

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

Plaintiffs/Appellees,

v.

SCOTT SCHWAB, in his official capacity
as the Kansas Secretary of State,

Defendant/Appellant,

and

JAMIE SHEW, in his official capacity as
the Douglas County Clerk, *Defendant.*

Appellate Case No. 130,839

District Court Case
No. DG-2025-CV-000206

**DEFENDANT SECRETARY SCHWAB’S EMERGENCY MOTION TO
STAY OR SUSPEND TEMPORARY INJUNCTION PENDING APPEAL**

Under Supreme Court Rule 5.01 and K.S.A. 60-262(f), Defendant/Appellant Scott Schwab (“the Secretary”) respectfully moves this Court to stay or suspend the district court’s July 16, 2026, order temporarily enjoining 2025 Senate Bill 4, a statute imposing an Election Day ballot receipt deadline for advanced mail ballots. This is the same deadline Kansas had in large measure for nearly 150 years and that 35 other States require.

The district court’s unprecedented order invents constitutional rights found nowhere in the Kansas Constitution. Worse yet, it sows chaos in an ongoing election because it comes less than three weeks before Election Day, after advance voting has already begun. This leads to voter confusion and interferes with the orderly conduct of the election. To avoid election chaos and

because the Secretary is likely to prevail on the merits, this Court should stay the district court's order while it considers this appeal.

Plaintiffs filed this lawsuit over a year ago, on May 5, 2025, yet they did not request a temporary injunction until seven months later, on December 9, 2025. The district court heard oral argument on Plaintiffs' motion for a temporary injunction nearly six months ago on January 27, 2026, but the court waited until July 16, 2026—a day after the largest batch of advance ballots had already been sent out in the current primary election—to issue its temporary injunction altering voting procedures. When the temporary injunction was issued, 46,127 ballots had already been mailed out.

Over the past year, the Secretary of State has engaged in an extensive education campaign to inform voters and election officials of the Election-Day deadline. Voting has already begun in the August primary election, with 50,345 ballots having been mailed out and hundreds of votes having already been cast as of today, July 20. The ballots that have been sent contain instructions comporting with current Kansas law, stating they must be returned by 7 p.m. on Election Day. Allowing the district court's order to remain in effect would cause mass confusion in the electorate in the midst of an ongoing election.

The United States Supreme Court has “repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (collecting cases applying the so-called *Purcell* principle). Simply stated, the traditional test for stay pending appeal “does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state’s election law in the period close to an election.” *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J. concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 1 (2006)). Instead, under

Purcell, “in addition to the harms attendant upon issuance or nonissuance of an injunction,” courts must weigh considerations specific to election cases.” 549 U.S. at 4. “Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences.” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).¹

Although this case proceeds in state court, the policy rationale for staying orders altering election statutes close to an election applies equally here. *See Liddy v. Lamone*, 398 Md. 233, 251, 919 A.2d 1276 (2007) (“[T]his Court is faced with the same quandary as the *Purcell* Court and must contemplate the ‘considerations specific to election cases,’ *i.e.* the potential harm to the appellees and, more important, to the electorate[.]”). This rationale resonates even more here where tens of thousands of advance ballots with accompanying instructions have already been mailed and the election is ongoing. “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As

¹ The district court’s order stating that the Secretary did not advise the Court of a specific deadline by which it must reach a decision ignores the surrounding discussion at the January 27, 2026, hearing on the motion. *See* Ex. A, p. 5, n.2. At the hearing, held nearly *seven months* before the district court issued its decision, the district court stated, “I understand time is of the essence[.]” Ex. B, p. 101. The court then asked the Secretary’s counsel when a decision was needed, to which counsel stated “certainly, you know, this would be a dramatic change to the procedures for elections,” and discussed the need to have a decision in time to review the ballots before they are mailed to voters for the August primary. Ex. B, p. 101. The Secretary’s counsel explained that ballots would go out in July, so, “depending on how quickly the court rules, . . . presumably [timing] would not be an issue.” Ex. B, p. 101. The court closed the hearing by stating, “I will try to make a decision as soon as I can” and that “I understand . . . that time is of the essence on this issue.” Ex. B, p. 105. The fact that the Secretary did not believe timing would be an issue in *January*, when the court promised to issue a decision soon, does not mean the Secretary has waived a *Purcell* argument about a decision in *July*, after voting has begun. As the Seventh Circuit recognized in rejecting an argument that the State waived a *Purcell* claim, “what counsel may have said in July was *about* July. That the state defendants’ lawyers may have thought action in July was proper does not imply agreement to a three-month delay into late September.” *Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1042 (7th Cir. 2020).

an election draws closer, that risk will increase.” *Purcell*, 549 U.S. at 4-5. When an election is rapidly approaching, “the public interest is well served by preserving [the State’s] existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure . . . at the eleventh hour.” *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1088 (9th Cir. 2020) (*Hobbs* 2020).

The order also disregards the fact that the Douglas County District Court lacks authority to enter statewide injunctive relief in this case. Plaintiffs sued only the Secretary of State and the Douglas County Clerk; no other county election official is named. By explicit statutory command, the Secretary has no operational control over county election officers. K.S.A. 25-126(a)-(b). This ultra vires action further exacerbates confusion throughout the State.

An Election Day ballot receipt deadline, which 35 other States impose, is plainly constitutional. Any judicial review should have ended with that conclusion. Instead, Kansas is now enjoined from enforcing a duly-enacted election statute in the midst of an election. “[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.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration in original) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))). “A decision of that moment warrants cautious review” and favors a stay pending appeal. *Doe v. Gonzales*, 546 U.S. 1301, 1308-09 (2005) (Ginsburg, J., in chambers).

I. Background

On May 5, 2025, Plaintiffs Kansas Appleseed Center for Law and Justice, Inc.; Loud Light; and Disability Rights Center of Kansas filed a civil Petition for declaratory and injunctive relief against Defendant Scott Schwab, in his official capacity as the Kansas Secretary of State, and

Defendant Jamie Shew, in his official capacity as the Douglas County Clerk. More than seven months after commencing their lawsuit, Plaintiffs filed a motion for a temporary injunction.

Plaintiffs assert a state facial constitutional attack against S.B. 4, a law the Kansas Legislature enacted in March 2025 to require that all advance voting ballots must be received in the county election office or polling place no later than the close of the polls. This law, which went into effect January 1, 2026, amends K.S.A. 25-1132(b) to eliminate the three-day grace period for county election offices to accept advance mail ballots.

