Court:	Court of Appeals
Case Number:	130839
Case Title:	Kansas Appleseed Center for Law and Justice, Inc., et al., Appellees, v. Scott Schwab, In His Official Capacity as the Kansas Secretary of State; Appellant, and Jamie Shew, In His Official Capacity as Douglas County Clerk, Defendant.
Type:	COA Order by the Court Appellees' Response in Opposition to Sec.'s Renewed Motion to Stay or Suspend Temp. Inj.

Noted.

SO ORDERED,

/s/ Sarah E. Warner, Court of Appeals Judge

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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 Douglas County Clerk,

Defendant.

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO THE SECRETARY'S RENEWED MOTION TO STAY OR SUSPEND TEMPORARY INJUNCTION

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

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INTRODUCTION

A stay pending appeal is an extraordinary remedy that imposes a heavy burden on the party that seeks it, and because the order the Secretary challenges is a temporary injunction, his burden is heavier still. He simply cannot carry it here. Indeed, this Court denied the Secretary's exact same request for a stay just a few weeks ago, and the Supreme Court declined the Secretary's emergency petition for review of that ruling. In doing so, the Supreme Court clearly anticipated the stay would remain in place through the general election. It made plain that it viewed it together with the August primary, emphasizing that, "[w]e are now in the thick of election season," given that "Kansas' 2026 primary election takes place on August 4, and the 2026 general election is on November 3." Dkt. 24 at 1. Even the dissent, which would have resolved the question sooner, framed the issue presented as "which ballots shall be counted in the upcoming primary *and general elections*." *Id.* at 10 (Stegall and Wall, JJ., dissenting) (emphasis added).

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This makes good sense. Voters just voted in the primary where the injunction was in force, ensuring that, if their ballots were postmarked by Election Day and received within three days thereafter, they would count (just as they have for a decade before that). To change the rules now would cause the very confusion that the Secretary claims he seeks to prevent. And the Secretary's contention that voters will be confused or election administration will be hindered without a stay is flatly contradicted by Kansas's *actual experience* in the August primary. The Secretary himself has admitted that *none* of the chaos that he predicted when he sought an emergency stay in July materialized: instead, he

has described the August primary as the "smoothest" primary Kansas has "ever had."[1]

The Secretary's position here is also at odds with a brief he submitted to the U.S. Supreme Court just last week, urging it not to allow the federal government to move forward with a USPS rule that would change the treatment of mail ballots at this point in the election cycle. Doing so, the Secretary emphasized, would "breed confusion" that could deter "eligible voters from voting" and cause "election chaos." Br. of Amici Curiae Current & Former Election Officials at 3, *U.S. Postal Serv. v. California*, No. 26A305 (U.S. Sep. 9, 2026). The same is true of the Secretary's request that this Court stay the temporary injunction here. And the Secretary also argued, "[w]hatever the [U.S. Supreme] Court concludes about the merits" of that challenge, the November election "should be conducted under the" pre-existing status quo, and the merits "can then easily be placed on a schedule that resolves the [challenged rule's] validity well before the 2028 election." *Id.* at 11-12. The three-day grace period *is* the status quo here. The Kansas Supreme Court *expressly rejected* the Secretary's argument to the contrary just weeks ago. *See* Dkt. 24 at 5-6 (holding the temporary injunction "preserve[s] the status quo," minimizes disruption, and avoids irreparable harm). There is simply no reason to reconsider that conclusion and upend an ongoing election.

On every level, the Secretary has failed to carry his burden of showing that he is

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[1] *See* Brayden Day, *'Smoothest Primary We've Ever Had': Kansas Officials Say August Election Went Well Despite 3-day Grace Period Controversy*, KSNT (Sep. 1, 2026), https://www.ksnt.com/capitol-bureau/smoothest-primary-weve-ever-had-kansas-officials-say-august-election-went-well-despite-3-day-grace-period-controversy/.

entitled to the extraordinary remedy of a stay. He fails to make a strong showing that he is likely to persuade this Court that the district court abused its discretion in issuing the injunction, which applied Kansas Supreme Court precedent for challenges brought under the Kansas Constitution to laws that impact the counting of ballots, to an extensive factual record that the Secretary made no effort to contest below. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *League of Women Voters of Kan. v. Schwab* ("*LWV II*"), 318 Kan. 777, 788 (2024). And he thoroughly fails to show that the district court's conclusion that a temporary injunction was necessary to avoid irreparable harm was an abuse of discretion, or that a stay is in the public interest. Indeed, *no one* disputes that *enforcing* SB 4 will result in the rejection of thousands of ballots cast by eligible Kansas voters due to USPS issues that are out of their control.

