No. 21-125084-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

Plaintiffs-Appellants

v.

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

Defendants-Appellees

BRIEF OF APPELLEES

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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Oral Argument Requested: 15 minutes

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II. – STATEMENT OF RELEVANT FACTS

Plaintiffs are four organizations – League of Women Voters of Kansas ("LWV); Loud Light; Kansas Appleseed Center for Law and Justice, Inc. ("Appleseed"); and Topeka Independent Living Resource Center ("TILRC") – and three individuals who appeal the dismissal of their facial, pre-enforcement constitutional challenges to two election integrity statutes passed by the legislature in 2021. The first, a signature verification requirement ("SVR") codified at K.S.A. 25-1124(h), prohibits election officials from accepting advance voting ballots through the mail unless the voter's signature on the required ballot envelope matches the signature on file in the county's voter registration records (with exceptions for disabled voters who cannot provide a consistent signature). Signature-matching is not new in Kansas elections. Since 2019, the State has required that voters be afforded a "cure opportunity" to correct missing or mismatched signatures for advance ballots up to the time of the final county canvass. K.S.A. 25-1124(b). If a voter is ill, disabled, or not proficient

in English, the law further allows the voter to seek assistance in completing and signing the ballot application or envelope. K.S.A. 25-1124(c).

Pursuant to his authority under K.S.A. 25-1131, the Secretary of State recently adopted a regulation to help facilitate consistent administration of this statute and provide standards for the signature verification process. *See* K.A.R. 7-36-9 (effective May 26, 2022) (published in 41 Kan. Register 1060-61 (June 2, 2022)). This regulation additionally requires any county election official performing signature verification responsibilities to undergo approved training before undertaking such work. *Id.* at 7-36-9(f).

The second challenged statute, a ballot collection restriction ("BCR") codified at K.S.A. 25-2437, requires that any person transmitting or delivering another voter's advance ballot to the county election office or polling place submit a written statement attesting to certain information to ensure the security of the ballot and integrity of the electoral process. *Id.* at 25-2437(a). The statute also restricts any person from transmitting or delivering more than ten advance ballots on behalf of other voters during an election. *Id.* at 25-2437(c).

Plaintiffs devote nearly five pages of their opening brief to an irrelevant recitation of the legislative debates that culminated in the passage of H.B. 2183. (Br. 7-11). The brief highlights the views of legislators whose views did not carry the day and other citizens who wished that they had more opportunity to comment before the legislation's passage. None of that discussion has any bearing on the issues before the Court. Plaintiffs also dedicate multiple pages to the evidence they sought to introduce in connection with a preliminary injunction motion (filed *ten months* after their original Petition) in support of their attack on the signature verification requirements. (Br. 14-15). But that discussion is also

immaterial because the district court never even addressed (and Defendants never had an opportunity to respond to) that motion in light of the district court's dismissal, two business days later, of Plaintiffs' Amended Petition for failure to state a claim upon which relief can be granted pursuant to K.S.A. 60-212(b)(6). (R. V, 54-79).

III. – ARGUMENT AND AUTHORITIES

A. Jurisdictional questions ordered addressed by the Court of Appeals

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

Plaintiffs' various constitutional challenges to K.S.A. 25-2438(a)(2) and (3), which criminalize conduct related to the knowingly false representation of an election official, remain pending before the district court. The district court denied Plaintiffs' motion for a temporary injunction against the enforcement of those statutes, (R. III, 21), and Plaintiffs appealed that Order to this Court, which recently dismissed the appeal for lack of standing. Case No. 21-124378-A. Because no *final judgment* has been issued on those claims, the district court retains jurisdiction.

"The general rule . . . is that the docketing of an appeal divests the district court of jurisdiction to modify a judgment." *Hernandez v. Pistotnik*, 60 Kan. App.2d 393, 405, 494 P.3d 203 (2021). But this rule is not absolute. A district court, for example, remains free to proceed with any collateral "matters independent of the judgment." *Id.* More to the point here, a district court is empowered to suspend, modify, restore, or grant an injunction "[w]hile an appeal is pending from an interlocutory order" granting, dissolving, or denying an injunction. K.S.A. 60-262(c).

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)?*

As this Court has noted, the "parameters of jurisdiction" under K.S.A. 60-2102(a)(3) are "less than clear." *Cummings v. Gish*, No. 96,124, 2007 WL 1530113, at *2 (Kan. Ct. App. May 25, 2007). But the Supreme Court has refused to read the statute as conferring appellate jurisdiction over *any order* involving the Kansas or federal constitution. Rather, there must be a "semblance of finality." *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164 (1965). The Court explained as follows:

> An appeal is permitted from '[a]n order . . . involving . . . the constitution of this state . . . .' However, the order must have some semblance of finality. The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy. An order involving a constitutional question or one where the laws of the United States are involved has always been subject to review regardless of the amount in controversy. Such an order is, however, subject to the rule that an order involving the constitutional question must constitute a final determination of the constitutional controversy. Any other conclusion would constitute a usurpation by this court of the original jurisdiction of the district court to determine actions involving constitutional questions. *Id.* (alterations in original) (internal citations omitted).

Plaintiffs argue that the district court's dismissal of their claims challenging the SVR and BCR means that there has been a "semblance of finality" on those causes of action because there has been a "full investigation and determination of the controversy." (Br. 3.) But the Supreme Court has not been so flexible with this statute. Indeed, Defendants have not found *a single case* since the code of civil procedure was adopted in 1963 in which a Kansas appellate court agreed to exercise jurisdiction over an interlocutory appeal of a non-final judgment involving a constitutional question. In fact, two years after *Cusintz*, the

Supreme Court again addressed the scope of K.S.A. 60-2102(a)(3) and underscored that "[t]he policy of the new code (of civil procedure) leaves no place for intermediate and piecemeal appeals which tend to extend and prolong litigation." *In re Austin*, 200 Kan. 92, 94, 435 P.2d 1 (1967) (citing *Connell v. State Highway Comm'n*, 192 Kan. 371, Syl. ¶ 1, 388 P.2d 637 (1964)). Two decades later, the Court was even more emphatic, noting:

> If appeals in original proceedings were allowed under K.S.A. 60-2102(a)(3), the original proceedings would be subject to interminable interruption and delay. As we said in *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976): "Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory appeals and fractionalized appeals are discouraged, and are the exceptions and not the rule." *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 683 P.2d 1247 (1984).

The handful of cases in which appeals of non-final judgments have been allowed under K.S.A. 60-2102(a)(3) involve either the appointment of receivers to sell or dissolve property free and clear of encumbrances – which would effectively abrogate a party's entire interest in the property – or definitive rulings on quiet title actions – which similarly would divest a party of its right to occupy or use the realty. *See Cummings*, 2007 WL 1530113, at *2 (citing *J.E. Akers Co. v. Advert. Unlimited, Inc.*, 274 Kan. 359, 360 49 P.3d 506 (2002) and *Smith v. Williams*, 3 Kan. App. 2d 205, 206, 592 P.3d 129 (1979)); *see also Pistotnik v. Pistotnik*, No. 115,715, 2017 WL 2210776, at *6 (Kan. Ct. App. May 19, 2017).

Plaintiffs' references to dictionary definitions of "semblance" add little to the debate given that the concept of a "semblance of finality" is not statutorily grounded, but is judicial gloss on an opaque and largely untested provision. What *is* clear is the Supreme Court's prudential rationale for minimizing collateral appeals. The mere fact that a litigant asserts

a constitutional claim in its petition provides no sound basis for awarding the litigant an early admission ticket to the court of appeals prior to the issuance of a final judgment.

In this lawsuit, Plaintiffs initially asserted fourteen constitutional claims involving four different statutes. Plaintiffs then opted to proceed piecemeal on the claims, filing a motion for a partial temporary injunction directed at one statute, an appeal of the denial of that motion (Case No. 21-124378-A), and later a separate motion for partial temporary injunction targeted at another statute. Unless this appeal is dismissed, there will be *at least* three appeals in this case (including a second appeal of any post-remand final judgment in Case No. 21-124378-A), and the principles of finality that the Supreme Court has consistently declared to be of paramount importance in passing on the scope of K.S.A. 60-2102(a)(3) will be reduced to meaningless palaver.

If the Court embraces Plaintiffs' broad interpretation, one can also expect a deluge of interlocutory appeals that will assuredly tax the resources and staffing of the appellate courts, undermine the case-management authority of district courts, and often tilt the scales of justice towards litigants with greater financial means. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). As for certain litigants without resources (think inmates), the explosion of interlocutory appeals will be felt across the judicial system. Worse still, once this Court blesses the growth of such appeals, litigants will assuredly seek to bootstrap other claims allegedly "inexplicably intertwined" with the cause of action that the Court must now take up despite the absence of a final judgment. Defendants urge the Court to avoid that dangerous path.

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

The parties all agree that a "final decision" under K.S.A. 60-2102(a)(4) is one "that disposes of the entire merits of a case and leaves no further questions or possibilities for future directions or actions by the lower court." *Kaelter v. Sokol*, 301 Kan. 247, 249-50, 340 P.3d 1210 (2015). Plaintiffs contend that Defendants' proposed construction of K.S.A. 60-2102(a)(3) would effectively render K.S.A. 60-2102(a)(4) superfluous since the latter already permits appeals from final judgments. (Br. 3.) But Plaintiffs' interpretation of the former would accomplish exactly what the Supreme Court has warned against: multiplicity of appeals via piecemeal litigation. It is inconceivable that the legislature intended such a revolutionary outcome in 1963, particularly in light of the paucity of such appeals over the last sixty years. The only logical way to give meaning to K.S.A. 60-2102(a)(3), while not undermining core principles of finality and avoidance of piecemeal appeals, is to sanction interlocutory appeals of constitutional claims only in those circumstances when foreclosing an immediate appeal of a non-final judgment would effectively deprive the litigant of any opportunity to meaningful relief on the claim. This proposal would be akin to collateral orders, which the Court has previously embraced as an exception to the final judgment rule. *See In re T.S.W.*, 294 Kan. 423, 434-35, 276 P.3d 133 (2012). Or to qualified immunity defenses in the federal courts. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985) (granting governmental officials sued for violations of federal constitutional rights in federal court the ability to immediately appeal the denial of their motion to dismiss such claims on the grounds that the official enjoys immunity from suit, not just from liability);

Estate of Belden v. Brown Cnty., 46 Kan. App.2d 247, 255, 261 P.3d 943 (2011) (allowing interlocutory appeal of denial of qualified immunity dismissal motion in state court).[1]

4. *What was the basis of the district court's conclusion that the request for temporary injunction of the SVR was moot?*

The district court properly determined that, after having dismissed Plaintiffs' claims attacking the SVR under K.S.A. 60-212(b)(6), their dilatory request (filed ten months after their original Petition and two business days before the dismissal Order) for a temporary injunction on those same claims was now moot. One of the elements to obtain a temporary injunction is establishing a "substantial likelihood of eventually prevailing on the merits." *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 492-93 173 P.3d 642 (2007). If Plaintiffs could not even state a claim upon which relief can be granted, they necessarily could not show a likelihood of success on the merits. Moreover, once the SVR claim was dismissed on the merits, it became illogical to grant injunctive relief on that same claim.

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

There is nothing to review in connection with Plaintiffs' motion. Defendants had no opportunity to respond to the motion (since it was mooted by the district court's outright dismissal of the claim before a response was due), no evidence was admitted, no hearing was conducted, and the district court never evaluated the motion (other than to note that it was moot). Any appeal of the motion would thus be pointless. To allow a litigant to appeal

[1] If a litigant cannot satisfy the standard Defendants advocate, K.S.A. 60-254(b) and 60-2102(c) remain available. For whatever reason, Plaintiffs did not pursue those options.

the denial of a temporary injunction on a cause of action on which the district court *simultaneously* dismissed the claim on the merits defies logic.

In an attempt to circumvent this factual and legal impediment, Plaintiffs first propose that the Court review the district court's K.S.A. 60-212(b)(6) dismissal of their SVR claims under a more liberal standard applicable to the evaluation of temporary injunction motions. *See Idbeis*, 285 Kan. at 492-93. That "mix and match" approach would make a mockery of appellate review principles and promote gamesmanship. It should not be countenanced.

Second, Plaintiffs seek to pivot to pendant appellate jurisdiction and argue that this Court is empowered to review the district court's denial of their motion because that ruling is "inextricably intertwined" with the dismissal of the same claim on the merits. But that would stretch the concept of pendant appellate jurisdiction far beyond its breaking point.

The Kansas Supreme Court has embraced pendant appellate jurisdiction only in narrow contexts, primarily in cases where a specific question or issue has been certified. *See Williams v. Lawton*, 288 Kan. 768, 783-87, 207 P.3d 1027 (2009) (where district court certified questions related to admissibility of evidence and proper handling of the jury, the court of appeals could also evaluate whether a new trial was necessary because the certified questions go to the heart of whether there should be a new trial); *City of Neodesha v. BP Corp. of N. Am., Inc.*, 295 Kan. 298, 310-12, 287 P.3d 214 (2012) (after district court certified the question whether it had erred in granting plaintiffs judgment as a matter of law, court of appeals properly expanded its review to consider whether district court also erred in conditionally granting a new trial since, "if the conditional order is left intact, it could

potentially negate any ruling by this court that the district court's entry of judgment as a matter of law was improper."). Even then, the Supreme Court emphasized that its holding hinged in significant part on the deferential standard under which it scrutinizes challenges to the scope of certified questions. *Williams*, 288 Kan. at 782.

If, as Plaintiffs propose here, an appellate court could reach the merits of a district court's dismissal of any and all causes of action – in a lawsuit in which there has been no final judgment (and no certification under K.S.A. 60-254(b) or 60-2102(c)) anytime there is an appeal from the denial of a motion for a temporary injunction pursuant to K.S.A. 60-2102(a)(2), restrictions on appellate jurisdiction in K.S.A. 60-2102(a)(4) could be avoided with ease and the thin reeds of pendent appellate jurisdiction would take over the swamp. That was clearly not the intent of the Supreme Court. Interlocutory appeals are highly disfavored in Kansas, *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976), and the jurisdictional theory Plaintiffs' now promulgate is deeply at odds with that principle.

6. *How, if at all, was the district court's constitutional analysis of the BCR related to the district court's constitutional analysis of the SVR?*

Plaintiffs acknowledge that their constitutional attacks on the SVR and BCR only slightly overlap and are rooted in different provisions of the Kansas Constitution. (Br. 5-7). This recognition reinforces why this Court's entertainment of the BCR claims would be inappropriate at this time. As noted in the response to Question 5, allowing Plaintiffs to invoke pendant appellate jurisdiction with respect to those claims – for which they never even sought a temporary injunction in the district court – and backdoor them into this interlocutory appeal would leave nothing left of the final judgment rule and serve as an

open invitation for fractionalized appeals.

B. Plaintiffs lack standing to pursue their claims challenging the SVR

The district court assumed that Plaintiffs had standing and proceeded directly to the merits of their claims. (R. V, 60). But unless this Court opts to simply affirm the district court's ruling on the merits, it will need to address Plaintiffs' standing to pursue an attack on the SVR statute because none of the Plaintiffs have standing on those causes of action.

Standing requires Plaintiffs to prove that they have suffered a cognizable injury that is causally connected to the challenged conduct. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved.'" *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). "[S]tanding is not dispensed in gross," meaning that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotations omitted). While only one party need possess standing to raise a claim, none of the Plaintiffs has standing to challenge the SVR in K.S.A. 25-1124(h).

1. Standard of Review

"While standing is a requirement for case-or-controversy, i.e., justiciability, it is also a component of subject matter jurisdiction." *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015) (quoting *Gannon*, 298 Kan. at 1122). It is thus a jurisdictional prerequisite to suit. *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296

Kan. 906, Syl. ¶ 1, 296 P.3d 1106 (2013). Plaintiffs bear the burden of establishing standing. *Gannon*, 298 Kan. at 1123. At the motion to dismiss stage, factual disputes regarding standing are resolved in the plaintiff's favor based on the allegations in the petition. *See Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017).

2. Plaintiffs lack Associational Standing to challenge the SVR law

In the case of an organization, legal standing may arise in two different contexts. First, the organization may assert standing as a representative of its members, which is generally referred to as "associational standing." *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Alternatively, the organization may have standing in its own right, typically known as "organizational standing." *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). In their Amended Petition, Plaintiffs plead two categories of purported injuries in connection with the SVR: (i) harm to each organization's members or "constituents;" and (ii) harm to the organizations themselves. (R. II, 283 at ¶ 17, 242 at ¶ 25, 244 at ¶ 31, 245-46 at ¶ 35). None of these allegations supports associational standing.

For an association to have standing to sue on behalf of its members, in addition to establishing the cognizable injury and causal connection elements referenced above, the association must also satisfy three additional requirements: (i) the association's members must have standing to sue individually; (ii) the interests that the association seeks to protect must be germane to its purpose; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members. *Kan. Nat'l Educ. Ass'n*, 305 Kan. at 747 (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)).

To meet the first prong of this test, the association must show that it, or at least one

of its members, "has suffered actual or threatened injury i.e., the association or one of its members must have suffered cognizable injury or have been threatened with an impending, probable injury and the injury or threatened injury must be caused by the complained-of act or omission." *Moser*, 298 Kan. at 33. The injury also must be "concrete, particularized, and actual or imminent." *Gannon*, 298 Kan. 1123. In other words, the injury "must affect the [member] in a personal and individual way." *Moser*, 298 Kan. at 35 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). It "cannot be a 'generalized grievance' and must be more than 'merely a general interest common to all members of the public.'" *Gannon*, 298 Kan. at 1123 (quoting *Lujan*, 504 U.S. at 575).

Plaintiffs fall far short of the mark in satisfying the standard for associational standing. Only LWV is a membership organization. (R. II, 235 at ¶ 10). The others are non-membership organizations claiming associational standing on behalf of "constituents." (R. II, 238-246).[2] Lacking any members, the organizations can assert associational standing only if they are seeking to represent persons who are effectively "members," meaning that they possess an "indicia of membership." *Hunt*, 432 U.S. at 344.

In evaluating indicia of membership, the cases construing *Hunt* focus on whether the relationship between the organization and the persons it purports to represent resembles that of a membership organization. *See e.g., Friends of the Earth, Inc. v. Chevron Chem.*

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[2] Although Appleseed claims to be suing "on behalf of its members and constituencies," (R. II, 244 at ¶ 31), it never alleged that it is a membership organization. Nor did it suggest as much in response to Defendants' motion to dismiss. (R. II, 398-400). It merely alleged that it was asserting associational standing on behalf of its *constituents*. (Vol. II at 398-399). In any event, with respect to its challenge to the SVR, Appleseed refers only to its "constituencies." (R. II, 244 at ¶ 31).

Co., 129 F.3d 826, 827-829 (5th Cir. 1997); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 261 F. Supp.3d 99, 103-109 (D. Mass. 2017); *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 157 (2d Cir. 2012). These factors generally include whether the non-members can elect the directors, make budget decisions, and influence the organization's activities or litigation strategies. *Hunt*, 432 U.S. at 344-45. Plaintiffs' associational standing arguments fail to satisfy these criteria. *Cf. Disability Advocates*. *See* 675 F.3d at 157 (rejecting associational standing because organization did not allege that the individuals on whose behalf it was purporting to act had "the power to elect its directors, make budget decisions, or influence [its] activities or litigation strategies").

a. Loud Light, Appleseed, and TILRC do not allege facts supporting associational standing

Loud Light and Appleseed nowhere allege facts sufficient to establish associational standing. Instead, they advocate for an exceptionally broad theory of standing in which an organization could assert any claim on behalf of its "primary beneficiaries." (R. II, 398). They further purport to bring this case on behalf of other unidentified individuals within unidentified "coalitions" or "community partners," (R. II, 398-99), and claim to tailor their activities to those constituents. (R. II, 399). But while Plaintiffs parrot the words "indicia of membership," the Amended Petition's allegations in no way support that representation.

In claiming to bring this case on behalf of their "primary beneficiaries," Loud Light and Appleseed contend that they educate their constituents and encourage them to vote and become involved in the political process. (R. II, 398). Yet despite using the magic words

"indicia of membership," they seek to represent an entirely different category of individuals and groups, none of whom possess the "indicia of membership" that *Hunt* demands. (R. II, 398-99) (citing R. II, 239 at ¶ 19 – Loud Light "builds coalitions within the community to advocate for . . . changes for youth;" R. II, 242 at ¶ 26 Appleseed "works with community partners to understand the root causes of problems, support strong grassroots coalitions, [and] advocates for comprehensive solutions.").

Loud Light and Appleseed also claim they "tailor[]" their activities to their "constituents" so that the organizations can "express their collective views and protect their collective interests." (R. II, 399) (allegedly supported by R. II, 239, 242 at ¶¶ 19, 26). But modifying an organization's activities to more effectively target its audience is not the same as an organization representing its members' interests. Loud Light and Appleseed are not claiming to represent any persons in a membership-like capacity but are instead asserting associational standing on behalf of individuals whom they target for their own organizations' voting goals. In any event, even if such theories could satisfy *Hunt*, those allegations are not in the Amended Petition and the cited paragraphs do not support the assertions. The quoted part of ¶ 19 regarding meeting the "needs" of the community refers to Loud Light and its non-existent members' "fundamental belief" about what "less voter turnout" means. As for Appleseed, it is a mystery what allegation, if any, in ¶ 26 matches this assertion.

The associational standing theory advanced by Loud Light and Appleseed is nearly identical to the third-party standing theory rejected in *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp.3d 158, 189-190 (M.D.N.C. 2020). Perhaps the rejection of the third-party standing theory in that case is the reason Plaintiffs here insist that they are *not*

asserting third-party standing. (R. II, 399). Regardless, neither Loud Light nor Appleseed can assert associational standing on behalf of the unidentified and unaffiliated "constituents" they purport to represent.

