

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 22-125084-S

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

Plaintiffs-Appellants-Respondents,

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-Petitioners.

MOTION FOR AN INJUNCTION PENDING RESOLUTION OF APPEAL

Appeal from the Kansas Court of Appeals
Case No. 22-125084-A

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

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MOTION FOR AN INJUNCTION PENDING RESOLUTION OF APPEAL

At issue are two restrictions enacted in 2021 that erect barriers to lawful voters having their ballots counted, largely for reasons beyond their control: K.S.A. 25-1124(h) (the “Signature Verification Requirement”) and K.S.A. 25-2437 (the “Ballot Collection Restriction”). Plaintiffs sued shortly after enactment, but the district court did not allow discovery while Defendants’ motion to dismiss was pending, and then waited another six months to decide that motion. The Court of Appeals unanimously reversed the district court’s order of dismissal and remanded for proceedings on the merits, but Plaintiffs cannot move for an injunction in the district court until this appeal is resolved, which will not be in time to protect voters in elections in August, and perhaps not even in time for November or next year’s elections.

To guard against the risk that lawful voters are disenfranchised by the challenged provisions while this Court considers Defendants’ arguments, Plaintiffs move, pursuant to K.S.A. 60-262, for an injunction pending appeal. The challenged provisions threaten fundamental rights and there is no evidence that they are necessary to protect the integrity of the state’s elections, which have long been safe and secure without these new impediments. Each relevant factor favors an injunction: (1) there is a substantial likelihood Plaintiffs will prevail, (2) absent an injunction, Plaintiffs, their members and constituents, and countless other lawful voters face irreparable harm to their fundamental rights, (3) there is no adequate legal remedy for that harm, (4) the threatened harm outweighs any injury that would be imposed on Defendants, and (5) an injunction is in the public interest.

STATEMENT OF FACTS

History of Advance Voting in Kansas

Kansas has a long history of ensuring access to the franchise—including by allowing voting by advance ballot and permitting a broad array of means of returning those ballots. The Kansas Constitution refers to absentee voting specifically. Kan. Const. art. V, § 1. And as the Secretary recently noted in testimony before the Legislature, the practice of absentee voting in Kansas—and of ballot collection—goes as far back as the Civil War. For 28 years, Kansas has expressly permitted all voters to vote using advance ballots without incident. K.S.A. 25-1119. The two new provisions at issue in this appeal break with this long historical tradition and directly threaten the right to vote.

The Signature Verification Requirement

First, the Signature Verification Requirement *requires* election officials to reject advance ballots for perceived mismatches between the signature on the ballot envelope and in the voter's registration records. K.S.A. 25-1124(h). Even experts with years of training need many exemplars, significant time, and the right equipment to accurately match signatures. (R. III, 225). When non-experts attempt it, the process is inherently unreliable, and far more likely to misidentify authentic signatures as forgeries than identify a true mismatch. (R. III, 219, 222-28). When done as required by the new Signature Matching Requirement, mistakes are guaranteed. (R. III, 234). Anyone is at risk of having their ballot rejected in this inherently unreliable process, but voters who are elderly, disabled, in poor health, young, or non-native English speakers are particularly vulnerable due to higher rates of signature variability. (R. III, 222-23, 226-28).

The legislative proceedings were rushed and fraught with irregular maneuvers that limited opportunity for public comment (or even input from election officials), but even so the Legislature heard testimony—and acknowledged—that the Requirement would threaten lawful voters. (R. III, 477-78, 527-28). As Senator Mary Ware recognized, “signatures vary constantly, depending on a thousand factors,” and other legislators—Republicans and Democrats alike—acknowledged the Requirement would result in valid signatures being erroneously flagged for rejection. (R. III, 410).

The Ballot Collection Restriction

The second restriction involves the practice of ballot collection, upon which Kansas voters have long relied, without incident, to ensure their ballots are delivered to election officials in time to be counted. *See* Ct. of Appeals Op. (“Op.”) at 32. As the Secretary recently acknowledged, the practice goes back to the very beginning of statehood: “[G]oing back to the Civil War, we wanted to make sure Kansans could vote. And so we were one of the first states to do advance mail ballots for our military members that were fighting in the Civil War [so they] could vote. And often, one person in that military unit would collect those ballots to make sure they got sent back to the state.” SB 208 2/20/23 Hr’g. 39:05-39:20.¹

¹ Kansas became the 34th state in the Union on January 29, 1861, when the U.S. Senate approved the Wyandotte Constitution. The Civil War began on April 23, 1861. A recording of the hearing where the Secretary made these statements, which related to proposed Senate Bill 208 (2023), is available at Kan. Legis., *Senate Federal & State Affairs Committee 02/20/2023*, with the relevant portion beginning at 38:36, YOUTUBE, <https://www.youtube.com/watch?v=sWJUgtUmPvA> (last visited June 26, 2023). The hearing is referred to herein as SB 208 2/20/23 Hr’g.

