No. 22-125084-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS; LOUD LIGHT; KANSAS APPLESEED CENTER FOR LAW AND JUSTICE; TOPEKA INDEPENDENT LIVING RESOURCE CENTER; CHARLEY CRABTREE; FAYE HUELSMANN; and PATRICIA LEWTER

Plaintiffs-Appellants

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; and KRIS KOBACH, in his official capacity as Kansas Attorney General

Defendants-Appellees

PETITION FOR REVIEW AS A MATTER OF RIGHT OF DEFENDANTS-APPELLEES

Appeal from the Kansas Court of Appeals Opinion
Dated March 17, 2023

Appeal from the District Court of Shawnee County, Kansas
Honorable Teresa Watson, District Judge
District Court Case No. 2021-CV-000299

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I. – PRAYER FOR REVIEW

Defendants Scott Schwab and Kris Kobach petition for review of the Court of Appeals' reversal of the district court's dismissal of Plaintiffs' constitutional challenges to two election integrity statutes: a signature verification requirement ("SVR") in K.S.A. 25-1124(h), and ballot collection restrictions ("BCRs") in K.S.A. 25-2437(c). Because this case represents the first time that a Kansas appellate court has addressed the constitutionality of these laws, Defendants petition as a matter of right under Sup. Ct. R. 8.03(g)(1); K.S.A. 60-2101(b). But even if review were not as a matter of right, this Court's review would still be warranted because the case presents issues of first impression on matters of extremely significant public importance. *See* Sup. Ct. R. 8.03(b)(6)(E).

In an unprecedented departure from both federal law and the law of virtually every other state, the Court of Appeals held that any law burdening the right to vote – no matter how slight – must be subjected to strict scrutiny. In the process, the Court categorically rejected all notions of balancing and judicial deference in evaluating such provisions. If allowed to stand, this decision would severely jeopardize the survival of nearly all statutes and regulations in the State that govern the mechanics of the election process and that are, at their core, designed to safeguard the security of the ballot, deter fraud, facilitate efficient election administration, and enhance the public's confidence in elections.

The Court of Appeals reached this decision by treating *Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), as some sort of talisman that eviscerated 150 years of jurisprudence regarding the deference owed to the legislature on election-related matters. Significant as it was, *Hodes* radiates no such magical powers. Perhaps

recognizing the extraordinary breadth of its holding, the Court of Appeals then invoked an amorphous "regulation vs. restriction" distinction that is as inexplicable as it is untethered from any foundation in case law or statutory text. Op. at 28. But the only thing the Court has done is to distort the history of our State's founding, misinterpret the jurisprudence in this space, arrogate to itself the role of a supra-election administrator, and put the judiciary on a collision course with traditional separation of powers in the regulation of elections.

Equally problematic, the Court of Appeals framed the legal issues in Plaintiffs' constitutional challenges at the highest level of generality. While no one disputes that the right to vote is fundamental, there is no fundamental right to *vote by mail*. Kansas was an early adopter of no-excuse advance voting by mail as a convenience to voters, *see* 1995 Kan. Sess. Laws, ch. 192, § 17, but the legislature could just as easily repeal this option. In fact, nearly one-third of the states do not allow no-excuse absentee voting.[1] Moreover, states must be afforded a high degree of discretion in structuring their elections and adopting safeguards to ensure that they are administered in an honest, fair, and orderly manner, lest chaos reign and the public's confidence in the democratic process diminish.

As for Plaintiffs' claims that turn on federal law (i.e., where this Court has held the Kansas Constitution to be co-extensive with its federal counterpart), the Court of Appeals' decision was similarly problematic. The Court of Appeals erred at the outset by refusing to apply *Anderson-Burdick* balancing to such causes of action, despite the U.S. Supreme Court utilizing that test time and again and repeatedly recognizing the need to afford state

[1] https://www.ncsl.org/elections-and-campaigns/table-1-states-with-no-excuse-absentee-voting (last visited Apr. 4, 2023)

officials substantial latitude in administering their elections. Instead, the Court of Appeals effectively mixed the standards, imposing a strict scrutiny gloss on case law that inherently calls for balancing and deference. This misinterpretation of the law resulted in flawed analyses of Plaintiffs' due process, equal protection, and free speech claims. Had the proper standard been employed, the dismissal of those claims should have been upheld.

The Court of Appeals' opinion will legitimately cause many perfectly rational voters to question the fairness and integrity of our election process, and the State will now be largely powerless to assuage those concerns. While the law has heretofore been clear that a State's political processes need not sustain some level of damage before the legislature can take prophylactic measures to avoid such harm, the decision below radically alters the landscape so that no election-integrity provision can pass judicial muster unless it is the least restrictive possible measure. That has never been the law, it is dangerous, and we urge this Court to review and reverse the Court of Appeals' opinion.

II. – DATE OF COURT OF APPEALS DECISION

The opinion of the Court of Appeals was dated March 17, 2023.

III. – STATEMENT OF ISSUES

1. The Court of Appeals erred by applying a "strict scrutiny" standard of review to Plaintiffs' constitutional challenges to the SVR and BCR statutes.

2. The Court of Appeals erred by finding that the SVRs in K.S.A. 25-1124(h) impose a severe burden on the right to vote.

3. The Court of Appeals erred by finding that BCRs in K.S.A. 25-2437(c) impose a severe burden on the right to vote.

4. The Court of Appeals erred by holding that there is a state-created liberty interest in voting by mail, thus triggering procedural due process rights.

5. The Court of Appeals erred by holding that Plaintiffs stated a valid equal protection claim against the SVRs.

6. The Court of Appeals erred by (apparently) holding that the ballot harvesting restrictions in K.S.A. 25-2437(c) violate ballot collectors' free speech rights.[2]

IV. – STATEMENT OF FACTS

Plaintiffs have filed *facial* constitutional challenges to recent legislative enactments (i) requiring that a voter's signature on an advance voting ballot match the signature on file in the county registration office (with exceptions for disabled persons who cannot sign or cannot sign consistently with the signature on file), and (ii) restricting individuals to delivering no more than ten cast ballots of other voters to election officials during any election cycle. Except as otherwise stated below, Defendants incorporate any additional facts from the Court of Appeals' opinion pursuant to Sup. Ct. R. 8.03(b)(6)(C).

V. – ARGUMENT

A. – The Court of Appeals erred by applying a strict scrutiny standard of review to Plaintiffs' constitutional challenges to the SVR and BCR statutes.

In determining the proper standard of review for evaluating constitutional attacks

[2] The Court also may wish to (i) clarify the scope of its jurisdictional authority over non-final judgments of constitutional claims under K.S.A. 60-2102(a)(3), which Defendants addressed on pages 3-8 of their Appellees' Brief; and (ii) assess whether the district court's dismissal of Plaintiffs' claims pursuant to K.S.A. 60-212(b)(6) mooted their motion for temporary injunction filed on the eve of dismissal. Defendants discussed this jurisdictional issue on pages 8-11 of their Brief, but the Court of Appeals gave it no analysis.

on statutes governing the mechanics of voting and elections, the Court of Appeals rejected the deferential balancing standard employed by both the federal judiciary, *see Anderson v. Celebrezze*, 460 U.S. 780 (1982); *Burdick v. Takushi*, 504 U.S. 428 (1992), as well as virtually every other state appellate court that has specifically ruled on time/place/manner challenges under their own state constitutions.[3] Op. at 27-28. The Court of Appeals held that voting is a fundamental right and, under *Hodes*, strict scrutiny must be applied any time a fundamental right is implicated. *Id.* at 25, 27-28. This analysis calls on *Hodes* to bear far more weight than it can withstand.

This Court invoked strict scrutiny for the first time under the Kansas Constitution in *Hodes* after probing the meaning of "inalienable natural rights" in Section 1 of our

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[3] *See, e.g., Kohlhaas v. State*, 518 P.3d 1095, 1123 (Alaska 2022); *Edelstein v. City and Cnty. of San Francisco*, 56 P.3d 1029, 1038-41 (Cal. 2002); *Lorenz v. State*, 928 P.2d 1274, 1277-79 (Colo. 1996); *League of Women Voters of Del., Inc. v. Dep't of Elections*, 250 A.3d 922, 936 (Del. Ch. 2020); *Libertarian Party of Fla. v. Smith*, 687 So.2d 1292, 1293-96 (Fla. 1996); *Rhoden v. Athens-Clarke County Bd. of Elections*, 850 S.E.2d 141, 150-151 (Ga. 2020); *Hustace v. Doi*, 588 P.2d 915, 919-922 (Hawaii 1978); *DSCC v. Pate*, 950 N.W.2d 1, 6-9 (Iowa 2020); *All. for Retired Ams, v. Sec'y of State*, 240 A.3d 45, 51-54 (Me. 2020); *Burruss v. Bd. of Cnty. Comm'rs*, 46 A.3d 1182, 1194-1204 (Md. 2012); *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 333-35 (Mass. 2018); *In re Request for Advisory Op. Regarding Constit. of 2005 PA 71*, 740 N.W.2d 444, 459-63 (Mich. 2007); *DSCC v. Simon*, 950 N.W.2d 280, 291-94 (Minn. 2020); *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006); *Pick v. Nelson*, 528 N.W.2d 309, 316-18 (Neb. 1995); *Libertarian Party N.H. v. State*, 910 A.2d 1276, 1280-81 (N.H. 2006); *Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections*, 141 A.3d 335, 339-343 (N.J. Super. Ct. App. Div. 2016); *Crum v. Duran*, 390 P.3d 971, 972-77 (N.M. 2017); *Moody v. N.Y. State Bd. of Elections*, 86 N.Y.S.3d 25, 27 (N.Y. App. Div. 2018); *Libertarian Party of N.C. v. State*, 707 S.E.2d 199, 204-07 (N.C. 2011); *Libertarian Party of Ohio v. Husted*, 97 N.E.3d 1083, 1098-1108 (Ohio Ct. App. 2017); *Gentges v. State Election Bd.*, 419 P.3d 224, 228-231 (Okla. 2018); *Banfield v. Cortes*, 110 A.3d 155, 175-78 (Pa. 2015); *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 919-22 (Tex. 2020); *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 270-81 (Wis. 2014).

Constitution's Bill of Rights. Following a deep dive into the history of the State's founding, this Court concluded that the "natural rights" encompassed in Section 1 include the "ability to control one's body, to assert bodily integrity, and to exercise self-determination." *Hodes*, 309 Kan. at 492. The Court then held that the right of personal autonomy (including the right to undergo an abortion) is a fundamental right for which any infringement must survive strict judicial scrutiny. *Id.* at 493.

The text of our Constitution, however, dictates a much different result for reviewing challenges to statutes and regulations governing election administration. To begin with, the Constitution endows the legislature with exclusive responsibility for determining how elections shall be conducted. Kan. Const., Art. 4, § 1 ("All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide."). The Constitution further *explicitly directs* the legislature to adopt measures of the type at issue here designed to ensure that only eligible voters can exercise the franchise. *Id.* at Art. 5, § 4 ("The legislature shall provide by law for proper proofs of the right of suffrage."). Considering that all these provisions were adopted at the same time during the Wyandotte Convention in 1859, it makes no sense to argue that Section 1 of the Bill of Rights was intended to *narrow* the powers conferred by Art. 4, § 1 or Art. 5, § 4. After all, the Constitution was adopted on the heels of the Kansas-Nebraska Act of 1854, which precipitated the Bleeding Kansas era in which thousands of Missouri citizens flooded our State in an effort to influence the "popular sovereignty" elections and extend slavery to this region. Concerns about voter fraud and ineligible voters were at the forefront of framers' minds. How the Court of Appeals can interpret this history as *supporting* its position that election-integrity

provisions in Kansas must be exposed to even greater scrutiny than in the federal judiciary or the courts of any other state is a mystery. The panel reads its history exactly backwards.

Moreover, the Court of Appeals mischaracterized the legal issue by describing it at the highest level of generality. No one disputes that the right to vote is fundamental or that legally cast votes must be counted. But there is no fundamental right (let alone a natural right) to *vote absentee or by mail*. Were it otherwise, Art. 4, § 1 would be a dead letter. In fact, it was not until 1936 that this Court even recognized that the Constitution *permitted* absentee voting. *Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177, 182 (1936). It took five more decades for the Court to uphold the constitutionality of voting by mail. *Sawyer v. Chapman*, 240 Kan. 409, 729 P.2d 1220 (1986).

In approving those electoral processes, the Supreme Court added that the legislature had full authority to mandate that voters provide proof of their right to vote when requesting a ballot, and it applied a deferential standard to its review. *See Lemons*, 63 P.2d at 185-86 (invoking reasonableness standard and observing that "the fact that voters under some circumstances may be able to vote while others cannot, does not make the statutes invalid"); *id.* at 185 (legislature has broad reserved powers over the manner or form of holding elections, which include requiring individuals guaranteed the right to vote the obligation to execute an affidavit ascribing to their eligibility before exercising that right); *Sawyer*, 240 Kan. at 413 (explaining that how one's right to vote in "secrecy is preserved is a matter for legislative determination," including the requirement that voters must sign their ballot before returning it to the county election office). This Court also "conceded that voting by mail increases the potential for compromise of secrecy and opportunity for

fraud," *Sawyer*, 240 Kan. at 414, and held that striking the right balance and developing procedures for addressing the same are matters properly left to the legislature. *Id.* at 415.

The Court of Appeals sought to draw a contrast between voting regulations and restrictions, Op. at 28, but there is no logical basis for this distinction. In fact, none of this Court's election-related opinions offer Plaintiffs refuge. *See State v. Butts*, 31 Kan. 537, 2 P. 618, 620-21 (1884) ("If the legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal, and unless this power is abused the courts may not interfere."); *Taylor v. Bleakley*, 55 Kan. 1, 39 P. 1045, 1050 (1895) ("The legislature, within the terms of the constitution, may adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary to prevent intimidation, bribery, and fraud. . . ."). Where this Court has discussed improper "additional qualifications" being imposed on voters, it has targeted *outright disenfranchisement*. *See, e.g.*, *State ex rel. Smith v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928) (invalidating statute that required voters to declare party affiliation before voting in general election); *State ex rel. Brewster v. Doane*, 98 Kan. 435, 158 P. 38, 39-40 (1916) (striking down statute that prohibited voters residing in certain cities within a county from voting for county officers). One could imagine, of course, voting restrictions short of disenfranchisement that cross a constitutional line, but insisting that a voter's signature on an advance ballot match the signature on file with the county election office hardly qualifies. To suggest otherwise makes a mockery of our Constitution.

