IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC. et al., *Plaintiffs*, v. SCOTT SCHWAB, in his official capacity as the Kansas Secretary of State et al., *Defendants*.	Case No. 2:25-cv-02375-JWB-GEB

MEMORANDUM IN SUPPORT OF DEFENDANT SCHWAB'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant Scott Schwab, in his official capacity as the Kansas Secretary of State, submits this memorandum in support of his motion to dismiss Plaintiffs' Amended Petition (filed in state court) for failure to state a claim upon which relief can be granted. For the reasons set forth below, all of Plaintiffs' causes of action fail as a matter of law.

I. – INTRODUCTION

Plaintiffs wage a state facial constitutional attack against S.B. 4 (2025), a law the Kansas Legislature passed last March (via gubernatorial veto override) to require that all advance voting ballots must be received in the county election office or polling place no later than the close of the polls. *See* K.S.A. 25-1132. This is the same deadline Kansas had for many decades, until 2017 when the Legislature amended the statute to allow ballots to be received up to three days after Election Day if they were postmarked no later than Election Day. After eight years of experience with the three-day grace period, the Legislature opted to return to the Election Day deadline. Plaintiffs allege that a return to the previous rule will have a disparate impact on rural and disabled voters who, they contend, rely heavily on the U.S. Postal Service ("USPS") to deliver their ballots.

And the USPS, Plaintiffs add, has a poor record when it comes to timely delivering the mail, particularly in rural communities. According to Plaintiffs, the USPS's lack of reliability means that the elimination of the three-day grace period violates their equal protection, due process, and voting rights under the Kansas Constitution.

Once the law takes effect on January 1, 2026, Kansas will be one of 34 states in the country requiring ballots to be received by the close of the polls.[1] That overwhelming consensus among the states is no surprise. As Defendants argue below, federal law *mandates* such a policy. Any grace period not specifically authorized by federal law is thus preempted. That, in fact, represented part (although certainly not all) of the legislature's motivation for enacting S.B. 4.

Even putting the federal preemption issue aside, however, this case represents little more than an effort to inject the Court into a divisive public policy dispute. There are legislators, election officials, and citizens on both sides of the debate. But there is nothing unconstitutional about this law, and it is certainly not the role of the judiciary to pick sides in the fight.

The mechanics of our State's electoral process is a matter textually committed to the sound discretion of the legislature. Kan. Const. art. 4, § 1. While the challenged statute must comply with state constitutional guarantees in the Bill of Rights, the Kansas Supreme Court has made clear that the Judicial Branch must afford substantial deference to the legislature in this area. See *League of Women Voters v. Schwab*, 549 P.3d 363, 378-83 (Kan. 2024) ("*LWV*"). As long as the legislature's statutory enactment is *reasonable*, it will pass muster under the Kansas Constitution. That is clearly the case here. None of the Plaintiffs are members of a suspect class, no fundamental rights are at stake, and the State has legitimate and strong interests in an Election Day ballot receipt deadline.

[1] *See* https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots?utm_source=chatgpt.com (National Conference of State Legislature Table).

Whatever the Court may think about the wisdom of this law, the Court has no warrant to invalidate it based on the policy-laden objections advanced by Plaintiffs.

II. – STANDARD OF REVIEW

Plaintiff's Complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* That is, Plaintiff must "nudge [his] claims across the line from conceivable to plausible." *Id.* at 570. A claim has "facial plausibility" only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff," *Jordan-Arapahoe, LLP v. Bd. of Cnty, Comm'rs*, 633 F.3d 1022, 1025 (10th Cir. 2011), this general rule is inapplicable where a plaintiff's allegations are simply legal conclusions. *Iqbal*, 556 U.S. at 678.

III. – ARGUMENT

A. – Plaintiffs' Claims are Preempted by Federal Law

Plaintiffs' claims are all preempted by federal law, specifically, the so-called Election Day statutes described below. Preemption is an affirmative defense that may be resolved on a motion to dismiss when it is apparent from the face of the complaint that the plaintiff's claim is barred by federal law. *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1341 (10th Cir. 2015) (citations omitted). The Supremacy Clause dictates that a valid federal law is "the supreme Law of the Land[.]" U.S. Const. art. VI, cl. 2. If a plaintiff's claim rests on a state law that is preempted by federal law, then the claim fails as a matter of law. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128 (10th Cir. 2007) (recognizing that all preempted state law is "without effect"). The grace period Plaintiffs demand would allow mail-in ballots to be accepted after the federally-prescribed Election Day for

selection of the President and members of Congress. As the Fifth Circuit recently explained in *RNC v. Wetzel*, 120 F.4th 200 (2024), such a grace period cannot be reconciled with the federal Election Day statutes. Indeed, this issue is fundamental to the entire federal electoral process. *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