In contrast to Loud Light and Appleseed, TILRC at least alleges that it is "operated and governed by people who themselves have disabilities" and its "mission is to advocate for justice, equality and essential services" for people with disabilities. (R. II, 237 at ¶ 15). However, TILRC does not allege that these constituents guide and influence its mission or that they fund the organization. *See Hunt*, 432 U.S. at 344. Plaintiffs intimate that some kind of guidance occurs, (R. II, 399), but the cited allegations in the Amended Petition (R. II, 244 at ¶ 32) do not support that representation. Moreover, even if TILRC pled enough facts to establish an "indicia of membership," it must be asserting claims on behalf of those specific individuals as opposed to disabled voters in general or the electorate as a whole.

b. LWV's claimed associational standing must be limited to its members

As for LWV, while it pled that it has members, it cannot assert associational standing on behalf of "the broader Kansas electorate" or on behalf of non-members whom it registers, educates, or assists. (R. II, 236-39 at ¶¶ 13-18). Thus, to the extent LWV could challenge this claim, its standing would have to be rooted in one of *its own members* having standing to assert the claim. *See Moser*, 298 Kan. at 33. The problem for LWV, and every other organizational Plaintiff in this case is that, as discussed below, not a single individual affiliated with any of the entities (member, constituent, primary beneficiary, or otherwise) would have standing to challenge the constitutionality of the State's SVR at this time.

c. No member/constituent of any of the Plaintiff organizations would have standing to challenge the SVR on her own

Other than LWV, none of the organizational Plaintiffs can demonstrate the type of "indicia of membership" necessary to establish associational standing. But the Court need not delve into Plaintiffs' overly broad membership theories in order to uphold the dismissal of the SVR legal challenges. The claims can be dismissed simply because no organization has alleged that any of its "members" or "constituents" would have standing to bring such suit individually. Indeed, even if every organization had members and properly pled as much, it would not matter for purposes of the SVR because no Plaintiff could show that at least one member possesses standing to challenge the law on her own. All Plaintiffs thus lack associational standing. *See Moser*, 298 Kan. at 33.

Standing requires allegations of a cognizable injury that is causally connected to the challenged conduct. *Gannon*, 298 Kan. at 1123. Yet Plaintiffs have not alleged (nor could they) that any of their members have suffered a past injury in connection with this law. The only thing they say about the past is that, prior to the passage of K.S.A. 25-1124(h), some counties allegedly "failed to contact voters" to cure perceived signature mismatches. (R. II, 269 at ¶ 151). That allegation has nothing to do with the new law, which now *mandates* cure opportunities. More importantly, Plaintiffs' allegation would still not confer standing upon them to attack the amended law. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974), *cited with approval in Baker v. Hayden*, 313 Kan. 667, 678, 490 P.3d 1164

(2021). That is why a plaintiff seeking declaratory or injunctive relief must demonstrate that *she herself* will face a sufficient likelihood of future harm from the challenged policy. *Baker*, 313 Kan. at 678 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

Plaintiffs do allege is possible future injuries, all of which are speculative and none of which are impending. But allegations of speculative, possible future injuries are insufficient to establish a cognizable injury. *Moser*, 298 Kan. at 33. The threatened injury must be "certainly impending." *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiffs' injury allegations are strikingly similar to those rejected as a basis for standing in *Memphis A. Phillip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) ("*MPRI*"). In that case, the plaintiffs challenged a state law requiring signature verification for absentee ballot applications. As here, Plaintiffs cited an "expert" who alleged that it was "highly likely that Tennessee officials will erroneously reject some absentee ballots in the upcoming election." *Id.* at 387. The Sixth Circuit held such "allegations of *possible* future injury are not sufficient" to confer standing on the organizational plaintiffs or their individual members; rather, any injuries must be "*certainly impending*." *Id.* at 386 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The Court added that when "allegations of future injury are based on past human errors," which Plaintiffs here do not even allege, "the plaintiffs face a high bar to demonstrate standing." *Id.* at 386.

Moreover, *MPRI* did not address a larger problem that Plaintiffs face in this case. Not only would Plaintiffs need to allege a certainly impending injury, but that injury would have to be to one of its *members*, not to Kansans generally. LWV merely claims that the SVR is "harmful to [its] members, many of whom are older and are at a significant risk of

having their ballots flagged erroneously as having a mismatched signature." (R. II, 238 at ¶ 17). In other words, LWV is alleging that some unidentified member might someday be subject to an erroneous signature mismatch. That will not cut it for associational standing. Appleseed and TILRC suffer from the same pleading infirmity. (R. II, 238 at ¶ 17; 244 at ¶ 31; 245-46 ¶ 35). Loud Light, meanwhile, does not even attempt to describe how its purported constituents would suffer from this statute. (R. II, 241-42 at ¶¶ 24-25). Yet claiming that members or "constituents" (or even voters generally) *might* erroneously be subject to a mismatched signature in the future on the premise that the SVR is "inherently unreliable" and that mismatches are "inevitable," (R. II, 265-66 at ¶¶ 131-36), is entirely speculative in nature and does not establish an injury-in-fact for standing. This argument also fails to take into account the new mandatory cure opportunities in K.S.A. 25-1124(h).

Plaintiffs argued below that *MPRI* should be distinguished because the court there reviewed evidence provided by the defendant in dismissing the case for lack of standing. (R. II, at 401-02). But the context of why the Sixth Circuit majority did so is critical. In reviewing the denial of a preliminary injunction, the majority highlighted evidence refuting arguments that plaintiffs' expert had presented and that the dissent had raised. *MPRI*, 978 F.3d at 387. But that evidence was in no way essential to the majority's *standing* holding, and the Court's rationale for determining the absence of standing fully applies to this case.

Plaintiffs here do not allege that anyone, let alone a member or constituent, has had a signature improperly mismatched in Kansas. Their basis for standing is nothing more than rank speculation that a mismatch *might* happen in the future due to human error, and that if it does, such mismatch *might* be to one of their members or constituents. Although

past instances of injury would still not provide a basis for standing, *see supra*, the absence of any such allegation is telling. Indeed, Kansas has had a similar signature-matching law since 2012 for advance ballots applications; that statute includes the same verification "by electronic device or by human inspection" as the statute being challenged. 2011 Kan. Sess. Laws Ch. 56, § 2(e) (amending K.S.A. 25-1122(e)). Kansas has also required county election officials to permit voters who cast an advance ballot by mail to cure mismatched signatures since 2020. 2019 Kan. Sess. Laws. Ch. 36, § 1 (amending K.S.A. 25-1124(b)). Yet despite one of the laws being in effect for more than eight years, Plaintiffs have not alleged a single individual who suffered the kind of mismatch they insist is "inevitable."

The fact that this appeal is from a motion to dismiss also does not help Plaintiffs. The issue is not about facts pled being viewed in the light most favorable to Plaintiffs. The issue is Plaintiffs' failure *to allege any facts at all* demonstrating a concrete and imminent injury sufficient to meet their burden to establish standing. Speculative claims of future hypothetical injuries about hypothetical errors by election workers do not allege a concrete injury that permits standing. *Moser*, 298 Kan. at 33; *MPRI*, 978 F.3d at 386.[3]

3. Plaintiffs lack Organizational Standing to challenge the SVR

LWV, Loud Light, and TILRC also claim organizational standing to challenge the SVR law.[4] They allege that they will now have to divert time and resources to develop and

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[3] If, as Defendants expect, Plaintiffs cite the same inapposite cases in their reply brief as they did in the district court, Defendants urge the Court to refer to Defendants' analysis below as to why those cases have no bearing here. (*See* R. III, 59).

[4] Appleseed asserts no allegations that would support organizational standing on the signature verification requirement claims, and Plaintiffs appear to concede that Appleseed has no standing to assert such claims on that theory. (R. II, 395-97).

execute programs to educate voters and ensure that the law does not result in voter disenfranchisement. (R. II, 238 at ¶ 17; 241-42 at ¶ 24; 245-46 at ¶ 35). But Plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 402. For the same reasons Plaintiffs lack associational standing to challenge this statute, they also lack organizational standing.

The closest any Plaintiff comes to alleging an organizational standing injury is Loud Light, which states that it "organizes ballot cure programs, contacting voters whose ballots are challenged . . . including for mismatched signatures, and educating them on how to cure their ballots." (R. II, 240 at ¶ 20). Loud Light claims that because "counties will *now* be required to reject any signatures that an official believes is not a match," there will be "a greater number of mismatches," which will force it "to expend more resources." (R. II, 241-42 at ¶ 24) (emphasis added). This argument is no different than the wholly speculative theory it advanced for purposes of associational standing, i.e., that potential signature mismatches by unidentified election officials, possibly involving its members or "constituents," at some unknown date in the future may require them to spend more resources. A plaintiff cannot obtain organizational standing by simply presenting a "repackaged version of [its] first failed theory of [associational] standing." *Clapper*, 568 U.S. at 416.

With regard to LWV and TILRC, they allege no facts as to how this law will cause any legally cognizable injury to them. They merely claim that the SVR will necessitate that they "expend additional resources . . . to develop and execute programs to ensure that eligible voters are educated about and ultimately are not disenfranchised," and that they otherwise would not spend that money. (R. II, 238 at ¶ 17; 246-47 a ¶ 35). That statement

is purely conclusory. It contains no actual *factual allegations* as to how the SVR will require the organizations to spend more resources, beyond the same rank speculation they rely on to try to engineer associational standing. Further, given that these programs have been part of Plaintiffs' respective missions for many years, (R. II, 235-36 at ¶ 11; 240 at ¶ 20; 244-45 at ¶ 32), the fact that they might infuse additional resources into such activities does not mean that they have suffered an injury. *See NAACP v. City of Kyle, Tex.*, 626 F.3d 233-238-39 (5th Cir. 2010) (diversion of resources to activities cannot support organizational standing if such activities do not differ from the plaintiff's routine activities or projects). This is all the more true in this case considering that signature verification has been a requirement in Kansas for obtaining advance mail ballots for nearly a decade, and the State has also required for two years that voters be afforded cure opportunities for mismatched signatures on ballot applications and ballot envelopes.

In sum, LWV, Loud Light, and TILRC lack organizational standing because they have not alleged a concrete injury to their organizations. Their entirely conclusory claims of diverting or spending additional funds are predicated on conjecture, and the speculative future harms they identify are self-inflicted injuries based not on the statute, but on their own subjective fears. *See Clapper*, 568 U.S. at 416. This does not give rise to standing.

C. The district court properly held that Plaintiffs' Amended Petition failed to state a claim with respect to its challenges to the SVR in K.S.A. 25-1124(h)

1. Standard of Review

Historically, the Kansas Supreme Court has held that, in reviewing the legal sufficiency of a claim in response to a motion to dismiss under K.S.A. 60-212(b)(6), a court

"must decide the issue based only on the well-plead facts and allegations, which are generally drawn from the petition," and must also "resolve every factual dispute in the plaintiff's favor." *Halley v. Barbabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001) (citations omitted). The appellate court then reviews a district court's decision granting a motion to dismiss under a *de novo* standard. *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438 (2008).

But recent developments in the federal standards for evaluating motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the language of which is identical to K.S.A. 60-212(b)(6), counsel in favor of applying the same federal standard to this action. Indeed, when first articulating the standard governing motions to dismiss in state court, our Supreme Court expressly relied on the then-applicable federal standard, noting that K.S.A. 60-212(b)(6) had been patterned after its federal counterpart. *Monroe v. Darr*, 214 Kan. 426, 430, 520 P.2d 1197 (1974); *accord Back-Wenzel v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194 (2005) ("[B]ecause the Kansas Rules of Civil Procedure are patterned after the federal rules, Kansas appellate courts often turn to federal case law for persuasive guidance."). The one time the Kansas Supreme Court was asked to adopt the federal standard, it declined to do so only because the issue had not been properly preserved on appeal. *See Williams v. C-U-Out Bonds, LLC*, 310 Kan. 775, 785, 450 P.3d 330 (2019).

Conformity with the notice-pleading requirements of K.S.A. 60-208(a)(1) are enforced by way of a motion filed under K.S.A. 60-212(b)(6). The U.S. Supreme Court – in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) – reinterpreted Federal Rule 8(a)(2), the counterpart to Kansas Rule 8(a)(1), and abandoned the long-held rule "that a complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Instead, the Court in *Twombly* and *Iqbal* directed that a two-step inquiry be undertaken. First, the court must disregard all recitals in the complaint that are mere legal conclusions. Second, the court must accept assertions in a complaint as true, for the purposes of a motion to dismiss, only if the trial judge finds those factual assertions plausible as a matter of judicial common sense.

In evaluating whether this standard is met, Plaintiffs' Petition must contain "enough facts to state a claim to relief that is plausible on its face," and Plaintiffs must "nudge [their] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Petition also must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 550. A claim has "facial plausibility" only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan-Arapahoe, LLP v. Bd. of Cnty. Com'rs of Cnty. of Arapahoe, Colo.*, 633 F. 3d 1022, 1025 (10th Cir. 2011). But this general rule does not apply where a plaintiff's allegations are mere legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). As the Supreme Court observed, "[w]here a Complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted).

To be clear, Defendants believe — as did the district court (R. V, 61) — that Plaintiffs' claims must be dismissed under either the historical Kansas standard or the revised federal standard now being advocated. But re-calibrating the state and federal standards is in order.

2. Analysis

Plaintiffs attack the SVR as violative of their right to vote, equal protection, and due process. The claims are meritless.

a. *Anderson-Burdick* provides the proper standard of review

Although Kansas appellate courts have never articulated the legal standard for evaluating a constitutional challenge to an election integrity statute, there is abundant federal and state case law on the subject. Where a statute revolving around the mechanics of the electoral process — as the SVR surely does — implicates speech, voting, or association rights, courts invoke the *Anderson-Burdick* standard. *See Anderson v. Celebrezze*, 460 U.S. 780 (1982); *Burdick v. Takushi*, 504 U.S. 428 (1992); *accord DSCC v. Pate*, 950 N.W.2d 1, 6-9 (Iowa 2020); *DSCC v. Simon*, 950 N.W.2d 280, 291-96 (Minn. 2020); *Fisher v. Hargett*, 604 S.W.3d 381, 399-405 (Tenn. 2020); *Arizonans for Second Chances v. Hobbs*, 471 P.3d 607, 619-25 (Ariz. 2020). This test utilizes a sliding scale under which the court assesses the burden that a State's regulation imposes on a plaintiff's constitutionally protected rights. The test recognizes that, when a State invokes its constitutional authority to regulate elections to ensure that they are fair and orderly, the resulting restrictions will "inevitably affect – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Those burdens, how-

ever, "must necessarily accommodate a State's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party*, 892 F.3d 1066, 1077 (10th Cir. 2018). Unless the burdens are severe, the State's "important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions" on election procedures, *Anderson*, 460 U.S. at 789, and the law is evaluated under a standard akin to rational basis. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016).

Plaintiffs dismiss the *Anderson-Burdick* balancing test as insufficiently protective of their rights under the Kansas Constitution and advocate for a strict scrutiny standard that they claim is necessitated by *Hodes & Nauser v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 46 (2019). (Br. 19-21, 34). Plaintiffs read that case far too broadly.

The Court in *Hodes & Nauser* confronted a constitutional challenge to an abortion statute under Section 1 of the Kansas Constitution's Bill of Rights. Parsing the scope of the "inalienable natural rights" language in that provision, the Court held that the explicit protection of "natural rights" in Section 1 afforded broader safeguards (in particular, to the right of personal autonomy) than the Federal Constitution's Fourteenth Amendment. 309 Kan. at 624-25. The Court reached that conclusion only after taking a deep dive into both the historical roots of Section 1 and the understanding at common law as to the meaning of a "natural right" in this context. *Id.* at 622-72.

Plaintiffs seek to short-circuit our Supreme Court's detailed analysis by suggesting heightened scrutiny applies whenever a statute touches on fundamental rights, regardless of the context of the asserted right. That is not the law. In marked contrast to Section 1's "natural rights" language discussed in *Hodes & Nauser*, or Section 5's "inviolate" right to

a jury trial elucidated in *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 442 P.3d 509 (2019), nothing in our constitution or history could be construed as limiting the ability of the legislature to enact reasonable measures to ensure the fairness and efficiency of the election process. Indeed, our constitution *explicitly directs* the legislature to adopt voter integrity measures of the type at issue here. *See* Kan. Const., Art. 5, § 4 ("The legislature shall provide by law for proper proofs of the right of suffrage.").

While Section 1's reference to "inalienable natural rights" has been held to confer broader rights in the context of personal autonomy rights involving abortion, nothing in that section speaks to voting. Considering that our Bill of Rights and Article 5, § 4 were both adopted at the same time during the Wyandotte Constitutional Convention in 1859, it makes little sense to argue that Section 1 was intended to *narrow* the powers conferred by Article 5, § 4. After all, our constitution was adopted on the heels of the Kansas-Nebraska Act of 1854, which precipitated the Bleeding Kansas era in which thousands of Missouri citizens flooded the State in an effort to influence the "popular sovereignty" elections and extend slavery to this region.[5] Concerns about voter fraud and ineligible voters were at the forefront of framers' minds. As Kansas (and later U.S.) Supreme Court Justice Brewer noted in describing the broad reach of Article 5, § 4, "Obviously, what was contemplated was the ascertaining beforehand by proper proof of the persons who should, on the day of election, be entitled to vote, and any reasonable provision for making such ascertainment must be upheld." *State v. Butts*, 31 Kan. 537, 2 P. 618, 621 (1884).

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[5] *See* Jason Roe, *The Contested Election of 1855*, K.C. Pub. Library Digital History, *available* at https://civilwaronthewesternborder.org/blog/contested-election-1855.

As for Section 2 of our Bill of Rights, the exact scope of that provision has never been a model of clarity. But the Kansas Supreme Court has made clear that Section 2 does *not* extend to voting. *See Buffington v. Grosvenor*, 46 Kan. 730, 27 P. 137, 139 (1891) ("The privilege of voting . . . [does] not fall within the privileges and immunities of general citizenship.").

Regarding Plaintiffs' equal protection claim, the Supreme Court has also held that the U.S. Constitution's Fourteenth Amendment and Section 2 of the Kansas Constitution's Bill of Rights provide the same protection when it comes to equal protection of the laws. *Rivera v. Schwab*, No. 125,092, __ Kan. __ (slip op. at 18-22) (June 21, 2022); *Miami Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315, 255 P.3d 1186 (2011). And *Anderson-Burdick* balancing is the test used to analyze election-related, equal protection claims. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235 (5th Cir. 2020); *Fish v. Schwab*, 957 F.3d 1105, 1122 (10th Cir. 2020); *Husted*, 834 F.3d at 626.

The due process protections found in Section 18 of the Kansas Constitution's Bill of Rights have similarly been held to provide the same procedural safeguards as the Federal Constitution. *See State v. Boysaw*, 309 Kan. 526, 536-37 439 P.3d 909 (2019) ("[N]othing in the history of the Kansas Constitution or in our caselaw . . . would suggest a different analytic framework for questions of fundamental fairness [or] due process."). Indeed, the Kansas Supreme Court has, time and again, construed Section 18 as being "coextensive" with its Fourteenth Amendment federal counterpart. *Id.* at 537-38 (collecting cases).

b. Right to Vote

i. The SVR does not severely burden Plaintiffs' right to vote

Even accepting all of the allegations in the Amended Petition as true, the burden of K.S.A. 25-1124(h)'s SVR on Plaintiffs and their "members," to the extent one exists at all, is so *de minimis* that it renders it unnecessary to proceed past the motion to dismiss stage. As the Fifth Circuit observed:

> Signature-verification requirements, like photo-ID requirements, help to ensure the veracity of a ballot by "identifying eligible voters." Signature-verification requirements are even less burdensome than photo-ID requirements, as they do not require a voter "to secure . . . or to assemble any documentation. True, some voters may have difficulty signing their names on ballots. But in *Crawford*, even though some voters might find it "difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification," that difficulty did not render the photo-ID law a severe burden on the right to vote.
>
> Even if some voters have trouble duplicating their signatures, that problem is "neither so serious nor so frequent as to raise any question about the constitutionality" of the signature-verification requirement. No citizen has a Fourteenth Amendment right to be free from the usual burdens of voting. And mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect.

Richardson, 978 F.3d at 236-37 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008)). Kansas also mitigates any potential burden the SVR might impose on voters in a number of ways. First, the State mandates that county election officials contact any voter whose advance ballot appears to contain a signature mismatch (or missing signature) and provide her an opportunity to cure the deficiency. K.S.A. 25-1124(b). Second, the statute wholly exempts disabled individuals from its reach to the extent their disability prevents them from signing the ballot or having a verifiable signature on file with

the county election office. *Id.* at 25-1124(h). Third, directly refuting much of Plaintiffs' claimed harms, the statute allows any voter with an illness or disability that prevents her from signing the ballot to request assistance from a third-party in marking the ballot. *Id.* at 25-1124(c), (e). Fourth, for individuals who are concerned that they will be unable to provide a matching signature, the State allows them to vote in person either on Election Day itself or during an extensive advance voting period. These mitigation measures negate even the conjectural burdens that Plaintiffs allege the SVR poses. Identical measures in other states have been deemed sufficient to render the verification requirements a non-severe burden. *See Richardson*, 978 F.3d at 237; *MPRI*, 978 F.3d at 388.

Furthermore, the proper judicial inquiry is *not* on the burden to a handful of individual voters who might be adversely affected by the statute; it is on the electorate "as a whole." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021); *cf. Crawford*, 553 U.S. at 200-03 (rejecting facial constitutional challenge to voter ID law despite burden it might impose on certain segments of population). Reinforcing this point in turning away a constitutional challenge to a signature verification law similar to the one here, the Fifth Circuit noted, "If the Court were 'to deem ordinary and widespread burdens like these severe' based solely on their impact on a small number of voters, we 'would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.'" *Richardson*, 978 F.3d at 236 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)).