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Finally, the Secretary continues to contend that the timing of the district court's order creates an emergency that can only be remedied by a stay. This Court has already received briefing on this issue ad nauseam, but it need not retread over that ground again. The Supreme Court ruled that the timing of the temporary injunction "should not dictate an appellate ruling adverse to Plaintiffs." Dkt. 24 at 5. For all of these reasons and those discussed further below, the Court should deny the Secretary's renewed stay motion.

BACKGROUND

This Court is well familiar with the procedural background of this litigation, which has been addressed in detail in prior submissions to this Court in connection with the Secretary's earlier motions to stay and for expedited review. *See, e.g.*, Dkt. 11 at 3-6; Dkt. 20 at 3-8. In short, Plaintiffs are three registered Kansas voters ("Voter Plaintiffs") who

rely on advance mail ballots and three nonpartisan organizations ("Organizational Plaintiffs") that register, educate, and turn out voters, particularly among communities reliant on advance mail ballots. They sued in Douglas County District Court in May 2025, mere weeks after the Legislature enacted SB 4 and nearly eight months before the law was set to go into effect in January 2026. (R. V, 68). After the Secretary removed the matter to federal court, Plaintiffs filed a motion to remand, which was ultimately granted in October 2025. (R. I, 341-49). That same day, Plaintiffs' counsel advised the Secretary's counsel that they would be filing a temporary injunction motion, as there was no longer sufficient time to litigate to resolution prior to SB 4's January 1, 2026 effective date. Dkt. 34 at 8. The district court ultimately heard the matter on a schedule agreed to by the Secretary and, on July 16, it issued a lengthy 54-page order detailing the extensive undisputed factual record before it, applying those facts to Kansas Supreme Court precedent, and granting Plaintiffs' motion for a temporary injunction. (R. V, 117-18).

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The Secretary first moved to stay the temporary injunction in this Court on July 20, 2026. *See* Dkt. 8. The Court denied that motion, holding that the "very real and irreparable harm—that the votes of well-meaning Kansans, acting in good faith based on a judicial decision, would not be counted—outweighs the administrative burden of counting the mail-in ballots received within three days after Election Day." Dkt. 19 at 4. The Secretary then petitioned the Kansas Supreme Court for emergency review, arguing that this Court failed to properly consider the timing of the injunction and did not adequately assess the Secretary's likelihood of success on the merits. Dkt. 21 at 4. The Supreme Court denied both the petition and a separate motion to transfer the appeal. Dkt. 24. In doing so, it held

that the temporary injunction "preserve[d] the status quo" that had existed for nearly a decade—*i.e.*, the three-day grace period—while also "minimiz[ing] disruption" and "avoid[ing] irreparable harm," rejecting the Secretary's argument to the contrary. *Id.* at 5-6. The Supreme Court further observed that the temporary injunction order "address[ed] each of the required factors informing decisions on temporary injunctions based on the largely uncontested facts presented" and was "not plainly erroneous." *Id.* at 6-8.

The Secretary filed his "renewed" stay motion—effectively, a motion for reconsideration—on August 14, 2026, just a few weeks after this Court's and the Supreme Court's rejections of his earlier request for a stay. In it, he recycles the same arguments that this Court and the Supreme Court rejected the first time around.

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STANDARD OF REVIEW

The Secretary moves under K.S.A. 60-262(f), which permits an appellate court to "suspend, modify, restore or grant an injunction, while an appeal is pending." The Secretary agrees that the Court should look to the factors set out in *Nken v. Holder*, 556 U.S. 418 (2009), in considering his motion. *See* Dkt. 19 at 3-4; Dkt. 24 at 7, 13. Under *Nken*, courts consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 556 U.S. at 434 (citation omitted). As the movant, the Secretary "bears the burden" of showing these factors warrant a stay. *See id.* at 433-34. "[A] stay is an intrusion into the ordinary processes of administration and judicial review," and thus is never "a matter of right, even if irreparable injury might

otherwise result to the appellant." *Id.* at 427 (citation modified). "Because the burden of meeting this standard is a heavy one, more commonly stay requests . . . will be denied." *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 615 (D. Kan. 1995) (citation omitted).