Moreover, the federal judiciary's rationale for a sliding scale that affords deference to states in election administration is not, as the Court of Appeals intimated, merely

anchored in principles of comity. Op. at 27-28. Rather, it reflects a recognition that states must be provided great discretion in structuring elections and adopting safeguards to ensure that they are administered in an honest, fair, and orderly manner, lest chaos reign and public confidence in the democratic process diminish. After all, every election-related provision "inevitably affects – at least to some degree – the individual's right to vote." *Burdick*, 504 U.S. 433. But to "subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* That is why, as noted in footnote 3, virtually every state appellate court has adopted the same standard in reviewing election-related challenges under their own constitutions.

Automatically exposing all election integrity statutes to strict scrutiny would invite endless litigation and grind our election framework to a halt. Worse still, if – as Plaintiffs here propose and the Court of Appeals seemed to embrace – our legislature can impose fraud prevention measures only when there is proof that Kansas itself has experienced some unspecified level of fraud, then the legislature will always be acting after-the-fact and will be powerless to avoid potential future harms before they occur in our voting processes. That is a truly radical proposition. As the U.S. Supreme Court recently underscored, "[e]lection fraud has had serious consequences" throughout the country, and "[f]raud is a real risk that accompanies mail-in voting even if [Kansas has] had the good fortune to avoid it." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021); *accord Sawyer*, 240 Kan. at 414-15.

B. – The Court of Appeals erred by finding that the SVRs in K.S.A. 25-1124(h) impose a severe burden on the right to vote.

The Court of Appeals also erred by finding that the SVR rules infringe on the right to vote. Op. at 28-32. The Court took the legislature to task for not mandating, *in the statute itself*, standards for determining what constitutes a signature mismatch, training of election officials, or cure opportunities for voters whose signatures are deemed to not match with the signature on file in the election office. This argument crumbles at the touch.

First, K.S.A. 25-1124(b), *which was adopted in 2019*, explicitly dictates that county election offices contact voters submitting an advance ballot with a signature mismatch and allow the voter an opportunity to correct the deficiency at any time before the final county canvas. The new 2021 statute, K.S.A. 25-1124(h), simply clarifies that ballots containing a mismatched signature that are not cured by the time of the canvas will not be counted, and it also carves out exceptions for voters with disabilities who cannot sign or cannot sign consistently with the signature on file.

Second, the law has never required that level of detail in legislative enactments upon pain of total invalidation. Under the Court of Appeals' theory, administrative regulations would be obsolete. In fact, the Secretary adopted comprehensive regulations in May 2022 that, *inter alia*, fleshed out standards for assessing whether a signature is a match, required special training for election officials performing signature mismatch, and further expanded voters' cure rights. *See* K.A.R. 7-36-9. These regulations have the force and effect of law, K.S.A. 77-425, they are presumed to be valid, *Pemco, Inc. v. Kan. Dep't of Rev.*, 258 Kan. 717, 720, 907 P.2d 863 (1995), and they must be upheld as long as they are appropriate,

reasonable, consistent with the underlying statute, and within the agency's authority. *In re City of Wichita*, 277 Kan. 487, 495, 86 P.3d 513 (2004).[4]

Third, given that Plaintiffs initiated a *facial* challenge to this statute, meaning that they can prevail only if "no set of circumstances exists under which the Act would be valid," *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021), it is difficult to discern the utility of any discovery. Ignoring all the cure mechanisms, exceptions, and other measures designed to minimize the rejection of any ballots due to signature mismatch, the Court of Appeals found the statute infirm because Plaintiffs claim that it is inevitable properly cast ballots will be rejected. Op. at 21. This cannot suffice in a *facial* attack. Plaintiffs' position is that, absent a guarantee that all signatures can be authenticated with the precision of a forensic examiner, there can be no signature review whatsoever. The implications of such a standard are frightening. And Plaintiffs' Petition does not even allege that a single ballot has heretofore been improperly rejected in Kansas due to an erroneous signature mismatch.

This law does not infringe anyone's right to vote; it protects it. Without it, there is almost no way to safeguard against individuals casting advance/absentee ballots on behalf of others. Fraudulent votes dilute the value of legitimately cast votes, and this statute is

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[4] The Secretary published a notice of this regulation on June 2, 2022 in the Kansas Register, which also invited the public to submit written comments and/or attend a public hearing on Aug. 5, 2022. *See* 41 Kan. Reg. at 1059-61. No Plaintiff filed comments or attended the hearing. The Court's refusal to consider this regulation lacks merit. Plaintiffs commenced this lawsuit *the day after* the legislature passed the law, which was a month before the law even took effect. S. Sub. for H.B. 2183, § 11. Despite no major election on the horizon, the Secretary promptly began developing training and crafting a regulation to ensure effective implementation prior to the 2022 primary election. The regulation took effect on an interim basis on May 26, 2022, and became effective in final form on Sept. 23, 2022. If anything, the Court should have held that the regulation *mooted* Plaintiffs' claim.

essential to stave off such fraud. Evaluated under the proper standard, Plaintiffs' attack on this statute was properly dismissed.

C. – The Court of Appeals erred by finding that the BCRs in K.S.A. 25-2437(c) impose a severe burden on the right to vote.

The Court's holding that BCRs impose a severe burden on the right to vote, Op. at 32-34, is similarly flawed. First, there is no constitutional right to vote by mail. Kansas has allowed this option as a convenience for voters since 1995, but it is not grounded in constitutional soil. In other words, the State has "increase[d] options, not restrictions." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J., concurring). "[T]here will always be other voters for whom, through no fault of the state, getting to the polls is difficult or even impossible. But . . . that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that the state has in fact precluded voters from voting – that the voter has been prohibited from voting by the State." *Id.* (cleaned up) (quoting *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 808 & n.7 (1969)).

Second, the notion that BCRs infringe on the right to vote cannot be squared with case law. Putting a stamp on an advance ballot envelope is hardly so great a hardship as to trigger constitutional protections. And the U.S. Postal Service delivers (and picks up) from every community in the country. If having to travel to the local DMV office to obtain a voter 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 v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008), then surely requiring a voter who chooses to vote absentee rather than in person to mail in an advance ballot does not contravene the Constitution;

accord Simon, 950 N.W.2d at 292-93. And Kansas does not even require *that*; it simply limits the number of ballots that any one person can collect and deliver from other individuals. Moreover, as the U.S. Supreme Court held in repudiating a legal challenge to an Arizona statute that did not allow *any* third-party collection or delivery, the relevant judicial inquiry is on the burden to the electorate "as a whole," not on the burden to a handful of individual voters who might be adversely affected by the statute. *Brnovich*, 141 S. Ct. at 2339; *see also id.* ("[E]ven neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

D. – The Court of Appeals erred by holding that there is a state-created liberty interest in voting by mail.

Citing a series of outlier federal district court cases that upheld constitutional due process attacks on state signature verification statutes because, *in direct contrast to Kansas, the statutes contained no cure opportunities for voters*, the Court of Appeals held that there is a liberty interest in having one's vote counted, thereby triggering procedural due process protections. Op. at 34-38. Putting aside the lack of merit to this claim – *as a matter of law* – in light of the myriad rights of notice and ability (and extensive time) to correct any signature mismatch that Kansas voters enjoy, the Court made the classic error of collapsing the interest protected and the process that protects it.

All three federal appellate courts to address this issue have held that, while the right

to vote may be fundamental, it is not a constitutionally protected *liberty* interest. *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 231 (5th Cir. 2020); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020), *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008). In reaching a contrary decision, the Court of Appeals noted that Kansans have had the right to vote by mail for decades, and voters should have no less due process than drivers whose licenses are in jeopardy. But while those may be important interests and the right to vote is clearly protected elsewhere in our Constitution, these state-created rights do not implicate the liberty component of the Due Process Clause. That is why *Anderson-Burdick* provides the appropriate analytical framework. *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 n.1 (9th Cir. 2020).

E. – The Court of Appeals erred by holding that Plaintiffs had stated a valid equal protection claim against the SVRs.

The Court of Appeals further erred by finding that Plaintiffs had stated a claim on their equal protection challenge to the SVR. To support this holding, the Court cited *Bush v. Gore*, 531 U.S. 98 (2000), and then opined that our "statute contains no standards to determine what constitutes a signature match, and requires no training, ensuring that what constitutes a signature match will vary from county to county and even from one election official to another." Op. at 41-42.

In addition to ignoring K.A.R. 7-36-9, the Court's reasoning upends Kansas' voting process, including our county canvassing procedures. *See* K.S.A. 25-3002(b)(1) (providing canvassers discretion to determine voter intent). The fact that voters in one county are not treated identically to those in another in terms of signature review cannot be sufficient

to establish an equal protection violation. The law requires neither absolute precision nor perfect symmetry among the State's 105 counties. Almost every state's electoral system is administered on a county-by-county basis. To suggest that *de minimis* deviations from one county to another – particularly on matters involving human judgment and discretion – trigger equal protection violations would be unprecedented and revolutionary. Under this theory, *nothing* would be acceptable short of either eliminating signature verification altogether or having a single individual (or machine) conduct all signature review for the entire State. Neither the federal nor the Kansas constitution requires anything so radical.

F. – The Court of Appeals erred by (apparently) holding that the BCRs in K.S.A. 25-2437(c) violate ballot collectors' free speech rights.

The Court of Appeals also erred by (apparently) holding that the BCRs in K.S.A. 25-2437(c) implicate the free speech rights of ballot collectors. The Court's analysis is a mystery. After noting that voted ballots are the speech of the voter, not the ballot collector, the Court held that "regulation of the handling of those ballots is warranted" and affirmed the dismissal of this free speech claim. Op. at 46. Yet the Court elsewhere suggested that the statute restricts the free speech rights of the ballot collectors. *Id.* at 46-47. Whatever the Court meant to do, it is clear that the statute does not prevent any individual from speaking to another person, nor does it impose any content restriction on such speech. The statute thus impacts neither speech nor expressive conduct and should be upheld.

VI. – CONCLUSION

Defendants request that this Court grant their Petition for Review, reverse the Court of Appeals, and affirm the district court's dismissal of Plaintiffs' constitutional challenges.

Respectfully submitted,

/s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I certify that on this 5th day of April 2023, I electronically filed the foregoing document with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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APPENDIX

Opinion of the Kansas Court of Appeals – March 17, 2023

Memorandum & Order of the District Court – April 11, 2022

No. 125,084

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS,
LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.,
and
TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State,
and
KRIS KOBACH, in His Official Capacity as Kansas Attorney General,
Appellees.

SYLLABUS BY THE COURT

1.

An order that involves the Constitution of this state may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(3).

2.

A final decision in any action, except in an action where a direct appeal to the Supreme Court is required by law, may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(4).

3.

Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome."

Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time.

4.

To demonstrate standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable."

5.

An organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action.

6.

The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote.

7.

The Kansas Supreme Court has held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928).

8.

Presuming a state action alleged to infringe a fundamental right is constitutional dilutes the protections established by our Constitution.

9.

The right to vote is a fundamental right protected by the Kansas Constitution. The rule of strict scrutiny applies when a fundamental right is implicated. The rule of strict scrutiny applies here.

10.

Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim.

11.

Under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather, the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed March 17, 2023. Reversed and remanded.

Pedro L. Irigonegaray, *Nicole Revenaugh*, *Jason A. Zavadil*, and *J. Bo Turney*, of Irigonegaray, Turney, & Revenaugh, LLP, of Topeka, for appellants.

Elisabeth C. Frost, *Henry J. Brewster*, *Mollie A. DiBrell*, and *Marisa A. O'Gara*, pro hac vice, of Elias Law Group LLP, of Washington, D.C., for appellants Loud Light, Kansas Appleseed Center for Law and Justice, Topeka Independent Living Resource Center, Charley Crabtree, Patricia Lewter, and Faye Huelsmann.

David Anstaett, pro hac vice, of Perkins Coie LLP, of Madison, Wisconsin, for appellant League of Women Voters of Kansas.

Bradley J. Schlozman and *Scott R. Schillings*, of Hinkle Law Firm LLC, of Wichita, *Brant M. Laue* and *Anthony J. Powell*, solicitors general, and *Kris Kobach*, attorney general, for appellees.

Before WARNER, P.J., GREEN and HILL, JJ.

HILL, J.: The history of the Kansas Territory joining the union of states is filled with grave struggle. In the Kansas Nebraska Act, 33 Cong. Ch. 59, 10 Stat. 277 (1854), Congress called for the residents of the Kansas Territory to decide if their new state would be free or allow the enslavement of people. The residents of the territory decided the question in two ways—by bloodshed and by the ballot. History teaches that the people finally decided that the Territory would join the United States as a free state. With this history of great struggle, it is not surprising that the Constitution of Kansas enshrines provisions for elections. The Constitution made sure voting rights would be preserved in this State's future. Voting was important then and voting is important now.

This case calls into question various election procedures and limits and asks us to examine the Kansas Constitution and decide if some recent enactments of the Legislature comply with its principles. Do these new laws promote or prohibit voting in accordance with the Kansas Constitution?

Citing the historical importance of voting in the Kansas Constitution, some groups and individuals came together and sued the State and some officials seeking to ban the implementation of some voting law changes made in 2021. They were unsuccessful in district court and therefore bring this appeal, asking us to reverse and remand for a trial on the merits of their claims.

During the 2021 session, the Legislature passed Senate Substitute for House Bill 2183, containing various new election laws. Governor Kelly vetoed the bill, but the

Legislature overrode the veto. HB 2183 went into effect on July 1, 2021. L. 2021, ch. 96, § 2, 3, 5.

Relevant to this lawsuit, the bill:

- Created a new election crime called "False representation of an election official";
- mandated that election officials reject any advance ballot in which the signature on the ballot does not match the signature on file for the voter; and
- made it a crime to deliver more than 10 advance ballots to election officials on behalf of other voters. L. 2021, ch. 96, § 2, 3, 5.

The codified, signature matching requirement in the statute reads:

> "(b) The county election officer shall attempt to contact each person who submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file and allow such voter the opportunity to correct the deficiency before the commencement of the final county canvass.
>
> . . . .
>
> "(h) Subject to the provisions of subsection (b), no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted." K.S.A. 2021 Supp. 25-1124.

The ballot collection restriction states: "No person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election." K.S.A. 2021

Supp. 25-2437(c). A violation is a class B misdemeanor. K.S.A. 2021 Supp. 25-2437(d)(2).

THE PLAINTIFFS

All of the Plaintiffs, both groups and individuals, share an intense interest in promoting the electoral process in Kansas. They seek to educate the public and assist voters.

The League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center are nonpartisan, nonprofit organizations that endeavor to educate voters and encourage voting. They all perform voter outreach, education, registration, and assistance activities.

The League members register voters, educate Kansans about the voting process, and assist those voters using advance ballots by collecting and delivering the ballots to election officials. In so doing, the League promotes its message of political and civic participation. League members in prior elections have collected and returned ballots well above the recently established 10-ballot limit.

