

**IN THE SUPREME COURT OF THE STATE OF KANSAS**

No. 22-125084-S

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

Plaintiffs-Appellants-Respondents,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and KRIS KOBACH, in  
his official capacity as Kansas Attorney General,

Defendants-Appellees-Petitioners.

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**RESPONSE TO DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF**

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Appeal from the Kansas Court of Appeals  
Case No. 22-125084-A  
Appeal from the District Court of Shawnee County  
Honorable Teresa Watson, Judge  
District Court Case No. 2021-CV-000299

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## INTRODUCTION

Kansas has a proud history of maintaining free and open and highly secure elections. However, in 2021, reacting to false claims of fraud in the 2020 election, the Legislature enacted K.S.A. 25-1124(h) (the “Signature Verification Requirement”), and K.S.A. 25-2437(c) (the “Ballot Collection Restriction”). Plaintiffs filed suit, alleging (among other things) that these new restrictions improperly impede on the right to vote in violation of the Kansas Constitution. The district court granted the Secretary of State and Attorney General’s (the “State’s”) motion to dismiss, misapplying the motion to dismiss standard as well as this Court’s precedent for analyzing claims involving fundamental rights. The Court of Appeals reversed in a unanimous decision firmly grounded in this Court’s precedent, which requires a rights-first framework for evaluating challenges to fundamental rights.

The State now miscasts that well-reasoned decision as announcing a radical standard that cannot be found anywhere in the text of the opinion. Instead, after finding that the right to vote is a fundamental right protected by the Kansas Constitution (a finding that the State does not actually contest), and finding that Plaintiffs’ allegations established that the challenged laws impede on that right, the Court of Appeals applied this Court’s precedent and remanded to the district court for further proceedings to determine whether the State could show that the imposition on this fundamental right was narrowly tailored to advance a compelling state interest. The problem for the State at this stage in the proceedings is that Plaintiffs’ factual allegations, which must be credited as true on a motion to dismiss, establish that the challenged restrictions will burden and even disenfranchise lawful voters, yet do not actually address any vulnerability in the administration of Kansas elections.

First, the Signature Verification Requirement requires rejecting ballots based on a highly error prone and subjective signature “matching” process. As Plaintiffs alleged, accurate signature

matching is extremely difficult, even when done by experts. When done by inexpert election officials, it is guaranteed to reject lawful ballots. Indeed, likely all (or nearly all) ballots identified for rejection will be from lawful voters. This is both because there is likely no fraud to find, and because nonexperts are more likely to flag lawful ballots as invalid than identify true mismatches, so that any “identification” of fraud using signature matching is almost certain to be a complete accident. To the extent there is any fraud to be found, pre-existing safeguards protect against it and, indeed, have sufficiently safeguarded the state’s elections for the decades that Kansans have been voting by advance ballot.

Second, the State ignores the narrow breadth of Plaintiffs’ Ballot Collection Restriction challenge. Plaintiffs only challenge K.S.A. 25-2437(c), which makes it a crime to assist more than 10 voters in returning their ballots. Ballot collection has a long history in Kansas—dating back to the beginning of its statehood—and many rely on it to vote. This new restriction imposes an arbitrary and unjustifiable constraint on that right and limits the reach of Plaintiffs’ advocacy to voters, unnecessarily restricting free speech and association. And at no point has anyone explained why delivering 10 ballots is fine, but delivering 11 and above is criminal. Any concerns about fraud are more than adequately addressed by other safeguards that Plaintiffs do not challenge.

The Court of Appeals properly took Plaintiffs’ well-pleaded facts as true, applied precedent holding the right to vote is a fundamental right protected by the Kansas Constitution, and left factual disputes for the district court to decide in the first instance, remanding for consideration under the correct standards. This Court should affirm.

### **LEGAL STANDARD**

The district court’s grant of a motion to dismiss “is a question of law subject to unlimited review.” *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330, 338 (2019) (quoting *Cohen v. Battaglia*, 296 Kan. 542, Syl. ¶ 1, 293 P.3d 752 (2013)). In considering a motion

to dismiss, the court must view the plaintiffs' well-pleaded facts in the light most favorable to plaintiffs, assuming as true those facts and any inferences reasonably drawn from them. *See id.* In cases challenging statutes, courts should not “conjure up” hypothetical situations in which the statute might be valid. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124, 1127 (10th Cir. 2012).

### **STATEMENT OF THE FACTS<sup>1</sup>**

Plaintiffs challenge the Signature Verification Requirement as violating the right (1) to vote under Art. 5, § 1 of the Kansas Constitution and §§ 1 and 2 of the Bill of Rights; (2) to equal protection under Art. 5, § 1 of the Constitution and the Bill of Rights' §§ 1 and 2; and (3) to due process under the Bill of Rights § 18. Plaintiffs challenge the Ballot Collection Restriction as violating the right (1) to vote, under the provisions listed above, and (2) to free speech and association under §§ 3 and 11 of the Bill of Rights. At issue is the propriety of dismissal before discovery or any substantive proceedings. (R. V, 76).<sup>2</sup>

The Court of Appeals found the district court's decision to dismiss in error. Order (“Op.”) at 32, No. 125,084 (Mar. 17, 2023). In doing so, it recognized that as the State does not dispute the right to vote is fundamental. *Id.* at 24. The Court of Appeals also found that the district court failed to credit Plaintiffs' factual allegations, as required on a motion to dismiss. *Id.* at 31. Applying the proper standard, the Court of Appeals determined that Plaintiffs sufficiently alleged that the challenged restrictions infringe on the right to vote: the Signature Verification Requirement because it leads to the rejection of qualified ballots and the Ballot Collection Restriction because it prevents valid votes from being cast and counted. *Id.* at 30-31.