This is the same deadline Kansas had in large measure for nearly 150 years, until 2017 when the Legislature amended the statute to allow ballots to be received up to three days after Election Day if they were postmarked no later than Election Day. Having returned to its pre-2017 election methodology, Kansas is now one of 36 states in the country requiring ballots to be received before or by Election Day.²

On July 16, 2026, the district court temporarily enjoined S.B. 4. *See* Ex. A. That same day, the Secretary filed a Notice of Appeal. The next day, July 17, the Secretary filed an Emergency Motion to Stay or Suspend Temporary Injunction Pending Appeal in the district court, but the district court has not yet acted on that motion. Under K.S.A. 60-262(f), the Secretary now moves this Court to suspend or stay the temporary injunction during the Secretary's appeal so that the statute remains in place during the pendency of the Secretary's appeal.

² *See* <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (National Conference of State Legislature Table) (listing specific statute of each state that requires Election Day receipt of advance mail ballots) (last visited July 20, 2026).

II. Legal Standards

Kansas law provides that “[w]hile an appeal is pending from an interlocutory order . . . that grants, dissolves or denies an injunction, the court may suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” K.S.A. 60-262(c). Further, K.S.A. 60-262(f) provides:

(f) *Appellate court’s power not limited.* This section does not limit the power of the appellate court or one of its judges or justices:

- (1) To stay proceedings, or to suspend, modify, restore or grant an injunction, while an appeal is pending; or
- (2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

Due to the time constraints at issue, the Secretary files this motion with this Court in addition to its previously filed Emergency Motion to Stay or Suspend Temporary Injunction Pending Appeal directed to the district court. The Legislature has explicitly authorized this dual approach under K.S.A. 60-262(f). Because the district court has not yet addressed the Secretary’s Motion, and due to the timing of the district court’s injunction, expeditious relief under K.S.A. 60-262(f) is necessary.

The Secretary respectfully requests this Court, or one of its jurists, to suspend or stay the temporary injunction to preserve the status quo of conducting elections under Kansas’ duly-enacted statutes during the appeal. *See Arizona Secretary of State’s Office v. Feldman*, 580 U.S. 977 (2016) (Kennedy, J, in chambers) (granting stay of Ninth Circuit’s preliminary injunction barring enforcement of a new criminal law associated with voting pending resolution of the case by that circuit); *K.C. v. Individual Members of Med. Licensing Bd. of Indiana*, 121 F.4th 604, 613 (7th Cir. 2024) (“Indiana’s law would have gone into effect had the district court not entered its injunction, so the stay allowed the state to enforce SEA 480 while this appeal proceeded.”)

(emphasis added); *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116-17 (9th Cir. 2008) (“[G]ranted a stay in this case would, in a real sense, preserve rather than change the status quo. In the absence of the district court injunction on December 26, 2007, the provisions of the Ordinance that were scheduled to go into effect on January 1, 2008, would now be part of the status quo.”), *overruled on other grounds by Nken v. Holder*, 556 U.S. 418 (2009). Moreover, courts reviewing preliminary injunctions enjoining implementation of a new law have granted motions for stays without regard to whether a stay would disturb or preserve the status quo. *See Id.* at 1117 (citing, as examples, *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244-53 (6th Cir. 2006); *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997)). “In this context, the status quo is that which the People have wrought, not that which . . . judges impose upon them.” *Camblos*, 116 F.3d at 721.

Kansas courts have not addressed the specific factors a court should consider in determining whether to suspend or stay a temporary injunction under K.S.A. 60-262. Kansas courts often look to cases interpreting the parallel federal rules of procedure for persuasive guidance. *E.g. Reed v. Chaffin*, 205 Kan. 815, 819, 473 P.2d 102 (1970); *In re Est. of Fechner*, 56 Kan. App. 2d 519, 527, 432 P.3d 93 (2018). Because K.S.A. 60-262(c) is substantially similar to Fed. R. Civ. P. 62, federal guidance is persuasive here. *See* 4 Gard, Casad, Mulligan, *Kansas Law and Practice: Kansas C. of Civ. Proc. Annot. § 60-262* (5th ed. 2025) (stating K.S.A. 60-262 “is substantially similar to Federal Rule 62, except the Kansas rule has no counterparts of Federal Rule 62(f) or the last sentence of Federal Rule 62(c),” neither of which are at issue here).

Under federal law, in determining whether a stay is warranted pending appeal, a court considers the following factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured

absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors are the most critical. *Id.*

III. The *Nken* Factors Strongly Favor a Stay

(1) The Secretary is Likely to Succeed on the Merits

Here, the Secretary is likely to succeed on the merits. Returning Kansas to the practice it employed for nearly *150 years* prior to a brief eight-year experiment with a grace period and realigning Kansas with the 35 other States that eschew grace periods does not contravene Kansans' right to suffrage, equal protection, or due process. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, 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) (quotation omitted).

A. Kansas courts presume statutes are constitutional, and Plaintiffs' facial attack requires a showing that no set of circumstances exist under which S.B. 4 is valid

Under the separation of powers doctrine and longstanding Kansas Supreme Court precedent, Kansas courts "presume a statute to be constitutional, resolve all doubts in favor of a statute's validity, and require that a statute must clearly violate the constitution before it may be struck down." *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 749-50, 387 P.3d 795 (2017); *accord Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021). "Courts may not 'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.'" *Christopher v. State ex rel. Kansas Juv. Just. Auth.*, 36 Kan. App. 2d 697, 709, 143 P.3d 685 (2006) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Accordingly, a "court should not strike down a

statute unless the infringement of the superior law is clear beyond a reasonable doubt.” *Hall v. Dillon Cos., Inc.*, 286 Kan. 777, 789, 189 P.3d 508 (2008). Kansas has long applied this principle in the election context. *See Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177, 180 (1936) (“No statute should be declared unconstitutional unless the infringement of the superior law is clear, beyond substantial doubt.”) (quotation omitted).

Plaintiffs are waging a facial constitutional challenge to S.B. 4. “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)). It thus does not necessitate any findings of fact and, instead, presents a question of law. *Id.*

Because Plaintiffs bring a facial challenge, they face a major obstacle to their success. They must “establish that *no set of circumstances exists under which the Act would be valid.*” *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)) (emphasis added). “The fact that the [challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Court has] not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *Id.* (quoting *Salerno*, 481 U.S. at 745) (cleaned up). Facial challenge are highly disfavored 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, 450-51 (2008); *State v. Bollinger*, 302 Kan. 309, 318-19, 352 P.3d 1003 (2015).

Despite this controlling authority, the district court’s Order holds that the longstanding test for facial challenges does not apply, citing *City of Los Angeles, CA. v. Patel*, 576 U.S. 409, 418

(2015) and *State v. Ryce*, 303 Kan. 899, 915, 368 P.3d 342, 354 (2016), *adhered to on reh’g*, 306 Kan. 682, 396 P.3d 711 (2017). *See* Ex. A, p. 52-53. But this overlooks the fact that *Ryce* explicitly cabined its holding: “when it comes to *Fourth Amendment challenges*, the ‘no set of circumstances’ test becomes more focused.” 303 Kan. at 915 (emphasis added).

