

No. 26-130839-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

v.

**SCOTT SCHWAB, in his official capacity
as the Kansas Secretary of State,**
Defendant/Appellant,

and

**Jamie Shew, in his official capacity
as the Douglas County Clerk,**
Defendant.

BRIEF OF DEFENDANT-APPELLANT SCOTT SCHWAB

Appeal from the District Court of Douglas County
Honorable Carl Folsom, District Judge
District Court Case No. DG-2025-CV-000206

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Oral Argument Requested: 20 minutes

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NATURE OF THE CASE

In March 2025, the Kansas Legislature passed (via gubernatorial override) S.B. 4, which eliminated the three-day grace period for the receipt of advance mail ballots and required that all ballots be received by 7:00 p.m. on Election Day. The bill took effect January 1, 2026, and is now codified at K.S.A. 25-1132(b).

On May 5, 2025, Plaintiffs commenced a facial constitutional attack on the new statute. More than seven months later, Plaintiffs sought a temporary injunction enjoining the law. Following a non-evidentiary hearing, the district court granted Plaintiffs' motion and ordered the statewide implementation of a three-day grace period. Defendant Secretary of State Scott Schwab (the Secretary) appeals that decision.

STATEMENT OF THE ISSUES

1. Do Plaintiffs lack standing to maintain this lawsuit?
2. Did the district court abuse its discretion in facially enjoining K.S.A. 25-1132(b)?

STATEMENT OF FACTS

Plaintiffs Kansas Appleseed Center for Law and Justice, Inc. (Appleseed); Loud Light; and Disability Rights Center of Kansas (DRC) filed a Petition for declaratory and injunctive relief in May 2025 against the Secretary and Douglas County Clerk Jamie Shew, in their official capacities, asserting state facial constitutional attacks against K.S.A. 25-1132(b). (R. I, 1). The Legislature had amended this statute two months earlier, in S.B. 4, to eliminate the three-day grace period for advance mail ballots. The new law required that all advance mail ballots must be received in the county election office or polling place no

later than the close of the polls on Election Day.

Plaintiffs later amended their Petition to add a number of individual voters to the case—Dorothy Nary, Martha Hodgesmith, Robert Mikesic, and Benjamin Simons—claiming they were injured by the grace period’s removal. (R. I, 81-112).¹

On December 9, 2025, more than *seven months* after initiating this action, Plaintiffs moved for a temporary injunction. (R. II, 198). Although Kansas had used an Election Day deadline for mail ballots for nearly 150 years prior to a brief seven-year experiment with a three-day grace period beginning in 2017, see L. 2017, ch. 49 § 2,² and notwithstanding the fact that the 2025 amendment made Kansas one of 36 states requiring mail ballots to be received no later than Election Day,³ Plaintiffs insisted the matter was of such urgency that expedited injunctive relief was necessary.

After their motion for temporary injunction was fully briefed, the district court inquired whether the parties planned to present testimony in support of the motion. Plaintiffs declined in favor of relying on the exhibits included with their motion. (R. IV, 151-53; R. VI, 2). On January 27, 2026, the district court held a combined, non-evidentiary hearing on the Secretary’s motion to dismiss and Plaintiffs’ motion for a temporary injunction. (R. VI, 1-106). Counsel for each side presented oral argument to the Court.

¹ The Court later granted Plaintiffs’ motion to voluntarily dismiss Mr. Simons from the case. (R. III, 255-57).

² The Secretary provided a detailed history of mail voting in Kansas at R. VII, 3-7.

³ <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (National Conference of State Legislature Table) (listing each state’s statute requiring Election Day receipt of advance mail ballots) (last visited August 4, 2026).

Nearly six months later, on July 16, 2026—after tens of thousands of advance ballots had been mailed out and voting had begun—the district court temporarily enjoined K.S.A. 25-1132(b), finding Plaintiffs were substantially likely to succeed on their facial challenges under the Kansas Constitution’s guarantees of suffrage, equal protection, and due process. (R. V, 65-118). The court’s order relied on statewide grace period data from three prior general elections: in 2020, more than 32,000 advance mail ballots arrived at county election offices during the three-day grace period; in 2022, approximately 1,000 ballots were received during the grace period; and in 2024, roughly 2,110 ballots (or 1.4% of timely postmarked ballots) were received during the grace period. (R. V, 77). The district court, relying on a hearsay newspaper article, also found that Douglas County rejected about 200 ballots that arrived after the grace period in the 2024 primary election, even though they were purportedly postmarked in July. (R. V, 78).

The court further found it relevant that, notwithstanding the tiny sample sizes, which can skew percentage figures, some rural counties had higher percentages of mail ballots arriving during the grace period than other counties in 2024. (R. V, 85-86, 92, 101-02). The court then ordered statewide relief and directed that a three-day grace period be used for all future elections.

The Secretary timely appealed and moved for an emergency stay pending appeal. (R. V, 119). After this Court denied the emergency stay, the Secretary filed a Petition for Review, which the Kansas Supreme Court denied “expressly without comment on the merits.” Order at *9, *Kansas Appleseed Center for Law and Justice, Inc. v. Schwab*, No. 130,839 (Kan. July 30, 2026). Justices Stegall and Wall dissented, explaining that they

would have granted the stay because Plaintiffs’ “likelihood of ultimate success on the merits is sufficiently in doubt.” *Id.* at *13.

ARGUMENT AND AUTHORITIES

I. Plaintiffs Lack Standing to Maintain this Lawsuit

Although Plaintiffs’ substantive claims lack merit, none of the individual or organizational Plaintiffs have standing either.⁴ The district court engaged in no analysis of this issue. It simply asserted in a single sentence, “the Court affirmatively finds the Plaintiffs have standing to bring their claims.” (R. V, 90). This unsupported finding is flawed.

