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CLERK OF THE SEDGWICK COUNTY DISTRICT COURT
CASE NUMBER: 2022-CV-001370-OT

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

MARK S. GIETZEN, Plaintiff, vs. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and ANGELA CAUDILLO, in her official capacity as Sedgwick County Election Commissioner, Defendants.	Case No: 2022-CV-001370

DEFENDANT SCOTT SCHWAB'S RESPONSE TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendant Scott Schwab, in his official capacity as the Kansas Secretary of State (the "Secretary"), respectfully submits this Response to the *pro se* Plaintiff's "Petition for Control of Ballot Drop-Boxes Within State Law," which the Court appears to have treated as a motion for a temporary injunction and which the Secretary will accordingly do the same.[1] The motion has no merit, and for the reasons specified below, should be promptly denied.

Although the Secretary will file a formal motion to dismiss the case for lack of subject-matter jurisdiction in due course, Plaintiff's Petition can also be *immediately* dismissed – without the Court even having to reach the merits – because Plaintiff has no standing to pursue his claim.

[1] To be clear, the Secretary does *not* believe that Plaintiff's Petition is properly characterized as a motion for a temporary injunction. Nowhere does the Petition reference any emergency relief, nor does he cite any of the standards applicable to such motions. While *pro se* pleadings are liberally construed, and the substance of such pleadings will control over their label, *pro se* litigants still must follow the same rules of procedure and evidence as represented parties. *Joritz v. Univ. of Kan.*, 61 Kan. App.2d 482,498 505 P.3d 775 (2022).

INTRODUCTION

The legal theory for Plaintiff's lawsuit is a mystery. He references a statute passed by the Legislature in 2021, H.B. 2183, § 2 (codified at K.S.A. 25-2437), which: (i) requires that any person transmitting or delivering another voter's advance ballot to a county election officer or polling place must sign the envelope containing the sealed ballot and attest to certain information intended to ensure the security of the ballot and integrity of the electoral process; and (ii) restricts any person from transmitting or delivering more than ten advance ballots on behalf of other voters during a particular election cycle. K.S.A. 25-2437(a), (c). Taking issue with Sedgwick County's decision to allow voters to return their cast advance ballots to a series of fourteen drop-boxes throughout the county, he alleges that both the Secretary and Ms. Caudillo have failed to "establish a meaningful method of complying" with the ballot collection prohibition in K.S.A. 25-2437(c). (Pet. ¶ 4). More specifically, Plaintiff argues, '[i]nstead of establishing a system of control," the Secretary and Ms. Caudillo "over-stepped their authority, and under-exercised their responsibility, by illegally substituting and introducing into Sedgwick County, an uncontrolled, unproven, and unverifiable 'honor system' for those using ballot drop-boxes in Sedgwick County." (Pet. ¶ 5). Plaintiff contends that the drop-boxes do not adequately protect "election integrity" because ballot harvesters could violate the prohibition on collecting/returning more than ten advance ballots in a single election cycle simply by inserting a fictitious name on the envelope. (Pet. ¶ 10).

The obstacles to Plaintiff obtaining relief are insurmountable. First, he lacks standing to challenge the efficacy of the advance voting process in general and/or the specific use of drop-boxes. Plaintiff does not, and cannot, allege that he *personally* has been aggrieved by Sedgwick

County's use of drop-boxes, and he has no legal right to pursue such a challenge on behalf of other individuals (none of whom could establish an injury in any event). As a result, this Court lacks jurisdiction over Plaintiff's claim.

Second, even if he could overcome this jurisdictional bar, he fails to state a claim upon which relief can be granted. He does not tether his allegations to *any* constitutional or statutory foundation. Nor does any conceivable foundation exist. There is thus *zero* likelihood of success in his motion.

Third, not only is Election Day imminent, but the public has already been using the drop-boxes for nearly two weeks. Any possible relief, therefore, would be both unfeasible and wholly improper. Courts regularly turn aside these kind of last-minute requests for judicial intervention in election disputes without even reaching the merits. And there is good reason for exercising such judicial restraint: dictating eleventh-hour alterations to the procedures and/or rules in place for an election unsettles the electorate's expectations, undermines the public's confidence in the fairness and integrity of the electoral process, impedes the ability of election administrators to carry out their responsibilities, and causes the Court to involve itself in matters that are properly entrusted to a coordinate branch.