Plaintiffs contend that Defendants' emphasis on the *de minimis* impact that the SVR will have on voters is not an appropriate argument at the motion to dismiss stage. (Br. 35-

37). The problem with Plaintiffs' argument is that they have raised only a *facial* attack on the statute. "A facial challenge is an 'attack on a statute itself as opposed to a particular application' of that law." *State v. Hinnenkamp*, 57 Kan. App.2d 1, 4, 446 P.3d 1103 (2019) (quoting *Los Angeles v. Patel*, 576 U.S. 409, 415 (2015)). In contrast to as-applied claims, *there are no necessary findings of fact in a facial challenge. Id.* With facial attacks, "courts must interpret a statute in a manner that renders it constitutional if there is any reasonable construction that will maintain the Legislature's apparent intent." *Id.* Such claims are disfavored and are generally resolved early in the proceeding because they typically rest on speculation, run contrary to the principle of judicial restraint, and threaten to short-circuit the democratic process by preventing laws representing the will of the people from being implemented. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021).[6]

Plaintiffs argue on appeal that the district court ignored their factual allegations. (Br. 36). Not so. Nowhere in the Amended Petition do Plaintiffs allege that any particular voter had a ballot rejected due to a signature mismatch under this law. The most Plaintiffs allege is that, based on Loud Light's ballot cure program in past elections, "election officials in counties that have previously engaged in signature matching have often failed to contact voters, let alone contact them with sufficient time for those voters to cure any perceived signature mismatch," thus "leav[ing] the fate of many people's votes to depend on

[6] Even if Plaintiffs had not raised a facial challenge, dismissal would still be appropriate. *See Tedards v. Ducey*, 951 F.3d 1041, 1067-68 (9th Cir. 2020) (affirming dismissal of constitutional attack on election statute evaluated under *Anderson-Burdick* standard).

the availability of volunteers who work to help track down voters who would otherwise be disenfranchised." (R. II, 269 at ¶ 151). And they add that election officials might not know if a voter's inability to apply a proper signature is due to disability. (R. II, 267-68 at ¶ 146). These allegations, which totally ignore the cure mechanisms in K.S.A. 25-1124(b), and amount to "people might be harmed because election officials will not follow the law," do not suffice to survive a motion to dismiss.

The law affords a strong presumption of regularity to all government functions. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001); *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *cf. Sheldon v. Bd. of Educ.*, 134 Kan. 135, 4 P.2d 430, 434 (1931) ("|P|ublic officers . . . are presumed to be obeying and following the law in the discharge of their official duties[.]"); *Kosik v. Cloud Cnty. Comm. Coll.*, 250 Kan. 507, 517, 827 P.2d 59 (1992) (recognizing "presumption of regularity" in Kansas). "[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). To suggest that the SVR process is constitutionally suspect because county election officials might not follow the law (e.g., contacting voters to provide them an opportunity to cure a signature-related deficiency) would require allegations far more specific than anything Plaintiffs have asserted here.

What is left in Plaintiffs' Amended Petition is nothing more than rank speculation. Plaintiffs allege that signature verification by laypersons is inherently unreliable (R. II, 265 at ¶ 131), that certain segments of the population are likely to have greater signature variability (*id.* at ¶ 135), and that it is "inevitable that Kansas election officials who choose to

inspect signatures by hand will erroneously determine voters' signatures are mismatched, leading to wrongful rejection of legitimate ballots and the disenfranchisement |of| hundreds of eligible voters." (R. II, 266 at ¶ 136). This is insufficient pleading to survive a motion to dismiss. Were the rule otherwise, the "cognizable injury" element of the test for standing in Kansas would be rendered a dead letter. *See Gannon*, 298 Kan. at 1123 ("a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.").

Moreover, the burden of a nondiscriminatory law is analyzed *categorically* under *Anderson-Burdick*, without consideration of "the peculiar circumstances of individual voters." *Crawford*, 553 U.S. at 206 (2008) (Scalia, J., concurring); *cf. id.* at 190 (plurality opinion) (noting that *Burdick* held that reasonable, nondiscriminatory election law imposed only a minimal burden despite preventing "a significant number of voters from participating in Hawaii elections in a meaningful manner") (cleaned up); *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020) ("One less-convenient feature does not an unconstitutional system make."); *Memphis A. Philip Randolph Instit. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) (same).

Every federal appellate court save one to consider constitutional challenges to state election-related signature verification requirements has rejected those claims. *Richardson v. Texas Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *MPRI*, 978 F.3d at 378; *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008). The one outlier, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019), is wholly distinguishable from this case, (R. V, 73), and was later criticized by the Eleventh Circuit itself, which questioned the case's

precedential validity. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) ("Nor need we decide whether *Lee* – which was issued by a motions panel instead of a merits panel – is even binding precedent.").

The Kansas Supreme Court has also held that a challenged statute "comes before the court cloaked in a presumption of constitutionality." *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989). Plaintiffs insist that *Hodes & Nauser* rendered this presumption no longer valid. (Br. 18-21). As previously discussed, Plaintiffs read that case much more broadly than is warranted. In fact, the Supreme Court reiterated the soundness of this presumption last year in *Matter of A.B.* *See* 313 Kan. 135, 138, 484 P.3d 226 (2021) ("This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction.") (quoting *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015)). A plaintiff cannot define a right at the highest level of generality and then argue that any statute touching on that right – however indirectly – is inherently suspect. Here, then, the proper inquiry is not on the right to vote, but the right to vote by mail. And there is nothing fundamental about the right to vote by mail. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-09 (1969) (no constitutional right to vote absentee).

But even if this presumption is disregarded, it still cannot be the case that the State is constitutionally precluded from imposing a SVR on advance ballots in the absence of meticulous standards that would satisfy a forensic accountant. After all, the only way to verify the identity of the person casting an advance ballot is by comparing her signature

with the one on file in the voter registration records. Imposing the kind of standards that Plaintiffs insist are necessary would fly in the face of *Burdick* and grind election offices to a halt. What Plaintiffs are proposing would also undermine Kansas' county canvassing board process. The impact would be not just revolutionary, but devastating; it would be antithetical to the way that nearly every state administers its elections.

ii. State's Strong Regulatory Interests Justify the Signature Verification Requirement

The next prong of the *Anderson-Burdick* test looks to the State's regulatory interests in the challenged statute. Kansas has a number of well-recognized interests in requiring that signatures on advance ballots are verified before being counted. The primary interest is in avoiding fraud. As the Supreme Court recently observed, although "every voting rule imposes a burden of some sort," a "strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich*, 141 S. Ct. at 2340. The risk of voter fraud is particularly acute with mail-in voting. *Sawyer v. Chapman*, 240 Kan. 409, 416, 729 P.2d 1220 (1986) ("[I]t must be conceded that voting by mail increases the . . . opportunity for fraud."); *see also Crawford*, 553 U.S. at 195-96; *Richardson*, 978 F.3d at 239; Comm'n on Federal Elections Reform, Building Confidence in U.S. Elections ("Baker-Carter Commission"), *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").

Plaintiffs take the Legislature to task for not providing "evidence of fraud or other issues that would support requiring signature matching in any of the counties, much less statewide." (R. II, 254 at ¶76). But there is no such requirement:

> [W]e do not force states to shoulder the burden of demonstrating empirically the objective effects of election laws. States may respond to potential deficiencies in the electoral process with foresight rather than reactively. States have thus never been required to justify their prophylactic measures to decrease occasions for voter fraud.

Richardson, 978 F.3d at 240 (quoting *Munro v. Socialist Workers Party*, 497 U.S. 189, 195 (1986)), and *Tex. LULAC v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020)); *accord Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.")

Kansas also has a powerful interest in promoting the orderly administration of all elections. This interest was expressly endorsed by the Supreme Court in *Doe v. Reed*, 561 U.S. 186 (2010). The Court there noted:

> [T]he State's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is essential to the proper functioning of a democracy. (*Id.* at 198).

In sum, Plaintiffs have demonstrated no burden to voting whatsoever from the SVR. Even if they could show that some voters' advance ballots were previously rejected due to a signature mismatch and that previous cure opportunities in the law proved inadequate for those individuals — which they clearly have not alleged, and which *Lyons* would operate as a standing roadblock anyway — the burden on the electorate "as a whole" would still be

minimal. And the State's regulatory interests are strong enough to easily outweigh such minor burden under the rational basis review dictated by *Anderson-Burdick*. That these Plaintiffs might have adopted a different law or drawn up a different regulatory scheme is beside the point. What Plaintiffs are asking the Court to do in this facial challenge is to micromanage the State's electoral regulatory process and second-guess the Legislature's policy decisions. With respect, that is not the Court's role.

c. Equal Protection

Plaintiffs further attack the SVR on equal protection grounds, claiming that the lack of standards for judging signatures confers too much discretion on election officials and provides no uniformity for each of the State's 105 counties. (R. II, 254-55 at ¶¶ 73-77). They suggest that accurate signature matching is a difficult task often susceptible to error. (R. II, 265-66 at ¶¶ 131-36). Citing *Bush v. Gore*, 531 U.S. 98 (2000), they maintain that the law's allowance of no, or at least different, standards in counties across the State violates their equal protection rights. (R. II, 279 at ¶¶ 206-08).

Plaintiffs' argument fails to take account of the new regulation that the Secretary of State recently adopted to provide more consistent standards across the State. *See* K.A.R. 7-36-9. That regulation also requires training of any election official performing signature verification responsibilities. *Id.* at 7-36-9(f).

In any event, the Ninth Circuit rejected a similar constitutional challenge to a signature verification regulatory scheme in *Lemons*, 538 F.3d at 1105-07. The court of appeals noted that the Supreme Court went to great lengths in *Bush* to underscore the narrow scope of its ruling ("limited to the present circumstances") and found an Equal Protection Clause violation

"only because it was a *court-ordered* recount." *Id.* at 1106 (quoting *Bush*, 531 U.S. 106-07, 109) (emphasis added). In addition, the Ninth Circuit held that the requirement that referendum signatures be matched to an individual's signature on file with the county registration office in and of itself represented a sufficiently uniform standard to survive an equal protection challenge. *Id.* The fact that a few signatures might have been rejected in error was deemed to be little more than "isolated discrepancies" that did "not demonstrate the absence of a uniform standard." *Id.* After all, individual counties administer elections in every state and "[a]rguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected." *N.E. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016). It is also inevitable – human nature being what it is – that certain election officials will do a better job than others. But that is simply not constitutionally significant. *See Lemons*, 538 F.3d at 1107.

Given that the statute only took effect on July 1, 2021 – after Plaintiffs filed their original Petition – Plaintiffs have not, and could not, allege any evidence of improperly rejected ballots. But the fact that similarly situated persons may not be treated identically is not sufficient to establish an equal protection violation. The law requires neither absolute precision nor perfect symmetry among the State's 105 counties on this issue. Every state's electoral system is administered on a county-by-county basis. To suggest that *de minimis* deviations from one county to another – particularly on matters that involve human judgment and discretion – trigger Equal Protection Clause violations would be unprecedented. As noted, it would totally upend the county canvassing procedures. Neither the federal nor the Kansas constitution requires anything so radical. The bottom line is that Plaintiffs'

facial equal protection attack on the SVR fails to state a claim.

d. Due Process

Plaintiffs next contend that the law's failure "to provide any standard by which county election officials are to evaluate a voter's ballot" constitutes a violation of voters' due process rights. (R. II, 284 at ¶¶ 229-230). The flaw in this claim, in addition to failing to take into account the new regulation, *see* K.A.R. 7-36-9, is that the right to vote does not implicate any property or liberty interest protected by the Fourteenth Amendment's Due Process Clause or its apparent analogue in Section 18 of the Kansas Constitution's Bill of Rights. "In the absence of a protected property or liberty interest, there can be no due process violation." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 544, 216 P.3d 158 (2009) (citing *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cnty. Kansas City*, 265 Kan. 779, 809, 962 P.2d 543 (1998)).

At least with respect to the federal Constitution, a "liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation of interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests arising out of the U.S. Constitution encompass "the right to contract, to engage in the common occupations of life, to gain useful knowledge, to marry and establish a home to bring up children, to worship God, and to enjoy those privileges long recognized as essential to the orderly pursuit of happiness." *Richardson*, 978 F.3d at 230 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 546, 572 (1972). State-created liberty interests, on the other hand, are "generally limited to freedom from restraint." *Id.* (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

While the right to vote may be a fundamental right implicating the Equal Protection Clause, it is *not* a constitutionally-protected liberty interest. *Id.* at 231; *accord New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *LWV v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008). And invoking a liberty interest in the context of an SVR is even more of a stretch. Having held that there is not even a constitutional right to vote via absentee ballot, *see McDonald*, 394 U.S. at 807-09, it is unfathomable that the Supreme Court would find a liberty interest in avoiding a SVR in connection with such ballots. In short, Plaintiffs' due process rights are not at stake here and this claim must be dismissed.[7]

D. The district court did not abuse its discretion in denying as moot Plaintiffs' motion for a temporary injunction against the SVR

For the same reasons set forth in Parts III.A.4 and III.A.5., *supra*, which Defendants specifically incorporate here, the district court properly denied Plaintiffs' motion for a temporary injunction against the signature verification requirement.

E. The district court properly held that Plaintiffs' Amended Petition failed to state a claim with respect to its challenges to the BCRs in K.S.A. 25-2437

1. Standard of Review

The same standard of review applicable to Plaintiffs' signature verification claims applies to their claims challenging the BCRs in K.S.A. 25-2437. *See* Part III.C.1, supra.

2. Analysis

Plaintiffs allege that the BCRs violate their free speech and association rights and

[7] The cases Plaintiffs cite in opposition to this point, (Br. 40-41), have their roots in *Raetzel v. Parks Bellemont Absentee Election Bd.*, 762 F. Supp.2d 1354 (D. Ariz. 1990), the flaws in which were explained by the Fifth Circuit in *Richardson*, 978 F.3d at 230-32.

the voting rights of their members and constituents. All of those causes of action were properly dismissed.

a. Free Speech/Association

Plaintiffs argue that K.S.A. 25-2437 implicates free speech and association rights because the statute targets core political speech. (R. II, 275-76 at ¶¶ 184-88). But the law impacts neither speech nor expressive conduct. The statute clearly does not prevent any individual from speaking to another person, nor does it impose any content restriction on such speech. And while certain conduct enjoys constitutional protection, "only conduct that is 'inherently expressive' is entitled to First Amendment protection." *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("FAIR")). In assessing whether conduct has "sufficient 'communicative elements' to be embraced by the First Amendment, courts look to whether the conduct shows an 'intent to convey a particular message' and whether 'the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Courts have consistently held that "collecting and returning ballots of another voter, do not communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny." *DCCC v. Ziriax*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020); *accord Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting argument that act of collecting early ballots is expressive conduct that conveys any message about voting; concluding that this type of conduct cannot reasonably be construed "as conveying a symbolic message of any sort"); *Lichtenstein v. Hargett*, 489 F. Supp.3d 742, 765-77 (M.D.

Tenn. 2020); *New Ga. Project v. Raffensperger*, 484 F. Supp.3d 1265, 1300-02 (N.D. Ga. 2020) (same); *Steen*, 732 F.3d at 393 (collecting voter registrations isn't protected speech); *Middleton v. Andino*, 488 F. Supp.2d 261, 305-06 (D.S.C. 2020).[8] Although a handful of federal district courts — acting against the heavy weight of contrary authority — have held the First Amendment to be implicated where a third-party endeavors to distribute absentee ballot applications to voters,[9] we are unaware of *any* case in which a court has taken the additional step to find that the *collection and return of a voter's completed ballot* somehow constitutes expressive conduct on the part of the third party.

As the party invoking the First Amendment (or its Kansas Constitution counterpart), Plaintiffs have the burden of proving its applicability, *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and they simply cannot do so. *See Simon*, 950 N.W.2d at 294-96 (rejecting free speech and association attacks on statute that limited third-parties from collecting and returning more than three absentee ballots of other voters).

The Supreme Court in *FAIR* "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 547 U.S.

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[8] In *Meyer v. Grant*, 486 U.S. 414 (1988), upon which Plaintiffs heavily rely, (Br. 23-25), referendum circulators presented a petition to voters for signature. The *presentation itself conveyed a political message*, and the voter, by signing, expressed agreement therewith. Restricting those interactions thus limited the quantum of speech and the message that could be communicated. *Id.* at 421-23. There are no such limitations with K.S.A. 25-2437. Plaintiffs are free to share any message they want with an unlimited number of voters; they simply cannot return the completed ballots of more than ten voters. *See Simon*, 950 N.W.2d at 294-96 (*Meyer* test has no applicability in constitutional challenge to state restriction on third-party assistors seeking to return absentee ballots of other voters).

[9] In the latest case rejecting this theory, the court in *VoteAmerica v. Raffensperger*, No. 21-cv-1390, 2022 WL 2357395, at *8-9 (N.D. Ga. June 30, 2022) held that the act of distributing absentee ballot applications to voters by a third-party is not expressive conduct.

at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The Court has "extended First Amendment protection only to conduct that is inherently expressive." *Id.* at 66. And where the expressive component of an individual's "actions is not created by the conduct itself but by the speech that accompanies it," that "explanatory speech is . . . strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under" the First Amendment. *Id.* Were the rule otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

This law in no way prohibits Plaintiffs from engaging in any interactions with voters regarding advance ballots. Plaintiffs are free to encourage voters to request an advance ballot, to provide voters an advance ballot application, to help voters complete the ballot (with the proper attestation mandated by K.S.A. 25-1124(e)), and to return a completed application to the county election office. There is no restriction whatsoever on the message or form thereof that Plaintiffs may share with voters. Nor is there any limit on how many voters Plaintiffs can interact with. The *only* thing being limited by the BCR is the number of completed applications that a third-party may return on behalf of other voters during a particular election cycle (a mechanism designed to stave off the kind of fraud that jurisdictions across the U.S. have experienced with ballot harvesting, some as recently as last month). *See* Michael Lee, "*Texas woman pleads guilty on 26 counts of voter fraud over alleged vote harvesting operation*," Yahoo News (June 19, 2022), available at https://news.yahoo.com/texas-woman-pleads-guilty-26-141213898.html.

Given that the collection and return of another person's advance ballot is nothing more than non-expressive conduct, the State is free to regulate it as part of a legitimate,

non-discriminatory election process, and that law is subject only to rational basis scrutiny. *See Steen*, 732 F.3d at 392; *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (law that involves neither a "fundamental right" nor a "suspect" classification is constitutionally valid if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

The same principle governs Plaintiffs' freedom of association theory (*which they do not address on appeal and have thus waived*). The Supreme Court has recognized a First Amendment right "to associate for the purpose of speaking," which it characterizes as a "right of expressive association." *FAIR*, 547 U.S. at 68 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000)). This right is rooted in the fact that the "right to speak is often exercised most effectively by combining one's voice with the voices of others." *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). But there is no impairment of Plaintiffs' speech or association rights. Nothing in the BCRs limit Plaintiffs' ability to speak or associate with anyone about anything at any time. The statute's reach is strictly confined to *non-expressive conduct*. This is a purely legal issue and Plaintiffs cannot prevail on it.

But even if some minimal expressive conduct were implicated by K.S.A. 25-2437, *Anderson-Burdick* would still apply. The Kansas Supreme Court has held that Section 11 of our Bill of Rights is "generally considered coextensive" with the First Amendment when it comes to free speech rights, and, like the First Amendment, it "is not without certain limitations." *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). Moreover, the challenged statute must be considered and construed as part of an election-related regulation. *See State Bd. of Nursing v. Ruebke*, 259 Kan. 599, Syl. ¶ 12, 913 P.2d 142 (1996)

("A statute must be interpreted in the context in which it was enacted and in light of legislature's intent at that time."). If the contrary were true, the State's authority to enact legislation regulating the electoral process would be neutered by the threat of a plaintiff raising a free speech or association challenge. Eschewing deference to the State on such matters – which is effectively what Plaintiffs advocate here by insisting that *any* state regulation of the electoral process that might touch on an individual's speech, association, or voting rights (in other words, *virtually all regulations involving the electoral process*) must be subjected to strict scrutiny – would greatly compromise the State's ability to ensure the integrity, fairness, efficiency, and public confidence in its elections.

As the Court noted in *Burdick*, while "voting is of the most fundamental significance under our constitutional structure," that does not mean "the right to associate for political purposes through the ballot [is] absolute." 504 U.S. at 433 (citations omitted). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections" lest elections be reduced to chaos. *Id.*

Plaintiffs take issue with the State's regulatory interests in adopting the new BCRs, suggesting there is a factual dispute on the issue. (Br. 28). This argument ignores the significance of the *facial* nature of their constitutional challenge, *see* Part III.C.2.b, *supra*, and unduly seeks to elevate the State's burden of proof. What is presented is a *legal*, not *factual*, question. For reasons that are foundational to the division of powers among the coordinate branches, legislative choices are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Comme'ns, Inc.*, 508 U.S. 307, 315 (1993). As the Kansas Supreme Court noted,

even if the State's justification for a statute amounts to "an after-the-fact rationalization which was never espoused by the legislature," it is entirely irrelevant. *Injured Workers of Kan. v. Franklin*, 262 Kan. 840, 862, 942 P.2d 591 (1997).

It certainly was not necessary for the legislature to show that the State had been victimized by systematic fraud from ballot harvesting before enacting certain prophylactic measures to minimize the chance of harm. *See Munro*, 479 U.S. at 195 ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."); *id.* ("State's political system [need not] sustain some level of damage before the legislature [can] take corrective action."). In any event, the dangers that ballot harvesting activities can inflict on election integrity are well established. The Supreme Court, in upholding the legality of a ballot harvesting law far more restrictive than the one at issue here against a Voting Rights Act challenge, underscored that "[f]raud is a real risk that accompanies mail-in voting even if [a state has] had the good fortune to avoid it." *Brnovich*, 141 S. Ct. at 2348; *see also Crawford*, 553 U.S. at 195-96 ("the risk of voter fraud" particularly with "absentee ballots" is "real.").