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<sup>1</sup> The factual background until the Court of Appeals decision is laid out in pages 7-18 of Appellants' June 9, 2022 Brief (“Appellants' Br.”). *See also* Sup. Ct. R. 8.03(i)(2).

<sup>2</sup> The district court simultaneously denied Plaintiffs' motion to temporarily enjoin the Signature Verification Requirement as moot. (R. V, 78). If this Court affirms the Court of Appeals' opinion, that related decision, too, would be vacated and remanded. Op. at 48.



The Court of Appeals then applied this Court’s established rights-first framework for evaluating challenges to laws shown to violate fundamental rights protected by the Kansas Constitution, which does not apply a presumption of constitutionality and reviews through the lens of strict scrutiny. Op. at 24. It considered and rejected the State’s argument that the right to vote should be afforded less protection than other fundamental rights protected by the Kansas Constitution, and instead be evaluated using the federal *Anderson-Burdick* balancing test—a test this Court has never endorsed. The Court of Appeals also determined that Plaintiffs’ due process and equal protection claims could not be adjudicated without additional factual development. Op. at 33-38. Finally, the Court of Appeals held that the Ballot Collection Restriction limits the free speech of ballot collectors and likewise must be subjected to strict scrutiny. Op. at 47. It remanded to the district court for consideration under the proper standards.

The State filed a petition for review, which this Court granted on June 23, 2023.

### **ARGUMENTS AND AUTHORITY**

The Court of Appeals properly applied this Court’s precedent to unanimously reverse the district court and remand for further proceedings under the correct standards. The State’s contention that the decision was a radical departure from precedent is unfounded. To support its position, the State misconstrues the Court of Appeals’ decision and asks this Court to turn the well-settled standard for motions to dismiss on its head and by ignoring Plaintiffs’ well-pleaded facts in favor of the State’s factual assertions. And, while the State concedes in the “abstract” that the right to vote is a fundamental right protected by the Kansas Constitution, Defs.’ Suppl. Br. at 6, it asks this Court to break from its precedent and relegate that gateway right to a lesser tier than other fundamental rights. It also asks this Court to accept that impeding the right to vote is necessary to advance the State’s interest in election administration—even if there is no evidence that the challenged laws actually advance that interest or if there are less burdensome alternatives to

achieve the same goal. This would reverse the rights-first approach that this Court has historically applied to fundamental rights protected by the Kansas Constitution, particularly for rights like the right to vote—that are protected by more robust language than in the federal constitution. The State provides no basis for abandoning that approach. In fact, even the State’s preferred *Anderson-Burdick* test—which the district court purported to apply—is not so solicitous. Regardless of the standard applied, the Court of Appeals properly reversed and this Court should affirm.

**I. Strict scrutiny applies to Plaintiffs’ right-to-vote claims.**

Under this Court’s precedent, state actions that infringe on fundamental rights protected by the Kansas Constitution are subject to strict scrutiny. As Defendants have repeatedly conceded, the right to vote is fundamental. *See* Pet. at 2; *see also* Pet. at 7; Defs.’ Reply ISO Pet. at 3; Defs.’ Suppl. Br. at 6. The Court of Appeals found, based on Plaintiffs’ factual allegations, that the restrictions challenged here infringe on the right to vote. As a result, it adopted this Court’s rights-first framework and held that strict scrutiny applies. Op. at 24-25. The State argues this Court should either treat the right to vote as less worthy of protection than other fundamental rights or find that votes cast by advance ballot are less valuable than other votes, but neither proposition can be reconciled with this Court’s precedent recognizing the right to vote as “pervasive of other basic civil and political rights,” *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971); *see also* Op. at 24 (“All basic civil and political rights depend on the right to vote.”).

**A. Laws that infringe on fundamental rights receive strict scrutiny.**

This Court has consistently recognized that state actions that infringe on fundamental rights are evaluated using strict scrutiny. *See State ex rel. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221, 227 (1978) (strict scrutiny applies to “infringements of fundamental rights”); *see also, e.g., Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993) (“This strict level of scrutiny applies when fundamental rights are affected . . .”); *Bd. of Educ. of Unified Sch. Dist.*

*No. 443, Ford Cnty. v. Kan. State Bd. of Educ.*, 266 Kan. 75, 88, 966 P.2d 68, 80 (1998) (same); *State v. Voyles*, 284 Kan. 239, 257, 160 P.3d 794, 807 (2007) (same); *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342, 377 (2016), *adhered to on reh'g*, 306 Kan. 682, 396 P.3d 711 (2017) (“Because a fundamental right is involved we apply strict scrutiny.”). More recently, the Court plainly stated the rule in *Hodes & Nauser, MDs, P.A. v. Schmidt*: “The most searching of these standards—strict scrutiny—applies when a fundamental right is implicated.” 309 Kan. 610, 663, 440 P.3d 461, 493 (2019). In such a case, a reviewing court must “start[] with an emphasis on the individual’s rights” and “peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis.” *Id.* at 670, 673. The State then has the opportunity to justify the challenged action. *See id.*

The State’s claim that this Court has applied a lower tier of scrutiny to infringements of some fundamental rights does not hold up. The State points to *State v. Carr* and *Matter of A.B.*, but in neither case did this Court apply a lower level of scrutiny to State infringement upon a fundamental right. In *Carr*, this Court held that Kansas’s death penalty does not infringe on the fundamental right to life because that right is forfeit “when a person is convicted of capital murder beyond reasonable doubt.” 314 Kan. 615, 643, 502 P.3d 546, 578 (2022). In *Matter of A.B.*, this Court held that the defendant failed to carry her burden of establishing that “minors who are 14 or 15 have a constitutional right to sexual intercourse with their age mates.” 313 Kan. 135, 144, 484 P.3d 226, 233 (2021). Because no fundamental rights were infringed, the Court did not need to address the appropriate level of scrutiny in either case.

