No. 22-125084-A

IN THE COURT OF APPEALS
OF KANSAS

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,

vs.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General,
Defendants-Appellees.

BRIEF OF APPELLANTS

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. NATURE OF THE CASE

Plaintiffs are four nonpartisan nonprofits dedicated to promoting the right to vote and maximizing political engagement, and three voters who work to help citizens engage in Kansas elections.[1] They appeal the district court's order dismissing their constitutional challenges to: (1) the Ballot Collection Restriction, which makes it a crime to deliver more than ten advance ballots on behalf of other voters, and (2) the Signature Verification Requirement, which requires election officials to reject advance ballots for perceived mismatches in signatures on the ballot envelope as compared to the voter's signature one on file (together the "Challenged Restrictions"). Plaintiffs also appeal the dismissal of their motion to temporarily enjoin the Signature Verification Requirement. The district court's orders are at odds with precedent and threaten Plaintiffs, their members, and constituents with irreparable harm in the coming elections. This Court should reverse the dismissal, enter a temporary injunction enjoining the Signature Verification Requirement, and remand for an expedited trial. Given the coming elections, Plaintiffs moved to expedite this appeal. In granting that motion in part, this Court asked the parties to address six questions in their brief. Plaintiffs begin by addressing those questions:

1. Which of Appellants' claims remain pending before the district court, and what is the status of those claims?

Plaintiffs challenged the following provisions of H.B. 2183 and H.B. 2332 under various provisions of the Kansas Constitution: (1) the False Representation Provision, K.S.A. 25-2436, (2) the Advocacy Ban, K.S.A. 25-1122(l)(1), (3) the Ballot Collection

[1] The organizational Plaintiffs are the League of Women Voters of Kansas (the "League"), Loud Light, Kansas Appleseed Center for Law & Justice, Inc. ("Kansas Appleseed"), and Topeka Independent Living Resource Center (the "Center"). The voters are Charley Crabtree, Faye Huelsmann, and Patricia Lewter.

Restriction, K.S.A. 25-2437, and (4) the Signature Verification Requirement, K.S.A. 25-1124(h). Only the challenges to the False Representation Provision remain pending before the district court. However, the district court concluded that it presently lacks jurisdiction over those challenges, because they are the subject of a separate, pending appeal in this Court. *League of Women Voters v. Schwab*, No. 21-124378-A (appeal from district court's denial, in September of 2021, of Plaintiffs' motion for temporary injunction of the False Representation Provision). As a result, the district court did not address those challenges in its order of dismissal. (R. V, 60-61.)[2]

2. What is required for a decision to have a "semblance of finality" such that it may be reviewable under K.S.A. 2020 Supp. 60-2102(a)(3)?

K.S.A. 60-2102(a)(3) confers a right of appeal and gives this Court jurisdiction over appeals from orders "involving ... the constitution of this state." The language "semblance of finality" does not appear in 60-2102(a)(3). That requirement comes from *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164, 165 (1965), in which the Kansas Supreme Court found that 60-2102(a)(3) was not a blanket right to appeal any order involving a constitutional question, regardless of how preliminary or cursory. The Court found that an order involving a constitutional question should have "some semblance of finality" to qualify for review under 60-2102(a)(3). *Id.* The Court explained that this occurs when the trial court has had "an opportunity to make a full investigation and determination of the controversy." *Id.*

[2] Plaintiffs' challenge to the Advocacy Ban was voluntarily dismissed after a federal court considering a separate challenge to the Ban found it violated the First Amendment and Defendants agreed to a permanent injunction. *VoteAmerica v. Schwab*, No. 1:31-cv-02253-KHV-GEB. The other two claims brought by Plaintiffs—against the Signature Verification Requirement and the Ballot Collection Restriction—were dismissed by the district court in its order on the motion to dismiss that is the subject of this appeal.

There have only been a handful of cases discussing this standard since *Cusintz*, but it is clearly met here. The district court made clear that it had the opportunity to make a full investigation and determination of the constitutional questions at issue, stating in its order of dismissal that the "arguments detailed . . . dispose of the claims before the Court." (R. V, 60). It is plain that the district court has no intention to make any further investigation into or determinations about the controversy. The order, therefore, has a "semblance of finality" and is reviewable under 60-2102(a)(3). Compare this with *Cusintz*, which involved a motion to strike a preliminary order of support and an order *denying* a motion to dismiss in an on-going custody battle. 195 Kan. at 301. Similarly, in *In re Guardianship & Conservatorship of Austin*, 200 Kan. 92, 94, 435 P.2d 1, 3 (1967), the appeal was premature because it involved decisions made during *pretrial proceedings* about what rules would apply to the proceedings going forward.

The State appears to argue that an order only has a semblance of finality if it is, in fact, a final judgment. Defs. Appellees' Mot. to Dismiss Pls.-Appellants' Appeal at 7. But this would render K.S.A. 60-2102(a)(3) superfluous of K.S.A. 60-2102(a)(4), which already permits appeals from final judgments. This violates "a cardinal rule of statutory construction that a provision should not be interpreted as to render some language mere surplusage." *Rhodenbaugh v. Kan. Emp. Sec. Bd. of Rev.*, 52 Kan. App. 2d 621, 626, 372 P.3d 1252, 1257 (2016). The State's interpretation is also at odds with the term "*semblance* of finality," itself. The word "semblance" means "a situation or condition that is similar to what is wanted or expected, but is not exactly as hoped for." Cambridge Advanced Learner's Dictionary & Thesaurus (Online ed. 2022). To find that an order only has a "semblance" of finality if it is an actual final judgment would read out the word "semblance" entirely. Here, where the court issued an order that, in its own words,

"*disposed of all claims before the court,*" the order bore—at the very least—a "*semblance*" of "finality," and is reviewable under 60-2102(a)(3).

3. How, if at all, does the finality requirement of K.S.A. 2020 Supp. 60-2102(a)(3) differ from the final order requirement of K.S.A. 2020 Supp. 60-2102(a)(4)?

By its terms, jurisdiction under K.S.A. 60-2102(a)(4) requires a "final decision in any action." A "final decision" is "one which finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future." *Kan. Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 244 P.3d 642 (2010). An order is final when "all the issues *in the case* [have been] determined." *Connell v. State Highway Comm'n*, 192 Kan. 371, 374, 388 P.2d 637 (1964) (emphasis added). In other words, a final judgment. Here, because Plaintiffs' challenge to the False Representation Provision is on appeal, the district court's April 11 order did not determine "all the issues in the case," and Plaintiffs do not seek review under 60-2102(a)(4). However, the same order conclusively disposed of all of the claims that remained before the district court, and the court's order makes clear it had an opportunity to make a full investigation and determination of the controversy. As a result, it has the "semblance of finality" required to confer jurisdiction under K.S.A. 60-2102(a)(3), as discussed in response to question #2, above.

4. What was the basis of the district court's conclusion that the request for temporary injunction of the Signature Verification Requirement was moot?

In the same order in which the district court dismissed the Signature Verification Requirement, the district court denied Plaintiffs' motion to temporarily enjoin that Requirement, finding it moot in light of the dismissal of the underlying claim. (R. V, 78). The district court offered no other reasoning for denying the motion for a temporary

injunction.

5. May we review the district court's denial of the temporary injunction since the district court dismissed the constitutional challenges to the Signature Verification Requirement on the merits?

Yes, this Court can and should review the district court's denial of the temporary injunction. Under K.S.A. 60-2101(a), this Court has the power "to correct, modify, vacate or reverse any act, order or judgment of a district court to assure that" it "is just, legal and free of abuse." Because the denial of injunctive relief was based on the district court's legal error in dismissing the underlying claim, and because the 2022 elections are swiftly approaching, further delay would be highly prejudicial to Plaintiffs' ability to protect their fundamental rights. Thus, review is necessary to assure that the district court's act "is just, legal, and free of abuse." In addition, dismissal of the claims against the Signature Verification Requirement and the resulting denial of the motion for temporary relief are "inextricably intertwined" such that even if this Court did not independently have jurisdiction to review one, review of both would be permitted "to allow meaningful review and promote judicial economy." *City of Neodesha v. BP Corp. N. Am.*, 295 Kan. 298, 312, 287 P.3d 214, 224 (2012). This Court also independently has jurisdiction to review the denial of the temporary injunction under K.S.A. 60-2102(a)(2), because the district court's order "refuse[d] . . . an injunction." In a recent decision, the Tenth Circuit held that an appellate court could consider a motion for a preliminary injunction in an analogous situation. *See, e.g., Wellington v. Daza*, 795 F. App'x 605, 608 (10th Cir. 2020).

6. How, if at all, was the district court's constitutional analysis of the Ballot Collection Restrictions related to the district court's constitutional analysis of the Signature Verification Requirement?

Plaintiffs challenge both the Ballot Collection Restriction and Signature Verification Requirement as violating the Kansas Constitution, but under different

provisions, overlapping only on the right-to-vote claim. Plaintiffs challenge the Ballot Collection Restriction as violating (1) the right to vote, under Kan. Const. art. 5, § 1; Kan. Const. Bill of Rts, §§ 1, 2, and (2) the right to free speech and association under Kan. Const. Bill of Rts. §§ 3, 11. They challenge the Signature Verification Requirement as violating (1) the right to vote, under the constitutional provisions above, (2) the right to equal protection under Kan. Const. art. 5, § 1; Kan. Const. Bill of Rts. §§ 1, 2, and (3) the right to due process under Kan. Const. Bill of Rts. § 18.

The district court analyzed the right-to-vote challenges against each of these provisions differently. With regard to the Ballot Collection Restriction, the district court evaluated Plaintiffs' right-to-vote and free speech claims in tandem, erroneously concluding that Plaintiffs "agreed" they were subject to the same analysis. *See also infra* n.8. The district court then concluded that the Restriction "do[es] not restrict core political speech or expressive conduct," and that rational basis review applied (and was satisfied). The court further held that even if the Restriction "incidentally implicated speech or conduct protected by the Kansas Constitution, [it] would be subject only to the *Anderson-Burdick* flexible balancing test"—a federal test that has not been adopted by the state of Kansas. (R. V. 69-70); *see infra* at III.D.1; IV.B.2.D. The court found that *Anderson-Burdick* would be "easily met," but did not otherwise elaborate except to say that the government's regulatory interests were "important and justifi[ied]." (R. V, 71).

In contrast, when analyzing the right-to-vote claim against the Signature Verification Requirement, the district court proceeded directly to applying *Anderson-Burdick*. It first determined that the Requirement did not implicate political speech—seemingly ignoring that Plaintiffs do not bring a speech claim against that Requirement. The court then turned to the state's justifications and found that the Signature

Verification Requirement imposed "reasonable, non-discriminatory restrictions which are outweighed by the state's compelling state interest in the integrity of its elections." (R. V, 74-75). The court did not explain why it chose to apply *Anderson-Burdick* instead of rational basis review, as it did in analyzing the Ballot Collection Restriction.

II. STATEMENT OF THE ISSUES

A. The district court erred in holding that laws that infringe the fundamental rights to vote and to free speech and association are presumed constitutional.

B. The district court erred in holding that Plaintiffs' Petition fails to state claims that the Ballot Collection Restriction violates the right to freedom of speech and the right to vote.

C. The district court erred in holding that Plaintiffs' Petition fails to state claims that the Signature Verification Requirement violates the right to vote, due process, and equal protection.

D. The district court abused its discretion in denying Plaintiffs' motion for a temporary injunction against the Signature Verification Requirement based on the court's errors of law.

III. STATEMENT OF THE FACTS

A. After the 2020 election, the Legislature moved to restrict advance voting unnecessarily and over significant objection.

Voter participation in the 2020 election was among the highest in Kansas history, with more than 1.3 million—nearly 71% of registered voters—casting a ballot. (R. II, 230). "[A] record number" used "advance by mail ballots." (*Id.* at 249). State and local officials "publicly declared that the 2020 election was successful, without 'any widespread, systematic issues [of] voter fraud, intimidation, irregularities, or voting problems.'" *VoteAmerica v. Schwab*, No. 21-2253-KHV, ___ F. Supp. 3d ___, 2021 WL 5918918, at *21 (D. Kan. Dec. 15, 2021) (citation omitted) (alteration in original). After a statewide audit, the Secretary of State's office itself announced: "[a]ll votes [were] accounted for and foul

play, of any kind, was not found." (R. II, 7).

However, as soon as the 2021 legislative session convened, legislators moved to introduce several bills that severely restricted access to the franchise—including by making it harder for voters to successfully use the advance vote-by-mail system that drove the record setting 2020 turnout. (R. V, 15). Several of those proposals became part of two omnibus election bills, H.B. 2183 and H.B. 2332, which were considered, using unusual and rushed procedures, primarily in the Kansas Senate. (*Id.*) The Challenged Provisions at issue in this appeal were both part of H.B. 2183.

1. The Ballot Collection Restriction

K.S.A. 25-2437(a) imposes several new restrictions on the collection and delivery of advance ballots by persons other than the voter. Plaintiffs challenge the quantitative restriction imposed on the number of ballots that a single person may collect. Specifically, the Ballot Collection Restriction provides that "[n]o person shall transmit or deliver more than 10 advance voting ballots on behalf of other voters during an election." K.S.A. 25-2437(c). A violation is a class B misdemeanor punishable by six months in jail and a $1,000 fine. K.S.A. 25-2437(d), 21-6602(a)(2), 21-6611(b)(2).[3]

Kansas voters have long relied on being able to have others return their ballots, and there was significant public opposition to the Restriction. (R. I, 43). Numerous faith leaders—including Plaintiffs Huelsmann and Lewter—submitted written testimony that the new restrictions would hinder their ability to deliver ballots for the sick and elderly

[3] Plaintiffs do not challenge new restrictions that require persons delivering ballots obtain a written statement from the voter accompanying the ballot at the time of delivery that is signed by both the voter and the person delivering the ballot. K.S.A. 25-2437(a). Nor do Plaintiffs challenge the portion of the law that makes it illegal for a candidate for office to collect and deliver voters' ballots for them. K.S.A. 25-2437(b).

communities they serve. The Executive Director of the Disability Rights Center of Kansas told the lawmakers that the Restriction would "disproportionately harm Kansans with disabilities." (*Id.* at 48, 57). The Legislature offered no justifications for the Restriction, other than rumor and innuendo. For example, the sponsor, Senator Larry Alley, suggested the Restriction was in response to "allegations of ballot harvesting" in other states. (*Id.* at 43). "I'm not saying they were true, but there were allegations. What we want to do is not have those type of allegations here in Kansas," he said. (*Id.*) Despite the public opposition and lack of any evidence to justify its passage, the Legislature passed it along partisan lines as part of H.B. 2183 on April 8, 2021. (*Id.* at 46).

2. The Signature Verification Requirement

The Signature Verification Requirement, codified at K.S.A. 25-1124(h), provides:

> [N]o 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.

Like the rest of H.B. 2138, the Signature Verification Requirement was rushed through the legislative process. Senator Brenda Dietrich noted that those tasked with evaluating the signatures under the new law—county election officials—did not have any "chance to weigh in" on the bill in the Legislature's sprint to pass the new law. (R. V, 16).