Loud Light's mission is to engage, educate, and empower individuals from underrepresented populations, in particular young individuals, to become active in the political process. Loud Light focuses on strategies to increase turnout among young voters. Loud Light has encouraged and educated about advance voting. Loud Light also organizes ballot cure programs by contacting voters whose ballots are challenged by election officials and explain to them how to cure their challenged ballots so their votes will be counted and not rejected. Loud Light focuses on voters who election officials have been unable to contact and would have otherwise not known their ballot was rejected.

Kansas Appleseed educates and engages voters in Southwest and Southeast Kansas. In their view, this is where underrepresented populations are not afforded the same access to the ballot as other Kansans. Kansas Appleseed encourages and assists voters in remote and rural areas in returning their advance ballots.

The Center is operated and governed by people with disabilities seeking an opportunity for independent living. Its mission is to advocate for justice, equality, and essential services for people with disabilities. It registers, educates, and supports voters. The Center promotes the use of absentee ballots to increase voter turnout among people with disabilities. It collects and delivers ballots for individuals with disabilities. In 2020, several Center volunteers collected many more than 10 advance ballots from people with disabilities.

A Douglas County resident, Charley Crabtree, is a member of the League. He supplies local nursing homes with applications for advance ballots. He then collects the completed ballots from the nursing home residents who are unable to return the ballots to election officials. In 2020, Crabtree collected more than 75 ballots from nursing home residents.

Faye Huelsmann and Patricia Lewter are residents of Concordia. They are sisters of an institute of religious women of the Roman Catholic Church. They help their sisters who have mobility problems or face other obstacles and are unable to return their advance ballots. They collect and deliver the advance ballots to election officials.

THE DEFENDANTS

The two individuals most responsible for enforcing these election law changes are Defendants—Scott Schwab, the Kansas Secretary of State, and Kris Kobach (formerly

Derek Schmidt), the Kansas Attorney General. They were sued in their official capacities by Plaintiffs.

The lawsuit

In June 2021, the Plaintiffs filed suit challenging the new election laws. They initially moved for a temporary injunction on the ground that the false representation law violated their rights under section 11 of the Kansas Constitution Bill of Rights. Defendants disputed Plaintiffs' interpretation of the false representation statute, contending it would not apply to Plaintiffs' activities. The district court denied the injunction motion and Plaintiffs appealed. A panel of this court dismissed the appeal for lack of standing. *League of Women Voters of Kansas v. Schwab*, 62 Kan. App. 2d 310, 513 P.3d 1222 (2022). Plaintiffs petitioned the Supreme Court for review, which was granted. That review is pending.

In their petition, Plaintiffs also challenged a new restriction that banned nonresidents from mailing advance ballot applications to Kansas voters. Two out-of-state organizations procured an injunction against that restriction in federal court because it violated the First Amendment to the United States Constitution. See *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 892, 894 (D. Kan. 2021). Plaintiffs then voluntarily dismissed that claim from this suit.

Important here is that the Plaintiffs' petition alleged:

- The ballot collection restriction violates the right of freedom of speech and association under sections 3 and 11 of the Kansas Constitution Bill of Rights;
- both the ballot collection restriction and signature matching requirement violate the right to vote under article 5, section 1 of the Kansas Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights;

- the signature matching requirement violates the guarantee of equal protection under article 5, section 1 of the Kansas Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights; and
- the signature matching requirement violates due process under section 18 of the Kansas Constitution Bill of Rights.

Plaintiffs later moved for a partial temporary injunction against the signature matching requirement.

THE DISTRICT COURT'S RULING

The district court granted Defendants' motion to dismiss for failure to state a claim on all Plaintiffs' remaining claims except for Plaintiffs' challenge to the false representation statute, as that issue was pending with the Kansas Supreme Court. The court then denied Plaintiffs' injunction motion as moot. Plaintiffs appeal.

Do we have jurisdiction?

Before the parties submitted briefs in this appeal, Defendants moved to dismiss the case for lack of jurisdiction because the district court had not dismissed all claims. Some procedural history provides a helpful context to understand this argument.

Plaintiffs initially moved to temporarily enjoin enforcement of K.S.A. 25-2438(a)(2)-(3). Those subsections create a new election crime entitled "False representation of an election official." After the district court denied the motion for an injunction, Plaintiffs appealed. A panel of this court later dismissed the appeal for lack of standing. See 62 Kan. App. 2d 310. That standing ruling is now under review by our Supreme Court. Because that contest is pending in the Supreme Court, the district court

concluded it did not have jurisdiction to consider a dismissal of Plaintiffs' claim regarding the false election official crime. Therefore, that claim lies fallow in the district court.

Whether the claims about the new false election official crime are revived awaits the ruling of our highest court. It is this idle claim concerning the new election crime that Defendants use as a reason that we cannot entertain this appeal. In their view, the district court wrongly ruled it had no jurisdiction to rule on their motion to dismiss because the case is now in the Supreme Court. Because it remains in district court, we should not entertain this appeal.

Plaintiffs respond that this court has jurisdiction over the appeal under K.S.A. 2021 Supp. 60-2102(a)(2)—jurisdiction to review an order that refuses an injunction—and K.S.A. 2021 Supp. 60-2102(a)(3)—jurisdiction to review an order involving the Kansas Constitution.

The motions panel of our court denied Defendants' motion to dismiss on present showing. The appeal involves, in part, the denial of a temporary injunction with respect to the signature matching requirement giving rise to an appeal as of right under K.S.A. 2021 Supp. 60-2102(a)(2). The panel ordered the parties to address appellate jurisdiction under K.S.A. 2021 Supp. 60-2102(a)(3) in their briefs.

The right to appeal in a civil case comes from statutes and is not guaranteed by the United States or Kansas Constitutions. Kansas appellate courts have jurisdiction to entertain an appeal in a civil case only if the appeal is taken in the manner prescribed by statutes. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019).

The statute that controls this issue is K.S.A. 2021 Supp. 60-2102(a). That law sets out four categories of cases that may, as a matter of right, be appealed to this court. The categories begin with specific orders and extends to the more general category of all final dispositions, as discussed below.

(1) ***An order that discharges****, vacates, or modifies a provisional remedy.* In the law of injunctions, provisional remedies may be sought under K.S.A. 60-902. Examples of provisional remedies according to caselaw include a preliminary injunction, restraining order, prejudgment receivership, attachment, garnishment, and order of arrest. See *Edwards v. Edwards*, 182 Kan. 737, 747, 324 P.2d 150 (1958); *Macias v. Correct Care Solutions, Inc.*, 52 Kan. App. 2d 400, 407, 367 P.3d 311 (2016).

(2) ***An order that*** *grants, continues, modifies,* ***refuses,*** *or dissolves* ***an injunction****, or an order that grants or refuses relief in the form of mandamus, quo warranto, or habeas corpus.*

The rule on injunctions needs no further explanation but this section includes orders pertaining to the three great common-law writs.

(3) *An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or* ***an order involving*** *the tax or revenue laws, the title to real estate,* ***the constitution of this state*** *or the constitution, laws, or treaties of the United States.*

Several specific orders are included in this category. All are unique to the nature of the legal subject matter. The constitutional questions—the law that governs governments—is included in this subsection.

(4) ***A final decision*** *in any action, except in an action where a direct appeal to the Supreme Court is required by law. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.*

This is the general category of appeals. This category, frankly, makes up the bulk of our caseload.

What becomes manifest when reading this statute is that its drafting makes it clear that the Legislature wanted litigants to have an appeal as a matter of right on several specific categories as well as the more general category of final rulings. Otherwise, subsections 1-3 would be unnecessary.

But there is more. A policy comes into play here. In Kansas, our courts try to avoid piecemeal appeals which prolong litigation. We agree with our Supreme Court that the purpose of the Code of Civil Procedure is to assure the just, speedy, and inexpensive determination of disputes. *Harsch v. Miller*, 288 Kan. 280, 288, 200 P.3d 467 (2009). Those goals cannot be met if a litigant could interrupt a lawsuit with an appeal of every adverse ruling when it was made. With such a system, a case could drag on indefinitely and end up costing a fortune.

To this end, the Kansas Legislature limited the statutory categories of appeal under K.S.A. 2021 Supp. 60-2102. *Kansas Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 610, 244 P.3d 642 (2010). "'Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory and fractionalized appeals are discouraged, and are the exceptions and not the rule.'" *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 682, 683 P.2d 1247 (1984) (concluding appeal did not lie under K.S.A. 60-2102[a][3] in original eminent domain proceeding).

A "final decision" under K.S.A. 2021 Supp. 60-2102(a)(4) generally disposes of the entire merits of the case and leaves no further questions or the possibility of future directions or actions by the lower court. *Kaelter v. Sokol*, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015). When an action presents more than one claim for relief, a decision that adjudicates fewer than all the claims does not end the action and may be revised at any time before the entry of a judgment adjudicating all the claims. K.S.A. 2021 Supp. 60-254(b). Here, as Plaintiffs acknowledge, the district court's order was not a final decision because it did not dispose of the false representation issue.

PLAINTIFFS CAN APPEAL THE CONSTITUTIONAL RULINGS IN THIS CASE

Even though this court's jurisdiction to review "an order involving . . . the constitution of this state" under K.S.A. 2021 Supp. 60-2102(a)(3) has been rarely invoked, it is appropriate here. We acknowledge that despite the broad language, the statute does not create an absolute right to appeal any order involving a constitutional question. Our Supreme Court has held that the order involving the constitutional question "must constitute a final determination of the constitutional controversy." *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164 (1965).

In *Cusintz*, the district court denied the defendant's motion to dismiss a petition for alimony and child support. The defendant had argued a relevant alimony and child support statute was unconstitutional. He sought to appeal the denial of his motion to dismiss because the court's order involved a constitutional question, acknowledging that it was not a final decision disposing of the entire merits of the controversy. The Supreme Court ruled it did not have jurisdiction. "[T]he order must have some semblance of finality. The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy." 195 Kan. at 302.

Later, in *In re Austin*, 200 Kan. 92, 94-95, 435 P.2d 1 (1967), the court ruled it did not have jurisdiction to hear an appeal from a pretrial order in which the petitioner was ordered to amend the petition and stated that the proceeding would be tried under the new act for obtaining a guardian or conservator that became effective January 1966. The appellant argued her constitutional rights would be violated if the district court proceeded under that act. The Supreme Court ruled it did not have jurisdiction:

> "In the case at bar the pretrial orders complained of clearly lacked the requisite semblance of finality. No final determination affecting appellant's rights has been made. Her constitutional privileges have not been infringed in any way. No hearing on appellee's petition has been held and no adjudication of incapacity has been made. Nothing has really happened yet except the laying down of certain ground rules for the ultimate trial of the case, which rules may or may not be adhered to by the trial court in deprivation of appellant's constitutional rights." 200 Kan. at 94-95.

This court has followed the *Cusintz* holding by ruling a trial court's order of the sale of real property was not appealable under the broad "title to real estate" clause of K.S.A. 60-2102(a)(3) because the order had no semblance of finality. The trial court still had to confirm the sale. "[T]he statutes clearly provide for further action by the district court after the order of sale is issued, and the order has no semblance of being a final determination of the title to the real estate." *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 486, 748 P.2d 905 (1988).

But this court has allowed an appeal under K.S.A. 60-2102(a)(3) of an order quieting title in a boundary line dispute because it involved the title to real estate and had some semblance of finality, though it did not resolve the defendant's claim for damages or the plaintiffs' third-party action. *Smith v. Williams*, 3 Kan. App. 2d 205, 206, 592 P.2d 129 (1979).

Here, Plaintiffs argue that K.S.A. 2021 Supp. 60-2102(a)(3) applies because the district court had the opportunity to make a full investigation and determination of the constitutional questions at issue. They argue that K.S.A. 2021 Supp. 60-2102(a)(3) must require something less than a final decision that disposes of all the issues in the case. Otherwise, it would be superfluous of K.S.A. 2021 Supp. 60-2102(a)(4).

Defendants argue this court should not read the statute to permit piecemeal appeals of nonfinal judgments, warning of the deluge of interlocutory appeals that would follow. Defendants argue the court should allow interlocutory appeals of constitutional claims "only in those circumstances when foreclosing an immediate appeal of a non-final judgment would effectively deprive the litigant of any opportunity to meaningful relief on the claim."

The district court dismissed all of Plaintiffs' claims concerning the signature matching statute and the ballot collection statute. We consider this dismissal to be a final determination of the constitutional controversy concerning those statutes. The district court had the opportunity to fully investigate and determine those issues. The court gave no indication it would revisit its dismissal. The court explained it could not rule on the false representation issue only because it lacked jurisdiction over that issue while it was on appeal.

The plain language of the statute says that "an order involving . . . the constitution of this state" under K.S.A. 2021 Supp. 60-2102(a)(3) may be appealed. Such an order may be something less than a "final decision" under K.S.A. 2021 Supp. 60-2102(a)(4). The difference in language between (a)(3) and (a)(4), though, is striking. In fact, all of the orders listed in (a)(1)-(a)(3) may be something less than final decisions. There would be no need for the Legislature to list them that way otherwise.

The statute provides an appeal "as a matter of right" in such circumstances. K.S.A. 2021 Supp. 60-2102(a). The constitutional rights at issue in this case are important to all Kansans. We ask, in what circumstance could K.S.A. 2021 Supp. 60-2102(a)(3) be invoked if not in this case?

This case has already been split in two by the earlier appeal. Rejecting this appeal would only delay resolution of the constitutionality of these two separate statutes. The court can fully resolve the controversy concerning the signature matching and ballot collection statutes separate from the controversy concerning the false representation statute.

We hold that we have jurisdiction under K.S.A. 2021 Supp. 60-2102(a)(3) as a constitutional question.

THE PLAINTIFFS HAVE STANDING TO CHALLENGE THE SIGNATURE-MATCHING STATUTE

Defendants attack Plaintiffs' standing to sue on several fronts. They contend that none of the Plaintiffs have standing to challenge the signature matching requirement because in their petition they have alleged no cognizable injury. They first contend only the League is a membership organization that can assert associational standing. They further assert Plaintiffs have not alleged that any identified person associated with their organizations would have standing to challenge the signature matching requirement individually.

They also argue that a past injury cannot confer standing and that the potential for a future injury is too speculative to confer standing. And they argue the harm must be to one of Plaintiffs' members, not to Kansans generally. Defendants further claim Plaintiffs lack organizational standing because it is mere speculation that they will have to divert

resources to ballot cure programs and that such diversion would not constitute an injury anyway.

In response, Plaintiffs first point out that only one Plaintiff need have standing for their claim to proceed. They argue that nonmembership organizations can assert standing on behalf of their beneficiaries. Plaintiffs contend that the injury to their members and to constituents is not hypothetical. The signature matching requirement will disenfranchise lawful voters due to the unreliability of a layperson matching signatures. In their view, this is particularly true for the signatures of voters who are older or disabled. Plaintiffs further contend they do have organizational standing because the signature matching requirement will force them to divert resources and frustrate their missions.