The Federal Constitution's Elections Clause, found in Art. I, § 4, cl. 1, provides that states shall prescribe the "Times, Places and Manner" of congressional elections, "but the Congress may at any time by Law make or alter such Regulations. . . ." Similarly, the Electors Clause, found in Art. II, § 1, cl. 4, empowers Congress to set the time for choosing presidential electors. These Clauses collectively entrust Congress with final say over the rules governing federal elections. State election regulations, whether enacted by the legislature or mandated by state constitutions or courts, must yield to conflicting federal requirements. *Foster v. Love*, 522 U.S. 67, 69 (1997).

By statute, Congress has fixed the date of federal general elections as the Tuesday following the first Monday in November in applicable years by enacting three separate statutes: 2 U.S.C. § 7 ("The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress . . . ."); 2 U.S.C. § 1 (providing for U.S. Senators to be chosen at the regular November election coincident with the House elections); 3 U.S.C. § 1 ("The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day."). Election Day, meanwhile, is defined as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 21.[2] These statutes, known as the

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

Election Day statutes, create a uniform Election Day for Congress and the Presidency that is required throughout the country. *Foster*, 522 U.S. at 70. Their purpose is to limit states' ability to influence voting by allowing varying election days. *Foster*, 522 U.S. at 73-74.

In *Foster*, the Supreme Court struck down Louisiana's open primary statute for congressional elections because it allowed the final selection of a candidate to occur in October. *Id.* at 72. Under Louisiana law, if one candidate won by a majority in the October primary, then no further action took place to elect the official on Election Day in November. *Id.* at 70. Louisiana's law "clearly violate[d]" the federal Election Day law because "in speaking of 'the election' of a Senator or Representative, the federal statutes plainly refer to the combined actions of voters and officials meant to make the final selection of an officeholder; and by establishing 'the day' on which these actions must take place, the statutes simply regulate the time of the election . . . ." *Id.* at 67–68. Importantly, the *Foster* Court recognized that Congress intended all steps necessary to choose the elected official – the casting of ballots by voters and the acceptance/receipt of the ballots by election officials – to occur within the single, congressionally fixed Election Day. *Id.*

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

In *Wetzel*, the Fifth Circuit addressed a Mississippi law allowing state officials to accept and count mail-in ballots received during a five-day grace period. 120 F.4th at 204. The court noted that the "upshot" of the federal Election Day statutes is that they require all elections for Congress and the Presidency to be held on a single day. *Id.* Looking at *Foster* for guidance, the court

considered three definitional elements in connection with the term "election": (1) official action; (2) finality; and (3) consummation. *Id.* at 206–07.

With respect to "official action," the court recognized that the "election" of a member of Congress "plainly refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder . . . ." *Id.* at 207 (quoting *Foster*, 522 U.S. at 71). That is, a ballot is only "'cast' when the State takes custody of it." *Id.* As to "finality," Supreme Court precedent provides that the word "election" indicates a "final choice of an officer by the duly qualified electors." *Id.* (quoting *Newberry v. United States*, 256 U.S. 232, 250 (1921)). "A voter's *selection* of a candidate differs from the public's *election* of the candidate[,]" and it is nonsensical to claim an electorate has officially elected an officeholder before all voters' selections (i.e., properly cast ballots) are received. *Id.* This means that "the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen." *Id.*

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

The same conflict would exist here if Kansas election officials were forced to accept mail-in ballots delivered after Election Day. The fact that Plaintiffs attempt to ground their claims in the Kansas Constitution is irrelevant. The Supremacy Clause applies to "any Thing in the Constitution or Laws of any State" that conflicts with federal law. U.S. Const. art. VI, cl. 2. To the extent that the Kansas Constitution, as capaciously and unreasonably interpreted by Plaintiffs, requires

extending federal elections beyond the timeline set by Congress in the Election Day statutes, such a state constitutional mandate would be without effect. *See Emerson*, 503 F.3d at 1128–29.

Conflict preemption exists where "compliance with both state and federal law is impossible, or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quotation omitted). The State cannot simultaneously enforce a policy requiring that mail-in ballots be counted if they are received after Election Day (as Plaintiffs insist), while also maintaining legal fidelity to the federal Election Day statutes discussed above. Faced with this conflict, compliance with both state and federal law would be impossible. As such, the state law must yield. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (Elections Clause makes Congress' regulations paramount, and any conflicting state rule is preempted and "ceases to be operative[]").

