent election fraud. Mail ballots arriving late are harder to verify, raising concerns about post-election tampering. This is especially true when the USPS has failed to include a postmark on the ballot. The revised law will avoid problems potentially arising from missing, unclear, or even altered postmarks.⁷ *See RNC v.*

⁶ The Public Interest Legal Foundation has prepared a “Tied Election Chart” that catalogues many of these elections. *See* <https://publicinterestlegal.org/tied-elections/>.

⁷ The Kansas Legislature received testimony on these interests during its consideration of S.B. 4. *See* Written Testimony of the Public Interest Legal Foundation, Opportunity Solutions Project, and Honest Elections Project (available at https://www.kslegislature.gov/li/b2025_26/measures/S.B.4/testimony); *see also* Oral Testimony at <https://www.youtube.com/live/dOAuHaYvxik?si=akvLMq038V8c1f6R>.

Aguilar, 2024 WL 4601602, at *2-4 (Nev. Oct. 28, 2024) (ordering mail ballots received after Election Day to be accepted despite a missing or indeterminate postmark).

All of these interests have been recognized as powerful and “more than enough to uphold [the State’s] reasonable ballot-receipt restriction” and “justify the deadline.” *New Ga. Project*, 976 F.3d at 1282; *accord Common Cause Ind.*, 977 F.3d at 664-66; *All. for Retired Ams.*, 240 A.3d at 52-55. Moreover, the State is not required to provide any “elaborate, empirical verification of the weightiness of [its] asserted justifications.” *Timmons*, 520 U.S. at 364. The fact that Kansas, so far as we know, has been lucky enough to avoid systemic fraud from mail ballots does not mean it is constrained from adopting this type of prophylactic measure. *See id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (“Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.”)). In sum, Plaintiffs’ equal protection cause of action fails to state a claim upon which relief can be granted and, therefore, must be dismissed.

D. Plaintiffs’ Due Process Claim Fails a Matter of Law

Plaintiffs next claim that Kansas’ imposition of a neutrally applicable Election Day ballot deadline violates their due process rights under Section 18 of the Kansas Constitution’s Bill of Rights. This claim, too, fails as a matter of law.

As a threshold matter, due process rights are implicated only when there has been a deprivation of life, liberty, or property. *Interest of A.S.*, 319 Kan. 396, 402-03, 555 P.3d 732 (2024). “In the absence of a protected property or liberty interest, there can be no due process violation.” *Landmark Nat’l Bank v. Kesler*, 289 Kan. 528, 544, 216 P.3d 158 (2009). Here, as federal appellate courts have uniformly held, there is no liberty interest in voting by mail, let alone in a grace period. *See Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 231 (5th Cir. 2020) (no liberty interest in right

to vote); *New Ga. Project*, 976 F.3d at 1282 (same); *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (same). Invoking *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 3d 1354 (D. Ariz. 1990), Plaintiffs urge the Court to disregard these decisions. But the Fifth Circuit explained in detail why that decision was wrongly decided and why no appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

Plaintiffs also rely on *LWV II*, where the Kansas Supreme Court remanded the plaintiffs' due process challenge to the State's signature verification requirements for advance mail ballots for the purpose of determining if voters are provided "reasonable notice" of their signature mismatch and "an opportunity to be heard at a meaningful time and in a meaningful manner" in order to contest the preliminary mismatch assessment. 318 Kan. at 807. But the Supreme Court never addressed the liberty issue in its majority opinion. And as discussed in Section III.A. above, there is no precedential value to an opinion that did not explicitly address an issue.⁸

In any event, Plaintiffs fail to recognize the distinctions between an Election Day ballot receipt deadline and the signature verification requirement at issue in *LWV II*. Plaintiffs argue that the due process defect with S.B. 4 is that, if a ballot fails to arrive by Election Day, it can never be validly counted; there is no possibility of cure. An Election Day receipt deadline, however, does not implicate the type of individualized, discretionary determinations that can trigger due-process scrutiny. Unlike signature-verification processes or case-specific eligibility judgments – where election officials assess voter-specific information and thus must be guided by adequate procedural safeguards – an across-the-board receipt deadline is a neutral, bright-line rule that applies equally to every voter. There is no individualized decision to review, no adjudicative process to second guess, and no risk of an erroneous deprivation dependent on administrative discretion.