Nor is a State restricted to demonstrating harms only within its own borders. *See Brnovich*, 141 S. Ct. at 2348 (upholding Arizona's ballot collection restrictions despite "Arizona ha[ving] the good fortune to avoid" fraud, and referencing fraud from proscribed activity in North Carolina); *Crawford*, 553 U.S. at 194-95 (upholding Indiana voter ID law even though "[t]he record contained no evidence of any such fraud actually occurring in Indiana at any time in its history," but noting that "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history"); *Burson v.*

Freeman, 504 U.S. 191, 208-09 (1992) (upholding dismissal of facial attack on Tennessee law prohibiting solicitation of voting and campaign materials within 100 feet of polling place despite the State producing no evidence of the necessity of that boundary, and noting that the Court "never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question"). Discovery, therefore, would be pointless on this issue.

b. Right to Vote

Finally, Plaintiffs argue that Article 5, § 1 of the Kansas Constitution, which affords Kansas resident citizens age eighteen or older the right to vote, is somehow absolute and invalidates the BCRs. (Br. 28-29).[10] But the very next section empowers the legislature to exclude persons from voting if they are convicted of a felony, and the same article *requires* the legislature to adopt measures to ensure that only eligible voters are permitted to cast ballots. Kan. Const., art. 5, §§ 2, 4. This claim is also undermined by the fact that the U.S. Supreme Court has held that there is no federal constitutional right at all to vote by mail. *McDonald*, 394 U.S. at 807-08. So to describe the right at issue as the "right to vote" in general, as opposed to the "right to vote by mail," inappropriately modifies the legal inquiry and the proper level of scrutiny.

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[10] In addition to failing on the merits, Plaintiffs also have no standing to pursue their right to vote claim in connection with the BCRs. Organizational standing does not work because an organization lacks the right to vote. *See Vote.org v. Callanen*, __ F.4th __, 2022 WL 2389566, at *4 (5th Cir. July 2, 2022). And while Plaintiffs have failed to plead adequate facts to establish associational standing, *see* Part III.B., even if they could, the alleged "members" themselves are not limited in their ability to vote. Any purported limitation is on the voters who Plaintiffs seek to help. If there is to be claim attacking the BCRs' impact on the right to vote, those voters — not Plaintiffs — must bring such an action.

Plaintiffs allege that the law's restrictions will have an adverse impact on the State's "most vulnerable citizens" who purportedly have a great need for "ballot collection and delivery assistance." (R. II., 269-70 at ¶ 154). While it is entirely speculative whether certain segments of the population use ballot collection assistance in statistically significant greater numbers than others, those issues are ultimately irrelevant. Any burden on voting from the BCRs (if there even *is* one) is extremely minimal. Putting a stamp on an advance ballot envelope is hardly so great a hardship as to trigger constitutional protections. And the U.S. Postal Service delivers (and picks up) from every community in the country.

If, as the Supreme Court held, having to travel to the local DMV office to obtain a voter ID "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting," *Crawford*, 553 U.S. at 198, then surely requiring a voter – who chooses to vote absentee rather than on Election Day – to mail in an advance ballot does not contravene the Constitution. And Kansas does not even require *that*; it simply limits the number of ballots that any one person can collect and deliver from other individuals. Moreover, as the Supreme Court held in repudiating a legal challenge to an Arizona statute did not allow *any* third-party collection or delivery, the relevant judicial inquiry is on the burden to the electorate "as a whole," not on the burden to a handful of individual voters who might be adversely affected by the statute. *Brnovich*, 141 S. Ct. at 2339; *see also id.* ("[E]ven neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

Since a state is not required to allow *any* absentee voting at all, by choosing to offer such a feature, Kansas has actually "increase[d] options, not restrictions." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J., concurring). "Of course, there will always be other voters for whom, through no fault of the state, getting to the polls is difficult or even impossible. But . . . that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that the state has in fact precluded voters from voting — that the voter has been prohibited from voting by the State." *Id.* (cleaned up) (quoting *McDonald*, 394 U.S. at 808 & n.7, 810).

The State's restrictions on third-parties' collection and delivery of advance ballots are rooted in strong interests of combating voter fraud and facilitating public confidence in the election process. To quote the Supreme Court's recent decision in *Brnovich*:

> "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*) (internal quotation marks omitted). Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that "[a]bsentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005).
>
> The Commission warned that "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," and it recommended that "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.* The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to "the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." *Id.* at 47. [Arizona's law] is even more permissive

in that it also authorizes ballot-handling by a voter's household member and caregiver.

* * *

> The Court of Appeals thought that the State's justifications . . . were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. . . . But prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. *Brnovich*, 141 S. Ct. at 2347-48 (final alteration in original).

Discovery is unnecessary because this case can easily be resolved at the motion to dismiss stage. Crediting every allegation in the Amended Petition as true, there is *nothing* that would constitute so significant a burden as to justify striking down the BCRs on their face. And the State's powerful interests in limiting potential mischief that can accompany advance ballots, particularly when those ballots are returned by individuals other than the voters themselves, is undeniable. Any balancing required by *Anderson-Burdick* thus must be resolved in favor of the State. Even if the plaintiffs could somehow show a disparate burden on certain groups, the State's justifications in avoiding voter fraud would more than suffice to uphold the law. *See Brnovich*, 141 S. Ct. at 2347; *accord DCCC*, 487 F. Supp.3d at 1235; *New Ga. Project*, 484 F. Supp.3d at 1299-1300.

Respectfully submitted,

/s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I certify that on this 11th day of July 2022, I electronically filed the foregoing Brief of Appellee with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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UNPUBLISHED OPINIONS
CITED IN THE BRIEF

- *Cummings v. Gish*, No. 96,124, 2007 WL 1530113 (Kan. Ct. App. May 25, 2007)
- *Pistotnik v. Pistotnik*, No. 115,715, 2017 WL 2210776 (Kan. Ct. App. May 19, 2017)
- *VoteAmerica v. Raffensperger*, No. 21-cv-1390, 2022 WL 2357395 (N.D. Ga. June 30, 2022)
- *Vote.org v. Callanen*, No. 22-50536, __ F.4th __, 2022 WL 2389566 (5th Cir. July 2, 2022)

158 P.3d 375 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Ron CUMMINGS, Appellee,

v.

Ina M. GISH, et al., Defendant/Appellees,

Isaac MILLER, Defendant/Appellee,

Dan NEAR and Toinette Near, Defendant/Appellant.

No. 96,124.

May 25, 2007.

Appeal from Rooks District Court; Thomas L. Toepfer, judge. Opinion filed May 25, 2007. Appeal dismissed.

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Before MCANANY, P.J., ELLIOTT and PIERRON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Toinette Near and Dan Near appeal from the trial court's order granting partition of mineral interests they held with others in property located in Rooks County, Kansas. The Nears contend their interest is not subject to partition. We dismiss the appeal for lack of jurisdiction under K.S.A. 60-2102(a)(3) and (a)(4).

Ron Cummings initially filed this action against numerous parties who allegedly owned fractional shares of the mineral interests in 400 acres in Rooks County. Cummings requested partition of the parties' commonly held mineral interests under K.S.A. 60-1003. The Nears allegedly owned a 1/8th share of the mineral interests and were the only parties contesting partition. Judgment on the pleadings was entered in Cummings' favor as to all the remaining parties who failed to respond to the petition. After contentious and convoluted pretrial proceedings, the claims involving the Nears proceeded to trial in December 2005. It was agreed at the pretrial conference that the only issues at trial would be the nature of the Nears' interests in the property, whether partition was appropriate, and whether sanctions under K.S.A. 60-211 were appropriate against the Nears.

In its journal entry, the trial court found that all the parties owned mineral interests in the property as tenants in common and rejected the Nears' claims they only held a nonpossessory overriding royalty interest in the minerals produced. Finding no credible evidence that partition would create an extraordinary hardship or oppression as to any party, the trial court found partition was warranted. However, the court found that partition in kind would be inequitable. Accordingly, the court ordered that appraisers be appointed to appraise the mineral interests and that an election period be established to determine if one or more of the parties elected to purchase the complete interest at the appraised price. If no such election was made, the court ordered that a public sale be held. In either event, the trial court ordered any proceeds from a sale be divided according to the ownership proportions previously held by the parties.

The trial court also found the Nears had violated K.S.A. 60-211(b)(1) and (3) in their various pleadings. The court found that attorney fees and nonmonetary sanctions were appropriate but deferred imposition of sanctions until the conclusion of the partition sale.

The Nears appealed from this order challenging various evidentiary rulings made by the trial court as well as the court's conclusion their property interest was subject to partition and that their conduct violated K.S.A. 60-211(b).

This court issued an order to show cause directing the parties to show case why the appeal should not be dismissed for lack of jurisdiction; the court pointed out that the order from which the appeal was taken was interlocutory. Only the Nears filed a response to the court's show cause order.

Kansas courts have only such appellate jurisdiction as is conferred by statute, pursuant to Article 3, § 3, of the Kansas

Constitution. *In re Condemnation of Land v. Stranger Valley Land Co.*, 280 Kan. 576, 578, 123 P.3d 731 (2005). The right to appeal is purely statutory, and an appellate court has a duty to question jurisdiction on its own initiative. If the record indicates that jurisdiction does not exist, the appeal must be dismissed. *State v. Phinney*, 280 Kan. 394, 398, 122 P.3d 356 (2005). Whether jurisdiction exists is a question of law over which we have unlimited review. *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 414, 997 P.2d 681 (2000).

***2** The parties do not dispute that there is no final order in this case within the meaning of K.S.A. 60–2102(a)(4). Under that statute, appellate jurisdiction exists when all claims between all parties are resolved and there are no further questions or the possibility of future directions or actions by the court. *Investcorp, L.P. v. Simpson Investment Co., L.C.*, 277 Kan. 448, Syl. ¶ 3, 85 P.3d 1140 (2003). The record fails to reflect whether appraisers have appointed, an appraisal has been made, any sale has been completed, or any final determination made as to the appropriate amount of sanctions to be assessed.

In response to the court's order to show cause, however, the Nears encourage the court to retain jurisdiction under K.S.A. 60–2102(a)(3). That statute permits a party to invoke the jurisdiction of the court of appeal from "an order involving ... the title to real estate...." This particular provision has been interpreted to allow review of nonfinal order involving real estate only if the order has " 'some semblance of finality.' " *In re Estate of Isbell*, 2 Kan.App.2d 99, 101, 575 P.2d 574 (1978).

The parameters of jurisdiction under K.S.A. 60–2102(a)(3) is less than clear. However, the cases where jurisdiction have been found clearly meet the "semblance of finality" standard. For example, in *J.L. Akers Co. v. Advertising Unlimited, Inc.*, 274 Kan. 359, 49 P.3d 506 (2002), the district court authorized the receiver of a dissolved corporation to sell corporate realty free and clear of any encumbrances, including judgment liens held by the appellants. The appellants immediately appealed, and the Supreme Court found jurisdiction under K.S.A. 60–2102(a)(3) to consider the merits of the nonfinal order. 274 Kan. at 360. Under those facts, however, the district court's order effectively abrogated the appellants' liens and their interest in the property; any further proceedings regarding the real estate would have no effect on the appellants' interests. Such an order possesses "some semblance of finality."

Likewise, in *Smith v. Williams*, 3 Kan.App.2d 205, 592 P.2d 129, *rev. denied* 226 Kan. 792 (1979), adjoining landowners filed counter-petitions for quiet title in a boundary line dispute. The original defendant filed a counterclaim for monetary damages and the plaintiffs filed a third party claim against their predecessor in interest for indemnification if monetary damages were awarded. The trial court granted summary judgment to the defendant on the quiet title claims and reserved ruling on the claim for monetary damages and the third party petition. The Plaintiffs immediately appealed. The Court of Appeals concluded jurisdiction existed under K.S.A. 60–2102(a)(3). 3 Kan.App.2d at 206.

Although the *Smith* court did not discuss why jurisdiction existed under that provision, the facts support a finding that the order in question had "some semblance of finality." The order finally determined the boundary line dispute as between all the parties; the only remaining issues related to the defendant's claims for monetary damages which were collateral to the title issue.

***3** However, the mere fact an order affects title to real estate does not render the order subject to immediate appeal under K.S.A. 60–2102(a)(3). In *Valley State Bank v. Geiger*, 12 Kan.App.2d 485, 748 P.2d 905 (1988), this court dismissed an appeal from a district court's order directing the sale of real property in a mortgage foreclosure action; the debtor immediately appealed because of the order directed the sale in parcels different from those he requested. 12 Kan.App.2d at 488. This court declined to exercise jurisdiction under K.S.A. 60–2102(a)(3) because the statutory requirements for future review and confirmation of the sale of the property established there was no semblance of finality to the order being appealed. 12 Kan.App.2d at 486.

The reasoning of *Valley State Bank* is more compelling in this case. Here, the partition statute requires, once partition is ordered, the appointment of commissioners to appraise the value of the property. K.S.A. 60–1003(c)(2). Any party may then take exception to the commissioners' report and the court may modify the same. K.S.A. 60–1003(c)(3). The statute then provides for election to purchase by any of the parties or for sale of the property. K.S.A. 60–1003(e)(4). The Nears or other parties may well challenge any of the orders from these subsequent proceedings and all these proceedings have some effect on the parties' interest in the property. Likewise, the Nears are challenging the finding that they violated K.S.A. 60–211(b), even though no final determination has been made as to the amount of sanctions that will be imposed.

In noting the limits of jurisdiction under K.S.A. 60–2102(a)(3) in eminent domain cases, the Supreme Court noted:

> "All original eminent domain proceedings, to some extent, involve title to real estate. If appeals in original proceedings were allowed under K.S.A. 60–2102(a)(3), the original proceedings would be subject to interminable interruption and delay. As we said in *McCain v. McCain*, 219 Kan. 780, *3, 549 P.2d 896 (1976):
>
> 'Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory and fractionalized appeals are discouraged, and are the exceptions and not the rule.'
>
> We do not think the legislature contemplated appeals in original eminent domain proceedings when it enacted K.S.A. 60–2102(a)(3). We conclude that this appeal does not lie under that statute." *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 682, 683 P.2d 1247 (1984).

Similarly, all partition actions under K.S.A. 60–1003 inherently involve title to real estate. If parties were permitted to appeal every interim order in a partition action, the "proceedings would be subject to interminable interruption and delay." 235 Kan. at 682.

For these reasons, the court concludes the order granting partition lacks any semblance of finality and therefore is not appealable under K.S.A. 60–2102(a)(3). In the absence of evidence establishing any other basis for this court's jurisdiction, the appeal must be dismissed.

***4** Appeal dismissed.

All Citations

158 P.3d 375 (Table), 2007 WL 1530113

394 P.3d 902 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Bradley A. PISTOTNIK and Brad Pistotnik Law, P.A., Appellees,

v.

Brian D. PISTOTNIK, Affiliated Attorneys of Pistotnik Law Offices, P.A., and Pistotnik Law Offices, LLC, Appellants.

No. 115,715

Opinion filed May 19, 2017

Appeal from Sedgwick District Court; TIMOTHY H. HENDERSON, Judge.

Attorneys and Law Firms

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Charles E. Millsap, Lyndon W. Vix, and Ron Campbell, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, for appellees.

Before Green, P.J., Standridge and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Brian D. Pistotnik appeals the district court's decision to deny his motion to terminate the receivership it ordered after dissolving Affiliated Attorneys of Pistotnik Law Offices, P.A. (AAPLO), an association which Brian owned with his brother, Bradley A. Pistotnik. Brian argues the court should have terminated the receivership because the parties contemplated termination in their settlement agreement and because the facts and circumstances of the case no longer necessitate the receivership. Finding no abuse of discretion, we affirm the district court's decision.

FACTS

Brian and Brad were each 50% shareholders of the law firm AAPLO. On June 19, 2014, Brad filed a petition seeking dissolution of AAPLO. Brian answered the lawsuit and asserted several counterclaims against Brad. Brad answered Brian's counterclaims and included additional claims against Brian. The numerous claims between the brothers were the subject of lengthy litigation, most of which is not relevant to this appeal.

Brad filed a motion for dissolution of AAPLO and appointment of receiver on November 3, 2014. The district court issued an order on January 15, 2015, dissolving AAPLO and placing it in receivership. The court appointed attorney David Rapp to serve as the receiver to wind up the affairs of AAPLO. See K.S.A. 17-6808 (appointment by court and power of receiver for dissolved corporations). Rapp filed his oath as receiver on January 28, 2015, and filed his bond on February 11, 2015.

During the course of the receivership, Rapp worked under the authority of the district court to marshal AAPLO's assets, collect its debts, and evaluate claims made by or against AAPLO or its shareholders. The receiver also oversaw the litigation of certain claims in which AAPLO asserted attorneys' liens for predissolution cases, which are referred to as the *Consolver* and *Hernandez* cases. Former AAPLO clients additionally filed counterclaims against Brad (in *Consolver II*) and Brian (in *Hernandez*).

On July 16, 2015, Brian and Brad met with a mediator, who assisted them in settling their claims against each other and agreeing to a mutual release. The mediator read the terms of the settlement agreement into the court's record the same day. Brian and Brad confirmed that the terms of their agreement were correctly recited by the mediator into the record. Relevant to the issue on appeal, the settlement agreement included the following provision:

> "[THE MEDIATOR]: Judge, this is what I believe the settlement agreement to be between the parties. The receivership will be closed as soon as possible. There's been a lawsuit filed recently naming the old—I'm not going to call it AAPLO. I'm just going to say the old law firm as a defendant, which may require some action by the receiver. These parties

> agree that it should be closed as soon as possible."

In accordance with their agreement, Brad's attorneys drafted a written settlement agreement and mutual release that incorporated the terms of the mediated agreement and then presented the draft to Brian for signature. On October 13, 2015, Brad filed a motion to enforce the settlement agreement, asking the court to order that Brian sign the written agreement. On October 16, 2015, Brian filed a separate motion to enforce the terms of the settlement agreement and terminate the receivership, or in the alternative to stay the receivership. Brian complained that after the July 16, 2015, settlement agreement was reached, Brad filed a claim against AAPLO for indemnity in *Consolver II*. Brian alleged that because Brad was aware of that case prior to agreeing to release all claims against the receivership on July 16, 2015, Brad breached the terms of the settlement agreement and his claim for indemnity should be rejected.

**2 The district court held a hearing on October 29, 2015, regarding the competing motions and heard argument from the parties on issues pertaining to the interpretation of the settlement agreement. The court ultimately allowed Brad to make an indemnity claim against AAPLO in *Consolver II* and ordered the receiver to oversee that litigation. The court then granted Brad's motion to enforce the settlement agreement. Noting several objections, Brian signed the written settlement agreement on November 12, 2015. Relevant to the sole issue on appeal, the written agreement stated:

> "8. CLOSING OF THE RECEIVERSHIP. The Receivership shall be closed as soon as practicable. It is understood that a suit has recently been filed in which the RECEIVER has been named as a defendant, which may require some action by the RECEIVER."

On December 8, 2015, the district court entered a journal entry dismissing the parties' claims against each other with prejudice. The order stated: "[T]his action shall remain open until the Receiver, David Rapp, winds up the affairs of Affiliated Attorneys of Pistotnik Law Offices, P.A., and provides his final report to the Court pursuant to K.S.A. 1[illegible] 6808."

On February 11, 2016, Brian filed a motion to terminate the receivership. The district court heard argument on the motion on February 24–25, 2016, along with other issues pertaining to the ongoing wind up of AAPLO. On March 31, 2016, the court issued an order in which it denied the motion to terminate the receivership, but strictly limited the receiver's work. The order stated, in relevant part:

> "2. At the time of the hearing, there were four cases outstanding for AAPLO: *Consolver I*, *Consolver II*, and two *Hernandez* cases, all involving attorneys' liens. There is a potential for future litigation concerning these cases. The Receiver does not believe the receivership needs to stay open for these cases. The Court shares that observation and notes that Brian Pistotnik made a very fair point when he indicated that four or five years from now there may be liability for the corporation and we do not need to keep a receiver open for those purposes.
>
> "3. The Receiver does believe, however, as does the Court, that the receivership needs to remain open to complete the 2015 taxes and may need to stay open for the 2016 taxes.
>
> "4. The Court's primary concern about closing the receivership is that throughout the life of this case, the Court had concluded that the matter was resolved. However, such closure never came to fruition. The Court is mindful of the expenses to the parties that a receivership creates. The Court is equally mindful that much of these expenses are the result of issues raised by the parties to the Receiver.
>
> "5. The Receiver has performed admirably, and the Court has no concerns about the work done by the Receiver.
>
> "6. The Receiver is to complete the work necessary for the 2015 taxes. Once those tax returns are filed, the Court orders that the Receiver shall not work this case in any further manner without further Court order (with the exception of 2016 taxes, as discussed below). The Court will consider any motion allowing the Receiver to work the case filed by the parties or the Receiver for future actions. Absence of issuance of such an order, there is not to be any further work on the receivership. The Court cautions the parties that it reserves the right to assess the cost of future work done by the Receiver to the party seeking the Receiver's involvement from this point forward. The Receiver may work the receivership concerning 2016

AAPLO taxes without further order of the Court. Once the 2016 taxes are paid, it is the Court's intention to close the receivership. The Court is not terminating and winding up the Receivership at this time, but is limiting its future work as outlined above.

***3** "IT IS SO ORDERED."

Brian timely appealed the district court's order on April 15, 2016.

After the district court's March 31, 2016, order in this case, Rapp, in his capacity as receiver of AAPLO, was served with a counterclaim in the *Hernandez* lawsuit. On August 11, 2016, Rapp filed a motion in the district court seeking authorization to participate in the defense of the *Hernandez* litigation asserted against AAPLO. The district court granted the motion and authorized Rapp "to participate in the defense of the above identified Counterclaim, but directed that the Receiver minimize his participation to the extent reasonably possible." The order also provided that the parties could terminate the receivership as matters progressed "only if both parties consent."

ANALYSIS

Motion to terminate receivership

Brian argues the district court erred when it denied his motion to terminate the AAPLO receivership, citing two reasons the receivership should have been be closed. First, he argues the parties agreed to terminate the receivership and the court erred in failing to enforce that agreement. Second, he contends that under the facts and circumstances of this case, there was no reason for the court to keep the receivership open. In response to Brian's argument, Brad contends the agreement did not require the district court to immediately close the receivership, the court had discretion to keep the receivership open, and there are pending matters for the receiver to address before the receivership may be completed.

When a corporate entity is dissolved, the district court may, upon application, appoint a receiver of the corporation. K.S.A. 17-6808. The receiver's duties are defined by statute:

> "[T]o take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation." K.S.A. 17-6808.

The powers of the receiver continue "as long as the court shall think necessary for the purposes aforesaid." K.S.A. 17-6808.