ARGUMENT

I. Plaintiff Lacks Standing to Pursue His Claim

As a threshold matter, the Court lacks subject-matter jurisdiction to hear this case because Plaintiff lacks standing to challenge the use of ballot boxes in this election. He has suffered no cognizable injury, rests his allegations on pure speculation, and has no authority to assert claims on behalf of any third-parties.

Although the Kansas Constitution does not contain "case or controversy" language in its description of the scope of judicial power, Kansas courts have adopted such a limitation pursuant to the separation of powers doctrine inherent in the State's constitutional framework. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008). The requirement that parties must have standing before they can pursue relief in court is one component of this justiciability mandate, and it is deeply rooted in the State Constitution's prohibition against advisory opinions. *Id.* at 897–98. The fundamental principles at play are that "controversies provide factual context, arguments are sharpened by adversarial positions, and judgments resolve disputes rather than provide mere legal advice." *Id.* at 897. In the absence of such a genuine and concrete dispute, any judgment by the Court would be little more than an advisory opinion on an abstract question, which is "inoperative and nugatory" and which would "remain a dead letter . . . without any operation upon the rights of the parties." *Id.* (internal quotations omitted).

The doctrine of standing focuses on a party's right to assert a legal cause of action or to seek judicial enforcement of some legal duty or right. *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015). "While standing is a requirement for case-or-controversy, i.e., justiciability, it is also a component of subject matter jurisdiction." *Id.* (quoting *Gannon v. State*, 298 Kan. 1107, 1122, 319 P.3d 1196 (2014). And a court must be vested with subject matter jurisdiction in order for it to properly act in a case. *State v. Bickford*, 234 Kan. 507, 508-09, 672 P.2d 607 (1983).

Whether jurisdiction exists is a question of law. *Wichita Eagle & Beacon Publ'g Co., Inc. v. Simmons*, 274 Kan. 194, 205, 50 P.3d 66 (2002). "If a trial court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is

required as a matter of law to dismiss it." *Chelf v. State*, 46 Kan. App.2d 522, 529, 263 P.3d 852 (2011).

To establish standing under Kansas law, a party must demonstrate that: (i) it suffered a "cognizable injury;" and (ii) there is a causal connection between the injury and the challenged conduct. *Gannon*, 298 Kan. at 1123. In applying these two requirements, the Kansas Supreme Court frequently refers to the federal judiciary's standing elements. *Id.* In other words, the party invoking a court's jurisdiction "must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." *Id.*

A. Plaintiff's Petition asserts nothing more than a "generalized grievance"

A "cognizable injury," also known as an "injury in fact," demands that a plaintiff show that the injury is "particularized, *i.e.*, it must affect the plaintiff in a 'personal and individual way.'" *Gannon*, 298 Kan. at 1123 (citation omitted). Such an injury "cannot be a 'generalized grievance' and must be more than 'merely a general interest common to all members of the public.'" *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992)).

Plaintiff seeks to challenge Sedgwick County's use of ballot drop-boxes on the theory that such boxes are insufficient to ensure compliance with the State's prohibition against ballot harvesting in K.S.A. 25-2437(c). He alleges that some unspecified additional security measures should be required to guard against an individual returning more than ten ballots on behalf of other voters during an election cycle. (Pet. at ¶¶ 4-6, 10). Plaintiff further argues that the Court should effectively act as an election special master and either bless these unspecified additional security measures or forbid drop-boxes altogether.

Plaintiff's fatal deficiency is that he alleges no facts showing how the use of drop-boxes affects him *personally* and *individually*. *See Gannon*, 298 Kan. at 1123. Instead, he simply argues that current enforcement measures for the State's ballot harvesting restrictions (what he characterizes as the "honor system") might allow unidentified third-parties to return more ballots than state law allows. (Pet. ¶¶ 6, 10). This allegation is a quintessential generalized grievance (i.e., an injury that, in his view, might be suffered by Kansans generally absent intervention by the Court). It is in no way particularized to the Plaintiff and the impact – if any – on Plaintiff is "plainly undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575 (citing *United States v. Richardson*, 418 U.S. 166, 176-77 (1974)). The law is well settled that a plaintiff has no standing to seek redress for a generalized grievance that "no more directly and tangibly benefits him than it does the public at large." *Id.* at 573-74; *accord Jarvis v. Wood*, No. 117,790, 2018 WL 5852581, at *6 (Kan. Ct. App. Nov. 9, 2018) ("[G]enerally, Kansas appellate courts have found a lack of standing where the complaining party is affected by the offending act or failure to act no more than any other taxpayer is affected.").

