

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 130,839

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

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State,
Defendant-Appellant,

and

JAMIE SHEW, in his official capacity as Douglas County Clerk,
Defendant.

ORDER

Effective January 1, 2026, our Legislature enacted Kansas Senate Bill 4, L. 2025, ch. 8, § 1, which changed the deadline in K.S.A. 25-1132(b) for the receipt by mail of advance voting ballots from the third day after the date of the election to 7:00 p.m. on the date of the election. Seven months before that change went into effect, three registered voters and three organizations (collectively "Plaintiffs") sued in Douglas County District Court challenging the facial constitutionality of S.B. 4 (now contained in K.S.A. 2025 Supp. 25-1132[b]) (hereafter K.S.A. 25-1132[b]). That lawsuit remains pending.

We are now in the thick of election season. Kansas' 2026 primary election takes place on August 4, and the 2026 general election is on November 3. Advanced mail ballots for the primaries began to be distributed by post on July 15 with instruction, consistent with K.S.A. 25-1132(b), that the ballot must be received in the election office by 7:00 p.m. on Election Day to be counted.

On July 16, the district court overseeing Plaintiffs' challenge to the law entered an order granting Plaintiffs' request to temporarily enjoin the application of the 7:00 p.m. election-day deadline in K.S.A. 25-1132(b), effectively reverting to the three-day grace period that statutory subsection had previously permitted.

Secretary of State Scott Schwab, one of the two defendants named in the lawsuit, filed a notice of appeal that same day and properly docketed the appeal in the Kansas Court of Appeals. See K.S.A. 60-2102(a)(1), (2).

On July 20, Secretary Schwab filed with the Court of Appeals an emergency motion to stay or suspend the district court's order enjoining the 7:00 p.m. deadline and an emergency motion to expedite a decision on the motion to stay. On the same day, Secretary Schwab filed with this court an emergency motion to transfer, requesting we transfer the entire matter from the Court of Appeals to this court. Plaintiffs subsequently responded to the Secretary's motion to transfer, so that matter is ready for decision.

On July 27, the Court of Appeals issued an order denying Secretary Schwab's emergency motion to stay or suspend temporary injunction pending appeal. In response, on July 28, Secretary Schwab filed an "Emergency Petition for Review" asserting that exercise of this court's discretionary review was required to correct the Court of Appeals' misapplication of the "proper standards for granting a stay pending appeal" and seeking an emergency stay or suspension of the district court's temporary injunction. Petition at 1, 3. Plaintiffs responded on July 29.

Although governed by distinct rules, both the Secretary's motion to transfer and petition for review turn on an exercise of our discretion. For the reasons discussed below, we deny both requests.

Motion to Transfer

K.S.A. 20-3017 and Supreme Court Rule 8.02 (2026 Kan. S. Ct. R. at 54), which govern motions to transfer, require Secretary Schwab to show, among other things, the existence of one or more of the grounds for transfer specified in K.S.A. 20-3016(a) by providing, as relevant here:

"(B) the subject matter of the case . . . has significant public interest;

"(C) the particular legal question raised . . . has major public significance; or

"(D) sufficient data concerning the state of the docket of the Court of Appeals and of the Supreme Court to demonstrate that the expeditious administration of justice requires the transfer."

Secretary Schwab's primary focus in seeking transfer of the appeal is exigency. See Motion to Transfer, at 1 ("Transfer is necessary for the expeditious resolution of those questions."). But exigency alone is not a ground for transfer in K.S.A. 20-3017 or Rule 8.02(b). And although Rule 8.02(b)(3)(D) mentions the promotion of "the expeditious administration of justice," Secretary Schwab has failed to make the required showing under that subsection, i.e., to establish "sufficient data concerning the state of the docket of the Court of Appeals and of the Supreme Court to demonstrate that the expeditious administration of justice requires the transfer." To the contrary, and as demonstrated by its expeditious ruling on Secretary Schwab's emergency motion to stay, the Court of Appeals appears ready, willing, and able to administer justice at this stage in the case.

We agree with our dissenting colleagues that the subject of this appeal, amplified by its timing in the midst of election season, has significant public interest. And the constitutionality of K.S.A. 25-1132(b), which eliminated a three-day grace period for counting qualified mail-in ballots and set a 7:00 p.m. Election Day deadline, raises an important legal question with major public significance.

But the existence of some grounds for transfer does not mandate transfer. Rather, this court has discretion in deciding whether to transfer a case. K.S.A. 20-3017 ("The supreme court shall consider such [motion to transfer] and may accept the case for review and final determination or may decline jurisdiction and order that the case be determined by the court of appeals."); Rule 8.02.