The Requirement leaves the process of how to verify signatures and what constitutes a match entirely to the discretion of local election officials. (*See id.*) The legislative history confirms that the Legislature was aware that, by giving counties this

broad unfettered discretion, it would subject voters to disparate treatment across the state's 105 counties, with some having their ballots wrongfully rejected as a result. In response to a question by Senator Mary Ware at a legislative hearing that discussed how counties would determine a "match," the Office of the Revisor explained that neither the bill nor existing law provided guidance. Instead, the bill left it "to the discretion of the county election officer to verify that these signatures are within a reasonable person standard a match." (*Id.*) Senator Ware expressed concern about the lack of specificity in the law because "signatures vary constantly, depending on a thousand factors because we're people . . . some [signatures] would be clear but many would be nebulous." (*Id.*) Other Senators—Republicans and Democrats alike—acknowledged that signatures will often be erroneously flagged for rejection. (*Id.*) And even though the rushed maneuvers used to add the Requirement largely precluded public input, testimony by the Disability Rights Center warned the law was likely to harm people with disabilities, even with its supposed disability exception. (*Id.*)

As noted, county officials did not have a chance to comment on the provision before it was added to the bill, and no explanation was offered as to why the unusual legislative process or the Signature Verification Requirement itself was necessary. The only state interest referenced as justification came in a statement by a senator who suggested that he supported preventing "illegal voting," but no one explained how the provision achieves this goal. (R. V, 16-17). Later, on the floor of the Senate, Senator Alley conceded that H.B. 2183 was not aimed at addressing any existing problem with fraud, suggesting the issue is not what had "happen[ed] in Kansas," but what *could* happen. (R. V, 17). The Senate nevertheless approved H.B. 2183 with the approval of all but four Republican lawmakers. (*Id.*) No Democrats voted for the bill. (*Id.*)

Because of the Senate's abnormal procedure—a so called, legislative "gut and go" of what had previously been H.B. 2183—neither the full House nor the committee of jurisdiction considered the amended bill. (*Id.*) As a result, the only Representatives to formally weigh in on the legislation before final approval were the members assigned to the Conference Committee. (*Id.*) During that Committee's brief discussion, in response to a question about what the Requirement *adds* to existing law, the Revisor's office explained that the provision requires county officials to reject ballots with signatures that are deemed not to match the signature on record. (*Id.*) And the Secretary's office confirmed that the law leaves discretion in the hands of the counties regarding how to "attempt" to provide a "cure" process to voters whose ballots are rejected. (*Id.*)

* * *

Governor Kelly vetoed H.B. 2183 in its entirety on April 23, 2021. (R. V, 18). In her veto statement, she emphasized that, "[a]lthough Kansans have cast millions of ballots over the last decade, there remains no evidence of significant voter fraud in Kansas. This bill is a solution to a problem that doesn't exist. It is designed to disenfranchise Kansans, making it difficult for them to participate in the democratic process, not to stop voter fraud." (R. III, 200). The Legislature, along party lines, overrode the veto on May 3, 2021. (R. I, 549-50). The provisions went into effect July 1, 2021.

B. Plaintiffs' Petition details the burdens the Challenged Restrictions impose on their fundamental rights.

This action was filed on June 1, 2021. (R. I, 2, 21). After Defendants (the "State") moved to dismiss the Petition, Plaintiffs filed the governing Amended Petition on August 3, 2021. (R. I, 9; R. II, 230). As relevant here, the Amended Petition makes the following claims under the Kansas Constitution: (1) that the Ballot Collection Restriction violates

(a) the right to vote under Article 5, Section 1, and Sections 1 and 2 of the Bill of Rights, and (b) the right to free speech and association under Sections 3 and 11 of the Bill of Rights; and (2) that the Signature Verification Requirement violates (a) the right to vote under the same provisions listed above, (b) equal protection under Sections 1 and 2 of the Bill of Rights, and (c) due process under Section 18. (R. II, 230-86).

1. The Ballot Collection Restriction

Plaintiffs plead extensive facts showing how the Ballot Collection Restriction impedes their speech and expressive conduct by diminishing their ability to assist voters. The ability to deliver ballots is a critical means by which Plaintiffs engage with and communicate their message to Kansas voters. (R. II, 237-39, 244, 246-48). Mr. Crabtree, a member of the League, uses ballot collection to "effectively communicate his message of civic participation and engagement." (R. II, 247). In 2020 alone, he returned more than 75 ballots for fellow voters in his county. (R. II, 246-47). It is also how Sisters Huelsmann and Lewter (both Sisters of St. Joseph of Concordia, Kansas), express their commitment to building a community of loving neighbors united by faith. (R. II, 247-48). Ballot delivery assistance is also a critical means by which the League, Kansas Appleseed, and the Center, communicate their core message of maximizing civic engagement among the constituencies they serve. (R. II, 237-39, 244, 246). The Restriction directly chills Plaintiffs from engaging with voters in these ways. (R. II, 237-39, 244, 246-48, 275).

The Petition also pleads facts demonstrating how the Restriction infringes the right to vote. "[M]any of Kansas's most vulnerable citizens" rely on delivery assistance, including "seniors, minority voters, 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, 269-70). This includes many

of Huelsmann and Lewter's Sisters "who . . . would find it very hard to take their own ballot to the Court House or even to a drop box." (R. II, 271). The Restriction impacts "several hundred" individuals in their community alone. (*Id.*) Countless others depend on organizations like Plaintiffs and individuals in their community, including "church members, neighbors, friends, and family to assist them." (R. II, 272). Under the Restriction, such voters are at a substantial risk of losing access to the help they need to vote. (R. II, 269-72, 277-78).

2. The Signature Verification Requirement

The Petition also sets out facts describing how the Signature Verification Requirement disenfranchises lawful voters and subjects others to needless additional burdens. (R. II, 264-69). "[S]ignature verification by laypersons is inherently unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries." (R. II, 265). "Accurate signature matching is particularly difficult because it is common for handwriting to change." (*Id.*) Voters "who are elderly, disabled, suffer from poor health, are young, or are non-native English speakers are particularly likely to have greater signature variability and therefore are especially likely" to have their signatures erroneously declared a mismatch. (*Id.*) Officials will accordingly wrongfully reject the ballots of eligible voters because of the Requirement, with "disparate rates of disenfranchisement across counties" guaranteed. (R. II, 266).

Although the law purports to not apply to voters with disabilities, there is no "way for county election officials to know if someone has a disability preventing the voter from having a signature consistent with their registration form." (R. II, 267-68). And although existing law directs officials to "attempt" to contact voters if their ballot is flagged for rejection, the counties implement highly disparate cure protocols (if any). Loud Light has

documented repeated instances in which counties have "failed to contact voters" entitled to a cure opportunity. (R. II, 269). As a result, the scheme "leaves the fate of many people's votes to depend on the availability of volunteers [from organizations like Plaintiffs] who work to help track down voters who would otherwise be disenfranchised." (*Id.*)

C. As the 2022 elections got closer with no decision on the motion to dismiss, Plaintiffs moved for a temporary injunction.

The 2022 elections will be the first statewide, large-turnout election cycle in which the Challenged Restrictions will be in effect. (R. II, 259). When Plaintiffs initiated this litigation in June 2021, there was ample time to hold a trial before the 2022 election cycle. (*See* R. I, 2, 21). Plaintiffs made repeated efforts to advance the case, but the State resisted. On August 23, 2021, the State moved to dismiss. (R. I, 10; R. II, 300, 303). When the motion was fully briefed, Plaintiffs moved to set a case management conference and proceed with discovery. (R. I, 16). The district court denied that motion, staying discovery indefinitely. (R. I, 16; V, 19). The motion to dismiss then sat, pending, for more than six months. (R. V, 54-80).

With the 2022 elections looming, Plaintiffs concluded their only chance at preventing the Signature Verification Requirement from disenfranchising lawful voters in what is anticipated to be a high-turnout election cycle was to move for a temporary injunction. (R. V, 18-19). Plaintiffs filed that motion on April 7, 2022. (R. V, 6). It was supported by substantial evidence, including expert analysis from the board-certified and internationally recognized forensic document examiner, Dr. Linton Mohammed. (R. III, 211-52). As reflected in his report, Dr. Mohammed concludes that the Signature Verification Requirement is "all but guaranteed to result in the erroneous rejection of properly cast ballots." (R. III, 236). Particular types of voters, including young, disabled,

elderly, and non-native English speakers, are disproportionately likely to have their ballots rejected, and their right to vote denied, as a result of the Requirement. (R. III, 219). Plaintiffs also presented evidence from public records demonstrating that signature-matching protocols and standards differ significantly among the counties. (R. IV, 332-76; IV, 385). There are substantial differences in the amount and content of the guidance and training provided to officials who have unfettered discretion to accept or reject ballots. (R. III, 217). Johnson County, for instance, created a signature-matching manual and has used materials developed by Oregon to guide its process. (R. IV, 332-76). In contrast, several other counties do not have any records of any guidance or training at all. (R. IV, 385). The records also show disparity in the quantity and quality of the comparator signatures used to determine whether the voter's signatures "match," and in the technology (if any) used for matching. (R. IV, 332-76; IV, 13).

D. The district court granted the motion to dismiss and denied the motion for a temporary injunction as moot.

On April 11, two business days after Plaintiffs filed their motion for a temporary injunction against the Signature Verification Requirement, and more than six months after the State's motion to dismiss became ripe for resolution, the district court granted the motion to dismiss all the claims over which it concluded it had jurisdiction. (R. V, 54-80). The district court's order did not address any of the State's arguments that Plaintiffs lack standing. (*Id.*)[4] Instead, the Court "assume[d] the existence of standing because" it found that the State's "other arguments" supported dismissal for failure to state a claim. (R. V, 60). The district court stated it was "analyz[ing] whether Plaintiffs stated a claim

[4] The State conceded in their motion to dismiss that at least some Plaintiffs have standing to challenge the Delivery Assistance Restriction but challenged Plaintiffs' standing to challenge the Signature Matching Requirement. (R. II, 311-32).

under the facial challenge standard," which it defined as requiring "the challenger [to] establish that no set of circumstances exists under which the Act would be valid." (R. V, 62). The district court recognized that no presumption of constitutionality applies to cases involving a "fundamental interest," "such as in the case of abortion," but nonetheless concluded "the general presumption of constitutionality applies" to Plaintiffs' claims because "there is currently no such specific declaration by the Kansas Supreme Court about" the rights to vote and free speech. (R. V, 63). The court proceeded to grant the motion to dismiss all of Plaintiffs' claims challenging the provisions at issue in this appeal.

1. Ballot Collection Restriction

As to Plaintiffs' free speech and association claim, the court found that the Ballot Collection Restriction "do[es] not restrict core political speech or expressive conduct" at all, and that "the rational basis test" accordingly applied. (R. V, 69). With respect to the right-to-vote claim, the district court appeared to hold that the Restriction also does not burden this right, although the order is not entirely clear. (*See id.*) The court simply concluded that, 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." (R. V, 71).

The district court further held that, even if the Restriction implicated a fundamental right, Kansas Supreme Court precedent applying strict scrutiny to challenges based on fundamental rights under the Kansas Constitution would not apply to impose strict scrutiny review here. (*Id.*) Instead, the district court held that the *Anderson-Burdick* test, applied by federal courts to claims that a law violates the right to vote under the federal constitution, would apply. The court then purported to apply that test, which "requires weighing the character and magnitude of the burden on constitutional rights against the government interests justifying the burden." (R. V, 73).

Disregarding other critical direction from the federal courts in that test's application, the district court concluded the Restriction survived because it represents a "reasonable" and "non-discriminatory" electoral regulation supported by "important" interests. (R. V, 71).

2. Signature Verification Requirement

As to Plaintiffs' claims against the Signature Verification Requirement, the district court similarly rejected the argument that Kansas precedent applying strict scrutiny to violations of fundamental rights protected by the Kansas Constitution applied. (R. V, 71-76). The court concluded that strict scrutiny applies only to "laws that restrict core political speech," and held that Plaintiffs' right-to-vote and equal protection claims under the Kansas Constitution should be analyzed under *Anderson-Burdick*. (R. V, 72-75). The district court further concluded that Plaintiffs' factual allegations, including those regarding erroneous disenfranchisement of lawful voters, could be ignored because in "a facial challenge" "there are no 'facts' necessary, other than the provisions of the statute themselves," to weigh against the state's interests. (R. V, 74). The court concluded that the Signature Matching Requirement is a "reasonable, nondiscriminatory restriction[] . . . outweighed by the state's compelling state interest in the integrity of its elections" and dismissed the right to vote and equal protection claims. (*Id.*)

With respect to Plaintiffs' due process claim, the district court held that the right to "vote by mail does not give rise to a protected liberty interest under . . . the Kansas Constitution Bill of Rights," and therefore does not entitle voters "to procedural protections." (R. V, 75-76). Thus, the court saw "no need to analyze whether the protections provided [under the Requirement] are adequate," at all. (*Id.*)

In light of the dismissal of Plaintiffs' claims, the district court concluded that the pending motion for a temporary injunction against the Signature Verification

Requirement was "moot" and refused to consider it. (R. V, 78).

IV. ARGUMENTS AND AUTHORITIES

The district court's dismissal of Plaintiffs' claims was premised on a series of legal errors. By holding that the right to vote and to freedom of expression do not implicate the types of "fundamental interests" that require courts to "peel back" the general presumption of constitutionality, the court ignored the Kansas Supreme Court's repeated mandate that the most searching level of scrutiny applies to infringements of fundamental rights. The district court then proceeded to apply a federal standard of review that has never been applied (or even cited) by the Kansas Supreme Court or any Kansas Court of Appeals. In doing so, the district court ignored the facts alleged in the Petition, at time substituting them with the district court's own factual assumptions. None of this can be squared with the controlling authority from the Kansas Supreme Court. These errors of law led the district court to also improperly refuse to consider Plaintiffs' motion for temporary relief, depriving Plaintiffs of an opportunity to be heard on their constitutional challenges ahead of the 2022 elections. For the reasons set forth below, the Court should reverse the motion to dismiss, enter a temporary injunction enjoining enforcement of the Signature Verification Requirement, and remand the case for an expedited trial.

A. The district court erred in holding that the Challenged Restrictions are entitled to a presumption of constitutionality.

1. Standard of Review and Preservation of the Issue

The district court committed legal error in concluding that laws that infringe the fundamental rights to vote and to free expression are afforded a presumption of constitutionality. (R. V, 63). This Court reviews a trial court's conclusions of law, including whether it "was required to presume [a law] was constitutional," de novo. *Hodes*

& Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 673, 440 P.3d 461, 498 (2019). Plaintiffs preserved this issue by arguing that the Supreme Court has held that when a law restricts a "fundamental right," courts do not apply a presumption of constitutionality, and by further contending that this principle applies to the fundamental rights to vote and to freedom of speech. (R. V, 31-32).

2. Analysis

Even after acknowledging that the Kansas Supreme Court emphasized yet again just three years ago that laws implicating "fundamental interests" are not afforded the "general presumption of constitutionality," *Hodes*, 309 Kan. at 673-74, the district court declared that, "[b]ecause there is . . . no such specific declaration by the Kansas Supreme Court" that the rights to vote and to free expression are "fundamental interest(s)," the "general presumption of constitutionality applies to the challenged provisions." (R. V, 63).

This ignored controlling Kansas Supreme Court cases that have, in fact, declared the rights to vote and to free expression under the Kansas Constitution "fundamental." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860, 869 (1984) (freedom of speech under Section 11 of the Bill of Rights is among "the most fundamental personal rights and liberties of the people"); *Moore v. Shanahan*, 207 Kan. 1, 649, 486 P.2d 506, 511 (1971) (right to vote "is a fundamental matter"); *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1063 (1987) ("Fundamental rights recognized by the Supreme Court include voting."). It also ignores the Kansas Supreme Court's clear instruction in *Hodes* that "government infringement of a fundamental right is *inherently* suspect," and as such subject to "strict scrutiny" review. 309 Kan. at 673 (emphasis added); *see also Farley*, 241 Kan. 669 ("The most critical level of examination under current equal protection analysis is 'strict scrutiny,' which applies in cases involving . . .

fundamental rights expressly or implicitly guaranteed by the Constitution.").[5]

Under this standard, "once a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional. The burden then shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it." *Hodes*, 309 Kan. at 669 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)). The district court failed to identify *any* case in which the Kansas Supreme Court purports to exclude the right to vote or to free speech from these protections. The district court's position represents a significant deviation from Kansas precedent that, if accepted more broadly, would have serious, far-reaching consequences. Unless the impact of a statute that impedes fundamental voting, speech, or association rights is facially and obviously severe, applying the district court's reasoning would allow such laws to evade virtually all pre-enforcement judicial review. *But see Hodes*, 309 Kan. at 673-74 (courts must take an "active and critical" role when fundamental rights are implicated to "smoke out illegitimate governmental action" (citations omitted)).