This court reviews the district court's decisions regarding the appointment and retention of a receiver for abuse of discretion. See *Jischke v. Mid Continent Development Co.*, 94 Kan. 370, 382, 146 P. 1014 (1915) (retention of receiver reviewed for abuse of discretion); see also *City of Mulvane v. Henderson*, 46 Kan. App. 2d 113, 118, 257 P.3d 1272 (2011) (appointment of receiver reviewed for abuse of discretion). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable or when the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances. *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009); *Rose v. Via Christi Health System, Inc.*, 276 Kan. 539, Syl. ¶ 1, 78 P.3d 798 (2003).

> ***4** "Under an abuse of discretion standard, a district court's decision is protected if reasonable persons could differ upon the propriety of the decision, as long as the discretionary decision is made within and takes into account the applicable legal standards." *Harrison v. Bathrick*, 292 Kan. 663, Syl. ¶ 2, 256 P.3d 851 (2011).

The burden of showing an abuse of discretion is on the party claiming error. *Miller v. Glacier Development Co., LLC*, 284 Kan. 476, 498, 161 P.3d 730 (2007).

Brian first argues that the district court abused its discretion by failing to enforce the parties' settlement agreement, which he contends primarily required closing the receivership. Brad contends that Brian overstates the nature of the parties' agreement with respect to the termination of the receivership and that the district court is in any case not bound by the parties' agreement to terminate the receivership.

Brian makes two conflicting contract interpretation arguments. First, he urges us to look to the plain language of the verbal agreement and written agreement and contends "both agreements clearly state that the parties agreed to close the receivership." Alternatively, Brian argues that the termination provision in the written agreement is ambiguous because it fails to clearly define when and how the receivership will be closed, and such an ambiguity should

be resolved against Brad since his attorneys drafted that agreement. The interpretation of a written instrument is a question of law, over which this court exercises unlimited review. *Prairie Land Elec. Co-Op. v. Kansas Elec. Power Co-Op.*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). "Whether a written instrument is ambiguous is a matter of law subject to de novo review." *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 921, 46 P.3d 1120 (2002).

> "The primary rule in interpreting written contracts is to ascertain the intent of the parties. If the terms of the contract are clear, there is no room for rules of construction, and the intent of the parties is determined from the contract itself. [Citation omitted.] ... Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning. [Citation omitted.] Put another way: 'Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.' [Citation omitted.] Before a contract is determined to be ambiguous, the language must be given a fair, reasonable, and practical construction. [Citation omitted.]" *Liggatt*, 273 Kan. at 921.

The intent of the parties can be determined from the plain language of the agreements. The verbal agreement states that "[t]he receivership will be closed as soon as possible." Similarly, the written agreement provided that "[t]he Receivership shall be closed as soon as practicable." The agreements plainly did not require immediate termination of the receivership.

The language "as soon as possible" and "as soon as practicable" does not render the provision ambiguous, as the meaning of those provisions is not doubtful or contradictory. See *Liggatt*, 273 Kan. at 921. The context of the agreement is an ongoing wind up of a corporation. Looking at the provisions themselves, they contemplated that the receiver had pending responsibilities prior to winding up AAPLO: the verbal agreement stated "[t]here's been a lawsuit filed recently naming ... the old law firm as a defendant, which may require some action by the receiver," and the written agreement stated "[i]t is understood that a suit has recently been filed in which the RECEIVER has been named as a defendant, which may require some action by the RECEIVER." The provisions did not contemplate immediate termination but anticipated that the receiver would have to wind up the outstanding litigation.

***5** Because the provisions are not ambiguous, it is not proper to interpret the provision against the drafter of the agreement. See *Thoroughbred Associates, LLC v. Kansas City Royalty Company, LLC*, 297 Kan. 1193, 1206, 308 P.3d 1235 (2013) ("When ambiguity appears, the language is interpreted against the party who prepared the instrument."). In any case, the written agreement simply formalized the parties' earlier verbal agreement, and the two provisions are almost identical. There is no reason for this court to interpret the meaning of the agreement to terminate the receivership against Brad.

As Brad contends, the district court is not bound by the agreement of the parties to terminate a receivership, even if that is what the parties agreed. Indeed, the receiver serves at the discretion of the court. The receivership may continue "as long as the court shall think necessary" to do all acts that might be done by the corporation necessary for the final settlement of unfinished business of the corporation. K.S.A. 17-6808; see also *Shaw v. Robison*, 537 P.2d 487, 490 (Utah 1975) ("A receivership is an equitable matter and is entirely within the control of the court. The fact that the parties requested a termination of the matter in the midst of the proceedings does not compel the court to 'about face' and cease all matters instanter.").

> "The decision on whether to terminate a receivership turns on the facts and circumstances of each case. In determining whether to continue a receivership or discharge the receiver, the court will consider the rights and interests of all parties concerned and will not grant an application for discharge merely because it is made by the party at whose instance the appointment was made. Similarly, the fact that the parties request a termination of receivership in the midst of the proceedings does not compel the court to cease all matters instantly though a court may agree to discharge a court-appointed receiver upon the agreement of all parties." 65 Am. Jur. 2d Receivers § 146.

The district court did not abuse its discretion in denying Brian's motion to terminate the receivership based on the parties' agreement that the receivership would be terminated as soon as possible.

In his next argument, Brian points to several facts and circumstances that he argues required the receivership to be terminated. First, he alleges the settlement agreement resolved all outstanding issues with the wind up of AAPLO

how the receiver would handle AAPLO's assets and debts, how the parties would pay the expenses of filing tax returns, and how the parties would divide expenses and recovery regarding the *Consolver I* case. Second, he notes that the receiver admitted he was not actively involved in *Consolver*

I and *Consolver II* and that the parties could file the taxes on their own if the court relieved him of his duties. Finally, Brian argues the continuation of the receivership is depleting AAPLO's assets which would otherwise be distributed to the shareholders. In short, Brian alleges that the purpose of the receivership is complete, and the district court abused its discretion in keeping it open. He argues that a receiver is not necessary for the filing AAPLO's taxes, which is a function performed by AAPLO's accountant.

Brian acknowledges that the receiver was named on behalf of AAPLO as a counterclaim defendant in *Hernandez* after the district court's March 31, 2016, order, and the court has approved the receiver to oversee that litigation. Although Brian asserts his malpractice insurer is handling the defense of the case, he fails to acknowledge that the receivership is the only entity that can act on behalf of AAPLO as a dissolved corporation. As such, the receiver must not only communicate with the attorneys representing AAPLO in the *Hernandez* litigation but also is solely responsible for making decisions on the corporation's behalf to resolve that claim.

***6** The district court exercised its discretion to deny Brian's motion to terminate the receivership after taking into consideration the facts and circumstances Brian raises now on appeal. The court's March 31, 2016, order denying Brian's motion to terminate the receivership stayed the receiver's work except to complete the work necessary for the filing of AAPLO's 2015 and 2016 taxes. The court specified that the limitation on the receiver's work was in response to concerns about expenses incurred by continuing the receivership. The court specifically noted its agreement with Brian's position that the receivership did not need to remain open indefinitely to handle any future litigation filed against AAPLO. The court provided a method for the receiver to be involved in unforeseen issues that may arise during the wind up of the corporation but only upon application to the court and permission granted.

The district court has discretion to continue the receivership "as long as the court shall think necessary" for the receiver to complete its work. K.S.A. 17-6808. The powers of the receiver include "all ... acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation." K.S.A. 17-6808. Filing AAPLO's 2016 taxes to complete the wind up of the corporation is squarely within the receiver's powers. At the time of the district court's order, the final wind up of the corporation was not complete. The district court was not "beyond the limits of permissible choice under the circumstances" of this case. See *Rose*, 276 Kan. 539, Syl. ¶ 1.

The district court's decision was made within the applicable legal standards. See *Harrison*, 292 Kan. 668, Syl. ¶ 2. Reasonable persons could agree that the receivership should have been continued on a limited basis so that the receiver could oversee filing of the 2016 taxes and could be available to take care of any unresolved issue that arose as the wind up was completed. As such, the district court's decision to deny Brian's motion to terminate the receivership and to maintain the receivership in a limited fashion through the filing of the 2016 taxes was not an abuse of discretion.

Indemnity claim

Brian contends that Brad breached the terms of the settlement agreement by making a claim against the receivership for indemnity in the *Consolver II* lawsuit. On appeal, Brian asks us for an order prohibiting Brad from making additional claims against the receivership. Because Brian appeals only from the district court's decision to deny his motion to terminate the receivership, we lack jurisdiction to consider the indemnity issue he now raises. See *State v. Herman*, 50 Kan. App. 2d 316, 327, 324 P.3d 1134 (2014) ("An appellate court may not properly exercise jurisdiction over an appeal that has not been taken in conformity with that statutory grant."). As we stated in our order dated June 16, 2016: "This appeal is limited to the question of whether the district court erred by refusing to wind up the receivership. Under K.S.A. 2015 Supp. 60-2102(a)(3), this is the only statutory jurisdiction which exists."

Affirmed.

All Citations

394 P.3d 902 (Table), 2017 WL 2210776

End of Document

2022 WL 2357395
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

VOTEAMERICA, et al., Plaintiffs,
v.
Brad RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, et al., Defendants,
and
Republican National Committee, et al., Intervenor Defendants.

CIVIL ACTION NO. 1:21-CV-01390-JPB
|
Signed June 30, 2022

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ORDER

J. P. BOULEE, United States District Judge

*1 Before the Court is VoteAmerica, Voter Participation Center ("VPC") and Center for Voter Information's ("CVI") (collectively "Plaintiffs") Motion for Preliminary Injunction ("Motion"). ECF No. 103. After due consideration of the briefs, accompanying evidence and oral argument, the Court finds as follows:

I. BACKGROUND

A. Procedural History

Plaintiffs challenge certain provisions of Georgia Senate Bill 202 ("SB 202") on First Amendment grounds. SB 202 governs election-related processes and was signed into law by Governor Brian Kemp on March 25, 2021.

On April 7, 2021, Plaintiffs filed suit against Brad Raffensperger, in his official capacity as the Georgia Secretary of State; Rebecca Sullivan, in her official capacity as the Vice Chair of the State Election Board; and David Worley, Matthew Mashburn and Anh Le, in their official capacities as members of the State Election Board (collectively "State Defendants").[1] The Court permitted the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee and Georgia Republican Party, Inc. (collectively "Intervenor Defendants") to intervene in this action.

Both State Defendants and Intervenor Defendants moved to dismiss Plaintiffs' Complaint, but the Court denied the motions on December 9, 2021. Discovery opened thereafter and is ongoing.

On April 26, 2022, Plaintiffs filed the instant Motion, asking the Court to enjoin the following three provisions of SB 202: (1) the Prefilling Provision, (2) the Anti-Duplication Provision and (3) the Disclaimer Provision (collectively the "Ballot Application Provisions"). The challenged provisions pertain to the distribution of absentee ballot application forms by third parties.

Briefing on the Motion closed on June 6, 2022, and the parties presented oral argument and evidence on June 9 and 10, 2022.

B. The Parties

VoteAmerica is a nonpartisan, nonprofit organization whose mission is to "engage eligible voters throughout the country in the electoral process, with an emphasis on voting absentee." ECF No. 103 at 7; *see also* McCarthy Decl. ¶ 2, ECF No. 103-4. VoteAmerica provides online resources for voting, including an absentee ballot application tool. The tool allows voters to submit their personal information online and receive a prefilled absentee ballot application form that they can complete and send to their local election office. McCarthy Decl. ¶ 7, ECF No. 103-4.

VPC and CVI are also nonpartisan, nonprofit organizations. Lopach Decl. ¶¶ 2-3, ECF No. 103-3. Their mission is to "encourage the political participation of historically underrepresented groups" by providing members of those groups with voter resources, including vote-by-mail information. ECF No. 103 at 8; Lopach Decl. ¶¶ 2-7, ECF No. 103-3. Their core message is that "absentee voting is reliable and trustworthy," ECF No. 103 at 13; *see also* McCarthy Decl. ¶¶ 2-5, ECF No. 103-4; Lopach Decl. ¶¶ 7-10, ECF No. 103-3, and that "all eligible voters should participate in the political process," ECF No. 103 at 18. VPC and CVI further their mission in part by sending absentee ballot application forms to prospective voters. ECF No. 103 at 18.

***2** Prior to the enactment of SB 202, Plaintiffs could send prospective voters an unlimited number of absentee voter application forms. VPC and CVI prefilled the absentee ballot applications with prospective voters' personal identification information, such as name and address, before sending the applications to the voters. Tr. 43:21-44:3, June 9, 2022, ECF No. 129 (hereinafter "Tr. Day 1"). VPC and CVI obtained this information from the state's voter registration records. *Id.* The package mailed to prospective voters included cover information that urged the recipients to vote absentee. ECF No. 103 at 19. For example, cover letters exclaimed that the recipients' votes matter and that voting by mail "is EASY." *Id.*

VPC and CVI contend that, based on their experience and research, voters are more likely to return the ballot application form when it is prefilled with their personal information, and the applications are less likely to be rejected by election officials for scrivener errors, illegible handwriting, etc. Tr. 65:8-66:1, Day 1.

C. The Ballot Application Provisions [2]

The Ballot Application Provisions changed Georgia law regarding the distribution of absentee ballot application forms by third parties.

1. The Prefilling Provision

The Prefilling Provision provides that "[n]o person or entity ... shall send any elector an absentee ballot application that is prefilled with the elector's required information." O.C.G.A. § 21-2-381(a)(1)(C)(ii). Failure to comply with this provision could result in misdemeanor or felony charges. *See id.* §§ 21-2-598, 21-2-562(a).

VPC and CVI seek an injunction against the enforcement of the Prefilling Provision because they argue that it "restricts the content of [their] communications; interferes with their models for voter engagement, assistance, and association; and curtails the most effective means of conveying their speech." ECF No. 103 at 14. They explain that prospective voters are more likely to return ballot application forms that are prefilled, and those application forms are less likely to be rejected by election officials. Therefore, the prohibition on sending prefilled forms diminishes the effectiveness of their work. [3]

2. The Anti-Duplication Provision

The Anti-Duplication Provision states that "[a]ll persons or entities ... that send applications for absentee ballots to electors in a primary, election, or runoff shall mail such applications only to individuals who have not already requested, received, or voted an absentee ballot in the primary, election, or runoff." O.C.G.A. § 21-2-381(a)(3)(A). According to VPC and CVI, this provision requires them to compare their mail distribution lists with the most recent information available from the Secretary of State's office and cull from their mailing lists the names of electors who have already requested, been issued or voted an absentee ballot. McCarthy Decl. ¶¶ 25-30, ECF No. 103-4; Lopach Decl. ¶¶ 51-60, ECF No. 103-3. Failure

to comply with the Anti-Duplication Provision may result in fines of up to $100 "per duplicate absentee ballot application," O.C.G.A. § 21-2-381(a)(3)(B), and criminal penalties, including confinement of up to twelve months, *see id.* §§ 21-2-598, 21-2-603, 21-2-599. However, the statute provides a safe harbor for any entity that "relied upon information made available by the Secretary of State within five business days prior to the date" the applications were mailed. *Id.* § 21-2-381(a)(3)(A).

***3** VPC and CVI challenge the Anti-Duplication Provision because they contend that it is "logistically impossible" to remove duplicates from the voter roll and print and mail applications within the five-day safe harbor. ECF No. 103 at 11; *see also* Lopach Decl. ¶¶ 33, 56, ECF No. 103-3. They explain that during the 2020 election cycle, they mailed more than eleven million absentee ballot applications in up to five waves, Tr. 38:4-10, Day 1, and preparation for each bulk mailing typically required several weeks of lead time, Lopach Decl. ¶¶ 33, 56, ECF No. 103-3.

VPC and CVI insist that it is equally untenable to cull duplicates after the packages are printed because that task would entail manually searching up to two million mailers stored on pallets to identify and remove packages addressed to voters who have already requested, been issued or voted an absentee ballot. Tr. 61:10-62:9, Day 1. They underscore that this task is even more daunting because the mailers are arranged by zip code and postal carrier route, rather than in alphabetical order.[4] *Id.* at 61:24-62:2.

Additionally, VPC and CVI assert that removing mailers from a completed print run will likely result in increased mailing rates because the rates are tiered according to the size of the batch, and certain bulk discounts may no longer apply. *Id.* at 62:10-14.

Given these logistical difficulties, VPC and CVI intend to send only one wave of mailers this election cycle as close as possible to August 22, 2022, which is the first day that voters may request a ballot application form. *Id.* at 63:2-10. They argue that, even though voter communications are "less effective earlier in an election season" and sending "multiple waves increase[s] the effectiveness of their communications," ECF No. 103 at 12; *see also* Lopach Decl. ¶¶ 34, 54, ECF No. 103-3, this course of action is necessary to avoid sending duplicate forms in violation of the Anti-Duplication Provision and incurring the concomitant fines. Tr. 63:15-64:2, Day 1.

In sum, VPC and CVI conclude that the Anti-Duplication Provision will "force [them] to drastically alter their civic engagement communications in Georgia in 2022."[5] ECF No. 103 at 11.

3. The Disclaimer Provision

The Disclaimer Provision mandates that "[a]ny application for an absentee ballot sent to any elector ... shall utilize the form of the application made available by the Secretary of State and shall clearly and prominently disclose on the face of the form" the following language (the "Disclaimer"):

> This is NOT an official government publication and was NOT provided to you by any governmental entity and this is NOT a ballot. It is being distributed by [insert name and address of person, organization, or other entity distributing such document or material].

O.C.G.A. § 21-2-381(a)(1)(C)(ii). Failure to include this Disclaimer may result in criminal penalties. *Id.* §§ 21-2-598, 21-2-603, 21-2-599.

Plaintiffs challenge the Disclaimer Provision on two grounds. First, they contend that the first statement of the Disclaimer ("[t]his is NOT an official government publication") is factually inaccurate because the ballot application form onto which Plaintiffs must affix the Disclaimer is indeed the official ballot application form promulgated by the Georgia Secretary of State. In Plaintiffs' view, the form *is* an "official government publication." *see* Tr. 66:14-67:9, Day 1, and stating to the contrary is "wrong, false, misleading and a lie." *id.* at 143:18.[6]

***4** Second, Plaintiffs assert that the third statement of the Disclaimer ("this is NOT a ballot") is confusing, and the Disclaimer's overall successive use of the capitalized word "NOT" portrays Plaintiffs as an "untrusted source." *Id.* at 66:17. Plaintiffs reason that the language will discourage recipients from using the application forms, *id.* at 145:1-21, or from voting at all, *id.* at 66:14-67:9. Plaintiffs therefore conclude that the Disclaimer Provision renders their efforts

less effective and detracts from their mission." *See id.* at 66:14-67:9.

During oral argument, Plaintiffs clarified that at this stage of the litigation, they wish to focus on the first and third statements in the Disclaimer: "[t]his is NOT an official government publication" and "this is NOT a ballot." *Id.* at 219:1-221:8, Day 2. They maintain that the Court may enjoin the enforcement of these statements, leaving the remainder of the Disclaimer intact.

D. State Defendants' Justifications for the Challenged Provisions

State Defendants argue that the Ballot Application Provisions are justified because they were enacted in response to the numerous complaints State Defendants received from the public regarding absentee ballot applications sent by third-party organizations. *See* ECF No. 113 at 8. Some complaints concerned (i) applications prefilled with incorrect voter information; (ii) receipt of duplicate application forms; (iii) confusion over whether the applications were ballots or whether recipients of multiple applications could cast more than one vote; (iv) the identity of the sender of the application forms; and (v) whether recipients were required to return the forms. *Id.* at 8-10. State and county election officials spent a significant amount of time fielding calls from the public regarding these concerns. Tr. 43:20-44:1, Day 2.

Apart from the specific complaints, some recipients completed and returned the ballot application forms even though they did not intend to vote absentee. ECF No. 113 at 9. This caused election officials to divert finite resources to process redundant applications or to cancel them on election day when voters who had inadvertently submitted an absentee ballot application form arrived to vote in person. *Id.*

State Defendants assert that the Ballot Application Provisions were enacted to address these issues: the Prefilling Provision was designed to address the issue of incorrectly prefilled applications; the Anti-Duplication Provision was designed to minimize voter confusion and the administrative disruption caused by duplicate absentee ballot application forms sent by third parties; and the Disclaimer Provision was designed to address overall voter confusion and the resulting burdens on election officials. *Id.* at 10-11.

***5** With respect to the first statement of the Disclaimer ("[t]his is NOT an official government publication"), State Defendants maintain that they intended to communicate to application recipients that they are not required to complete and return the forms they receive. Tr. 42:7-43:7, Day 2. State Defendants assert that the third statement of the Disclaimer ("this is NOT a ballot") aimed to address the common misimpression that the form is a ballot. *See id.* at 44:5-45:1.

II. DISCUSSION

A. Preliminary Injunction Standard

A plaintiff seeking preliminary injunctive relief must show the following:

> (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Siqueili v. Pinellas Cnty., 931 F.2d 718, 723-24 (11th Cir. 1991) (quoting *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983)). "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establish[es] the burden of persuasion as to each of the four prerequisites." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (internal punctuation omitted) (quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). Granting a preliminary injunction is thus the exception rather than the rule. *See id.*

1. Likelihood of Success on the Merits

A plaintiff seeking preliminary injunctive relief must show a substantial likelihood that he will ultimately prevail on the merits of his claim. *Siqueili*, 931 F.2d at 723. This factor is generally considered the most important of the four factors. *see Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir.

1986), and failure to satisfy this burden – as with any of the other prerequisites—is fatal to the claim, *see Siegel*, 234 F.3d at 1176.

Because Plaintiffs contend that the Ballot Application Provisions infringe on their freedom of speech and expression, the Court begins its analysis of this prong with a general overview of the available First Amendment protections.

The First Amendment provides that Congress "shall make no law ... abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."[8] U.S. Const. amend. 1. As reflected in the text of the amendment, the First Amendment guarantees not only freedom of speech, *see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988), but also "the right of citizens to associate ... for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997).