B. Plaintiff may not assert standing on behalf of third-parties

To the extent Plaintiff is attempting to pursue relief on behalf of other parties not before the Court – and the Secretary is hard-pressed to identify a cognizable injury that *any* third-party might be experiencing from Sedgwick County's use of ballot drop-boxes – Plaintiff has no standing to bring those claims either. Typically, a plaintiff may not assert the rights of others. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The rationale for this rule is that only "the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Id*; *see also State v.*

Neighbors, 21 Kan. App.2d 824, 828-29, 908 P.2d 649 (1995) ("The general rule of standing is that '[u]nconstitutional governmental action can only be challenged by a person directly affected and such a challenge cannot be made by invoking the rights of others.'") (quoting *State v. Thompson*, 221 Kan. 165, Syl. ¶ 4, 558 P.2d 1079 (1976)).

C. Plaintiff's alleged injuries are too speculative to trigger legal standing

Even if Plaintiff could identify an injury capable of satisfying standing, he would still lack standing because his asserted concern – that third-parties might return more than ten ballots to drop-boxes using fictitious names – is entirely speculative and cannot support his request for injunctive relief. "Mere apprehension or possibility of wrong or injury ordinarily does not establish a reasonable probability of future injury that will justify injunctive relief." *Sampel v. Balbernie*, 20 Kan. App.2d 527, 531, 889 P.2d 804 (1995). "To obtain injunctive relief, it must *clearly* appear that some act has been done, or is threatened, which will produce irreparable injury." *Id.* (emphasis added).

K.S.A. 25-2437(c) took effect on July 1, 2021, meaning that the upcoming primary is the first statewide election in which the statute has been in place. Plaintiff thus cannot (and makes no effort to) allege sufficient facts showing that unidentified third-parties have previously created fictitious names to circumvent the ten-ballot cap on returned ballots or that third-parties would do so in the future. Moreover, the Legislature established criminal penalties to dissuade third-parties from violating the statute. *See* K.S.A. 25-2411(d) (writing false name on ballot collector line of advance ballot is "election perjury," a level nine nonperson felony punishable by a prison sentence of 5-18 months); K.S.A. 25-2437(d)(2) (returning more than ten advance ballots of other voters in a single election cycle is a Class B misdemeanor, punishable by up to six months

in prison). Plaintiff's Petition, therefore, contains little more than his own "mere apprehension" that unidentified third-parties will violate multiple criminal laws by making up fictitious names and falsely swearing to a statement. That does not suffice for legal standing and, as a result, subject-matter jurisdiction is absent.

II. Plaintiff is Not Entitled to Any Injunctive Relief

In light of its lack of subject-matter jurisdiction as a result of Plaintiff's absence of legal standing, the Court's most prudent course of action is to simply dismiss the case without looking to the merits of Plaintiff's claims or the relief he seeks.

A. Legal Standard

A preliminary 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). A request for a temporary restraining order, meanwhile, carries even more "drastic consequences" since it occurs so early in the litigation. *Unified Sch. Dist. No. 503 v. McKinne*y, 236 Kan. 224, 227, 689 P.2d 860 (1984). In order to receive temporary injunctive relief, five separate factors must be established: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant lacks an adequate legal remedy, such as damages; (4) the movant's threatened injury outweighs the injury that the defendant will suffer under the injunction; and (5) the injunction will not be adverse to the public interest. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). The movant bears the heavy burden of proof in demonstrating the presence of each of these factors. *Schuck v. Rural Tel. Serv. Co., Inc.*, 286 Kan. 19, 24, 180 P.3d 571 (2008).