In other words, the district court's analysis was inconsistent with governing precedent regarding judicial review of allegations involving fundamental rights violations. Having miscalibrated its compass from the start, the district court proceeded to make multiple additional legal errors, any one of which requires reversal. The district court ignored the well-pleaded facts in the Petition to conclude that the State's generalized

[5] Other state courts protecting analogous state rights under their constitutions have come to similar conclusions as the Kansas Supreme Court. *See, e.g.*, *Harper v. Hall*, 2022-NCSC-17, ¶ 172, 868 S.E.2d 499, 550 (usual presumptions do not apply in cases implicating "civil rights guaranteed by the [North Carolina] Declaration of Rights"); *Weinschenk v. State*, 203 S.W.3d 201, 215 (Mo. 2006) ("Missouri courts . . . have uniformly applied strict scrutiny to statutes impinging upon the right to vote."); *Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994) (presumption "does not apply where a citizen's fundamental constitutional right, such as free speech, is involved").

interests in election integrity justified the Challenged Restrictions without conducting any meaningful "tailoring" analysis. *See infra*, §§ IV.B and IV.C. Similarly, without distinguishing or even acknowledging the abundance of contrary case law, the district court held that the Ballot Collection Restriction does not restrict core political speech or expressive conduct and, affording the Restrictions a "strong presumption of validity," dismissed Plaintiffs' claims under rational basis review. *See infra*, § IV.B. In short, because the court erroneously held that statutes that burden the rights to vote and to free speech are presumed constitutional—a conclusion that guided its other errors of law, including the dismissal of Plaintiffs' claims—it must be reversed on this ground.

B. The district court erred in dismissing Plaintiffs' claims against the Ballot Collection Restriction.

1. Standard of Review and Preservation of the Issue

When considering a motion to dismiss, courts must "assume as true the well-pled facts," and "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, 338 (2019) (citations omitted). "[I]f the facts alleged . . . and the reasonable inferences arising from them stated a claim based on their theory 'or any other possible theory,'" the court must deny the motion. *Id.* (quoting *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013)).

The district court's conclusion that Plaintiffs failed to state claims that the Ballot Collection Restriction, K.S.A. 25-2437(c), violates the rights to free speech and to vote was based on errors of law. (R. V, 63-71). This Court reviews a trial court's conclusions of law, including its decision to grant a motion to dismiss, de novo. *Rodina v. Castaneda*, 60 Kan.

App. 2d 384, 386, 494 P.3d 172, 175 (2021) (citing *Williams v. C-U-Out Bail Bonds*, 310 Kan. 775, 784, 450 P.3d 330 (2019)). Plaintiffs preserved this issue by arguing that the Restriction violates their free speech rights by diminishing their ability to provide voter assistance, which is protected expression, and that it unconstitutionally infringes the right to vote by limiting the ability of voters to deliver their ballots to officials. (R.II, 416).

2. Analysis

a. Plaintiffs alleged the Ballot Collection Restriction limits constitutionally-protected speech.

The district court perfunctorily rejected Plaintiffs' claim that the Ballot Collection Restriction curtails core political speech, stating without analysis that assisting voters in returning their completed ballots is not expressive conduct protected by the Kansas Constitution. (R. V, 68). In doing so, the court relied on a handful of decisions considering federal claims, failing to consider whether the Kansas Constitution might require a more searching level of scrutiny, and failing to acknowledge (much less distinguish) the numerous federal decisions that have affirmatively concluded that assisting voters to register, to obtain or return ballot applications or ballots, or perform other acts requisite to voting *is* constitutionally protected expressive activity. *E.g.*, *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1215–16 (D.N.M. 2010); *Tenn. State Conference of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 704 (M.D. Tenn. 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158-59 (N.D. Fla. 2012); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1215–16 (D.N.M. 2010); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006). The reasoning in these decisions

is more persuasive than those cited by the district court.

Kansas courts have not addressed the contours of the protections the Kansas Constitution provides for election-related speech. They are, however, at least "coextensive" with the protections of the First Amendment, *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980), and the Kansas Supreme Court has explained that in some instances "the Kansas Constitution protect[s] the rights of Kansans more robustly than" the federal constitution. *Hodes*, 309 Kan. at 621. Federal cases addressing protection under the First Amendment are thus instructive in determining whether similar activity is protected by the state's analogous provisions, but do not necessarily establish the full scope of the rights or the standard of review for such claims. *See infra*, n.9.

Even if one were to presume that the rights were entirely co-extensive, federal precedent supports Plaintiffs. In *Meyer v. Grant*, 486 U.S. 414 (1988), the U.S. Supreme Court considered whether a state law that, like the Ballot Collection Restriction, limited the ability of advocates to facilitate others in making their voices heard in the electoral process complied with the First Amendment—there, a prohibition on paying initiative petition signature gatherers. *Id.* at 417. The Court reasoned that the act of proactively gathering signatures for an initiative "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech,'" and it thus is protected expression. *Id.* at 421-22; *see also Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999) (holding requiring initiative-petition circulators to be registered voters and wear ID badges, and requiring reporting on payment of circulators, unconstitutionally burdened core political speech).

The Ballot Collection Restriction is much the same. The collection and return of absentee ballots "of necessity involves both the expression of a desire for political change

and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421. Ballot collectors necessarily advocate for democratic participation; a collector "may not have to persuade potential [voters] that a particular proposal [or candidate] should prevail to capture their [votes, but] he or she will at least have to persuade them that the matter is one deserving of" making their voice heard. *Id.* "This will in almost every case involve an explanation of the nature of the [election] and" the merits of voting, if not of the candidates and proposals themselves. *Id. Meyer* reasoned that prohibiting payment of petition circulators restricts core political expression because "it limits the number of voices who will convey [initiative proponents'] message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Id.* at 422–23. The Court also concluded that such a ban "makes it less likely that [proponents] will garner the number of signatures necessary to place the matter on the ballot." *Id.* at 423. As Plaintiffs detail in their Petition, *see supra*, § III.B, the Ballot Collection Restriction similarly squelches Plaintiffs' ability to disseminate their message—limiting each person to returning a maximum of ten ballots—and makes it less likely they will achieve their political goals.

It does not matter that the Restriction may leave individuals free to advocate for a cause or candidate or voting in general without collecting and delivering ballots. The circulators in *Meyer* could discuss the initiative and inform a potential signatory how to support the initiative, without doing so in coordination with the circulator. The Supreme Court found this immaterial: "That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424 (citing *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986)). Just as in *Meyer*, the Ballot Collection Restriction impedes "access to the most effective, fundamental, and perhaps

economical avenue of political discourse, direct one-on-one communication. That it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." *Id.*

Given these parallels, it is unsurprising that many courts have declined to follow the caselaw upon which the district court exclusively relied, instead finding that voter assistance activities like those the Ballot Collection Restriction limits are constitutionally protected. *See Priorities USA*, 462 F. Supp. 3d at 812; *Herrera*, 690 F. Supp. 2d at 1215–16; *Hargett*, 420 F. Supp. 3d at 704; *League of Women Voters*, 400 F. Supp. 3d at 720; *Browning*, 863 F. Supp. 2d at 1158-59; *Project Vote*, 455 F. Supp. 2d at 706. The district court failed to engage with these precedents—or in any meaningful analysis at all—and it erred by concluding ballot collection is not protected expression.

b. Strict Scrutiny applies.

Because the district court incorrectly concluded that the Ballot Collection Restriction does not restrict protected expression, it applied rational basis review. (R. V, 69). It further found that, "[e]ven if the [Restriction] incidentally implicated speech or conduct protected by the Kansas Constitution, [it] would be subject only to the *Anderson-Burdick* flexible balancing test." (R. V, 70). Both conclusions are incorrect.

Because speech rights under Section 11 of the Bill of Rights are "among the most fundamental personal rights and liberties of the people," *McKinney*, 236 Kan. at 234, strict scrutiny applies. *Hodes*, 309 Kan. at 669 (citing *Reed*, 135 S. Ct. at 2226). This conclusion is apparent from Kansas Supreme Court precedent and the language and intent of the Kansas Constitution. "[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." *Id.* at 622–23 (quoting *Wright v. Noell*, 16

Kan. 601, 607, 1876 WL 1081 (1876)). Here, Section 11's broad protection of speech by "*all* persons" covering "*all* subjects," Kan. Const. Bill of Rights at 14, § 11 (emphasis added), communicates a clear intent by the Framers to preserve and protect the ability of the people to engage in activities associated with the interchange of ideas concerning political and social change.

The primacy of protecting core political speech is also evident from the contemporary history of the Constitution's passage. During the 1859 Wyandotte Convention, the Framers spoke openly of the need to ensure petitioners seeking to address the Convention would not "be debarred the right to express [their] views." Proceedings & Debates of the Kansas Constit. Convention (Drapier ed., 1859), reprinted in Kansas Constit. Convention 79-81 (1920). This history reflects the fundamental understanding, dating back to the state's founding, that political activities aimed at influencing those with voting power are at the core of the freedoms protected by Section 11, and it confirms that the "intent of the Wyandotte Convention delegation and voters who ratified the Constitution" was that the right to such speech be protected to the utmost degree. *Hodes*, 309 Kan. at 669. Thus, Section 11 of the Kansas Bill of Rights calls for the application of strict scrutiny even when less searching scrutiny might be appropriate under the First Amendment. *See id.* at 621 (recognizing fundamental rights may be "more robustly" protected under the Kansas Constitution).[6]

Significantly, however, even if federal standards were to guide the Court, they would point to the same conclusion: strict—or, at the very least, a similarly demanding

[6] Kansas courts have at times adopted standards used by federal courts applying analogous federal provisions, but only "in cases where a party asserts violations of both [the state and federal] Constitutions *without making unique arguments*" regarding the protections afforded by the Kansas provisions. *Id.* at 620 (emphasis added).

"exacting"—scrutiny applies. The district court's conclusion to apply *Anderson-Burdick* cannot be squared. That test applies when plaintiffs challenge election restrictions on the ground that they burden their right to vote under the federal Constitution. *Fish v. Schwab*, 957 F.3d 1105, 1121 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 965 (2020). But as discussed further *infra*, §§ I.6 and IV, *Anderson-Burdick* does not apply to alleged violations of the right to vote under the Kansas Constitution. And it clearly does not apply to Plaintiffs' speech-based claims. Because the "interchange of ideas for the bringing about of political and social changes" are at the core of First Amendment protections, *Meyer*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)), federal courts apply strict (or its close cousin "exacting") scrutiny to challenges to laws that directly restrict such activities. *See Buckley*, 525 U.S. at 207 (Thomas, J., concurring) ("When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny . . .").[7]

c. Under any standard, dismissal of Plaintiffs' speech claims was improper.

Because the district court erroneously applied rational basis scrutiny, it did not

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[7] *Meyer* and *Buckley* described the standard of review for a law that reduces the total quantity of speech without directly regulating its content as "exacting scrutiny." *Meyer*, 486 U.S. at 423; *Buckley*, 525 U.S. at 204. Since then, the Supreme Court has described *Meyer* as a decision "unanimously appl[ying] strict scrutiny," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 n.10 (1995), and many courts have interpreted "exacting scrutiny" as indistinguishable from strict scrutiny. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002). Following that precedent, a federal Kansas district court recently determined that a Kansas election law violated the First Amendment, concluding that "strict scrutiny must be applied 'where the government restricts the overall quantum of speech available to the election or voting process.'" *VoteAmerica*, 2021 WL 5918918, at *21 (quoting *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000)); *see also supra* n.9. In fact, although the district court in this case erroneously concluded that the Ballot Collection Restriction did not implicate protected speech, it acknowledged twice in its order that "[t]he strict scrutiny test applies to laws that restrict core political speech." (R. V, 65, 72.)

engage with the tailoring analysis required under strict or exacting scrutiny. It simply held that the state's asserted interests in "combating voter fraud and instilling public confidence in elections" were sufficient to justify the Ballot Collection Restriction. (R. V, 69.) But determining whether the Restriction was sufficiently "tailored" to address that interest is a *factual question* not suitable for resolution on a motion to dismiss. And, in reaching the conclusion that it did, the district court improperly credited the State's factual allegations over those in Plaintiffs' Petition. In short, the district court failed to apply the proper legal standards, and those legal errors resulted in its order of dismissal. That order must be reversed.

d. Plaintiffs stated a claim that the Ballot Collection Restriction burdens the right to vote.

The district court's corresponding dismissal of Plaintiffs' claim that the Ballot Collection Restriction unconstitutionally infringes the fundamental right to vote was also the result of legal error. As discussed, the Kansas Supreme Court has instructed that "strict scrutiny" applies when infringements of "fundamental rights" are alleged. *Hodes*, 309 Kan. at 673. The Court explained: "[w]e adopt the strict scrutiny standard because it is our obligation to protect (1) the intent of the Wyandotte Convention delegation and voters who ratified the Constitution and (2) the inalienable natural rights of all Kansans today. And the strict scrutiny test best protects those natural rights." *Id.* at 669.[8]

The right to vote is expressly guaranteed by Article 5, Section 1 of the Kansas

[8] The district court stated without citation that "[t]he parties appear to agree that the legal challenges based on freedom of speech and the right to vote are subject to the same analysis," before disposing of Plaintiffs claims against the Delivery Assistance Ban without separately analyzing Plaintiffs' right-to-vote challenge. (R. V, 64-65.) But Plaintiffs made no such concession. Whether a law prevents or limits *advocates'* ability to engage in election-related speech is a very different question than whether a law makes it more difficult for *voters* to cast a ballot for their candidates of choice.

Constitution, which provides that every Kansan who (1) is a citizen of the United States, (2) "has attained the age of eighteen years," and (3) "resides in the voting area in which he or she seeks to vote *shall*" have the right to vote. Kan. Const. art. 5, § 1 (emphasis added); *see also Hodes*, 309 Kan. at 657 (explaining that, although Article 5, Section 1 of the 1861 Kansas Constitution initially denied women the right to vote, "we now consider [the right] fundamental"). The right to vote is also protected by Section 1 of the Bill of Rights, interpreted in *Hodes*, which found that the provision's "broad declaration that all men are entitled to a non-exhaustive list of inalienable natural rights clearly reveals that section 1 recognizes a distinct and broader category of rights than does the Fourteenth Amendment [of the U.S. Constitution]." *Id.* at 626. When the Framers adopted Section 1, it was generally understood that natural rights "protected a vast range of unenumerated rights," including political rights. *Id.* at 632. In accordance with this understanding, the Framers intended the rights afforded by Section 1 to be "broad enough for all to stand upon." *Id.* at 632–33 (citing Wyandotte Convention, at 281–83). Further evidencing the Framers' strong intent to broadly and aggressively protect the right to vote, they included *additional* protections of that right in Section 2 of the Bill of Rights, providing that: "[a]ll 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." *See State ex rel. Fatzer v. Urb. Renewal Agency of Kan. City*, 179 Kan. 435, 439–40, 296 P.2d 656, 660 (1956) (noting a political right is defined as "consisting of the right and power to . . . exercise the right of suffrage"); *see also Farley*, 241 Kan. at 667 (holding Sections 1 and 2 protect "individual personal" and "political" rights). There is simply no way to read these controlling authorities other than to conclude that laws that infringe upon the fundamental right to vote must be subject to the most searching review, strict scrutiny.

Not only did the district court misapply (or, in many cases, ignore) the relevant authority, it failed to consider the Petition's numerous allegations demonstrating how 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." *Supra*, § III.B. Moreover, the district court ignored these allegations in favor of its *own factual conclusions* about the Restriction's impact. For instance, the district court concluded that, "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." (R. V, 71). Not only is this a factual conclusion at odds with the facts alleged in the Petition, it also reflects a fundamental legal error: claims that a law impedes the right to vote are not just limited to circumstances in which individuals are *entirely incapable* of voting. *See, e.g., Harris v. Anderson*, 194 Kan. 302, 303, 400 P.2d 25, 26 (1965) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise[.]" (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see also Hodes*, 309 Kan. at 673 (requiring strict scrutiny "regardless of degree" of infringement). The Petition more than adequately pleads a claim that the Restriction infringes upon the right to vote under the Kansas Constitution, imposing significant burdens that fall most heavily on "Kansans with disabilities," "seniors, minority voters, rural voters in western Kansas," and "Native voters living on tribal lands who may have to travel for hours on unpaved roads to access mail services or election offices." (R. II, 270; *see also* R. I, 165).