The State’s other examples fare no better. *State v. Russell* dealt not with freedom of speech generally, but the State’s ability to censure an attorney for violating the Code of Professional Conduct. 227 Kan. 897, 904, 610 P.2d 1122 (1980). The U.S. Supreme Court in *Vernonia School*

*District 47J v. Acton* employed “a reasonableness test” in a Fourth Amendment case because that Amendment prohibits “unreasonable searches and seizures.” 515 U.S. 646, 652 (1995). If a search is reasonable, it does not infringe on any fundamental right. And the “categorical rules” for Fifth and Sixth Amendment cases impose *higher* standards than strict scrutiny: there is no circumstance (short of waiver) under which the State can rely on interrogation outside the presence of counsel once the right to counsel has been asserted or can compel a defendant to self-incriminate. *See Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 189 (2004) (Fifth Amendment); *Montejo v. Louisiana*, 556 U.S. 778 (2009) (Sixth Amendment). None of these cases support the State’s central claim that infringement of fundamental rights can be subject to lower standards of scrutiny much less that a lower standard is appropriate under the Kansas Constitution.

**B. The right to vote is fundamental.**

The State concedes the right to vote is fundamental. *See* Defs.’ Suppl. Br. at 6 (“No one disputes that the right to vote, in the abstract, is fundamental or that legally cast votes must be counted.”). Under this Court’s precedent, strict scrutiny accordingly applies. *See supra* § I.A. The State asks the Court to make an exception that would treat the right to vote as less worthy of protection than other fundamental rights. The Court should decline to do so.

The State primarily argues that Kansas should apply the federal *Anderson-Burdick* “deferential balancing standard” to laws that impact the right to vote, Defs.’ Suppl. Br. at 3, falsely claiming that the Court of Appeals did not engage with this argument but instead treated *Hodes* “as some sort of talisman” with “magical powers,” Pet. at 1, or “simply cited *Hodes* reflexively,” Defs.’ Suppl. Br. at 4. In reality, the Court of Appeals closely engaged with the State’s argument and found it lacking for the same reason that this Court has rejected similar arguments that it should

evaluate challenges to other fundamental rights using balancing tests. As the Court of Appeals observed, far from promoting clarity, the *Anderson-Burdick* test, “has led to a wide array of decisions on comparable state statutes,” including “differing conclusions on whether signature requirements and ballot collection limits constitute a severe burden on the right to vote,” because “[t]here is no litmus test for measuring the severity of the burden” imposed on the right to vote. Op. at 26. The Court of Appeals compared this rudderless test to the undue burden standard this Court “strongly criticized and rejected” in *Hodes* because it “was difficult to understand and apply,” relies on determinations that are “subjective and varied from person to person,” and ultimately “lacks the rigor demanded by the Kansas Constitution for protecting fundamental rights.” Op. at 27 (citing *Hodes*, 309 Kan. at 665-70) (quotations omitted).

Noting that “[t]he Kansas constitutional provisions are unique,” the Court of Appeals concluded that under this Court’s precedent, strict scrutiny applies. Op. at 27-28. That conclusion is supported by *Hodes*, which identifies the right to vote as “fundamental to all citizens of our state,” 309 Kan. at 657, and sets forth a clear framework for evaluating fundamental rights claims under the Kansas Constitution. First, the Court looks to the text of the Kansas Constitution to establish the existence of a constitutional right; next, it looks to Kansas precedent to see how this Court has previously treated the identified right; and third, it examines whether there is any support for the State’s argument that the right should *not* receive heightened protection. *Id.* at 620-23. Application of that framework confirms that the Court of Appeals’ holding was correct: there is no dispute that voting is a fundamental right protected by the Kansas Constitution or that it historically has received heightened protection, and the State cannot support its argument that voting should be treated less favorably than other fundamental rights.

The State attempts to avoid this result by arguing that the right at issue is the right to vote

by mail or to have a ballot collected by a third party, not the fundamental right to vote, Defs.’ Suppl. Br. at 6, but that argument, too, was considered and properly rejected by the Court of Appeals. With respect to the Signature Verification Requirement, the Court of Appeals recognized that “[a] person cannot know beforehand that their mail-in ballot will be rejected for a signature mismatch by the elections office,” and that therefore (as pled by Plaintiffs) application of the Requirement could deprive a voter of their vote through no fault of their own. Op. at 36. Moreover, voting by absentee ballot is an indistinguishable part of what the right to vote means in Kansas. It is “a state-created right that all Kansans have had for decades,” *id.*, and is explicitly referenced in the Kansas Constitution. *See* Kan. Const. art. 5, § 1.<sup>3</sup>

The Court of Appeals similarly properly found that, based on the facts alleged by Plaintiffs, the Ballot Collection Restriction impairs the right to vote by imposing a “limitation that prevents votes from being cast and counted” because “[n]ot all voters can make a trip to the polls” on their own. Op. at 32. As Plaintiffs alleged, “many of Kansas’s most vulnerable citizens” rely on ballot collection assistance to be able to vote at all, including “seniors, minority voters, rural voters in western Kansas . . . Native voters living on tribal lands who may have to travel for hours on