Petition for Review

We treat Secretary Schwab's emergency petition for review of the Court of Appeals order on his motion to stay as an expedited petition under Supreme Court Rule 8.03(b)(4) (2026 Kan. S. Ct. R. at 55). The petition reframes and reargues the stay motion that the Court of Appeals denied. It focuses on what the Secretary characterizes as "two critical errors": (1) the panel's failure to apply the United States Supreme Court's "Purcell principle," espoused in *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006), that federal courts "should ordinarily not alter the election rules on the eve of an election," and (2) the panel's failure to investigate the Secretary's likelihood of success on the merits. Neither alleged error convinces us review is warranted.

As to the first argument, K.S.A. 60-262(f) recognizes an appellate court's inherent discretionary power to "stay proceedings, or to suspend, modify, restore or grant an injunction, while an appeal is pending" or "to issue an order to preserve the status quo or the effectiveness of the judgment to be entered."

Kansas law defines the status quo as "the last actual, peaceable, noncontested position of the parties which preceded the pending controversy." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860 (1984); see also *City of Leavenworth v. CoreCivic, Inc.*, 66 Kan. App. 2d 498, 505, 584 P.3d 742 (2026) (holding that when status

changed, status quo for purposes of temporary injunction was to restore parties to "the position they were in at the actual time the present suit was filed").

The position driving the Secretary's stay motion was that the district court's order has disrupted the status quo. S.B. 4 became law; its Election-Day deadline has been the law since January 1 of this year; and, according to the Secretary's uncontroverted representation, tens of thousands of ballots have already been mailed that inform voters they must be returned by 7:00 p.m. on Election Day. Thus, the Secretary asserts a stay would have righted things while an appellate court determines whether the temporary injunction should have been issued at all.

But Plaintiffs asserted their constitutional challenges well before S.B. 4 became law. As viewed by the Plaintiffs and the district court, and apparently the Court of Appeals, the parties' "last peaceable, noncontested position" that "preceded the pending controversy" was the pre-2026 version of the law (with the 3-day grace period). And while we need not speculate on the many factors that likely impacted the timing of the district court's order, we observe that Secretary Schwab advocated a federal preemption argument in the district court that the United States Supreme Court had pending and did not decide until June 29, 2026. *Watson v. Republican Nat'l Comm.*, 609 U.S. __, __ S. Ct. __, 2026 WL 1855462, at *3 (2026). ("We must decide whether the federal election-day statutes preempt Mississippi's law. They do not."). The timing is unfortunate but should not dictate an appellate ruling adverse to Plaintiffs.

Thus, even if the *Purcell* principle controlled the inquiry, which it does not clearly do, we see no conflict between it and the result of the Court of Appeals' reasoning here, when the intent and effect of the order is to minimize disruption, preserve the status quo, and avoid irreparable harm while the appellate court decides the substantive question of the propriety of the lower court's injunction.

Problematic too is the heavy reliance Secretary Schwab and the dissent place on *Purcell* itself because recent rulings by the United States Supreme Court show an inconsistency in its application that would require deeper analysis before being invoked to disadvantage one side or the other in this litigation. Compare *Callais v. Louisiana*, 608 U.S. ___, 146 S. Ct. 1111 (2026) (majority decision permitting redrawing of new congressional districts 12 days before election and after ballots using the previous districts already mailed); *Allen v. Milligan*, 608 U.S. ___, 146 S. Ct. 1377, 1387 (2026) (allowing reversion to a different congressional districting map right before an election after voter rolls were locked) (Sotomayer, J., dissenting) ("To switch to the 2023 Redistricting Plan now, however, county elections officials will have to reassign hundreds of thousands of voters across the State to new congressional districts."); with *Abbott v. League of United Latin American Citizens*, 607 U.S. ___, 146 S. Ct. 418, 223 L. Ed. 2d 260 (2025) (granting application for stay of a three-judge district court's injunction finding illegal racial gerrymandering a year before the general election); *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (granting applications for stay of unanimous lower court ruling that Alabama's congressional map likely violated Voting Rights Act because it occurred nine months before the election). This inconsistency illustrates a fundamental flaw in the dissent's position: none of this is remotely settled, does not arise under Kansas law, and has not yet been properly briefed and argued by the parties. Dramatic rush to judgment does a disservice to the parties and the public.

Secretary Schwab's second argument faults the Court of Appeals for failing to conduct a thorough inquiry into whether the Secretary was likely to succeed on the merits of the appeal. We disagree. Expressly disclaiming any judgment on the merits, the Court of Appeals panel weighed competing harms, including irreparable harm, administrative burden, and confusion that would result from further court intrusion, and denied the motion.

As the Secretary readily acknowledges, this court has not expressly addressed the specific factors a court should consider in determining whether to suspend or stay a temporary injunction under K.S.A. 60-262. In the same breath, the Secretary asks us to both adopt and apply the factors articulated by the United States Supreme Court in *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), which include "whether the stay applicant has made a strong showing that he is likely to succeed on the merits."

