

CASE NO. 130,839

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., *et al.*,
Appellees,

v.

SCOTT SCHWAB, In His Official Capacity
as the Kansas Secretary of State,
Appellant,

and

JAMIE SHEW, In His Official Capacity
as Douglas County Clerk,
Defendant.

**Order Denying Renewed Motion
to Stay or Suspend Temporary Injunction**

Before Warner, C.J., Hill and Schroeder, JJ.: In a case dealing with timeframe for counting votes, courts must exercise caution. When considering important constitutional challenges concerning election procedure and faced with an upcoming election, courts must be careful to avoid rulings that could cause votes to be lost.

This appeal concerns K.S.A. 25-1132, which defines the method and timeframe in Kansas for submitting advance-voting ballots, commonly known as mail-in ballots. For about 40 years, K.S.A. 25-1132 required that advance-voting ballots must be received by a county election office by Election Day to be counted. In 2017, the legislature amended the statute, requiring election offices to count advance-voting ballots postmarked before the close of the polls on Election Day so long as they were received within three days after the election. In 2025, the legislature eliminated that three-day window, setting the

"deadline for receipt by mail" of advance-voting ballots as "7:00 p.m. on the date of the election." K.S.A. 2026 Supp. 25-1132(b).

The plaintiffs filed this lawsuit in May 2025, challenging the constitutionality of that change. For reasons largely irrelevant to this appeal, this case has followed an unconventional path, including its removal to federal district court and ultimate remand to the Douglas County District Court. On July 16, 2026, the district court a temporary injunction, effectively leaving the three-day window in place while the litigation proceeds. The Secretary immediately appealed and sought an emergency stay of the injunction during the August primary election. We denied that request on July 27, concluding that the potential irreparable harm to Kansas voters whose ballots could otherwise be rejected outweighed the administrative burden associated with maintaining the three-day window during the ongoing primary. The Kansas Supreme Court declined the Secretary's request for emergency review.

The Secretary now renews his request for a stay before the upcoming general election, arguing that today's circumstances are different from those surrounding our July order. He notes that advance voting for the general election has not yet begun, though the first advance ballots are scheduled to be mailed to Kansas voters who requested them on October 14. He also points out that the parties have submitted their briefs on the legal issues we will ultimately consider.

We recognize these different circumstances. But whether to grant an appellate stay is a legal question, not a political concern. We conclude that the Secretary has not demonstrated that a stay is warranted while this matter proceeds on appeal.

The standards governing our decision

K.S.A. 60-262(f) recognizes an appellate court's authority to "stay proceedings, or to suspend, modify, restore or grant an injunction, while an appeal is pending," as well as its authority "to issue an order to preserve the status quo or the effectiveness of the judgment to be entered." Requests for stays at the appellate level are relatively rare, and Kansas courts have not previously identified a distinct set of factors that address when a stay on appeal is warranted.

The United States Supreme Court has explained that courts considering a stay pending appeal traditionally consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 [1987]). The party requesting a stay on appeal must demonstrate that the circumstances justify that relief. *Nken*, 556 U.S. at 433-34.

These four considerations are not new to Kansas law. To obtain a temporary injunction, a party generally must demonstrate a substantial likelihood of success on the merits, a reasonable probability of irreparable injury, the absence of an adequate remedy at law, that the threatened injury outweighs the harm an injunction might cause the opposing party, and that the injunction will not be adverse to the public interest. See *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 791-92, 549 P.3d 363 (2024). Kansas courts have placed particular emphasis on the likelihood of success and potential for irreparable injury, and have described irreparable harm as the most important prerequisite for temporary injunctive relief. *State ex rel. Kobach v. Harper*, 65 Kan. App. 2d 680, 687, 690-91, 571 P.3d 6, rev. denied 321 Kan. 790 (2025).