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<sup>3</sup> In recent remarks to the Legislature, the Secretary stressed Kansas’ long commitment to enabling the right to vote—including through mail voting and ballot collection. The Secretary emphasized that: “[G]oing back to the Civil War, we wanted to make sure Kansans could vote. And so we were one of the first states to do advance mail ballots for our military members that were fighting in the Civil War [so they] could vote. And often, one person in that military unit would collect those ballots to make sure they got sent back to the state.” A recording of the hearing where these statements were made can be found at Kan. Legis., *Senate Federal & State Affairs Committee 02 20 2023*, with the relevant portion beginning at 38:36, and the quoted language above at 39:05-39:20, YOUTUBE, <https://www.youtube.com/watch?v=sWJLgtUmPvA> (last visited Aug. 23, 2023) (“SB 208 2/20/23 Hr’g.”). Although this statement was made after Plaintiffs filed their Petition, the Court may take judicial notice of it. K.S.A. 60-409; *see also In re Starosta*, 314 Kan. 378, 388, 499 P.3d 458, 466 (2021). In the alternative, it is more reason to find that factual development should be permitted before this matter is dismissed.

unpaved roads to access mail services or election offices,” and “Kansans with disabilities.” (R. II, 269-70). This includes many in Plaintiffs Faye Huelsmann and Patricia Lewter’s religious order the Sisters of St. Joseph of Concordia, Kansas, as well as countless others who depend on ballot collection to vote. (R. II, 271-72). Such voters are at a substantial risk of losing access to the help they need to exercise their fundamental right to vote. (R. II, 269-72, 277-78).

Defendants’ hyperbolic assertion that the Court of Appeals’ decision “jeopardizes the survival of nearly all statutes and regulations governing the mechanics of the electoral process,” Defs.’ Suppl. Br. at 2, can be easily dispensed with. As the Court of Appeals emphasized, the analysis takes into account the distinction between “[b]enign election regulations” and those that restrict the right to vote. Op. at 28. Before strict scrutiny is applied, the court “must decide whether the government action impairs the constitutionally protected right to vote.” *Id.*; *see also State v. Carr*, 314 Kan. 615, 628, 502 P.3d 546, 569 (2022) (“determin[ing] whether the challenged governmental action unconstitutionally infringes upon [a right] . . . requires the court to first determine whether the governmental action impairs the right”); *see Hodes*, 309 Kan. at 672 (“[B]efore a court considers whether a governmental action survives this test, it must be sure the action actually impairs the right.”). And even if a plaintiff establishes a law infringes on a fundamental right, it will survive if the state shows it is narrowly tailored to advance a compelling interest. *Hodes*, 309 Kan. at 611-12. The State may try to do this on remand. Op. at 47.

**C. Plaintiffs sufficiently pled that the Signature Verification Requirement impairs the right to vote.**

The Court of Appeals correctly held that “Plaintiffs have met their minimal burden to plead a claim that the signature matching requirement impairs the constitutionally protected right to vote.” Op. at 30. Specifically, it found that Plaintiffs sufficiently pled that the Signature Matching Requirement impairs the right to vote because it will cause lawful, valid votes to be discarded for

reasons beyond the voter's control. *Id.* It accepted Plaintiffs' allegations about "the unreliability of a layperson matching signatures," Op. at 17, and that "[l]ay election officials will erroneously determine voters' signatures are mismatched," Op. at 30. The Court of Appeals also found that the Signature Verification Requirement "does not require training of election officials, contains no standard for determining what constitutes a signature match, and does not provide a standard for the opportunity to cure an error made when matching signatures." *Id.* These facts and inferences are well-supported by the Amended Petition, which details the inherent unreliability of signature matching and how the Requirement is certain to disenfranchise eligible voters. (R. II, 264-69.)

The State criticizes the Court of Appeals for "embrac[ing] Plaintiffs' allegation[s]," Defs.' Suppl. Br. at 11, but that is exactly what is required at this stage. And even the State does not dispute that some valid ballots will be rejected because of the Signature Verification Requirement. Pet. at 11 (conceding the Requirement contains "cure mechanisms, exceptions, and other measures designed to *minimize* the rejection of any ballots" (emphasis added)). The State attempts to minimize this by claiming that it is "unlikely that more than a handful (if any) [voters] were improperly rejected" due to signature matching in the 2022 General Election. Defs.' Suppl. Br. at 16 n.4. But this is a concession that the Requirement *is* causing lawful votes to be rejected. Any infringement, "regardless of degree," shifts the burden to the State to prove that the restriction is narrowly tailored to further a compelling state interest. *Hodes*, 309 Kan. at 699.

The State next mischaracterizes Plaintiffs' allegations as "an argument that 'people might be harmed because election officials will not follow the law,'" Defs.' Suppl. Br. at 11, but that is incorrect. Plaintiffs allege that election officials *following the law* are virtually certain to reject valid ballots based on mistakenly perceived signature issues, burdening the right to vote at times to the extent of total disenfranchisement. As Plaintiffs alleged, accurate signature matching is



exceedingly difficult even when conducted under the most optimal circumstances. (R. II, 265). This is because no one's signature is entirely consistent; it is common for handwriting to change, and particular types of voters—including elderly voters, voters with certain health conditions, young voters, and non-native English speakers—are all much more likely to have greater signature variability. *Id.* These are not inconsequential “vagaries” as the State claims, Defs.’ Suppl. Br. at 15; they are circumstances under which some people will be denied their fundamental rights.