Relying on federal caselaw admonishing "last minute" rulings in election-law cases, the Secretary would have both appellate courts, in piecemeal style and without the benefit of the usual appellate litigation process—i.e., briefing and argument—craft precedential rules (procedural and substantive) and effectively "pre-rule" on the merits of the case by engaging in the same "likelihood of success on the merits" analysis that is required for deciding a temporary injunction and for appellate review of the same. But such analysis is not a candidate for the kind of expedited consideration the Secretary seeks through his emergency motion to stay or his emergency petition for review of the Court of Appeals ruling on that motion. Obviously, our dissenting colleagues disagree: although they claim their dissent from this nonprecedential order "is not the proper place for a full discussion of the merits of the district court's temporary injunction," slip op. at ___, they engage in comment and discussion on the merits on what they improperly characterize as a purely legal question on undisputed facts. Kansans deserve better from their highest court. The case is on interlocutory appeal from a preliminary injunction. The facts are not undisputed; they are undeveloped. We choose a different path.

The temporary injunction motion was before the district court for nearly seven months, and extensive litigation on that motion resulted in a 54-page district court order addressing each of the required factors informing decisions on temporary injunctions based on the largely uncontested facts presented. The temporary injunction may not ultimately survive appellate scrutiny, but it is not plainly erroneous, and—despite the

Secretary's contrary position and as explained above—it does "preserve[] the relative positions of the parties until a full decision on the merits can be made." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461 (2019); see also *Landis v. North American Co.*, 299 U.S. 248, 254-56, 57 S. Ct. 163, 81 L. Ed. 153 (1936) ("Especially in cases of extraordinary public moment," a party "may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.").

Conclusion

Like the mechanism authorizing the transfer of an appeal under Rule 8.02, Rule 8.03's review mechanism is discretionary. In exercising our discretion on the Secretary's two pending requests, we are mindful this appeal is interlocutory, meaning it arises within an ongoing case, and is properly within the general jurisdiction of the Court of Appeals. K.S.A. 60-2102(a)(2). It is not an appeal from a final judgment—the district court has yet to decide the question of whether K.S.A. 25-1132(b) is constitutional. And any appeal from any final judgment that a statute is unconstitutional *is* a question that will come directly to this court by legislative design. See K.S.A. 60-2101(b). The Secretary has failed to credibly convince a majority of this court that this case, in its current posture, should bypass the regular appellate review process established by our Legislature. Adhering to our tiered appellate process has the benefit of creating a natural filtration system that allows for deeper exploration of, and refinement of complex issues which results in an orderly development of caselaw. Cf. Wood, *The U.S. Supreme Court and the "Inferior" Courts: Siblings or Distant Cousins?*, 139 Harv. L. Rev. F. 221, 224-25 (2026) (noting that the United States Supreme Court may defer addressing "significant policy issues . . . when it thinks that the question would benefit from further percolation in the lower courts").

This court denies both Secretary Schwab's emergency motion to transfer this appeal from the Court of Appeals and his emergency petition for review of the Court of Appeals' ruling on his motion to stay. We do so expressly without comment on the merits of the appeal. Although the issues are of significant public importance, the posture of this appeal is interlocutory. We respect our colleagues' sense that the highest court has a duty to issue the final word on important constitutional questions, but any decision we render now will not finally resolve the case. For this and other reasons, we view the exercise of judicial restraint under these circumstances not as an abdication of duty but as a form of institutional humility—one that reminds both judges and the public that judges are guardians of the law, not arbiters of social or political wisdom. Collier, *Judicial Restraint: Just Because you Can Doesn't Mean You Should*, U.S. Ct. of Appeals for the Sixth Circuit: Court Connections (Jan. 2026). The public at large will benefit from an expeditious decision from the Court of Appeals, which will have the opportunity to interpret and apply Kansas precedent to evaluate the propriety of the temporary injunction. We will no doubt have our say at the appropriate time.

The court denies Secretary Schwab's motion to transfer and notes the Plaintiffs' response to that motion. The court grants the Secretary's request for an expedited ruling on the petition for review, the court denies the petition for review, and notes Plaintiffs' response to the petition.

Dated this 30th day of July 2026.

FOR THE COURT



ERIC S. ROSEN
Chief Justice

[STEGALL and WALL, JJ., dissent continued on next page]

* * *

STEGALL and WALL, JJ., dissenting: This case presents us with a pure question of law on undisputed facts. And the question is undeniably of maximal importance—which ballots shall be counted in the upcoming primary and general elections? And in these elections, Kansas voters will set the direction of our state's leadership for years to come. There are contested races in both the primary and general elections touching on all three branches of government—all our state officers, much of the state Legislature, and a ballot measure impacting this court. Not to mention federal races that may sway control of Congress during the last two years of the current Administration. And yet the highest court in our state has decided not to weigh in.