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

The preemption issue is sufficient to dispose of this case. But Plaintiffs claims would fail even in the absence of a preemptive federal law. Turning to those state law claims, all fall flat as a matter of law. Defendants begin with the equal protection claim. Plaintiffs allege that the absence of a grace period for receiving advance mail ballots has a disparate impact on "voters living in rural areas and voters who are temporarily away from Kansas" because (i) such voters supposedly tend to rely more heavily on voting by mail than other Kansans, and (ii) the USPS's on-time delivery track record is not at levels Plaintiffs and some Kansas state officials deem acceptable. Am. Pet. ¶¶ 10-11, 29, 59-74, 87, 106. Plaintiffs similarly allege that the elimination of the grace period violates the equal protection rights of disabled voters whose mobility issues necessitate that they vote by mail. *Id.* at ¶¶ 8, 26-28, 88-91. Plaintiffs argue the USPS's slow mail processing/delivery times will make it difficult for these voters to ensure that their mailed ballots are received at the county election office by the close of polls on Election Day.

1. *Standard of Review – Deferential Review is Constitutionally Mandated*

Plaintiffs maintain that strict scrutiny must be applied to their equal protection claim, *id.* at ¶ 107, ignoring that the Kansas Supreme Court specifically rejected this argument. *See LWV*, 549 P.3d at 383 (to comply with equal protection in the context of electoral mechanics, State need only establish that the legislative enactment is "capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment"). The legal requirement is mere reasonableness, coupled with objectivity in the standard.

The Kansas Constitution expressly assigns to the legislature all decisions regarding the specific voting methodology to be used in state elections. Kan. Const. art. 4, § 1 ("Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide*.") (emphasis added); *see also id.* art. 1, § 1 (in "elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly *in such manner as is prescribed by law*") (emphasis added). The Kansas Supreme Court recently reinforced the scope of this provision. *See LWV*, 549 P.3d at 378 ("Where popular elections are required – by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.") (citing Kan. Const. art. 4, § 1).

Just as is true of Article 5, § 4, which authorizes the legislature to require "proper proofs" to ensure that the right of suffrage extends only to eligible voters, *LWV*, 549 P.3d at 380-81, 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 380 (quoting *State v. Butts*, 2 P. 618, 622 (Kan. 1884)); *see also Sawyer v. Chapman*, 729 P.2d 1220, 1222 (Kan. 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*, 39 P. 1045, 1050 (Kan. 1895)).

As the Kansas Supreme Court explained in *LWV*, there can be no fundamental right to vote that is divorced from "concrete and specific provisions of the Constitution or statutes." 549 P.3d at 379-80. It is an "enumerated political right." *Id.* at 380. 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.").

Bear in mind that, with respect to Plaintiffs' equal protection claim, the scope and application of the Kansas Constitution's equal protection rights is identical to that of the U.S. Constitution. *See Rivera v. Schwab*, 512 P.3d 168, 180 (Kan. 2022) (Section 2 of Kansas Constitution's Bill of Rights is "coextensive" with equal protection guarantees of the Fourteenth Amendment of the U.S. Constitution). Neither rural residents 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). When no suspect class is at issue, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Guttman*, 669 F.3d at 1116. "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." *Bd. of Trustees v. Garrett*, 531 U.S.

356, 367 (2001). The same is true for individuals living outside urban centers. In sum, whatever rights voters have to cast their ballot via mail are a matter of legislative grace.[3]

In the absence of proof that a challenged statute was adopted with a *discriminatory purpose targeted at a suspect class*, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976) – which is clearly not present here – the law is reviewed under a rational basis standard. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The fact that the law might have a disparate impact on particular individuals (or even a suspect class) does not suffice to trigger an equal protection violation. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Id.* As part of this review, "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." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). A challenged state law must be upheld under this standard