“[S]tanding is a component of subject matter jurisdiction,” *State v. Ernesti*, 291 Kan. 54, 60, 293 P.3d 40 (2010), and 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 bear the burden of demonstrating 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. Cap. Homes*, 279 Kan. 178, 185, 106 P.3d 483 (2005)). The question is thus reviewed de novo on appeal, *State ex rel. Kan. Highway Patrol v. \$381,620 in U.S. Currency*, 322 Kan. 237, 239, 588 P.3d 1187 (2026), although factual findings are reviewed for “substantial competent evidence,” i.e., evidence sufficient for a reasonable person to accept the conclusion. *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015).

⁴ The Secretary raised this issue at R. I, 331-38; R. II 178-82; R. III, 261-62.

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.” *LWV I*, 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). 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)); *Baker v. Hayden*, 313 Kan. 667, 681, 490 P.3d 1164 (2021) (“speculative allegations about possible future injury” are insufficient to confer plaintiff with standing).

With respect to pre-enforcement challenges like the one here, “[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.” *LWV I*, 317 Kan. at 813 (citations omitted). But this is no small test. “A high threshold is required to demonstrate standing on a pre-enforcement challenge.” *Id.* at 813-14. The threat must be “imminent” and not “speculative or imaginary.” *Id.* at 814.

In the case of an organization, legal standing may arise in two different contexts: the organization may enjoy standing as a representative of its members, often referred to as “associational standing.” See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). Alternatively, the organization may have standing in its own right, typically known as “organizational standing.” See *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Plaintiffs allege standing on behalf of both individual voters and organizations. But none of their legal theories withstand scrutiny.

A. Individual Plaintiffs' Standing

The three Individual Plaintiffs argue they will be injured by SB 4 because they will now have less time to return their advance mail ballots, thereby requiring them to vote earlier or choose a different means of voting. (R. III, 120-121, ¶¶ 9-11) (D. Nary); (R. III, 124-125, ¶¶ 9-12) (M. Hodgesmith); (R. III, 128-129, ¶¶ 10-12) (R. Mikesic). None of this suffices to establish standing.

It is black letter law that a plaintiff cannot establish standing to seek prospective injunctive relief merely by pointing to a past injury and speculating that it might recur. 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*, 313 Kan. at 678. Rather, a plaintiff must demonstrate a "real and immediate threat" of future injury, not just a possibility that the prior injury may happen again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-06 (1983). Nor may standing rest on a speculative chain of contingencies. In other words, Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

That is precisely the theory advanced here. Plaintiffs' alleged future injury depends on a string of independent contingencies: that they will again vote by mail, again mail their ballots close to Election Day, again experience delayed mail delivery, and again have their

ballots arrive after the statutory deadline. Such speculation cannot satisfy the constitutional requirement of a certainly impending, non-speculative injury. See *Gallagher v. N.Y. State Bd. of Elections*, 496 F. Supp. 3d 842 (S.D.N.Y. 2020) (mere fact that plaintiffs' ballots were rejected as untimely in the past does not give them standing to challenge New York law requiring that ballots be postmarked by Election Day to be counted).

Plaintiffs' allegations here are particularly weak. The fact that a voter's Valentine's Day card once took eleven days to travel to "nearby friends in Kansas" (R. III, 120-121, ¶ 10) is irrelevant. That another voter finds it difficult to vote in person in inclement weather (R. III, 125, ¶ 11) is equally immaterial; no one is forcing her to do so. As for the voter who complains that his mail ballot arrived late in a 2025 municipal election and that it "typically takes a week or more for [his] medication to arrive at [his] house after it is shipped" (R. III, 129, ¶ 11), that comes nowhere close to establishing the requisite injury to show standing for having to comply with a universally applied ballot deadline.

The challenged law does not regulate how Individual Plaintiffs cast their ballot. Individual Plaintiffs remain fully able to vote via any method they choose, including by mail. And if voters 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; have a third party return their ballot to a county election office, polling place, or drop box; vote in person; or utilize state-mandated curbside voting that does not require them to exit their vehicle. The inability to procrastinate or personal fears of mail delays, however, are not cognizable injuries. 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. Plaintiffs have simply not been injured in the kind of immediate or real way necessary to establish standing.

B. Associational Standing

The associational standing rule is an exception to the general rule that a plaintiff may not ordinarily assert the rights of others. 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* and embraced by the Kansas Supreme Court—must be satisfied: (i) the association’s members must have standing to sue individually; (ii) the interests that the association seeks to protect must be germane to its purpose; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members. *Kan. Nat’l Educ. Ass’n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017) (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)). “[A] mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved[.]’” *Sierra Club*, 298 Kan. at 35 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

1. The organizational plaintiffs have neither members nor indicia of membership.

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). The Organizational Plaintiffs—Appleseed, Loud Light, and DRC—all falter at the outset because none has members. To assert associational standing on behalf of others, Plaintiffs must demonstrate that the

individuals they seek to represent are *effectively* “members.” This they cannot do.

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 that 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,” 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 344-45.

Not only are Plaintiffs not membership organizations, but neither the Amended Petition nor any affidavits submitted as part of Plaintiffs’ motion for a temporary injunction allege any actual relationship with voters that would give rise to associational standing. Rather, these organizations suggest their interactions with random, unidentified members of the public whom they target—many times merely a passing encounter—is enough to establish associational standing. R. I, 86 (Appleseed “works with community partners to

understand the root causes of problems, support strong grassroots coalitions, advocates for comprehensive solutions so all Kansans can reach their full potential, and educates and engages voters across the state.”); R. I, 87 (Loud Light “builds coalitions within the community to advocate for . . . changes for youth, and works . . . to encourage voters to sign up for advance voting and to educate them on the process.”); R. I, 88 (DRC “provides free advocacy and legal services for Kansans with disabilities” and “has a mandate to ‘educate policymakers’ on proposed policy changes and the impact on people with disabilities.”).