The reason given is that this is how cases generally play out. The intermediate court decides first, and judicial restraint counsels that the highest court bide its time and allow issues to develop below. In ordinary matters, we agree with this. But this case is not ordinary. See K.S.A. 20-3016(a)(3) (expressly allowing for transfer of cases involving questions of major public significance). By failing to take up our responsibility as the court of last resort in Kansas on these issues, we invite only suspicions about the integrity of our election outcomes at a time when the legitimacy of our voting procedures is under unprecedented assault. There are thousands of ballots at stake in this lawsuit. They are now going to be counted. But their ultimate legality will not be determined by this court until long after the results are announced. *Johnson v. Russell*, 161 Kan. 203, 209, 166 P.2d 568 (1946) ("It is the concern and duty of courts to make certain, *insofar as they are able*, that a contested election is decided on its merits, *pursuant to proper procedure*, to the end that the final judgment shall be responsive to the will of the electorate." [Emphases added.]). In our judgment, this is an untenable and unacceptable outcome. For these reasons, we respectfully dissent from today's decision to deny the motion to transfer.

We also dissent from the majority's decision to deny the Secretary of State's emergency petition for review. The Secretary petitioned for review of the Court of Appeals' order denying its motion to stay the district court's temporary injunction. There is no jurisdictional bar to review—the panel's order is one of several decisions appealable to our court. See K.S.A. 20-3018(b) ("[a]ny party aggrieved by a decision of the court of appeals" may petition our court for review within 30 days; "[t]he procedures governing petitions for review shall be prescribed by rules of the supreme court"); see also Supreme Court Rule 8.03(a) (2026 Kan. S. Ct. R. at 54) (A "'decision' means any formal or memorandum opinion, order, or involuntary dismissal under Rule 5.05."). And our court should exercise that jurisdiction given the general importance of the question presented and because the panel likely reached an incorrect result. See K.S.A. 20-3018; Rule 8.03 (factors for granting discretionary review).

We explained the importance of the question presented in our rationale for granting the Secretary's motion to transfer. As for the panel's decision, it ought to be reviewed by this court for at least two reasons: (1) the unique timing of the case weighs in favor of courts exercising judicial restraint when it comes to changing the election rules; and (2) there are compelling reasons to doubt the likelihood that plaintiffs will succeed on the merits.

Courts should not ordinarily interfere with election procedures on the eve of an election. In the federal courts, this so-called *Purcell* principle is motivated at least partially by federalism. See *Purcell v. Gonzalez*, 549 U.S. 1, 5-6, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."); *Democratic National Committee v. Wisconsin State Legislature*, 592 U.S. ___, ___, 141 S. Ct. 28, 31, 208 L. Ed. 2d 247 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("When an election is close at hand, the rules of the road should be clear and settled.");

Republican National Committee v. Democratic National Committee, 589 U.S. 423, 424, 140 S. Ct. 1205, 206 L. Ed. 2d 452 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

Given the federalism motivations behind *Purcell*, it makes sense that state courts have been more circumspect in its application. See Yablon and Clinger, *Purcell Principles for State Courts*, 2024 Wis. L. Rev. 1637, 1651-68 (2024) (examining state cases). But the other equitable considerations supporting the *Purcell* principle still apply, including the timing of a district court's ruling. When, as here, the district court changes election rules only days before the primary—after mail-in ballots have been distributed—the timing concerns undergirding *Purcell* are amplified. *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute."); *Democratic National Committee*, 141 S. Ct. at 28 (Roberts, C.J., concurring in denial of application to vacate stay) ("[A] District Court intervened in the thick of election season to enjoin enforcement of a State's laws. Because I believe this intervention was improper, I agree with the decision of the Seventh Circuit to stay the injunction pending appeal."). And all of this is underscored by the fact this is a *preliminary* injunction—there has yet to be a final determination of the merits. See *Purcell*, 549 U.S. at 6 (Stevens, J., concurring) ("Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. . . . Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.").

But aside from the *Purcell* principle, the reasons to stay the injunction in this case are clear. K.S.A. 60-262 allows an appellate court to suspend an injunction while that injunction is pending appeal. While we have not laid out specific factors to consider in granting a stay, we note that K.S.A. 60-262(c) resembles Federal Rule of Civil Procedure 62. Therefore, we find federal caselaw persuasive. See *In re Estate of Lentz*, 312 Kan. 490, 500, 476 P.3d 1151 (2020) ("Without clear legislative guidance or established precedent," we look to federal court interpretations of comparable federal rules.). The parties, too, are agreed that federal standards apply. Under federal law, a court evaluates the following factors to determine whether a stay is warranted:

"(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 v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 [1987]).

