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PII COMPLIANT



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: ORD: Order Originated by Judge MEMORANDUM DECISION AND ORDER

SO ORDERED,

A handwritten signature in cursive script, appearing to read "T. Watson".

/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

v.

2021-CV-299

SCOTT SCHWAB, et al.,

Defendants

MEMORANDUM DECISION AND ORDER

This matter is back before the Court on a years-long journey through the Kansas court system. In 2021, Plaintiffs filed a petition challenging the legality of then-recently enacted Kansas election laws. Defendants Kansas Secretary of State Scott Schwab and Attorney General Derek Schmidt (now Kris Kobach) 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, known as the false representation provision (“FRP”). The Court denied Plaintiffs’ motion for a partial temporary injunction. Plaintiffs appealed that ruling. This Court later granted Defendants’ motion to dismiss the amended petition in its entirety on grounds other

than standing. Plaintiffs separately appealed that ruling.

One panel of the Kansas Court of Appeals first addressed this Court's denial of Plaintiffs' temporary injunction regarding the FRP. See *League of Women Voters of Kansas v. Schwab*, 62 Kan.App.2d 310, 513 P.3d 1222 (2022). The Court of Appeals majority concluded that Plaintiffs did not have standing to mount a pre-enforcement challenge to the FRP and dismissed the appeal. The Kansas Supreme Court granted Plaintiffs' petition for review. The Supreme Court reversed the Court of Appeals, concluding that Plaintiffs had standing. The Supreme Court remanded the matter to the Court of Appeals to analyze the merits of this Court's temporary injunction decision. See *League of Women Voters of Kansas v. Schwab*, 317 Kan. 805, 539 P.3d 1022 (2023) ("*LOWV II*").

A different panel of the Court of Appeals addressed this Court's grant of Defendants' motion to dismiss the amended petition. See *League of Women Voters of Kansas v. Schwab*, 63 Kan. App. 2d 187, 525 P.3d 803 (2023) ("*LOWVI*"). The Court of Appeals concluded in pertinent part that: 1) Plaintiffs had standing to challenge the signature verification requirement and the ballot collection provision; and 2) the signature verification requirement and the ballot collection provision impaired various rights guaranteed by the Kansas Constitution and were subject to strict scrutiny. The Court of Appeals remanded the matter to this Court for further constitutional analysis of the signature verification requirement and the ballot collection provision under a strict scrutiny standard.

The Kansas Supreme Court granted Defendants' petition for review of the second panel's decision. It decided to transfer the FRP case it had earlier remanded to the Court of Appeals back to itself and consolidated the two appeals. Ultimately, a majority of the Kansas Supreme Court: 1)

reversed this Court’s denial of Plaintiffs’ motion for a temporary injunction regarding the FRP and remanded to this Court for further consideration of the temporary injunction factors; 2) affirmed this Court’s dismissal of Plaintiffs’ challenge to the ballot collection restriction; 3) affirmed this Court’s dismissal of Plaintiff’s challenge to the signature verification requirement under a state constitution “right to vote” theory; and 4) reversed this Court’s dismissal of the remainder of Plaintiffs’ challenge to the signature verification requirement, remanding it for further consideration of whether the statute and implementing regulations violate state due process or equal protection guarantees according to standards set forth in the Supreme Court opinion. *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) (“*LOWV III*”).

After remand to this Court, the parties agreed to, and the Court approved, a temporary injunction prohibiting enforcement of the FRP. The parties later agreed to, and the Court approved, a permanent injunction prohibiting enforcement of the FRP. Defendants then filed a motion to dismiss the remainder of the case – at this point narrowed to Plaintiffs’ challenge to the signature verification requirement on due process and equal protection grounds – asserting that Plaintiffs lacked standing to sue. Plaintiffs claim that the issue of standing has been determined in their favor by the appellate courts, thus this Court cannot revisit it here.

Law of the case and the mandate rule.

The law of the case and the mandate rule are related, yet distinct, concepts. *L. Ruth Fawcett Tr. v. Oil Producers Inc. of Kansas*, 315 Kan. 259, 269, 507 P.3d 1124 (2022). “The law of the case doctrine provides that when a second trial or appeal is pursued in a case, the first decision is the settled law of the case on all questions addressed in a first appeal.” *Id.* The law of the case is rooted in common law, and there are exceptions to its application. The exceptions include when

“(1) a subsequent trial produces substantially different evidence, (2) a controlling authority has made a contrary decision regarding the law applicable to the issues, or (3) the prior decision was clearly erroneous and would work a manifest injustice.” *State v. Kleypas*, 305 Kan. 224, 245, 382 P.3d 373 (2016). Thus, “the law of the case doctrine states a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so.” *Id.* (internal quotations and citations omitted).