First Amendment protection of speech "includes both the right to speak freely and the right to refrain from speaking at all," *McCloskey v. Tally*, 22 F.4th 1330, 1336 (11th Cir. 2022) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Protection of associational rights turns on "collective effort" with others "in pursuit of a wide variety of ... ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

***6** Importantly, First Amendment protections exist against the reality that "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358. When election regulations are in tension with constitutional rights, the United States Supreme Court requires lower courts to balance the character and magnitude of the asserted injury against the state's justifications for imposing the election rule. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). This approach is commonly referred to as the "*Anderson-Burdick*" framework, named after *Anderson* and *Burdick v. Takushi*, 504 U.S. 428 (1992), where the Supreme Court reiterated and refined the standard it first enunciated in *Anderson*.

The *Anderson-Burdick* framework is, however, inapplicable where the election statute directly regulates core political speech and does not merely "control the mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). If the regulation at issue directly controls speech, courts must employ whatever level of scrutiny corresponds to the category of speech. *See id.* at 345-46.

In accordance with the foregoing principles, the decision process this Court must use to evaluate Plaintiffs' claims requires the Court to consider (i) what category of speech is at issue here;[9] (ii) what protections are available for the category of speech and what level of scrutiny or analytical framework applies; (iii) whether the Ballot Application Provisions implicate that category of speech; (iv) whether the *Anderson-Burdick* framework or some other level of scrutiny is appropriate; and (v) whether the provisions ultimately pass muster under the applicable framework or level of scrutiny. Therefore, the Court finds it helpful to structure its analysis around these questions.

a. What Category of Speech Is at Issue; What Protections Are Available; and Whether the Ballot Application Provisions Implicate That Category of Speech

The First Amendment protects several categories of speech and expression, and the Supreme Court's decisions in this area have created a "rough hierarchy" of available protections. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992). "Core political speech occupies the highest, most protected position" in the hierarchy, while obscenity and fighting words receive the least protection. *See id.* Other categories of speech rank somewhere between these poles. *See id.*

The Court's analysis will address only the following categories of speech, which are relevant to the arguments raised in this case: core political speech, expressive conduct, associational rights and compelled speech.

i. Core Political Speech

The Supreme Court has found that "interactive communication concerning political change ... is appropriately described as 'core political speech.' " *Meyer v. Grant*, 486 U.S. 414, 422 (1988). In *Meyer*, the Supreme Court was asked to decide whether the circulation of a petition

constituted core political speech and therefore was afforded the highest level of protection under the First Amendment. *Id.* at 416. The Court reasoned that circulating a petition necessarily "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. This, "in almost every case[, would] involve an explanation of the nature of the proposal and why its advocates support it." *Id.* As such, a restriction limiting who could circulate petitions would impede political expression and limit the quantum of speech available on the topic of the petition. *Id.* at 422-23. The Supreme Court therefore determined that the statute restricted core political speech and "trenche[d] upon an area in which the importance of First Amendment protections is 'at its zenith.' " *Id.* at 425. The Court emphasized that the state's burden to justify the law in that circumstance was "well-nigh insurmountable." *Id.*

*7 In short, the Supreme Court's First Amendment jurisprudence defines core political speech as the discussion of public issues and the exchange of ideas for bringing about political and social change and reserves the highest level of protection for such speech. *See McIntyre*, 514 U.S. at 346. Thus, a law that burdens core political speech is subject to strict scrutiny and will be upheld "only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347.

Here, Plaintiffs argue that their application distribution program constitutes core political speech because the application forms are "characteristically intertwined" with the pro-absentee voting message in the accompanying cover information. ECF No. 103 at 18 (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). Plaintiffs conclude that the Ballot Application Provisions directly regulate their core political speech by restricting to whom and the manner in which they can distribute ballot application packages.

State Defendants counter that Plaintiffs' advocacy occurs only through the cover information included with the ballot application forms, not through the ballot applications themselves. ECF No. 113 at 13. State Defendants contend that the Ballot Application Provisions do not regulate Plaintiffs' cover information and concern only whether the forms can be prefilled with voters' personal information, how the voter roll may be used to identify potential recipients and what information must be included in the required Disclaimer affixed to the form. *See id.* at 14-15.

Plaintiffs' argument that their application distribution program constitutes core political speech does not square with the line of cases that the Supreme Court has ruled implicates political speech. For example, both *Meyer* and *Buckley v. American Law Constitution Foundation, Inc.*, 525 U.S. 182 (1999), which Plaintiffs cite, involved circulating petitions expressing a desire for political change. The Supreme Court concluded that the circumstances in *Meyer* involved core political speech because the act of circulating a petition necessarily requires a discussion of the nature of the proposal, the merits of the proposed change and why advocates support it. *See* 486 U.S. at 421; *see also Buckley*, 525 U.S. at 199 (noting the substantial nature of communications between petition circulators and their targets).

In contrast, distributing forms prefilled with a prospective voter's own personal information and the ability to send an essentially unlimited number of forms to a prospective voter do not require the type of interactive debate and advocacy that the Supreme Court found constituted core political speech in *Meyer*.

Moreover, Plaintiffs are not prohibited from engaging in any of the persuasive speech regarding absentee voting that is reflected in their cover communication. To the contrary, they can engage in those communications as often as and in whatever form—that they desire.

As State Defendants point out, the Prefilling and Anti-Duplication Provisions simply prohibit Plaintiffs from inserting personal identification information on applications and from sending applications to prospective voters who have already requested or received one. These actions relate to the administrative mechanisms through which eligible voters request and receive an absentee ballot. The actions do not embody core political speech.

Plaintiffs' reliance on *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), is similarly misplaced. The ordinance in that case prohibited charitable organizations from soliciting donations if they did not use at least seventy-five percent of the donations " 'directly for the charitable purpose of the organization.' " *Id.* at 622 (citation omitted). The Supreme Court's finding that the ordinance restricted core political speech was based in part on the "reality" that on-the-street or door-to-door solicitations are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Id.* at 632.

***8** *Schaumburg* is different from the circumstances here because the cover information and application forms that Plaintiffs send are not inextricably linked or "characteristically intertwined." Each can exist and be sent without the other. Since the Ballot Application Provisions do not restrict Plaintiffs from sending their cover information, they are not restricted from sharing their pro-absentee voting message.

For these reasons, the Court finds that Plaintiffs have not shown that the Ballot Application Provisions restrict core political speech.

ii. Expressive Conduct

Although the First Amendment, on its face, forbids only the abridgment of "speech," the Supreme Court has recognized that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope' " of First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). To make this determination, the Supreme Court looks at whether the plaintiff intended " 'to convey a particularized message' " ***and*** whether it is likely that " 'the message would be understood by those who viewed it.' " *Id.* (quoting *Spence*, 418 U.S. at 410-11).

The Supreme Court has classified a range of activities as expressive conduct. *See, e.g.*, *Spence*, 418 U.S. at 409 (superimposing a peace sign on a flag to convey the message that America stood for peace); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (engaging in a sit-in demonstration to protest segregation); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (contributing funds to a political campaign). While "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), Supreme Court precedent is clear that First Amendment protection extends only to conduct that is "***inherently*** expressive." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) (emphasis added).

Indeed, the Supreme Court has rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court explained in *Rumsfeld* that "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, 547 U.S. at 66.

Rumsfeld involved a challenge to a statute that penalized schools for refusing to allow United States military recruiters to interview on their campuses due to the military's policy on homosexuals serving in the military. *Id.* at 51. The Supreme Court found that the schools' prohibition of military recruiters was not inherently expressive because an observer would not know whether the recruiters were interviewing off campus due to personal preference, lack of space or some other innocuous reason. *Id.* at 66. The Court pointed out that the necessity of "explanatory speech" to elucidate why military recruiters were absent from campus was "strong evidence" that the speech was not "so inherently expressive" as to qualify for First Amendment protection. *Id.* In other words, the "expressive component of [the] ... school's actions [was] not created by the conduct itself but by the speech that accompanie[d] it." *Id.*

The *Rumsfeld* opinion relied in significant part on the analysis in *O'Brien*, where the Supreme Court recognized that some forms of symbolic speech warrant First Amendment protection. *See* 391 U.S. at 376. In *O'Brien*, the plaintiff burned his Selective Service registration certificate on the steps of a courthouse to communicate his antiwar beliefs. *See id.* at 369. Although the Supreme Court did not decide whether the plaintiff's conduct constituted expressive conduct protected by the First Amendment, it dismissed the argument that conduct is necessarily protected if the actor intends to express an idea. *See id.* at 376.

***9** In short, conduct that lacks inherent expression is not transformed into protected First Amendment speech merely because it is combined with another activity that does involve protected speech. When conduct is deemed sufficiently expressive and thereby deserving of First Amendment protection, the state's asserted interest in regulating the conduct is subject to "the most exacting scrutiny." *Johnson*, 491 U.S. at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

Here, Plaintiffs maintain that mailing absentee voter application packages is inherently expressive conduct protected by the First Amendment. ECF No. 103 at 19. They argue that this conduct personifies political advocacy

of a controversial viewpoint that "absentee voting is safe, accessible, and beneficial." *See id.* at 19.

While State Defendants concede that Plaintiffs' cover information may fairly be described as political advocacy, they disagree that the distribution of ballot application forms is expressive conduct. *See* ECF No. 113 at 15.

Intervenor Defendants additionally contend that the conduct of sending an application form is not expressive because it is not likely that the recipient will understand Plaintiffs' message. ECF No. 114 at 12. Intervenor Defendants insist that most recipients will view the application package as any other mass mailing that arrives in their mailboxes or possibly perceive other messages, including a conclusion that they are being targeted because they may be more likely to vote for a given candidate. *See id.*

As an initial matter, the Court finds that Plaintiffs' conduct in distributing applications is clearly distinguishable from conduct such as burning a flag and participating in a demonstration sit-in, which the Supreme Court has explicitly found to embody expressive conduct.

Further, this Court finds that combining speech (in the cover information) with the conduct of sending an application form, as Plaintiffs do here, is not sufficient to transform the act of sending the application forms into protected speech. Plaintiffs' pro-absentee voting message is not necessarily intrinsic to the act of sending prospective voters an application form. As Intervenor Defendants suggest, without the accompanying cover information, the provision of an application form could mean a number of things to a recipient. For example, some voters likely perceived the state's decision to send absentee ballot applications to all eligible voters during the 2020 primary elections, Tr. 63:14-16, Day 2, as merely a convenience offered to citizens in light of the pandemic. This Court cannot say that the state's conduct in sending those forms would necessarily have been understood as communicating a pro-absentee voting message.

As in *Rumsfeld*, the expressive component of sending application packages in this case is not created by the conduct itself but by the included cover information encouraging the recipient to vote. The necessity of the cover message is "strong evidence" that the conduct of sending an application form is not so inherently expressive as to qualify for First Amendment protection.

Based on the foregoing analysis, the Court finds that Plaintiffs have not shown that the act of sending ballot application packages is expressive conduct subject to First Amendment protections. [6]

iii. Associational Rights

***10** The First Amendment protects the "right to associate with others" for a variety of purposes. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Such protection exists because the "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also NAACP v. Button*, 371 U.S. 415, 430 (1963) (recognizing "the kind of cooperative, organizational activity" that arises from an association formed " 'for the advancement of beliefs and ideas' " (quoting *Patterson*, 357 U.S. at 460)).

Opinions in cases like *Roberts*, *Patterson* and *Button* demonstrate that the cornerstone of associational rights is cooperative advocacy. The Supreme Court has therefore refused to recognize associational rights where the parties were strangers to one another and were not members of a particular organization. *See, e.g.*, *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (finding that the hundreds of teenagers who patronized a dance hall on a certain night did not have expressive associational rights because they were not members of an organization; they did not engage in the type of collective effort that typically supports associational rights; and most were just strangers who were willing to pay a fee for admission).

The right to associate for expressive purposes is also not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see also Buckley*, 424 U.S. at 25 (stating that "significant interference" with associational rights may be constitutional "if the [s]tate demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms" (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975))).

The record here shows that Plaintiffs send application forms to strangers whose information they obtain from the state's

voter roll. While it is undisputed that Plaintiffs' overall program involves advocacy work, there is no evidence of the type of two-way engagement that characterizes cases like *Button*.

The circumstances here are more akin to those in *Stanglin*, where the Supreme Court declined to find associational rights for strangers who merely patronized a dance club and were not engaged in any type of joint advocacy. 490 U.S. at 24-25.

Accordingly, the Court finds that Plaintiffs have not shown that the Ballot Application Provisions restrict their associational rights.

iv. Compelled Speech [11]

First Amendment protection of speech encompasses "the decision of both what to say and what ***not*** to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). For example, in *McClendon v. Long*, a Georgia sheriff placed signs in the front yards of registered sex offenders (without their consent and despite their objections) warning the public not to trick or treat at the home. 22 F.4th 1330, 1333-34 (11th Cir. 2022). Because the sheriff used private property to disseminate "his own ideological message," the Eleventh Circuit Court of Appeals found that the signs were a "classic example of compelled government speech" prohibited by the First Amendment. *Id.* at 1337.

***11** Similarly, in *National Institute of Family and Life Advocates v. Becerra* (hereinafter "*NIFLA*"), the Supreme Court found that the State of California improperly compelled a crisis pregnancy center to speak by requiring it to notify patients of alternate reproductive services such as abortion, even though such services were antithetical to its mission. 138 S. Ct. 2361, 2371 (2018).

In these cases, the courts focused in part on the fact that the compelled messages altered the content of the plaintiffs' speech and forced them to convey a message that they would not otherwise communicate. Therefore, the statutes were subject to heightened scrutiny. *See, e.g., McClendon*, 22 F.4th at 1338 (concluding that the compelled signs at issue were subject to strict scrutiny review and would be constitutional only if they represented a "narrowly tailored means of serving a compelling state interest").

However, the state's burden of proof appears to be lower in cases involving compelled disclaimers. In the campaign finance context, the Supreme Court has stated that disclaimer requirements are subject to only exacting scrutiny review. *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010); *see also Riley*, 487 U.S. at 798 (finding that a state statute compelling disclosure of information was subject to "exacting First Amendment scrutiny"). Thus, a disclaimer "may burden the ability to speak" so long as it has a "substantial relation" to a "sufficiently important" government interest. *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). The level of scrutiny is lower because a "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.

In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court recently confirmed that the exacting scrutiny standard is applicable in election-related cases outside the campaign finance disclosure context. 141 S. Ct. 2373, 2383 (2021). The Court clarified that under this standard, a "substantial relation" between the statute and the government's interest "is necessary but not sufficient." *Id.* at 2384. The challenged rule must also "be narrowly tailored to the interest it promotes, even if [the rule] is not the least restrictive means of achieving that end." *Id.*

Further, a perfect fit between the state's interest and the regulation is not required. *Id.* Rather, a court must look for reasonableness and scope " 'in proportion' " to the interest served. *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014)).

In this case, Plaintiffs contend that the Disclaimer Provision violates their First Amendment rights by compelling them to convey a misleading message to prospective voters. ECF No. 103 at 33. They also assert that the Disclaimer is an improper content-based regulation of speech. *Id.* As such, they argue that the Disclaimer Provision should be subject to strict scrutiny.

State and Intervenor Defendants agree that the Disclaimer Provision impacts Plaintiffs' First Amendment speech rights in some way, but they dispute the significance of the impact. State Defendants argue that the Disclaimer Provision does not require Plaintiffs to change their message or to convey the government's own message. Therefore, State Defendants analogize the Disclaimer Provision to those found in campaign disclosure cases, wherein the Supreme Court has applied only exacting scrutiny review.

***12** Intervenor Defendants, on the other hand, argue that the Disclaimer Provision only requires Plaintiffs to include specified language on the ballot application forms they distribute. Intervenor Defendants therefore conclude that the Disclaimer Provision is an election regulation, not a regulation of speech, and the *Anderson-Burdick* framework should apply.

The Court agrees that the manner of speech compelled in this case (factual information regarding the nature of the application form) is quite different from the manner of speech compelled in cases like *McClendon* (a sheriff's yard sign warning the public not to trick or treat at a registered sex offender's home) and *NIFLA* (a statute requiring a crisis pregnancy center to disclose the availability of alternate reproductive care, including abortions). In *McClendon* and *NIFLA*, the plaintiffs were required to convey the government's own message, which directly altered whatever message the plaintiffs communicated or would have refrained from communicating. It therefore makes sense that the Supreme Court employed a heightened level of scrutiny in those cases.

In this case, pretermitting Plaintiffs' contention that the first statement of the Disclaimer is factually incorrect, the Disclaimer says nothing (whether complementary or contradictory) regarding the pro-absentee voting message Plaintiffs wish to convey. It simply presents information designed to reduce voter confusion regarding absentee ballot applications provided by third parties and to relieve election officials of the administrative burdens resulting from such confusion.

For these reasons, the Court finds that the Disclaimer constitutes compelled speech but is more analogous to the disclaimers in *Citizens United* and *Americans for Prosperity*. Therefore, it would be subject to exacting scrutiny if that type of analysis were applicable here.

The Court will next address whether the *Anderson-Burdick* framework or the First Amendment levels of scrutiny apply here.

b. Whether the *Anderson-Burdick* Framework Is Appropriate Here

The Supreme Court has recognized that " 'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). But election schemes "inevitably affect[ ]" First Amendment rights. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The Supreme Court therefore developed the *Anderson-Burdick* framework as a balancing test to manage these competing interests and rights. *See Burdick*, 504 U.S. at 433. It explained that subjecting every voting regulation to strict scrutiny "would tie the hands of [s]tates seeking to assure that elections are operated equitably and efficiently." *Id.*

The *Anderson-Burdick* framework requires courts to carefully weigh the relative interests of the state in imposing election-related regulations against the alleged constitutional injury and the extent to which it is necessary to burden the plaintiff's rights. *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434. Courts routinely employ the *Anderson-Burdick* framework to decide First Amendment challenges to election laws. *See, e.g.*, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213–15 (1986) (employing the *Anderson-Burdick* framework to decide a freedom of association challenge to an election law governing voter access to a primary election); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (relying on the *Anderson-Burdick* framework to decide a challenge to a rule governing nomination of candidates); *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 694 (11th Cir. 2014) (reiterating, in the context of a ballot access case, that First Amendment challenges to a state's election laws are governed by the *Anderson-Burdick* framework); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1280 (N.D. Ga. 2020) (stating, in reference to a ballot application notification statute, that courts apply the *Anderson-Burdick* framework "[w]hen considering the constitutionality of an election law").

***13** The Supreme Court has, however, declined to apply the *Anderson-Burdick* framework in cases that concern "pure speech" as opposed to the "mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). In *McIntyre*, the Supreme Court concluded that the exacting scrutiny level of review applied to the plaintiff's challenge of a statute that prohibited the anonymous distribution of documents designed to influence voters in an election. *Id.* at 347. The Court reasoned that the *Anderson-Burdick* framework did not apply because the

ordinance did not merely impact speech incident to the ordinance's regulation of election procedure. *Id.* at 345-46. It directly regulated "the essence of First Amendment expression." *Id.* at 347. Therefore, the ordinance fell outside the scope of the *Anderson-Burdick* framework.

It is important to note that no bright line separates an election regulation that incidentally burdens speech and one that directly regulates speech. Courts must conduct a case-specific inquiry to determine whether the facts support an *Anderson-Burdick* analysis or are more appropriate for a traditional First Amendment scrutiny test.

Given the Court's conclusion above that Plaintiffs have not shown that the Prefilling and Anti-Duplication Provisions restrict speech, the Court finds that those provisions are more appropriately categorized as rules governing the "mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. As such, the Court will employ the *Anderson-Burdick* framework to determine Plaintiffs' challenge to the Prefilling and Anti-Duplication Provisions.

The Court likewise finds that the *Anderson-Burdick* framework applies to Plaintiffs' challenge to the Disclaimer Provision. Although, as the Court found above, the Disclaimer Provision burdens Plaintiffs' First Amendment rights, the Disclaimer Provision is not a direct regulation of speech similar to the ordinance in *McIntyre*. It does not prohibit Plaintiffs from conveying their message and merely establishes what information Plaintiffs must affix to application forms they send to third parties. Accordingly, the Disclaimer Provision can more appropriately be described as a regulation that governs the mechanics of an election process.

The Court now considers whether the Ballot Application Provisions are constitutional under the *Anderson-Burdick* analysis.

c. Evaluation of the Ballot Application Provisions Under the *Anderson-Burdick* Framework

The *Anderson-Burdick* framework requires courts to: (i) "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (ii) "identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule"; (iii) "determine the legitimacy and strength of each of those interests"; and (iv) "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. The analysis is not a "litmus-paper test" and instead requires a " 'flexible' " approach. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Anderson*, 460 U.S. at 789). Any "[d]ecision ... is very much a matter of degree, very much a matter of considering the facts and circumstances behind the law, the interests which the [s]tate claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer*, 415 U.S. at 730 (internal citations and punctuation omitted). Ultimately, "there is 'no substitute for the hard judgments that must be made.' " *Anderson*, 460 U.S. at 789-90 (quoting *Storer*, 415 U.S. at 730).

If a court finds that a plaintiff's rights "are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when [the law] imposes only reasonable, nondiscriminatory restrictions ..., the [s]tate's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal citations and punctuation omitted); *see also Common Cause*, 554 F.3d at 1354-55 (stating that where the burden is slight, "the state interest need not be 'compelling ... to tip the constitutional scales in its direction' " (alteration in original) (quoting *Burdick*, 504 U.S. at 439)). Thus, the balancing test ranges from strict scrutiny to rational basis analysis, depending on the circumstances of the case. *See Pisani v. Kervanick*, 973 F.2d 1539, 1543 (11th Cir. 1992).

***14** In any event, even a slight burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' " *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Lastly, "a [s]tate may not choose means that unnecessarily restrict constitutionally protected liberty." *Anderson*, 460 U.S. at 806 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)).

i. The Prefilling and Anti-Duplication Provisions

Since the Court has already found that the Prefilling and Anti-Duplication Provisions do not implicate Plaintiffs' First Amendment rights, it follows that the magnitude of the alleged injury is not severe. As a result, State Defendants have to show only that the provisions are reasonable and supported by important regulatory interests.

The record shows that the government designed the Prefilling Provision to address the concerns and confusion that arise when voters receive prefilled applications with incorrect identification information.