[3] At various points in the Amended Petition, Plaintiffs invoke the term "absentee ballots," including a reference to Art. 5, § 1 of the Kansas Constitution. *See* Am. Pet. ¶¶ 22, 28, 32. That term has no relevance here. Nothing in that provision touches the issue of mail voting. The Constitution's reference to "absentee" simply underscores that citizens may vote absentee if they have either moved out of Kansas just before a Presidential election or moved out of their voting area (yet still reside in Kansas) prior to any election. The language was adopted in an amendment approved by the electorate on April 6, 1971, and was designed to implement a new requirement of the Voting Rights Act of 1970, Pub. L. No. 91-285, § 202 (codified at 52 U.S.C. § 10502(d)), which limited durational residency requirements and mandated that "each State shall provide by law for the casting of absentee ballots for President and Vice President ... by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election." *See* Kan. Legislature, 1971 Report of Special Comm. on Party Convention Nominations and Election Law Changes, at 178-79 (Dec. 1971) ("The committee concludes that changes are necessary in order to implement the recent amendment to [Art. 5, § 1] . . . making other changes regarding the right to vote of those who have recently moved, in part necessitated by the federal voting rights act amendments of 1970."). Moreover, the only references to absentee voting in the Kansas Election Code are targeted at members of the armed services, their families, and citizens residing overseas. *See* K.S.A. 25-1215 *et seq.* These provisions reflect the State's implementation of the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311. In short, nothing in the amendment of Art. 5, § 1 was intended to restrict the legislature's Article 4, § 1 authority – beyond the limits identified in Art. 5, § 1 itself, of course – to regulate the process for casting and receiving ballots or to require *mail voting* at all. The Court has no constitutional authority to interfere with the legislature's policy choices in structuring the scope of "advance voting," a concept introduced in 1995, *see* 1995 Kan. Sess. Laws ch. 192, § 17, and governed by its own chapter in the State Election Code. *See* K.S.A. 25-1114 *et seq.*

"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; *see also Mays v. LaRose*, 951 F.3d 775, 783 & n.4 (6th Cir. 2020) (applying traditional equal protection test to allegation of disparate burden on voting rights).

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

Moreover, the burden of a nondiscriminatory law is analyzed *categorically* under *Anderson-Burdick*, without consideration of "the peculiar circumstances of individual voters." *Crawford*, 553 U.S. at 206 (2008) (Scalia, J., concurring); *cf id* at 190 (plurality opinion) (noting that *Burdick* held that reasonable, nondiscriminatory election law imposed only a minimal burden despite preventing "a significant number of voters from participating in Hawaii elections in a

meaningful manner") (cleaned up); *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020) ("One less-convenient feature does not an unconstitutional system make."); *Memphis A. Philip Randolph Instit. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) (same).

2. *Elimination of Three-Day Grace Period Does Not Legally Burden Plaintiffs' Equal Protection Rights Under Kansas Constitution*

There can be no dispute that the Election Day ballot receipt deadline implemented by S.B. 4 applies in a neutral, even-handed manner to all Kansas voters. *Every voter* who opts to vote by mail must return the ballot to the county election office or a polling place no later than 7:00 PM on Election Day. No exceptions.

"Equal protection requires similarly situated individuals should be treated alike." *LWV*, 549 P.3d at 805 (quotation omitted). "It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Id.* (quotation omitted). All that is necessary for the State to show is that the law in question is "being applied with reasonable uniformity so that no voter is subject to arbitrary and disparate treatment." *Id.* Moreover, "citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised." *Id.* (citing *Butts*, 2 P. at 622). This is all the more true in light of Plaintiffs' *facial* challenge. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (to succeed in a facial attack, plaintiffs must establish that "no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) ("A facial challenge must fail where the statute has a plainly legitimate sweep.") (quotations omitted).

S.B. 4 imposes *no* legitimate burden – let alone a *severe* burden – on any voter in the State. Kansas voters have myriad options for exercising the franchise. In addition to voting by mail, they

can vote in person on either Election Day or up to twenty days before the election at an advance voting site. K.S.A. 25-1123(a), 1122(g)(1). All such polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA). The State even mandates curbside voting so that voters do not have to exit their vehicle; election officials literally will bring a ballot to the voter in the precinct's parking lot. K.S.A. 25-2909(d). Voters may also direct a third party to return their ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

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

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

Third, with a modicum of diligence, all voters can ensure that their ballots are counted. If a voter knows it can take as much as a week or ten days for his mailed ballot to reach the county election office, then that voter simply needs to send it in early rather than waiting close to Election Day. As the U.S. Supreme Court pointed out in rejecting a request to extend a ballot receipt deadline, voters who request a ballot at the last minute (and thus risk it not being counted) suffer the typical burden of a late-requesting voter, *not a burden imposed by state law*. *RNC v. DNC*, 589 U.S. 423, 425 (2020). An election deadline is not unconstitutional merely because an individual "fail[ed] to take timely steps to effect[uate]" his vote. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *accord DNC v. Wisc. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (rejecting all of the same arguments Plaintiffs advance in this case, noting state's interest in enforcing Election Day ballot receipt deadline, and holding that voters who delay the submission of their ballot have no right to demand that it be counted); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting. ... And the burden on a voter to ensure that a ballot is postmarked by Election Day is not meaningfully smaller than the burden of, say, dropping the ballot in a drop box at one's polling place on Election Day."); *accord Mays*, 951 F.3d at 782-91 (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 40, 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.