Relevant to the Secretary's ability to make a strong showing that he is likely to succeed on the merits is the standard of review that this Court must apply to the district court's temporary injunction order. "It is well established that a trial court is vested with a large measure of discretion in granting a temporary injunction, and that appellate courts will not interfere absent a manifest abuse of discretion." *Augusta Med. Complex, Inc. v. Blue Cross of Kan., Inc.*, 227 Kan. 469, 473, 608 P.2d 890, 894 (1980); *see also LWV II*, 318 Kan. at 788. Here, too, the Secretary bears the burden of establishing an abuse of discretion. *Augusta*, 227 Kan. at 473. A district court abuses its discretion when the "decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *LWV II*, 318 Kan. at 788. Its findings of fact are reviewed to determine only "if they are supported by substantial evidence and are sufficient to support its conclusions of law." *Digital Off. Sys., Inc. v. Bleier*, 423 P.3d 1064 (Kan. Ct. App. 2018) (unpublished). They may only be reversed if "clearly erroneous." *Portfolio Recovery Assocs., LLC v. Dixon*, 52 Kan. App. 2d 365, 369, 366 P.3d 245, 250 (2016).

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ARGUMENT

I. A stay would disrupt the status quo and sow chaos.

The Secretary's lead argument is that a stay would "preserve the status quo." Mot. 2, 6-7. The Supreme Court rejected this argument just weeks ago in its order denying the

Secretary's petition for review, holding that the temporary injunction "preserve[d] the status quo" while "minimiz[ing] disruption" and "avoid[ing] irreparable harm." Dkt. 24 at 5. As the Supreme Court recognized, the relevant status quo is "the last actual, peaceable, noncontested position of the parties which preceded the pending controversy"—that is, the law *before* SB 4 went into effect. *Id.* at 4 (quoting *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860, 865 (1984)). The Secretary thus gets his analysis backwards—the temporary injunction should remain in place because it preserves the status quo, and a stay would *disrupt* the status quo on the eve of an election. Further, the Supreme Court clearly anticipated its decision would ensure the temporary injunction would remain in place through, at the very least, the November election. *See id.* at 1 (emphasizing that, "[w]e are now in the thick of election season," with the primary election "tak[ing] place on August 4, *and the 2026 general election is on November 3*" (emphasis added)).

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The Secretary's motion ignores all of this—an omission that is dispositive and fatal to his renewed motion for a stay. Nowhere does the Secretary identify anything that has changed—since this Court and the Supreme Court rejected his first, effectively identical request—that could support a different conclusion now. In fact, the Secretary ignores what *has* changed—all of which weighs heavily against issuing a stay now, making his position even less tenable than it was the first time around. The statewide August primary was held with the temporary injunction in effect and that election proved that the Secretary's earlier warnings that it would "sow[] chaos in an ongoing election" and cause "voter confusion" that would "interfere[] with the orderly conduct of the election" were wrong. Dkt. 8 at 1. The Secretary himself has publicly confirmed that, far from an unmitigated mess of voter

confusion and administrative debacle, the August primary was "the smoothest [p]rimary" Kansas has "ever had." *Supra* n.1 Yet, in his renewed motion filed with this Court, he inexplicably—and without pointing to any evidence or offering any elaboration—states that the decision to leave the temporary injunction in place when the Secretary first sought a stay "injected administrative and voter confusion into the primary election." Mot. 2. This Court is not required to accept the Secretary's *ipse dixit*, particularly when it is rebutted by the clear public record—which, here, includes the Secretary's own admission that the election went extremely smoothly.