The district court did not address this issue. It assumed the existence of standing without so deciding.

A PARTY MUST PROVE TWO THINGS TO HAVE STANDING TO SUE: INJURY AND CAUSATION

Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome." *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021). Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time. 313 Kan. at 673.

Kansas courts use a two-part standing test. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 680, 359 P.3d 33 (2015). To demonstrate standing, a party "'must show a cognizable injury and establish a causal connection between the injury and

the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable." *KNEA v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017). Federal courts also have a prudential standing requirement that the plaintiffs' grievance not be a general one shared by a large class of citizens. But Kansas has not explicitly adopted the federal model. *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 679-80. The burden to establish standing rests with the party asserting it. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

When standing is determined on a motion to dismiss without an evidentiary hearing, the court must resolve factual disputes in the plaintiffs' favor and plaintiffs need only make a prima facie showing of jurisdiction. *KNEA*, 305 Kan. at 747. That is how we shall proceed here.

> An association has standing to sue on behalf of its members when:
>
> - The members have standing to sue individually;
> - the interests the association seeks to protect are germane to the organization's purpose; and
> - neither the claim asserted nor the relief requested requires individual members' participation.

KNEA, 305 Kan. at 747.

Only the first element is at issue here—whether a member has standing to sue individually.

Our Supreme Court has called standing "'one of the most amorphous concepts in the entire domain of public law.'" *Board of Sumner County Comm'rs v. Bremby*, 286 Kan.

745, 750, 189 P.3d 494 (2008). To resolve this amorphous matter in this case, we must examine the Plaintiffs' claims.

In their amended petition, Plaintiffs alleged the signature matching requirement was "certain to disenfranchise lawful Kansas voters"—particularly those who are elderly, disabled, in poor health, young, and nonnative English speakers. Plaintiffs cited a study finding laypersons rejected authentic signatures 26 percent of the time. Age, illness, injury, medication, eyesight, alcohol use, drug use, pen type, ink, writing surface, position, paper quality, and state of mind can all affect a person's signature and cause an untrained layperson to mismatch a signature.

The League engages in efforts to get Kansas voters to use advance ballots. The League alleged injury to their members and the broader electorate:

> "The Signature Rejection Requirement is also harmful to the League's members, many of whom are older and are at significant risk of having their ballots flagged erroneously as having a mismatched signature. The League is also extremely concerned about the impact the Signature Rejection Requirement will have on the broader Kansas electorate, countless of whom will be disenfranchised as the result of inexpert and arbitrary decisions by elections officials ill-suited, ill-equipped, and untrained to be signature matching at all. Study after study has shown that not only non-experts particularly bad at accurately 'matching' signatures (something that is nearly impossible for even an expert to do accurately under the conditions that signatures are 'matched' in elections), but that they overwhelmingly misidentify valid signatures as 'mismatches.' Here, the consequences of that could mean total disenfranchisement."

The League further alleged injury to their organization:

> "Because of these inevitable consequences, the League will have to expend additional resources, including valuable and limited volunteer time, to develop and execute programs to ensure that eligible voters are educated about and ultimately are not

> disenfranchised by the Requirement. These are resources that the League would expend on other programs and initiatives but for the passage of the Signature Rejection Requirement."

Loud Light works "tirelessly to encourage voters to sign up for advance voting and to educate them on the process." Loud Light organizes ballot cure programs, contacts voters whose ballots are challenged by election officers for mismatched signatures, and educates them on how to cure their ballots. "Much of Loud Light's efforts focus on voters who election officials have been unable to contact, and many of these voters would not have known about their rejected ballot if it had not been for Loud Lights' contact." Loud Light alleged it will be forced to expand its ballot cure program:

> "Loud Light will have to expend greater resources educating the public about the lack of standards for signature rejection, and how to avoid its disenfranchising effects. Because counties will now be *required* to reject any signatures that an official believes is not a match—which will necessarily result in a greater number of mismatches, Loud Light will be forced to expend more resources recruiting and training additional staff and volunteers to help voters cure their ballots and combat the disenfranchising effects of county election officials rejecting purportedly mismatched signatures. These are resources that Loud Light would have expended on its other important programs and initiatives."

Kansas Appleseed encourages voters to sign up for advance voting. It alleged its constituencies "are far more likely to have their ballot rejected due to purportedly mismatched signatures."

The Center promotes advance voting to increase voter turnout among individuals with disabilities. The Center alleged its constituency is likely to vote by advance ballot, likely to have their ballots rejected due to an alleged signature mismatch, and that mismatches will be a burden to cure due to transportation concerns. The Center alleged:

> "Because of the Requirement the Center will expend more resources, including limited staff hours, ensuring that people are educated about its disenfranchising effects and how to avoid them, as well as assisting any voters whose ballots are rejected as a result of a signature mismatch. These are resources the Center would expend on its other key services if the Restriction were not in place."

In conjunction with its motion for a partial temporary injunction, Plaintiffs provided an expert report from Dr. Linton Mohammed confirming that "'Kansas' signature matching procedures are all but guaranteed to result in the erroneous rejection of properly cast ballots.'" Signature verification is a difficult task even for a trained forensic document examiner because signatures are written in different styles with varying levels of readability and variability. Signatures also vary because of age, health, native language, and writing conditions. Dr. Mohammed confirmed particular groups of voters—the young, disabled, elderly, and nonnative English speakers—are more likely to have their ballots rejected.

We need not decide whether Plaintiffs' failure to identify a specific individual is fatal to their claim. The League, Loud Light, Kansas Appleseed, and the Center have shown that they have standing in their own right because they will have to divert resources from their usual activities to ballot cure programs.

An organization may assert standing in its own right if it can establish a cognizable injury and a causal connection between the injury and the challenged conduct. See *Gannon*, 298 Kan. at 1127.

We find law from a federal case persuasive on this point. It is generally accepted that an organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action. This theory was adopted by the United

States Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).

In *Havens Realty*, the Housing Opportunities Made Equal organization alleged that Havens Realty Corporation's racial steering practices frustrated their efforts to assist equal access to housing through counseling and referral services to low-income home seekers. HOME had to devote significant resources to identify and counteract the racially discriminatory steering practices. The Court held:

> "If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." 455 U.S. at 379.

HOME had standing in its own right. *Havens Realty*, 455 U.S. at 379.

Courts have distinguished *Havens Realty* in ways that do not apply here. Organizations do not have standing based on activities that are no different from their daily operations. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). The costs of detecting an illegal practice, preparing for litigation, and mounting a legal challenge do not qualify as an injury. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 611-12 (5th Cir. 2017); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008); *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 386, 870 S.E.2d 430 (2022).

Some courts have demanded plaintiffs show what specific activities they would divert resources away from to counteract the challenged law. *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1250 (11th Cir. 2020); *N.A.A.C.P. v. City of Kyle, Tex.*,

626 F.3d 233, 238-39 (5th Cir. 2010). But a broad allegation of diversion of resources is sufficient at the pleading stage. *Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, 36 F.4th 1100, 1115 (11th Cir. 2022).

Plaintiffs have alleged that they encourage advance voting and that they will have to divert resources from their other voter assistance activities to ballot cure programs to prevent voters from being disenfranchised by the new signature matching requirement. These are sufficient allegations to establish their standing at this point.

We hold that Plaintiffs have standing to sue.

DO THE TWO PROVISIONS IN THE NEW LAW VIOLATE THE RIGHT TO VOTE IN KANSAS?

In their amended petition, Plaintiffs alleged the signature matching requirement and ballot collection restriction violate the fundamental right to vote under the Kansas Constitution. They alleged that legal voters will be disenfranchised by the signature matching requirement because their ballots will be rejected. They contend the ballot collection restriction severely burdens the right to vote by limiting the pool of individuals who can help deliver ballots. It is their view that the ballot collection restriction will particularly affect senior citizens, minorities, people with disabilities, rural voters, natives living on tribal land, those with limited access to transportation, and those with work, school, and family care commitments.

The district court presumed the statutes were constitutional and decided that Plaintiffs were mounting a facial challenge to the statutes. The court chose to analyze whether Plaintiffs had established that "'no set of circumstances exist[ed]'" under which the statutes would be valid. The court made a rational-basis review of these claims and also applied the *Anderson-Burdick* balancing test. We find this approach and analysis to

be erroneous. This is like saying, "This glass of water is pure, show me where there are any impurities." The correct inquiry should be, "This is important, show me this glass of water is entirely pure." The first test begins with the assumption that this is all pure. The second test requires proof that it is entirely pure.

Our Supreme Court has held that presuming a state action alleged to infringe a fundamental right is constitutional "dilutes the protections established by our Constitution." *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 674, 440 P.3d 461 (2019). The court was referring to the right of personal autonomy protected by section 1 when it made that statement, but its reasoning was not limited to that one fundamental right. The court called the right to vote a "fundamental" right protected by the Kansas Constitution in the same opinion. 309 Kan. at 657. The court reiterated its holding that laws infringing fundamental rights are not presumed constitutional in *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019). So we see that the district court here erred by beginning with a presumption that the questioned statutes were constitutional.

There is no question that the right to vote is a fundamental right protected by the Kansas Constitution. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote. We agree with the language of our Supreme Court in 1971:

> "The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system. . . . This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized." *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971).

Even earlier than that, the court held that the Legislature "'must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right.'" *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928). Voting is serious in Kansas from the beginning of statehood to now.

Our Supreme Court has instructed that strict scrutiny "applies when a fundamental right is implicated." *Hodes*, 309 Kan. at 663. We follow the command and presume that strict scrutiny applies.

Turning to the use of a federal test by the district court, we find another error. Federal law is not controlling here. Federal courts use a flexible balancing test when evaluating the constitutionality of election laws that govern the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself (and that thereby burden the right to vote). The standard is known as the *Anderson-Burdick* flexible balancing test:

> "A court considering a challenge to a state election law must 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.'
>
> "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." [Citations omitted.] *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (state's interest in prohibiting write-in voting outweighed limited burden on voters' rights).

See also *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (the burden filing deadline placed on voters' freedoms outweighed state's minimal interest in deadline).

Every voting rule imposes a burden of some sort. *Brnovich v. Democratic National Committee*, 594 U.S. ___, 141 S. Ct. 2321, 2338, 210 L. Ed. 2d 753 (2021). There is no litmus test for measuring the severity of the burden. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). Under the *Anderson-Burdick* test, the court first determines the extent of the burden the challenged law places on the right to vote. A severe burden is subject to strict scrutiny. But if the court characterizes the burden as something other than severe, the court weighs the competing interests. This so-called "flexible" balancing test has led to a wide array of decisions on comparable state statutes.

One court reviewing a state's signature matching requirement stated, "If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does." *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. 2016) (unpublished opinion). But not all courts agree.

Federal courts have come to differing conclusions on whether signature requirements and ballot collection limits constitute a severe burden on the right to vote. Cf. *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (finding signature matching scheme—that mandated no uniform standards for matching signatures, no training for election officials, and did not ensure voters would be informed of a mismatch with adequate time to cure—imposed "at least a serious burden on the right to vote"); *Democratic Executive Committee of Florida v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018) (finding disenfranchisement of thousands of voters based on a standardless determination of signature mismatches by laypeople is a

substantial burden on the right to vote); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 735-36 (S.D. Ohio 2020) (finding signature matching requirements impose "some burden on the right to vote," or a moderate burden); *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1181 (9th Cir. 2021) (holding that correcting a missing signature by election day is a minimal burden); *Richardson v. Texas Secretary of State*, 978 F.3d 220, 237 (5th Cir. 2020) (finding signature-verification requirements without notice and an opportunity to cure "are even less burdensome than photo-ID requirements"); see *DSCC v. Simon*, 950 N.W.2d 280, 293 (Minn. 2020) (finding ballot collection and delivery limit not a severe burden on voting).

But when we return to Kansas law, we see that when our Supreme Court faced whether to adopt an undue burden standard in *Hodes*, the court recognized that the right to personal autonomy was not absolute. 309 Kan. at 661. The court strongly criticized and rejected the undue burden test and adopted strict scrutiny. The undue burden standard was difficult to understand and apply. The determination of what constituted an undue burden was subjective and varied from person to person. Thus, it lacked predictability concerning what regulations would be constitutional. And the court held the strict scrutiny test best protected fundamental rights. 309 Kan. at 665-69. The court stated the undue burden standard "lacks the rigor demanded by the Kansas Constitution" for protecting fundamental rights. 309 Kan. at 670. "This balancing test relieves the State of some of the burden of proof and from having to narrowly tailor an infringement to the interest it seeks to protect." 309 Kan. at 670.

Given the strong criticism in *Hodes*, we do not see our Supreme Court adopting a flexible balancing test that varies depending on how severe the court characterizes the burden. The *Anderson-Burdick* test is a federal test based on the federal Constitution for reviewing state election laws. Federal courts must deal with the concept of comity—respecting the integrity of two court systems. State courts do not have to deal with that

issue. The Kansas constitutional provisions are unique. The right to vote is a fundamental right. Strict scrutiny applies here.

Under strict scrutiny, once the plaintiff has shown an infringement—regardless of degree—the state action is presumed unconstitutional. The burden then shifts to the State to establish a compelling interest and narrow tailoring of the law to serve the interest. *Hodes*, 309 Kan. at 669.

We are mindful that in the context of the review of election laws, there is a long recognized distinction made by Kansas courts between regulations and restrictions. Benign election regulations which are a mere exercise of police powers to regulate and preserve the purity of the election are usually upheld. But statutes that restrict the constitutional right to vote are invariably void. *State v. Doane*, 98 Kan. 435, 440, 158 P. 38 (1916). The statutes we are dealing with are not mere regulations, such as setting the opening and closing time of the polls. The statutes we are reviewing are restrictions that must be examined closely.

But before we apply strict scrutiny, we must decide whether the government action impairs the constitutionally protected right to vote. As the *Hodes* court explained: "In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment." 309 Kan. at 672.

THE SIGNATURE MATCHING STATUTE IMPAIRS THE RIGHT TO VOTE

In interpreting the Kansas Constitution, Kansas courts read its wording with great care:

> "'[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing.' [Citation omitted.]" *State v. Albano*, 313 Kan. 638, 645, 487 P.3d 750 (2021).

When the words do not make the intent clear, courts look to the historical record. The state-centric focus of the analysis leaves room for variance or divergence between the rights guaranteed under the Kansas and United States Constitutions. *Albano*, 313 Kan. at 645.

We note that the right to vote is not absolute. The Kansas Constitution protects the right of *qualified* electors to vote. See Kan. Const. art. 5, § 1.