Before the district court, Plaintiffs also argued that the “no-set-of-circumstances” test for facial statutory challenges does not apply because *League of Women Voters v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) (“*LWV II*”), did not discuss it when addressing a challenge to a signature verification requirement. This assertion overlooks hornbook law on stare decisis. “The rule of stare decisis may not be extended to cover implications from what was decided in a former case, and thus, a case is not binding precedent if its holding is only implicit or assumed, or the issue was decided sub silentio.” 21 C.J.S. Courts § 218 (2025). In other words, “Constitutional rights are not defined by inferences from opinions which did not address the question at issue.” *Texas v. Cobb*, 532 U.S. 162, 169 (2001); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”). “In order for a decision to be given stare decisis effect with respect to a particular issue, that issue must have been *actually decided* by the court.” *United Food & Com. Workers Union, Loc. 1564 of New Mexico v. Albertson’s, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000) (emphasis added) (citation omitted).

Moreover, both the Kansas Supreme Court and Court of Appeals have reiterated the no-set-of-circumstances test since *Ryce*. *See State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025) (“A successful facial challenge generally requires a litigant to establish that the law is unconstitutional in all its applications. Thus, for the State to prevail in a facial challenge, it need only demonstrate that the law is constitutional in at least some applications.”); *State v. Hall*, 65

Kan. App. 2d 369, 371-72, 564 P.3d 786 (2025) (holding that to prevail on a challenge under section 4 of the Kansas Constitution Bill of Rights, a criminal defendant must show that “no application of [the statute] could survive constitutional review under section 4—a formidable legal task even with a fundamental right”), *rev. denied* June 27, 2025. The district court ignored its duty to adhere to this controlling precedent. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022) (“Courts are duty bound to follow this court’s precedent absent an indication that we are departing from that precedent[.]”).

B. Deferential Review is Constitutionally Mandated

The Kansas Constitution expressly assigns to the Legislature all decisions regarding the specific voting methodology to be used in state elections. Kan. Const. art. 4, § 1 (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added); *see also id.* art. 1, § 1 (in “elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly *in such manner as is prescribed by law*”) (emphasis added). The Kansas Supreme Court recently reinforced the scope of this provision. *See LWV II*, 318 Kan. at 797 (“Where popular elections are required—by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere)—the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.”) (citing Kan. Const. art. 4, § 1).

Just as is true of Article 5, § 4, which authorizes the Legislature to require “proper proofs” to ensure that the right of suffrage extends only to eligible voters, *LWV II*, 318 Kan. at 801-02, the exclusive delegation to the Legislature in Article 4, § 1 necessarily confers upon lawmakers the power to select *any reasonable* mode of voting for state elections. “[U]nless this power is abused the courts may not interfere.” *Id.* at 801 (quoting *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618

(1884)); *see also Sawyer v. Chapman*, 240 Kan. 409, 412, 729 P.2d 1220 (1986) (as long as voting is by ballot and the person casting vote may do so in secrecy, Article 4, § 1, empowers the Legislature to “adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary”) (quoting *Taylor v. Bleakley*, 55 Kan. 1, 39 P. 1045, 1050 (1895)).

As the Kansas Supreme Court explained in *LWV II*, there can be no right to vote that is divorced from “concrete and specific provisions of the Constitution or statutes.” 318 Kan. at 800. It is an “enumerated political right.” *Id.* And neither the Kansas nor U.S. Constitution confers any right to vote by mail. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969) (any fundamental right to vote under the Federal Constitution is directed at the ability to *generally cast a ballot*, not the right to do so in the voter’s preferred manner, such as by mail); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.”); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (affirming dismissal of complaint for failure to state a claim where working mothers argued that because it is a hardship for them to vote in person on election day, the U.S. Constitution required Illinois to allow them to vote by absentee ballot, reasoning, “at bottom the plaintiffs are arguing that the Constitution requires all states to allow unlimited absentee voting, and the argument ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution”).

C. Plaintiffs’ Equal Protection Claim Fails as a Matter of Law

The district court erroneously held that Plaintiffs were likely to succeed on an equal protection claim under Sections 1 and 2 of the Kansas Constitution’s Bill of Rights. *See Ex. A*, pp.

26-41. Plaintiffs contend that the absence of a grace period for receiving advance mail ballots has a disparate impact on voters living in rural areas and voters who are temporarily away from Kansas because (i) such voters allegedly tend to rely more heavily on voting by mail than other Kansans, and (ii) the USPS's on-time delivery track record is not at levels Plaintiffs and some Kansas state officials deem acceptable. Plaintiffs similarly allege that the elimination of the grace period violates the equal protection rights of disabled voters whose mobility issues necessitate that they vote by mail. Plaintiffs argue the USPS's slow delivery times will make it difficult for these voters to ensure that their mailed ballots are received at the county election office by the close of polls on Election Day. These arguments are without merit.

i. – Plaintiffs Fail to State an Equal Protection Claim under Section 1

First, the district court failed to acknowledge that Plaintiffs' Section 1 claims are foreclosed by *LWV II*. See Ex. A, pp. 26-27. There, the majority held the “‘right to vote’ is not an unenumerated ‘natural right’ protected by section 1 of the Kansas Constitution Bill of Rights. Rather, suffrage is universally understood as a political right.” 318 Kan. at 793 (collecting cases). Accordingly, the Supreme Court held, “the Court of Appeals erred when it analyzed the question under our existing section 1 jurisprudence.” *Id.* at 793-74. Now Chief Justice Rosen's dissent echoed this holding. *Id.* at 813 (Rosen, J., dissenting) (“The majority concludes voting is a political right, not a natural one, so section 1 offers it no protection. I agree.”).

ii. – Section 2 is Coextensive with Fourteenth Amendment of U.S. Constitution

Further, with respect to Section 2, the district court failed to acknowledge that Kansas courts have long held that the scope and application of the “the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution.” *Rivera v. Schwab*, 315 Kan. 877, 893-94, 512 P.3d

168 (2022). *Rivera* explained that the Court’s decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did *not* alter Kansas’ “historical and fundamental interpretation of the scope of equal protection found in section 2.” *Rivera*, 315 Kan. at 894. To the contrary, the Court in *Rivera* reiterated that “section 2 is ‘given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.’” *Id.* (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917)). And if there were any doubt regarding *Rivera*’s continued application, the Supreme Court in *LWV II* quoted from *Rivera* in explaining that Section 2 of the Kansas Constitution Bill of Rights is to be read coextensively with the U.S. Constitution. *LWV II*, 318 Kan. at 805.

iii. – The District Court Failed to Apply the Governing Legal Standard for Equal Protection Claims

The district court did not find any suspect class was at issue for purposes of equal protection. This is crucial because if there is no suspect class, “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Guttman*, 669 F.3d at 1116. In the absence of proof that a challenged statute was adopted with a *discriminatory purpose targeted at a suspect class*, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976)—which is clearly not present here—the law is reviewed under the rational basis standard. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). The fact that the law might have a disparate impact on particular individuals (or even a suspect class) does not suffice to trigger an equal protection violation. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *accord Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308, *supplemented*, 279 Kan. 817, 112 P.3d 923 (2005) (“In order to establish an equal protection

violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose.”).