In 2021, the Legislature enacted three new restrictions on this long-standing practice. Plaintiffs challenge only one of them: Plaintiffs do *not* challenge the requirement that ballot collectors obtain a written statement of authorization, signed by both the voter and collector, to submit with the ballot when delivered, *id.* at 25-2437(a), nor do they challenge the ban on candidates personally collecting and delivering ballots, *id.* at 25-2437(b). Plaintiffs only challenge the additional restriction, codified at K.S.A. 25-2437(c), criminalizing the collection and delivery of more than 10 advance ballots by any single person, *even if they fully comply with the limitations above*—an arbitrary limit that severely curtails the number of voters who can be reached and assisted. *See also* Op. at 32.²

There was significant opposition to the Restriction including from faith leaders like Plaintiffs Sisters of St. Joseph of Concordia Faye Huelsmann and Patricia Lewter, who submitted written testimony that it would significantly hinder their ability to continue to assist the communities they serve. (R. II, 271; *see also* R. III, 375-76). The Executive Director of the Disability Rights Center of Kansas similarly testified that both challenged provisions would disproportionately harm disabled voters. (R. II, 270; R. V, 16).

The Legislative Process

There was no evidence that either challenged provision was necessary to solve any existing, actual problem. One of the bill’s sponsors, Senator Larry Alley, conceded on the Senate Floor that the issue is not what had “happen[ed] in Kansas,” but what theoretically

² The written certification required by K.S.A. 25-2437(a) includes a statement that the ballot collector has not returned more than ten ballots. *See* K.S.A. 25-2437(a)(1)(B). That statement is within the scope of Plaintiffs’ challenge.

could happen. (R. III, 492). But, as noted, Kansas has without incident given voters the right to vote by advance ballot for decades—*without* signature matching or criminal restrictions on the number of ballots that the civic-minded can collect and deliver for voters, suggesting that these additional restrictions are unnecessary.

The provisions passed on April 8, 2021, on largely party line votes, as part of House Bill 2183. (R. III, 23). On April 23, Governor Kelly vetoed the bill, describing it as “a solution to a problem that does not exist,” and noting that, “[a]lthough Kansans have cast millions of ballots over the last decade, there remains no evidence of significant voter fraud in Kansas.” (R. III, 200). The Governor concluded the bill was “designed to disenfranchise Kansans, making it difficult for them to participate in the democratic process, not to stop voter fraud.” *Id.* The Legislature overrode the veto along party lines, and the provisions became effective on July 1, 2021.

Plaintiffs’ Lawsuit

Plaintiffs filed suit on June 1, 2021. (R. I, 21). They amended their petition to add claims against additional legislation on August 3, 2021. (R. II, 230). Defendants moved to dismiss, (R. II, 300), and that motion was fully briefed on October 1, 2021, (R. III, 40). Plaintiffs sought to proceed with discovery, but the district court denied the request, stating it would “not consider” doing so until after it decided the motion to dismiss. Order on Mot. to Set Case Mgm’t Conf. (Nov. 1, 2021).

The motion to dismiss sat pending for more than six months. In early spring of 2022, concerned that voters would be disenfranchised in upcoming elections, Plaintiffs moved for a temporary injunction of the Signature Verification Requirement. That motion was

filed on April 7, 2022. (R. V, 2). It was supported by substantial evidence, including expert analysis from board-certified and internationally recognized forensic document examiner Dr. Linton Mohammed, who explained in detail why the Requirement was “all but guaranteed to result in the erroneous rejection of properly cast ballots.” (R. III, 236).

The District Court’s Order on the Motion to Dismiss

Four days after Plaintiffs filed their motion for a temporary injunction, the district court granted the motion to dismiss and denied the motion for a temporary injunction as moot. (R. V, 54). The district court’s opinion was riddled with errors. Instead of following this Court’s precedent for evaluating challenges to fundamental rights, *see Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663, 440 P.3d 461, 493 (2019), the district court applied a standard that was highly deferential to the State and held that the Ballot Collection Restriction satisfied rational basis review. The district court also subjected both the Ballot Collection Restriction (in the alternative) and the Signature Verification Requirement to the federal *Anderson-Burdick* “flexible balancing” test—despite that test having never before been used by a Kansas court—ostensibly weighing the burdens of the challenged laws against the purported government interests. (R. V, 73). In doing so, the district court ignored the facts as pleaded by Plaintiffs and determined that the burdens were slight and justified by the State’s interest in election integrity. (R. V, 74); *see also*

Op. at 31 (Court of Appeals asking: “Upon what facts in this record did the district court make this determination?”).³

The Court of Appeals’ Proceedings and Decision

Plaintiffs immediately appealed and requested expedited review. The Court of Appeals held oral argument on September 20, 2022, and on March 17, 2023 issued an opinion unanimously reversing the district court’s dismissal of Plaintiffs’ claims. Op. at 48. In doing so, the Court of Appeals recognized that the right to vote is fundamental—a point that Defendants do not dispute—and that infringement on that right must satisfy strict scrutiny in accordance with this Court’s precedent. *Id.* at 25. It further determined that the challenged provisions infringe upon the right to vote: the Signature Verification Requirement because it leads to the erroneous rejection of qualified ballots and the Ballot Collection Restriction because it prevents votes from being cast and counted. *Id.* at 28-34. It remanded to the district court for further proceedings to determine whether Defendants could show that either provision satisfies strict scrutiny. *Id.* at 47.