"The legislature shall provide by law for proper proofs of the right of suffrage." Kan. Const. art. 5, § 4.

Shortly after the Kansas Constitution was adopted, our Supreme Court interpreted this latter provision. The court stated, "Obviously, what was contemplated was the ascertaining beforehand by proper proof of the persons who should, on the day of election, be entitled to vote, and any reasonable provision for making such ascertainment must be upheld." *State v. Butts*, 31 Kan. 537, 554, 2 P. 618 (1884).

The *Butts* court distinguished between simple "matters of proof" to find out who may vote—such as requiring that a party be registered, requiring a voter to go to a specific place to vote, and requiring proof by oath of the right to vote—and laws that "under the pretext of securing evidence of voters' qualifications . . . would cast so much burden as really to be imposing additional qualifications." 31 Kan. at 554. "The legislature cannot, by, in form, legislating concerning rules of evidence, in fact,

overthrow constitutional provisions." 31 Kan. at 554-55. The court found that a registration law was permissible if ample facilities for registering were furnished, and the opportunities for registering were continued down to within a reasonable time of the election day. 31 Kan. at 554-55.

Elections at the time of the Wyandotte Constitutional Convention were "held under difficulty and each side accused the other of procuring votes from persons not entitled." *Lemons v. Noller*, 144 Kan. 813, 819, 63 P.2d 177 (1936). But our understanding of who may vote changed in subsequent years with amendments.

We also note that signature matching is not new. See *Sawyer v. Chapman*, 240 Kan. 409, 413, 729 P.2d 1220 (1986). But because the only purpose of statutes relating to the validity of signatures is to prevent fraud, an overly strict regulation can impair the right to vote. See *Cline v. Meis*, 21 Kan. App. 2d 622, 905 P.2d 1072 (1995) (excluding electors who could not write in cursive from a recall petition was improper).

The Legislature can require voters to establish their right to vote. But, as pled by Plaintiffs, whether an election official perceives a voter's signature as a mismatch is not in the voter's control. Lay election officials will erroneously determine voters' signatures are mismatched. Thus, the statute disenfranchises voters even after the voter provided "proper proofs." See Kan. Const. art. 5, § 4. The statute alone does not require training of election officials, contains no standard for determining what constitutes a signature match, and does not provide a standard for the opportunity to cure an error made when matching signatures. Plaintiffs have met their minimal burden to plead a claim that the signature matching requirement impairs the constitutionally protected right to vote.

The district court here ruled there were no facts necessary to evaluate Plaintiffs' facial challenge. But it then conversely applied a fact-driven test to determine the questioned statutes were not a severe burden on the right to vote. This is akin to saying, "I

will not consider your factual allegations but I will use my own facts to decide this motion to dismiss." In doing so, the district court relied on *Crawford*, 553 U.S. at 199-203, where the *Crawford* Court looked to facts to determine the severity of the burden of the voting restriction and affirmed the grant of summary judgment after discovery.

In *Crawford*, the Court considered both the statute's broad application to all of Indiana's voters, but also the burden imposed on specific categories of voters. The Court found the evidence lacking. As the Tenth Circuit explained:

> "In sum, *Crawford* teaches that . . . while we are to evaluate 'the statute's broad application to all . . . voters' to determine the magnitude of the burden, *Crawford*, 553 U.S. at 202-03, 128 S. Ct. 1610 (plurality opinion of Stevens, J.), we may nevertheless specifically consider the 'limited number of persons' on whom '[t]he burdens that are relevant to the issue before us' will be 'somewhat heavier,' *id.* at 198-99, 128 S. Ct. 1610 (plurality opinion of Stevens, J.)." *Fish v. Schwab*, 957 F.3d 1105, 1127 (10th Cir.), *cert. denied* 141 S. Ct. 965 (2020).

When the district court applied the *Anderson-Burdick* test to the signature matching requirement, it found it important that under the statute, the election officials "must notify an advance ballot voter of a missing signature or signature mismatch and provide an opportunity to cure." The court held the signature matching requirement thus was not a severe burden on the right to vote and any burden was outweighed by the State's interest in the integrity of its elections.

Upon what facts in this record did the district court make this determination? Even though it rejected Plaintiffs' argument that this was a factual determination, *it was*. The court weighed the provisions and ruled that it was fair. This ruling was reached before any depositions, discovery, or motions for summary judgment. In its eagerness to use the *Anderson-Burdick* test, the court erred by making factual determinations with no evidence.

Plaintiffs claimed that the signature matching requirement burdens the right to vote because ballots are rejected erroneously. This provision burdens the whole electorate because signatures are wrongly mismatched for reasons we have already discussed above.

THE BALLOT COLLECTION RESTRICTION RESTRICTS THE RIGHT TO VOTE

The Plaintiffs make a similar argument concerning the ballot collection restriction. They contend it is an unreasonable infringement of the right to vote under the Kansas Constitution. Their petition contends that the ballot collection restriction will limit the ability of voters to cast their ballots, including many who may not be able to return them at all.

The argument is straightforward. Not all voters can make a trip to the polls, for various reasons. In the past, other people have assisted them in voting by helping them mark their ballot or by simply taking their marked ballot to the ballot box for them. The limit of 10 ballots means only 10 voters will be helped. What about any others? The restriction will prevent those votes from being cast and counted because those who can get to the polls are limited to 10. If a volunteer routinely picked up 30 ballots and now is limited to 10, who will take up the slack?

This statute is a limitation that prevents votes from being cast and counted. The district court in dealing with this said "the need may still be met" and perhaps other people could be found to collect 10 ballots each. But we see no facts that support the court's hope. It is clear that the court did not take as true the facts as pled in the petition as it was required to do when considering a motion to dismiss. See *KNEA*, 305 Kan. at 747; see also K.S.A. 2021 Supp. 60-212(b)(6).

Strict scrutiny must apply here as well. After all, *Hodes* held that when considering a law that is an infringement of fundamental rights, the strict scrutiny standard applies regardless of the degree of infringement of rights. 309 Kan. at 663.

The rule we follow

Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

Also, in considering how pleadings work in Kansas, our Supreme Court has advised that, "under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order." *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008).

When we apply those standards to the district court's ruling, we conclude that the court erred.

Preventing voter fraud is a compelling state interest. See *Brnovich*, 141 S. Ct. at 2347. But our Supreme Court has also held there is a compelling state interest in increased participation in the election process from mail ballot voting. *Sawyer*, 240 Kan. at 415. The State must establish a compelling interest and narrow tailoring of the law to serve the interest. *Hodes*, 309 Kan. at 669. Courts have commented that states will have a

problem with the latter part of its burden if there is no evidence mismatched signature ballots were submitted fraudulently. See *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. 2016) (unpublished opinion). And courts have commented that the State's interest in preserving the integrity of the election process is better served by ensuring that all nonfraudulent ballots timely submitted are counted. See *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1323 (11th Cir. 2019).

We therefore remand this matter to the district court to give the State the opportunity to show that these statutes can overcome strict scrutiny.

PLAINTIFFS CLAIM THE SIGNATURE MATCHING REQUIREMENT VIOLATES THE RIGHT TO DUE PROCESS

In their amended petition, Plaintiffs alleged the signature matching requirement violates the right to procedural due process protected by section 18 of the Kansas Constitution Bill of Rights. They alleged due process requires uniform standards for matching signatures and additional procedures to safeguard the right to vote.

The district court ruled that there is no constitutional right to vote by mail and that state law providing for advance voting did not give rise to a liberty interest entitled to procedural due process protections.

Plaintiffs contend the district court erred in dismissing their due process claim under section 18 of the Kansas Constitution Bill of Rights and improperly concluded that there is no protected liberty interest in voting by mail. They argue the right to vote necessarily includes the right to have one's vote counted. And they argue that once a state offers an absentee voting scheme, the state has created a sufficient liberty interest in exercising the right to vote in such manner.

Defendants contend that Plaintiffs ignore a new regulation—K.A.R. 7-36-9—and that the right to vote does not implicate a liberty interest. Defendants look to federal law in search of such liberty interest. Plaintiffs respond that the regulation is inadequate.

"All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Kan. Const. Bill of Rights, § 18.

Kansas courts have long held that "remedy by due course of law" refers to due process. *State v. N.R.*, 314 Kan. 98, 113, 495 P.3d 16 (2021), *cert. denied* 142 S. Ct. 1678 (2022). Due process may refer to substantive due process or procedural due process. Procedural due process means notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 462, 447 P.3d 959 (2019).

Historically, Kansas courts have analyzed section 18 of the Kansas Constitution Bill of Rights as coextensive with its federal counterpart. *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019). "In reviewing a procedural due process claim, the court first must determine whether a protected liberty or property interest is involved. If so, the court then must determine the nature and extent of the process which is due." *N.R.*, 314 Kan. at 113.

The right to procedural due process is not limited to fundamental rights; it may be applied to state-created "privileges." *Creecy*, 310 Kan. at 463 (holding person is entitled to due process before driving license taken away). A liberty interest may arise from the Constitution itself or it may arise from an expectation or interest created by state law. *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

The scope of a claimed state-created liberty interest is determined by state law. *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1994). In Kansas, "[t]he concept of 'liberty' is broad." *N.R.*, 314 Kan. at 113 (recognizing liberty interest includes protection of a person's good name).

The district court here held there was no constitutional right to vote by mail, relying on *McDonald v. Board of Election*, 394 U.S. 802, 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) (finding it was "not the right to vote that is at stake here but a claimed right to receive absentee ballots"). *McDonald* is a federal equal protection case from 1969 interpreting an Illinois law that made absentee balloting available only to distinct groups of people. It does not control Plaintiffs' claim that lawfully cast absentee votes under Kansas law cannot be rejected without due process.

The right at issue is not the right to vote by mail. A person cannot know beforehand that their mail-in ballot will be rejected for a signature mismatch by the elections office. A qualified voter that votes by mail for whatever reason in accordance with Kansas law has an expectation that their vote will be counted. The right at issue is really the fundamental right to have one's vote counted.

The right to vote is illusory if it does not include the right to have one's vote counted.

> "It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted . . . . '[T]he right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.'" *Reynolds v. Sims*, 377 U.S. 533, 554-55, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

But even if the right at issue were only the right to vote by mail, voting by mail is a state-created right that all Kansans have had for decades. If due process is required in

Kansas before a person's driving license is revoked, then a qualified voter's mail-in ballot cannot be thrown out without due process.

The few federal cases that have struck down signature matching laws because of due process concerns support our view. "Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217, 222 (D. N.H. 2018) (holding signature match law that did not give voters timely notice of ballot rejection, contained no functional standards on signature matching, and vested unreviewable discretion on an untrained moderator was facially unconstitutional); see *Frederick v. Lawson*, 481 F. Supp. 3d 774, 793 (S.D. Ind. 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. 2006) (unpublished opinion).

We are persuaded by the *Andino* court when it stated that, the contention that there is no liberty interest in the right to have one's vote counted "is contrary to a large body of case law, which recognizes that the franchise is a fundamental right and the cornerstone of a citizen's liberty." *League of Women Voters of South Carolina v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed and remanded* 849 Fed. Appx. 39 (4th Cir. 2021).

The cases holding otherwise do not explain why voting deserves less protection than other state-created rights or constitutionally created liberty interests. The Fifth Circuit held that state-created liberty interests are limited to freedom from restraint, and that a constitutionally created fundamental right is different from a liberty interest. *Richardson v. Texas Secretary of State*, 978 F.3d 220, 230-32 (5th Cir. 2020); see also *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (holding fundamental rights for purposes of substantive due process are not liberty interests for purposes of procedural due process).

In Kansas, the right of a parent to the custody, care, and control of their child is considered a fundamental right and a liberty interest deserving of procedural due process. *In re. J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). Likewise, the fundamental right to vote can be considered a liberty interest for procedural due process analysis. Both rights are fundamental. Both rights are important.

The district court erred by ruling that the signature matching requirement did not implicate a liberty interest entitled to procedural due process.

But neither party has briefed the next question—the nature and extent of the process due.

Plaintiffs claimed that the signature matching requirement violates the right to procedural due process protected by section 18 of the Kansas Constitution Bill of Rights.

The new regulation was issued after the district court dismissed this case. We will not consider the regulation now. It would be unfair to the parties for us to consider its impact on these issues if they have not had the chance to brief the point. Additionally, it would be improper for us to take up the effect of the regulation since the district court did not have a chance to consider the matter. No doubt the impact of this new regulation will affect the procedural due process analysis on remand.

PLAINTIFFS MAKE AN EQUAL PROTECTION CLAIM BUT WE CANNOT REVIEW IT PROPERLY

Plaintiffs' petition alleged the signature matching requirement violates the equal protection provisions of sections 1 and 2 of the Kansas Constitution Bill of Rights. In their view, the statute "explicitly and arbitrarily endorses multiple, standardless processes for verifying signatures, placing voters across the state's 105 counties at differing risks of

disenfranchisement." Different counties will have different procedures for matching signatures. There is no statutory definition of a "match." And the statute allows the county to choose between an electronic device or human inspection. Thus, a ballot that would be accepted in one county could be rejected in another county.

The district court grouped Plaintiffs' equal protection claim with their right to vote claim. The court then applied the *Anderson-Burdick* test and concluded the signature matching requirement was a reasonable, nondiscriminatory restriction that was outweighed by the State's compelling interest in the integrity of elections. We again point out that applying the *Anderson-Burdick* test was erroneous.

But Plaintiffs also contend it was error for the district court to merge the two issues and that the district court skirted its claim that the signature matching requirement violates the equal protection provisions of sections 1 and 2 of the Kansas Constitution Bill of Rights. They argue that the Constitution protects against differential treatment, particularly in the context of voting. Plaintiffs argue that the statute allows the 105 counties to institute different procedures for verifying signatures with no guidance, resulting in unequal treatment of voters across the state. Plaintiffs also allege voters who are elderly, disabled, in poor health, young, or nonnative English speakers are particularly likely to have their legitimate ballots rejected. They again argue strict scrutiny applies.

Defendants contend that Plaintiffs have disregarded a new regulation the Secretary adopted to provide consistent standards for implementing the signature matching requirement across the state. See K.A.R. 7-36-9. Defendants argue the signature matching statute is a sufficiently uniform standard. Discrepancies in how county election officials apply uniform standards that require human judgment are to be expected and are not constitutionally significant. They argue that a contrary ruling would "totally upend the county canvassing procedures."

In response, Plaintiffs argue that the new regulation was published mere days before their brief was due, is not part of the record, and is not properly before the court. They also argue the regulation provides "woefully insufficient" guidance.

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, § 1. "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, § 2.

Our Supreme Court has recently held:

> "[T]he equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution. . . . Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022).