Plaintiffs allege no intentional discrimination from S.B. 4, nor could they. This legislation is a quintessential, neutrally-applied statute that is administered identically (and objectively) to every voter. There are no individualized determinations to be made. No category of the electorate is treated differently than any other.

The district court incorrectly found Plaintiffs are likely to prove that S.B. 4’s “lack of uniformity creates an independent violation of equal protection principles.” Ex. A, p. 36. In reaching this conclusion, the court relied on the Kansas Supreme Court’s use of the phrase “achieve reasonable uniformity” in *LWV II*. 318 Kan. at 807. But the Supreme Court was simply describing the test to be applied on remand for evaluating the signature verification process for advance mail ballots, which the plaintiffs alleged was not reasonably uniform among the counties. It is inconceivable that the Supreme Court was jettisoning fifty years of consistent equal protection jurisprudence with no explanation whatsoever. Under that long line of equal protection case law, where there is no proof that a law was adopted with a discriminatory purpose, a rational basis standard must be applied in a manner that affords substantial deference to the State. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 193-94, 273 P.3d 709 (2012).

None of Plaintiffs’ or the district court’s policy objections to S.B. 4 equate to an equal protection violation, much less one authorizing the district court to facially enjoin a duly enacted election statute. Plaintiffs argue that the law would be fairer if mail ballots could be disseminated earlier than twenty days prior to the election, and if timely postmarked ballots could be received up to a week after the election. But even assuming these one-sided policy arguments were correct, the State would not be under a legal obligation to choose a “better” or less burdensome method for

pursuing its policy objectives. “[T]he relationship between the classification and the legislative objective it serves need not be narrowly tailored to the objective. A rational connection between the two will suffice.” *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 370, 361 P.3d 504 (2015).

The Kansas Legislature’s decision to bring the State back into alignment with 35 other states—returning to a requirement that ruled the day in Kansas for roughly *150 years*—may or may not accord with the policy preferences of some voters. But that is immaterial to the constitutional analysis. See *USD No. 380 v. McMillen*, 252 Kan. 451, 461, 845 P.2d 676 (1993) (“[I]f a legislative enactment is constitutional, it is not for this court to set policy or to substitute its opinion for that of the legislature no matter how strongly individual members of the court may personally feel on the issue.”). The Kansas Constitution does not impose a one-way ratchet preventing the Legislature, after briefly experimenting with a change to its electoral mechanics, from reverting to the original procedures.

There can be no dispute that the Election Day ballot receipt deadline implemented by S.B. 4 applies in a neutral, even-handed manner to all Kansas voters. *Every voter* who opts to vote by mail must return the ballot to the county election office or a polling place no later than 7:00 PM on Election Day. No exceptions. “Equal protection requires similarly situated individuals should be treated alike. It does not require that all persons receive identical treatment, but only that person similarly situated with respect to the legitimate purpose of the law receive like treatment.” *LWV II*, 318 Kan. at 805 (quotation omitted). All that is necessary for the State to show is that the law in question is “capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment.” *Id.* Moreover, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” *Id.* (citing *Butts*, 31 Kan. at

555-56). This is all the more true in light of Plaintiffs’ *facial* challenge. See *United States v. Stevens*, 559 U.S. 460, 472 (2010) (to succeed in a facial attack, plaintiffs must establish that “no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.”).

The federal district court cases Plaintiffs and the district court rely upon do not support the extraordinary relief the district court granted here, even if they were correctly decided. For example, *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 46-48 (S.D.N.Y. 2020), involved an “as-applied” challenge to election officials’ refusal to accept and count late-arriving ballots *in electoral ecosystems that included a statutory grace period*. See Ex. A, p. 36, 37, 39. It did not suggest a State would have to accept late-arriving ballots *where the law provided no grace period*. Never has the Equal Protection Clause been held to impose such a requirement.

A recent decision of the Michigan Court of Appeals rejecting a state constitutional challenge (including on equal protection grounds) to an Election Day receipt deadline for absentee ballots is particularly illuminating. See *League of Women Voters v. Sec’y of State*, 959 N.W.2d 1 (Mich. Ct. App.), *appeal denied*, 946 N.W.2d 307 (Mich. 2020). The court explained that the receipt deadline is a facially nondiscriminatory law equally applicable to all voters who choose to vote absentee by mail. *Id.* at 15. “Although mail may be processed more expeditiously in some areas and less expeditiously in others, the Legislature has opted to impose a received-by deadline rather than a mailed-by deadline for absent-voter ballots. That determination was a policy decision, and the [State Constitution] grants the Legislature the authority to provide for a system of absentee voting.” *Id.* And while all deadlines carry the possibility that a voter’s ballot will arrive too late to be counted, the court noted, “there must be a deadline—at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision.” *Id.* at 12.

The same analysis applies here. The erroneous decision below concerned a policy decision—not a constitutional command. Moreover, in casting its decision as a constitutional one, the district court failed to describe the boundaries of this imagined constitutional right. Does the Constitution require a two-day grace period, a three-day grace period, or something else? One cannot say because it is a legislative policy choice, not a constitutional requirement.

iv. – Plaintiffs Claims Also Fail Under *Anderson-Burdick* Type Balancing

Even if this Court were to find either the reasonableness standard applied by the Kansas Supreme Court in *LWV II* or the general rational basis test for equal protection claims not involving suspect classes inapplicable, a balancing test along the lines of the *Anderson-Burdick* standard utilized by the federal judiciary would govern. Under this standard, courts “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the state as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982)). “[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the challenged law is exposed to far less searching review that is “closer to rational basis and the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434); *Fish v. Schwab*, 957 F.3d 1105, 1124-25 (10th Cir. 2020) (same).