No conceivable indicia of membership flows from such activities. Nowhere, for example, do any of the Organizational Plaintiffs allege that the individuals they purport to represent or their unidentified partners elect the leadership of the organizations, serve on the organizations’ boards, 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).

2. The organizational plaintiffs cannot satisfy the *Hunt* requirement that members have standing in their own right.

The Organizational Plaintiffs also cannot satisfy the *Hunt* requirement for associational standing that at least one member (or quasi-member) have legal standing in his or her own right. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) (an organization must identify at least one member by name who would have standing to sue); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) (same). 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 in the future (a matter over which the voters themselves have substantial control) is entirely speculative and cannot establish an injury-in-fact for standing.

Although Plaintiffs identify three voters who claim to rely on the mail to vote, as the Secretary detailed above, none of those individuals would have standing to challenge the elimination of the grace period based on their discrete experiences and frustrations with mail delivery times and speculative concerns about future delays. This is especially true in a *facial* attack like the one here. See *infra* (discussing standard for facial claims).

Plaintiffs argued in the district court that DRC has associational standing based on its status as a protection and advocacy (P&A) organization in Kansas. R. II, 121 (citing *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003)). But they neglect to mention that both the Fifth and Eighth Circuits have categorically rejected such reasoning, holding that P&A system constituents lack sufficient indicia of membership given that “most of its ‘clients’ . . . are unable to participate in and guide the organization’s efforts.” *Ass’n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994); accord *Mo. Prot. & Advoc. Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007). Indeed, there is no indicia of membership at all with DRC. The approach taken by the Ninth Circuit would eviscerate the key part of the associational standing test adopted by the U.S. Supreme Court in *Hunt*.

C. 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 v. State*, 298 Kan. 1107, 1127, 319 P.3d 1196 (2014). 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). As the U.S. Supreme Court recently underscored, “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 ground their organizational standing argument on a diversion of resources theory. R. I, 86, ¶ 19 (Kansas Appleseed); R. I, 87-88, ¶ 21 (Loud Light); R. I, 88-89, ¶ 23 (DRC). Plaintiffs allege they will now have to divert time and resources to develop and execute programs to educate voters and combat the speculative harm supposedly arising out of the elimination of the grace period.

Historically, many plaintiffs invoking a diversion of resources theory for organizational standing have relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). The U.S. Supreme Court, however, recently rejected the “expansive” reading of *Heavens Realty* that many lower courts had embraced. The Court held that an entity cannot establish organizational standing merely by incurring costs to oppose a government regulation or policy or expending time and resources “to the detriment of other spending priorities.” *Alliance for Hippocratic Med.*, 602 U.S. at 394. In other words, the Court noted, it is “incorrect” that *Havens Realty* stands for the proposition that “standing exists when an organization diverts its resources in response to a defendant’s actions.” *Id.* at 395. Were the rule otherwise, the Court explained, “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.*⁵ The Court also cast doubt on the precedential value of

⁵ The Kansas Supreme Court has never recognized diversion of resources as a basis for organizational standing. The Court of Appeals briefly addressed the issue in *League of Women Voters v. Schwab*, 63 Kan. App. 2d 187, 203-04, 525 P.3d 803 (2023), a “decision [that] has no force or effect” given that the Supreme Court granted the State’s Petition for Review from that opinion. See Sup. Ct. R. 8.03(k)(2). Whatever might be said about the Court of Appeals’ standing analysis prior to *Alliance for Hippocratic Medicine*, the panel’s

Havens Realty. Alliance for Hippocratic Med., 602 U.S. at 396 (“*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context.”).

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

Plaintiffs aver that K.S.A. 25-1132(b) forces them to divert resources from other voter assistance activities in order to educate voters about the new law and encourage voters to mail ballots earlier. R. III, 102-103, ¶¶ 8-9 (Appleseed); R. III, 107-108, ¶¶ 7-8 (Loud Light); R. III, 113-117, ¶¶ 8-16 (DRC). But the Organizational Plaintiffs’ *already* use their resources to perform the very activities for which they now argue they are going to have to divert funds—voter engagement and education dedicated to assisting individuals in casting their votes and accessing polling places. R. III, 100-101, ¶¶ 4-5 (Appleseed); R. III, 107, ¶¶ 4-5 (Loud Light); R. III, 112-114 ¶¶ 6, 10 (DRC).

Because voter outreach and education have been a component of the Organizational Plaintiffs’ respective missions for many years, the fact that they might infuse additional resources into such activities in the wake of the State’s elimination of its brief experiment with a grace period does not mean they have suffered an injury in fact. See *NAACP v. City*

reasoning—which relied exclusively on *Havens Realty*—must now be revisited.

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.").

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) (citation 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.*

Plaintiffs cannot create standing simply by labeling advocacy expenditures a "diversion of resources" or invoking their "core mission." Standing turns on objective facts, not talismanic phrases. The relevant inquiry is whether the law has actually impaired Plaintiffs' ability to carry out their organizational purposes, not whether Plaintiffs have elected to devote additional resources to advocating against or adapting to a new law. See *Arizona Alliance for Retired Americans v. Mayes*, __ F.4th __, 2026 WL 2277101 at *8 (9th Cir. 2026) (en banc) ("The Organizations also contend that they must divert resources

to educate voters and the public about [a law's] supposed effects. But without . . . harm to the Organizations' voter-registration activities, their mere diversion of resources to educate and train voters on the potential effects of the [law] cannot independently establish an injury-in-fact.").