³ In addition to the Ballot Collection Restriction and the Signature Verification Requirement, Plaintiffs alleged claims against the False Representation Provision, K.S.A. 25-2438, and the Advocacy Ban, K.S.A. 25-1122(1)(1). Plaintiffs dismissed their Advocacy Ban claims after a federal court found the Ban violated the First Amendment and Defendants agreed to a permanent injunction. Mem. & Order, *VoteAmerica v. Schwab*, No. 2:21-cv-02253-KHV-GEB (D. Kan. Nov. 19, 2021), ECF No. 50. Plaintiffs’ challenge to the False Representation Provision is the subject of a separate appeal pending before this Court. See *League of Women Voters v. Schwab*, No. 124378. Because that appeal was pending when the district court decided the motion to dismiss, it found it did not have jurisdiction to dismiss those claims, (R. V, 60), and they are not at issue in this appeal.

Defendants' Petition for Review

Defendants' petition for review was granted on June 23, 2023. This Court is next scheduled to hear argument in mid-September. In the meantime, multiple jurisdictions will hold local primary elections on August 1, closely followed by a general election on November 7. In addition, the Legislature recently enacted a law allowing for a state-wide presidential primary on March 19, 2024. H.B. 2053 (2023). It is likely already too late to resolve this appeal before this year's elections and—even if the Court affirms—it would need to act quickly for Plaintiffs to be able to secure relief before the March 2024 primary. In the meantime, the challenged provisions threaten to disenfranchise lawful voters in ongoing elections. *See* Defs.' Resp. to Pls.' Mot. to Expedite Pet. for Rev. at 3 (“[T]here are virtually always ongoing elections in Kansas throughout the year.”).

The Secretary's Public Admissions

The Secretary has repeatedly touted the safety and security of Kansas's elections—including after the 2020 elections and before the challenged restrictions were passed. The Secretary's Office conducted a statewide audit of the 2020 election, which confirmed that “[a]ll votes [were] accounted for and foul play, of any kind, was not found.” (R. II, 7).

And, although he supported the challenged restrictions, the Secretary recently testified before the Legislature about the threat to voters when they have to depend on USPS to return their ballots. Specifically, the Secretary testified that legislation that would restrict drop boxes would have the effect of pushing lawful voters “to put [their ballots] in the mail,” and asked (rhetorically, clearly): “[W]hy in God's green earth would you want the federal post office or the federal government in charge of your ballot? I got a Christmas

card last week.” SB 208 2/20/23 Hr’g. 21:24-21:45. The Secretary went on to detail several accounts from county clerks who reported receiving ballots in the mail long after elections in recent years, including *six months or even a year-and-a-half after* an election. *Id.* at 21:48-21:59. He indicated that this is because, at least “in Southwest Kansas, your mail goes to Santa Fe, New Mexico,” before coming back to be delivered in Kansas. *id.* at 21:59-22:04; *see also* SB 209 2/16/23 Hr’g. 43:11-43:24, Kan. Legis., *Senate Federal & State Affairs Committee 02/16/2023*, YOUTUBE, <https://www.youtube.com/watch?v=pnFsqBUTrcM> (last visited June 26, 2023) (D. Hammet testimony on how Kansas does not have in-state mail processing facilities so Kansans’ mail must leave the state).

The Secretary emphasized that when the Legislature passes laws that “push [ballots] towards the mail, most ballots will leave the state of Kansas” before they are delivered back in Kansas. SB 209 2/20/23 Hr’g. 22:47-22:51. During that process, they are outside of Kansas’s jurisdiction, and any number of things can happen. *Id.* at 22:52-22:56. Among other issues, the Secretary explained that those who deal with bulk mailings are aware of a phenomenon with the mail system that he referred to as places called “black holes” because “mail goes in, but it don’t come out.” *Id.* at 22:07-22:13. All of these issues can plague ballots that are diverted to the mail due to the Ballot Collection Restriction, just as profoundly as they would have if the Legislature had restricted the use of drop boxes.

During this same hearing, the Secretary detailed several of the ways in which Kansas elections are tightly secured against fraud, making any attempt to cast a fraudulent advance ballot exceedingly unlikely to be successful, including that ballots are prepared on special weight paper with alphanumeric marks and bar codes; voters have to affirmatively

request an advance ballot for them to be counted and must include their driver's license number when applying for an advance ballot by mail; and advance ballots come in special security envelopes in which they must be returned. *See id.* at 20:35-21:06.

LEGAL STANDARD

Under K.S.A. 60-262(f) appellate courts have the power “to suspend, modify, restore or grant an injunction, while an appeal is pending.” *Cf. City of Olathe v. City of Spring Hill*, 316 Kan. 64, 66, 512 P.3d 723, 725 (2022) (noting Court of Appeals issued stay and injunction pending appeal pursuant to 20-262(f)); *State v. Morrison*, 302 Kan. 804, 811, 359 P.3d 60, 65 (2015) (same where appellee faced irreparable harm during State's appeal). Under the five-factor test applied by Kansas courts, a temporary injunction is appropriate if (1) there is a “substantial likelihood” movants will prevail on the merits; (2) there is a “reasonable probability” they will suffer irreparable injury without an injunction; (3) movants have no other adequate legal remedy (e.g., damages); (4) the injury to movants outweighs injury an injunction would impose on the appellant; and (5) an injunction “will not be against the public interest.” *Hodes*, 309 Kan. at 619. Each factor is satisfied here.

ARGUMENT

I. Plaintiffs are substantially likely to prevail on their claims.

The challenged provisions unduly burden fundamental rights protected by the Kansas Constitution, including the right to vote, and therefore, under this Court's precedent, must satisfy strict scrutiny. But even if the Court were to apply the federal

Anderson-Burdick balancing test, Plaintiffs are still likely to prevail, because Defendants lack an adequate basis to justify the burden that the provisions impose on the right to vote.