"The guiding principle of equal protection analysis is that similarly situated individuals should be treated alike." *In re K.M.H.*, 285 Kan. 53, 73, 169 P.3d 1025 (2007). Thus, the question that must be answered here is whether this law treats similarly situated voters differently?

Equal protection challenges are evaluated in three steps. First, the court determines whether the legislation creates a classification resulting in different treatment of similarly situated individuals. Second, the court determines the appropriate level of scrutiny by examining the nature of the right affected by the classification. Third, the court applies that level of scrutiny to the legislation. *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, Syl. ¶ 3, 291 P.3d 1056 (2013); *State v. Dixon*, 60 Kan. App. 2d 100, Syl. ¶ 8, 492 P.3d 455, *rev. denied* 314 Kan. 856 (2021). Strict scrutiny applies in cases involving suspect classifications such as race, and fundamental rights guaranteed by the

Constitution. *Farley v. Engelken*, 241 Kan. 663, 669-70, 740 P.2d 1058 (1987); *In re T.N.Y.*, 51 Kan. App. 2d 956, 965, 360 P.3d 433 (2015). Voting is a fundamental right for purposes of equal protection. *Farley*, 241 Kan. at 669-70.

Our reading of the signature matching statute leads us to conclude that it does not directly treat similarly situated individuals differently because it applies to all mail-in ballots. Plaintiffs' argument is really based on the ruling in *Bush v. Gore*, 531 U.S. 98, 105-106, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). There, the Supreme Court held the right to vote was fundamental and equal weight must be given to each vote:

> "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05.

The Court held that a recount of ballots to determine the voters' intent violated the guarantee of equal protection because of "the absence of specific standards to ensure its equal application." 531 U.S. at 106. The Court stated the formulation of uniform rules to determine intent was "practicable" and "necessary." 531 U.S. at 106. The Court was concerned that the standards for accepting or rejecting ballots would "vary not only from county to county but indeed within a single county from one recount team to another." 531 U.S. at 106. Compliance with the requirements of equal protection would require adopting "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them." 531 U.S. at 110. But the Court stated that its analysis was "limited to the present circumstances." 531 U.S. at 109. It is unclear what level of scrutiny was applied.

If we apply the *Bush* reasoning to this case, Plaintiffs have adequately stated an equal protection claim because the signature matching statute contains no standards to determine what constitutes a signature match, and requires no training—ensuring that

what constitutes a signature match will vary from county to county and even from one election official to another. Election officials will use varying methods to judge whether signatures are truly mismatched or merely natural variations in signatures.

But that conclusion does not end the matter. Defendants have pointed out that the new regulation adopted after the district court's ruling fixes all of these concerns. We say, again, that it would be unfair to the parties for us, on appeal, to interpret and apply this regulation from a record that lacks any information about this regulation. Nor is it proper for us to consider this issue without giving the parties a chance to brief the matter. Since we are remanding this case, the effect of the new regulation can be considered by the district court after allowing the parties to present evidence and arguments they think are sufficient for the court to resolve these questions.

DOES THE VOTE COLLECTION LIMIT VIOLATE FREEDOM OF SPEECH IN KANSAS?

Plaintiffs have alleged that they are exercising core political speech when they engage, encourage, register, educate, and assist voters, including by collecting and delivering completed advance ballots. They argue that the ballot collection restriction limits their core political speech and expressive conduct by diminishing the number of voters they can assist. They also alleged they will have to recruit more volunteers, stressing their limited resources. They alleged there is no compelling state interest to justify this restriction and that the restriction is not narrowly tailored to that interest.

The district court ruled that the delivery of advance ballots to election officials is not expressive conduct and therefore the rational basis test applies. The court ruled the ballot collection restriction was justified by the State's interest in combating voter fraud and instilling public confidence in elections, stating that the government need not actually show that the fraud existed to justify measures to prevent it. The court further ruled that

even if the ballot collection restriction implicated constitutionally protected speech or conduct, then the *Anderson-Burdick* test would apply rather than strict scrutiny.

Plaintiffs contend they stated a claim that the ballot collection restriction limits constitutionally protected speech because assisting voters to return ballots is expressive activity. They argue that ballot collectors necessarily advocate for democratic participation and the fact that they have other means to disseminate their ideas does not take their speech outside the bounds of constitutional protection. They argue that strict scrutiny applies because free speech is a fundamental right protected by section 11 of the Kansas Constitution Bill of Rights. And they argue that whether the ballot collection restriction is narrowly tailored to address a state interest is a factual question that could not be resolved on a motion to dismiss and that the district court improperly credited the State's factual allegations.

Defendants contend that this statute makes no impact on either speech or expressive conduct. They argue collecting and returning ballots of another voter does not communicate any particular message. They argue that Plaintiffs can still interact with all voters and provide them with advance ballot applications. They argue the restriction is needed to prevent ballot harvesting.

"The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." Kan. Const. Bill of Rights, § 3.

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." Kan. Const. Bill of Rights, § 11.

Freedom of speech is "among the most fundamental personal rights and liberties of the people." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). The right is "'generally considered coextensive'" with that right protected under the First Amendment to the United States Constitution. It is not absolute. *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 37, 20 P.3d 39 (2001); *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). The freedom of speech constitutional guarantee has "'its fullest and most urgent application'" to political speech. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

A review of Kansas precedent leads us to hold that strict scrutiny applies when a fundamental right is implicated. Strict scrutiny analysis requires consideration of whether the enactment serves some compelling state interest and is narrowly tailored to further that interest. *Hodes*, 309 Kan. at 663. "Where a statute restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *McKinney*, 236 Kan. at 235. But courts apply varying degrees of scrutiny depending on the nature of the infringement on free expression. *City of Wichita v. Trotter*, 58 Kan. App. 2d 781, 790, 475 P.3d 365 (2020), *rev. denied* 312 Kan. 890 (2021).

The United States Supreme Court has cautioned that free speech concerns sometimes intersect with a state's need to regulate elections. First Amendment protection is "'at its zenith'" when it comes to "'core political speech.'" *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186-87, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). But "'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" 525 U.S. at 187. When a law burdens "core political speech" or "pure speech," it is subject to "exacting scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344-45, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Meyer v. Grant*, 486 U.S. 414, 420, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). But when the law merely regulates

the mechanics of the electoral process, it is subject to a less exacting scrutiny. *McIntyre*, 514 U.S. at 345-46; *Meyer*, 486 U.S. at 420.

"Exacting scrutiny" has been likened to strict scrutiny. See *McIntyre*, 514 U.S. at 346, n.10; *Buckley*, 525 U.S. at 215 (O'Connor, J., concurring). When a law burdens core political speech, the court upholds the law "only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___, 141 S. Ct. 2373, 2384, 210 L. Ed. 2d 716 (2021).

Several federal courts have concluded that ballot collection is not an expressive activity and therefore not subject to strict scrutiny for various reasons. Ballot collection does "not communicate any particular message." See, e.g., *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1235 (N.D. Okla. 2020). Regardless of the ballot collector's intent, ballot collection is not reasonably perceived as a way to communicate a message; it is perceived as a way to facilitate voting. *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 392-93 (9th Cir. 2016). A voted ballot constitutes the voter's speech rather than the speech of the person delivering the ballot on their behalf. *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018). A limit on the number of voted ballots that a person can collect for others governs the way voting occurs—not core political speech. *DSCC v. Simon*, 950 N.W.2d 280, 295 (Minn. 2020).

But other courts have been skeptical of an analytic approach that would separate an advocacy for voting from the collection of ballots or applications themselves. This approach allows the government to indirectly burden protected activity. "The defendants are not free to rewrite the way democracy has been practiced for decades." *Tennessee State Conference of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 699 (M.D. Tenn. 2019) (stating voter registration drives have historically involved both encouraging registration

and physically transporting registration applications); see also *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 728 (M.D. Tenn. 2019) (holding that the collection of applications is "'inextricably intertwined'" with the expressive and advocatory aspects of a voter registration drive, and "it is impossible to burden one without, in effect, burdening the other").

The ballot collection restriction limits one-on-one communication between the ballot collector and voter. Plaintiff Crabtree alleged he communicates a message of civic participation and engagement when he collects ballots for others. The statute reduces the number of voters he can assist. And volunteer ballot collectors have been a part of how democracy in Kansas has been practiced. Collecting ballots and delivering those ballots to election officials is part of a larger advocacy for voting itself.

The ballots themselves, however, are the speech of the voter, not the ballot collector. After all, postal carriers who deliver hundreds of ballots to an election office are not involved in protected speech in either collecting those ballots or in delivering them. They are delivering the mail. Individuals who perform the same task are doing just that—carrying the mail. Therefore, regulation of the handling of those ballots is warranted. This claim does not survive Defendants' motion to dismiss.

Summary of our rulings

Statutory authority to bring this appeal exists under K.S.A. 2021 Supp. 60-2102(a)(3).

The Plaintiffs have standing to sue as they have sufficiently alleged injury and causation to overcome a motion to dismiss.

Because the right to vote is a fundamental right guaranteed under the Kansas Constitution, an act that infringes on that right must be strictly scrutinized to determine if it is enforceable.

Some federal courts have created a balancing test used by the district court in this case and it is not applicable to the questions concerning the Kansas Constitution.

The signature matching provision of this law does impair the right to vote, but due to the fact that the district court used the incorrect test, we remand this matter to the district court to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny.

The ballot collection restriction of this law does impair the right to vote. We remand this matter to the district court to give the State and the Defendants the opportunity to show that the statute can overcome strict scrutiny.

The ballot collection limitation statute does limit the free speech of the ballot collector but not the speech of the voter as expressed in the ballot. On remand, when applying strict scrutiny, the effect of the law on the collector is the focus and not the content of the vote.

THE MOTION FOR A TEMPORARY INJUNCTION WAS NOT MOOT

The district court ruled Plaintiffs' motion for a temporary injunction was moot because it dismissed the claim. For all of the reasons we have set out above, we hold that this issue is not moot, and the district court should not have dismissed the Plaintiffs' claims.

History records the struggle Kansans experienced when joining the Union of States. It was by free elections that we gained statehood. Thus, voting rights are preserved in the Kansas Constitution. Great care must be taken when trying to limit or infringe on those rights. Voting was important then. Voting is important now.

Reversed and remanded for further proceedings.

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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299

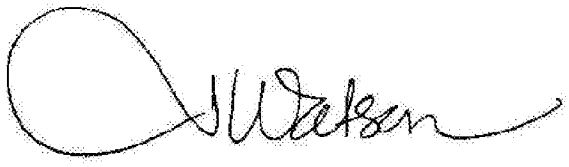
Court: Shawnee County District Court

Case Number: 2021-CV-000299

Case Title: League of Women Voters of Kansas, et al. vs. Scott Schwab - Kansas Secretary of State, et al.

Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.



/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

LEAGUE OF WOMEN VOTERS OF KANSAS, et al.,

Plaintiffs

2021-CV-299

SCOTT SCHWAB, et al.,

Defendants

MEMORANDUM DECISION AND ORDER

Plaintiffs filed a petition challenging the legality of recently enacted Kansas election laws. Defendants Kansas Secretary of State Scott Schwab and Attorney General Derek Schmidt moved to dismiss the petition. Plaintiffs later filed an amended petition, and Defendants once again moved for dismissal. In the meantime, Plaintiffs sought a partial temporary injunction to prevent the implementation and enforcement of one provision of the challenged laws, Section 3(a)(2) and (3) of Kansas House Bill 2183 (2021) (hereinafter the "False Representation Provision" or "FRP"). The Court denied Plaintiffs' motion for partial temporary injunction. Plaintiffs have appealed that ruling. The Court will now address Defendants' motion to dismiss the amended petition.

STATEMENT OF FACTS

1. Plaintiffs are four Kansas organizations and three individuals interested in the issue of voter participation.
2. Plaintiffs state that they engage in certain voter registration and education activities, including assisting people in navigating the election process.
3. Kansas House Bill 2183 (2021) was adopted by the Kansas Legislature on April 8, 2021. Governor Laura Kelly vetoed the bill on April 23, 2021. The Kansas Legislature voted to override her veto on May 3, 2021. HB 2183 became law effective July 1, 2021.
4. Plaintiffs challenge the constitutionality of three provisions in HB 2183: 1) the false representation provision ("FRP"); 2) the advance ballot signature verification requirement ("SVR"); and 3) the ballot collection restrictions ("BCRs").
5. Plaintiffs also challenged the constitutionality of one provision in Kansas House Bill 2332 (2021), the so-called "Advocacy Ban," a related law that prohibits out of state persons or entities from mailing advance ballot applications to Kansas voters.
6. The same provision in HB 2332 was challenged by different parties in a federal case filed in the United States District Court for the District of Kansas, *VoteAmerica v. Schwab,* No. 1:21-CV-02253-KHV-GEB. The parties in *VoteAmerica* have since resolved the claims involving that provision.
7. On March 2, 2022, Plaintiffs in the instant case voluntarily dismissed their claims related to HB 2332. Thus, the Court will not consider Plaintiffs' claims in the amended petition related to HB 2332 or Defendants' arguments in favor of their dismissal.

8. Plaintiffs in the instant case filed a motion for partial temporary injunction on June 18, 2021, addressing only the FRP. This Court denied the motion in an opinion dated September 16, 2021. Plaintiffs appealed, and the appeal is pending.
9. Kansas law - as it is and as it existed prior to HB 2183 - allows any eligible registered voter to cast an advance voting ballot. Advance ballots may be cast in person or by mail. K.S.A. 25-1119.
10. Kansas law - as it is and as it existed prior to HB 2183 – provides that any eligible registered voter may file an application for an advance ballot with the county election officer. K.S.A. 2020 Supp. 25-1122(a). As part of the application, the voter must provide a Kansas driver's license number or another statutorily approved form of identification. K.S.A. 2020 Supp. 25-1122(c). The county election officer must verify that the voter's signature on the application matches the signature on file in voter registration records before issuing an advance mail ballot. K.S.A. 2020 Supp. 25-1122(e).
11. Kansas law - as it is and as it existed prior to HB 2183 – allows voters to cast advance ballots by mailing completed ballots or dropping off their ballots at a local election office. K.S.A. 2020 Supp. 25-1124(a). Voters who are ill, disabled, or who fit other statutorily defined categories may receive assistance from others to mark the advance ballot. K.S.A. 2020 Supp. 25-1124(c).
12. Under law existing prior to HB 2183, "[t]he county election officer shall attempt to contact each person who submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file and allow such voter

the opportunity to correct the deficiency before the commencement of the final county canvass." K.S.A. 2020 Supp. 25-1124(b).

13. The absentee ballot signature verification requirement, or SVR, is found in HB 2183, Section 5(h). It is now codified at K.S.A. 25-1124(h). It says:

> "Subject to the provisions of subsection (b), no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted."