If – as the U.S. Supreme Court has held – the obligation of voters to travel across town to the DMV and gather documents for a photo ID "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting," *Crawford*,

553 U.S. at 198, then surely insisting that a voter either arrange for a third party to deliver his ballot, mail the ballot in early enough to account for potentially slow USPS delivery, or simply vote in person is not so severe a burden as to contravene any constitutional rights.

3. *Kansas' Interests in S.B. 4 are Legitimate and Strong*

When – as is true of an Election Day ballot receipt deadline – "the alleged burdens are not severe, a compelling state interest is not required." *New Ga. Project*, 976 F.3d at 1282 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Yet while not required, Kansas does have compelling interests in such a law. First, there is the need to remain compliant with the Federal Election Day statutes described in Part III.A. Second, eliminating the grace period ensures prompt tabulation of all votes and facilitates public confidence in the finality of results. Close elections are a regular feature of down-ballot races in every state (including Kansas), and a grace period for mail ballots means the outcome can teeter back and forth every day based on what mail arrives into the election office.[4] Delayed counting of ballots received days after the election fuels mistrust and speculation, especially in tight contests. Third, enforcing an Election Day ballot receipt deadline simplifies logistics and enhances efficiency. Processing late-arriving mail ballots necessitates additional manpower, resources, and contingency planning, all of which complicate election administration. Fourth, eliminating the grace period helps prevent election fraud. Mail ballots arriving late are harder to verify, raising concerns about post-election tampering. This is especially true when the USPS has failed to include a postmark on the ballot. The revised law will avoid problems potentially arising from missing, unclear, or even altered postmarks.[5]

[4] The Public Interest Legal Foundation has prepared a "Tied Election Chart" that catalogues many of these elections. *See* https://publicinterestlegal.org/tied-elections/.

[5] This is no mere hypothetical concern. The same law firm representing Plaintiffs here convinced the Nevada Supreme Court to accept mail ballots received after Election Day where the postmark could not be determined or was missing. *See RNC v. Aguilar*, 2024 WL 4601602, at *2-4 (Nev. Oct. 28, 2024). This is a recipe for fraud.

All of these interests have been recognized as powerful and "more than enough to uphold [the State's] reasonable ballot-receipt restriction" and "justify the deadline." *New Ga. Project*, 976 F.3d at 1282; *accord Common Cause Ind.*, 977 F.3d at 664-66; *All. for Retired Ams.*, 240 A.3d at 52-55. Moreover, the State is not required to provide any "elaborate, empirical verification of the weightiness of [its] asserted justifications."[6] *Timmons*, 520 U.S. at 364. The fact that Kansas, so far as we know, has been lucky enough to avoid systemic fraud from mail ballots does not mean it is constrained from adopting this type of prophylactic measure. *See id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.")).

In short, the burden on voters from an Election Day ballot receipt deadline is, as a matter of law, minimal to non-existent. Whatever standard the Court invokes, the State's strong interests in the statute easily outweigh any such burden. There is no conceivable equal protection violation here, and the Court should not invite a serious separation of powers dispute by entertaining Plaintiffs' entirely non-meritorious legal theory.

C. – Plaintiffs' Due Process Cause of Action Has No Merit

Plaintiffs next claim that S.B. 4 violates their due process rights under Section 18 of the Kansas Constitution's Bill of Rights. It is difficult to see how. Due process rights are implicated only when there has been a deprivation of life, liberty, or property. *Interest of A.S.*, 555 P.3d 732, 739 (Kan. 2024). "In the absence of a protected property or liberty interest, there can be no due process violation." *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 169 (Kan. 2009).

[6] The Kansas legislature received testimony on these interests during its consideration of S.B. 4. *See* Written Testimony of the Public Interest Legal Foundation, Opportunity Solutions Project, and Honest Elections Project (available at https://www.kslegislature.gov/li/b2025_26/measures/SB4/testimony); *see also* Oral Testimony at https://www.youtube.com/live/dOAuHaYvxik?si=akvLMq038V8c1f6R.