But a stay and an injunction are not the same remedy. As *Nken* explained, "a stay operates upon the judicial proceeding itself." 556 U.S. at 428. The relative burdens of persuasion of the parties seeking relief are also different. The plaintiffs—the parties bringing the suit—bore the burden of establishing their entitlement to the temporary injunction in the district court. The Secretary—the party seeking relief on appeal—now bears the burden of establishing why that injunction should be suspended during appellate review. But the equitable considerations underlying the two inquiries substantially overlap. See 556 U.S. at 434. We therefore find *Nken*'s four factors provide useful persuasive guidance in exercising our authority under K.S.A. 60-262(f).

Balancing the legal interests at stake against the possible relative harms

As we have noted, our analysis of the most recent request for stay rests primarily on the balancing of whether the Secretary has made a strong showing that he will ultimately prevail on the constitutional claims presented and whether the potential harms suffered by the State, the plaintiffs, and the public warrant a stay. *Nken*, 556 U.S. at 434.

The Secretary's likelihood of success presents substantial questions that are now fully briefed before this court. He argues, among other things, that the district court misapplied Kansas constitutional law, improperly sustained a facial challenge to a generally applicable ballot-receipt deadline, and entered relief broader than Kansas law permits. The plaintiffs dispute each of those points and rely principally on *League of Women Voters of Kansas*, 318 Kan. 777, to argue that the district court properly analyzed the challenged law under the Kansas Constitution.

We will not resolve those important questions in this order. A stay necessarily requires some preliminary consideration of the merits, but it does not require—and should not become—a substitute for deciding the appeal itself. See *Nken*, 556 U.S. at 434. This case involves important legal questions that will benefit from the deliberative

analysis of the appellate process. The district court's temporary injunction followed extensive litigation and a lengthy memorandum decision addressing each of the requirements for temporary relief. Indeed, in declining emergency review of our previous stay order, the Kansas Supreme Court observed that the temporary injunction "may not ultimately survive appellate scrutiny" but was not "plainly erroneous." Order, *Kansas Appleseed Center for Law and Justice, Inc., et al. v. Schwab*, No. 130,839, Order at 7-8 (Kan. July 30, 2026). Even if we were to find that there is a "fair prospect" of the Secretary prevailing on his legal claims, that possibility is not sufficiently strong to warrant the extreme step of staying the district court's order. See *United States Postal Service, et al. v. California, et al.*, No. 26A305, slip op. at 1 (U.S. September 14, 2026) (Kavanaugh, J., concurring). Given the substantial arguments on both sides and the interlocutory posture of this appeal, we are not persuaded that the Secretary's preliminary showing on the merits is sufficiently strong to require suspending the injunction before we can resolve those issues through the normal appellate process.

Our remaining considerations focus on what will happen while that appellate process unfolds. And given the timing of this appeal, those practical concerns carry particular significance. The Secretary correctly observes that the State has an important interest in administering elections under laws enacted by the legislature. Preventing a State from enforcing a duly enacted statute can itself constitute a form of irreparable injury. See, e.g., *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). But see *Harper*, 65 Kan. App. 2d 680, Syl. ¶ 9 (noting that this injury alone is not sufficient to warrant injunctive relief). The Secretary also asserts an administrative interest in establishing clear election rules before ballots are mailed and avoiding confusion among voters and county election officials. We are sensitive to those interests.

But we must consider these asserted harms alongside the harms that would arise if a stay were granted. If the injunction remains in place through the November election, the State will temporarily continue administering the ballot-receipt rule that has existed since

2017 and that governed the August 2026 primary. In other words, the election would be conducted in the same way it has for the last eight years. The principal injury to the State will thus be the temporary inability to enforce the Election Day receipt deadline while this appeal is decided, along with any administrative burden associated with receiving and counting qualifying ballots during the three days following Election Day. If the Secretary ultimately prevails on the merits, the court's decision can determine the governing law going forward.