To constitute irreparable harm, the movant's injury must be "certain, great, actual, and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation omitted). "Irreparable harm is not harm that is merely serious or substantial." *Id.* Rather, "the party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (emphasis in original) (citation omitted). Only in the face of compelling equities with a demonstrable urgency can a litigant challenging a statute passed through the democratic process obtain a temporary injunction.

B. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits

Plaintiff here has not come close to establishing a likelihood of success on the merits. It is not at all clear what legal theory, if any, Plaintiff is even asserting as the predicate for his suit. His Petition articulates no cause of action, cites no legal duty owed by Defendants (other than some amorphous obligation to "establish[] a system of control" in the context of advance ballots, Pet. ¶ 5, which is unmoored from any statutory or constitutional text), and asks the Court to take on a policymaker role by implementing a "fix" to a statute that Plaintiff personally deems to be ineffective. The Court has no warrant to grant Plaintiff the relief he seeks.

Furthermore, the Secretary has fully complied with all of his statutory obligations under the ballot harvesting statute. That statute restricts individuals from returning ballots on behalf of more than ten other voters in a single election. K.S.A. 25-2437(c). The Legislature enforces that prohibition by requiring any person returning ballots for others to "submit[] a written statement accompanying the ballot" that includes a "sworn statement" that he/she has not "transmitted or delivered more than 10 advance voting ballots on behalf of other persons during the election[.]"

K.S.A. 25-2437(a)(1). The statute directs the Secretary to prescribe the form upon which the statement would be made. *Id.* Nothing more. And the Secretary has done so. (Pet., ¶ 7).

While Plaintiff may believe that the statutorily prescribed mechanism for policing ballot harvesting is insufficient, this is not the proper forum to register his complaint. Plaintiff's complaint should be directed at the Legislature, not at the Secretary. *See Gannon*, 298 Kan. at 1119 ("[T]he legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws[.]").

C. The Purcell Doctrine Counsels Against Granting Relief on the Eve of Election

Moreover, just as the U.S. Supreme Court has consistently directed federal district courts to exercise significant caution and restraint before ordering any changes to a state's election procedures in the run-up to an election, the same principles are applicable here. Such "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As the election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *id.* at 5-6 (vacating trial court's stay of injunction against enforcement of voter ID issued less than five weeks before election). Requests for any sort of injunctive relief that would change election procedures in close proximity to an election are met with extreme skepticism and nearly always rejected. *See Veasey v. Perry*, 769 F.3d 890, 894-95 (5th Cir. 2014) (cataloguing Supreme Court cases).

Justice Kavanaugh, in a recent concurrence denying an application to vacate a stay of a district court's attempt to change a state's election procedures too close to the election, nicely

described the policy considerations behind courts needing to stay their hand in these late-in-the day disputes. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020):

> The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.
>
> Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.
>
> That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion – and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election. *See Purcell*, 549 U.S., at 4–5; *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality opinion). The principle also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process. For those reasons, among others, this Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate.

To be sure, the U.S. Supreme Court has recognized that *state legislatures* – in light of their express authority to prescribe the "Times, Places, and Manner" of holding federal elections under Article I, Section 4 of the U.S. Constitution – may make last-minute changes to election

procedures. But the *judiciary* must exercise much greater restraint. As one court noted, "Call it what you will – laches, the *Purcell* principle, or common sense – the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

The primary election in Kansas is scheduled for *next Tuesday*, August 2, 2022. County election offices across the State began accepting advance ballots – including through drop-boxes – on July 13, 2022 (which is twenty days before Election Day). *See* K.S.A. 25-1123(a). To take any action with respect to these drop-boxes now, therefore, would be hugely disruptive to the electorate and would throw the electoral process into disarray at the last minute. It would also invite inconsistencies in election administration, yield legitimate claims of unfairness from voters who have not yet had an opportunity to cast and return their ballot, and potentially undermine the public's confidence in the outcome of the election. One of the most critical components to a fair election is that everyone play by the same rules. The relief Plaintiff seeks would accomplish the exact opposite and, accordingly, must be denied.

Respectfully Submitted,

By /s/ Bradley J. Schlozman
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2022, a true and correct copy of the above and foregoing was electronically filed with the Clerk of the District Court by using the eFlex filing system, which will transmit a copy to all counsel of record. A copy was also mailed to the pro se Plaintiff at the following address:

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By /s/ Bradley J. Schlozman