This is not the only occasion when the Secretary's renewed motion repeats arguments rejected by this Court and the Supreme Court mere weeks ago or clashes with the public record. The Secretary also repeats his claim that a stay is required because he engaged in an "extensive education[al] campaign" notifying voters of the election-day ballot receipt deadline. *Id.* This Court already considered and rejected this argument. Dkt. 8 at 2; *see also* Dkt. 19 at 2 ("The Secretary indicates that his office has conducted a campaign throughout 2026 to educate voters about the elimination of the previous three-day window."). Instead, this Court found that the events of the past several weeks weighed the other way, where many voters have learned about the temporary injunction (indeed, then, and now, the Secretary's own website describes that injunction), and may anticipate that their advance-mail ballots will be counted if mailed before Election Day and received within the three-day grace period. *See* Dkt. 19 at 4.[2] That is all the more so now, where

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[2] The Secretary's official website continues to reference the temporary injunction. *See* Kan. Sec'y of State, *Advance Voting Information*, https://sos.ks.gov/elections/advance-voting-

there has been widespread reporting about this Court's and the Supreme Court's decisions rejecting the Secretary's motion for a stay just weeks ago.[3] Thus, as this Court previously recognized, there is a significant threat that, if the stay is granted, "real and irreparable harm" will follow, because "the votes of well-meaning Kansans, acting in good faith based on . . . judicial decision[s], would not be counted." *Id.* As before, this serious and significant harm, far "outweighs" any purported "administrative burden of counting the mail-in ballots received within three days after Election Day." *Id.* Nor is there any evidence that any administrative burdens actually arose in the August primary as a result of the maintenance of the injunction.

The Secretary's arguments that the timing of the injunction supports his request for a stay—and is the source of the potential to cause election chaos—are also foreclosed, both by the Supreme Court's prior ruling that the timing of the injunction "should not dictate an appellate ruling adverse to Plaintiffs," Dkt. 24 at 5, and by the ensuing primary election, in which no chaos materialized. The same is also true of the Secretary's attempt to invoke the

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information.html (last visited Sep. 14, 2026).

[3] *See, e.g.*, Tim Carpenter, *Kansas Supreme Court Declines to Take Emergency Appeal of Election Law*, Kansas Reflector (July 31, 2026), https://kansasreflector.com/2026/07/31/kansas-supreme-court-declines-to-take-emergency-appeal-of-election-law/ (reporting that the temporary injunction presented "a question of importance to the August primary *and* November general elections"); Sarah Motter, *Kansas Supreme Court Upholds Mail Ballot Grace Period Ahead of Primary Election*, KCTV5 (July 31, 2026), https://www.kctv5.com/2026/07/31/kansas-supreme-court-upholds-mail-ballot-grace-period-ahead-primary-election/ (reporting that "[t]he ruling means Kansas voters who mail their ballots on or before Election Day . . . will have their votes counted if those ballots arrive at county election offices within three days after the election").

federal *Purcell* doctrine. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). In rejecting the Secretary's petition for review, the Supreme Court held that, irrespective of whether *Purcell* could apply in Kansas, there is "no conflict between [*Purcell*] and the result of the Court of Appeals' reasoning" denying the Secretary's stay motion, "when the intent and effect of the order is to minimize disruption, preserve the status quo, and avoid irreparable harm." *Id.* at 5.[4] The Secretary himself argued as much before the U.S. Supreme Court just last week. *See* Br. of Amici Curiae Current & Former Election Officials at 3, *U.S. Postal Serv. v. California*, No. 26A305 (U.S. Sep. 9, 2026) ("Attempting to implement this new process on the eve of an election is what *Purcell* . . . exists to prevent").

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[4] The Kansas Supreme Court also cast doubt whether the doctrine applies in Kansas at all, noting that *Purcell* does "not arise under Kansas law" and observing serious "inconsistency" in how it is applied federally. Dkt. 24 at 5-6 (holding *Purcell* "does not clearly" control the inquiry here); *see also, e.g.*, *Harkenrider v. Hochul*, 38 N.Y.3d 494, 521 n.16 (2022) ("The *Purcell* doctrine cautions *federal* courts . . . and does not limit state judicial authority . . . ."); *State ex rel. Ohio Democratic Party v. LaRose*, 178 Ohio St.3d 229, 236 (2024) ("*Purcell* is a federal case and therefore not binding on this Court . . . ."). In fact, state courts often issue decisions suspending state election laws in the leadup to an election. *See, e.g.*, *von Glahn v. Hoskins*, No. SC101805, 2026 WL 2628846 (Mo. en banc Sep. 3, 2026) (enjoining use of congressional districting map weeks after a primary election was conducted under that map and fewer than two months before November general election); Order, *Hoskins v. von Glahn*, No. 26A304 (U.S. Sep. 9, 2026) (Kavanaugh, J.) (denying emergency application to stay that ruling pending certiorari); *Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. en banc 2020) (affirming injunction of voter-ID law entered 14 days before 2018 general election); *Pa. Democratic Party v. Boockvar*, 662 Pa. 39, 50 (2020) (ordering deadline extension for mail ballots six weeks before 2020 general election). And, even in federal court, the U.S. Supreme Court has indicated that the doctrine does not apply when, as here, the party invoking it made "representations to the district court that the schedule on which the district court proceeded was sufficient." Order, *Rose v. Raffensperger*, No. 22A136 (U.S. Aug. 19, 2022).