The Anti-Duplication Provision was designed to address the confusion and administrative burden that occurs when voters receive multiple ballot applications. Rather than altogether prohibit the distribution of application forms by third parties, as some states have done, the Georgia legislature struck a balance. It required third parties to consult the state voter roll and refrain from sending duplicate applications to voters who have already requested, received or voted an absentee ballot. The legislature also provided a safe harbor for entities who relied on information made available by the Secretary of State within five business days prior to the date the applications were mailed.

To be sure, avoiding voter confusion and administering effective elections are important regulatory interests. *See Storer*, 415 U.S. at 730 (recognizing the importance of fair, honest and orderly elections). Thus, State Defendants have demonstrated sufficient reasons for enacting the Prefilling and Anti-Duplication Provisions.

Moreover, the Prefilling and Anti-Duplication Provisions appear to be reasonable and nondiscriminatory methods of achieving the state's goals. This is especially true where State Defendants elected not to impose an outright ban on third-parties' distribution of absentee ballot applications and instead chose to regulate only the specific parts of the process that are problematic.

In all, it is not the role of the courts to dictate election policy to legislatures. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Elected officials should be permitted leeway to address potential deficiencies in the electoral process, so long as the response is reasonable and does not impose a severe burden on constitutionally protected rights. *See id.*

Based on the foregoing analysis under the *Anderson-Burdick* framework, the Court finds that Plaintiffs have not shown a substantial likelihood of success on the merits of their claim as to the Prefilling and Anti-Duplication Provisions.

ii. The Disclaimer Provision

As stated above, the parties agree that the Disclaimer Provision impacts First Amendment speech rights in some way. Thus, this Court must balance the magnitude of the injury against the strength of the government's interests as well as consider the extent to which the Disclaimer is necessary.

***15** Plaintiffs contend that the Disclaimer Provision compels them to disseminate false or, at the very least, misleading information, which portrays them as an untrusted source and is contrary to the pro-absentee voting message that they wish to convey. Plaintiffs argue that this type of forced communication strikes at the heart of First Amendment freedoms and warrants the highest level of scrutiny.

On the other hand, State Defendants argue that Plaintiffs have not demonstrated the alleged harm of the Disclaimer. State Defendants also point to the voter confusion and burden on election officials that result from third-party ballot application programs, including questions regarding the source of the forms and the misperception that the application form is itself a ballot or that recipients must return it. State Defendants assert that the Disclaimer Provision addresses these issues by affirmatively stating that (i) the application form is not published by the government, (ii) it is not provided by the government and (iii) it is not a ballot.

It is undisputed that the last two statements of the Disclaimer are true: a third party is responsible for sending the application form to the prospective voter, and the application form is the mechanism for requesting a ballot, not a ballot itself.[12] The main dispute relates to whether the first statement is true, false or otherwise confusing.

The Court understands Plaintiffs' argument that the Disclaimer is internally inconsistent. Specifically, Plaintiffs point out that the application form made available on the Secretary of State's website bears the Secretary of State's seal and includes a header that states it is an "Application for Official Absentee Ballot" at the same time that the first statement of the Disclaimer declares that the form is "NOT an official government publication." If a recipient understands "government publication" to refer to the source of the form, *see Official Publication*, Black's Law Dictionary (11th ed. 2019) ("book, pamphlet, or similar written statement issued by a government authority"), then the first statement of the Disclaimer will be confusing.[13]

Although the Court finds that a recipient could reasonably be confused by the Disclaimer, the record currently does not establish what harm may result from this potential confusion. Dr. Green's cursory survey of only five potential Georgia voters found one person who was reluctant to use the form based on the Disclaimer. Tr. 225:18-226:5, Day 1. That person initially stated that he would complete the form, and only after the researcher prodded him with a question regarding the specifics of the Disclaimer did he say that he would throw the form in the "trash." *Id.* at 226:1. In any event, Dr. Green conceded that this type of qualitative study cannot establish what proportion of absentee ballot applications would not be returned as a result of the Disclaimer. *See* ECF No. 103-5 at 8.

***16** Balancing this lack of evidence of significant harm against the state's compelling interests in avoiding voter confusion and ensuring the smooth administration of its elections, the Court finds that the Disclaimer Provision is justified. Although the Court's conclusion could change after a trial on the merits where the burden will be different and the evidence will be more developed, the Court cannot at this time (and on this record) find that Plaintiffs have shown a substantial likelihood of success on the merits of their claim with respect to the first statement of the Disclaimer. [11]

d. Whether and How the First Amendment Scrutiny Levels Apply

As the Court's analysis herein indicates, the *Anderson-Burdick* framework applies to each of the Ballot Application Provisions. However, Plaintiffs argue that the *Anderson-Burdick* framework is inapplicable here, and they urge the Court to employ the strict scrutiny test across the board. *See* ECF No. 103 at 32-33.

Intervenor Defendants advocate for rational basis review with respect to the Prefilling and Anti-Duplication Provisions but contend that the *Anderson-Burdick* framework is appropriate with respect to the Disclaimer Provision. *See* ECF No. 114 at 11, 16.

State Defendants agree with Intervenor Defendants that rational basis review should apply to the Prefilling and Anti-Duplication Provisions but argue in their brief that exacting scrutiny is the correct standard to apply to the Disclaimer Provision. *See* ECF No. 113 at 26.

To account for these disagreements, the Court will also consider the constitutionality of the Ballot Application Provisions under the scrutiny levels applicable to First Amendment cases.

i. The Prefilling and Anti-Duplication Provisions

Because the Court found that the Prefilling and Anti-Duplication Provisions do not regulate speech, those provisions are subject only to rational basis review. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that if a law does not burden a fundamental right, it will survive scrutiny as long as "it bears a rational relation to some legitimate end").

"A statute is constitutional under rational basis scrutiny so long as 'there is ***any reasonably conceivable state of facts*** that could provide a rational basis for the' statute." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)). Such "leniency ... provides the political branches the flexibility to address problems incrementally and to engage in the delicate line-drawing process of legislation without undue interference from the judicial branch." *Illinois v. City of Miami*, 82 F.3d 918, 923-24 (11th Cir. 1996). Courts must accept the "legislature's generalizations" regarding the impetus for a statute "even when there is an imperfect fit between means and ends" or when the statute causes " 'some inequality.' " *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

The Court's *Anderson-Burdick* framework analysis herein demonstrates that the Prefilling and Anti-Duplication Provisions are rational and reasonable in light of the state's goals of avoiding voter confusion and reducing the administrative burden on election officials. The Prefilling and Anti-Duplication Provisions thus survive rational basis scrutiny.

Accordingly, even assuming that the First Amendment scrutiny levels are relevant here, Plaintiffs have not shown a substantial likelihood of success on the merits of their claim as to the Prefilling and Anti-Duplication Provisions.

ii. The Disclaimer Provision

***17** Given the Supreme Court's guidance in *Americans for Prosperity* that "compelled disclosure requirements are

reviewed under exacting scrutiny" and that such analysis is applicable in other election-related settings, the Court will employ exacting scrutiny review here. 141 S. Ct. 2373, 2383 (2021).

"[E]xacting scrutiny requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest' and that the disclosure requirement be narrowly tailored to the interest it promotes." *Id.* at 2383 (citation omitted) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). Narrow tailoring in this context means that the government must endeavor to balance the restriction against the interests it seeks to advance, even if the solution it selects is not the least restrictive means of achieving the end. *See id.* at 2384. Thus, " 'fit matters.' " *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014)). The fit need not be " 'perfect' " or represent " 'the single best disposition,' " but it must be " 'reasonable,' " and its scope must be " 'in proportion to the interest served.' " *Id.* (quoting *McCutcheon*, 572 U.S. at 218).

Based on the Court's above *Anderson-Burdick* analysis of the Disclaimer Provision, the Court concludes that there is a "substantial relation" between the language of the Disclaimer and the state's interests in reducing voter confusion and ensuring the effective and efficient administration of its elections. The fit is certainly not perfect, as evidenced by the potentially confusing information conveyed by the first statement of the Disclaimer. Also, the Disclaimer is likely not the narrowest possible solution to the problems the state identified.

Nevertheless, whatever infirmities may exist in the government's choice of words, Plaintiffs have not sufficiently demonstrated that the alleged harm of the Disclaimer is so severe as to outweigh the compelling interests at stake. Indeed, as the Court highlighted above, Plaintiffs' evidence regarding the Disclaimer's impact is unpersuasive. Consequently, the Court finds that the Disclaimer reasonably fits and is in proportion to the interests its serves. The Disclaimer Provision therefore survives exacting scrutiny review.

In sum, whether the Court employs the *Anderson-Burdick* framework or the First Amendment exacting scrutiny test, it remains that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their Disclaimer Provision claim.

2. Irreparable Harm

"A showing of irreparable injury is 'the sine qua non of injunctive relief.' " *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quoting *No. Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). Even if a plaintiff can show a substantial likelihood of success on the merits, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id.*; *see also City of Jacksonville*, 896 F.2d at 1285 (declining to address all elements of the preliminary injunction test because "no showing of irreparable injury was made").

The irreparable injury sufficient to satisfy the burden "must be neither remote nor speculative, but actual and imminent." *Siegel*, 234 F.3d at 1176 (quoting *City of Jacksonville*, 896 F.2d at 1285). In the context of constitutional claims, it is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also City of Jacksonville*, 896 F.2d at 1285-86 (noting that an ongoing violation of First Amendment rights constitutes irreparable injury).

***18** In light of the Court's finding that Plaintiffs have not shown that they are substantially likely to succeed on the merits of their claims, the Court need not (and does not) address the irreparable injury prong of the preliminary injunction test. *See Siegel*, 234 F.3d at 1176 (stating that a preliminary injunction may not to be granted unless the movant clearly establishes "each of the four prerequisites").

3. Balance of the Equities and the Public Interest

The Court is likewise not required to address the balance of the equities and the public interest prongs of the preliminary injunction test but provides the following analysis as additional support for its finding here.

The balance of the equities and the public interest factors are intertwined in the context of an election because "the real question posed ... is how injunctive relief ... would impact the public interest in an orderly and fair election, with the fullest voter participation possible and an accurate count of the ballots cast." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1326 (N.D. Ga. 2018). Courts therefore consider these two

factors in "tandem." *See, e.g., id.* (merging the analysis of the third and fourth prongs of the preliminary injunction test); *see also Black Voters Matter Fund v. Raffensperger*, No. 1:20-CV-4809, 2020 WL 7079249, at *2 (N.D. Ga. Apr. 30, 2020) (same); *Martin v. Kemp*, No. 1:18-CV-4776, 2018 WL 10509439, at *3 (N.D. Ga. Nov. 2, 2018) (same).

The Court's analysis of the balance of the equities and public interest factors will focus on the considerations outlined in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The Supreme Court has recognized that while it would be "the unusual case" in which a court would not act to prevent a constitutional violation, "under certain circumstances, such as where an impending election is imminent and a [s]tate's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Although the election in *Reynolds* was not imminent, and that case does not necessarily have broad application to cases like the one at bar, *Reynolds* helped further the principle of exercising judicial restraint where an injunction could hamper the electoral process.

In subsequent opinions, the Supreme Court identified specific factors that could militate against granting election-related injunctive relief close to election day. For example, in *Fishman v. Schaffer*, the Court focused on factors such as unnecessary delay in commencing a suit and relief that "would have a chaotic and disruptive effect upon the electoral process" as grounds for denying a motion for injunctive relief close to an election. 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers).

This principle of restraint has continued to develop over the years, and the Supreme Court's opinion in *Purcell* is now frequently cited for the proposition that a court should ordinarily decline to issue an injunction—especially one that changes existing election rules—when an election is imminent. 549 U.S. at 5-6. The *Purcell* court reasoned that such a change could be inappropriate because it could result in "voter confusion and [the] consequent incentive to remain away from the polls." *Id.* at 4-5.

The Supreme Court has reiterated this directive on many occasions. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (finding that an injunction "at the last minute" would "violate *Purcell*'s well-known caution against federal courts mandating new election rules").

***19** Most recently, Justice Kavanaugh stated in a concurring opinion in *Merrill v. Milligan* that *Purcell* concerns can be overcome by establishing that

> (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). Considering the reasoning in *Purcell* and Justice Kavanaugh's opinion in *Merrill*, the Eleventh Circuit recently stayed an injunction in *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, 32 F.4th 1363, 1375 (11th Cir. 2022). The court's decision relied in part on the fact that voting in the next election was set to begin in less than four months and that the injunction implicated aspects of the election machinery that were already underway. *Id.* at 1371. The court also observed that "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Id.* (alteration in original) (quoting *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring)).

Plaintiffs are, however, correct that *Purcell* does not function as a bright line rule. *Cf. Riley v. Kennedy*, 553 U.S. 406, 426 (2008) (noting that "practical considerations ***sometimes*** require courts to allow elections to proceed despite pending legal challenges" (emphasis added)); *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 508, 514 (11th Cir. 2020) (Rosenbaum, R., and Pryor, J., concurring) ("*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists."); *Nampby v. DeSantis*, 493 F. Supp. 3d 1130, 1141 (N.D. Fla. 2020) (noting that *Purcell* did not "create a per se rule" prohibiting the issuance of an

injunction against voting laws on the eve of an election). Rather, courts must engage with the facts and specific circumstances of the case to reach a decision. *See Purcell*, 549 U.S. at 4-5.

Here, State and Intervenor Defendants argue that the Court should withhold relief under *Purcell* because Plaintiffs unduly delayed in bringing the Motion.

Plaintiffs respond that they filed their Complaint close in time to the passage of SB 202, and the timing of their Motion makes sense within the procedural posture of this case—the Motion was filed after the Court's decision on State and Intervenor Defendants' motions to dismiss and after the parties had an opportunity to engage in some discovery. The Court notes that cases discussing undue delay in connection with the *Purcell* doctrine usually refer to the timing of the complaint. *See, e.g.*, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

In any event, the key issue here is whether an injunction at this stage of the current election cycle would cause further voter confusion. SB 202 is already the law, and an injunction with respect to the Disclaimer Provision, for example, would not merely preserve the status quo. It would change the law while the election machinery is already grinding. Third parties who may not be aware of these proceedings are presumably already preparing to distribute ballot application forms bearing the current Disclaimer. A ruling requiring a different disclaimer could cause two different application forms to be in circulation. Prospective voters who receive both versions of the form could be confused by the conflicting statements. The Court is also mindful of unintended consequences of late-breaking changes to the law. *See League of Women Voters*, 32 F.4th at 1371.

***20** While the Court agrees that the *Purcell* consideration is arguably less significant in this case because the challenged provisions affect primarily back-of-the-house activity undertaken by third-party organizations, the Court finds that some risk does exist, and that risk indicates that the balance of the equities and the public interest weigh against entering a preliminary injunction in this case.

III. CONCLUSION

For all the reasons set forth in this opinion, Plaintiffs have not satisfied their burden on at least three of the four prongs of the preliminary injunction test (likelihood of success on the merits, balance of the equities and public interest). The Court did not reach the fourth prong (irreparable harm). Accordingly, the Court finds that a preliminary injunction is not warranted here. Plaintiffs' Motion (ECF No. 103) is **DENIED** in all respects.

SO ORDERED this 30th day of June, 2022.

All Citations

Slip Copy, 2022 WL 2357395

Footnotes

1 Pursuant to Federal Rule of Civil Procedure 25(d), State Election Board members Edward Lindsay (who succeeded Rebecca Sullivan), Sara Ghazal (who succeeded David Worley) and Janice Johnston (who succeeded Anh Le) were automatically substituted as Defendants in this action upon their appointments to the State Election Board.

2 VoteAmerica's claims regarding the Prefilling and Anti-Duplication Provisions appear to be moot for the purposes of this Motion. VoteAmerica initially believed that its operations would be impacted by the Prefilling and Anti-Duplication Provisions, but State Defendants confirmed during the preliminary injunction hearing that those provisions do not apply to VoteAmerica's absentee ballot application tool. Tr. 38:25-39:15, June 10, 2022, ECF No. 130 (hereinafter "Tr. Day 2").

3 Plaintiffs' expert, Dr. Donald P. Green, testified that "the net effect of [the Prefilling Provision] is that groups such as the Plaintiffs must waste money sending *more* unfilled forms in an attempt to generate the same number of vote-by-mail requests." ECF No. 103-5 at 9. During the preliminary injunction hearing, State

Defendants moved to exclude Dr. Green's opinions on the ground that they do not satisfy the Federal Rule of Evidence 702 standard for expert testimony. Tr. 205:7-12, Day 1; *see also* Tr. 215:21-216:7, Day 2. State Defendants' oral motion reiterated arguments that they mentioned in their brief. Because the arguments regarding the validity of Dr. Green's opinions have not been adequately developed for the Court, the Court defers ruling on State Defendants' motion to exclude. The Court considers Dr. Green's opinions only for the purposes of this Motion.

4 State Defendants, however, presented evidence that some of these difficulties could potentially be avoided by using a different vendor. *See, e.g.*, Tr. 138:5-12, Day 2.

5 Dr. Green opined that the Anti-Duplication Provision will "severely attenuate or altogether eliminate" Plaintiffs' absentee ballot application communications. ECF No. 103-5 at 11.

6 Contrary to Plaintiffs themselves, their expert testified that the portion of the Disclaimer stating that the application form is not an "official government publication" is "[t]rue." Tr. 215:23-216:51, Day 1. Dr. Green explained that the form Plaintiffs mail to prospective voters is "identical" to the official publication but that it is not the actual publication. *Id.* at 216:1.

7 Dr. Green opined that the Disclaimer would "likely ... create confusion among voters" and make prospective voters "reluctant to fill out an otherwise innocuous form." ECF No. 103-5 at 6, 7. He based his opinion in part on a qualitative semi-structured interview of five potential voters in Georgia and on his "decades" of experience "studying public opinion[,] ... conducting randomized trials and reading about randomized trials involving things like voter turnout and absentee voting or registration." Tr. 228:10-16, Day 1. While Dr. Green concedes that the type of qualitative study he employed to analyze the Disclaimer Provision cannot establish what proportion of absentee ballot applications would not be returned as a result of the Disclaimer, he emphasized that the study "clearly indicates" that the Disclaimer "can cause hesitancy to complete an otherwise acceptable form." ECF No. 103-5 at 8.

8 The First Amendment was made applicable to the states through the Fourteenth Amendment. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988).

9 The Court's reference to "speech" generally refers to First Amendment speech and association rights.

10 Implicit in this Court's finding that the Prefilling and Anti-Duplication Provisions do not restrict speech or protected conduct is the conclusion that they are likewise not content-based restrictions of speech. The Court therefore does not address Plaintiffs' argument in this regard.

11 It is clear that the Prefilling and Anti-Duplication Provisions do not compel Plaintiffs to convey any message, and Plaintiffs do not argue that those provisions compel speech. Therefore, the Court's compelled speech analysis applies only to the Disclaimer Provision.

12 Plaintiffs contend that the Secretary of State could easily include the third statement of the Disclaimer on the required application form if it desired to do so.

13 The Secretary of State's General Counsel had some concern regarding the clarity of this statement in the Disclaimer. Tr. 93:21-95:20, Day 2. He provided language for a bill that would have amended the Disclaimer to delete the statement, but the legislature did not pass the bill. *Id.* Also, Plaintiffs' own expert conceded that the statement is true, apparently based on the interpretation that the specific application provided by third parties is "identical" to but is not the actual government publication. Tr. 215:23-216:16, Day 1. The Court agrees that this is one plausible interpretation of the statement. *See Publication*, Merriam-webster.com,

https://www.merriam-webster.com/dictionary/publication (last visited June 27, 2022) ("the act or process of publishing"). The differing views underscore the potential for confusion here.

14 For the same reasons, the Court finds that Plaintiffs have not shown a substantial likelihood of success on the merits of their claim with respect to the third statement of the Disclaimer.

End of Document

2022 WL 2389566
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

VOTE.ORG, Plaintiff—Appellee,

v.

Jacquelyn CALLANEN, Et al. Defendants,

v.

Ken Paxton, In His Official Capacity as the Attorney General of Texas; Lupe C. Torres, In His Official Capacity as the Medina County Elections Administrator; Terrie Pendley, In Her Official Capacity as the Real County Tax Assessor-Collector, Intervenor Defendants—Appellants.

No. 22-50536
|
FILED July 2, 2022

Appeal from the United States District Court for the Western District of Texas, USDC No. 5:21-CV-649, Jason Kenneth Pulliam, U.S. District Judge

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Autumn Hamit Patterson, Robert E. Henneke, Texas Public Policy Foundation, Austin, TX, Chance Weldon, Austin, TX, Intervenor Defendants—Appellants Lupe C. Torres, and Terrie Pendley.

Before Jones, Duncan, and Engelhardt, Circuit Judges.

Opinion

Edith H. Jones, Circuit Judge:

***1** Vote.org sued several county election administrators seeking to enjoin enforcement of a recently enacted Texas Election Code provision that, in practice, makes useless the web application it developed to allow Texas voters to register electronically. The district court granted a permanent injunction, concluding that Vote.org adequately showed that the provision violates both the Civil Rights Act and the Constitution. The defendants seek a stay pending appeal from this court. We conclude that the defendants have met their burden for such extraordinary relief and exercise our discretion to GRANT a stay pending appeal.

I.

In virtually every state, those eligible to vote must register before casting a ballot. To register in Texas, applicants need only "submit an application to the registrar of the county in which the [applicant] resides." Tex. Elec. Code § 13.002(a). That application "must be in writing and signed by the applicant." Tex. Elec. Code § 13.002(b).

Applicants have several ways to "submit" their application to the county registrar. Most straightforwardly, an applicant may submit the application directly to the county registrar by personal delivery or mail. Tex. Elec. Code § 13.002(a). Texas also designates as certain governmental offices, such as the Department of Public Safety and public libraries, as "voter registration agencies" and requires them to accept and deliver completed applications to the county registrar. Tex. Elec. Code §§ 20.001, 20.035. Further, counties may appoint volunteer "deputy registrars" to distribute and accept applications on the county registrar's behalf. Tex. Elec. Code §§ 13.038, 13.041. If an applicant submits an incomplete voter registration application, then the county registrar will notify the applicant and allow ten days to cure the deficiency. Tex. Elec. Code § 13.073.