A. Strict scrutiny applies to laws that burden fundamental rights protected by the Kansas Constitution, including the right to vote.

As Defendants conceded in their petition for review, there is no dispute that “the right to vote is fundamental or that legally cast votes must be counted.” Pet. at 7. This Court has consistently recognized the same in its precedent. *See, e.g., Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1063 (1987) (“Fundamental rights recognized by the Supreme Court include voting”); *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506, 511 (1971) (holding that the right to vote “is a fundamental matter”).

Under this Court’s precedent, strict scrutiny applies to laws that infringe upon fundamental rights. The Court most recently reached this conclusion in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 673, 440 P.3d 461, 498 (2019) (explaining “government infringement of a fundamental right is inherently suspect” and subject to “strict scrutiny” review), but even before that decision, for decades, the Court consistently affirmed that strict scrutiny applies to “infringements of fundamental rights,” *State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221, 227 (1978); *see also, e.g., Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993) (“This strict level of scrutiny applies when fundamental rights are affected”); *Bd. of Educ. of Unified Sch. Dist. No. 443, Ford Cnty. v. Kan. State Bd. of Educ.*, 266 Kan. 75, 88, 966 P.2d 68, 80 (1998) (same); *State v. Voyles*, 284 Kan. 239, 257, 160 P.3d 794, 807 (2007) (same); *State*

v. Ryce, 303 Kan. 899, 957, 368 P.3d 342, 377 (2016), *adhered to on reh'g*, 306 Kan. 682, 396 P.3d 711 (2017) (“Because a fundamental right is involved we apply strict scrutiny.”).

For example, in *Moore v. Shanahan*, the Court considered a claim that legislative proposals to amend the Kansas Constitution denied voters a constitutionally-protected right to vote on each amendment separately. The Court observed that “[t]he right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner . . . [it] is pervasive of other basic civil and political rights, and is the bed-rock of our free political system.” 207 Kan. at 649. Because this right is “fundamental,” the Court held, “any alleged restriction or infringement . . . strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized.” *Id.* The Court ultimately struck down one of the proposals that deprived voters of the right to separately vote on each amendment. *Id.* at 663.

Requiring heightened, searching scrutiny of laws that impede the right to vote is squarely grounded in the Kansas Constitution’s text, which—unlike its federal counterpart—includes two provisions that expressly guarantee the right to vote: Article 5, Section 1, which guarantees that “[e]very 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,” (emphasis added), and even expressly references voting by absentee ballot; and Section 2 of the Bill of Rights, which asserts that “[a]ll political power is inherent in the people.” These protections are critical and cannot lightly be set aside: for nearly 150 years, this Court has recognized that every provision of the Bill of Rights is “binding on legislatures and courts,” and that “no act of the legislature can be

upheld which conflicts with their provisions, or trenches upon the political truths which they affirm.” *Atchison St. Ry. Co. v. Mo. Pac. Ry. Co.*, 31 Kan. 660, 3 P. 284 (1884).

Under strict scrutiny, “once a plaintiff proves an infringement—regardless of degree . . . the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it.” *Hodes*, 309 Kan. at 669. A compelling interest is “one that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.” *Id.* at 664 (internal quotation marks and citation omitted). And as the district court overseeing this case has recognized, to be narrowly tailored “[a] regulation must further the identified state interest that motivated the regulation not merely in theory, but in fact.” *Nauser v. Schmidt*, No. 2015-CV-490, 2021 WL 7450395, at *14 (D. Kan. Apr. 07, 2021) (Watson, J.). The State also must show that “no less restrictive alternatives are available” to achieve its interest. *State v. Smith*, 57 Kan. App. 2d 312, 322, 452 P.3d 382 (2019).

B. Applying *Anderson-Burdick* is inconsistent with this Court’s “rights-first” approach to fundamental rights protected by the Kansas Constitution.

The district court’s conclusion that the Kansas Constitution’s guarantees of the right to vote can adequately be protected using the *Anderson-Burdick* balancing test—which has been applied to claims brought in federal court alleging that state laws violate the *federal* constitution’s protections of the right to vote—ignores fundamental differences between the Kansas and federal constitutions, as well as how the *Anderson-Burdick* test itself is informed by concerns of federalism that are not implicated when a state court considers its

own voting laws under its *own* constitution.⁴ Furthermore, the application of *Anderson-Burdick* to right-to-vote claims brought under the Kansas Constitution is contrary to this Court’s precedent, including *Hodes*, which rejected the State’s argument that it should apply a similar balancing test when considering challenges to laws that impede on the right to abortion, which is fundamental under the Kansas Constitution. 309 Kan. at 616.

As noted, the *Anderson-Burdick* test was created by federal courts in considering right-to-vote challenges to state election laws brought under the federal constitution. It applies a sliding scale, under which the degree of scrutiny depends on the extent of the challenged law’s burden on the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). If the burden is severe, the State must satisfy something approaching strict scrutiny. *See id.* at 787. If the burden is less than severe, the law must be justified by a “corresponding interest sufficiently weighty to justify the limitation.” *Norman v. Reed*, 502 U.S. 279, 289 (1992).⁵

⁴ *E.g.*, *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (explaining *Anderson-Burdick* is the product of a “confluence of interests” between a state’s regulation of elections and federal courts’ protection of federal rights); *Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. 2006) (en banc) (“Appellants’ argument that this Court should not apply strict scrutiny but should apply a ‘flexible’ test for examining voting restrictions such as that announced by the Supreme Court in [*Burdick*] is not persuasive. Here, the issue is constitutionality under Missouri’s Constitution, not under the [U.S.] Constitution.”).