The grace period and the temporary injunction keeping that status quo in place provide a safeguard that *protects* voters—it does not risk that they will stay away from the polls because they are confused about what the rules are. The Secretary's own admission that the August primary went smoothly proves there is no risk of voter confusion disrupting the November election if the temporary injunction remains in place; the only risk is if the injunction is now *stayed*. In short, the concerns underlying *Purcell* also cut *against* staying the temporary injunction of SB 4.

II. The *Nken* factors all weigh against issuing a stay.

In considering the Secretary's first motion to stay, both this Court and the Supreme Court weighed the *Nken* factors and concluded that they supported leaving the temporary injunction in place. The Supreme Court further observed that the temporary injunction order "address[ed] each of the required factors informing decisions on temporary injunctions based on the largely uncontested facts presented" and was "not plainly erroneous." Dkt. 24 at 7. The Secretary's renewed motion never grapples with either decision, even though he invoked the same *Nken* factors and presented nearly identical arguments—often verbatim—the first time around. The Secretary's failure to even engage with this Court's and the Supreme Court's prior disposition of his earlier, redundant stay motion—much less explain why, just a few weeks later, this Court should come to the opposite conclusion—is reason alone to deny the renewed motion. Through any lens, the Secretary fails to carry his heavy burden of showing that this extraordinary remedy is warranted here. His renewed stay motion should meet the same fate as his first and be denied.

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A. The Secretary fails to make a strong showing he is likely to succeed.

The Secretary almost entirely punts any arguments on likelihood of success to his merits brief. Mot. 8. His only gesture at this factor in his renewed motion is to claim that the district court must have erred because some *other* states impose an election-day deadline, and Kansas did as well until 2017. *Id.* But the question here is what the *Kansas* Constitution permits, and the *Kansas* Supreme Court has instructed that *Kansas* courts answer that question by applying the applicable legal standards and tests set forth in *LWV II*, not by tallying practices in other jurisdictions. *See LWV II*, 318 Kan. at 792; *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 621, 440 P.3d 461, 470 (2019). What other legislatures have written into their statute books says nothing about how SB 4 will operate against the postal conditions *in Kansas* and the vote-by-mail calendar *in Kansas*, and even less about whether that law survives challenges brought under multiple different provisions of the *Kansas* Constitution.

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The comparison also fails on its own terms. The Secretary does not argue that other states have seen the same degradation in mail delivery causing large numbers of timely-cast ballots to arrive a few days after Election Day, as has been well-documented in Kansas; as the district court found, a USPS audit concluded that Kansas's mail delivery has fallen to one of the three or four worst in the nation. (R. V, 78). Further, Kansas election officials may not send advance ballots to voters until a mere 20 days before Election Day—which, combined with SB 4, gives Kansas voters the shortest mail-voting window in the nation—making an election-day ballot receipt deadline particularly pernicious here. (R. V, 77, 81, 84). Indeed, the Secretary's own office told the Legislature in 2017 that the 20-day window

was among the reasons a grace period was *necessary*. (R. V, 77). And that was *before* USPS started deteriorating even further in recent years, prompting the Secretary himself to write to the U.S. Postmaster General complaining that many Kansas voters' advance ballots were "failing to reach the county election office on time, *even when voters have mailed them timely*." (R. V, 78). The Secretary was unequivocal: "it is unacceptable that voters, who follow the rules for requesting, voting, and returning their mail ballot, are disenfranchised" when USPS fails to deliver their ballots in a timely manner. (R. V, 79). Indeed, the Secretary emphasized that "Kansas has had mail voting in some form since the Civil War, but never has a lack of confidence in the delivery of our ballot been questioned as it has in the 21st Century." (R. V, 79).