In 2013, the Texas Legislature passed, and the Governor signed, legislation that expanded an applicant's options for submitting a voter registration application. The legislation allowed an applicant to transmit a registration form to the county registrar via fax, so long as they delivered or mailed a hardcopy of the application to the registrar within four days of the fax transmission. 2013 Tex. Sess. Law Serv. 1178. The application is considered submitted to the registrar "on the date the [fax] transmission is received ...." *Id.* The requirement that an applicant submit a copy of by personal

delivery or mail within four days was codified at Tex. Elec. Code § 13.143(d-2).

Vote.org is a non-profit, non-membership organization that seeks to simplify and streamline political engagement by, for example, facilitating voter registration. In 2018, Vote.org launched a web application that purported to allow a person to complete a voter registration application digitally. A user need only supply the required information and an electronic image of her signature and the web application would assemble a completed voter registration application. The web application would then transmit the completed form to a third-party fax vendor, who would transmit the form via fax to the county registrar, and another third-party vendor, who would mail a hardcopy of the application to the county registrar.

***2** During the 2018 election cycle, Vote.org piloted its web application in Bexar, Travis, Cameron, and Dallas counties. Other counties rejected its invitation to participate. The pilot program was an unmitigated disaster. Because of its poor design, many of the voter registration applications assembled using the web application contained signature lines that were blank, blacked out, illegible, or otherwise unacceptable. Moreover, the web application failed to fax many of the voter registration applications to the relevant registrar's office.

After encountering difficulties with the pilot program, the Cameron County Elections Administrator sought the Secretary of State's guidance on whether Vote.org's web application complied with the Texas Election Code. Because applications submitted using the web application lacked an original, "wet" signature, the Secretary of State's office advised that those applications were incomplete. Consequently, any applicant who submitted a voter registration application using Vote.org's web application needed to be notified and given an opportunity to cure the deficiency in accordance with Tex. Elec. Code § 13.073. The Secretary of State later issued a public statement to the same effect. Vote.org notified users of its web application that their applications would not be processed unless they cured the signature defect.[1] Vote.org stated that it was "truly, deeply, sorry for [the] inconvenience."

Several years later, during the 2021 Legislative session, Texas passed House Bill 3107, which clarified several provisions in the Election Code. 2021 Tex. Sess. Law Serv. 1469. Critically, the bill amended Tex. Elec. Code § 13.143(d-2) to specify that for "a registration application submitted by [fax] to be effective, a copy of the original registration application containing the voter's original signature must be submitted by personal delivery or mail" within four days. *Id.*

Vote.org then brought this lawsuit under 42 U.S.C. § 1983 against four county election officials seeking to enjoin § 13.143(d-2)'s wet signature requirement. Specifically, Vote.org argues that the wet signature requirement violates § 1971 of the Civil Rights Act of 1964, codified at 52 U.S.C. § 10101(a)(2)(B), because it is immaterial to an individual's qualification to vote. Vote.org also contends that the wet signature requirement unduly burdens the right to vote in violation of the First and Fourteenth Amendments. Attorney General Paxton and others intervened to defend § 13.143(d-2)'s constitutionality. After extensive discovery, the defendants and Vote.org filed competing motions for summary judgment.

The district court denied the defendants' motion and granted Vote.org's. Echoing an earlier ruling on a motion to dismiss for lack of jurisdiction, the district court held that Vote.org had organizational and statutory standing. As to the merits, the district court concluded that the wet signature requirement violates § 1971 because an original, wet signature is "not material" to an individual's qualification to vote. Whether a registration form mailed to the county registrar's office after being faxed contains a wet signature, the district court noted, is distinct from the material requirement that the form be "signed by the applicant." Furthermore, the district court reasoned, Vote.org showed that the county registrars do not use the wet signatures for any purpose, only electronically stored versions of the signatures, and Texas law does not enumerate a wet signature as one of the qualifications for voter registration. The district court also held that the wet signature requirement violates the First and Fourteenth Amendments. Importantly, the district court concluded as a threshold matter that the wet signature rule implicates the right to vote. Then, the district court weighed "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State" and concluded that there was "no valid justification" for the burden. Ultimately, the district court granted a permanent injunction.

***3** The defendants sought a stay pending appeal, which the district court denied. The defendants now seek the same relief from this court. Based on the standard and reasons articulated below, we conclude the defendants have met their burden and are entitled to a stay pending appeal.

II.

To determine if a party is entitled to a stay pending appeal, this court considers "(1) whether the applicant has made a strong showing of likelihood to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of a stay will substantially injure other interested parties; and (4) where the public interest lies." *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761, 173 L.Ed.2d 550 (2009)). Addressing first the defendants' likelihood of success on the merits and then the other stay factors, we conclude that the defendants have met their burden. We therefore exercise our discretion in granting a stay pending appeal.

A.

The defendants contend that they are likely to succeed on the merits for three reasons: Vote.org lacks standing; the wet signature requirement (a) does not deny anyone the right to vote and (b) is material to determining whether an individual is qualified to vote; and the wet signature requirement does not burden the right to vote and, even if it does, that burden is minimal and outweighed by the State's interests. We address each argument in turn.

i.

First, the defendants contend that Vote.org lacks standing. Article III specifies that the judicial power of the United States extends only to "Cases" and "Controversies." U.S. CONST. art. III, § 2. Standing doctrine implements the case-or-controversy requirement by insisting that the plaintiff "prove that he has suffered a concrete and particularized [injury in fact] that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 570 U.S. 693, 704, 133 S. Ct. 2652, 2661, 186 L.Ed.2d 768 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)). An organization suing on its own behalf, as Vote.org is here, must satisfy the same standard. [2] *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010).

*4 Even assuming that Vote.org has shown organizational injury from the diversion of resources, the defendants argue that Vote.org lacks third-party standing. Vote.org's lawsuit, the defendants assert, does not seek to vindicate its own rights, only the rights of Texans not before this court. The defendants are, without question, correct that Vote.org invokes the rights of Texas voters and not its own—an organization plainly lacks the right to vote. A party must ordinarily assert only "his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Supreme Court crafted a prudential exception to the traditional rule against third-party standing where "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S. Ct. 564, 567, 160 L.Ed.2d 519 (2004) (citing *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L.Ed.2d 411 (1991)). Otherwise, the Supreme Court has "not looked favorably upon third-party standing." *Id.*

Vote.org asserts that it fits within the prudential exception to the rule against third-party standing. It posits that it has a close relationship with some unknown subset of Texas voters that may in the future submit their voter registration applications via fax using the Vote.org web application because their right to submit those applications free from the burden imposed by the wet signature requirement is inextricable from Vote.org's platform. Furthermore, Vote.org hypothesizes that individual voters injured by the wet signature requirement are hindered by financial constraints and justiciability problems in protecting their own rights. We disagree. Vote.org's relationship with prospective users is no closer than the hypothetical attorney-client relationship rejected as insufficiently close to support third-party standing in *Kowalski*. 543 U.S. at 130-31, 125 S. Ct. at 568 (concluding that a "future attorney-client relationship with as yet unascertained" criminal defendants is not only not a close relationship but "no relationship at all"). Indeed, Vote.org's CEO explained that the organization does not "assist people in registering to vote," instead it designed technology that allows users to "register themselves to vote." Moreover, there is little doubt that voters injured by the wet signature requirement could protect their rights—voters and associations representing those voters bring such lawsuits all the time. *See, e.g.*, *Tex. Democratic Party v. Hughs*, 860 F. App'x 874 (5th Cir. 2021) (lawsuit brought by same group of attorneys challenging wet signature requirement on behalf of

associations with eligible voter members). If Vote.org cannot prove that it meets the requirements for third-party standing, as seems probable, then the defendants must prevail.

The defendants alternatively contend that even if Vote.org could fit within the exception to the general prohibition on third-party standing, § 1983 contains no exception that allows a plaintiff to invoke a third-party's rights and therefore Vote.org lacks statutory standing for want of an arguable cause of action. Statutory standing turns on "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-128 & n.4, 134 S. Ct. 1377, 1387, 1387 n.4, 188 L.Ed.2d 392 (2014). Section 1983, the defendants point out, specifies that state actors who subject a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable *to the party injured* ...." 42 U.S.C. § 1983(emphasis added). Thus, the defendants emphasize, the text seemingly precludes an action premised on the deprivation of another's rights. And here there is little doubt that Vote.org's lawsuit is derivative in that sense: The substantive claims both hinge on allegations that the wet signature requirement unlawfully infringes Texans' right to vote.

***5** Vote.org retorts that the defendants' position is contradicted by the weight of precedent. Less clear is what precedent. Of the cases Vote.org cites, some involve organizations bringing § 1983 claims but, with two exceptions, none appear to involve an organization suing only on its own behalf based on injuries to a third parties.[3] The two cases where courts allowed an organization to sue under § 1983 based on the infringement of another's rights did so without discussing the issue. *See Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011); *Common Cause v. Thomsen*, No. 19-cv-323, ---- F.Supp.3d ----, 2021 WL 5833971 (W.D. Wis. Dec. 9, 2021). The defendants' textual argument is powerful and Vote.org's response weak.[4] Without an arguable cause of action, Vote.org lacks statutory standing and the defendants appear poised for merits success on this basis too.

ii.

Second, the defendants argue that Vote.org is unlikely to prevail on its § 1971 claim because (1) no voter is deprived of the opportunity to vote by virtue of the wet signature requirement and (2) the wet signature requirement is material to determining whether an individual is qualified to vote.[5] Section 1971 provides:

> No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper related to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).

***6** The defendants contend that enforcement of the wet signature rule does not result in anyone being deprived of the right to vote because the Texas Election Code confers a right to cure and allows other means of registration.[6] Under the wet signature rule, an application submitted via fax and mailed without a wet signature is incomplete and must be rejected. Tex. Elec. Code § 13.073 requires the county registrar to notify any applicant whose voter registration application is rejected, explain the reason for the rejection, and allow the applicant ten days to cure the defect. And an applicant has many other means of registering, by mail or personal delivery, for instance. Texas Elec. Code § 13.002(a). Vote.org argues that the opportunity to cure is beside the point because if the applicant who desires to submit her application via fax does not eventually comply with a wet signature requirement, then the voter will not be registered and, consequently, will not be able to vote. But under Vote.org's theory an individual's failure to comply with *any* registration requirement would deprive that person of the right to vote. That proves too much. Voters that submit their applications via fax and mistakenly mail a copy without a wet signature are given a second bite at the apple. Indeed, the county registrar is *required* to notify the applicant in short order and allow ten days to cure. What is more, no applicant *must* comply with the wet signature requirement – there are plenty of alternative means to register. Thus, it is hard to conceive how the wet signature rule deprives anyone of the right to vote.

Next, the defendants argue that the wet signature requirement is material in determining whether an individual is qualified to vote. To be qualified to vote in Texas, an individual must, among other things, be "a registered voter." Tex. Elec. Code § 11.002(a)(6). And to register to vote in Texas an individual must submit a written and signed "application to the registrar of the county in which the [individual] resides ... by personal delivery, by mail, or by [fax] in accordance with Sections 13.143(d) and (d-2)." Tex. Elec. Code § 13.002(a)-(b). Section 13.143(d-2), in turn, requires that a voter registration application submitted via fax be subsequently mailed with the applicant's original, i.e. wet, signature. Tex. Elec. Code § 13.143(d-2). Texas's approved voter registration application displays the State's voting requirements immediately above the signature box and also that giving false information to procure a voter registration is criminal perjury. Requiring a wet signature on a voter registration application submitted via fax, the defendants emphasize, therefore ensures that an applicant has read, understood, and attested that he meets the qualifications for voting. Thus, the defendants conclude, not only is the wet signature requirement material in the sense that it is one of the ways an individual becomes qualified to vote but it is also material in the sense that it deters fraud, as I explain in the next section.

Vote.org contests the wet signature rule's materiality by pointing out that several election administrators admitted in depositions that the rule serves no purpose related to determining an applicant's qualifications to vote. Indeed, Vote.org stresses, county registrars accept any voter registration application with a wet signature without comparing or otherwise inspecting the signature other than to ensure the signature is present. Vote.org does not, however, contest the materiality of Tex. Elec. Code § 13.002(b)'s general requirement that an application "must be in writing and signed by the applicant."

It seems to us that Vote.org's position is logically inconsistent. For one, it is unclear how its argument squares with § 1971's text. In Texas, an individual is qualified to vote only if she is registered and to register via fax she must comply with the wet signature rule. Tex. Elec. Code §§ 11.002(a)(6), 13.002(a). Thus, to be qualified to vote she must mail her application to the county registrar with a wet signature. Moreover, the text of Tex. Elec. Code §§ 13.002(a) and 13.002(b) suggest that the general requirement that an application be "signed by the applicant" is no more or less material under § 1971 than the requirement that an application submitted by fax be "in accordance with" the wet signature requirement. In short, the two requirements fall or stand together under § 1971. Vote.org cannot logically maintain that the one is valid and the other not.

*7 Because the defendants can show that Vote.org's § 1971 claim is unlikely to succeed, they have also shown a strong likelihood of success on this front.

iii.

Finally, the defendants contend that Vote.org is unlikely to succeed on its constitutional claim under the First and Fourteenth Amendments. "Where a state election rule directly restricts or otherwise burdens an individual's First [or Fourteenth] Amendment rights, courts apply a balancing test derived from two Supreme Court decisions," *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992), *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). In applying the *Anderson-Burdick* framework, this court "must weigh the character and magnitude of the asserted injury" to voting rights under the First and Fourteenth Amendments "against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 387-88 (quoting *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063, and *Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570). "State rules that impose a severe burden" on voting rights "must be 'narrowly drawn to advance a state interest of compelling importance.' " *Id.* at 388 (quoting *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063). By contrast, State rules that impose lesser burdens "trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' " *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 1370, 137 L.Ed.2d 589 (1997)).

The defendants assert that the wet signature rule imposes at most a *de minimis* burden on the right to vote. Drawing an analogy to *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020) ("*LULAC*"), the defendants posit that the wet signature requirement is part of the Texas Legislature's expansion of the means for voter registration. *Id.* at 144 (concluding that "one strains to see how [the voting provision at issue] burdens voting at all" because it is "part of the Governor's *expansion* of opportunities to cast" a ballot). And any burden on the right to vote, the defendants contend, is mitigated by the availability of numerous other

ways to register. Furthermore, the defendants stress that the wet signature requirement advances Texas's interests in (1) guaranteeing that the applicant attests to meeting the State's voting qualifications and (2) helping to deter and detect voter fraud.

As it did before the district court, Vote.org contends that the defendants err in characterizing the wet signature rule as part of an expansion of voting rights. *LULAC* is distinguishable. Vote.org contends, because it addressed a challenge to voting provisions adopted in quick succession. Here, by contrast, Texas first offered registration via fax in 2013 but then restricted access to that method of registration by adopting the wet signature rule in 2021. As to the State's interests, Vote.org asserts that the defendants fail to offer a coherent explanation that justifies the burden the wet signature rule places on voters. Texas's asserted interest in guaranteeing that an applicant attests to meeting the qualifications to vote is belied by the fact that Texas allows residents to use imaged signatures in many other similarly important contexts. And that Texas might compare a voter registration form against later registration or ballots if their authenticity is in question hardly shows why a *wet* signature is required. Critically, the district court found that "[a]t no time is an original, wet signature used to conduct a voter-fraud investigation."

***8** For at least two reasons the defendants are likely to succeed on this balancing test. First, the defendants are almost certainly correct that the wet signature rule imposes at most a very slight burden on the right to vote. Indeed, "one strains to see how it burdens voting at all." *LULAC*, 978 F.3d at 144. The wet signature requirement does not burden the right to vote in toto, it only affects the small subset of voter registration applicants that elect to register via fax. And even for those applicants, the burden is small. Second, the State's asserted interests are surely adequate to justify the slight burden imposed by the wet signature rule. "Any corruption in voter registration affects a state's paramount obligation to ensure the integrity of the voting process and threatens the public's right to democratic government." *Voting for Am., Inc.*, 732 F.3d at 394. Physically signing a voter registration form and thereby attesting, under penalty of perjury, that one satisfies the requirements to vote carries a solemn weight that merely submitting an electronic image of one's signature via web application does not. Thus, it is almost unquestionable that the wet signature requirement helps deter voter registration fraud. Moreover, actual evidence of voter registration fraud "has never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration." *LULAC*, 978 F.3d at 147. Accordingly, the defendants have shown a likelihood of success on this issue.

B.

Having concluded that the defendants have shown a strong likelihood of success on the merits, we address the remaining *Nken* factors: namely, "whether the applicant will be irreparably injured absent a stay"; "whether issuance of the say will substantially injure the other parties interested in the proceeding"; and "where the public interest lies." *Nken*, 556 U.S. at 426, 129 S. Ct. at 1756.

The defendants easily satisfy their burden to show that they will be irreparably injured absent a stay. When a "State is seeking to stay a preliminary injunction, it's generally enough to say" that " '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.' " *Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (quoting *Maryland v. King*, 567 U.S. 1301, 1301, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers)). So it is here. *See LULAC*, 978 F.3d at 149; *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020). Vote.org's contrary arguments are unavailing.

The remaining two factors also weigh in the defendants' favor. Issuing a stay pending appeal will not substantially injure either Vote.org or other interested parties (i.e. voters in the four counties where the district court's injunction applies) because Vote.org cannot register to vote and individuals seeking to register to vote can simply comply with the wet signature requirement or else register in another way. Moreover, a stay simply maintains the status quo since at least 2018, when the Texas Secretary of State clarified that wet signatures are required for voter registration applications submitted via fax. Finally, where "the State is the appealing party," as it is here, "its interest and harm merge with the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). A temporary stay will, at a minimum, minimize confusion among voters and county registrars by making voter registration law uniform throughout the state in the crucial months leading up to the voter registration deadline. That result is plainly within the public's interest.

III.

The defendants' emergency motion for stay pending appeal is therefore GRANTED.

All Citations

--- F.4th ----, 2022 WL 2389566

Footnotes

1 Several groups sued the Secretary of State, arguing that requiring a wet signature on a voter registration application violates the Constitution and § 1971 of the Civil Rights Act. *Tex. Democratic Party v. Hughs*, 860 F. App'x 874, 876 (5th Cir. 2021) (per curiam). This court dismissed that lawsuit, concluding that the Secretary of State is an improper defendant under *Ex parte Young*.

2 Organizations can satisfy the standing requirement under two theories, "appropriately called 'associational standing' and 'organizational standing.' " *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Organizational standing requires the organization to establish its own standing premised on a cognizable Article III injury to the organization itself. *Id.* By contrast, associational standing "is derivative of the standing of the [organization's] members, requiring that they have standing and that the interests the [organization] seeks to protect be germane to its purpose." *Id.* Here, Vote.org asserts only the former theory. (Because it is a non-membership organization, Vote.org cannot contend that it has associational standing.) We are dubious whether Vote.org can show an injury sufficient to claim organizational standing in light of, e.g., *El Paso Cnty. v. Trump*, 982 F.3d 332, 344-45 (5th Cir. 2020); *City of Kyle*, 626 F.3d at 238-39. We are also dubious that its claims satisfy the traceability and redressability prongs of organizational standing, but we leave these issues to the merits panel.

3 *See, e.g.*, *Ass'n of Am. Physicians & Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 553 (5th Cir. 2010) (concluding that association "was entitled to claim associational standing on behalf of its members ...."); *Anderson v. Ghaly*, No. 16-cv-5120, 2022 WL 717842, at *6 (N.D. Cal. Mar. 10, 2022) (holding that organizations alleged facts sufficient for both associational and organizational standing); *Tex. Democratic Party v. Hughs*, 474 F. Supp.3d 849, 855-857 (W.D. Tex. 2020) (same), *rev'd on other grounds* 860 F.App'x 874 (5th Cir. 2021); *Mercado Azteca, L.L.C. v. City of Dallas*, No. 3:03-cv-1145, 2004 WL 2056791, at *6 (N.D. Tex. Sept. 14, 2004) (claim involving cognizable discrimination harm to entity).

4 What is more, this court's precedents may preclude § 1983 actions premised on injuries to third parties. *Shaw v. Garrison*, 545 F.2d 980, 983 n.4 (5th Cir. 1977) (noting that this is "not an attempt to sue under the civil rights statutes for deprivation of another's constitutional rights" and that "[s]uch suits are impermissible."), *rev'd on other grounds*, 436 U.S. 584, 98 S. Ct. 1991, 56 L. Ed 2d 554 (1978); *but see Church of Scientology v. Cazares*, 638 F.2d 1272, 1278-80 (5th Cir. 1981) (allowing organization to pursue § 1983 claim based on injuries to organization's members without substantive discussion).

5 The defendants additionally assert that § 1971 does not create an implied cause of action or a private right enforceable in a § 1983 suit. Courts are divided on this point. *Compare Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022) (concluding that § 1971 does secure a private right enforceable under § 1983), *and Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (same), *with McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (holding otherwise). Of course, even if § 1971 provides an enforceable private right to individuals that does not mean Vote.org may invoke that right. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed 2d 309 (2002) (noting that part of the inquiry to determine if a statute grants a right enforceable under § 1983 is "whether or not a statute 'confer[s] rights on a *particular class of persons*.' " (emphasis added, quoting *California v. Sierra Club*, 451 U.S. 287, 294, 101 S. Ct. 1775, 1779, 68 L.Ed 2d 101 (1981))). Because we

need not resolve this issue to grant the defendants' motion for a stay pending appeal, we leave it for the merits panel to consider in the first instance.

6 A plausible argument can be made that § 1971 is tied to only voter registration specifically and not to all acts that constitute casting a ballot. For example, if a voter goes "to the polling place on the wrong day or after the polls have closed," is that voter denied the right to vote under § 1971? *Ritter v. Migliori*, —— U.S. ——, 142 S. Ct. 1824, 1824, —— L.Ed.2d —— (2022) (Alito, J., dissenting from denial of application for stay). It cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under § 1971. Otherwise, virtually every rule governing how citizens vote would is suspect. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*

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