⁵ Importantly, in all cases, *Anderson-Burdick* requires actual and meaningful scrutiny of both the burden on voting rights and the state’s specific justifications for imposing those burdens with the law in question. It is never equivalent to rational basis review: if the law burdens voting rights, there must be some fit between it and the state’s justifications. And even if a state’s interest is “legitimate in the abstract,” the state must demonstrate why it makes it “necessary to burden voters’ rights” through the specific challenged provision. *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020). Properly determining the nature and

In *Hodes*, the State urged the Court to use the federal “undue burden” test to evaluate restrictions on the right to abortion. *See* 309 Kan. at 616. Like *Anderson-Burdick*, the undue burden test “balanc[es] the burdens imposed on [individual] rights and the State’s interests,” *id.*, and “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,” *id.* at 670. The Court rejected the argument that this approach was appropriate in a case brought to vindicate fundamental rights protected by the Kansas Constitution, finding that the undue burden test improperly “emphasiz[ed] the governmental interest[s].” *Id.*

Instead, this Court held that, where fundamental rights are at issue, Kansas courts must “start[] with an emphasis on the *individual’s rights* and requir[e] the government to establish its compelling interest and to prove its action is narrowly tailored to serve that interest—even if the infringement is slight.” *Id.* (emphasis added). Courts must “peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis” recognizing “that government infringement of a fundamental right is inherently suspect.” *Id.* at 673 (quotation omitted). A flexible balancing test “lacks the rigor demanded by the Kansas Constitution for protecting” fundamental rights, as well as necessary “predictability.” *Id.* at 670. Strict scrutiny, on the other hand, “demands a searching judicial inquiry as a way to smoke out illegitimate governmental action,” *Hodes*, 309 Kan. at 673

magnitude of the burden requires assessing the law’s impact on all voters *and* those uniquely affected. *Id.* at 1125 (striking down Kansas proof of citizenship requirement). The district court misapplied *Anderson-Burdick*, contrary to these well-established standards.

(cleaned up), drawing from “a robust body” of caselaw that establishes “how to apply it.”
Id. at 663.

C. The challenged provisions cannot survive either type of scrutiny.

Even if the Court were to consider only the face of the challenged provisions, the legislative record, and Defendants’ own admissions, Plaintiffs are substantially likely to prove that the challenged provisions violate the Kansas Constitution’s protections of the fundamental right to vote. This Court’s precedent requires the application of strict scrutiny to Plaintiffs’ claims. But under any test, Plaintiffs are substantially likely to succeed.

1. The Signature Verification Requirement

The Court of Appeals held that the Signature Verification Requirement infringes on the right to vote because it threatens lawful voters with disenfranchisement due to mistakes by election officials who “will erroneously determine” that voters’ signatures “are mismatched.” Op. at 30. As such, it distinguished the Requirement from legitimate efforts to require “proper proofs” to determine if a specific voter is qualified to vote. *Id.* at 29-30; *see also id.* (reiterating the Legislature may not “under the pretext of securing evidence of voters’ qualifications . . . cast so much burden as really to be imposing additional qualifications”) (quoting *State v. Butts*, 31 Kan. 537, 554, 2 P. 618 (1884)).

The Court of Appeals’ holding was consistent with the understanding of members of the Legislature, who recognized when the Signature Verification Requirement was being considered, that it would disenfranchise lawful voters based on normal signature variances. (R. III, 410-11, 413-14). And even Defendants do not actually dispute that lawful votes will be discarded; they concede as much by arguing that the Requirement contains “cure

mechanisms, exceptions, and other measures designed to *minimize* the rejection of any ballots.” Pet. at 11 (emphasis added).

Defendants’ argument that the Signature Verification Requirement does not implicate the fundamental right to vote but only the ability to vote by mail is mistaken. First, Article 5, Section 1 *expressly refers to* absentee voting, making it clear that absentee voting is contemplated by the Constitution and under the umbrella of the right to vote. Second, as the Court of Appeals recognized, “[a] person cannot know beforehand that their mail-in ballot will be rejected for a signature mismatch by the elections office.” Op. at 36. The Signature Verification Requirement forces voters to incur that risk, or else navigate the burdens to vote in person. For some, those burdens will be minimal, but for others they will be formidable or insurmountable. Thus, the Signature Verification Requirement threatens lawful voters’ fundamental right to vote and to have their vote counted. *See id.*

The Secretary’s recent regulation cannot—and does not—avoid the fatal problems with the statute. Its direction that county election officials “complete training approved by” the Secretary, K.A.R. 7-36-9(f), glosses over the complexity of doing signature matching accurately. Professional examiners have “at least two, and typically three, years of full-time training with an experienced examiner, with at least eighteen (18) months of that training in the examination of signatures and handwriting.” (R. III, 225). Obviously, Kansas election officials cannot complete this type of intensive training—they have elections to run. But without it, non-experts have a “significantly higher rate of error” in signature matching and are “more likely to wrongly determine that authentic signatures are *not* genuine than to make the opposite error.” (R. III, 219).