Because Plaintiffs sufficiently alleged infringements on the right to vote, strict scrutiny requires that the State prove that the Restriction is narrowly tailored to achieve a compelling state interest. But the district court held that the state's conclusory asserted

interests in "combating voter fraud and instilling public confidence in elections" were sufficient to justify the Restriction. (R. V, 69). Not only is this a factual question improper for resolution on a motion to dismiss, *see, e.g.*, *Hodes*, 309 Kan. at 678; *Workers of Kansas v. Franklin*, 262 Kan. 840, 863, 942 P.2d 591, 608 (1997), regardless of the legal standard, the district court's cursory analysis misapplied it. The district court's dismissal of the right-to-vote claim should be reversed.

As a threshold matter, the district court's conclusion that, even if fundamental rights were implicated, the Restriction would be subject to the *Anderson-Burdick* test was legal error. (R. V, 70-71). *Anderson-Burdick* was created by federal courts in considering right-to-vote challenges to state election laws brought under the federal constitution. It is a balancing test that works on a sliding scale precisely *because* of federalism concerns that arise when a *federal* court considers the constitutionality of a state election law under the *federal* constitution. Here, those concerns simply are not present. *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 the federal courts' protection of federal rights); *see also Weinschenk*, 203 S.W.3d at 216 (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 [U.S.] Supreme Court in [*Burdick*] is not persuasive. Here, the issue is constitutionality under Missouri's Constitution, not under the [U.S.] Constitution.").

Anderson-Burdick has never been endorsed, adopted, or even cited by the Kansas Supreme Court or the Court of Appeals. For good reason. Kansas courts apply state law "independently of the manner in which federal courts" do, and blindly following federal decisions "seems inconsistent with the notion of state sovereignty." *Hodes*, 309 Kan. at

621. The Kansas Supreme Court has articulated *its own test* for challenges in which fundamental rights guaranteed by the Kansas Constitution are implicated by a challenged law—it asks whether the government has a compelling interest that justifies the restriction, and whether the law is narrowly tailored to advance that interest. *See supra*, § IV.A. There is simply no reason to look to federal caselaw for a different test. For this reason alone, the district court's order of dismissal must be reversed.[9]

But even if *Anderson-Burdick* applied, the district court misapplied that test. Under *Anderson-Burdick*'s sliding scale, the degree of scrutiny depends on the extent of the challenged law's burden on the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). If the burden is "severe," the State must show that the law is "narrowly drawn to advance a state interest of compelling importance." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Even if the burden is less than severe, the law must be justified by a "corresponding interest sufficiently weighty to justify the limitation." *Norman*, 502 U.S. at 288–89. In other words, even if a state's interest in a challenged provision is "legitimate in the abstract," the State still must demonstrate why the interest makes it "*necessary* to burden voters' rights." *Fish*, 957 F.3d at 1133 (emphasis added). And determining the nature and magnitude of the burden requires assessing the law's impact on all voters, as well as its impact on subclasses of voters who are uniquely affected. *Id.* at 1125 (striking down Kansas's documentary proof of citizenship requirement).

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[9] The Kansas Supreme Court's reasoning for applying strict scrutiny in *Hodes* is informative. There, the parties disputed whether, in challenges to abortion restrictions, Kansas courts should apply the federal "undue burden" standard—a balancing test that seeks to accommodate both state interests and individual rights by weighing a law's benefits against its burdens. 309 Kan. at 664. After examining the text of Section 1 of the Kansas Bill of Rights, the Fourteenth Amendment, and the differences between the two, as well as the history of the Kansas Constitution, the Court held strict scrutiny applied. *Id.* at 638, 669. These principles similarly require strict scrutiny here.

Thus, the district court's conclusory opinion—which did not consider Plaintiffs' factual allegations, nor engage in any examination of the state's generalized and abstract justification—that the Restriction is a "reasonable" and "non-discriminatory" restriction supported by "important" regulatory interests, (R. V, 71), misapplied *Anderson-Burdick*. Under a proper application, Plaintiffs' right-to-vote claim easily survives the motion to dismiss. As discussed, the Petition makes extensive allegations about the ways in which the Restriction burdens the right to vote, demanding a level of scrutiny that would mirror—or at least approach—strict scrutiny. But even if the law imposed less severe burdens, the State would still have to demonstrate that the burden is sufficiently justified by corresponding state interests. *Fish*, 957 F.3d at 1133. Because the district court failed to address Plaintiffs' factual allegations as to burden, it also failed to assess why the State's asserted interests justify those burdens.

Federal appeals courts routinely reverse orders granting motions to dismiss *Anderson-Burdick* claims, finding them ill-suited to dismissal prior to the development of a factual record. *E.g.*, *Wilmoth v. Sec'y of New Jersey*, 731 F. App'x 97, 104 (3d Cir. 2018) ("[B]ecause the District Court granted [state's] motion to dismiss prior to discovery taking place, the parties were not afforded an opportunity to develop an evidentiary record, and thus we have no basis upon which to gauge the validity of the competing interests at stake."); *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (reversing dismissal because burden could not be weighed against state interest at motion to dismiss stage); *Duke v. Cleland*, 5 F.3d 1399, 1405 (11th Cir. 1993) (explaining it was "impossible [] to undertake the proper" balancing analysis without a record). Under any possible applicable standard, the district court's dismissal of Plaintiffs' right-to-vote claims against the Ballot Collection Restriction constituted legal error and should be reversed.

C. The district court erred in dismissing Plaintiffs' claims against the Signature Verification Requirement.

1. Standard of Review and Preservation of the Issue

The district court's conclusion that Plaintiffs failed to state claims that the Signature Verification Requirement, K.S.A. 25-1124(h), violates the right to vote, due process, and equal protection was based on errors of law. This Court reviews a trial court's conclusions of law, including its decision to grant or deny a motion to dismiss, de novo. *Rodina*, 60 Kan. App. 2d at 384. Plaintiffs preserved this issue by arguing that the Requirement violates the right to vote by disparately subjecting voters to an inexpert and error-prone process that disenfranchises lawful voters, (R. II, 421-22), by arguing that it violates equal protection by permitting counties to implement inconsistent procedures for matching signatures, (R. II, 428-29), and by arguing that it violates due process by depriving voters of the right to have their vote counted—a fundamental liberty interest—without adequate procedural protections, (R. II, 429-31). Each is discussed in turn.

2. Analysis

a. Plaintiffs stated claims that the Signature Verification Requirement burdens the right to vote.

As with their right-to-vote claim against the Ballot Collection Restriction, strict scrutiny is the proper standard of review for Plaintiffs' claim against the Signature Verification Requirement, because Plaintiffs allege that the Requirement infringes the fundamental right to vote. *See supra*, § IV.B.2.b.i.

The Petition more than sufficiently pleads facts showing that the Requirement infringes upon the right to vote, both by subjecting lawful voters to needless additional steps to ensure their ballot is lawfully cast and counted, and by entirely disenfranchising others. *Supra*, § III.C. These are not just conclusory allegations. "[S]ignature verification

by laypersons is inherently unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries," and voters "who are elderly, disabled, suffer from poor health, are young, or are non-native English speakers are particularly likely to have greater signature variability." (R. III, 219). Moreover, as cited in the Petition, courts around the country have noted that signature matching laws like Kansas's cause the erroneous rejection of otherwise valid ballots for these same reasons. (R II, 269).[10]

Once again, the district court either ignored Plaintiffs' factual allegations, or improperly substituted its own view of the facts. For example, the district court concluded that the language in the Requirement purporting to exclude voters with disabilities from the Signature Verification Requirement, as well as the requirement that election officials "attempt" to contact voters when their ballots are flagged for rejection, ameliorates the burden on the right to vote. (R. V, 73) (citing K.S.A. 25-1124(b)). But the facts as alleged in the Petition contradicted the court's factual conclusions. For example, the Petition alleges that the Restriction *will* be applied to voters with disabilities, because—as disability advocates warned the Legislature—there is no "way for county election officials to know for certain if someone has a disability" when they are engaging in the requisite signature matching. (R. II, 267). And although existing law directs officials to "*attempt*"

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[10] *See, e.g.*, *Lee*, 915 F.3d at 1320 ("[E]ven if election officials uniformly and expertly judged signatures, rightful ballots still would be rejected just because of the inherent nature of signatures."); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206 (D.N.H. 2018) ("As will become evident, this signature-matching process is fundamentally flawed."); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339–40 (N.D. Ga. 2018) (enjoining signature match scheme as violating due process); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) (ballot rejection rules "ha[ve] categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time"); *LULAC v. Pate*, No. CVCV056403, 2019 WL 6358335, at *15–17 (Iowa Dist. Ct. Sept. 30, 2019) (finding signature match scheme violated due process and equal protection).

to contact voters if their ballot is flagged for rejection, "Loud Light's ballot cure program" has found that officials "often failed to contact voters, let alone contact them with sufficient time for those voters to cure any perceived signature mismatch." (R. II, 269).

The district court's order expressly declined to engage with any of these factual allegations regarding the "nature of the [Requirement's] burden on the right to vote." (R. V, 74). It justified its ignorance of the factual allegations by asserting that:

> Plaintiffs' claim is essentially a facial challenge to the [Requirement]—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.

Id. This conclusion is irreconcilable with precedent applying *either* strict scrutiny or *Anderson-Burdick*. Both tests are routinely applied to pre-enforcement challenges to the *facial validity* of laws that burden fundamental rights. *See, e.g., Hodes*, 309 Kan. at 680 (pre-enforcement facial challenge to abortion restriction); *Fish*, 957 F.3d at 1125 (facial challenge to Kansas's proof of citizenship requirement). And, in both, courts regularly (and in most instances *are required to*) consider the specific factual circumstances. *See, e.g., Hodes*, 309 Kan. at 669, 672 (noting a court applying strict scrutiny must first make a factual finding that governmental action impairs a fundamental right, and then the State must prove that there is a compelling state interest); *Workers of Kansas*, 262 Kan. at 863 (even rational basis standard was only satisfied after "[t]he State [offered] facts . . . reasonably justif[ying] the [challenged] statute); *Fish*, 957 F.3d at 1125 (determining whether there is a burden on plaintiffs' rights is "record based" (citing *Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 208 (opinion of Scalia, J.); *id.* at 189 (2008) (plurality op. of Stevens, J.)).

As the U.S. Supreme Court has recognized, "the distinction between facial and as-

applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Instead, "[t]he distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* And in addressing a "misunderst[anding] of how courts analyze [such] facial challenges," in a pre-enforcement challenge, the Supreme Court explained that, when determining whether a law is "unconstitutional in all of its applications," the "proper focus" of the constitutional inquiry is how the law affects "the group for whom the law is a restriction." *City of Los Angeles v. Patel*, 576 U.S. 409, 415-19 (2015) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1992)). In this case, this necessarily required considering Plaintiffs' factual allegations as to those effects. Kansas precedent engaging in pre-enforcement review of claims involving fundamental rights is consistent with this approach. *See supra*, § IV.A.

As discussed, because the district court improperly ignored Plaintiffs' factual allegations based on its misapplication of law, it failed to engage in the requisite tailoring analysis. *See supra* § IV.B.2.c; *see also Hodes*, 309 Kan. at 669 ("[O]nce 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."). Instead, the district court simply concluded that the Requirement is a "reasonable, non-discriminatory restriction[] which [is] outweighed by the state's compelling state interest in the integrity of its elections." (R. V, 74-75). Not only did this ignore Plaintiffs' allegations regarding the burdens that the law imposes on the right to vote, it also ignored Plaintiffs' assertions—supported by the legislative record, no less—that (1) there is no evidence of fraud with respect to advance voting in Kansas elections, and (2) the

Legislature failed to engage in any tailoring. *See supra*, § II.B.

Even if *Anderson-Burdick* applied (and for the reasons discussed *supra*, § IV.B.2.b.ii, it does not), the district court misapplied that test. Plaintiffs pleaded that the Requirement imposes a severe burden—disenfranchisement—on the right to vote, because it will result in the ballots of lawful voters being erroneously rejected based on mistaken and arbitrary conclusions that the voters' signatures do not "match" the signature on file. *Supra*, § III.C. Laws that lead to disenfranchisement of lawful voters constitute "severe" burdens subject to the most searching review, even under *Anderson-Burdick*. *E.g.*, *Fla. Democratic Party*, 2016 WL 6090943, at *6 ("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."); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("even one disenfranchised voter . . . is too many"), *cert. denied*, 135 S. Ct. 1735 (2015). But even if the burdens were less than severe, the State would *still* be required to demonstrate that they are sufficiently justified by a corresponding state interest. *Fish*, 957 F.3d at 1133; *see also supra* § IV.B.2.d. In sum, under any standard, the district court's order dismissing Plaintiffs' right-to-vote claim against the Signature Verification Requirement was reversible error.

b. Plaintiffs stated a claim that the Signature Verification Requirement violates equal protection.

The district court's order did not recognize that Plaintiffs' Petition brought an independent equal protection claim under Sections 1 and 2 of the Kansas Constitution. (*See* R. V, 72-75). Instead, it merged Plaintiffs' right to vote and equal protection claims and dismissed them both together. (*Id.*) This, too, was error.

The Kansas Constitution provides powerful protections against unjustified

differential treatment, especially when such treatment affects fundamental political rights such as voting. Section 1 of the Bill of Rights guarantees that: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 provides that "[a]ll political power is inherent in the people," and that government is "instituted" for the *purpose* of providing "equal protection" to the people in the exercise of their political rights. *See id.* As noted, this text, along with the history of the Kansas Constitution, confirms the intent of the Framers to ensure equality in the exercise of political rights like voting. *Supra*, § IV.B.2.i; *Farley*, 241 Kan. at 669–70 ("The most critical level of examination under current equal protection analysis is 'strict scrutiny,' which applies in cases involving . . . voting.").

Here, the Requirement triggers strict scrutiny because it "explicitly and arbitrarily endorses multiple, standardless processes for verifying signatures, placing voters across the state's 105 counties at differing risks of disenfranchisement." (R. II, 254, 264-69, 279). The Requirement further fails to provide *any* guidance or standards for implementation. *See* K.S.A. 25-1124(h). Accordingly, "different counties have different procedures for verifying signatures that will result [in] unequal treatment of ballots across the state." (R. II, 279). The facts alleged further demonstrate how voters will be subject to varied treatment: certain subgroups, including voters who are elderly, disabled, in poor health, young, or are non-native English speakers are particularly likely to have their properly cast ballots rejected as a direct result of the Requirement. (R. II, 264-69).

These allegations, especially when viewed in the light most favorable to Plaintiffs, are sufficient to establish that the Requirement subjects voters to differential treatment with respect to voting, triggering strict scrutiny review under the Kansas Constitution. *See Farley*, 241 Kan. at 670. But for the same reasons discussed *supra*, Section IV.B.2.a, the

district court ignored Plaintiffs' well-pleaded allegations and did not conduct a proper analysis under strict scrutiny. The dismissal of Plaintiffs' equal protection claim against the Requirement should similarly be reversed.

c. Plaintiffs stated a claim that the Signature Verification Requirement violates due process.

The district court also erred in dismissing Plaintiffs' due process claim based on its improper conclusion that there is no protected liberty interest in casting a ballot by mail. Section 18 of the Kansas Bill of Rights guarantees due process, stating: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." *See also Creecy v. Kan. Dep't of Revenue*, 310 Kan. 454, 462, 447 P.3d 959, 966 (2019). Kansas courts interpret Section 18 as coextensive with its federal counterpart. *State v. Boysaw*, 309 Kan. 526, 537–38, 439 P.3d 909, 917 (2019) (collecting cases). In reviewing a procedural due process claim, the court determines first whether a protected liberty interest is involved, and then what procedural protections are due. *State v. Wilkinson*, 269 Kan. 603, 608–09, 9 P.3d 1, 5 (2000) (citing *Murphy v. Nelson*, 260 Kan. 589, 598, 921 P.2d 1225 (1996)). "[T]he scope of a claimed state created liberty interest is determined by reference to state law." *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1994).