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The Secretary's contention that, because Kansas once had an Election Day ballot receipt deadline, SB 4 must survive constitutional scrutiny, Mot. 8, not only ignores all of this, it fails to apply the relevant legal tests. The Court need not speculate about whether a strict Election Day receipt deadline for Kansas advance mail ballots would have been constitutional at some other time in history had it been challenged then, where there were different factual circumstances, and when the Court might have been presented with different evidence than that which is detailed in the present record. The only question is whether SB 4 can pass constitutional scrutiny under the current circumstances and on the record that is presently before the Court.

Plaintiffs submitted substantial, unrebutted evidence that the issues that make this problem one of constitutional magnitude began in the early 2010s. (R. V, 74-77). Indeed, the Secretary's own repeated admissions about the grave risk of disenfranchisement that

Kansas voters are currently (and increasingly) facing due to rapidly deteriorating USPS performance are part of that evidence. (R. V, 77-81, 83, 85).

So, too, is evidence about what led the Legislature to enact the grace period in the first place (evidence that the Secretary similarly simply ignores). It is undisputed that the Legislature—by a vote of 123 to 1, with the support of then-Secretary of State Kobach—crafted the three-day grace period as a *remedy* to a growing constitutional crisis after 1,449 Kansans who voted on time in the 2016 general election were disenfranchised because USPS delivered their ballots after Election Day. (R. V, 75-76). As the Secretary and Legislature recognized, postal service in Kansas had materially degraded in the early 2010s after USPS consolidated its Kansas processing centers to only five centers, with only two of them in Kansas, and first-class delivery times lengthened from one-to-two days to two-to-five, causing mail to often be delivered on Wednesday or Thursday (right after Election Day), even if sent the week before. (R. V, 74-75). The grace period was carefully calibrated to address this problem, and it accomplished precisely what it was designed to do, saving more than 32,000 ballots in 2020, roughly 1,000 in 2022, and 2,110 in 2024. (R. V, 77, 84).

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The undisputed record also establishes that issues with mail delivery in Kansas have not improved since 2017, when the grace period became a necessity to save voters from disenfranchisement; as the Secretary's office has emphasized, it "has gotten even slower since 2017[.]" (R. V, 77 (alteration in original)). The Kansas-Missouri postal district now ranks among the worst in the nation for on-time delivery, barely half of first-class mail met even the lengthened three-to-five-day standard in 2025, and in the August 2024 Douglas County primary more than twelve percent of ballots spent ten days or longer in transit in a

single direction. (R. V, 78, 84). The legal question the district court decided was whether SB 4 operates constitutionally under *these* conditions, on *this* record, yet the Secretary simply does not engage with any of it.

In doing so, the Secretary fails to carry his high burden to justify a stay of the injunction, which can only be met with a "*strong*" showing that he is likely to succeed on appeal in convincing this Court that the district court abused its discretion in granting the temporary injunction. *Nken*, 556 U.S. at 434 (emphasis added). Nor is he likely to succeed on the merits of his appeal for the reasons set forth in the Brief of Appellees, which is filed together with this response in opposition to the Secretary's renewed motion for a stay.

As discussed more fully in that brief, Plaintiffs are likely to succeed on the merits of *each* of their three claims. With respect to their equal protection claim, the Supreme Court has held that an election law "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. But under SB 4, whether any given ballot will be counted hinges on arbitrary postal delays that are outside a voter's control. *See* Appellees' Merits Br. Argument § I.C. Plaintiffs are also likely to succeed on their due process claim, because due process is violated when the State rejects a ballot without "reasonable notice" and an "opportunity to . . . cure deficiencies," *LWV II*, 318 Kan. at 806, and SB 4 allows for neither. *See* Appellees' Merits Br. Argument § I.D. Plaintiffs are also likely to succeed on their right-to-vote claim on two independent grounds: both because SB 4's known disenfranchising effects will "unreasonably burden the right to suffrage," *LWV II*, 318 Kan. at 801, making it an extra-constitutional qualification on the right to vote, and also because

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it is subject to strict scrutiny, which it cannot survive. *See* Appellees' Merits Br. Argument § I.E. The Secretary is thus unlikely to ultimately win on the merits on *any* of those issues, but he needs to win on *all* to succeed on the merits of the appeal. The weakness of his merits claims—and the fact he does not even *discuss* the merits within his present motion—only underscore how far short he comes from the *higher* standard he needs to show in order to qualify for the "extraordinary" remedy of obtaining a stay pending appeal. *Nken*, 556 U.S. at 428.