As for the Secretary’s attempt to address what constitutes a signature “match”—something the statute itself does not define—the regulation adds little clarity, stating simply that a match means “that the signature is generally uniform and consistent with the voter’s signature in the voter registration database.” K.A.R. 7-36-9(a)(4). This not only fails to provide any meaningful guidance, it highlights another inherent issue with the law: the limited and low-quality exemplars that non-expert election officials will have to “match” against. (R. III, 220, 226-28, 234, 236). To accurately verify a signature, “require[s] at least 10 to 15 specimen signatures for comparison with a questioned signature, and often more if issues such as age or illness are involved,” (R. III, 234), and at least two hours per comparison. (R. III, 220).⁶ Election officials now must attempt to match thousands of signatures in the time crunch of the election, often with only one exemplar (which may be years old) and without any information about the circumstances under which it was created. Even if they use six exemplars, they are still three and a half times more likely than an expert to reject an authentic signature. (R. III, 223). As for the so-called “disability” exception, it does not actually protect disabled voters—who are far more likely to have signatures (and ballots) rejected—as neither the statute nor the regulation provides guidance as to how to identify exempted voters. The inevitable result is a bias towards rejecting valid votes due to faulty amateur signature analysis.

⁶ In the 2020 general election, Kansas voters cast 459,229 advance ballots by mail. Kan. Sec’y of State, *Election Statistics*, <https://sos.ks.gov/elections/elections-statistics.html> (last visited June 26, 2023). That would require **918,458 person-hours** for adequate signature verification—equivalent to 1,000 officials working around-the-clock for over five weeks.

The law also fails to ensure that eligible voters whose ballots are erroneously rejected based on a perceived “mismatch” have a meaningful opportunity to save their ballot from rejection. To be sure, even a *perfect* cure process would impose burdens on voters that the State cannot justify—requiring faultless, lawful voters to cure their erroneously rejected ballots is in itself a heavy burden. But the cure process here guarantees that some number of lawful voters will not be able to save their ballots from rejection. Election officials are only required to “attempt to contact” a voter whose ballot is rejected for signature issues. K.S.A. 25-1124(b); K.A.R. 7-36-9(b)(2). And there is no requirement that voters be contacted *promptly* or *within a specific time frame* to ensure they have time to cure their ballot, much less that the voter receive *actual* notice that their ballot was rejected. *See* K.S.A. 25-1124(b), (h); K.A.R. 7-36-9(b)-(d).

The burdens created by the Signature Verification Requirement cannot be justified by an interest in preventing fraud because there is no evidence of fraud—let alone advance ballot voter impersonation fraud—in Kansas’s elections. As noted, the Secretary has repeatedly confirmed that Kansas’s elections are safe, secure, and fraud-free. (R. V, 21). Similarly, former Attorney General Derek Schmidt confirmed he had “never seen the evidence” of “widespread institutional” voter fraud in Kansas. (R. IV, 73). For the 2020 election, the State Board of Canvassers confirmed that every county completed “post-election audits” and there was no evidence of “foul play.” (R. V, 32).

In line with this undisputed evidence, a Kansas federal district court recently rejected Defendants’ arguments that the state’s interest in preventing voter fraud could justify different restrictions the Legislature passed in 2021 that impacted advance mail

voting. In so finding, the court noted that Defendants (the same ones as here) failed to present any evidence of voter fraud “effectuated through advance mail voting or otherwise.” *VoteAmerica v. Schwab*, No. 21-2253-KHV, 2023 WL 3251009, at *16 (D. Kan. May 4, 2023). Quite to the contrary, Defendants “presented that every cast ballot was accounted for” and “Kansas officials publicly declared that the 2020 election was successful, without widespread, systematic issues of voter fraud, intimidation, irregularities or voting problems.” *Id.* Similarly, Defendants cannot justify the Signature Verification Requirement’s burden on voters based on an interest in preventing voter fraud.

The Signature Verification Requirement is also not narrowly tailored to serve any anti-fraud interest. There was no evidence before the Legislature that any fraudulent vote has ever been uncovered through signature matching. And the fact that Kansas has allowed voters to exercise their right to vote using advance mail ballots for over two decades without incident is strong evidence that Kansas already has a highly effective system in place to guard against fraud. This was the conclusion of the *VoteAmerica* court, which found that: “The advance mail voting process includes multiple safeguards against fraud, and Kansas law criminalizes creation or submission of fraudulent advance mail ballot applications. These safeguards are extremely effective in preventing fraud in Kansas.” *Id.* These extensive safeguards include criminalizing voter impersonation, K.S.A. 25-2431, election forgery, K.S.A. 25-2412, and election tampering, K.S.A. 25-2423; requiring voters to apply for an advance ballot, *see* K.S.A. 25-1122d; requiring county election officers who receive multiple advance ballot applications for a single voter to send the ballot to the voter’s correct address, K.S.A. 25-1129; and making advance voting lists available at

polling places, K.S.A. 25-1126, and to the public, K.S.A. 25-1122(i). They also include the additional safeguards that the Secretary recently testified to, referenced *supra* at 9-10.