Plaintiffs’ Equal Protection claims fail under the *Anderson-Burdick* standard. Elimination of the three-day grace period imposes no illegitimate burden—let alone a *severe* burden—on any voter in the State. Kansas voters have myriad options for exercising the franchise. In addition to voting by mail, they can vote in person on either Election Day or up to twenty days before the election at an advance voting site. K.S.A. 25-1123(a), 1122(g)(1). All such polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA). Kansas even mandates curbside voting so that voters do not have to exit their vehicle; election officials will bring a ballot to the voter in the precinct’s parking lot. K.S.A. 25-2909(d). Voters may also direct a third party to return their ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

As for voting by mail, it is still freely available. Counties begin processing advance mail ballot applications ninety days before the election, K.S.A. 25-1122(f)(1)(B), and then mail advance ballots to voters beginning twenty days before the election. K.S.A. 25-1123(a). Voters with a permanent disability or illness may be placed on the permanent advance mail voter list, K.S.A. 25-1122(h), and do not even have to apply for an advance mail ballot; their ballot will be automatically sent to them twenty days before the election. Anyone not on the permanent list, meanwhile, must have their advance ballot application processed within two days of receipt. K.S.A. 25-1123(a).

“A state satisfies all constitutional requirements by devising a set of rules under which everyone who takes reasonable steps to cast an effective ballot can do so.” *Common Cause Indiana v. Lawson*, 977 F.3d 663, 665 (7th Cir. 2020). While Plaintiffs and the district court lament the USPS’s delivery pace, that is *legally irrelevant* to the facial challenge at issue here. The Legislature has no constitutional obligation to even allow mail voting. The fact that it does so does not

constrain it from imposing conditions (including an Election Day receipt deadline) on the practice. Kansas cannot be held to violate an elector's equal protection rights just because some third-party over whom the State has no control—the USPS—is not exactly a model of operational efficiency. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (State must not be held responsible under Fourteenth Amendment for conduct it cannot control).

In addition, all voters can ensure that their ballots are counted by sending them in early rather than waiting until close to Election Day. As the U.S. Supreme Court pointed out in rejecting a request to extend a ballot receipt deadline, voters who request a ballot at the last minute (and thus risk it not being counted) suffer the typical burden of a late-requesting voter, *not a burden imposed by state law*. *RNC v. DNC*, 589 U.S. 423, 425 (2020). An election deadline is not unconstitutional merely because an individual “fail[ed] to take timely steps to effect[uate]” his vote. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *accord DNC v. Wisc. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (rejecting all of the same arguments Plaintiffs advance in this case, noting state's interest in enforcing Election Day ballot receipt deadline, and holding that voters who delay the submission of their ballot have no right to demand that it be counted); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (“Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting. . . . And the burden on a voter to ensure that a ballot is postmarked by Election Day is not meaningfully smaller than the burden of, say, dropping the ballot in a drop box at one's polling place on Election Day.”); *accord Mays v. LaRose*, 951 F.3d 775, 782-91 (6th Cir. 2020) (plaintiffs are no more burdened than any elector when they fail to take steps necessary to ensure the timely return of their ballots); *All. for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 51-55 (Me. 2020) (same); *Common Cause Indiana v. Lawson*, 977

F.3d 663, 665 (7th Cir. 2020) (“People who worry that mail will be delayed during the pandemic can protect themselves by using early in-person voting or posting their ballots early.”); *cf. Tully v. Okeson*, 977 F.3d 608, 615-18 (7th Cir. 2020) (requiring voters to vote in person during COVID-19 pandemic did not contravene Equal Protection Clause).

When—as is true of an Election Day ballot receipt deadline—“the alleged burdens are not severe, a compelling state interest is not required.” *New Ga. Project*, 976 F.3d at 1282 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Even so, Kansas has very compelling interests in such a law. First, eliminating the grace period ensures prompt tabulation of all votes and facilitates public confidence in the finality of results. Close elections are a regular feature of down-ballot races in every state (including Kansas), and a grace period for mail ballots means the outcome can teeter back and forth every day based on what mail arrives into the election office. Delayed counting of ballots received days after the election fuels mistrust and speculation, especially in tight contests. Second, enforcing an Election Day ballot receipt deadline simplifies logistics and enhances efficiency. Processing late-arriving mail ballots necessitates additional manpower, resources, and contingency planning, all of which complicate election administration. Third, eliminating the grace period helps prevent election fraud and its appearance, which are serious issues properly directed to legislatures, not courts. *E.g. Watson v. RNC*, 609 U.S. ____, 2026 WL 1855462, at * 11 (June 29, 2026).

Mail ballots arriving late are harder to verify, raising concerns about post-election tampering. This is especially true when the USPS has failed to include a postmark on the ballot. The revised law avoids problems potentially arising from missing, unclear, or even altered postmarks. *See RNC v. Aguilar*, 2024 WL 4601602, at *2-4 (Nev. Oct. 28, 2024) (ordering mail ballots received after Election Day to be accepted despite a missing or indeterminate postmark).

All these interests have been recognized as powerful and “more than enough to uphold [the State’s] reasonable ballot-receipt restriction” and “justify the deadline.” *New Ga. Project*, 976 F.3d at 1282; *accord Common Cause Ind.*, 977 F.3d at 664-66; *All. for Retired Ams.*, 240 A.3d at 52-55. Moreover, the State is not required to provide any “elaborate, empirical verification of the weightiness of [its] asserted justifications.” *Timmons*, 520 U.S. at 364.

The district court’s holding is flawed under any established Equal Protection standard.

D. Plaintiffs’ Due Process Claim Fails as a Matter of Law

The district court next erroneously concluded that there is a substantial likelihood S.B. 4 violates Plaintiffs’ due process rights under Section 18 of the Kansas Constitution’s Bill of Rights because there is no right to cure a late-arriving ballot.

As a threshold matter, due process rights are implicated only when there has been a deprivation of life, liberty, or property. *Interest of A.S.*, 319 Kan. 396, 402-03, 555 P.3d 732 (2024). Here, as federal appellate courts have held, there is no liberty interest in voting by mail, let alone in a grace period. *See Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 231 (5th Cir. 2020) (no liberty interest in right to vote); *New Ga. Project*, 976 F.3d at 1282 (same); *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (same). Invoking *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 3d 1354 (D. Ariz. 1990), the district court disregarded these decisions. *See Ex. A*, p. 43-44. But the Fifth Circuit explained in detail why *Raetzel* was wrongly decided and why no federal appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

The district court also relied on *LWV II*, where the Kansas Supreme Court remanded the plaintiffs’ due process challenge to the State’s signature verification requirements for advance mail ballots for the purpose of determining if voters are provided “reasonable notice” of their signature mismatch and “an opportunity to be heard at a meaningful time and in a meaningful manner” in

order to contest the preliminary mismatch assessment. 318 Kan. at 807. *See* Ex. A, p. 41. But the Supreme Court never addressed the liberty issue in its majority opinion and there is no precedential value to an opinion that did not explicitly address an issue.