Further, studies have shown that, when done by laypersons, signature verification is inherently unreliable, with non-experts significantly more likely to misidentify authentic signatures as forgeries than to accurately identify fraudulent signatures. *Id.* In other words, under the Signature Verification Requirement, it is *inevitable* that lawful voters’ ballots will be wrongfully flagged for rejection, and there is no reason to believe that officials would be able to accurately identify a fraudulent signature. (R. II, 233, 265-66). The Court may not save the law based on hypothetical, speculative scenarios. *See United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016). Yet, the State’s argument that the Signature Verification Requirement protects against fraud is exactly this. Given the lack of any actual fraud and officials’ inability to accurately identify mismatches, if the Requirement actually does result in identifying any fraudulent signatures, it will almost certainly be an accident, not the natural result of the law.

All of these burdens on the right to vote are only exacerbated by the lack of safeguards to avoid disenfranchisement of lawful voters. (R. II, 264-66, 68-69). The State gestures at the cure process, but it is both facially inadequate and does not eliminate the burden that the Signature Verification Requirement imposes on the right to vote. In fact, the cure process does not even guarantee that voters will receive actual notice before their ballots are rejected. (R. II, 268); *see also* K.S.A. 25-1124(b) (“The county election officer shall *attempt* to contact each person who

submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file.” (emphasis added)); K.A.R. 7-36-9(b) (same). In Plaintiffs’ experience, counties’ ability to successfully contact voters varies widely. (R. II, 269) (noting repeated instances in which counties failed to contact voters entitled to a cure opportunity). As a result, the fate of many Kansans’ votes will depend on the availability of volunteers from organizations like Plaintiffs, who work to contact and assist voters who would otherwise be disenfranchised. *Id.* Not only does this impose an enormous strain on these organizations’ resources, it is impossible for them to successfully reach and assist each impacted voter. (*See, e.g.*, R. II, 242, 245-56).

Even for voters who receive notice and are able to jump through whatever hoops they must to “cure” their ballots and save them from rejection, the fact that they have to do so at all because of the State’s imposition of an unnecessary and unreliable signature “matching” requirement is itself a burden on the right to vote. No one should have to cure a ballot that was never invalid in the first place; that some must do so or lose their right to vote impedes that right. Moreover, it is not true that “any voter concerned that he/she may be unable to sign the advance ballot envelope consistent with a signature on file due to an illness, disability, or limited English proficiency, is free to have a third-party sign on his/her behalf.” Dcfs.’ Suppl. Br. at 14. That option is available only to those who are “physically unable to sign the envelope.” K.S.A. 25-1121(b); *see also* K.S.A. 25-1124(c), (e). Even so, lawful voters should not have to employ a workaround to avoid being disenfranchised by an inherently faulty “anti-fraud” measure.<sup>4</sup>

The State raises several other factual questions related to the Signature Verification

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<sup>4</sup> Similarly, the so-called “disability” exception is of no real help—as witnesses who testified before the Legislature emphasized, there is no way for election officials to know if a voter has a disability preventing them from signing (as opposed to a condition that impacts the consistency of their signature), nor are “disabilities” the only reason a signature could have normal—and even extreme—variability. (R. II, 267-68).

Requirement that are more properly presented to the district court in the first instance. For example, the State points to the newly adopted K.A.R. 7-36-9 to argue that there are sufficient procedures in place to prevent officials from erroneously discarding valid ballots based on a supposed signature mismatch. Defs.’ Suppl. Br. at 12-15. But this regulation was not published until well after the district court’s order, so the Court of Appeals was right not to consider its impact. And Plaintiffs dispute the State’s contention—which is an assertion of fact—that the regulation resolves the constitutional deficiencies with the Signature Verification Requirement. Similarly, the question of whether having one recent exemplar on file will enable accurate signature matching is a factual dispute. Defs.’ Suppl. Br. at 14-15. As the evidence that Plaintiffs submitted in support of their motion for a temporary injunction below showed, experts have found that accurate signature matching requires multiple, quality exemplars (R. III, 234), and even with such exemplars, election officials are unlikely to be able to identify when signatures are “generally uniform and consistent” due to lack of training, resources, and time. (R. III, 218-20). Finally, even a recent signature may not help certain voters—including in particular, the young, elderly, and those with certain medical conditions—who are more likely to sign differently each time. (R. III, 222, 28).

Because Plaintiffs adequately pled that the Signature Verification Requirement infringes on the right to vote, the Court of Appeals correctly found that the burden should shift to the State on remand to show that it is narrowly tailored to further a compelling state interest. The State avers that there are no other reasonable mechanisms to verify an advance voter’s identity in terms of cost or administrability, Defs.’ Suppl. Br. at 16 n.16, and that the reliability of signature matching is evidenced by its use to prove one’s identity in other non-protected daily activities, such as check-writing and loan applications. *See* Defs.’ Suppl. Br. at 13. The State waived both arguments by failing to brief them below. *See Super. Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d

676, 679 (2011). But in any event, these, too, are factual assertions that the State should be required to support and present to the district court to consider in the first instance in determining whether the Requirement is narrowly tailored.

**D. Plaintiffs sufficiently pled that the Ballot Collection Restriction impairs the right to vote.**

The Court of Appeals also correctly held that Plaintiffs sufficiently alleged that the Ballot Collection Restriction, which criminalizes collecting and delivering ballots above an arbitrary ten ballot maximum burdens the right to vote, because it “is a limitation that prevents votes from being cast and counted.” Op. at 32. Imposing an arbitrary ten-ballot limit on ballot collectors means that some voters who rely on this long-standing practice will be unable to vote. *Id.*; (R. II, 271).