The first two factors are of primary importance. *Nken*, 556 U.S. at 434. And both favor a stay.

Here, plaintiffs' likelihood of ultimate success on the merits is sufficiently in doubt to warrant a stay and our further review. This dissent is not the proper place for a full discussion of the merits of the district court's temporary injunction. It may or may not survive appellate review. But there are reasons to think it will not.

For example, why have neither the plaintiffs nor the district court cited any appellate authority holding that an election day deadline for mail-in ballots is unconstitutional? Federal district courts attempted to extend mail-in ballot deadlines across the country in the wake of the COVID-19 pandemic, but federal appellate courts uniformly declined to require such strong judicial medicine. *Organization for Black*

Struggle v. Ashcroft, 978 F.3d 603, 606-07 (8th Cir. 2020) (The court granted a stay after "[t]he district court thus granted in part Plaintiffs' motion for a preliminary injunction and temporary restraining order and ordered the State to allow mail-ballots to be received by the same method as absentee ballots. The district court further ordered the State to immediately take steps to abide by the order, including informing the voting public that mail-in ballots could be returned in person."); *Common Cause Indiana v. Lawson*, 977 F.3d 663, 664-65 (7th Cir. 2020) ("That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits."); *New Georgia Project*, 976 F.3d at 1284 ("And finally, a stay is in the public interest. The Supreme Court has 'repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.' Staying the district court's order here will prevent voter confusion, especially since Georgia has already mailed absentee ballots with instructions that the Election Day deadline applies. [Citation omitted.]"); *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020) (granting a stay pending appeal on the merits after the district court enjoined an Arizona election law and ordered Arizona to create and to institute a new procedure that would grant voters who failed to sign their ballots up to five days *after* voting has ended to correct the error).

Moreover, what about this court's declaration over one hundred and forty years ago that "[i]f the legislature has the right to require proof of a man's qualification, it has a right to say *when* such proof shall be furnished, and before what tribunal, and unless this power is abused the courts may not interfere"? (Emphasis added.) *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618 (1884). If the Legislature is tasked with saying when proofs of qualification can be furnished, does it not also have the power to say when ballots must be received? The State of Kansas did not provide a 3-day grace period for casting a ballot for almost 150 years, so it is anything but a foregone conclusion that eliminating such a grace period is a clear and obvious violation of the Kansas Constitution. And yet we choose to remain silent while a district court enjoins the operation of a duly enacted election law—during an election—pending a final decision on the merits.

The district court held that plaintiffs were likely to prevail on at least one of their claims: that the elimination of the three-day grace period violated either (1) the Kansas Constitution's guarantee of equal protection, (2) due process, or (3) the "fundamental" right to vote. Plaintiffs frame these three claims as facial constitutional challenges to the statutory deadline for receiving mail-in ballots. To show a likelihood of success on the merits of a facial challenge, plaintiffs must typically show that there is no set of circumstances in which the statute can be constitutionally applied—that the statute is unconstitutional in all applications. *State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025). This is an exacting standard. *Miller v. Johnson*, 295 Kan. 636, Syl. ¶ 8, 289 P.3d 1098 (2012) ("When a party attacks a statute as facially unconstitutional for failing to satisfy the rational basis standard, that party must demonstrate that no set of circumstances exists that survives constitutional muster."), *abrogated on other grounds by Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019); *In re Tax Appeal of Weisgerber*, 285 Kan. 98, 105, 169 P.3d 321 (2007) ("When a plaintiff attacks a statute as facially unconstitutional under the Equal Protection Clauses, the plaintiff 'must establish that no set of circumstances exist under which the [statute, regulation, or statutory] amendment would be valid. Simply pointing out that the amendment might not be rationally related to the state objectives sought under one set of facts is not enough to declare the amendment unconstitutional on its face.'").

The uncontroverted evidence demonstrates that an overwhelming majority of mail-in ballots will be counted. And we have not been presented evidence that voters are necessarily subject to the whims of mailing a ballot via First Class Mail with the United States Postal Service. There are expedited services for mail. And with Senate Bill 4's (SB 4) elimination of a "postmark" for determining a timely ballot, it would appear voters have the option to use other carriers who guarantee overnight delivery. This does not even account for a voter's ability to drop a ballot off in person to an accessible polling place, in a locked ballot box, without even leaving the car—let alone the option to vote in person

on election day. See K.S.A. 25-1123(a); K.S.A. 25-2909(d); K.S.A. 25-2710. Yet the district court avoided the general facial standard and consideration of these options by citing Fourth Amendment caselaw. See *Los Angeles v. Patel*, 576 U.S. 409, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015). Why is that appropriate?