⁸ Plaintiffs reference a comment by Justice Rosen – *in his dissent* – about the presence of a liberty interest. Am. Pet. ¶ 113. The majority, however, never said anything of the sort.

To recast a uniform statutory deadline as a due-process problem would effectively grant courts a roving commission to revise election laws whenever litigants dislike the policy choices of the legislature. Such an approach collapses the line between permissible policy disagreements and constitutional violations, inviting judicial intrusion into core legislative functions and destabilizing the predictable administration of elections. Under no plausible reading of *LWV II* can it be said that the Kansas Supreme Court intended such a result. Instead, here, due process is satisfied once the legislature provides reasonable notice of the ballot receipt deadline, explains the procedures to cast a valid ballot by mail, and provides a fair opportunity to comply on or before Election Day.

Plaintiffs nevertheless propose a three-part balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), but our Supreme Court rejected that theory when formulating the standard for due process challenges involving electoral mechanics in *LWV II*. The Court highlighted that the legislature’s broad constitutional authority to require “proper proofs” under Article 5 means the State must enjoy great latitude in implementing that process. *LWV II*, 318 Kan. at 805-06. Further, the U.S. Supreme Court has directed that due process attacks on voting processes are best analyzed under a balancing test along the lines of *Anderson-Burdick*, see *Richardson*, 978 F.3d at 234, and the Kansas Supreme Court construes Sections 2 and 18 of the State Constitution as “coextensive” with their federal counterparts. *Rivera*, 315 Kan. at 894; *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019). That means *Eldridge* has no role here:

The flaw in using *Eldridge* is that election laws, by nature, inevitably affect the individual’s right to vote. Under *Eldridge*, however, courts may accord the private interest at stake, namely the right to vote, significant weight. Therefore, the *Eldridge* test would inevitably result in courts’ weighing the pros and cons of various balloting systems, thereby tying the hands of States seeking to assure that elections are operated equitably and efficiently. Unlike *Eldridge*, the *Anderson / Burdick* approach recognizes that the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. Because *Anderson/Burdick* – unlike *Eldridge* – appropriately accounts for the state’s interest in regulating voting, it provides the appropriate test for procedural due process

claims challenging election laws.

Richardson, 978 F.3d at 235 (cleaned up) (quotations omitted).

This no doubt explains why *every* federal appellate court to address the issue has reached the same conclusion. See *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194-95 (9th Cir. 2021) (rejecting use of *Eldridge* test in election law challenges); *Memphis A. Philip Randolph Inst.*, 978 F.3d at 387-391 (same); *New Ga. Project*, 976 F.3d at 1282 (refusing to apply *Eldridge* in constitutional attacks on voting law because doing so “would stretch concepts of due process to their breaking point”). See also *Lawson*, 977 F.3d at 664 (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex. It is rational to require absentee votes to be received by Election Day, just as in-person voting ends on Election Day.”).

In any event, whether or not there is a liberty interest in mail voting is irrelevant. Plaintiffs’ due process cause of action fails either way. Judge Lagoa described the point in her concurrence in *New Georgia Project*, a case in which the Eleventh Circuit rejected the identical theory Plaintiffs advance here. As she explained, “[e]ven if Plaintiffs are being deprived of that [liberty] interest, they are being deprived of it by *legislative* action, not by *adjudicative* action.” *New Ga. Project*, 976 F.3d at 1288 (Lagoa, J., concurring). The Supreme Court has long distinguished between the two when deciding what due process requires. *Id.* For this reason, Judge Lagoa underscored, the traditional *Mathews v. Eldridge* test that Plaintiffs urge the Court to adopt (Am. Pet. ¶ 111) has no role to play in this context:

When a state deprives persons of liberty or property through *legislative* action—an action passed by the legislative process that applies “to more than a few people”—then “the affected persons are not entitled to *any* process beyond that provided by the legislative process.” *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020)

(emphasis in original) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); see also *Bi-Metallic*, 239 U.S. at 445 (“General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”)). On the other hand, when a state deprives persons of a liberty interest through an *adjudicative* action—an action that concerns only a “relatively small number of persons” who are “exceptionally affected, in each case upon individual grounds”—then the affected individuals may be entitled to additional process above and beyond that provided by the legislative process. *Bi-Metallic*, 239 U.S. at 446. Only in the latter situation do courts apply the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Id. at 1288-89 (cleaned up).