For example, in 2020, Plaintiff Charley Crabtree’s ballot collection efforts enabled 75 nursing home residents to vote. (R. II, 246-47). The Ballot Collection Restriction makes it a crime for Mr. Crabtree to assist voters 11 through 75, leaving those voters—no matter how great their need for assistance—left to try to find someone else to help. There is no reason to believe they will be able to, just as there is no reason to believe that the first ten ballots Mr. Crabtree (or anyone else) collects are valid, but the 11th or 12th or 75th is fraudulent. The State’s suggestion that there is no unconstitutional burden because voters must simply “put a stamp on an advance mail ballot,” Defs.’ Suppl. Br. at 24, ignores the lived realities of Kansas’s most vulnerable voters, and also is—yet again—a factual assertion properly considered in the first instance as these proceedings progress below, not a reason to dismiss the case at the outset.

Plaintiffs’ allegations are more than sufficient to sustain these claims. They allege that the Restriction will make it more difficult for many lawful voters to cast their ballots, including in communities that rely heavily on ballot collection to successfully vote, as well as voters with limited access to transportation or other circumstances that make it more difficult for them to return

their ballots themselves. (R. II, 269-70.) Many of these voters cannot easily access mail services. *Id.* And, as recent years have shown, mail may not be a reliable way to ensure a ballot is returned in time to be counted. *Id.*<sup>5</sup> The Court of Appeals correctly found that dismissal was improper.

The State further argues that the Court of Appeals erred by holding that the State's interest in preventing fraud must be balanced against its interest in increasing voter participation, Defs.' Suppl. Br. at 24, but it did no such thing. The Court simply noted that the State has varying interests that the district court must consider on remand. Op. at 33. In the same vein, it noted that the State will have trouble showing that the Ballot Collection Restriction is narrowly tailored *if it does not actually prevent fraud*. Op. at 33-34. This appropriately reflects a rights-based approach to laws that threaten fundamental rights: if the plaintiffs can show that it will make it harder for lawful voters to exercise their voting rights, the State must show the restriction is actually necessary to secure Kansas's elections against fraud. Otherwise, Kansas is simply elevating unsubstantiated concerns about fraud over the actual voting rights of real, eligible, lawful voters. The test that the Court of Appeals applied properly holds the State to its proof to justify such a measure.

Once again, it is worth emphasizing the highly limited scope of Plaintiffs' challenge. In 2021, the Legislature imposed three new restrictions on ballot collection. Plaintiffs do *not* challenge either the requirement that ballot collectors obtain a written statement of authorization,

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<sup>5</sup> Recently the Secretary himself acknowledged as much in testimony before the Legislature opposing drop box restrictions, emphasizing the threat to voters when they have to depend on mail to return their ballots. *See, e.g.*, SB 208 2/20/23 Hr'g. 21:24-21:45 (“[W]hy in God’s green earth would you want the federal post office or the federal government in charge of your ballot? I got a Christmas card last week.”); *id.* at 21:48-21:59 (detailing accounts from clerks who reported receiving ballots in the mail long after elections in recent years, including *six months or even a year-and-a-half after* an election); *id.* at 21:59- 22:04 (stating that “in Southwest Kansas, your mail goes to Santa Fe, New Mexico,” before coming back to be delivered in Kansas); *id.* at 22:47-22:51 (emphasizing that when the Legislature passes laws that “push [ballots] towards the mail, most ballots will leave the state of Kansas” before they are delivered back in Kansas).

signed by both the voter and collector, to submit with the ballot when delivered, K.S.A. 25-2437(a), or the ban on candidates personally collecting and delivering ballots, K.S.A. 25-2437(b). Plaintiffs only challenge the additional restriction, codified at K.S.A. 25-2437(c), criminalizing the collection and delivery of more than 10 ballots by any single person, *even if they fully comply with the limitations above*—an arbitrary limit that severely curtails the number of voters who can be reached and assisted, but has no demonstrated effect on fraud. *See also* Op. at 32.

Indeed, given the total lack of any evidence or even explanation to justify the ten-ballot limit, it likely would fail under *any* level of scrutiny. The Court of Appeals was right to observe that it is unlikely to survive under the heightened level of scrutiny applicable here.

**E. Remand is proper even if a less exacting standard applies.**

No Kansas court has previously applied the *Anderson-Burdick* test, and for good reason, as Plaintiffs have already thoroughly briefed. *See* Appellants’ Br. at 27, 31-32; Appellants’ Reply Br. at 8-9; *supra* § I.B (discussing Court of Appeals’ rejection of that argument). But even if this Court were to change course, the district court’s order must be reversed because it misapplied that test as well as this Court’s long-standing standards applicable to reviewing motions to dismiss.

*Anderson-Burdick* applies a sliding scale, with the degree of scrutiny turning on the extent of the challenged law’s burden on the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). If the burden is “severe,” the State must satisfy strict scrutiny, and show that the law is “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289 (1992). But even for lesser burdens, the law still must be justified by a “corresponding interest sufficiently weighty to justify the limitation.” *Id.* at 288. As a result, *Anderson-Burdick* is rarely properly resolved on a motion to dismiss, because it always requires some showing of a fit between the actual law and the state’s interest—both largely questions of fact. *See* Appellants’ Br. at 33. But instead of crediting Plaintiffs’ factual allegations regarding the law’s burdens, the district

court concluded that because there was at least theoretically some opportunity to cure, there was no meaningful burden. (R. V, 72-75). As the Court of Appeals rightfully pondered, “Upon what facts in this record did the district court make this determination?” Op. at 31. None, and certainly not Plaintiffs’ allegations credited as true as is required on a motion to dismiss. That is enough to require reversal and remand.