B. If a stay is entered, Plaintiffs and thousands of Kansas voters will suffer irreparable harm.

This Court has already held that the "very real and irreparable harm—that the votes of well-meaning Kansans, acting in good faith based on a judicial decision, would not be counted—outweighs the administrative burden of counting the mail-in ballots received within three days after Election Day." Dkt. 19 at 4. The Supreme Court favorably cited this Court's irreparable harm finding in denying the Secretary's petition for review and motion to transfer the appeal. Dkt. 24 at 5. That Court further found that it is not unreasonable for the Secretary to "be required to submit to delay not immoderate in extent and not oppressive in its consequences," when, as here, "the public welfare or convenience will thereby be promoted," particularly given that the case is "of extraordinary public moment." *Id.* at 8 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-56 (1936)). The Secretary now asks this Court to reverse its own decision just a few weeks later, but provides no good reason why it should.

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The Secretary's theory of irreparable harm to the state chiefly rests on the legal fiction that a state is harmed whenever its laws are enjoined. Mot. 4. But that principle does not apply here because a state has *no* cognizable interest in enforcing an *unconstitutional* law such as SB 4. *See Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 66, 341 P.3d 607, 614 (2014); *see also KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (the "public has no interest in enforcing an unconstitutional" law). In contrast, the harm to Plaintiffs if the temporary injunction is stayed is tangible, irreparable, and not seriously contested. The Voter Plaintiffs, who rely on advance voting, are among the thousands of Kansans who will be at risk of disenfranchisement if SB 4's unforgiving Election Day ballot receipt deadline takes effect. As the district court correctly observed, even voters whose ballots are postmarked "well before Election Day," and that "compl[y] with all Kansas requirements to vote," are at risk of having their ballots rejected under SB 4. (R. V, 105).

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The Organizational Plaintiffs are also at risk of irreparable harm, both on behalf of their constituents and directly as organizations. Absent an injunction, they must "divert resources toward operating programs to mitigate the burdens of SB 4—resources that otherwise would be put toward other mission-critical activities." (R. V, 113-14); *see also League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) ("Courts routinely recognize that organizations suffer irreparable harm when a defendant's conduct causes them to lose opportunities to conduct election-related activities, such as voter registration and education."). Yet again, the Secretary offers nothing to rebut this finding of irreparable harm.

The Secretary is also wrong to suggest that the non-existent harm to the state is "compounded" by the timing of the district court's order. Mot. 8. The Secretary waived this argument by failing to identify a date by which he needed a decision, as requested by the district court. Dkt. 11 at 7. And the Supreme Court has already held that the timing of the injunction has no bearing on Plaintiffs' right to temporary injunctive relief. *See* Dkt. 24 at 5. It is also plain that the temporary injunction in no way threatens the "orderly manner" of Kansas elections. Mot. 8. The injunction *was in effect* during the August primary, and the Secretary himself confirmed that election proceeded without disruption, declaring it "the smoothest [p]rimary we've ever had." *Supra* n.1. That chaos did not ensue is not actually surprising. The temporary injunction simply ensures that timely-cast ballots that arrive within three days of Election Day will be counted, as they have been for nearly ten years.

The Secretary also argues that the district court caused the state irreparable harm by enjoining SB 4 statewide. Mot. 9. As already explained, this assertion is belied by the public record. But the Secretary also waived this argument by not raising it before the district court. *See* Appellees' Merits Br. Argument § IV. He is also wrong on the law: the district court's order enjoining the Secretary of State, Kansas's chief election official, is enough for the injunction to have statewide effect under Kansas law, because injunctions cover named parties and those who act in concert with them and have notice of the injunction, which includes local election officials. *See* K.S.A. 60-906.