Kansas’ Election Day ballot receipt deadline is a law of “general applicability which affects all [Kansans] equally.” *Id.* at 1289. It was adopted by the legislature as part of its basic legislative function. Thus, “even if Plaintiffs are being deprived of a constitutionally protected liberty interest, they are being deprived of that interest by *legislative* action.” *Id.* There is no individualized determination required before a late-arriving ballot will be rejected under the law. Nor is any individualized determination due. *Id.* The only “process” to which Kansas voters are entitled “before their late-arriving ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case.” *Id.*

Moreover, even if procedural due process were relevant, there is no process deficiency. Not only is the electorate fully apprised of the receipt deadline when submitting mail ballots, but voters are afforded myriad other reasonable options for exercising the franchise. See Section IV.C.3 above. As the Tenth Circuit observed, deadlines in the election process “will invariably burden some voters . . . for whom the earlier time is inconvenient,” but these burdens are assessed in light of “a state’s legitimate interest in providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018); see also *Burdick*, 504 U.S. at 438 (“Reasonable regulation of elections . . . does require [voters] to act in a timely

fashion if they wish to express their views in the voting booth.”). In the context of mail-in voting, once the State has provided reasonable notice of the ballot deadline, explanation of the procedures to cast a valid ballot by mail, and a fair opportunity to comply on or before Election Day, due process is satisfied.

S.B. 4 simply imposes a due date for the receipt of ballots in the event a voter opts to vote by mail. Plaintiffs argue the elimination of the grace period “is neither a reliable nor a fair way to administer voting by mail.” Am. Pet. at ¶ 114. Putting aside the fact that 35 other states employ the same rule (as did Kansas itself for nearly all of its history), Plaintiffs are asserting a *policy-grounded* argument that does not come within the vicinity of stating a due process claim. Whether a grace period is beneficial or problematic (or a combination of the two) is not for the judiciary to decide. It is a legislative judgment, one which our State Constitution explicitly assigns to the discretion of the legislature.

Plus, Plaintiffs’ expansive theory is virtually unbounded. If they were to prevail, even the current grace period would be inadequate. Further, any time a single voter missed a ballot receipt deadline, that individual voter could seek an individualized determination of whether this violated due process under *Eldridge*. The Kansas Constitution imposes no such requirements. The due process cause of action cannot succeed.

E. Plaintiffs’ Right to Vote Claim Fails a Matter of Law

In their final claim, Plaintiffs allege that S.B. 4 contravenes their right to vote under Article 5, Section 1 of the Kansas Constitution as well as Sections 1 and 2 of our Constitution’s Bill of Rights. Plaintiffs’ Amended Petition acknowledges that their claims grounded in Sections 1 and 2 of the Bill of Rights are foreclosed by *LWV II*. But Plaintiffs nevertheless argue that they still have a viable cause of action under Article 5, Section 1.

Plaintiffs aver that Article 5, Section 1 mandates that their right to vote theory be reviewed under a strict scrutiny standard. They posit that this provision does not address proper proofs, it stands alone. And any voting regulation that does not involve proper proofs, Plaintiffs contend, must survive the highest form of scrutiny. This Court rejects these arguments for multiple reasons.

First, this argument ignores *LWV II*, where the Kansas Supreme Court clearly set forth the standard for evaluating a challenge to a voting law pursuant to Article 5, Section 1. The Court explained that strict scrutiny does not apply to such a claim. *LWV II*, 318 Kan. at 802. Instead, “to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage.” *Id.* at 801. Plaintiffs argue that S.B. 4 is an extra-constitutional qualification, but they never state what the additional qualification is. (Am. Pet. at ¶ 124). Nor could they. The kind of extra-constitutional qualifications sufficient to invalidate a law under Article 5, Section 1, include, for example, a requirement to be up-to-date on all tax obligations, *see State v. Doane*, 98 Kan. 435, 158 P. 38, 40 (1916), certain residency requirements, *see id.*, and a party affiliation declaration mandate for the general election. *See State ex rel. Smith v. Beggs*, 126 Kan. 811, 814-15, 271 P. 400 (1928).