In contrast, the mandate rule is a creature of statute. K.S.A. 20-108 says:

An appellate court of this state may require the district court of the county where any action or proceeding shall have originated to carry the judgment or decree of the appellate court into execution; and the same shall be carried into execution by proper proceedings, by such district court, according to the command of the appellate court made therein.

K.S.A. 60-2106(c) says that once the decision of an appellate court becomes final, such court shall promptly cause to be transmitted to the clerk of the district court its mandate containing such directions as are appropriate under the decision. A copy of the opinion of the court shall accompany and be a part of the mandate. The clerk of the district court shall make a notation thereof on the appearance docket. Such mandate and opinion, without further order of the judge, shall thereupon be a part of the judgment of the court if it is determinative of the action, or shall be controlling in the conduct of any further proceedings necessary in the district court.

“The statutory mandate rule is a specific application of the law of the case doctrine, but to different ends. The law of the case doctrine applies to both the higher and lower court in a single proceeding, while the mandate rule acts as an exclusive limit on the ability of a trial court to review issues outside the scope of an appellate court's remand.” *Fawcett*, 315 Kan. at 270. “Unlike the doctrine of the law of the case, the statutory mandate rule has no recognized exceptions. These statutes require a district court to comply with an appellate court's mandate—it cannot change the mandate, make contrary findings to the ones in the mandate, or further review any issues the

mandate finally decided.” *Id.* at 269-70.

The mandate rule and this Court’s consideration of standing.

Defendants argue that the mandate rule does not prevent this Court’s consideration of Plaintiffs’ standing to challenge the signature verification requirement because: 1) neither the Supreme Court’s mandate nor its opinion specifically addressed Plaintiffs’ standing on this issue; and 2) Plaintiffs’ alleged lack of standing threatens to deprive this Court of subject matter jurisdiction, which this Court has an ongoing duty to question, and the parties may raise at any time.

The contents of the Supreme Court’s mandate are a logical, if not entirely helpful, place to start. The mandate itself is largely boilerplate and says nothing about standing. It says only that:

it was ordered and adjudged by the Supreme Court that the judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

The “judgment of the Court of Appeals” references the consolidated appeal, which had two parts:

1) In *LOWV II*, the appeal of this Court’s denial of a temporary injunction regarding the FRP was dismissed by the Court of Appeals because Plaintiffs lacked standing. The Supreme Court reversed the Court of Appeals’ dismissal because it held the Plaintiffs had standing to challenge the FRP. The Supreme Court ultimately reversed this Court’s denial of the temporary injunction and remanded the matter to this Court for further consideration of the request for a temporary injunction regarding the FRP. Since the parties have agreed to a permanent injunction, there is nothing more for this Court to consider regarding the FRP.

2) In *LOWV I*, this Court’s dismissal of Plaintiffs’ amended petition was reversed, and as

part of the appeal, the *LOWV I* panel concluded that Plaintiffs had standing to raise various challenges to the signature verification requirement and the ballot collection provision. The Court of Appeals decision was affirmed in part because the Supreme Court held that Plaintiffs should have the opportunity to develop their theory that the signature verification requirement violated due process and equal protection principles, but not under the strict scrutiny standard dictated by the Court of Appeals. The Court of Appeals decision was reversed in part because this Court correctly dismissed the challenge to the ballot collection provision in its entirety and correctly dismissed the challenge to the signature verification requirement based on a “right to vote” theory under the Kansas Constitution.

The mandate and the attached opinion constitute the judgment of the appellate court, so this Court looks next to the Supreme Court’s majority opinion in *LOWV III*. The Supreme Court concluded Plaintiffs had standing to seek a temporary injunction regarding the FRP. The FRP is no longer an issue before this Court. The Supreme Court did not analyze Plaintiffs’ standing to challenge the signature verification requirement in its opinion. But the Court of Appeals in *LOWV I* concluded that Plaintiffs had standing to challenge the signature verification requirement, and this conclusion was not disturbed by the Supreme Court in *LOWV III*. In fact, it was hardly mentioned.