False impersonation of a voter is a level 8 felony punishable by up to two years in prison, K.S.A. 25-2431, the same level as forgery, K.S.A. 21-5821, or counterfeiting up to \$25,000 in currency, K.S.A. 21-5840. Presumably, anyone willing to commit such a crime would take great pains to reproduce the impersonated voter's signature. Even if an election official accidentally identified a fraudulent signature—which would be due to luck, not skill—such a hypothetical scenario does not save the statute. “A facial challenge is best understood as ‘a challenge to the terms of the statute, not hypothetical applications,’” and courts are not supposed to “conjure up” hypothetical situations in which the statute might be valid. *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016) (quoting *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124, 1127 (10th Cir. 2012)).

At bottom, amateur signature matching is not a reliable tool for detecting voter impersonation; the State has not and cannot produce evidence of even any marginal benefit of the Signature Verification Requirement beyond the already extensive measures for preventing voter fraud in Kansas; and any such marginal benefit would be outweighed by the substantial likelihood of disenfranchisement of lawful voters. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 220 (D.N.H. 2018) (applying due process factors to hold that the State's interest in preventing fraud was outweighed where a signature matching process disenfranchised hundreds of voters but failed to uncover the *two* instances of absentee-voter fraud).

None of this is hypothetical. Before the Signature Verification Requirement took effect, a handful of counties voluntarily conducted signature matching and hundreds of voters had their ballots rejected based on perceived signature mismatches. (R. V, 30). Given the lack of fraud in Kansas’s elections, it is extremely unlikely that all—or even any—of these rejected ballots were fraudulent. (*See* R. IV, 73; R. V, 21, 32). Now that the Requirement mandates that counties conduct signature matching, there is no reason to believe that it will lead to any different results.

Because the Signature Verification Requirement will not prevent fraud and will lead to the disenfranchisement of qualified voters, Plaintiffs are substantially likely to prevail on their claims, regardless of the test applied. The Signature Verification Requirement imposes *at least* a significant burden on the right to vote, and yet—for all the reasons discussed—does not actually advance the state’s interest in preventing fraud. As such, the State cannot demonstrate why the Requirement is “*necessary* to burden voters’ rights.” *Fish v. Schwab* (“*Fish I*”), 957 F.3d 1105, 1133 (10th Cir. 2020) (emphasis added). The district court failed to apply this test, instead simply assuming the State had a compelling interest and failing to consider whether it could prevent fraud without burdening voters’ rights. (R. V, 74). Under the proper application of *Anderson-Burdick*, Plaintiffs are still substantially likely to prevail.

2. The Ballot Collection Restriction

As the Secretary recently recognized in remarks to the Legislature, ballot collection in Kansas dates back to the Civil War. 2/20/23 SB 208 Hr’g. 39:05-39:20. The Legislature provided no compelling reason to depart from this long history, least of all in light of the

burdens it will impose on particularly vulnerable voters. The Court of Appeals found that, on its face, the Ballot Collection Restriction is a “limitation that prevents votes from being cast and counted” because “[n]ot all voters can make a trip to the polls” on their own. Op. at 32. If a volunteer previously picked up 30 ballots and is now limited to 10, there will be no one to “take up the slack,” threatening to deny some Kansans the franchise. *Id.*

And, indeed, as the Secretary recently emphasized, voters who must rely on USPS to deliver their mail ballots may be out of luck. Much of Kansas’s mail leaves the state before coming back for delivery, which can cause serious delays. 2/20/23 SB 208 Hr’g. 22:47-22:57. The Secretary’s testimony comports with the allegations Plaintiffs make in their Amended Petition—that the Ballot Collection Restriction severely burdens the right to vote, particularly for “rural voters in western Kansas,” “Native voters living on tribal lands who may have to travel for hours on unpaved roads to access mail services or election offices,” and “Kansans with disabilities.” (R. II, 270).

As a result, many have long relied on trusted third parties, like Plaintiffs, to return their advance ballots for them. Plaintiff Charley Crabtree collected and returned approximately 75 advance ballots from at least 10 different nursing homes during the 2020 election, (R. II, 237, 246-47), and Plaintiff Sisters of St. Joseph Concordia Faye Huelsmann and Patricia Lewter collected and returned the advance ballots of their fellow convent residents whose mobility issues prevented them from mailing the ballots themselves. (R. II, 247-48.) Sister Huelsmann submitted testimony to the Legislature that “many of our sisters . . . would find it very hard to take their own ballot to the Court House or even to a drop box.” (R. II, 271.) Without the assistance of Plaintiffs many voters would be unable

to cast their ballots. *Id.* Yet, such assistance is now a crime after the first ten ballots. The Ballot Collection Restriction will prevent votes from being cast and counted. Op. at 32-34.

The arbitrary limit of collecting 10 ballots per person likewise is not narrowly tailored to serve a compelling state interest. Not one proponent during the legislative debate provided any explanation of why the limit was set at 10 rather than some other number. That is because the number is completely arbitrary. The eleventh ballot (or the third or fifth or thirtieth) is no more likely to be fraudulent than any other. In contrast, other safeguards more closely target potential fraud, including the requirement that collectors must affirm under penalty of perjury that they have not “exercised undue influence on the voting decision of the voter” and provide a sworn statement signed by the voter affirming they were not unduly influenced and that they authorized the collector to deliver their ballot. K.S.A. 25-2437(a)(1). Concerns about fraud are addressed by those affirmations—not challenged by the Plaintiffs in this lawsuit—and there is simply no legitimate anti-fraud justification for the arbitrary limit on the number of ballots that an individual can collect.