In this case, there is *no* additional qualification on any voter. The law simply imposes a neutrally applicable Election Day receipt deadline for mail ballots. There is nothing problematic, let alone unconstitutional, about that. As the Supreme Court held in *LWV II*, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” 318 Kan. at 804. *Accord Butts*, 31 Kan. at 554 (“Requiring a party to be registered is not in any true sense imposing an additional qualification any more than requiring a voter to go to a specific place for the purpose of

voting[.]”); *Lawson*, 977 F.3d at 664-65 (“Deadlines are essential to elections, as to other endeavors such as filing notices of appeal or tax returns. That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.”).

Second, Plaintiffs’ theory ignores Article 4, Section 1, in which the Constitution confers broad discretion on the legislature to regulate the structure and administration of elections. *See id.* (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added). As the Supreme Court recently noted, “Where popular elections are required – by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.” *LWV II*, 318 Kan. at 797. The vast delegation of authority in Article 4, Section 1, to select any reasonable mode of voting for state elections necessarily warrants great deference. Indeed, such principle follows naturally from *LWV II*’s adoption of a highly deferential standard for another constitutionally delegated electoral power to the legislature – the right to impose “proper proofs” pursuant to Article 5, § 4 – an authority deemed to encompass “any *reasonable* provision for ascertaining who is entitled to vote.” *LWV II*, 318 Kan. at 801.

Third, an Election Day ballot receipt deadline *does* functionally operate as a “proper proof” within the meaning of Article 5, Section 4. Part of the purpose behind S.B. 4 was the legislators’ concern that mail ballots were arriving after Election Day with no postmark, a postmark so smudged or illegible that it was impossible to reliably determine the date of mailing, or a stamp from a private postage meter (or similar business device) on which the date could be manipulated with ease. That meant that officials often had no dependable way to determine whether the voter had acted within the authorized voting window. By requiring that ballots be received by Election

Day, S.B. 4 helps ensure that only those voters who exercised their right to vote within the time prescribed by law are included in the count, thereby safeguarding both voter eligibility requirements and the integrity of the electoral process.

Fourth, Article 5, Section 1 merely states that “every citizen of the United States who has attained the age of eighteen and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector.” It is silent on the legislature’s authority to impose rules (or to delegate power to the Executive Branch to adopt regulations) to facilitate and maintain the integrity of the electoral process. That is why, as the Court in *LWV II* explained, the Constitution must be interpreted under the “principle that a specific provision controls over a more general one.” *LWV II*, 318 Kan. at 797. And the specific provisions in Article 4, Section 1 and Article 5, Section 4 offer the critical details. *Id.* (“[W]hile setting forth the specific and required qualifications for all electors in the Constitution, the people empowered the Legislature to ‘provide by law for proper proofs of the right of suffrage.’ See Kan. Const. art. 5, §§ 1, 4.”).

Fifth, the idea that substantial latitude and flexibility govern every election integrity law that targets voter eligibility, but anything outside that realm must be subjected to strict scrutiny – where the legislature can hardly act without turning the tightest corners and having a state court second-guess (and ultimately micromanage) its actions – is untenable. If anything, the legislature should enjoy even greater autonomy in these areas. In fact, it does, by virtue of Article 4, Section 1 discussed above.

In sum, Plaintiffs’ Amended Petition and Response to the Secretary’s Motion to Dismiss contain one-sided public policy arguments in favor of a grace period; however, a robust policy debate does not a constitutional violation make. “In the end, as a legal matter, it is just not enough

to conclude that if some ballots are likely to be rejected because of a rule, the burden on many voters will be severe.” *New. Ga. Project*, 976 F.3d at 1281 (quotation omitted).

V. PLAINTIFFS’ CLAIMS ARE PREEMPTED BY FEDERAL LAW

In addition to the reasons for dismissal set out above, Plaintiffs’ claims are also preempted by federal law, specifically, the federal Election Day statutes. Preemption is an affirmative defense that may be resolved on a motion to dismiss when it is apparent from the face of the complaint that the plaintiff’s claim is barred by federal law. *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1341 (10th Cir. 2015) (citations omitted). The Supremacy Clause dictates that a valid federal law is “the supreme Law of the Land[.]” U.S. Const. art. VI, cl. 2. If a plaintiff’s claim rests on a state law that is preempted by federal law, then the claim fails as a matter of law. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128 (10th Cir. 2007) (recognizing that all preempted state law is “without effect”). The grace period Plaintiffs demand would allow mail-in ballots to be accepted after the federally-prescribed Election Day for selection of the President and members of Congress. As the Fifth Circuit recently explained, such a grace period cannot be reconciled with the federal Election Day statutes. *RNC v. Wetzel*, 120 F.4th 200 (2024), *cert. granted*, 146 S. Ct. 355 (2025). Indeed, this issue is fundamental to the entire federal electoral process. *See Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