Furthermore, in the entirety of the district court's equal protection analysis, it relies solely on *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) (*LWV II*). The district court concluded that a voting law can independently violate equal protection if the law (1) subjects a ballot to "arbitrary treatment" or (2) lacks uniformity. See district court's Order Granting Temporary Injunction at 36 ("That lack of uniformity creates an independent violation of equal-protection principles.").

Does the district court's analysis accurately account for equal-protection principles or faithfully apply *LWV II*? Why does the analysis ignore *LWV II*'s holding that "the 'right to vote' is not an unenumerated 'natural right' protected by section 1 of the Kansas Constitution Bill of Rights"? 318 Kan. at 793. Furthermore, in examining the protections of *section 2* of the Kansas Constitution Bill of Rights, this court is "'guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights.'" 318 Kan. at 805 (quoting *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 [2022]). Thus, when conducting an equal-protection analysis, a court must generally examine whether rational basis, intermediate, or strict scrutiny applies. *Downtown Bar and Grill v. State*, 294 Kan. 188, 193, 273 P.3d 709 (2012) ("Both federal and Kansas law identify three levels of scrutiny that may be applied in equal protection claims."). The district court made no attempt to follow these traditional categories. Why not? How can a facially neutral statute—one that applies the same voting deadline to all qualified electors without any evidence of discriminatory purpose—violate equal-protection principles? See *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538

U.S. 188, 194, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003) (proof of discrimination against a protected class required to show Equal Protection Clause violation; disparate impact alone does not suffice when challenging a facially neutral statute).

Turning to due process, the district court concluded that there is likely a procedural due process violation in eliminating the grace period under K.S.A. 2025 Supp. 25-1132 because a voter does not receive reasonable notice and an opportunity to contest disqualification of a rejected ballot. But the power being exercised in amending K.S.A. 2025 Supp. 25-1132 is legislative rather than adjudicative power, thus the process to which Kansans were due was the process that occurred when the law was passed. See *New Georgia Project*, 976 F.3d at 1288 (Lagoa, J., concurring) (quoting *Jones v. Governor of Florida*, 975 F.3d 1016, 1048 [11th Cir. 2020]). Why is additional "process" required by the Kansas Constitution? The challenged amendment creates a uniform deadline that is self-executing and ministerial—no election official is called upon to exercise discretionary judgment about any voters or their ballots. The amendment does not present any of the individualized risks or error that created due process concerns with signature matching in *LWV II*.

Finally, how can the district court declare that we held in *LWV II* that the Kansas Constitution guarantees all qualified Kansans the "fundamental" right to vote in the State's elections? Such a holding conflicts with what was said in *LWV II*—"The article 5 right protected by the Kansas Constitution is an *enumerated political right*." *League of Women Voters*, 318 Kan. at 800. *LWV II* found no historical support for the proposition that this right is a "fundamental right." 318 Kan. at 799 ("The dissents cannot point to anywhere in the Kansas Reports where this court held that section 2 protects a fundamental right to vote. It simply is not there."). As we emphasized in *LWV II*, the use of the terms "fundamental" or "natural" to describe rights protected by section 1 of the Kansas Constitution Bill of Rights are terms of legal art with serious implications mandating review of restrictions on those rights under the highest standard of "strict

scrutiny." 318 Kan. at 793 ("The League asserted that, because the 'right to vote' is a fundamental right, the government must show the infringement withstands strict scrutiny . . . Rather, suffrage is universally understood as a political right."). Nothing about the holding of *LWV II* can be read to suggest the political right to vote is not "fundamental"—in the ordinary English meaning of the word—to our functioning democracy. Of course it is.

As a political right, however, "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. Thus, the critical question under *LWV II* is whether a voting regulation is a reasonable requirement or an "extra-constitutional qualification on the right of suffrage." 318 Kan. at 802. The district court's analysis neglects this all-important question.

Turning to the "irreparable harm" prong—the panel relies on the principle that the primary goal of a stay during an appeal is "to prevent irreparable injury to the parties or to the public resulting from the premature enforcement" of a district court's ruling. *Scripps-Howard Radio v. Comm'n.*, 316 U.S. 4, 9, 62 S. Ct. 875, 86 L. Ed. 1229 (1942). In applying this principle, the panel expresses its concern about disenfranchising those voters whose ballots will be received after SB 4's 7:00 p.m. deadline. We acknowledge that there will certainly be voters who are affected by the deadline. But the lower courts considered only part of the "injury" story.

A state is irreparably harmed when it is prevented from "conducting this year's elections pursuant to a statute enacted by the Legislature" when that statute is not unconstitutional. *Abbott v. Perez*, 585 U.S. 579, 602, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (2018). The panel disregards the State's interest in orderly elections, instead declaring that the State is barely burdened by simply following the previous version of the statute. But "a State cannot conduct an election without deadlines. It follows that the right to vote is

not substantially burdened by a requirement that voters 'act in a timely fashion if they wish to express their views in the voting booth.'" *Democratic National Committee*, 141 S. Ct. at 33 (Kavanaugh, J., concurring).