In any event, there is a clear distinction between an Election Day ballot receipt deadline and the signature verification requirement at issue in *LWV II*. Plaintiffs argue that the due process defect with S.B. 4 is that, if a ballot fails to arrive by Election Day, it can never be validly counted; there is no possibility of cure. An Election Day receipt deadline, however, does not implicate the type of individualized, discretionary determinations that can trigger due-process scrutiny. Unlike signature-verification processes or case-specific eligibility judgments—where election officials assess voter-specific information and thus must be guided by adequate procedural safeguards—an across-the-board receipt deadline is a neutral, bright-line rule that applies equally to every voter. There is no individualized decision to review, no adjudicative process to second guess, and no risk of an erroneous deprivation dependent on administrative discretion.

To recast a uniform statutory deadline as a due-process problem would effectively grant courts a roving commission to revise election laws whenever litigants dislike the policy choices of the Legislature. Such an approach collapses the line between permissible policy disagreements and constitutional violations, inviting judicial intrusion into core legislative functions and destabilizing the predictable administration of elections. Under no plausible reading of *LWV II* can it be said that the Kansas Supreme Court intended such a result. Instead, here, due process is satisfied once the Legislature provides reasonable notice of the ballot receipt deadline, explains the procedures to cast a valid ballot by mail, and provides a fair opportunity to comply on or before Election Day.

The district court also relied on the three-part balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), but our Supreme Court rejected that theory when formulating the standard

for due process challenges involving electoral mechanics in *LWV II*. 318 Kan. at 805-06. Further, the U.S. Supreme Court has directed that due process attacks on voting processes are best analyzed under a balancing test along the lines of *Anderson-Burdick*, see *Richardson*, 978 F.3d at 234, and the Kansas Supreme Court construes Sections 2 and 18 of the State Constitution as “coextensive” with their federal counterparts. *Rivera*, 315 Kan. at 894; *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019). That means *Eldridge* has no role here:

The flaw in using *Eldridge* is that election laws, by nature, inevitably affect the individual’s right to vote. Under *Eldridge*, however, courts may accord the private interest at stake, namely the right to vote, significant weight. Therefore, the *Eldridge* test would inevitably result in courts’ weighing the pros and cons of various balloting systems, thereby tying the hands of States seeking to assure that elections are operated equitably and efficiently. Unlike *Eldridge*, the *Anderson/Burdick* approach recognizes that the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. Because *Anderson/Burdick*—unlike *Eldridge*—appropriately accounts for the state’s interest in regulating voting, it provides the appropriate test for procedural due process claims challenging election laws.

Richardson, 978 F.3d at 235 (cleaned up) (quotations omitted).

Every federal appellate court to address the issue has reached the same conclusion. See *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194-95 (9th Cir. 2021) (rejecting use of *Eldridge* test in election law challenges); *Memphis A. Philip Randolph Inst.*, 978 F.3d at 387-91 (same); *New Ga. Project*, 976 F.3d at 1282 (refusing to apply *Eldridge* in constitutional attacks on voting law because doing so “would stretch concepts of due process to their breaking point”); see also *Lawson*, 977 F.3d at 664 (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex. It is rational to require absentee votes to be received by Election Day, just as in-person voting ends on Election Day.”).

In any event, whether or not there is a liberty interest in mail voting is irrelevant because

Plaintiffs’ due process cause of action fails either way. Judge Lagoa described the point in her concurrence in *New Georgia Project*, a case in which the Eleventh Circuit rejected the theory Plaintiffs advance here. As she explained, “[e]ven if Plaintiffs are being deprived of that [liberty] interest, they are being deprived of it by *legislative* action, not by *adjudicative* action.” *New Ga. Project*, 976 F.3d at 1288 (Lagoa, J., concurring). The United States Supreme Court has long distinguished between the two when deciding what due process requires. *Id.* For this reason, Judge Lagoa underscored, the traditional *Mathews v. Eldridge* test has no role to play in this context:

When a state deprives persons of liberty or property through *legislative* action—an action passed by the legislative process that applies “to more than a few people”—then “the affected persons are not entitled to *any* process beyond that provided by the legislative process.” *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020) (emphasis in original) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); see also *Bi-Metallic*, 239 U.S. at 445 (“General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”)). On the other hand, when a state deprives persons of a liberty interest through an *adjudicative* action—an action that concerns only a “relatively small number of persons” who are “exceptionally affected, in each case upon individual grounds”—then the affected individuals may be entitled to additional process above and beyond that provided by the legislative process. *Bi-Metallic*, 239 U.S. at 446. Only in the latter situation do courts apply the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Id. at 1288-89 (cleaned up).

Kansas’ Election Day ballot receipt deadline is a law of “general applicability which affects all [Kansans] equally.” *Id.* at 1289. Thus, “even if Plaintiffs are being deprived of a constitutionally protected liberty interest, they are being deprived of that interest by *legislative* action.” *Id.* There is no individualized determination required before a late-arriving ballot will be rejected under the law. The only “process” to which Kansas voters are entitled “before their late-arriving ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case.” *Id.*

Even if procedural due process were relevant, there is no process deficiency. Not only is the electorate fully apprised of the receipt deadline when submitting mail ballots, but voters are afforded myriad other reasonable options for exercising the franchise. As the Tenth Circuit observed, deadlines in the election process “will invariably burden some voters . . . for whom the earlier time is inconvenient,” but these burdens are assessed in light of “a state’s legitimate interest in providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018); *see also Burdick*, 504 U.S. at 438 (“Reasonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth.”).

Plaintiffs are asserting a *policy-grounded* argument that does not come within the vicinity of stating a due process claim. Whether a grace period is beneficial or problematic (or a combination of the two) is not for the judiciary to decide. It is a legislative judgment, one which our State Constitution explicitly assigns to the discretion of the legislature.

Plaintiffs’ expansive theory is virtually unbounded. If they were to eventually prevail, even a three-day grace period would be inadequate. Further, any time a single voter missed a ballot receipt deadline, that individual voter could seek an individualized determination of whether this violated due process under *Eldridge*. The Kansas Constitution imposes no such requirements.

E. The District Court’s Right to Suffrage Analysis Was Flawed

In *LWV II*, the Kansas Supreme Court clearly set forth the standard for evaluating a challenge to a voting law pursuant to Article 5, Section 1. The Court explained that strict scrutiny does not apply to such a claim. *LWV II*, 318 Kan. at 802. Instead, “to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the

law must be shown to unreasonably burden the right to suffrage.” *Id.* at 801. The kind of extra-constitutional qualifications sufficient to invalidate a law under Article 5, Section 1, include, for example, a requirement to be up-to-date on all tax obligations, *see State v. Doane*, 98 Kan. 435, 158 P. 38, 40 (1916), certain residency requirements, *see id.*, and a party affiliation declaration mandate for the general election. *See State ex rel. Smith v. Beggs*, 126 Kan. 811, 814-15, 271 P. 400 (1928).