14. Under law existing prior to HB 2183, a voter could have another person, as designated by the voter in writing, deliver the advance ballot to the county election official. K.S.A. 2020 Supp. 25-1124(d).

15. The advance ballot collection restrictions, or BCRs, are found in HB 2183, Section 2. They are referenced in amendments to K.S.A. 25-1124(d) and further codified in a new statute, K.S.A. 25-2437. K.S.A. 25-2437 says:

> "(a) No person shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, unless the person submits a written statement accompanying the ballot at the time of ballot delivery to the county election officer or polling place as provided in this section. Any written statement shall be transmitted or signed by both the voter and the person transmitting or delivering such ballot and shall be delivered only by such person. The statement shall be on a form prescribed by the secretary of state and shall contain:
>
> (1) A sworn statement from the person transmitting or delivering such ballot affirming that such person has not:
> (A) Exercised undue influence on the voting decision of the voter; or
> (B) transmitted or delivered more than 10 advance voting ballots on behalf of other persons during the election in which the ballot is being cast; and

(2) a sworn statement by the voter affirming that:
(A) The voter has authorized such person to transmit or deliver the voter's ballot to a county election officer or polling place; and
(B) such person has not exercised undue influence on the voting decision of the voter.

(b) No candidate for office shall knowingly transmit or deliver an advance voting ballot to the county election officer or polling place on behalf of a voter who is not such person, except on behalf of an immediate family member of such candidate.

(c) No person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election.

(d)(1) A violation of subsection (a) or (b) is a severity level 9, nonperson felony.
(2) A violation of subsection (c) is a class B misdemeanor."

CONCLUSIONS OF LAW

Defendants seek to dismiss Plaintiffs' amended petition on two grounds: 1) lack of subject matter jurisdiction; and 2) failure to state a claim.

SUBJECT MATTER JURISDICTION – STANDING.

Defendants assert that all claims against them should be dismissed for lack of subject matter jurisdiction, specifically on the basis that Plaintiffs lack standing to raise any of the claims. Where a motion to dismiss for lack of standing is decided prior to discovery and without an evidentiary hearing, the court must accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn from them. Plaintiffs need only to make a prima facie showing of standing. *Labette Cty. Med. Ctr. v. Kansas Dep't of Health & Env't,* 2017 WL 3203383, *5-6 (Kan. App. 2017) (unpublished).

Standing is the "right to make a legal claim or seek enforcement of a duty or right." *Gannon v. State,* 298 Kan. 1107, 1122, 319 P.3d 1196 (2014). Plaintiffs must have a "sufficient stake in

the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." *Id.* "The injury must be particularized, i.e., it must affect the plaintiff in a personal and individual way." *Id.* at 1123. "Under Kansas law, in order to establish standing, a plaintiff must show that (1) he or she suffered a cognizable injury and (2) there is a causal connection between the injury and the challenged conduct." *Solomon v. State,* 303 Kan. 512, 521, 364 P.3d 536 (2015). A cognizable injury is when a plaintiff demonstrates a "personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." *Id.* The existence of standing is a question of law for the court. *Id.* The burden to establish standing is on the party asserting it. *Gannon,* 298 Kan. at 1123.

For purposes of this motion to dismiss, the Court will assume the existence of standing because other arguments detailed below dispose of the claims before the Court in favor of Defendants.

FAILURE TO STATE A CLAIM.

Defendants assert that Plaintiffs' amended petition fails to state a claim regarding three provisions in HB 2183: 1) the false representation provision; 2) the advance ballot signature verification requirement; and 3) the ballot collection restrictions. The merits of Plaintiffs' FRP claim is the subject of a pending appeal of this Court's denial of a preliminary injunction regarding enforcement of the FRP. Because the merits of the FRP challenge are currently under consideration by the Kansas Court of Appeals, this Court has no jurisdiction to consider Defendants' motion to dismiss the FRP claim. Thus, that part of Defendants' motion will not be addressed here. See *Hernandez v. Pistotnik,* 60 Kan.App.3d 393, 405, 494 P.3d 203 (2021) (trial court loses jurisdiction

to modify a judgment once appeal is docketed, even while trial court may continue to address "matters independent of the judgment.")

In considering a motion to dismiss for failure to state a claim under K.S.A. 60-212(b)(6), "the court must decide the issue based only on the well-pled facts and allegations, which are generally drawn from the petition. Courts must resolve every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief. Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim." *Williams v. C-U-Out Bail Bonds, LLC,* 310 Kan. 775, 784, 450 P.3d 330 (2019) (internal quotations and citations omitted).

Defendants ask this Court to apply the federal standard for determining whether to grant a motion to dismiss for failure to state a claim. See *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (pleading must "contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (federal courts must determine whether claim has "facial plausibility"). The Kansas appellate courts have not yet explored the merits of adopting this standard, and the Court will not do so here because it makes no difference to the outcome.

Plaintiffs raise facial challenges to the election laws at issue. "A facial challenge is an attack on a statute itself as opposed to a particular application of that law. In comparison, as its name suggests, an as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as applied challenge necessarily requires findings of fact." *State v. Hinnenkamp,* 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019) (internal quotations and citations

omitted). It is "an important distinction" because it affects "the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy." *Id.*

"It is difficult for a challenger to succeed in persuading a court that a statute is facially unconstitutional. Such challenges are disfavored, because they may rest on speculation, may be contrary to the fundamental principle of judicial restraint, and may threaten to undermine the democratic process. It is easier for a challenger to succeed in persuading a court that a statute is unconstitutional as applied to that particular challenger." *State v. Bollinger,* 302 Kan. 309, 318–19, 352 P.3d 1003 (2015).

Plaintiffs do not specifically state in the amended petition whether their challenges are facial or as applied. But the remedy they seek is not to undo any particular result but to strike the challenged laws as contrary to the state constitution. This amounts to a facial challenge. And even where facial challenges and as-applied challenges may overlap, if the "claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs . . . they must satisfy . . . standards for a facial challenge to the extent of that reach." *Doe v. Reed,* 561 U.S. 186, 194 (2010).

Thus, the Court in this case will analyze whether Plaintiffs stated a claim under the facial challenge standard. "A facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *State v. Jones,* 313 Kan. 917, 931, 492 P.3d 433 (2021). Alleging that the challenged laws "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

The constitutionality of a statute is question of law. "A statute is presumed to be

constitutional, and all doubts must be resolved in favor of constitutionality. If a court can find any reasonable way to construe a statute as constitutionally valid, it must do so. Before a statute may be struck down, the constitutional violation must be clear." (Internal citations omitted.) *Solomon,* 303 Kan. at 523.

The Kansas Supreme Court has recently purported to scale back this presumption, but only in cases where it has declared a "fundamental interest" specially protected by the Kansas Constitution, such as in the case of abortion. See *Hodes & Nauser, MDs v. Schmidt,* 309 Kan. 610, 673-74, 440 P.3d 461 (2019). Because there is currently no such specific declaration by the Kansas Supreme Court about the particular state-created rights alleged here, the general presumption of constitutionality applies to the challenged provisions.

A. BALLOT COLLECTION RESTRICTIONS.

RIGHT TO FREE SPEECH/ASSOCIATION (COUNT I) AND RIGHT TO VOTE (COUNT II).

Plaintiffs argue that the ballot collection restrictions in HB 2183, Section 2, now codified at K.S.A. 25-2437, violate the right to freedom of speech and association embodied in Sections 3 and 11 of the Kansas Constitution Bill of Rights. Section 3 says: "The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." Section 11 says in pertinent part that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights."

By way of comparison, the First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It is applicable to the states through the Fourteenth Amendment. Though not identically worded, Kansas courts consider the two provisions to be "coextensive." *Prager v. Kansas Dept. of Revenue,* 271 Kan. 1, 33, 37, 20 P.3d 39 (2001); *State v. Russell,* 227 Kan. 897, 899, 610 P.2d 1122, *cert. denied* 449 U.S. 983 (1980). To the extent Plaintiffs suggest that Section 3 or 11 affords greater protection than the First Amendment, the suggestion is rejected as inconsistent with existing Kansas precedent, which this Court is bound to follow. *Henderson v. Board of Montgomery County Com'rs,* 57 Kan. App. 2d 818, 830, 461 P.3d 64 (2020).

Plaintiffs also assert that the BCRs violate the right to vote found in Article 5, Section 1 of the Kansas Constitution, and Sections 1 and 2 of the Kansas Constitution Bill of Rights. Article 5, Section 1 of the Kansas Constitution says in part: "Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector." Section 1 of the Kansas Constitution Bill of Rights says: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 says in pertinent part: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

Plaintiffs first argue that the ballot collection restrictions are unconstitutional because they criminalize certain advance ballot collection activities protected by the state constitution. Analysis of the challenged provision begins with the framework used to consider Plaintiffs' argument. There are four choices on the current First Amendment spectrum, and they apply here: 1) the strict scrutiny test; 2) the *Meyer-Buckley* "exacting scrutiny" test; 3) the *Anderson-Burdick* "flexible balancing" test; and 4) the rational basis test. The parties appear to agree that the legal challenges

based on freedom of speech and the right to vote are subject to the same analysis.

The strict scrutiny test has been applied to laws that proscribe core political speech. For example, the strict scrutiny test was applied to a city ordinance that prohibited non-residents from circulating initiative, referendum, or recall petitions inside city limits. *Chandler v. City of Arvada, Colo.,* 292 F.3d 1236 (10th Cir. 2002). Strict scrutiny requires any prohibition on protected speech to be narrowly tailored to support a compelling state interest. A compelling state interest includes "policing the integrity" of the political process. *Id.* at 1241.

But it is an "erroneous assumption" that strict scrutiny applies to any law touching upon the First Amendment rights in the election context. *Burdick v. Takushi,* 504 U.S. 428, 432 (1992).

> "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (Internal quotations and citations omitted.) *Id.* at 433.

For this reason, the United States Supreme Court has more often applied some form of a balancing test to laws that restrain or reduce core political speech to some degree. There are two such balancing tests. The more demanding of the two is the *Meyer-Buckley* "exacting scrutiny" test. This refers to *Meyer v. Grant,* 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182 (1999). In *Meyer,* the court invalidated the state's prohibition on the use of paid petition circulators. 486 U.S. at 428. In *Buckley,* the court invalidated three additional restrictions on petition circulators, including that circulators be registered voters, wear

an identification badge with name, and be listed in a report with the names and addresses of all paid circulators and the amount paid to each. 525 U.S. at 186. The so-called "exacting scrutiny" test arising from these cases requires a law to be "substantially related to important government interests" that cannot be addressed by "less problematic measures." 525 U.S. at 202, 204.

The *Meyer-Buckley* test has been applied in other jurisdictions in scenarios not analogous here. See *League of Women Voters v. Hargett,* 400 F.Supp.3d 706, 725 (M.D. Tenn. 2019). In *Hargett,* a federal district court in Tennessee applied "exacting scrutiny" to strike laws requiring among other things: 1) prior registration with the state for those who plan to collect 100 or more voter registration applications during a voter registration drive; 2) a 10-day turn-in period for voter registration applications collected, with criminal penalties for failure to do so; 3) civil penalties for submitting incomplete applications on behalf of others; and 4) mandatory disclaimers on communications regarding voter registration status. *Id.* at 711-13. Not wanting to "slice and dice" the numerous provisions at issue, *Id.* at 720, the *Hargett* court decided that it would apply *Meyer-Buckley* because taking all of the provisions together, "the regulation of First Amendment-protected activity is not some downstream or incidental effect" of the law as a whole. *Id.* at 720-24.

In the context of challenges to election laws, the most oft-applied test in the Tenth Circuit is the *Anderson-Burdick* "flexible balancing" test. See, e.g., *Fish v. Schwab,* 957 F.3d 1105 (10th Cir. 2020); *Navajo Nation v. San Juan Cty.,* 929 F.3d 1270 (10th Cir. 2019); *Utah Republican Party v. Cox,* 892 F.3d 1066 (10th Cir. 2018). This test is derived from *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983); and *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). In *Anderson,* the court invalidated a state's early filing deadline for independent candidates to appear on the ballot. 460

U.S. at 806. In *Takushi,* the court upheld a state's prohibition on write-in voting. 504 U.S. at 441-42. The resulting "flexible balancing" test is generally explained as follows:

> "a court considering a challenge to a state election law must 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." (Internal citations and quotations omitted.) *Cox,* 892 F.3d at 1077.

Further:

> "If a regulation is found to impose severe burdens on a party's associational rights, it must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." (Internal citations and quotations omitted.) *Id.*

The fourth and final test is the rational basis test. Where plaintiffs fail to demonstrate an actual burden on a constitutional right, a straightforward rational basis standard should be applied. *Hargett,* 400 F.Supp.3d at 722, citing *McDonald v. Bd. of Election Com'rs,* 394 U.S. 802, 807–09 (1969). The rational basis test requires only that the law "bear some rational relationship to a legitimate state interest." *Hodes,* 309 Kan. at 611.

With these frameworks in mind, the analysis turns to the plain language of the statute, "giving common words their ordinary meaning." *Carman v. Harris,* 313 Kan. 315, 318, 485 P.3d 644 (2021). K.S.A. 25-2437(a) requires that any person delivering the advance ballot of another person to a county election office or polling place must submit a written statement on a form approved by the Secretary of State with attestations from the voter and the delivery agent that the agent did not exert undue influence over the voter, the voter authorized the agent to deliver the ballot, and the agent has not delivered more than 10 advance voting ballots on behalf of others

during the election in which the ballot is being cast. K.S.A. 25-2437(b) prohibits a candidate for office from delivering advance voting ballots on behalf of another person other than immediate family members. K.S.A. 25-2437(c) prohibits a person from delivering more than 10 advance voting ballots on behalf of others during the election. Violation of Sections (a) and (b) are severity level 9, nonperson felonies. Violation of Section (c) is a class B misdemeanor.

Plaintiffs argue that the criminal prohibition of certain ballot collection activities "directly restricts Plaintiffs' core political speech and expressive conduct by severely diminishing their capacity and ability to assist voters." Defendants counter that the BCRs do not infringe on Plaintiffs' free speech or association rights at all because they do not target speech or expressive conduct. The only thing restricted under the BCRs is the specific conduct of delivering a third-party's advance ballot to election officials. "[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny." *DCCC v. Ziriax,* 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020); *Lichtenstein v. Hargett,* 489 F.Supp.3d 742, 765-77 (M.D. Tenn. 2020) (same); *New Georgia Project v. Raffensperger,* 484 F.Supp.3d 1265, 1300-02 (N.D. Georgia 2020) (same); *Knox v. Brnovich,* 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting argument that the act of collecting early ballots is expressive conduct that conveys any message about voting, concluding that this type of conduct cannot reasonably be construed "as conveying a symbolic message of any sort"); *Feldman v. Ariz. Sec'y of State's Office,* 843 F.3d 366, 392 (9th Cir. 2016) (collecting ballots is not expressive conduct "[e]ven if ballot collectors intend to communicate that voting is important"); *Voting for America v. Steen,* 732 F.3d 382, 393 (5th Cir. 2013) (similarly, collecting voter registrations is not protected speech).