Perhaps even more important than the potential harm to legitimate state interests, however, is the very real possibility of harm to timely voters. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell*, 549 U.S. at 4 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 [1964]).

While disallowing late ballots does practically restrict some voters, it is equally true that counting unlawful ballots discounts the votes of those who followed the statutory requirements. As we discussed in *LWV II*:

"[P]ermitting an unqualified elector has much the same effect as prohibiting a qualified one. Each of these outcomes disenfranchises the genuine vote of someone who is qualified to vote. See 144 Kan. at 819, 63 P.2d 177 ('When the constitutional convention of Kansas met in 1859, its members were well aware that a determined effort was being made by the antislavery and proslavery forces to dominate the form of government of the then territory Such elections as were had were held under difficulty and each side accused the other of procuring votes from persons not entitled.'). We read article 5 and *Butts* to be singularly focused on achieving the goal of ensuring that no qualified elector will have his or her vote 'not count' either by *actually* not counting it, or by having its effect *diluted* by the counting of illegitimate votes." *League of Women Voters*, 318 Kan. at 802-03.

Which is to say, as a matter of law, disenfranchisement is a two-way street. In weighing possible harms, neither the district court nor the Court of Appeals properly considered this fact. The district court considered mail delays harmful to rural and disabled voters, finding the postal service subjects these voters to "arbitrary and disparate

treatment." The district court considered the risk for these voters to be "particularly high" because of the 20-day window for mail-in voting and then explained that some ballots may spend up to 15 days travelling in the mail in a single direction. The district court therefore concluded that, based on the variance of the United States Postal Service (USPS), "[t]he lack of uniformity in ballot rejection creates an independent violation of equal-protection principles."

The district court held that "'it is unacceptable that voters, who follow the rules for requesting, voting, and returning their mail ballot, are disenfranchised' when USPS fails to deliver their ballots in a timely manner." The district court discussed the harm to the State as merely having to follow the same election process that has been in place since 2017—and that such harm was incomparable to that of the plaintiffs. The district court determined that ensuring that "qualified" voters can exercise their right to vote is in the public interest. Noticeably absent is any mention of the temporary injunction's impact on the *votes* of timely ballots.

The panel, too, was silent regarding the potential disenfranchisement of timely voters. Instead, the panel focused on the potential harms to "confused" voters who have learned about the injunction's three-day grace period and have decided to delay their vote. The panel was focused on the danger that "votes of well-meaning Kansans, acting in good faith based on a judicial decision, would not be counted." The lower courts' failures to weigh the impact of potential disenfranchisement to *all* Kansas voters present a flaw in the legal analysis.

A final word on the notion of "disenfranchisement" and how its use illustrates the nature of the right to vote. Disenfranchisement is an emotionally and historically laden word, calling to mind dark chapters in our nation's history. Clear examples include Jim Crow laws which incorporated discriminatory measures such as poll taxes, literacy tests, grandfather clauses, property ownership requirements, and good character tests. In other

forms, minority disenfranchisement has occurred by racial gerrymandering. We also recognize that women in Kansas were not afforded the right to vote in state elections until 1912 and not in federal elections until 1920. Clearly, the specter of disenfranchisement haunts the rulings in this case, at each of the three courts it has reached.

Colloquially speaking, disenfranchisement is what happens when someone we think should be able to vote is not permitted to do so. But that is not the legal test. Legally, a disenfranchisement only happens when the vote of a *qualified elector* who follows all *statutory procedures* is either not permitted or not counted. The district court, without explanation, concluded that all voters who do not engage in fraud are "qualified" and have demonstrated "proper proofs." Such an interpretation ignores the constitutional authority of the Legislature to provide "proper proofs" and regulate the mode of voting itself. Kan. Const. art. 4, § 1; Kan. Const. art. 5, § 4.

To illustrate with a few obvious examples, if you walk into your polling place and try to hand the poll workers your ballot written on a napkin, and your vote isn't counted, no one would think you had been disenfranchised. Why? Because you failed to cast your vote in the statutorily prescribed manner. Likewise, if you bring your 12-year-old daughter to the polling place and she is refused a ballot, she has not been disenfranchised. Why? Because she is not a qualified elector. As we observed in *LWV II* regarding a failure to provide proper proofs, "these are not truly disenfranchisements." 318 Kan. at 804.