Nor does S.B. 4 compel the Organizational Plaintiffs to expend any resources at all. Their alleged injury stems entirely from their own discretionary decision to devote additional time and money to voter education and advocacy. But self-inflicted expenditures undertaken in response to legislation do not establish standing. Otherwise, every advocacy organization could manufacture standing simply by deciding to spend more money opposing, explaining, or responding to any statute with which it disagreed.

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, 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 exactly what they were before S.B. 4 was enacted: educating voters and facilitating participation in elections. The amended statute neither prevents them from performing those

activities nor makes those activities more difficult. At most, Plaintiffs have elected to adjust the content of their voter education efforts to account for a change in Kansas law. That is not an impairment to their organizational mission or a cognizable injury in fact; it is simply advocacy in response to a new legal landscape.

II. The District Court Abused its Discretion in Facially Enjoining K.S.A. 25-1132(b).

Even if Plaintiffs had standing, the district court's injunction should nevertheless be reversed. Appellate courts review the grant or denial of an injunction for abuse of discretion. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). “A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.” *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 788, 549 P.3d 363 (2024) (*LWV II*). Under this standard, “[w]hen legal questions of constitutional and statutory interpretation arise, [an appellate court's] review is plenary.” *Id.* (citing *State v. Dunn*, 304 Kan. 773, 819, 375 P.3d 332 (2016)).

A temporary injunction 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); accord *State ex rel. Kobach v. Harper*, 65 Kan. App. 2d 680, 687, 691, 571 P.3d 6 (2025) (before a temporary injunction may be granted, “the right to relief must be clear and unequivocal” and supported by “extraordinary evidence”). The moving party bears the heavy burden of establishing *all* of the following elements: (1) it is substantially likely to succeed on the merits; (2) there is a reasonable probability

that it will suffer irreparable future injury; (3) it lacks an adequate legal remedy such as damages; (4) its 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*, 294 Kan. at 191. This extraordinary remedy must be “used sparingly.” *Harper*, 65 Kan. App. 2d at 687.

A. Plaintiffs Did Not Show a Substantial Likelihood of Success on the Merits.

The district court found Plaintiffs were substantially likely to prevail on their claims that K.S.A. 25-1132(b) violates the State Constitution’s guarantees of the right to suffrage, equal protection, and due process. (R. V, 89-90). None of these legal conclusions withstand scrutiny. And “a district court by definition abuses its discretion when it makes an error of law.” *Ernesti*, 291 Kan. at 65 (quoting *Kuhn*, 270 Kan. at 456).

Under the separation of powers doctrine and longstanding 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. Kan. 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)). “[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.” *USD No. 380 v. McMillen*, 252 Kan. 451, 461, 845, P.2d 676 (1993). 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).

Plaintiffs here face an even steeper hill, as they have waged a *facial* attack on the constitutionality of K.S.A. 25-1132(b). “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.*’” *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 legislation] 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.* at 931 (quoting *Salerno*, 481 U.S. at 745) (cleaned up). Such claims are highly disfavored because they usually 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).

The district court refused to apply this controlling precedent, suggesting it had been called into question by *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) and *State v. Ryce*, 303 Kan. 899, 915, 368 P.3d 342, 354 (2016). (R. V, 116-17). But *Ryce* specifically

cabined its holding to Fourth Amendment challenges, an issue not remotely present here. See *Ryce*, 303 Kan. at 915 (“*Patel* emphasizes that when it comes to *Fourth Amendment challenges*, the ‘no set of circumstances’ test becomes more focused.”). And Kansas courts have regularly reaffirmed the no-set-of-circumstances test. See *State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025); *Hall*, 65 Kan. App. 2d at 371-72. Under the correct legal framework, Plaintiffs’ facial constitutional challenges fail as a matter of law.

1. Plaintiffs’ right to suffrage claims have no merit.

Turning to Plaintiffs’ right to suffrage claim, the district court erred as a matter of law in describing the Kansas Constitution’s protection of the right as anything other than an enumerated political right. (R. V, 107, 109). This exact argument was made and rejected in *LWV II*, 318 Kan. at 793. The Supreme Court there held that “the ‘right to vote’ is not an unenumerated ‘natural right’ protected by section 1” of the Kansas Constitution. *Id.* at 793. Rather, it is a “political right” governed by Section 2, *id.* at 793-94, with contours set forth in greater specificity in Articles 4 and 5.⁶

a. The district court disregarded the deference the Legislature is owed on matters related to voting.

“At the heart of section 2,” the Supreme Court explained, “is the notion of *delegated* power.” *Id.* at 795. Thus, “[w]here 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.” *Id.* at 797 (citing Kan. Const. art. 4,

⁶ The Secretary raised this issue at R. I, 325-27; III, 263-67.

§ 1). The citizenry has assigned to *the Legislature* all authority to determine “the mechanisms by which the people continue to choose office holders who will occupy the seats of delegated power.” *Id.* And as a corollary to that delegation, “the people empowered the Legislature to ‘provide by law for proper proofs of the right of suffrage.’” *Id.* (citing Kan. Const. art. 5, §§ 1, 4).

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)).

Because the right to vote is an “enumerated political right,” all suffrage interests are tied to the “concrete and specific provisions of the Constitution or statutes.” *LWV II*, 318 Kan. at 800. 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 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). It is too plain for argument that, if there is no constitutional right to vote by mail, there is *a fortiori* no constitutional mandate for a grace period for mail ballots.

As for the district court’s invocation of Article 5, section 1 of our Constitution, once again, it misreads *LWV II*. The Supreme Court explained there: “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.” 318 Kan. at 801. The only examples the Court has ever recognized of extraconstitutional qualifications sufficient to invalidate a law under this article are a requirement to be up-to-date on all tax obligations, *State v. Doane*, 98 Kan. 435, 158 P. 38, 40 (1916), certain residency requirements, *id.*, and a party affiliation declaration mandate for the *general election*. *State ex rel. Smith v. Beggs*, 126 Kan. 811, 814-15, 271 P. 400 (1928).