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); *LWV v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (same). Plaintiffs invoke *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F.Supp.3d 1354 (D. Ariz. 1990), Am. Pet. ¶ 110, but the Fifth Circuit has explained in detail why that decision was wrongly decided and why no appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

In *LWV*, the Kansas Supreme Court did remand the plaintiffs' due process challenge to the State's signature verification requirements for advance mail ballots for the purpose of determining if voters are provided "reasonable notice" of their signature mismatch and "an opportunity to be heard at a meaningful time and in a meaningful manner" in order to contest the preliminary mismatch assessment. 549 P.3d at 383. But the 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).[7]

In any event, a voting procedure like signature verification of advance ballots – which, by its very nature, entails an *individualized examination* of the voter's signature on the ballot envelope and requires that the voter be given the opportunity to cure any defect – is fundamentally different than a neutrally applied, across-the-board deadline for the receipt of all mail ballots. There are no

[7] Plaintiffs reference a comment by Justice Rosen – *in his dissent* – about the presence of a liberty interest. Am. Pet. ¶ 113. The majority, however, never said anything of the sort. And as Chief Justice John Roberts recently quipped with tongue firmly in cheek, "A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 230 (2023).

individualized determinations with the latter. To suggest there are due process obligations inherent in such a law is illogical.

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

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

Id. at 1288-89 (cleaned up).

Kansas' Election Day ballot receipt deadline is a law of "general applicability which affects all citizens 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. Nor is any individualized determination due. *Id.* The only "process" to which Kansas voters are entitled "before their late-arriving ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case." *Id.*

Plus, even if procedural due process were relevant, where is the process deficiency? Not only is the electorate fully apprised of the receipt deadline when submitting mail ballots, but voters are afforded myriad other reasonable options for exercising the franchise. *See* Section III.B.2. As the Tenth Circuit observed, deadlines in the election process "will invariably burden some voters . . . for whom the earlier time is inconvenient," but these burdens are assessed in light of "a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018); *see also Burdick*, 504 U.S. at 438 ("Reasonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth."). In the context of mail-in voting, once the State has provided reasonable notice of the ballot deadline, explanation of the procedures to cast a valid ballot by mail, and a fair opportunity to comply on or before Election Day, due process is satisfied.

Two final points: Plaintiffs contend the Election Day ballot receipt deadline "disenfranchi[ses]" voters. Am. Pet. ¶ 114. That makes no sense. The law simply imposes a due date for the receipt of ballots in the event a voter opts to vote by mail. Plaintiffs also complain that the elimination of the grace period "is neither a reliable nor a fair way to administer voting by mail." *Id.* Putting aside the fact that 33 other states employ the same rule (as did Kansas itself, for many decades, until 2017, without any lawsuits attacking the practice), Plaintiffs are asserting a *policy-grounded* argument. Whether a grace period is beneficial or problematic (or a combination of the two) is not for the judiciary to decide. It is a legislative judgment, one which our State constitution

in fact explicitly assigns to the discretion of the legislature. Finally, Plaintiffs' expansive theory is virtually unbounded. If they were to prevail, even the current grace period would be inadequate and the State would be a slave to the USPS. The law imposes no such requirement.

D. – Plaintiffs' Ask This Court to Order Relief Outside the Scope of Judicial Power

In addition to the many flaws with Plaintiffs' legal claims detailed above, Plaintiffs also seek an improper remedy. They ask this Court to do more than strike down the challenged law; they further demand that the Court create an entirely new election procedure out of whole cloth – a *seven-day* grace period. In other words, Plaintiffs are asking the Court to *legislate* for them via an injunction that adopts their preferred policy. This is far outside the role of the judiciary. As the Kansas Supreme Court observed, "We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution." *Montoy v. State,* 120 P.3d 306, 310 (Kan. 2005).

E. – Plaintiffs' Right to Vote Claim is Foreclosed by *LWV*

Finally, Plaintiffs assert a violation of the right to vote under the Kansas Constitution. Am. Pet. ¶¶ 119-25. This claim is foreclosed by *LWV*, 549 P.3d at 376-82. Plaintiffs aver that the Kansas Supreme Court incorrectly decided the case, Am. Pet. at 29 n.2, but this Court has no authority to reverse the Kansas Supreme Court's authoritative interpretation of the State Constitution.

IV. – CONCLUSION

For all of the foregoing reasons, Defendants ask the Court to dismiss Plaintiffs' Amended Petition for failure to state a claim upon which relief can be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 18, 2025, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list.

By: */s/ Bradley J. Schlozman*