Even if subjected to the federal *Anderson-Burdick* analysis, the Ballot Collection Restriction does not pass constitutional muster. For the reasons explained, Defendants cannot demonstrate that the burden imposed by the Restriction is sufficiently justified by corresponding state interests. *Fish I*, 957 F. 3d at 1133.

II. Plaintiffs will suffer irreparable harm absent an injunction.

A temporary injunction is necessary to avoid continued injury to voting rights while this Court considers this appeal. A party seeking a temporary injunction need only show a “reasonable probability of irreparable future injury,” not a certainty of it. *Bd. of Cnty.*

Comm'rs of Leavenworth Cnty. v. Whitson, 281 Kan. 678, 684, 132 P.3d 920, 925 (2006). This is especially so in the context of the right to vote. “Because there can be no ‘do-over’ or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction.” *Fish v. Kobach* (“*Fish II*”), 840 F.3d 710, 752 (10th Cir. 2016) (quoting *League of Women Voters of N.C.*, 769 F.3d at 247). Here, admissions by both the Legislature and the Secretary himself raise the “reasonable probability” that the challenged provisions will cause irreparable harm absent an injunction to a certainty. *See, e.g.*, SB 208 2/20/23 Hr’g. 21:24-21:59 (discussing problems caused by missing or delayed mail).

Organizational Plaintiffs the League, Loud Light, Topeka Independent Living Resource Center, and Kansas Appleseed serve the exact types of voters—elderly, young, disabled, and non-native English speakers—who are most likely to have their advance ballots rejected by election officials because of natural variations in their signatures. (R. III, 219, 222 (discussing signature matching)); (R. II, 238 (the League)); (R. I, 124 (Loud Light)); (R. I, 143; R. II, 244) (Topeka Resource Center)); (R. II, 242 (Kansas Appleseed)). Many of these same populations are also more dependent upon ballot collection and more likely to be harmed by the Ballot Collection Restriction, which arbitrarily and severely limits access to a reliable and trustworthy means that Kansans have relied upon for years to ensure that their ballots are returned in time to be counted.

The Organizational Plaintiffs will also suffer direct irreparable injury because they must divert greater resources toward operating programs to mitigate the burdens of the challenged provisions—resources that they would otherwise be able to put toward other

mission-critical activities. “Courts routinely recognize that organizations suffer irreparable harm when a defendant’s conduct causes them to lose opportunities to conduct election-related activities, such as voter registration and education.” *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (collecting cases).

III. Plaintiffs have no other adequate legal remedy.

Injunctions are appropriate when the complained of injury is “continuous and ongoing,” and damages would be speculative and, even if ascertainable, would not adequately compensate the injured party. *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 63, 341 P.3d 607, 613 (2014). This case presents a textbook example of when no legal remedy is available or appropriate. There can be no restoration of the right to vote after an election, *Fish II*, 840 F. 3d at 752 (citing *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)), and monetary damages cannot redress the constitutional damages at issue, *see id.* Plaintiffs’ constitutional injuries began almost two years ago and will continue unabated in the absence of injunctive relief.

IV. The remaining elements weigh in favor of this Court issuing an injunction for the pendency of the appeal.

Finally, the threatened injuries to Plaintiffs outweigh any injury to the State, and an injunction will not be “against the public interest.” *Hodes*, 309 Kan. at 619. The State’s purported interest in preventing fraud is unsupported by any evidence of actual fraud that would ensue if the challenged provisions were enjoined. Kansas elected officials—including the Governor and the Secretary—have continually emphasized that there is no evidence of voter fraud in Kansas elections under the laws that existed before enactment

of the challenged provisions. (R. V, 14-18); (R. IV, 73). Evidence of fraud is not always a requirement for passing election-related laws, but here the lack of *any* evidence of a problem to be solved thoroughly demonstrates that there is no significant harm to the State in returning to its previously successful legal regime while this appeal is pending.

Moreover, neither provision actually furthers the State’s interest in ensuring election integrity. Election integrity requires that eligible voters will be able to trust that their votes will count. Due to the unreliability of signature matching, the Signature Verification Requirement will erroneously disenfranchise eligible voters and fail to identify voter fraud (assuming it exists). And the Ballot Collection Restriction’s arbitrary 10-ballot limit prevents lawful ballots from being cast, even though there are other statutory restrictions that are better tailored to prevent advance ballot voter fraud (including the affirmation provision in K.S.A. 25-2437(a), which Plaintiffs do not challenge). These measures do not further election integrity—they undermine it.

Enjoining the challenged provisions will do no harm to the public interest. *See Wing*, 51 Kan. App. 2d at 61. Ensuring that eligible voters can broadly exercise their right to vote *is in the public’s interest*. *See, e.g., Fish II*, 840 F.3d at 756 (holding “[t]he public interest in broad exercise of the right to vote will be furthered rather than harmed” by an injunction); *Patterson v. Justus*, 173 Kan. 207, 211, 245 P.2d 968, 970 (1952). Enjoining the challenged provisions will guarantee that eligible voters will be able to exercise their fundamental right to vote. In sum, all factors weigh in favor of a temporary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court enjoin the challenged provisions during the pendency of this appeal.

Respectfully submitted, this 27th day of June 2023.

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I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted via the Court's electronic filing system to the following:

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