Under no plausible reading of our Supreme Court’s precedent can a basic election integrity provision prohibiting the counting of ballots that arrive after the polls close be deemed an “additional de facto qualification” on the right to vote. A neutrally applicable

Election Day deadline imposes *no* additional qualification, much less an extra-constitutional one. *See Lemons*, 144 Kan. at 824 (“It is true, isolated instances may occur where a party, through absence or sickness, is unable to register, and so loses his vote; but the same result may follow where any failure to produce the required evidence occurs.”) (quoting *Butts*, 31 Kan. at 555).

The district court also failed to appreciate that our advance voting statutes flow from the bedrock principle that under the 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.”). “[C]itizens 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.” *LWV II*, 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[.]”).

The district court likewise erred in holding that Kansas’ Election Day ballot receipt deadline does not functionally operate as a “proper proof” within the meaning of Article 5, Section 4. (R. V, 111). As our Supreme Court recently noted, “if ‘the legislature has the right to require proof of a man’s qualification, it has a right to say *when* such proof shall be furnished, and before what tribunal; and unless this power is abused the courts may not interfere.’” *LWV II*, 318 Kan. at 801 (quoting *Butts*, 31 Kan. at 555-56) (emphasis added).

A substantial purpose behind K.S.A. 25-1132(b) was legislators’ concern that mail ballots were arriving after Election Day with either 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 election officials often had no dependable way to determine whether the voter acted within the authorized voting window. (R. II, 175-76.) Requiring ballots to be received by Election Day 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.

Nor does the Legislature’s decision to authorize voting by mail mean it cannot curtail that option in ways that may disproportionately affect certain voters. 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 the district court’s reasoning, Kansas’ election system operated unconstitutionally for all but eight of the roughly 158 years since some form of mail voting has been permitted. That stretches credulity beyond its outer limits. At no time has the absence of a grace period 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 the district court’s policy preferences, the idea that the Constitution imposes a one-way ratchet—i.e.,

that the Legislature, after briefly experimenting with a change to its electoral mechanics, can never revert back to the original procedures—is a baseless constitutional theory.

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 Lawson*, 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 v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020) (“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.”).

The rationale underlying these cases is especially applicable here considering that Kansas provides voters myriad other ways to cast their ballot, including methodologies that accommodate the voters upon whom Plaintiffs focus. *See Brnovich v. DNC*, 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 addition to voting by mail, registered voters 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 polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and Help America Vote Act. 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.

b. Kansas' interests in the repeal of the grace period 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)). Yet while

not required, Kansas has very compelling interests in such a law. First, 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. Delayed counting of ballots received days after the election fuels mistrust and speculation, especially in tight contests. Second, 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. Third, 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.

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 Lawson*, 977 F.3d at 664-66; *All. for Retired Ams.*, 240 A.3d at 52-55. In any event, the State is not required to provide “elaborate, empirical verification of the weightiness of [its] asserted justifications.”⁷ *Timmons*, 520 U.S. at 364; see also *Downtown Bar & Grill*, 294 Kan. at 198 (“a legislative choice is not subject to courtroom factfinding and may be based on *rational speculation* unsupported by evidence

⁷ In his district court filings, the Secretary specifically referenced the testimony that was presented to the Legislature on these state interests. (R. I, 326).

or empirical data.”). 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. *Timmons*, 520 U.S. at 364 (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, K.S.A. 25-1132(b) imposes no unconstitutional burden on Plaintiffs’ right to suffrage. As the Supreme Court has long explained, courts “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 v. State*, 278 Kan. 769, 775, 120 P.3d 306 (2005). The district court erred as a matter of law in holding Plaintiffs met their burden to show a substantial likelihood of success on the right to suffrage claim.

2. Plaintiffs’ equal protection claims are meritless.

The district court likewise erred as a matter of law in holding that Plaintiffs were likely to succeed on an equal protection claim under Sections 1 and 2 of the Kansas Constitution’s Bill of Rights. (R. V, 90-105).⁸ The district court found the absence of a grace period for receiving advance mail ballots violated the Kansas Constitution’s guarantee of equal protection because it: (1) subjects voters to arbitrary and disparate treatment and (2) lacks uniformity. (R. V, 92-100). The flaws in this reasoning are readily apparent when measured against the governing legal standards for facial challenges set out above and Kansas’ equal protection precedent.

⁸ The Secretary raised these issues at R. I, 317-27; R. II, 165-72; R. III, 261-74.

a. Section 1 of Kansas Constitution's Bill of Rights

The district court flatly refused to acknowledge that Plaintiffs' Section 1 claim is foreclosed by *LWV II*, in which the Court 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; see also *id.* at 793-94 ("the Court of Appeals erred when it analyzed the question under our existing section 1 jurisprudence."). Even (now-Chief) Justice Rosen's dissent echoed this point. *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.").

b. Section 2 of Kansas Constitution's Bill of Rights

The district court also ignored controlling precedent that "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." *Rivera v. Schwab*, 315 Kan. 877, 893-94, 512 P.3d 168 (2022). *Rivera* explained that the Supreme Court's decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did *not* alter its "historical and fundamental interpretation of the scope of equal protection found in section 2." *Rivera*, 315 Kan. at 894. If there were any doubt regarding *Rivera*'s continued application, the Supreme Court in *LWV II* quoted from *Rivera* in explaining that Section 2 of the Kansas Constitution Bill of Rights must be read coextensively with the U.S. Constitution. *LWV II*, 318 Kan. at 805.