Remand likewise would be appropriate under the standards proposed by either the concurrence or the dissent in *Hodes*—both call for a fact-intensive analysis that the district court simply did not do. There, Justice Stegall, in dissent, proposed “rational basis with bite,” which would never apply a presumption of constitutionality and instead would require a court to “examine the *actual* legislative record to determine the *real* purpose behind any law in question before it can conclude the law is within the limited constitutional grant of power possessed by the State.” *Hodes*, 309 Kan. at 767 (Stegall, J., dissenting). If there is evidence that the law is arbitrary or irrational, the court would have to “actively consider the possibility that” the law “was not *actually* intended to further the common welfare and legitimate state interest” asserted. *Id.* Justice Biles separately proposed in his concurring opinion a test by which the court would first “determine whether, and to what extent, a challenged legislative or administrative action burdens” the fundamental right and then “would need to determine to what extent that action directly promotes valid state interests,” noting that that “[t]hese findings must be based on evidence . . . presented in judicial proceedings” rather than “[m]ere deference to legislative or administrative findings or stated goals.” *Hodes*, 309 Kan. at 700 (Biles, J., concurring). Having considered the evidence and made appropriate findings, the court then would decide whether the challenged action “unduly restricts” the right in question “when the burdens are viewed in light of the action’s actual benefits to the state’s valid interests.” *Id.*

The district court here could not do any of these things, because it presumed the law constitutional and imagined facts that would make it so. Under any standard, reversal is required.

**II. The Signature Verification Requirement implicates a liberty interest entitled to procedural due process.**

The Court of Appeals correctly held that the Signature Verification Requirement implicates a liberty interest that is entitled to procedural due process because Plaintiffs sufficiently alleged that voters are being deprived of their right to vote. Op. at 38. Kansas courts have been clear that fundamental rights can be considered liberty interests in a due process analysis. *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). And, as already discussed, this Court has repeatedly held that the right to vote is a “fundamental matter, [and] any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government.” *Moore*, 207 Kan. at 649; *see also supra* § I.

The State attempts to avoid the result of this precedent by arguing that the liberty interest at issue is not the right to vote and have one’s ballot counted, but simply to vote by mail, Defs.’ Suppl. Br. at 6, but even if that were true (and as discussed *supra* § I.B, it is not), the Court of Appeals correctly reversed. Liberty interests may be created by statute. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). And Kansans have had the right to vote absentee for decades. Courts have repeatedly found that even where states need not offer absentee voting at all, if they do, they may not then deny that right without sufficient due process. *See Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (“Having created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate due process protection.”); *cf. Creecy v. Kan. Dep’t of Revenue*, 310 Kan. 454, 463, 447 P.3d 959, 966–67 (2019) (recognizing once someone has been granted “some type of” state-created interest, they are “entitled to due process before it is taken away”).



The State's remarkable suggestion that "[w]hile voting interests are important, they do not implicate the Due Process clause," Defs.' Suppl. Br. at 24, defies both binding precedent and common sense. For instance, the State now suggests that citizens are entitled to due process before their *drivers' license* is taken away, but not before their right to vote is denied. *See* Defs.' Suppl. Br. at 23-24; Op. at 36-37. Notably, before making this argument, the State appears not to have carefully read even the decisions cited by the Court of Appeals, arguing that the only authority that the Court cited in support of this holding was a decision about property interests, *see* Defs. Suppl. Br. at 23, ignoring its express discussion of *In re. J.D.C.* *See* Op. at 38. In that case, this Court held that the right of a parent to the care, custody, and control of their child is a liberty interest entitled to procedural due process. *In re J.D.C.*, 284 Kan. at 166. Here, Plaintiffs seek to protect a fundamental right *expressly* found in the text of the Kansas Constitution. The Court of Appeals was right to conclude that this fundamental right is also properly "considered a liberty interest." Op. at 38.

The State cites nothing that finds otherwise. While it relies on *Richardson v. Texas Secretary of State*, 978 F.3d 220 (5th Cir. 2020), not only is that decision not binding in Kansas, it also does not support finding a distinction between liberty and property interests, nor does it undermine the many cases that have relied upon the proposition that a state cannot lightly revoke established liberty interests including the interest in voting absentee. *See, e.g., Raetzel v. Parks Bellmont Absentee Election Bd.*, 762 F. Supp. 1354 (D. Ariz. 1990); Op. at 38. And the question of whether K.A.R. 7-36-9 sufficiently provides protections that satisfy due process is a factual question properly first submitted to the district court. At this stage, any inferences must be construed in the light most favorable to Plaintiffs. *Williams*, 310 Kan. at 784. Plaintiffs have argued that the new regulation does not guarantee that a voter will actually be notified their ballot has

been rejected for signature issues, there is no guidance about how officials should decide what constitutes a match, and there are no standards for how much training they will be given or what that training would look like. *See* Appellants' Reply Br. at 10-11. There is also a threshold question as to whether it is even appropriate to revoke voters' right to vote by advance ballot based on this highly arbitrary and unreliable practice to begin with. In sum, the Court of Appeals was correct to remand this claim for further proceedings.