A more serious illustration of the point can be found in article 3, section 5 of the Kansas Constitution. That provision creates public elections that are regularly held for the constitutional officers who sit on the Supreme Court Nominating Commission. We recognize this provision is affected by the pending ballot measure, and we expressly and emphatically take no position on the merits—political, legal, or otherwise—of that measure. The fact that article 3, section 5 exists in our Constitution, however, is directly

relevant to the necessary legal analysis of the issues presented in this case. This is because only lawyers are qualified electors in the elections mandated in article 3, section 5. Does this process "disenfranchise" non-lawyers? When people make this argument, they are describing a *political* disenfranchisement, not a *legal* one.

We can think of no better example to drive home the holding of this court in *LWV II* that the right to vote is a *political* right, not a *natural* right. See 318 Kan. at 793 ("[T]he '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."). If voting were a *natural* right—or what is sometimes called a "fundamental" right—limiting qualified electors in this fashion would certainly qualify as a disenfranchisement. We must read section 1 of the Bill of Rights in a manner that is consistent with the rest of the Constitution. Therefore, as a *political* right, the franchise is bounded by reasonable restrictions set forth in law on both the *qualifications* of the electors and on the *manner* in which they may exercise the vote. Thus—with a very few exceptions (such as racial discrimination or poll testing)—the determination of those qualifications and procedures is fundamentally a political question answered either by the Legislature when writing statutes or by the people in their Constitution.

Put even more bluntly, in the event the district court's preliminary injunction is later lifted based on the merits of this suit following the conclusion of the Kansas primary elections, it will be immediately true that every single Kansas voter who cast a lawful ballot under K.S.A. 2025 Supp. 25-1132 will have been disenfranchised due to the counting of tardy ballots. Lawful votes will have been diluted. Such injury to the public and to the integrity of our elections will be irreparable. *Scripps-Howard Radio*, 316 U.S. at 9.

Finally, we are skeptical of the district court's remedy in reviving a repealed statute. Such quasi-legislative action may ultimately violate the constitutional separation

of powers. The district court characterized its injunction as enjoining "SB 4," but notably SB 4 is not a statute. SB 4 was codified and went into effect on January 1, 2026, amending K.S.A. 25-1132. In doing so, SB 4, now codified, repealed the prior version of the mail-in voting statute—the version with a three-day extension for mail-in ballots. While district courts can certainly enjoin enforcement of unconstitutional statutes—even through preliminary injunctions—we know of no authority that permits a district court to enjoin the effect of a *bill* and thereby resurrect a repealed version of a statute. Such action likely overextends the court's constitutional authority to "say what the law is" and instead "makes law."

Further, in looking at the district court's own uncontested facts and legal conclusions, the prior statute suffers from the same declared constitutional deficiencies as SB 4. By the district court's own analysis, 3 days does not cure the constitutional concerns of arbitrary mail delays, 15-day one-way trips through the USPS, or the voter whose ballot was cast and postmarked "19 days before election day" and is still deemed late, should that ballot be received more than 3 days after election day. Certainly an injunctive remedy reinstating a statute which continues to create a nearly identical constitutional "injury" is outside of the authority of the judiciary.

While not directly on point, not even a legislative repeal will revive a previous statute. See *Sunflower Racing, Inc. v. Board of Wyandotte County Comm'rs*, 256 Kan. 426, 439, 885 P.2d 1233 (1994) ("The repeal of a statute does not revive a statute previously repealed, nor does the repeal affect any right which accrued, any duty imposed, any penalty incurred, or any proceeding commenced under or by virtue of the statute repealed."). Such a legislative rule is grounded in article 2, section 16 of our Constitution. See Kan. Const. art. 2, § 16 ("No law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed.").

We have also recognized an adjacent issue—though not addressed directly—in our school funding cases. In *Gannon v. State*, we encountered a situation where "[t]he panel . . . entered orders striking the 2015 legislature's amendments to the school funding system, reviving parts of the prior one, and ordering payment of aid." 303 Kan. 682, 741, 368 P.3d 1024 (2016). In that case, the State argued that a judicial revival of previous statutes violated the separation of powers. While the court acknowledged this argument, it never reached it nor needed to—because it imposed a stay. See *Gannon v. State*, 304 Kan. 490, 528-29, 372 P.3d 1181 (2016) (Johnson, J., concurring) ("I acknowledge the State's complaint that such an order would violate the separation of powers . . ."). While *Gannon* contains factual differences from the case at hand, we remain skeptical of the constitutionality of the relief granted by the district court in the present case.

Perhaps more importantly—regardless of the ultimate outcome of this case—we wholly disagree with our colleagues' decision not to consider these matters of maximal legal importance. This case is far from ordinary, the timing couldn't be worse for voters, and we are convinced both lower courts may have made serious legal errors. The court's discretionary failure to intervene ignores an important role of this court—to ensure, so far as we are able, that an election is decided pursuant to proper procedure. See *Johnson*, 161 Kan. at 209. We *are* able, but the majority is unwilling.

For these reasons, we respectfully dissent from today's decision.