This synchronicity is critical because no suspect classes are at issue here. Indeed, neither rural habitants nor disabled voters are 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). In such circumstances, “[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. In other words, absent proof that the 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 not alleged here—the law is reviewed under the rational basis standard. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). This is a “very lenient standard.” *In Re Tax Appeal of Weisgerber*, 285 Kan. 98, 105, 196 P.3d 321 (2007) (quotation omitted).

The fact that the law might have a disparate impact on particular individuals does not suffice to trigger an equal protection violation. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Foundation*, 538 U.S. 188, 194 (2003). “The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). A challenged state law must be upheld under this standard “if there is any reasonably conceivable state of facts that could provide a rational basis” for it. *Beach Commc’ns*, 508 U.S. at 313.

The Kansas Supreme Court in *LWV II* articulated a rational-basis framework for evaluating these types of election integrity statutes:

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 (cleaned up).

The district court nevertheless embraced Plaintiffs' illogical theory that the Kansas Supreme Court in *LWV II* adopted a "results-based" based test for equal protection and that K.S.A. 25-1132 does not "achieve[] reasonable uniformity." (R. V, 91). But an Election Day ballot receipt deadline is a uniform, objective standard under which no voter is subject to arbitrary and disparate treatment. 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. And as explained above, Kansas' interests in the repeal of the grace period are legitimate and strong.

The district court's flawed interpretation 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. *LWV II* did *not* hold that every instance of nonuniformity establishes an equal protection violation. It is inconceivable that our Supreme Court was jettisoning fifty years of consistent equal protection jurisprudence, with no explanation whatsoever, and implementing a strict liability regime. Equal Protection guarantees "equal laws, not equal results." *Feeney*, 442 U.S. at 273.

The district court's unsound approach to constitutional interpretation—seize upon what the Supreme Court did not expressly discuss and then treat that silence as though it displaced settled law—is also precisely the sort of inference that courts refuse to draw. See

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Had the Kansas Supreme Court intended to repudiate longstanding constitutional doctrine, it would have said so. Its silence cannot reasonably be construed as an implicit overruling of settled law.

c. Allegedly slow mail delivery times do not yield an equal protection violation.

The district court held that the elimination of a grace period would subject similarly situated voters to arbitrary and disparate treatment due to unanticipated or extended mail delays, voters’ location, the timing of voters’ ballot requests, and voters’ membership in “other discrete groups” like “seniors and Kansas with disabilities.” (R. V, 92, 94-96, 102). The court reasoned that the law would be fairer if mail ballots could be disseminated earlier than twenty days prior to the election, and if timely mailed ballots could be received up to three days after the election. (R. V, 96). 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, with even higher grace-period-receipt numbers in certain rural counties, the court posited that none of these votes would have counted (and voters would thus be “disenfranchised”) under K.S.A. 25-1132(b). (R. V, 77, 85-86). This analysis is flawed on multiple levels and riddled with legal errors.

As a threshold matter, 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.”).

Furthermore, the district court erred in finding that if the grace period had not been in effect during the 2020, 2022, and 2024 general elections, ballots received during the grace period would not have counted and those voters would have been “disenfranchised.” (R. V, 77, 84). This argument fails for two reasons. First, Plaintiffs failed to present *any* evidence regarding when the grace-period receipt ballots were mailed. (R. III, 141, 145, 147). Second, the district court’s assumption that voters would behave identically under the new statute as they did when the grace period was in effect is a logical fallacy. 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.

The district court similarly erred in finding an equal protection violation based on the theory that rural voters were more likely than non-rural voters to have their advance ballots “saved” by the three-day grace period. (R. V, 101). None of the exhibits on which the district court relied, however, even purports to establish when the affected voters placed their ballots in the mail. (R. III, 22-27, 209, 212, 214). Thus, the record says nothing about how long those ballots spent in transit, much less whether ballots mailed by rural voters experienced longer delivery times than ballots mailed by voters elsewhere in the State. The only evidence Plaintiffs offered regarding length of mail delivery came from the Individual Plaintiffs, all of whom reside in Douglas County. Whatever else might be said about Douglas County, no one familiar with Kansas geography would mistake it for rural Kansas relative to other counties.

In any event, the USPS’s delivery pace is legally irrelevant. The Legislature has no constitutional obligation to even allow mail voting. That it chose to do so does not constrain it from imposing conditions (including an Election Day receipt deadline) on the practice. Nor can Kansas be held to violate a voter’s equal protection rights just because some third-party over whom the State has no control is not 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). Plus, a mere disparate impact does not establish an equal protection violation.

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 7-10 days for a mailed ballot to reach the county election office, that voter simply needs to send the ballot in early rather than

waiting close to Election Day. As the U.S. Supreme Court explained, 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 Legis.*, 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*, 976 F.3d at 1282 (“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.”); *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.

The district court relied heavily on *Bush v. Gore*, 531 U.S. 98 (2000), and *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506 (1971), (see R. V, 101, 109), but those cases are not just distinguishable, they are unrecognizable, from this action. 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, K.S.A. 25-1132(b) 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 rejecting a state equal protection challenge to an Election Day receipt deadline for absentee ballots—which the Secretary cited below (R. III, 270), but the district court did not even reference in its opinion—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). In contrast to Kansas, the Michigan Constitution grants all Michigan voters a *constitutional* right to vote by absentee ballot. *Id.* at 4-5. Even so, the court held that an Election Day deadline did not offend Michigan’s state constitution. 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; accord *Driscoll v. Stapleton*, 473 P.3d 386, 394 (Mont. 2020) (vacating preliminary injunction against election-day ballot receipt deadline because “it substitutes the District Court’s choice of deadline for that of the Legislature.”).