The Federal Constitution’s Elections Clause, found in Art. I, § 4, cl. 1, provides that states shall prescribe the “Times, Places and Manner” of congressional elections, “but the Congress may at any time by Law make or alter such Regulations. . . .” Similarly, the Electors Clause, found in Art. II, § 1, cl. 4, empowers Congress to set the time for choosing presidential electors. These Clauses collectively entrust Congress with final say over the rules governing federal elections.

State election regulations, whether enacted by the legislature or mandated by state constitutions or courts, must yield to conflicting federal requirements. *Foster v. Love*, 522 U.S. 67, 69 (1997).

By statute, Congress has fixed the date of federal general elections as the Tuesday following the first Monday in November in applicable years by enacting three separate statutes: 2 U.S.C. § 7 (“The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress”); 2 U.S.C. § 1 (providing for U.S. Senators to be chosen at the regular November election coincident with the House elections); 3 U.S.C. § 1 (“The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.”). Election Day, meanwhile, is defined as “the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 21.⁹ These statutes, known as the Election Day statutes, create a uniform Election Day for Congress and the Presidency that is required throughout the country, *Foster*, 522 U.S. at 70. Their purpose is to limit states’ ability to influence voting by allowing varying election days. *Foster*, 522 U.S. at 73-74.

In *Foster*, the Supreme Court struck down Louisiana’s open primary statute for congressional elections because it allowed the final selection of a candidate to occur in October. *Id.* at 72. Under Louisiana law, if one candidate won by a majority in the October primary, then no further action took place to elect the official on Election Day in November. *Id.* at 70. Louisiana’s law “clearly violate[d]” the federal Election Day statutes because in speaking of “‘the election’ of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant

⁹ Prior to 2022, the definition of Election Day was embedded in 3 U.S.C. § 1. Congress amended the statute, however, in 2022 in the Electoral Count Reform Act, part of the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328), and shifted the definition to 3 U.S.C. § 21.

to make the final selection of an officeholder;” and by establishing “‘the day’ on which these actions must take place, the statutes simply regulate the time of the election” *Id.* at 71-72. Importantly, the *Foster* Court 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. *Id.*

The same principles announced in *Foster* are applicable here. A state law permitting mail-in ballots to be accepted after Election Day runs afoul of Congress’ directive for a uniform Election Day and contravenes the State’s federally mandated obligation to complete the voting process by receiving all ballots by the close of the polls on that day. If an election is consummated only after additional mail-in ballots trickle in days later, Election Day has effectively been extended beyond the day Congress fixed, and the federal requirement of finality is undermined.

In *Wetzel*, the Fifth Circuit addressed a Mississippi law allowing state officials to accept and count mail-in ballots received during a five-day grace period. 120 F.4th at 204. The court noted that the “upshot” of the federal Election Day statutes is that they require all elections for Congress and the Presidency to be held on a single day. *Id.* Looking at *Foster* for guidance, the court considered three definitional elements in connection with the term “election”: (1) official action; (2) finality; and (3) consummation. *Id.* at 206-07.

With respect to “official action,” the court recognized that the “election” of a member of Congress “plainly refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder.” *Id.* at 207 (quoting *Foster*, 522 U.S. at 71). That is, a ballot is only “‘cast’ when the State takes custody of it.” *Id.* As to “finality,” Supreme Court precedent provides that the word “election” indicates a “final choice of an officer by the duly qualified electors.” *Id.* (quoting *Newberry v. United States*, 256 U.S. 232, 250 (1921)). “A voter’s *selection* of a candidate

differs from the public's *election* of the candidate[,]" and it is nonsensical to claim an electorate has officially elected an officeholder before all voters' selections (i.e., properly cast ballots) are received. *Id.* This means that "the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen." *Id.*

Lastly, "consummation" of the election cannot occur prior to or after the federal Election Day. *Id.* at 208-09. The Fifth Circuit focused on the action of *receipt*, not *counting*, of the ballots in the ballot box to consummate the election. *Id.* It is commonplace for ballots to be counted after Election Day. "*Receipt* of the last ballot, by contrast, constitutes consummation of the election, and it must occur on Election Day." *Id.* at 209. Based on this reasoning, the court held Mississippi's grace period conflicted with, and was preempted by, federal law. *Id.* at 215.