As discussed, there is a fundamental right to vote under the Kansas Constitution. *Supra*, § IV.B.2.b.i. This right necessarily includes not just "the right to put a ballot in a box," but also "the right to have one's vote counted." *Reynolds*, 377 U.S. at 554 (quoting *United States v. Mosley*, 238 U.S. 383, 386 (1915)). And, once a state offers an absentee voting scheme—as Kansas has for over 25 years—it "create[s] a sufficient liberty interest in exercising [the] right to vote in such a manner." *Frederick v. Lawson*, 481 F. Supp. 3d

774, 792-93 (S.D. Ind. 2020); *see also Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020); *Martin*, 341 F. Supp. 3d at 1338; *Saucedo*, 335 F. Supp. 3d at 217; *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1356 (D. Ariz. 1990); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006). The district court rejected these cases, concluding without analysis that the "argument that the right to vote by mail does not implicate a protected liberty or property interest" under the state constitution was "[m]ore compelling." (R. V, 76). The district court relied on a handful of federal cases that have concluded that the right to vote, or right to vote by mail, do not implicate a liberty interest protected under the due process clause of the federal constitution. (*Id.*) But those cases are at odds with the "vast majority of courts addressing this issue." *Frederick*, 481 F. Supp. 3d at 793.

Moreover, the district court ignored that, in a due process inquiry, the existence and scope of a claimed state created liberty interest is "determined by reference to state law." *Montero*, 13 F.3d at 1447. Whether a person has a liberty interest in a benefit turns on the language of the statute itself—if the statute places "substantive limitations on official discretion," it creates a "'legitimate claim of entitlement' giving rise to a constitutional right." *Id.* at 1448 (noting state's issuance of driver's licenses creates such an interest (*id.* at 1447 (citation omitted))). Thus, none of the cases upon which the district court relied could have properly been applied to relieve the court of its duty to consider whether *Kansas's* conference of the right to vote by mail to the state's voters, and its *near three-decade long* invitation for voters to exercise that right, creates an interest that cannot be denied without adequate process. Such a conclusion is also impossible to square with the Kansas Supreme Court's instruction that "right of suffrage is a fundamental matter, [and] any alleged restriction or infringement of that right strikes at the heart of

orderly constitutional government." *Moore*, 207 Kan. at 649.

D. The district court abused its discretion in denying Plaintiffs' motion for a temporary injunction against the Signature Matching Requirement.

1. Standard of Review and Preservation of the Issue

While this Court generally reviews a decision to deny a temporary injunction for abuse of discretion, it reviews de novo questions of law that underlie the denial. *Matter of M.M.*, 312 Kan. 872, 874, 482 P.3d 583, 585 (2021); *Gen. Bldg. Contractors, L.L.C. v. Bd. Of Shawnee Cnty. Comm'rs, Shawnee Cnty.*, 275 Kan. 525, 533, 66 P.3d 873, 879 (2003); *Bd. Of Cnty. Comm'rs of Leavenworth Cnty. v. Whitson*, 281 Kan. 678, 132 P.3d 920 (2006); *Hodes*, 309 Kan. at 610. Plaintiffs preserved this issue by moving to temporarily enjoin the Signature Matching Requirement, and by establishing, with evidence, that that all factors necessary for injunctive relief were satisfied. (R. V, 2-53).

2. Analysis

a. The district court abused its discretion in refusing to consider Plaintiffs' motion for temporary relief.

The district court abused its discretion by rejecting the motion for a temporary injunction because the dismissal itself (and the court's resulting decision to deny the request for an injunction as moot) was based on the legal errors explained above. *Supra*, § IV.A-C; *State v. Morrison*, 302 Kan. 804, 818, 359 P.3d 60, 69 (2015) ("[The] district court by definition abuses its discretion when making an error of law."). These errors are not harmless. They deprived Plaintiffs of an opportunity to be heard on their request for emergency temporary relief, which they sought to prevent irreparable harm to their fundamental constitutional rights in the fast-approaching 2022 primary and general elections. (R. V, 13-14, 46-49). This Court has the authority to correct the district court's errors and enter temporary injunctive relief without the need for remand. K.S.A. 60-

2101(a); *see also* K.S.A. 20-3001 (court of appeals has "such original jurisdiction as may be necessary to the complete determination of any cause on review"); *State v. Delgado*, 322 P.3d 1028 (Kan. Ct. App. 2014) (resolving motion district court "did not consider," citing K.S.A. 20-3001).

b. A temporary injunction is warranted.

The Court should issue a temporary injunction of the Signature Verification Requirement because (1) there is a "substantial likelihood" Plaintiffs will prevail on the merits; (2) there is a "reasonable probability" Plaintiffs will suffer irreparable injury absent an injunction; (3) Plaintiffs have no other adequate legal remedy; (4) the injury that the Requirement threatens to impose on Plaintiffs outweighs any injury an injunction would impose on the State; and (5) an injunction "will not be adverse to the public interest." *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 61, 341 P.3d 607, 611 (2014).

i. Plaintiffs are substantially likely to prevail on the merits of their claims against the Signature Verification Requirement.

Courts across the country have invalidated signature matching requirements like the one at issue here, which includes no standards to ensure uniform application or protect against erroneous rejection of ballots cast by lawful voters. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319-20 (11th Cir. 2019); *Saucedo*, 335 F. Supp. 3d at 206; *Martin*, 341 F. Supp. 3d at 1339–40; *Fla. Democratic Party*, 2016 WL 6090943, at *7; *Pate*, 2019 WL 6358335, at *15–17. The Signature Verification Requirement is similarly infirm, and Plaintiffs are substantially likely to prevail.[11]

[11] The discussion of the Court's erroneous dismissal of Plaintiffs claims above sets out in detail the relevant statutory provision and standards of review. Plaintiffs incorporate those discussions, rather than repeating them again here. *See supra*, §§ IV.A-C.

Right to Vote. The Signature Matching Requirement violates the right to vote, and as discussed *supra*, § IV.C, is subject to strict scrutiny under the Kansas Constitution. The Requirement infringes upon the right to vote by disenfranchising eligible voters through no fault of their own due to election official error. *Supra*, § III.C. This conclusion is supported by substantial evidence presented by Plaintiffs in the district court. (R. III, 226-29.) Even before the Requirement was enacted, some counties conducted signature matching and rejected hundreds of ballots based on perceived signature mismatches. (R. IV, 12, 115, 117, 119-55).[12] Now that officials are *required* to reject ballots for this reason, the rejection figures are certain to increase substantially. (R. III 218-21). This high likelihood of disenfranchisement is compounded by the lack of any meaningful way for a voter to challenge a signature "mismatch" determination. Election officials must "attempt" to contact voters whose signatures are rejected, but the law does not guarantee that voters will actually receive notice and a meaningful opportunity to cure their advance ballot, instead leaving the notice and cure process to the discretion of the counties.

Because Plaintiffs proved that the Signature Verification Requirement infringes on the right to vote, it can only survive if it withstands strict scrutiny. *See Hodes*, 309 Kan. at 673. The State cannot carry this burden. There is no evidence of fraud, let alone of advance-voting voter impersonation, to justify the Requirement at all. The State's own admissions and the legislative history prove this. *See supra*, § III.A; *see also VoteAmerica*, 2021 WL 5918918, at *21. But even if the Court were to find the state's unsubstantiated

[12] It is difficult, if not impossible, to ascertain the precise extent to which mismatched signatures have caused ballot rejection in Kansas in the past. For example, Sedgwick County "does not have a specific category for mismatched signatures" in its record-keeping system. (R. IV, 378.) Instead, it combines "signature missing or not the voter[']s signatures." (*Id.*) Between the 2016, 2018, and 2020 elections, Sedgwick County rejected 2,454 ballots that fell into one of these two categories. (R. IV, 12.)

claims about concerns about *potential* fraud to be compelling, the Requirement is not narrowly tailored to achieve that interest.

Narrow tailoring means there are "no less restrictive alternatives" to further the identified interest. *Kansas v. Smith*, 57 Kan. App. 2d 312, 322, 452 P.3d 382, 391 (2019). The State cannot demonstrate that the anti-fraud measures already in place do not work; the Secretary himself acknowledges that the 2020 election, which saw record numbers of voters participating using absentee ballots, was safe and secure. Signature matching is inherently unreliable when done by non-experts under any circumstances, but all the more so in a situation like this, where the exemplars are few and far between and often created long ago or under markedly different conditions. (R. III, 226-29, 234-36). Moreover, the lack of any standards significantly increases the likelihood that county election officials will erroneously discard lawful ballots. (R. III, 218-21.) For the same reasons, the Requirement is unlikely to successfully prevent fraud. Untrained officials cannot reliably determine whether signatures are written by different individuals, or by one person whose signature exhibits natural variation. (*Id.*) Finally, the Requirement also does not include meaningful safeguards against discarding valid ballots, such as a presumption in favor of accepting ballots, or a codified cure program that ensures voters have a meaningful opportunity to challenge determinations that a signature is fraudulent. *See* K.S.A. 25-1124(h). Because there are less restrictive alternatives, the Requirement fails strict scrutiny, and Plaintiffs are substantially likely to prevail on this claim.

Finally, Plaintiffs would be likely to prevail even if the *Anderson-Burdick* test applies. Because the evidence demonstrates severe, disparate burdens on the right to vote, a standard approaching strict scrutiny would apply. *Fish*, 957 F.3d at 1133. But even if the burdens were less than severe, the Requirement could not survive any tailoring analysis—

even the less demanding one required of less burdensome laws under *Anderson-Burdick*. For less than severe burdens, the challenged law must be justified by a "corresponding [state] interest sufficiently weighty to justify the limitation." *Norman*, 502 U.S. at 288–89. Thus, as the Tenth Circuit has emphasized, even if a state's interest in a challenged provision is "legitimate in the abstract," the state must demonstrate why the interest makes it "necessary to burden voters' rights." *Fish*, 957 F.3d at 1133. There is no evidence that the law is at all necessary. Moreover, the record establishes that the Requirement will guarantee that lawful voters' ballots are arbitrarily rejected, (*see* R. III, 210-52), a fact that *undermines* the state's purported interest in integrity.

Equal Protection. For similar reasons, Plaintiffs are substantially likely to prevail on their equal protection claim. Because the Signature Verification Requirement *guarantees* there will be differential treatment of ballots among and within the 105 counties differentially impacting the right to vote, the Requirement is subject to strict scrutiny under Kansas's equal protection jurisprudence. *Farley*, 241 Kan. at 669–70. This is not speculation: Plaintiffs adduced evidence from the public record and expert analysis confirming that voters will be subject to differential treatment. *Supra*, § III.C. For the same reasons just discussed, the Requirement cannot survive strict scrutiny.

Due Process. Finally, Plaintiffs are substantially likely to prevail on their due process claim. As discussed *supra*, § IV.C.2.c, "Procedural due process protections are calibrated to the nature of the liberty interest or property right at stake—the more important the interest or right the greater the constitutionally required procedures aimed at averting a wrongful deprivation." *State v. Allen*, 478 P.3d 796 (Kan. Ct. App. 2021) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)), *review denied* (Apr. 23, 2021). For the reasons already addressed, the Requirement cannot survive. *Supra*, § IV.C.2.c.

First, the protected liberty here is of upmost importance because the right to vote is core to ordered liberty in Kansas, *Moore*, 207 Kan. at 649, and the state has invited and encouraged voters to cast their ballots using the State's vote by mail system. *Supra*, § IV.C.2.c. *Second*, the risk of erroneous disenfranchisement is great. As the evidence demonstrates, the Requirement creates a regime under which the right to vote may be entirely denied based on an arbitrary, uninformed, inexpert, and almost certainly erroneous conclusion that a signature on a ballot does not "match" the one on file for the voter. *See supra*, §§ III.C and IV.B.2. *Third*, the State's interests in adhering to this regime are heavily outweighed by the risk of erroneous disenfranchisement. There is no evidence of a problem of fraud that the law is solving. *VoteAmerica*, 2021 WL 5918918, at *21; *see also supra* § III.A. Requiring additional procedures would guard against erroneous disenfranchisement—in and of itself an important governmental interest. Lastly, any concerns about "fiscal and administrative burdens" that might result from additional safeguards are outweighed by the significant liberty interest at stake. *See, e.g.*, *Fish*, 840 F.3d at 755 ("There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by . . . state and local offices involved in elections."). Plaintiffs are likely to succeed on this claim.

ii. Plaintiffs will suffer irreparable harm absent an injunction.

Plaintiffs also satisfied their burden of showing a "reasonable probability" of irreparable injury absent a temporary injunction, and a lack of any "adequate legal remedy, such as damages." *Hodes*, 309 Kan. at 619. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Fish*, 840 F.3d at 752 (citation omitted); *Hodes, MDs, P.A. v. Schmidt*, No. 2015-CV-490,

2015 WL 13065200, at *5 (Kan. Dist. Ct. June 30, 2015) (collecting cases). Indeed, "a deprivation of a constitutional right is in and of itself irreparable harm." *Id.* This "is especially so in the context of the right to vote," as "there can be no 'do-over' or redress of a denial of the right to vote after an election." *Fish*, 840 F.3d at 752 (quoting *League of Women Voters of N.C.*, 769 F.3d at 247).

Absent an injunction, Plaintiffs' members and constituents stand to suffer irreparable injuries to their fundamental rights in the upcoming 2022 elections. *Supra*, § III.C. The organizational Plaintiffs will also suffer direct irreparable injury because they must divert resources to operating programs to mitigate the Requirement—resources they would otherwise be able to put toward other mission-critical activities. (R. II, 241-42, 245-46). In fact, "[c]ourts 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. The remaining elements strongly support temporary injunctive relief.

Plaintiffs also satisfy the remaining relevant factors: 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. Any alleged harm to the State from an injunction cannot compare to the irreparable harms that Plaintiffs, their members, and constituencies stand to suffer without one. Again, the State cannot point to any evidence of fraud or other compelling reason for the standardless Requirement. *See supra*, § III.A. In fact, the Requirement works to *undermine* the State's interests in the integrity of elections because it results in erroneous disenfranchisement. *See supra*, § III.A.1.d.

In short, the district court abused its discretion in refusing to consider Plaintiffs' motion for temporary relief based on its significant errors of law, despite Plaintiffs' satisfaction of all the factors necessary for relief. The district court's decision should be reversed, and a temporary injunction should issue.[13]

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the dismissal of Plaintiffs' claims against the Challenged Restrictions, enter a temporary injunction enjoining the Signature Matching Requirement, and remand for an expedited trial.

Respectfully submitted, this 7th day of June, 2022.

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[13] In the alternative, Plaintiffs request that the Court direct the district court to decide the motion for a temporary injunction on a highly expedited schedule upon remand. That schedule should be constructed so as to leave sufficient time for this Court to consider an appeal in advance of the coming elections, should the district court deny that motion on the merits. *E.g.*, *In re M.B.*, 241 P.3d 601 (Kan. Ct. App. 2010).

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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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Document (1)

1. *VoteAmerica v. Schwab, 2021 U.S. Dist. LEXIS 242511*

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VoteAmerica v. Schwab

United States District Court for the District of Kansas

December 15, 2021, Decided; December 15, 2021, Filed

Case No. 2:21-cv-2253-KHV-GEB

Reporter
2021 U.S. Dist. LEXIS 242611 *; __ F.Supp.3d __; 2021 WL 5918918

VOTEAMERICA AND VOTER PARTICIPATION CENTER, Plaintiffs, vs. SCOTT SCHWAB, in his official capacity as Secretary of State of the State of Kansas; DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; and STEPHEN M. HOWE, in his official capacity as District Attorney of Johnson County, Defendants.

Prior History: *VoteAmerica v. Schwab, 2021 U.S. Dist. LEXIS 223601 (D. Kan., Nov. 19, 2021)*

Counsel: **[*1]** For Scott Schwab, in his official capacity as Secretary of State of the State of Kansas, Derek Schmidt, in his official capacity as Attorney General of the State of Kansas, Stephen M. Howe, in his official capacity as District Attorney of Johnson County, Defendant: Scott R. Schillings, Bradley Joseph Schlozman, Krystle M. S. Dalke, LEAD ATTORNEY, Hinkle Law Firm LLC, Wichita, KS.