### **III. The Court of Appeals correctly remanded Plaintiffs' equal protection claim.**

The Court of Appeals properly held that Plaintiffs' equal protection claim should be evaluated on remand under the standard outlined in *Bush v. Gore*, 531 U.S. 98, 104 (2000). *Op.* at 41-42. As that case explained, the "right to vote is protected in more than the initial allocation of the franchise" but also "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104. Accepting Plaintiffs well-pleaded facts as true, the Signature Verification Requirement treats similarly situated advance ballot voters differently based simply on their zip code. (*R.* II, 264-66, 268-69, 279-80). This is because how the Requirement is enforced is left almost entirely to each county's discretion. *Id.* It is up to each of Kansas's 105 counties to choose whether to verify signatures electronically or by hand, (*id.* at 264-65); to determine what constitutes a match, (*id.* at 264-66); and to decide the manner and timing of any cure process, (*id.* at 268-69). Plaintiffs allege that this will result in "a crazy quilt of enforcement of the requirement from county to county," (*id.* at 266) (quotation omitted), meaning "a ballot that will be accepted in one county would be rejected in another," (*id.* at 280). This is sufficient to maintain this claim at this stage.

The Court of Appeals properly left the factual question of whether K.A.R. 7-36-9 prevents inconsistent application of the Requirement across counties to the district court to consider on remand. *Op.* at 42. As discussed *supra* at § I.C., the regulation does not provide meaningful

guidance or a standard for what constitutes a match, or mandate a uniform cure process. It also allows counties to choose whether to conduct matching by machine or by hand. The State again improperly points to facts to support their position that the Signature Verification Requirement will be applied uniformly across Kansas's 105 counties and asks that the Court credit them over Plaintiffs' well-pleaded facts, including a media release about the Secretary's Certified Election Training Program. Defs.' Suppl. Br. at 20. This is not appropriate at this stage.

Perhaps recognizing as much, Defendants cite *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), to argue that the equal protection claim fails even if this Court's analysis is restricted to the text of K.S.A. 25-1124(h). Defs.' Suppl. Br. at 21. But the challenge in *Lemons* was only resolved *after* a robust evidentiary record had been developed. 538 F.3d at 1101.<sup>6</sup> The other cases the State cites likewise were resolved only after the parties had an opportunity to present relevant evidence. *Richardson* was decided after "[t]he district court denied defendants' motions to dismiss, and the parties conducted discovery," *Richardson*, 978 F.3d at 226, and in *Northeast Ohio Coalition for the Homeless v. Husted*, the district court held a twelve-day bench trial, during which it heard extensive testimony from election officials. 837 F.3d 612, 621 (6th Cir. 2016).

#### **IV. The Ballot Collection Restriction limits free speech.**

As Plaintiffs pleaded and the Court of Appeals properly held, the Ballot Collection Restriction infringes on the free speech and assembly rights of ballot collectors by limiting their opportunities for one-on-one engagement with voters. Op. 46-47; (R. II, 275). As the Amended Petition alleges, Plaintiffs collect ballots to spread their message of political and civic engagement throughout their communities. (R. II, 247) (Plaintiff Sister Huelsmann's ballot collection efforts

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<sup>6</sup> Further distinguishing the case, the law at issue in *Lemons* addressed signatures on referendum petitions rather than on ballots, *see* 538 F.3d at 1100; a voter whose signature was rejected on the petition would still have the opportunity to vote their ballot.

are part-and-parcel of her “encourag[ing] others to exercise their fundamental right to vote”); *id.* (Plaintiff Crabtree’s collection of ballots “effectively communicates his message of civic participation and engagement”). The arbitrary ten-ballot limit limits the number of people that Plaintiffs will interact with in these efforts to encourage voting – efforts that “involve[] the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 422 (1988), *see also Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999) (protecting free speech requires court “to guard against undue hindrances to political conversations and the exchange of ideas”); *In re Ga. S.B. 202*, No. 1:23-CV-01229, 2023 WL 5334617, at \*7-8 (N.D. Ga. Aug. 18, 2023) (finding that a ban on providing refreshment to voters waiting at the polls is content-based speech regulation).

The ballot collector who previously would have expressed the importance of voting to dozens of citizens during critical interactions assisting them in exercising that right now must stop after the tenth and turn their energy to recruiting more ballot collectors rather than interactions directly with voters. This is a limitation on “advocacy for voting itself,” *Op.* at 46, and the Court of Appeals properly held it is subject to exacting scrutiny, *Op.* at 45 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 344-45 (1995)).

Like Plaintiffs’ right to vote claim, whether the Ballot Collection Restriction survives exacting scrutiny with respect to its burden on core speech is a factual inquiry for the district court. And because this is a restriction on speech, not a pure election administration provision, even under federal case law, exacting or strict scrutiny – not the *Anderson-Burdick* test – applies. *See e.g., Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (holding that the return of absentee ballots necessarily involves political communication and association and therefore exacting scrutiny applies). In addition, as the Court of Appeals recognized, the district court

improperly made up its own facts in order to dismiss Plaintiffs' Ballot Collection Restriction challenge. Op. at 32. Regardless of the test applied, reversal and remand is proper.

### **CONCLUSION**

This Court should affirm the Court of Appeals' decision and remand to the district court for expedited proceedings. To ensure that relief may be obtained in advance of upcoming elections, the Court should further direct the district court to conduct those proceedings on an expedited basis and without further delay. *See, e.g., In re K.W.*, 45 Kan. App. 2d 353, 355, 246 P.3d 1021, 1023 (2011) (urging district court to expedite on remand).

Respectfully submitted, this 23rd day of August, 2023.

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**CERTIFICATE OF SERVICE**

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

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