Even putting aside Plaintiffs’ insurmountable *legal* impediments, the facts Plaintiffs presented below at the non-evidentiary hearing—which are ultimately irrelevant given the facial nature of their claims—came nowhere close to demonstrating an unconstitutional burden, let alone an entitlement to injunctive relief. For example, Table 17 of Plaintiffs’ expert witness 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 during the 2024 *General* Election. (R. III, 68-69). 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—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’ expert also discussed the roundtrip transit times in Douglas County for the 2024 *Primary* Election. Assuming the data’s validity, 51 of 583 mail ballots (roughly 8.7%) had a total transit time of 15 days or more. (R. III, 75-76, ¶152 and Table 21). But that does not move the needle. While those figures may not win the USPS any performance awards, Table 21 (and the accompanying ¶ 152) ultimately show that if voters promptly return their mail ballots to the election office following receipt, there is *always* enough time for their ballots to be received 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. Once again, *nothing* here establishes a problem of constitutional magnitude.

The district court also inexplicably relied on Dr. Michael Herron’s discussion of incomplete (and unverified) “Ballot Scout” one-way transit data from Douglas County’s 2024 Primary Election. (R. V, 97; R. III, 271-72). Despite Ballot Scout’s terms and conditions explicitly stating, “[w]e make no warranties or representations about the Site or the Services, including but not limited to *accuracy, completeness, timeliness, or reliability*,”⁹ Dr. Herron made no attempt to establish Ballot Scout’s reliability, completeness, or error rate; he simply parroted the company’s description of its product.

⁹ *Ballot Scout Terms of Service*, BALLOT SCOUT, <https://www.ballotscout.org/terms> (last visited August 4, 2026)

(R. III, 61, ¶124 n.31; R. III, 61-66, ¶¶ 125-36; R. III, 271-72). And even if accurate, it is unclear why the court focused on this data when (a) the roundtrip data discussed above was included in the declaration and (b) the one-way transit times for Douglas County’s 2024 General Election (a more recent and larger sample showing quicker transit) were not discussed. (R. III, 68, Table 16). Regardless, not only is this data insufficient to invalidate K.S.A. 25-1132(b) on *any* constitutional ground, but no other Kansas county used Ballot Scout to track mail ballots in 2024. (R. III, 61, ¶124). The lack of comparative data is thus particularly fatal to Plaintiffs’ equal protection claim.

Finally, the district court highlighted statements from the Secretary and Defendant Shew (often filled with hyperbole and sarcasm) critical of the USPS’s delivery performance. (R. V, 79, 95). None of this remotely establishes a constitutional violation. These are merely out-of-context policy statements from officials outside the legislative branch.

Suffice to say, there are wide-ranging public policy arguments both for and against grace periods. But “[t]he 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). Especially on an issue that is constitutionally assigned to a coordinate branch, see Kan. Const. Art. 4, § 1, this is simply not a matter amenable to judicial fiat as the district court did here. For all these reasons, the district court erred as a matter of law in concluding that Plaintiffs are substantially likely to succeed on their facial equal protection attack on K.S.A. 25-1132(b).

3. Plaintiffs' due process cause of action has no merit.

The district court's holding that the elimination of a grace period for voting by mail contravenes 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 is deeply flawed. (R. V, 105-108).¹⁰

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*, 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/Bellefont Absentee Election Bd.*, 762 F. Supp. 3d 1354 (D. Ariz. 1990), the district court disregarded these decisions. (R. V, 107-08). But the Fifth Circuit explained in detail why *Raetzel* was wrongly decided and why no federal appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

The district court also misinterpreted the import of *LWV II*, where the Kansas Supreme Court remanded the plaintiffs' due process challenge to a signature verification requirement for advance mail ballots for the purpose of determining if voters are provided

¹⁰ The Secretary raised this issue at R. I, 327-30; R. II, 172-74; R. III, 274-76.

“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. (R. V, 105.) But the Supreme Court never addressed the liberty issue in its majority opinion. “[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 v. Albertson’s, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000) (citations omitted). “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.” *Id.* at 1200 (emphasis added) (citation omitted).

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 the due process defect with K.S.A. 25-1132(b) 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 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.

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 our Supreme Court intended such a result. 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.

The district court also erroneously relied on the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976). (R. V, 105). The Kansas Supreme Court rejected that theory when formulating the standard for due process challenges involving electoral mechanics in *LWV II*, 318 Kan. at 806. Further, the jurisprudence of the U.S. Supreme Court and federal appellate courts—which is the north star for Kansas courts in evaluating due process claims under the State Constitution, *Rivera*, 315 Kan. at 894; *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019)—has likewise repudiated this argument:

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).

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 387-91 (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”); *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.”).

Whether there is a liberty interest in mail voting is ultimately irrelevant here. 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 same theory Plaintiffs advance in this case. 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 U.S. 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 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); *see also Scribner v. Bd. of Education of U.S.D. No. 492*, 308 Kan. 254, 263-64, 419 P.3d 1149 (2018) (recognizing that “the legislative process itself generally provides all the process that is due” when legislation affects the property or liberty interests of more than a few individuals).

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 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. 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 is somehow 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 multiple 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 v. Takushi*, 504 U.S. 428, 438 (1992) (“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.

B. Plaintiffs failed to demonstrate a reasonable probability of irreparable harm.

In addition to committing reversible error in holding that Plaintiffs are substantially likely to succeed on the merits of their suffrage, equal protection, and due process claims, the district court also erred as a matter of law in finding Plaintiffs established a reasonable probability that they will suffer irreparable harm in the absence of an injunction. (R. V, 112-14).¹¹ Under this standard, “purely speculative harm will not suffice.” *Harper*, 65 Kan. App. 2d at 691. The mountain Plaintiffs must climb here is even steeper as well because a facial constitutional claim is so difficult to prove.