For VoteAmerica, Voter Participation Center, Plaintiff: Brooke Jarrett, Meredith D. Karp, Jonathan K. Youngwood, LEAD ATTORNEY, PRO HAC VICE, Simpson Thacher & Bartlett LLP, New York, NY; Wade P. K. Carr, Mark P. Johnson, LEAD ATTORNEY, Dentons US LLP - KC, Kansas City, MO; Aseem Mulji, Robert N. Weiner, Alice Huling, Danielle M. Lang, Hayden Johnson, LEAD ATTORNEY, PRO HAC VICE, Campaign Legal Center, Washington, DC.

Judges: KATHRYN H. VRATIL, United States District Judge.

Opinion by: KATHRYN H. VRATIL

Opinion

ORDER GRANTING DEFENDANTS' UNOPPOSED MOTION TO CLARIFY THE COURT'S MEMORANDUM & ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINIARY INJUUNCTION

After having reviewed and considered Defendants' Unopposed Motion to Clarify the Court's Memorandum & Order Granting Plaintiffs' Motion for a Preliminary Injunction (Dkt. # 58), the Court hereby **[*2]** GRANTS Defendants' motion. The Memorandum & Order issued on November 19, 2021 (Dkt. # 50) is amended *nunc pro tunc* by striking the sentence on page 46 that states, "The Court hereby enjoins enforcement of HB 2332," and inserting in its place the following sentence: "The Court hereby enjoins enforcement of Sections 3(k)(2) and 3(*l*)(1) of HB 2332."

Dated: December 15, 2021

/s/ Kathryn H. Vratil

KATHRYN H. VRATIL

U.S. District Judge

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Document (1)

1. *Fla. Democratic Party v. Detzner, 2016 U.S. Dist. LEXIS 143620*

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Cases	-None-

Fla. Democratic Party v. Detzner

United States District Court for the Northern District of Florida, Tallahassee Division

October 16, 2016, Decided; October 16, 2016, Filed

Case No. 4:16cv607-MW/CAS

Reporter
2016 U.S. Dist. LEXIS 143620 *; 2016 WL 6090943

FLORIDA DEMOCRATIC PARTY, AND THE DEMOCRATIC NATIONAL COMMITTEE, Plaintiffs, v. KEN DETZNER, IN HIS OFFICIAL CAPACITY AS FLORIDA SECRETARY OF STATE, Defendant.

Counsel: **[*1]** For FLORIDA DEMOCRATIC PARTY, DEMOCRATIC NATIONAL COMMITTEE, Plaintiffs: AMANDA R CALLAIS, ELISABETH C FROST, PRO HAC VICE, BRUCE V SPIVA, MARC E ELIAS, LEAD ATTORNEY, PERKINS COIE LLP - WASHINGTON DC, WASHINGTON, DC; MARK HERRON, LEAD ATTORNEY, ROBERT JOHN TELFER, III, MESSER CAPARELLO & SELF PA - TALLAHASSEE FL, TALLAHASSEE, FL.

For KEN DETZNER, IN HIS OFFICIAL CAPACITY AS FLORIDA SECRETARY OF STATE, Defendant: DAVID ANDREW FUGETT, LEAD ATTORNEY, FLORIDA DEPARTMENT OF STATE OFFICE OF GENERAL COUNSEL, TALLAHASSEE, FL; ADAM SCOTT TANENBAUM, FLORIDA DEPARTMENT OF STATE - RA GRAY BUILDING, OFFICE OF THE GENERAL COUNSEL, TALLAHASSEE, FL; ROBERT WAYNE PASS, W DOUGLAS HALL, CARLTON FIELDS JORDEN ETC PA - TALLAHASSEE FL, TALLAHASSEE, FL; STEVEN C DUPRE, CARLTON FIELDS JORDEN ETC PA - TAMPA FL, TAMPA, FL.

Judges: Mark E. Walker, United States District Judge.

Opinion by: Mark E. Walker

Opinion

ORDER GRANTING PRELIMINARY INJUNCTION[1]

"At the root **[*2]** of the present controversy is the right to vote—a 'fundamental political right' that is 'preservative of all rights.'" *Williams v. Rhodes, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968)* (quoting *Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)*). Voting is a "precious" and "fundamental" right. *Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966)*. By definition, that right includes "the right of qualified voters within a state to cast their ballots and *have them counted* . . . ." *United States v. Classic, 313 U.S. 299, 315, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)* (emphasis added).

This is a case about vote-by-mail ballots. For years, the State of Florida has consistently chipped away at the right to vote. It limits the time allotted to register to vote to the greatest extent permissible under federal law. *See 52 U.S.C. § 20507(a)(1) (2012)* (requiring each state to allow voters to register, at a minimum, up to thirty days prior to Election Day); *§ 97.055(1)(a), Fla. Stat.* (2016) (closing the Florida voter registration books twenty-nine days prior to Election Day). It limits the methods for voter registration. *See § 97.053, Fla. Stat.* (2016) (disallowing online voter registration and same-day registration on Election Day). It limits the number of early voting days. *See id. § 101.657* (allowing only seven days for early voting). This is just a sampling.

In light of those limitations, many Florida voters choose to vote by mail. And that option has become increasingly popular in recent years—six percent more voters **[*3]** cast vote-by-mail ballots in the 2012 General Election than the 2008 General Election. ECF No. 3, at 8-9. What vote-by-mail voters likely do not know, however, is that their vote may not be counted. In Florida, if a voter's signature on a vote-by-mail ballot does not match the signature on file with the supervisor of elections office then the ballot is declared "illegal" and their vote is not counted. Moreover, that voter only receives notice that their vote was not counted *after* the election has come and gone and, further, is provided no opportunity to cure that defect. On the other hand, if a

[1] This Court recognizes that time is of the essence inasmuch as the supervisors of elections have received thousands of vote-by-mail ballots. Moreover, this Court wishes to afford the parties a meaningful opportunity to file an appeal. Accordingly, this order issues on an expedited basis.

vote-by-mail voter doesn't bother to sign the ballot in the first place, that voter is immediately notified and provided an opportunity to cure.

The issue in this case is whether Florida's statutory scheme, which provides an opportunity to cure no-signature ballots yet denies that same opportunity for mismatched-signature ballots, is legally tenable. The answer is a resounding "no."

I

Like many states, Florida allows its registered eligible voters, without an excuse, to cast their ballots by mail (as opposed to casting their votes at their assigned precinct on Election Day). § 101.62, Fla. Stat. (2016). And that option **[*4]** is becoming more and more popular—2.37 million vote-by-mail ballots were submitted in the 2012 General Election, and even more are expected for the 2016 General Election. ECF No. 4, at 3. Those voters who opt to vote by mail have to jump through a few simple administrative hoops. For example, vote-by-mail voters must send their ballot back in a specially marked secrecy envelope. *§ 101.65, Fla. Stat.* (2016). Those voters also must insert that envelope in another mailing envelope, seal that mailing envelope, and fill out the "Voter's Certificate" on the back of the mailing envelope. *Id.*

A different requirement lies at the heart of this case. For a vote-by-mail ballot to be counted, the envelope of that ballot must include the voter's signature. *Id.* Once the vote-by-mail ballots are received, county canvassing boards review those ballots to verify that the signature requirement has been met. If the vote-by-mail ballot lacks the voter's signature, it is considered an "illegal" ballot and "will not be counted." *Id.* But the would-be-voter has an opportunity to cure that "no-signature" ballot and cast an effective vote in the same election cycle until 5:00 p.m. the day before an election by "complet[ing] and submit[ting] an affidavit **[*5]** in order to cure the unsigned vote-by-mail ballot." *Id.* § 101.68(4)(b). That affidavit must be accompanied by one of the enumerated identification forms and then mailed, faxed, e-mailed, or delivered in person to the applicable county supervisor of elections. *Id.* § 101.68(4)(d). As explained by Leon County Supervisor of Elections Ion Sancho, the affidavit is issued by the Florida Secretary of State's office. The specific instructions for each individual supervisor of elections, however, are listed on their individual websites, along with the state-issued affidavit and any necessary contact information. *Id.* § 101.68(4)(e).

But the county canvassing boards do not just review the vote-by-mail ballots to verify that they are *actually* signed; they also compare those signatures to voters' signatures submitted in the registration process. *Id.* § 101.68(2)(c)(1). Those county canvassing boards are staffed by laypersons that are not required to undergo—and many do not participate in—formal handwriting-analysis education or training.[2] If the canvassing board believes that the signature on the vote-by-mail ballot does not correspond to the signature on file with the supervisor of elections office, the ballot is deemed "illegal" and is therefore rejected. **[*6]** *Id. § 101.65* ("A vote-by-mail ballot will be considered illegal and not be counted if the signature on the voter's certificate does not match the signature on record.").[3] In other words, the vote does not count. When that occurs, the local supervisor of elections will mail a new registration application to the voter after the election, "indicating the elector's current signature." *Id.* § 101.68.

Prior to 2004, the same opportunity to cure was provided to "mismatched-signature" voters and no-signature voters. But that is no longer the case.[4] Rather, unlike the "no-signature" voters, those would-be-voters who, in fact, comply with Florida law and sign their ballot appropriately do not have an opportunity to cure before the election is over.[5] That is **[*7]** because, although

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[2] The canvassing boards consist of "the [local] supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commissioners." § 102.141, Fla. Stat. (2016). Substitute members can be appointed as necessary. *Id.*

[3] It bears noting that handwriting experts are often challenged under *Daubert*. There is no way that any member of a canvassing board could survive a *Daubert* challenge yet the State of Florida empowers them to declare ballots illegal.

[4] The tortured history of this statute is quite complicated. Prior to 2004, the procedures for curing vote-by-mail ballots varied from county to county. In 2004, the Florida legislature enacted a statute that rejected all mismatched-signature ballots and no-signature ballots without an opportunity to cure. Fla. H.R. Comm. on Ethics & Elections, Bill CS/HB 7013 (2013) Staff Analysis 1, 5. In 2013, the Florida legislature amended that statute to allow no-signature ballots to be cured but did not provide that same opportunity for mismatched-signature ballots. Ch. 2013-57, § 101.68, Laws of Fla. That amendment took effect in 2014. *Id.*

[5] It is true that voter signatures may be updated "at any time using a voter registration application submitted to a voter registration official." 98.077, Fla. Stat. (2016). That option,

those would-be-voters have an opportunity to update their registration signatures, that opportunity is too late for those votes to be counted in the same election cycle. Instead, the updated signature can only be used in future election cycles.

Furthermore, the State of Florida has no formalized statewide procedure for canvassing boards to evaluate whether the signature on a vote-by-mail ballot matches the signature on file with the elections office. And the procedures in place vary widely by county. ECF No. 4, at 7-9. As a result of these varied procedures, the number of mismatched-signature ballots that are rejected *also* varies widely by county. *See* ECF No. 3-3, at 30. In the 2012 General Election, for example, Pinellas County rejected approximately .25% of all vote-by-mail ballots cast, while Broward County rejected close to 1.5%. *Id.*

To help understand some of these differences, this Court called Ion Sancho, Leon County Supervisor of Elections, as a court witness pursuant to Federal Rule of Evidence 614(b). He explained that some counties go above and beyond that required under Florida law to make **[*9]** sure that all Florida citizens have a fair opportunity to vote and have their votes counted. Leon County, for example, will go so far as to call or email no-signature voters to make sure that they have notice as to their voting deficiency. He also explained that vote-by-mail ballots submitted in Leon County are first reviewed by a computer software. If the computerized comparison raises any issues, then a human inspection of that signature is conducted. If the elections staff is still unable to ascertain the validity of that signature, then the signature is brought before the canvassing board for adjudication. While that procedure is crucial in larger counties, Supervisor Sancho testified that it is not necessary (and, to his knowledge, is not used) in rural counties. In fact, financial limitations may make it unfeasible to conduct that exhaustive of a review in those smaller counties. Even though these procedures vary from county to county, Supervisor Sancho testified that he and two other supervisors of elections agree that there is no reason why mismatched-signature ballots cannot be treated the same as no-signature ballots during the review (and cure) process.[6]

Plaintiffs brought this case arguing that Florida's vote-by-mail procedures unconstitutionally burden the rights of Florida's mismatched-signature voters. Specifically, Plaintiffs seek an in-junction enjoining Defendants and anyone under their supervision from rejecting mismatched-signature ballots without first affording those voters an opportunity to cure in the same election cycle. ECF No. 4, at 25.[7]

II

Before this Court reaches the merits, a few housekeeping matters must be addressed.

The first is standing, "as it is a threshold matter required for a claim to be considered by the federal courts." Via Mat Int'l S. Am. Ltd. v. United States, 446 F.3d 1258, 1262 (11th Cir. 2006). Associations or organizations, in certain scenarios, have standing to assert claims based on injuries to itself or its members if that organization or its members are affected in a tangible way. *See* United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). More specifically, organizations can "enforce the rights of its members 'when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief

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however, is effectively foreclosed for mismatched-signature voters. For those updated signatures to be effective in the immediate election, they **[*8]** must be submitted prior to the canvass. *Id.* § 101.68. But because mismatched-signature ballots are necessarily rejected *during* the canvass, that option is not available. Rather, in any given election, those voters only receive notification as to their vote's rejection after their only opportunity to update their signature for that election cycle has come and gone.

[6] Defendant objected **[*10]** to portions of Supervisor Sancho's testimony on hearsay grounds. But "[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding.'" Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995) (quoting Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986)). For those same reasons, Defendant's objections to Plaintiffs' evidence are also denied. ECF No. 25. That evidence was therefore considered by this Court.

[7] This Court has not held a hearing on this matter. Under Rule 65, an evidentiary hearing is not required "where the material facts are not in dispute, or where facts in dispute are not material to the preliminary injunction sought . . . ." McDonald's Corp. v. Robertson, 147 F.3d 1301, 1313 (11th Cir. 1998) (citations omitted). Because Defendant Detzner only raised jurisdictional **[*11]** arguments, no material facts are in dispute and this Court may (and does) address the matter solely on the papers. *See* ECF No. 30 (cancelling hearing).

requested requires the participation of individual members in the lawsuit.'" *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

As one of my colleagues held in another election case, political parties have standing to assert, at least, the rights of its members who will vote in an upcoming election. *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1079, 1082-83 (N.D. Fla. 2004) (Hinkle, J.). That was so even though the political party could not identify *specific* voters that would be affected; it is sufficient **[*12]** that some inevitably would. Here too, Plaintiffs need not identify *specific* voters that are registered as Democrats that will have their vote-by-mail ballot rejected due to apparent mismatched signatures; it is sufficient that some inevitably will. In fact, because mismatched-signature voters do not receive notice that their vote was rejected until after the election, this Court cannot imagine who would have standing save such organizations. Plaintiffs thus have standing.

Second, this Court must address whether Defendant is the proper party to be sued in this case. It is well-established that while a state may not be sued unless it waives its sovereign immunity or that immunity is abrogated by Congress, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), a suit alleging a constitutional violation against a state official in his official capacity for prospective injunctive relief is not a suit against the state and, therefore, does not violate the *Eleventh Amendment*. *Ex Parte Young*, 209 U.S. 123, 161, 28 S. Ct. 441, 52 L. Ed. 714 (1908). That is because "[a] state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law or laws at issue in the suit." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011).

Here, Plaintiffs seek prospective injunctive relief against the Secretary of State in his official capacity. **[*13]** Defendant Detzner nonetheless argues that he cannot direct the canvassing boards to comply with any order issued by this Court. ECF No. 28, at 6. That is, Defendant Detzner asserts that Florida law does not allow him to grant the sort of directive that would be required here. *See* ECF No. 29, at 13.