The injury from a stay would be different. A Kansas voter may reasonably rely on the temporary injunction—and the rule that governed the August primary—when mailing an advance ballot by Election Day. If we were to grant a stay, and that ballot were received in the three-day window after Election Day, the ballot would not be counted. If a court later determines that the temporary injunction was appropriate, no subsequent appellate decision could meaningfully restore that vote to the 2026 general election. Once the election has occurred and a qualified voter's ballot has gone uncounted, that injury cannot be repaired by a later decision of this court on the merits.

That asymmetry is significant. The traditional purpose of a stay is to prevent irreparable injury while an appellate court takes the time necessary to determine the parties' rights. See *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 9 (1942). Here, the injury that cannot be remedied later—that is, the harm that is irreparable—is the loss of a vote in this election. The State's asserted injury from temporarily administering the three-day period is significant, but it is principally an injury of delay: The State must await our merits decision before enforcing the challenged provision. The potential injury to voters, by contrast, is final.

The election calendar magnifies the importance of continuity while this appeal proceeds. Kansas law generally understands the status quo for purposes of temporary relief as "the last actual, peaceable, noncontested position of the parties which preceded

the pending controversy." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860 (1984). In its order denying the Secretary's previous requests in this case, the Kansas Supreme Court found the district court's conclusion reasonable that this baseline was the law applicable when this case was filed—the three-day window that predated the 2026 amendments to K.S.A. 25-1132. *Kansas Appleseed*, No. 130,839, Order at 5. Our Supreme Court found no conflict between our earlier denial of an appellate stay and the election-timing concerns identified in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), when "the intent and effect of the order is to minimize disruption, preserve the status quo, and avoid irreparable harm while the appellate court decides the substantive question of the propriety of the lower court's injunction." *Kansas Appleseed*, No. 130,839, Order at 5.

We continue to find the practical concern underlying *Purcell* important. Courts should be mindful that alterations to election procedures near an election may themselves produce administrative difficulties and voter confusion. See *Purcell*, 549 U.S. at 4-5. But the approaching October 14 ballot-mailing date and November 3 election heighten rather than diminish our concern with the consequences of changing course before the merits can be fully resolved.

Conclusion

This is an important case, and important rights and interests are at stake on both sides. Kansans have a substantial interest in the orderly administration of elections under the law. Kansans also have a substantial interest in ensuring that well-meaning and qualified Kansas voters are not deprived of their votes through an interim judicial ruling that may later prove unnecessary.

The importance of these competing interests counsels careful appellate review, not a premature resolution of the merits through an interim stay motion. The parties and the public are entitled to the benefit of the deliberative appellate process: briefing, considered

argument, and a reasoned decision applying Kansas law to the issues presented. As the Kansas Supreme Court observed when it declined emergency review earlier in this case, adherence to the ordinary appellate process allows for "deeper exploration of, and refinement of complex issues" and the orderly development of the law. *Kansas Appleseed*, No. 130,839, Order at 8. We owe that process to both sides. Our decision today does not forecast the ultimate disposition of the appeal.

For now, our task is narrower. Considering the Secretary's preliminary showing on the merits, the State's asserted injuries, the irreparable consequences a stay could impose on voters, the public interest, and the rapidly approaching election calendar, we conclude that the Secretary has not met his burden to demonstrate that the temporary injunction should be suspended while this appeal proceeds. Leaving the temporary injunction in place minimizes the risk of an injury that could not be corrected after Election Day while permitting this court to decide the legal issues presented in the ordinary course of appellate review. We are preserving the status quo.

This court will contact the parties about setting a date for oral arguments so we may resolve the legal questions presented in the parties' briefs.

The Secretary's renewed motion to stay or suspend the temporary injunction pending appeal is denied.

DATED: October 2, 2026.

FOR THE PANEL:

A handwritten signature in blue ink, appearing to read "Sarah E. Warner", is written in a cursive style.

SARAH E. WARNER
CHIEF JUDGE