The district court cited no case law whatsoever holding that a duly enacted Election Day ballot receipt deadline establishes constitutionally irreparable harm, and the Secretary is unaware of any. The district court’s analysis is wholly premised upon its conclusion that

¹¹ The Secretary raised this issue at R. III, 276-278.

Plaintiffs have shown a likely abridgment of their constitutional rights. (R. V, 112-13). But as discussed above, the foundation for that legal assessment crumbles at the touch. And the Secretary’s analysis of Plaintiffs’ standing deficiencies in Section IV.A further underscores why the injuries Plaintiffs fear are entirely speculative. The court’s finding of irreparable harm, therefore, must suffer the same fate as its merits determination.

Plaintiffs’ extensive delay in pursuing this temporary injunction reinforces why temporary injunctive relief was unnecessary. 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 then waited *more than seven months* before seeking this injunction. They clearly felt no sense of impending harm.

C. An injunction is unjustified given the threat of injury to the State and the public interest.

The district court also erred in finding that the threatened injury to the Plaintiffs outweighs the harm to the Defendants and that the injunction will not be adverse to the

public interest.¹² These requirements merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In finding these requirements were satisfied, the district court once again relied on its erroneous conclusion that K.S.A. 25-1132(b) is likely unconstitutional on its face. (R. V, 114-15).¹³

Regarding the injury to the State, the district court ignored 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, 602-03 (2018). And Kansas has compelling interests in an Election Day ballot receipt deadline, as discussed at length above. In addition to those interests, counting mail-in ballots received after the statutory deadline injures the public 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 v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020). Simply stated, “[t]he counting of votes that are of questionable legality threatens irreparable harm.” *Id.* (quotation omitted).

D. The injunction exceeded the district court’s jurisdiction.

Not only was the public harmed by the injunction, but the district court exceeded its

¹² The Secretary raised this issue at R. III, 278-79.

¹³ The flimsiness of the district court’s finding on this element is reinforced by its suggestion that the Organizational Plaintiffs will “suffer irreparable injury by being forced to divert resources away from their mission-critical activities.” (R. V, 115). As described above, Plaintiffs cannot even satisfy the organizational standing test based on resource diversion. But even if they could, the notion that such an injury—which, under Plaintiffs’ own allegation, amounts to shifting a few dollars from one program to another—is “irreparable” is beyond the pale.

jurisdiction in issuing the injunction for two reasons.¹⁴ First, the district court had no authority to issue a *statewide* injunction in the absence of proper defendants. Second, the district court had no jurisdiction to reenact a repealed statute by injunction.

1. The district court’s jurisdiction was limited to Douglas County.

Kansas law mandates that any injunction be specific and “binding only upon the parties to the action, their officers, agents . . . and upon those persons in concert or participation with them who receive actual notice of the order.” 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 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 sued only the Secretary and Douglas County Clerk in this lawsuit. No other county election official is named. And by explicit statutory command, the Secretary has no operational control over county election officers. The Legislature has deliberately established a highly decentralized electoral framework: “Each 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

¹⁴ The Secretary raised the first of these issues at R. VII, 57-58. In addition, as these issues go to the district court’s jurisdiction, they may be raised at any time. See *State v. Jordan*, 317 Kan. 628, 641-42, 537 P.3d 443 (2023). They are also pure questions of law that this Court should consider on appeal given that they involve the district court’s statutory and constitutional authority to enjoin a state law governing elections. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015).

and state law and rules and regulations.” K.S.A. 25-126(b). The Secretary is responsible only 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, the district court’s injunction must be reversed for the additional reason that the court exceeded its jurisdictional authority by issuing a statewide injunction enjoining nonparties to the lawsuit.

2. The district court lacked jurisdiction to revive a repealed law by injunction.

The district court also lacked jurisdiction to reimpose the three-day grace period that was repealed by S.B. 4. The district court stated that it was enjoining S.B. 4, but courts enjoin statutes, not bills. K.S.A. 25-1132, the statute S.B. 4 amended, now requires that ballots be received by the close of polls on Election Day. Adopting a three-day grace period requires more than enjoining that statute; it requires the district court to revive a repealed law. That would violate the separation of powers and was therefore beyond the district court’s jurisdiction.

Article 2 of the Kansas Constitution gives the Legislature the exclusive power to pass, amend, and repeal statutes. *State ex rel. Stephan v. Finney*, 251 Kan. 559, 577, 836 P.2d 1169 (1992). While the judiciary may enjoin unconstitutional laws, the judicial power does

not extend to enacting legislation. See *State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan.*, 264 Kan. 293, 337-38, 955 P.2d 1136 (1998) (“Courts are limited to the exercise of judicial power in interpreting and applying the law and may not usurp the legislative power of determining policy matters or the executive power of implementing such policy.”). The district court had no jurisdiction to reenact a three-day grace period by injunction.

E. Judicial reassignment is necessary on remand.

Inasmuch as the district court “has already stated its opinion on the merits of [Plaintiffs’] constitutional claims,” the Secretary respectfully requests that a new judge be assigned to hear this case following remand. See *Harper*, 65 Kan. App. 2d at 726. The unusual and curious timing of the district court’s injunction order, not to mention the court’s utter disregard of controlling precedent, solidifies this necessity. See *State ex rel. Kan. Highway Patrol v. One 1995 Chevrolet Caprice Classic/Impala SS*, 53 Kan. App. 2d 35, 42, 382 P.3d 476 (2016).

CONCLUSION

The district court abused its discretion in finding Plaintiffs met their heavy burden to justify the issuance of a temporary injunction facially invalidating a duly enacted election statute setting an Election Day Deadline for advanced ballot receipt. The Secretary respectfully asks this Court to reverse the temporary injunction and order a new judge assigned on remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 14, 2026 the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants.

/s/ Dwight R. Carswell

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