This is, at best, disingenuous. As noted by Plaintiffs in their reply, ECF No. 33, at 2, Florida law, on its face, establishes that, as Secretary of State, Defendant Detzner is the "chief election officer" for the State of Florida. § 97.012, Fla. Stat. (2016). And as head of the Department of State, the "general supervision and administration of the election laws" in Florida are his responsibility. *Id.* §§ 15.13, 20.10. Florida law therefore vests Defendant Detzner with the authority to "adopt by rule uniform standards" for the "interpretation and implementation of" the Florida Election Code (specifically, "chapters 97-102 and chapter 105"), *id.* § 97.012(1); "[p]rovide written direction and opinions to the supervisors of elections" regarding their duties under Florida's election laws, *id.* § 97.012(16); and bring actions to "enforce compliance" with those laws, *id.* § 97.012(14). This isn't some recent invention either. The Secretary of State has held this power for **[*14]** the last ten years. *See* Ch. 2005-278, § 97.012, Laws of Fla. (codifying the pertinent changes to § 97.012 in 2005).

Defendant Detzner nonetheless attempts to distinguish *Grizzle* by arguing that, unlike Georgia's Secretary of State, he does not possess the power to issue orders directing compliance with Florida's election laws. But that is simply not the case. The Secretary of State has previously exercised this precise power under § 97.012(16) to order the supervisors of elections to perform specific duties. *See, e.g.*, App. I, at 2. Where those directives are not followed, section 97.012(14), Florida Statutes, provides an enforcement mechanism that only the Secretary of State can wield. Further, just last week, this Court ordered Defendant to direct the supervisors of elections to extend the voter registration deadline in light of Hurricane Matthew. *See Fla. Democratic Party v. Scott, et al.*, Case No. 4:16-cv-626-MW/CAS, 2016 U.S. Dist. LEXIS 142064 (N.D. Fla. Oct. 10, 2016). Twice. And, by every appearance, he did so. Twice. Nonetheless, Defendant Detzner still argues that he does not have the authority to issue the same kind of directive that he did last week.[8] Sometimes actions speak louder than words.

Finally, this Court emphasizes that it is not being asked to order Defendant Detzner to direct the individual supervisors of elections to implement specific procedures (which are ordinarily discretionary) in terms of when to meet, how often to meet, or how to evaluate signatures. Defendant's defense would have more merit

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[8] Defendant Detzner attempts to distinguish *Fla. Democratic Party* and, by extension, ***[*15]*** *Grizzle*, by asserting that his authority is not as inclusive as that exercised by the Georgia Secretary of State. But given this Court's analysis of § 97.012, it disagrees. *Grizzle* is therefore indistinguishable.

if that were the case. *See* ECF No. 29, at 10 ("The canvassing boards and local supervisors of elections, not the Secretary, have the final authority with respect to the signature comparison mandated by the statute."). Rather, this Court is simply asked to order Defendant to issue a directive, as he is empowered to do, copying the supervisors with this Order, explaining that a court has declared the existing statutory structure constitutionally impaired, and direct the supervisors of elections and canvassing boards to provide the same opportunity to cure mismatched-signature ballots as no-signature ballots and to follow precisely the same procedure. Because "[h]is power by **[*16]** virtue of his office sufficiently connect[s] him with the duty of enforc[ing]" the election laws, *Ex Parte Young, 209 U.S. at 161*, he is a proper party here, *cf. Grizzle, 634 F.3d at 1319* (holding that Georgia Secretary of State was proper party in voting case). In short, Defendant is the proper party.

III

Under *Rule 65 of the Federal Rules of Civil Procedure*, a district court may grant a preliminary injunction "only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)* (en banc). Although a "preliminary injunction is an extraordinary and drastic remedy," it nonetheless should be granted if "the movant 'clearly carries the burden of persuasion' as to the four prerequisites." *United States v. Jefferson Cnty., 720 F.2d 1511, 1519 (11th Cir. 1983)* (quoting *Canal Authority v. Callaway, 489 F.2d 567, 573 (11th Cir. 1974)*). None of these elements, however, is controlling; rather, this Court must consider the elements jointly, and a strong showing of one element may compensate for a weaker showing of another. *See Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ. & Welfare, 601 F.2d 199, 203 n.2 (5th Cir. 1979)*.[9]

"No right is more **[*17]** precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964)*. State and local laws that unconstitutionally burden that right are impermissible. *Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)*.

But that does not mean the right to vote is absolute. Rather, states retain the power to regulate their own elections. *Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)* (citations omitted). Election laws almost always burden the right to vote. *See id.* ("Election laws will invariably impose some burden upon individual voters."). Some of these regulations must be substantial to ensure that order rather than chaos accompanies our democratic process. *Id.*

Not every voting regulation, however, is subject to strict scrutiny. Rather, courts considering a challenge to state election laws "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 **[*18]** rights.'"[10] *Id. at 434* (quoting *Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)*). "This standard is sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote." *Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2012)*. When voting rights are subjected to "severe" restrictions, the regulation at issue "must be 'narrowly drawn to advance a compelling importance.'" *Id.* (quoting *Norman v. Reed, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992)*). If the right to vote is not burdened at all, then rational basis review applies. *Ne. Ohio Coal. for the*

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[9] Decisions of the Fifth Circuit prior to October 1, 1981, are binding within the Eleventh Circuit. *Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)* (en banc).

[10] The Supreme Court has consistently held that the right to vote is analyzed under equal protection. So, this Court does so. But, left to its own devices, this Court would hold that the right to vote is a fundamental right subject to substantive due process analysis and should always be subject to strict scrutiny. *See, e.g.*, Terry Smith, *Autonomy versus Equality: Voting Rights Rediscovered*, *57 Ala. L. Rev. 261, 266 (2005)* ("A **[*19]** continuing lamentation of scholars of voting is the failure of the Court to locate the right to vote within the contours of substantive due process rather than equal protection.").

Homeless v. Husted, 696 F.3d 580, 592 (6th Cir. 2012). But in the majority of cases where voting rights are subject to less-severe burdens, the State's interests often—but not always—are sufficient to justify the restrictions. Anderson, 460 U.S. at 788. In those cases, "[h]owever slight the burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Common Cause/Georgia v. Billups, 554 F.3d 1340, 1352 (11th Cir. 2009) (quotation omitted).

Defendants raised no defense on the merits (perhaps that is because Florida's statutory scheme is indefensible). This Court nonetheless addresses the merits. During this election cycle, millions of voters across the state will march happily to their mailbox and attempt to exercise their fundamental right to vote by mailing their vote-by-mail ballot. After the election, thousands of those same voters—through no fault of their own and without any notice or opportunity to cure—will learn that their vote was not counted. 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.[11] *See* Stewart v. Blackwell, 444 F.3d 843, 869 (6th Cir. 2006) (holding that the right to vote was severely burden where thousands of votes were not counted due to unreliable voting equipment).

As a severe burden, Florida's statutory scheme may survive only if it passes strict scrutiny. This Court does not question that preventing voter fraud is a compelling interest. *See* Crawford, et al. v. Marion Cnty. Election Bd., 553 U.S. 181, 225, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) ("There is no denying the abstract importance, the compelling nature, of combating voter fraud."); *see also* Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) ("A state indisputably has a compelling interest in preserving the integrity of its election process."). That interest just has no rational relationship (let alone narrow tailoring) to Florida's statutory scheme. There is simply no evidence that these mismatched-signature ballots were submitted fraudulently. Rather, the record **[*21]** shows that innocent factors—such as body position, writing surface, and noise—affect the accuracy of one's signature.

But even assuming the evidence established that voter fraud ran rampant, that would not be determinative. Again, at issue is not the accuracy of each individual county canvassing board's review process; it is that Florida denies mismatched-signature voters the opportunity to cure. Indeed, this Court is not being asked to order that *any* specific vote be counted, let alone those that are fraudulent. Rather, this Court is simply being asked to require that mismatched-signature voters have the same opportunity to cure as no-signature voters. In fact, letting mismatched-signature voters cure their vote by proving their identity *further* prevents voter fraud—it allows supervisors of elections to confirm the identity of that voter before their vote is counted.

Defendant could also have asserted (but did not) a compelling interest in administrative convenience. But the evidence in this case, again, would have foreclosed that argument. To be fair, this Court elicited testimony that at least one supervisor of elections expressed concern that providing an opportunity to cure mismatched-signature **[*22]** ballots would impose an administrative inconvenience on their staff. But that testimony is the only evidence supporting that contention. In fact, two other supervisors of elections—one from a large county, and one from a small county—disagreed and explained that it would "not [be] a problem" to allow mismatched-signature ballots the same opportunity to cure that no-signature ballots enjoy. Finally, even assuming that it *would* be an administrative inconvenience—and the evidence shows it is not—that interest cannot justify stripping Florida voters of their fundamental right to vote and to have their votes counted. *See* Taylor v. Louisiana, 419 U.S. 522, 535, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (explaining that "administrative convenience" cannot justify the deprivation of a constitutional right).

Finally, making matters worse is that canvassing boards across the state employ a litany of procedures when

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[11] One could (attempt to) argue that Florida's statutory scheme does not amount to a severe burden because it does not affect a large percentage of Florida voters. And that argument would fail. It affected approximately **[*20]** *23,000* in the last election cycle. ECF No. 3-3, at 29. In the 2000 General Election, President George W. Bush won Florida (and the election) by a mere 537 votes. *2000 Official Presidential General Election Results*, FEC (Dec. 2001), http://www.fec.gov/pubrec/2000presgeresults.htm . Not only is Florida's statutory scheme a severe burden on the right to vote, *cf.* Nw. Ohio Coal. For the Homeless v. Husted, 696 F.3d 580, 597 (6th Cir. 2012) (holding that disqualifying thousands of votes because they were cast in the right polling location but wrong precinct was a "substantial" burden on the right to vote), it affects enough votes to change the election results and, by extension, our country's future.

comparing signatures. Rather than enumerating specific procedures for comparing signatures, the Florida legislature "left it to the canvassing boards to make determinations using their collective best judgment as to what constitutes a signature match." ECF No. 3-3, 50 n.1. The result is a crazy quilt of conflicting and diverging procedures. And this Court is deeply **[*23]** troubled by that complete lack of uniformity. But this Court need not—and does not—address that hodgepodge of procedures.

Even assuming that some lesser level of scrutiny applied (which it does not), Florida's statutory scheme would still be unconstitutional. It is illogical, irrational, and patently bizarre for the State of Florida to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters. And in doing so, the State of Florida has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time. Thus, Florida's statutory scheme does not even survive rational basis review.

As explained above, in addition to the likelihood of success on the merits, three other factors influence the propriety of a preliminary injunction: whether "irreparable injury will be suffered unless the injunction issues," whether "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party," and whether "if issued, the injunction would not be adverse to the public interest." *Siegel, 234 F.3d at 1176*.

Plaintiffs and their members **[*24]** will undoubtedly suffer irreparable injury absent a preliminary injunction. *See, e.g., Obama for Am., 697 F.3d at 436* (finding irreparable injury because irreparable injury is presumed when "[a] restriction on the fundamental right to vote" is at issue). This is not a case where failing to grant the requested relief would be a mere inconvenience to Plaintiffs and their members. Rather, thousands of mismatched-signature voters, arguably through no fault of their own, will have their ballots declared "illegal" by canvassing boards—whose members, I might add, lack any formal handwriting-comparison training or education—without the opportunity to prove they are who they say they are. Those voters are therefore robbed of one of our most basic and cherished liberties; namely, the right to vote and have that vote counted. *See Louisiana v. United States, 380 U.S. 145, 153, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965)* ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar."). As this Court explained in another recent case about the upcoming election, "This isn't golf: there are no mulligans." *Scott, Case No. 4:16-cv-626-MW/CAS, 2016 U.S. Dist. LEXIS 142064, at *12*. Once the canvassing starts and **[*25]** the election comes and goes, "there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014)*.

Similarly, the balance of hardships favors Plaintiffs. The State of Florida has the ability to set its own election procedures (so long as they comply with federal law). That is without question. Some of those procedures promote administrative convenience and efficiency. *See, e.g., § 99.095, Fla. Stat.* (2016) (requiring persons running for certain offices to either pay a qualifying fee or obtain signatures of 1% of the total number of registered voters, divided by the number of districts involved in that office). But there is no rational explanation for why it would impose a severe hardship on Defendant to provide the same procedure for curing mismatchedsignature ballots as for no-signature ballots. In fact, prior to 2004, before the Florida Legislature outlawed the practice, voters had the ability to cure both mismatched-signature ballots and no-signature ballots. And, as testified by Supervisor Sancho, that method was highly effective.

In 2013, with yet another reversal, the Florida Legislature made it so that no-signature ballots could be cured in a simple and effective manner. *Id. § 101.68*. There is no reason that same procedure cannot **[*26]** be implemented (rather, re-implemented) for mismatched-signature ballots. Any potential hardship imposed by providing the same opportunity—and comfort—for mismatchedsignature voters pales in comparison to that imposed by unconstitutionally depriving those voters of their right to vote and to have their votes counted.

Finally, the injunction is in the public interest. The Constitution guarantees the right of voters "to cast their ballots and *have them counted* . . . ." *Classic, 313 U.S. at 315* (emphasis added); *see also Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 234 (6th Cir. 2011)* ("Thus, we have held that '[t]he right to vote includes the right to have one's votes counted on equal terms with others." (quoting *League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008)*)). Florida's statutory scheme, however, threatens that right by subjecting vote-by-mail voters to an unreasonable risk

that their ballot will be tossed without any opportunity to cure, let alone any form of notice. By doing so, Florida has cemented an unconstitutional obstacle to the right to vote and has thus struck "at the heart of representative government." *Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)*. The public interest is not served by depriving vote-by-mail voters of an opportunity to cure when that opportunity is already available for no-signature voters. In fact, it is just the opposite.

IV

This Order requires **[*27]** Plaintiffs to give security for costs in a modest amount; namely, $500.00. Any party may move at any time to adjust the amount of security.

V

Stays pending appeal are governed by a four-part test: "(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." *Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)*; *see also Venus Lines Agency v. CVG Industria Venezolana de Aluminio, C.A., 210 F.3d 1309, 1313 (11th Cir. 2000)* (applying the same test). Considering that this test is so similar to that applied when considering a preliminary injunction, courts rarely stay a preliminary injunction pending appeal. That rings true here. Because no exceptional circumstances justify staying this Order pending appeal, *see Brenner v. Scott, 999 F. Supp. 2d 1278, 1292 (N.D. Fla. 2014)* (Hinkle, J.) (issuing a rare stay of a preliminary injunction given the public interest in stable marriage laws across the country), this Court refuses to do so.

VI

Once again, at the end of the day, this case is about the precious and fundamental right to vote and to have one's vote counted. In our democracy, those who vote decide everything; those who count the vote decide nothing. **[*28]** [12] Justice Stewart once quipped, in reference to pornography, "I know it when I see it . . ." *Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964)* (Stewart, J., concurring). Likewise, this Court knows disenfranchisement when it sees it and it is obscene.

Accordingly,

IT IS ORDERED:

1. Plaintiffs' Motion for Preliminary Injunction, ECF No. 1, is **GRANTED**. Defendant's Motion to Dismiss, ECF No. 29, is **DENIED**.

2. Defendant Detzner is ordered to issue a directive to the supervisors of elections (with this Order attached) advising them (1) that Florida's statutory scheme as it relates to mismatched-signature ballots is unconstitutional; and (2) that in light of this Court's order they are required to allow mismatched-signature ballots to be cured in precisely the same fashion as currently provided for nonsignature ballots. For example, the supervisors of elections must provide the same notice, *see § 101.68(4)(a), Fla. Stat.* (2016) ("The supervisor of elections shall, on behalf of the county canvassing board, notify **[*29]** each elector whose ballot was rejected as illegal and provide the specific reason the ballot was rejected . . . ."), the same process, *see id. § 101.68(4)(c)* (outlining the required process), and must allow mismatched-signature ballots to be cured up to the same date and time as currently done for no-signature ballots, *id. § 101.68(4)(b)* (allowing to cure until 5:00 p.m. the day before the election). The difference is that a separate form must be used. Accordingly, Defendant Detzner is required to submit the attached affidavit, *see* App. II, in his directive to the supervisors of elections and require them to provide that form for mismatched-signature voters to cure their ballots (with "DRAFT" removed, of course).

3. The preliminary injunction set out above will take effect upon the posting of security in the amount of $500 for costs and damages sustained by a party found to have been wrongfully enjoined. Plaintiff will immediately notify Defendant when the bond has been posted and thereafter immediately file proof of such notice through the electronic case files system.