It is also worth observing that the Secretary's attempt to repurpose this argument about the scope of the injunction into a form of "irreparable harm" makes no sense. He

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conspicuously fails to cite *any* case, from any jurisdiction, finding irreparable harm under comparable circumstances. And his suggestion—again unsupported by any citation to any evidence—that the temporary injunction caused "confusion among county election officials as to whether they should follow the Election Day deadline," Mot. 9, cannot be squared with his public admission that the August primary was the smoothest in Kansas's history. Nor does he explain how staying the injunction outside Douglas County in advance of the November election, as he seems to suggest is warranted (since the Douglas County chief election officer is a Defendant here and is undoubtedly subject to the injunction), would reduce (and not exacerbate) any potential confusion, where the injunction already had statewide effect for the August primaries.

Irreparable harm is the "single most important" factor in assessing a temporary injunction, and Plaintiffs need only establish a "reasonable probability" of irreparable harm to secure a temporary injunction—a "much lower" burden than their burden of proof at trial. *State v. Harper*, 65 Kan. App. 2d 680, 690-91, 571 P.3d 6, 14-15 (2025). And since the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury," *First Sav. Bank*, 163 F.R.D. at 615, the Secretary's failure to make a strong showing that the district court abused its discretion in finding irreparable harm to Plaintiffs if SB 4 goes into effect is in and of itself dispositive and requires denial of his motion to stay the injunction.

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C. A stay would disenfranchise thousands of voters and is not in the public interest.

The Secretary has never seriously contested that thousands of voters will be disenfranchised under SB 4, nor explained how that could possibly be in the public interest. To be sure, "ensuring qualified voters exercise their right to vote is *always* in the public interest." *League of Women Voters of Mo.*, 336 F. Supp. 3d at 1006 (citation omitted) (emphasis added); *see also Fish v. Kobach*, 840 F.3d 710, 756 (10th Cir. 2016) (holding "[t]he public interest in broad exercise of the right to vote will be furthered rather than harmed" by an injunction). "Because there can be no 'do-over' or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction." *Fish*, 840 F.3d at 752 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). Likewise, issuing an injunction would "correct[] a violation of the law," which is also "in the public interest." *Wing*, 51 Kan. App. 2d at 66.

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The Secretary's attempt to avoid this result is not well founded. *See* Mot. 10-12. He cites only federal cases granting stays, and none are apposite. Take, for instance, the case he relies on most heavily, *Organization for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020). There, the district court had preliminarily enjoined a law that permitted voters who received "absentee" ballots to return them either in person or by mail, while voters who received "mail-in" ballots had to return ballots by mail—they could not return them in person. *Id.* at 606. The Eighth Circuit granted a stay because the plaintiffs "presented nothing more than anecdotal evidence of the unreliability of the USPS or delivery delays,"

while the defendants provided evidence that exceedingly few mail-in ballots were rejected for arriving late. *Id.* at 608. That is the *exact opposite* of the record here: Plaintiffs presented substantial and undisputed evidence showing *thousands* of voters will be disenfranchised absent the injunction, and the Secretary presented *no* evidence to the contrary.

The other federal cases the Secretary cites likewise rest on records that bear no resemblance to the one here and are driven by the courts' likelihood of success analysis under a federal balancing test, not the *LWV II* tests, which govern here. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1190 (9th Cir. 2021) (applying *Anderson-Burdick* to stay injunction extending deadline by which voters could sign affidavit on ballots, when the plaintiffs' claim did "not contain an equal-protection component" and they did not allege "that the burden of signing the affidavit falls disproportionately on a discrete group of voters"); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280-81 (11th Cir. 2020) (applying *Anderson-Burdick* to stay extending deadline for mail-in ballots during the COVID-19 pandemic when the district court only had "light analysis" on the burden on voters and evidence showed the number of late-arriving ballots in recent elections was "smaller than usual"); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (concluding federal case foreclosed extending mail-in ballot receipt deadline due to COVID-19 pandemic without any analysis of factual record). None of these cases support the Secretary's request for a stay of the temporary injunction of SB 4.

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CONCLUSION

The Court should deny the renewed motion for a stay of the temporary injunction.

September 14, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 14, 2026, a true and correct copy of the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send notice of electronic filing to all counsel of record.

/s/ *Nicole M. Revenaugh*
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