The district court incorrectly found Plaintiffs have shown a substantial likelihood that S.B. 4 imposes an extra-constitutional burden on the right to suffrage. *See* Ex. A, p. 47. Here, there is *no* additional qualification on any voter. The law simply imposes a neutrally applicable Election Day receipt deadline for mail ballots. There is nothing problematic, let alone unconstitutional, about that. As the Supreme Court held in *LWV II*, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” 318 Kan. at 804; *accord Butts*, 31 Kan. at 554 (“Requiring a party to be registered is not in any true sense imposing an additional qualification any more than requiring a voter to go to a specific place for the purpose of voting[.]”); *Lawson*, 977 F.3d at 664-65 (“Deadlines are essential to elections, as to other endeavors such as filing notices of appeal or tax returns. That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.”).

The district court’s holding to the contrary is flawed in multiple respects. First, the court’s sweeping constitutional pronouncements fail to even mention Article 4, Section 1, in which the Constitution confers broad discretion on the Legislature to regulate the structure and administration of elections. As the Supreme Court recently noted, “Where popular elections are required—by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere)—the

mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.” *LWV II*, 318 Kan. at 797. The vast delegation of authority in Article 4, Section 1, to select any reasonable mode of voting for state elections necessarily warrants great deference. Indeed, such principle follows naturally from *LWV II*’s adoption of a highly deferential standard for another constitutionally delegated electoral power to the Legislature—the right to impose “proper proofs” pursuant to Article 5, § 4—an authority deemed to encompass “any *reasonable* provision for ascertaining who is entitled to vote.” *LWV II*, 318 Kan. at 801.

The district court overlooked the fact that Kansas’ advance voting statutes flow from the bedrock principle that under our State Constitution, whether to allow advanced voting *at all* is a legislative decision. Kan. Const. Art. 4, § 1. A state’s choice to permit mail voting does not strip it of the authority to define the contours under which that method will operate or to revise those conditions over time. States remain free to regulate optional voting mechanisms, including receipt deadlines, subject only to the governing constitutional framework.

Second, contrary to the district court’s analysis, the Election Day ballot receipt deadline *does* functionally operate as a “proper proof” within the meaning of Article 5, Section 4. Part of the purpose behind S.B. 4 was the legislators’ concern that mail ballots were arriving after Election Day with no postmark, a postmark so smudged or illegible that it was impossible to reliably determine the date of mailing, or a stamp from a private postage meter (or similar business device) on which the date could be manipulated with ease. That meant that officials often had no dependable way to determine whether the voter had acted within the authorized voting window. By requiring that ballots be received by Election Day, S.B. 4 helps ensure that only those voters

who exercised their right to vote within the time prescribed by law are included in the count, thereby safeguarding both voter eligibility requirements and the integrity of the electoral process.

Under the district court’s reasoning, Kansas’ election system operated unconstitutionally for most of 158 years since some form of mail voting has been permitted. At no time has the absence of a grace period even been challenged before now. *See Chiafalo v. Washington*, 591 U.S. 578, 592-93 (2020) (“Long settled and established practice may have great weight in a proper interpretation of constitutional provisions” about the operation of government) (quotation omitted). While this latest legislative development may not comport with Plaintiffs’ policy preferences, the idea that the Legislature, after briefly experimenting with a change to its electoral mechanics, can never revert to the original procedures is without constitutional support.

Unsurprisingly, federal appellate courts addressing this issue have unanimously reversed district court decisions enjoining Election Day ballot receipt deadlines. For example, in staying a lower court’s injunction of Arizona’s law requiring early voters to sign their ballots by 7:00 p.m. on Election Day, the Ninth Circuit held: “All ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion.” *Hobbs 2020*, 976 F.3d at 1085; *see also Common Cause Ind.*, 977 F.3d at 664-65 (“That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.”); *New Ga. Project*, 976 F.3d at 1281 (“Georgia’s Election Day deadline does not implicate the right to vote at all. Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots.”). The rationale underlying these cases is especially applicable here considering Kansas provides a myriad of other ways to vote, including methods that accommodate the voters upon whom

Plaintiffs focus. See *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 671 (2021) (“[W]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.”).

In short, S.B. 4 imposes no unconstitutional burden on Plaintiffs’ right to vote. For all these reasons, Plaintiffs are not substantially likely to succeed on the merits of this claim.

(2) The State will suffer irreparable harm without a stay

“Prohibiting the State from enforcing a statute properly passed as part of its broad authority to regulate elections, particularly where the State has shown a strong likelihood that the statute is not constitutionally infirm, would irreparably harm the State.” *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Absent a stay, “the State will, in effect, be precluded from applying its duly enacted legislation regarding election procedures.” *Id.* Unless a statute is unconstitutional, which, as discussed above, S.B. 4 is plainly not, “barring the State from conducting this year’s elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] the State.” *Abbott v. Perez*, 585 U.S. 579, 602 (2018); see also *New Georgia Project*, 976 F.3d at 1283 (same).

This injury is compounded by the timing of the district court’s decision. The State has a compelling interest in seeing that its elections are carried out in an orderly manner. As explained above, an order changing election procedures at the last minute, when 46,127 ballots had already been mailed, leads to voter confusion and risks undermining confidence in the election.

Additionally, the State suffers irreparable harm because the district court purported to enjoin S.B. 4 on a state-wide basis in the absence of proper defendants against which such an injunction can issue, creating confusion among county election officials as to whether they should follow the Election Day deadline in current law or in the district court’s injunction, when they are

not parties to the case. Kansas law mandates that any injunction be specific and “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise.” K.S.A. 60-906. This limitation is consistent with traditional principles of equitable relief, as injunctions are designed to provide complete relief to the plaintiffs before the court and not to regulate the conduct of nonparties. *Trump v. CASA, Inc.*, 606 U.S. 831, 851-52 (2025) (explaining that universal injunctions improperly protect nonparties and that “complete relief” is relief administered “between the parties,” with any benefit to others only incidental).