4. Likewise, upon receipt of the notice of the posting of security, Defendant shall notify this Court whether he intends to comply with this Order **[*30]** by filing a notice through the electronic case files system on or before 5:00 p.m. on October 17, 2016.

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[12] An infamous world leader disagreed. See Herma Percy, Ph. D., *Will Your Vote Count? Fixing America's Broken Electoral System* 43 (2009) ("'Those who cast the votes decide nothing. Those who count the votes decide everything.' Joseph Stalin, Communist Dictator").

If Defendant declares that he intends to flout this Order then this Court will take the appropriate action.

SO ORDERED on October 16, 2016.

/s/ Mark E. Walker

United States District Judge

APPENDIX I

FLORIDA DEPARTMENT OF STATE

RICK SCOTT

Governor

KEN DETZNER

Secretary of State

MEMORANDUM

FROM: Ken Detzner

Florida Secretary of State

TO: Supervisors of Elections

DATE: August 14, 2015

SUBJECT: Directive 2015-02—State Senate Candidate Qualifying; Year of Apportionment

Supervisors of elections have asked for clarification regarding whether the 2016 election is to be deemed to occur in a "year of apportionment' as that term is used in connection with qualifying requirements for state senate candidates in Florida. Their question arises within the context of the recent consent order issued by the circuit court in Leon County requiring the redrawing of state senate district boundaries. *See League of Women Voters of Fla. et al. v. Detzner et al.*, Case No. 2012-CA-2842, Stipulation and Consent Judgment (Fla. 2d Jud. Cir. July 25, 2015)

In an apportionment year, the qualification requirement for a state senate **[*31]** candidate change in two significant ways. First, such a candidate may obtain signatures from electors who reside anywhere in the state (rather than from only those who reside within the district). *See* § 99.09651(3), Fla. Stat. Second, there is a different formula for calculating the minimum number of signatures required to qualify by petition. *See* § 99.09651(1), (2), Fla. Stat. These different requirements reflect the fact that the timing of redrawing of district boundaries conflicts with the ordinary process of identifying which and how many voters within a district would be required to qualify by petition. Redistricting also creates a period of uncertainty for a candidate trying to decide which specifically numbered district he or she might seek to represent, especially in light of the fact that any state senate district that is redrawn, regardless of district number, must be on the ballot in the next general election.

The consent order that the circuit court recently entered directs the Legislature to submit "a remedial apportionment plan" for state senate districts by November 9, 2015. The Legislature has indicated its intent to convene for a special session in October 2015 to adopt that plan. In turn, while state senate **[*32]** candidates seeking 2016 ballot placement will be running for office based on newly drawn district lines, such candidates may not know in a sufficiently timely manner from which voters they may obtain petition signatures or how many signatures they must obtain. Therefore, I conclude that the provisions in the Election Code referring to procedures to be followed in a year of apportionment" apply to state senate candidates for the purpose of qualifying in such races in Florida during the 2016 election cycle. *See* §§ 99.095, 99.09651, Fla. Stat.

In turn pursuant to my authority under section 97.012(1) and (16), Florida Statutes, I hereby direct the supervisors of elections in Florida to perform the duty of verifying signatures on petitions submitted to them by state Senate candidates pursuant to section 99.095(3), Florida Statutes, to determine whether a petition's signature is from a voter registered within the county in which it was circulated. The petitions must state that the candidate is seeking the office of state senator, but they shall not include a district number, *see* § 99.09651(4), Fla. Stat.; however, if a petition includes a district number, the district designation may be disregarded as extraneous and unnecessary information for the applicable qualifying period.

Any state **[*33]** senate candidate in Florida seeking ballot placement for the 2016 election who seeks to qualify by the petition process may obtain signatures "from any registered voter in Florida regardless of party affiliation or district boundaries." *See* § 99.09651(3), Fla. Stat. Moreover, such a candidate will need to collect 1,552 signatures. *See* § 99.09651(1), (2), Fla. Stat.

(requiring a candidate for state senate in an apportionment year to collect a number of signatures equal to one-third of one percent of the "ideal population," which is a number calculated by taking the total state population based on the most recent decennial census (18,801,310 in 2010) and dividing by the number of state senators in Honda (40)).

This directive remains in effect until such lime as it is superseded or revoked try subsequent directive, law, or final cowl order.

APPENDIX II

SIGNATURE CURE AFFIDAVIT FOR VOTE-BY-MAIL BALLOT

(The affidavit is far use by a voter who returns a Vote-by-mail ballot with a signature issue on their Voter's Certificate)

1. INSTRUCTIONS

Use the following checklist to complete and return this form to the Leon County Supervisor of Elections Office *no later than 5 p.m. on the Monday before the election*.

☐ **Complete and sign the affidavit [*34] below: AND**

☐ **Include a copy of one of the following forms of identification am that shows your name and photograph (if the affidavit is not submitted in person)**:

Identification Mat includes your name and photograph: Florida Drivers license; Florida ID; United States passport debit or credit card; military identification; student identification; retirement center identification neighborhood association identification; public assistance identification veteran health identification card issued by the United States Department of Veterans Affair; a Florida license to carry a concealed weapon or firearm; or an employee identification card issued by any branch, department, agency, or entity of the Federal Government, the state, a county, or a municipality.

OR

Identification that shows your name and current residence address: current utility bill, bank statement, government check, paycheck, or government dcoJrnent (excluding voter information card).

Return this completed affidavit and the copy of your identification documents to the Supervisor of Elections *no later than 5 p.m. on the Monday before the election*:

- Deliver to our office or to an Early Voting site (by you or another person)
- Mail diem **[*35]** to us using the included postage paid fdllfll envelope.
- Fax (850-606-8601) or email (vote@leoncountyfl.gov) to our office,

Contact LIS if you have arty questions at 850-606-81683

2. VOTE-BY-MAIL BALLOT AFFIDAVIT

I, _ (Print voter's name) am a qualified voter in this election and registered voter of Leon County, Florida. I do solemnly swear or affirm that: I requested and returned the vote-by-mail ballot and that I have not and will not mote mare than one ballot in this election. I understand that if I commit or attempt any fraud in connection with voting, vote a fraudulent ballot, or vote more than once in an election, I may be convicted of a felony of the third degree and fined up to $5,000 and imprisoned for up 5 years. I understand that my failure to sign this affidavit means that my vote-by-mail ballot will be invalidated.

—

(Voter's Signature)

—

(Voter's Address)

End of Document

Document (1)

1. *In re M.B., 2019 Kan. App. Unpub. LEXIS 815*

Client/Matter: -None-
241 p3d 601:
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

In re M.B.

Court of Appeals of Kansas

November 5, 2010, Opinion Filed

No. 104,332

Reporter
2010 Kan. App. Unpub. LEXIS 815 *; 241 P.3d 601

In the Interest of M.B. A.B. A.B. J.G.J.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Appeal after remand at *In the Interest of M.B., 2012 Kan. App. Unpub. LEXIS 123 (Kan. Ct. App., Feb. 17, 2012)*

Prior History: **[*1]** Appeal from Shawnee District Court; DANIEL L. MITCHELL, judge.

In re M.B., 225 P.3d 1211, 2010 Kan. App. Unpub. LEXIS 157 (Kan. Ct. App., 2010)

Disposition: Vacated and remanded.

Counsel: Wayne French, of Topeka, for appellant natural mother.

Dionne A.L. Carter, of Topeka, for appellant natural father.

Darren E. Root, assistant district attorney, and Chadwick J. Taylor, district attorney, for appellee.

Judges: Before RULON, C.J., GREENE, J., and KNUDSON, S.J.

Opinion

MEMORANDUM OPINION

Per Curiam: Both natural mother and natural father appeal the district court's termination of their parental rights to minor children M.B., born January 23, 1997; A.B., born July 25, 2002; and A.B., born July 16, 2004; mother also appeals the termination of her parental rights to J.G.-J., born November 25, 2007. These parents challenge the adequacy of the district court's findings and the sufficiency of the evidence to support the district court's judgment terminating their parental rights. We conclude the court's findings are inadequate and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

All four of these minor children were declared in need of care on February 25, 2008. In January 2009, the State moved to terminate both parents' rights to the children, and the district court granted the State's motion in May **[*2]** 2009, concluding that both parents were unfit pursuant to three subsections of *K.S.A. 2009 Supp. 38-2269*: *subsection (b)(4)* due to physical, mental, or emotional neglect of the children; *subsection (b)(7)* because reasonable efforts by appropriate public or private child caring agencies have been unable to rehabilitate the family; and *subsection (b)(8)* due to lack of efforts on the part of these parents to adjust the parent's circumstances, conduct, or conditions to meet the needs of the children. The court also found that mother was unfit pursuant to *K.S.A. 2009 Supp. 38-2269(b)(3)* due to use of intoxicating liquors or narcotic or dangerous drugs.

Mother and father perfected an appeal to this court of the judgment terminating their parental rights. A panel of this court vacated the district court judgment and remanded for further proceedings because the required statutory finding was not made that the conditions of unfitness of both parents was "unlikely to change in the foreseeable future" either on the record or in the journal entry of judgment. See *K.S.A. 2009 Supp. 38-2269(a)*. We reminded the district court that the better practice dictates that the court expressly reflect that **[*3]** all statutory findings were made and that the proper standard of proof was employed in making these findings. *In re M.B.*, No. 103,054 unpublished opinion filed March 5, 2010, citing *In re B.E.Y., 40 Kan. App. 2d 842, 844, 196 P.3d 439 (2008)*. We concluded that meaningful appellate review was impaired by the lack of an express finding required by the statute and we

remanded "for additional findings, and if the evidence in the record does not support all statutory findings, the remand may be expanded to include such supplemental proceedings as the court may deem necessary." We also urged the district court to "heed the clear statutory requirements in its ultimate findings and conclusions." *225 P.3d 1211*.

Without any further proceedings on remand, the district court issued its "Opinion. Pursuant to Remand" on March 25, 2010, incorporating its prior opinion and stating substantively only:

> "Efforts by SRS to provide services and assistance to the parents to facilitate reintegration failed due to a lack of effort on the part of the parents and their refusal to comply with case plan tasks. The parents had refused to cooperate with SRS on at least six (6) occasions prior to the filing of these **[*4]** cases and refused to follow the case plan in these cases which demonstrates that their conduct and condition is unlikely to change in the foreseeable future."

Both parents again have perfected a timely appeal.

ARE THE DISTRICT COURT'S FINDINGS SUFFICIENT TO SUPPORT THE CONCLUSION THAT ALL CONDITIONS OF UNFITNESS OF BOTH PARENTS ARE UNLIKELY TO CHANGE IN THE FORESEEABLE FUTURE?

Both parents challenge the sufficiency of the evidence to support a termination of their parental rights, but mother also challenges the adequacy of the district court's findings of fact in the Opinion Pursuant to Remand. When this court reviews a district court's termination of parental rights, it "should consider whether, after review of all the evidence, viewed in the light most favorable to the State, it is convinced that a rational factfinder could have found it highly probable, *i.e.*, by clear and convincing evidence, that [the parents' rights should be terminated]." *In re B.D.-Y., 286 Kan. 686, 705, 187 P.3d 594 (2008)*.

At the outset, the district court has failed to indicate whether the proper standard of proof, *i.e.* clear and convincing evidence, was employed in making the findings on remand. Not only does **[*5]** the better practice dictate that the district court reflect the standard of proof employed, but this court directed the district court to "heed the clear statutory requirements" on remand. The failure to so indicate causes this court to employ higher scrutiny in examining the findings reflected. See *In re B.E.Y., 40 Kan. App. 2d at 844*. For this reason alone, the district court's Opinion Pursuant to Remand is technically inadequate to support its conclusion.

Additionally, mother argues that the substantive findings contained in the Opinion Pursuant to Remand are conclusory and unsupportable. She argues:

> "The trial court's March 25, 2010 Opinion Pursuant to Remand makes a blanket finding that mother's conduct or condition is unlikely to change in the foreseeable future. However, the only supporting information for this ruling that the trial court offers is that (1) the parents refused to cooperate with SRS on at least six previous occasions and (2) refused to follow the caseplan tasks. The record offers no supporting evidence of six previous incidents in which the parents 'refused' to cooperate with SRS. In fact, Ms. McCray of SRS testified that there was no previous SRS history with **[*6]** this family. The record offers no evidence that parents were required to cooperate with SRS on six different occasions, nor that they 'refused' to cooperate with SRS. Should this Court find that the record does indeed support that in whole or in part there were six previous incidents in which mother was required to cooperate with SRS and failed to do so, mother submits that there is no evidence to support a finding that she actively 'refused' to cooperate with SRS.
>
> "Regarding the trial court's finding that mother 'refused' to follow the caseplan, mother submits that ample evidence was offered which shows that mother was indeed following the caseplan, as outlined previously under each statutory allegation."

In short, we generally agree with mother's criticism of the district court's findings on remand, and we conclude the criticism is likewise valid as to father. Our extensive review of the original trial record reflects that there was not strict compliance with the plan of reintegration by these parents, but we fail to understand how any such early refusals to cooperate support the broad and general finding that *both* parents "*refused* to comply with case plan tasks" or that any such refusals **[*7]** demonstrated that "their conduct and condition is unlikely to change in the foreseeable future." There may have been occasions when these parents were less than compliant with reintegration plans, but the record does not support a finding of persistent or chronic refusal to comply with the case plan as a whole. Moreover, the finding regarding "refus[als] to cooperate

with SRS on six occasions *prior to the filing of these cases*" certainly fails to suggest how any condition of unfitness determined at time of trial may or may not be unlikely to change in the foreseeable future. After all, more than 2 years had transpired between the filing of the cases and the order on remand.

This court cannot and should not be required to perform the tasks inherent in our order of remand. Nearly 10 months transpired between the original trial and our order of remand, and a short presentation on remand by counsel or an evidentiary hearing would likely have revealed salient evidence as to any change to the conditions of unfitness, as well as the likelihood to change in the foreseeable future. Instead, the district court merely entered a supplemental order with conclusory findings that are not supported **[*8]** by the original record.

Contrary to the practice in this area, there was no testimony at the original trial from case-managers, caseworkers, healthcare professionals, investigators, or other professionals familiar with mother, father, or the children, that any condition of unfitness was unlikely to change in the foreseeable future. We understand that neither mother nor father appears to be a model parent, but it cannot be said that they generally "refused" to cooperate or attempt compliance with reintegration plans. At the time of trial, mother was employed, had acquired a mobile home for her residence (although not yet habitable), and had recovered from a single relapse in her drug treatment plan; her case manager testified that mother was then drug-free and had not skipped any UAs since January 21, 2009. Father had provided only negative urine analyses, had plausible explanations for missing a few of these tests, had fully participated in mental health services offered, had maintained a residence with relatives for a few months prior to the trial, was employed, and had abstained from further criminal activity. In fact, the case manager testified, when asked whether father had reached **[*9]** all of his case plan goals, that "[t]hroughout the life of this case *he has been there,* but he has also been very inconsistent or unstable at times." (Emphasis added.) Diana Braner, the paternal aunt of M.B., A.B., and A.B., testified at trial that "these last . . . three months have been [*sic*] very well for [father]."

We recognize that these highly summarized facts may not present a complete picture of plan compliance, but they alone convince this court that the district court's findings of chronic "refusals" to comply with the reintegration plan cannot be supported by clear and convincing evidence and do not demonstrate that the conditions of unfitness are unlikely to change in the foreseeable future.

Unfortunately, we are compelled to remand once again to the district court, this time with more explicit directions. The district court is ordered to conduct supplemental proceedings with a sole focus on whether any condition of unfitness can be proven by clear and convincing evidence to be unlikely to change in the foreseeable future. The district court is then ordered to make detailed findings to support a conclusion regarding this statutory requirement, to file a journal entry of judgment **[*10]** reflecting these detailed findings and the conclusion drawn therefrom, and to otherwise observe statutory requirements and better practices as dictated by this court. See *In re S.F.Y., 40 Kan. App. 2d at 844*. Finally, the district court is ordered to expedite these proceedings on remand.

Vacated and remanded with directions.