The same conflict would exist here if Kansas election officials were forced to accept mail-in ballots delivered after Election Day. The fact that Plaintiffs attempt to ground their claims in the Kansas Constitution is irrelevant. The Supremacy Clause applies to "any Thing in the Constitution or Laws of any State" that conflicts with federal law. U.S. Const. art. VI, cl. 2. To the extent that the Kansas Constitution, as capaciously and unreasonably interpreted by Plaintiffs, requires extending federal elections beyond the timeline set by Congress in the Election Day statutes, such a state constitutional mandate would be without effect. *See Emerson*, 503 F.3d at 1128-29.

Conflict preemption exists where "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quotation omitted). The State cannot simultaneously enforce a policy requiring that mail-in ballots be counted if they are received after Election Day (as Plaintiffs insist), while also

maintaining legal fidelity to the federal Election Day statutes discussed above. Faced with this conflict, compliance with both state and federal law would be impossible. As such, the state law must yield. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (Elections Clause makes Congress’ regulations paramount, and any conflicting state rule is preempted and “ceases to be operative[.]”).

VI. PLAINTIFFS’ REQUESTED RELIEF IS OUTSIDE SCOPE OF JUDICIAL POWER

Finally, in addition to the many flaws with Plaintiffs’ legal claims detailed above, Plaintiffs also seek an improper remedy. They ask this Court to do more than strike down the challenged law; they further demand that the Court create an entirely new election procedure out of whole cloth – a *seven-day* grace period. In other words, Plaintiffs are asking the Court to *legislate* for them via an injunction that adopts their preferred policy. This is far outside the role of the judiciary. As the Kansas Supreme Court observed, “We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution.” *Montoy*, 278 Kan. at 771.

VII. CONCLUSION

Plaintiffs’ claims fail as a matter of law. The Amended Petition’s alleged injuries are not sufficiently concrete to confer standing. And on the merits, while couched in constitutional terms, the Amended Petition offers only policy disagreements with S.B. 4. Nothing comes close to establishing a constitutional violation, let alone one that would justify a facial invalidation of the statute and a judicial edict that the State must accompany advance mail voting with a grace period. S.B. 4 is a neutral, uniformly applicable provision well within the legislature’s broad constitutional authority to regulate the mechanics of elections. Because Plaintiffs have not carried their burden

to allege facts establishing the requisite standard to sue or stating a viable claim for relief, their Amended Petition must be dismissed.

IT IS THEREFORE ORDERED that the Secretary's Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Amended Petition is dismissed with prejudice.

DATE: _____

The Honorable Carl Folsom III
Division 7, Douglas County District Court

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Submitted by:

By: /s/ Bradley J. Schlozman
Bradley J. Schlozman (KS Bar #17621)
Krystle M. S. Dalke (KS Bar #23714)
HINKLE LAW FIRM LLC
1617 North Waterfront Parkway, Suite 400
Wichita, KS 67206
Tel.: (316) 267-2000
Fax: (316) 660-6596
Email: bschlozman@hinklaw.com
Email: kdalke@hinklaw.com

Ashley N. Jarmer (KS Bar #24722)
HINKLE LAW FIRM LLC
8711 Penrose Lane, Suite 400
Lenexa, KS 66219
Tel.: (913) 345-9205
Fax: (913) 345-4832
Email: ajarmer@hinklaw.com

Kris W. Kobach (KS Bar #17280)
Kansas Attorney General
120 S.W. 10th Street, Suite 200
Topeka, KS 66610
Tel: (785) 235-2218
Email: kris.kobach@ag.ks.gov

Attorneys for Defendant Scott Schwab

CERTIFICATE OF SERVICE

I certify that on March 2, 2026, I authorized the electronic filing of the foregoing with the Clerk of the Court using the eFlex filing system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list.

By: /s/ Bradley J. Schlozman

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Exhibit C

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