Because the BCRs do not restrict core political speech or expressive conduct, the rational basis test applies. As set forth above, rational basis review requires that legislative action bear some rational relationship to a legitimate state interest. There is a "strong presumption of validity" when examining a statute under rational basis review, and the burden is on the party challenging the validity of the legislative action to establish that the statute is unconstitutional. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993). The party defending the constitutionality of the action need not introduce evidence or prove the actual motivation behind passage but must only demonstrate that there is some legitimate justification that could have motivated the action. *Id.* at 315.

Defendants assert multiple justifications for the BCRs, primarily the government's interest in combating voter fraud and instilling public confidence in elections. The United States Supreme Court has emphasized that the state has an interest in deterring election fraud. *John Doe No. 1 v. Reed,* 561 U.S. 186, 217 (2010). The state has an interest in maintaining "public confidence in the integrity of the electoral process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997). Indeed, the Tenth Circuit has recognized a compelling state interest in the integrity of the election process. *Chandler,* 292 F.3d at 1241.

The United States Supreme Court has recently recognized these interests in the context of advance ballot collection restrictions.

> "A State indisputably has a compelling interest in preserving the integrity of its election process. Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election

> Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.
>
> The Commission warned that vote buying schemes are far more difficult to detect when citizens vote by mail, and it recommended that States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting third-party organizations, candidates, and political party activists from handling absentee ballots. The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials
> . . . .
>
> The Court of Appeals thought that the State's justifications for HB 2023 were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. But prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. Section 2's command that the political processes remain equally open surely does not demand that a State's political system sustain some level of damage before the legislature [can] take corrective action. Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States. . . . The Arizona Legislature was not obligated to wait for something similar to happen closer to home." *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2347–48 (2021) (internal quotation marks and citations omitted).

Plaintiffs assert that there is no evidence of voter fraud or insecurity in Kansas' election processes and thus no need to enact prophylactic measures. But as articulated in *Brnovich,* the government need not demonstrate that fraud exists to justify taking measures to prevent it. The BCRs pass constitutional muster under the rational basis test.

Even if the BCRs incidentally implicated speech or conduct protected by the Kansas Constitution, they would be subject only to the *Anderson-Burdick* flexible balancing test. This test weighs the character and nature of the burden on protected speech or conduct versus the

government's important regulatory interests, and whether these interests are enough to justify reasonable, non-discriminatory restrictions. The BCRs allow a person to deliver the advance ballots of others, but only with the submission of a written statement and a cap on how many advance ballots may be delivered in each election. To the extent Plaintiffs argue that there is a need in certain communities for help in collecting and delivering ballots, the need may still be met. And as Defendants point out, the United States Supreme Court in *Brnovich* recently upheld a more restrictive state law that prohibits third party ballot collection except by a postal worker, election official, or family or household member. 141 S.Ct. at 2325. Finally, the government's regulatory interests are important and justify the BCRs, which are reasonable, non-discriminatory restrictions. Even if the *Anderson-Burdick* test applies, it is easily met.

The ballot collection restrictions in HB 2183, Section 2, now K.S.A. 25-2437, do not violate the right to freedom of speech and association embodied in Sections 3 and 11 of the Kansas Constitution Bill of Rights, or the right to vote in Article 5, Section 1 of the Kansas Constitution, and Sections 1 and 2 of the Kansas Constitution Bill of Rights. For the reasons set forth above, the Court grants Defendants' motion to dismiss Plaintiffs' challenge to the BCRs.

B. SIGNATURE VERIFICATION REQUIREMENT.

Plaintiffs challenge the signature verification requirement in HB 2183, Section 5(h), now K.S.A. 25-1124(h). It says, "no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records." There is an exception where a voter's disability prevents him or her from signing the ballot or creating a signature consistent with the one on the voter's registration form. The signature

may be verified by an electronic device or human inspection. If the signatures do not match, the ballot does not count. But K.S.A. 25-1124(b) requires the county election officer to attempt to contact each person who submits an advance voting ballot where the signature does not match with the signature on file and "allow such voter the opportunity to correct the deficiency before the commencement of the final county canvass."

1. RIGHT TO VOTE (COUNT II) AND EQUAL PROTECTION (COUNT III).

Plaintiffs assert that the SVR violates the right to vote and to equal protection found in Article 5, Section 1 of the Kansas Constitution, and Sections 1 and 2 of the Kansas Constitution Bill of Rights. These provisions are quoted above. The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Kansas courts have interpreted Sections 1 and 2 of the Kansas Constitution Bill of Rights to be counterparts to the Equal Protection Clause of the Fourteenth Amendment and have interpreted the state and federal provisions in the same manner. *State ex rel. Tomasic v. City of Kansas City,* 237 Kan. 572, Syl. ¶ 12, 701 P.2d 1314 (1985).

Plaintiffs assert that the SVR is unreliable, non-uniform, and lacks standards for evaluating the authenticity of a signature match. Plaintiffs argue that for these reasons, the SVR imposes such a severe burden on advance ballot voters that it amounts to robbing them of their right to vote. Plaintiffs briefly assert that a strict scrutiny test applies to the SVR, but it does not. The strict scrutiny test applies to laws that restrict core political speech. Plaintiffs do not explain how a signature match requirement implicates political speech. On this issue, the Court will apply the

Anderson-Burdick test. This requires weighing the character and magnitude of the burden on constitutional rights against the government interests justifying the burden.

Plaintiffs cite *Democratic Executive Committee v. Lee,* 915 F.3d 1312, 1321 (11th Cir. 2019), where the court applied the *Anderson-Burdick* test and found Florida's SVR imposed "at least a serious burden" on the right to vote. But part of the burden calculus in that case was that there was no meaningful right to cure the signature discrepancy built into the legislation. *Id.* The court acknowledged the government's interests in "preventing fraud; promoting the orderly, efficient, and timely administration of the election; and ensuring fairness and public confidence in the legitimacy of the election," but considered the "legitimacy and strength" of these interests to be diminished by the voter's lack of an opportunity to cure, which was effectively absent from the Florida scheme. *Id.* at 1321-22.

The Kansas SVR requires a signature match between advance mail ballots and voter registration records. But importantly, county election officials must notify an advance ballot voter of a missing signature or signature mismatch and provide an opportunity to cure before the commencement of the final county canvass. The final county cavass occurs on the Monday next following a Tuesday election but can be moved by a county election officer to any business day not later than 13 days following an election. See K.S.A. 25-3104. Further, disabled persons are exempt from the signature match requirement if the disability prevents them from creating a signature consistent with the one on the voter's registration form. Ill or disabled persons who cannot sign the ballot may receive help from a third party in casting the ballot. Those who believe they cannot provide a matching signature can vote in person on Election Day or during advance voting.

"No citizen has a Fourteenth Amendment right to be free from the usual burdens of voting." *Richardson v. Texas Secretary of State,* 978 F.3d 220, 237 (5th Cir. 2020). In *Richardson,* the court concluded that Texas' signature verification requirement – much like the one at issue here and with some of the same mitigating measures – was not a severe burden on the right to vote, but a reasonable and non-discriminatory restriction justified by legitimate government interests in election integrity. *Id.* at 241. Accord *League of Women Voters of Ohio v. LaRose,* 489 F.Supp.3d 719, 737 (Ohio's SVR imposed a moderate burden on the right to vote, but was outweighed by the government's interest in combatting fraud and the appearance of fraud); *Lemons v. Bradbury,* 538 F.3d 1098 (9th Cir. 2008) (procedures for verifying referendum petition signatures did not violate plaintiffs' equal protection or due process rights; where there was no requirement to notify a voter of a non-match and no opportunity to dispute the finding, court held that any burden on the right to vote was minimal and outweighed by the state's interests in "detecting fraud and in the orderly administration of elections," interests which are "weighty and undeniable").

Plaintiffs' only remaining argument against dismissal is that the nature of the burden on the right to vote or equal protection concerns is a fact question that cannot be decided on a motion to dismiss. But Plaintiffs' claim is essentially a facial challenge to the SVR – in other words, there are no "facts" necessary, other than the provisions of the statute themselves to be weighed against the government's recognized compelling interest in preserving the integrity of its election process, preventing voter fraud and improving voter confidence in election results.

The Court concludes that the provisions of the SVR are reasonable, non-discriminatory restrictions which are outweighed by the state's compelling state interest in the integrity of its

elections. The Court grants Defendants' motion to dismiss the right to vote and equal protection claims regarding the SVR.

2. RIGHT TO DUE PROCESS (COUNT VI).

Plaintiffs also assert that the SVR violates the right to procedural due process found in Section 18 of the Kansas Constitution Bill of Rights because it allows for rejection of an advance mail ballot without adequate procedural protections. Section 18 says: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Remedy by due course of law refers to procedural due process. *In re Marriage of Soden,* 251 Kan. 225, 233, 834 P.2d 358 (1992). Historically, Kansas courts equate the due process protections of Section 18 with those guaranteed by the Fourteenth Amendment. *State v. Boysaw,* 309 Kan. 526, 537-38, 439 P.3d 909 (2019).

"The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. In reviewing a procedural due process claim, the court first must determine whether a protected liberty or property interest is involved. If so, the court then must determine the nature and extent of the process which is due." *State v. N.R.,* 314 Kan. 98, 113, 495 P.3d 16 (2021).

There is no federal constitutional right to vote by mail. *McDonald,* 394 U.S. at 807-08. Kansas law provides an option to vote by mail. Plaintiffs cite a smattering of federal district court cases from other jurisdictions for the proposition that once a state provides the option to vote by mail, that option gives rise to a liberty interest entitled to procedural due process protections. Those cases are not persuasive.

More compelling is Defendants' argument that the right to vote by mail does not implicate a protected liberty or property interest under the federal and state constitutions. See, e.g., *Richardson,* 978 F.3d at 231 (the United States Supreme Court has not extended the label of "liberty interest" to the right to vote in general, let alone to the right to vote by mail); *Org. for Black Struggle v. Ashcroft,* 2021 WL 1318011, at *6 (W.D. Mo. 2021), citing *Org. for Black Struggle v. Ashcroft,* 978 F.3d 603, 607-08 (8th Cir. 2020) ("the right to vote by mail is not a liberty interest to which procedural due process protections apply"); *New Georgia Project v. Raffensperger,* 976 F.3d 1278, 1282 (11th Cir. 2020) (in case involving absentee ballot submission deadlines, the "generalized due process argument . . . would stretch concepts of due process to their breaking point"); *Memphis A. Phillip Randolph Inst. v. Hargett,* 482 F. Supp. 3d 673, 691 (M.D. Tenn.), *aff'd on other grounds Memphis A. Philip Randolph Inst. v. Hargett,* 978 F.3d 378 (6th Cir. 2020) (right to vote is not a liberty interest for purposes of procedural due process); *League of Women Voters of Ohio v. Brunner,* 548 F.3d 463, 479 (6th Cir. 2008) (right to vote does not trigger procedural due process because voting is not a liberty interest protected by the due process clause).

The state-created option to vote by mail does not give rise to a protected liberty interest under Section 18 of the Kansas Constitution Bill of Rights. Without such an interest, there is no entitlement to procedural protections and thus no need to analyze whether the protections provided are adequate. Plaintiffs' claim for deprivation of procedural due process rights under the state constitution fails as a matter of law. Defendants' motion to dismiss Plaintiffs' challenge to the SVR on this basis is granted.

OTHER MOTIONS.

The parties filed procedural motions related to the briefing of Defendants' motion to dismiss. Further, Plaintiffs very recently moved for a second partial temporary injunction.

A. PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANTS' REPLY IN SUPPORT OF THE MOTION TO DISMISS.

On October 14, 2021, Plaintiffs moved to strike a few sentences of Defendants' reply brief devoted to the observation that Plaintiffs raised only a facial challenge to portions of HB 2183. Plaintiffs asserted that this was a new argument not raised in the opening brief in support of the motion to dismiss, thus it was waived and could not be raised in the reply. Plaintiffs then explained why Defendants' underlying observation was wrong.

Defendants responded that the discussion of a facial challenge was referenced in the motion to dismiss, acknowledged in Plaintiffs' response to the motion to dismiss, and properly raised in Defendants' reply to counter Plaintiffs' assertions in their response. The Court agrees and denies the motion to strike portions of Defendant's reply in support of the motion to dismiss.

Defendants in a similar vein accuse Plaintiffs of using the motion to strike as a vehicle for an unauthorized sur-reply. Defendants urge the Court to disregard at least one portion of Plaintiffs' motion to strike. The Court has read both the Defendants' reply and Plaintiffs' motion to strike portions of the reply and will accept these documents for what they are worth to the analysis.

B. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY.

On November 24, 2021, Plaintiffs filed a "notice of supplemental authority and explanation." In essence, Plaintiffs wanted to draw the Court's attention to an opinion in *VoteAmerica v. Schwab*, No. 1:21-cv-02253-KHV-GEB, filed November 19, 2021. There, the

Kansas federal district court considered a challenge to HB 2332 regarding mailing advance ballot voting applications. Two of the defendants in the VoteAmerica case are Defendants here. In the November 19, 2021, opinion, the federal court denied a motion to dismiss the HB 2332 claims and granted Plaintiffs' request for a preliminary injunction preventing enforcement of a portion of HB 2332.

On December 1, 2021, Defendants filed a response and motion to strike Plaintiffs' notice of supplemental authority and explanation, and on December 15, 2021, Plaintiffs replied. Rather than spend time analyzing this repartee, the Court will simply take judicial notice of the November 19, 2021, opinion in *VoteAmerica* (later amended by the federal court in an opinion dated December 15, 2021) and draw its own conclusions about any application here, notably since Plaintiffs here have dismissed their challenge to HB 2332. Defendants' motion to strike the notice and explanation is denied.

C. PLAINTIFFS' MOTION FOR PARTIAL TEMPORARY INJUNCTION REGARDING THE SVR.

On April 7, 2022, Plaintiffs filed a motion for partial temporary injunction regarding the signature verification requirement. Given the Court's dismissal of Plaintiffs' challenge to the SVR for failure to state a claim, the Plaintiffs' motion for partial temporary injunction is moot and will not be considered.

CONCLUSION

For the reasons set forth above, the Court grants Defendants' motion to dismiss Plaintiffs' claims in the amended petition regarding the ballot collection restrictions and the signature verification requirement. No further journal entry is necessary.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to counsel of record.

/s Angela Cox
Administrative Assistant