Plaintiffs urge that the lack of discussion in *LOWV III* means the Supreme Court was satisfied that Plaintiffs had standing to challenge the signature verification requirement. Defendants claim that the Supreme Court, in remaining silent on the issue, left a void for this Court to fill as it wished on remand. This is an unlikely scenario.

The Supreme Court on review considers the case at hand based on the record before the Court of Appeals; the petition for review, response, and reply; and the briefs previously filed with the Court of Appeals. Supreme Court Rule 8.03(i)(2). The parties may also file supplemental briefs. Supreme Court Rule 8.03(i)(3). The briefs previously filed with the Court of Appeals in *LOWV I* were replete with arguments about whether Plaintiffs had standing to challenge the signature verification requirement. The supplemental briefs filed with the Supreme Court after it granted review focused on the merits of other issues.

At oral argument before the Supreme Court, one of the Justices remarked to Defendants that the Court of Appeals in *LOWV I* “did a pretty lengthy analysis of your standing argument and rejected it,” and despite Defendants not raising the issue in the petition for review, recognized that “this court independently takes up issues of jurisdiction at standing.” The court and counsel then engaged in a brief discussion of standing.

The Kansas Supreme Court was and is fully aware that standing is a component of subject matter jurisdiction, which the court or a party can raise at any time, and it must be established before Plaintiffs’ claims may proceed. *Baker v. Hayden*, 313 Kan. 667, 672-73, 490 P.3d 1164 (2021). The Court of Appeals in *LOWV I* analyzed and confirmed Plaintiffs’ standing to challenge the signature verification requirement. The Supreme Court in *LOWV III* recognized this in its comments during oral argument, along with its duty to re-examine standing if the court thought it necessary to do so. The Supreme Court in *LOWV III* chose not to disturb the Court of Appeals ruling on Plaintiffs’ standing to challenge the signature verification requirement - while reversing other aspects of the Court of Appeals decision regarding signature verification. This is a strong indication that the Supreme Court believed Plaintiffs had standing to challenge the signature

verification requirement; otherwise, the Supreme Court would have had no jurisdiction to address as it did the additional arguments about due process and equal protection.

The mandate in this case echoed the last line of the majority opinion in *LOWV III*: “Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.” *LOWV III*, 318 Kan. at 811. The Supreme Court’s specific charge to this Court was as follows:

Because we are at a motion to dismiss stage of the proceeding, we will not deny the League their full opportunity to prove up their claims as a matter of evidence in the district court. Accordingly, we reverse the district court's grant of the State's motion to dismiss on the equal protection and due process claims. The League must have an opportunity to test the signature requirement against the proper legal standard: Does the signature requirement (and its implementing regulations and policies, such as those promulgated in K.A.R. 7-36-9, K.A.R. 7-36-7 [2023 Supp.], and K.A.R. 7-36-3) achieve reasonable uniformity on objective standards, and does it provide reasonable notice of defects and an opportunity to cure? We reverse and remand to the district court for that determination. *Id.* at 807.

The directions to this Court did not demand an analysis of Plaintiffs’ standing to challenge the signature verification requirement. Instead, this Court was directed to analyze the merits of Plaintiffs’ due process and equal protection arguments regarding signature verification according to standards set forth in the Supreme Court’s majority opinion. *Id.* at 807. None of that would be necessary if the Supreme Court doubted for a moment, after being apprised of the issue, that Plaintiffs had standing.

Finally, Defendants point out that, following the decision in *LOWV III*, the United States Supreme Court decided a consequential case that may change the standing analysis here. See *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 393-96 (2024). Plaintiffs deny that the United States Supreme Court decision would make a difference. Either

way, this Court is constrained by the mandate rule, which makes no exception even for a subsequent change in the law. “Kansas cases have not recognized the power of a district court to unilaterally depart from the mandate, even when a change in the law has occurred.” *Kleypas*, 305 Kan. at 297.

To do what Defendants ask – dismiss this case for lack of standing – would require this Court to disobey the mandate of the Supreme Court. The Supreme Court has directed this Court to analyze the merits of Plaintiffs’ due process and equal protection arguments regarding signature verification based on evidence and according to standards set forth in the Supreme Court’s majority opinion. And that is what this Court will do.

CONCLUSION

For these reasons, Defendants’ motion to dismiss is denied. The parties are directed to submit an agreed case management order with new deadlines. Call Division 3 to obtain a pretrial conference date to include in the agreed case management order.

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