Plaintiffs have sued only the Secretary of State and the Douglas County Clerk in this lawsuit. No other county election official is named. As explained in the Secretary’s Proposed Order Denying Plaintiffs’ Motion for Temporary Injunction,³ by explicit statutory command, the Secretary has no operational control over county election officers. The Legislature has deliberately established a highly decentralized electoral framework. Kansas law provides that “[e]ach county election officer shall be the sole public officer responsible for planning, conducting and coordinating elections held within such officer’s county,” and shall be “responsible for ensuring those elections comply with federal and state law and rules and regulations.” K.S.A. 25-126(b). The Secretary, meanwhile, merely is responsible for “*assisting and advising* county election

³ In response to the Secretary’s Motion to Stay in the District Court, Plaintiffs disingenuously argued this issue was not raised before the Motion to Stay. The Secretary raised this issue in his Proposed Order Denying Plaintiffs’ Motion for Temporary Injunction, served on March 2, 2026. See Ex. C, pg. 57 (Proposed Order); Ex. D (showing the Secretary’s Proposed Order was submitted to the district court through the eFlex filing system as a proposed order on March 2, 2026); Ex. E (showing Plaintiffs received a copy of the Proposed Order on March 2, 2026, the same day it was filed in eFlex, per the Court’s instructions at Ex. B, pp. 99-100).

officers in conducting elections in compliance with federal and state laws and rules and regulations.” K.S.A. 25-126(a) (emphasis added).

Kansas administrative rules further reinforce county-level responsibility for acceptance and counting of advance voting ballots. For example, K.A.R. 7-36-5 provides “[e]ach county election officer shall adopt procedures to ensure that ballots received after the time the polls close on election day shall not be counted.” Thus, the act of enforcement at issue—accepting ballots received after Election Day—is implemented locally through county procedures and personnel, not through statewide operational control by the Secretary. The district court’s order did not even attempt to explain its authority to enjoin nonparties to this lawsuit.

Ultimately, regardless of the scope of the district court’s injunction, “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))). “A decision of that moment warrants cautious review” and favors a stay pending appeal. *Doe v. Gonzales*, 546 U.S. 1301, 1308-09 (2005) (Ginsburg, J., in chambers).

(3) The Remaining Factors Strongly Favor a Stay

“[A]lthough the remaining factors of injury to other parties and the public’s interest generally warrant lesser consideration than those of likelihood of success and irreparable harm,” they likewise weigh heavily in favor of granting a stay in this case. *See Org. for Black Struggle*, 978 F.3d at 609. Those factors are: whether issuance of the stay will substantially injure the other parties interested in the proceeding and where the public interest lies. *Nken*, 556 U.S. at 434.

Federal appellate courts have repeatedly granted stays under similar circumstances, as it is indisputable that “[t]he public has an interest in the fair and orderly operation of elections[.]” 978 F.3d at 609. For example, the Eighth Circuit, relying heavily on an earlier decision from the Eleventh Circuit, granted a stay pending appeal where the district courts granted plaintiffs a preliminary injunction on equal protection grounds against enforcement of a Missouri statute that treated mail-in ballots differently than absentee ballots, requiring that the former be returned by mail only while the latter could be returned by mail or in-person. *Id.* at 606-07. With respect to the public’s interest, the Eighth Circuit reasoned, “the State’s ‘interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud,’ further serve the public’s interest, as ‘confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy[.]” *Id.* at 609 (cleaned up) (quoting *Purcell*, 549 U.S. at 4; *New Ga. Project*, 976 F.3d at 1284). And, regarding harm to other parties, the court explained, “there can be little harm to other parties where, . . . ‘a stay preserves the status quo and promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules.’” *Id.* (quoting *New Ga. Project*, 976 F.3d at 1284); *see also New Ga. Project*, 976 F.3d at 1279 (granting a stay of a district court decision extending ballot receipt deadline during COVID-19 pandemic, reasoning, *inter alia*, plaintiffs would suffer no irreparable injury due to the stay as “these plaintiffs may submit their absentee ballots (on time) or take advantage of any of the other avenues that Georgia has made available to ensure that voters are able to cast their ballots”).

The Seventh Circuit reached the same conclusion in *Lawson*, 977 F.3d at 664-65. There, the district court found Indiana’s Election Day ballot-receipt deadline unconstitutional “on the ground that the SARS-CoV-2 pandemic, which has led to more use of mail-in voting nationwide,

creates a risk that ballots mailed close to Election Day will not be received on time.” *Id.* at 664. The district court issued an injunction requiring the state to count ballots received ten days after Election Day. *Id.* The Seventh Circuit rejected that reasoning, explaining, “[t]hat some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.” *Id.* at 664-65. Regarding the public’s interest, the Seventh Circuit held, “[c]ounting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest.” *Id.* at 665. And, with respect to injury to other parties, the court explained, “[p]eople who worry that mail will be delayed during the pandemic can protect themselves by using early in-person voting or posting their ballots early.” *Id.* at 665. Further, even during a pandemic, the Court recognized “those who act at the last minute assume risks[.]” *Id.*

Continuing this refrain, the Ninth Circuit granted a motion for stay pending appeal when the district court enjoined Arizona’s Election Day ballot-signature deadline. *Hobbs 2020*, 976 F.3d at 1086. The Court recognized the irreparable harm to the State’s interest “where a court order ‘barr[ed] the State from conducting this year’s elections pursuant to a [constitutionally permissible] statute enacted by the Legislature.’” *Id.* (quoting *Abbott*, 585 U.S. at 602-03). In contrast, the Plaintiffs faced “only the ‘minimal’ burden of ensuring that voters sign their ballot affidavits by 7:00 PM on Election Day[.]” *Id.* at 1097.

IV. REQUESTED RELIEF

Due to the rapidly approaching August 4, 2026, primary election, the fact that county election officers already began transmitting advanced mail ballots on July 15, 2026, and the district court’s novel invention of a constitutional right found nowhere in the Kansas Constitution, the Secretary respectfully requests this Court grant the Secretary’s Motion and stay or suspend the district court’s order temporarily enjoining S.B. 4 pending the outcome of this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 20, 2026, I authorized the electronic filing of the foregoing with the Clerk of the Appellate Courts using the eFlex filing system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list.

By: /s/ Dwight R. Carswell

EXHIBIT A

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

KANSAS APPLESEED CENTER FOR	)	
LAW AND JUSTICE, INC., ET AL.,	)	
	)	
<i>Plaintiffs,</i>	)	Case No. DG-2025-CV-000206
	)	
v.	)	
	)	
SCOTT SCHWAB, in his official capacity	)	
as the Kansas Secretary of State; and	)	Division 7
JAMIE SHEW, in his official capacity as	)	
DOUGLAS COUNTY CLERK,	)	
	)	
<i>Defendants.</i>	)	

Order Granting Temporary Injunction

Plaintiffs challenge 2025 Senate Bill 4 (“SB 4”), which requires the rejection of any advance mail ballot that arrives at county election offices after 7:00 p.m. on Election Day for elections after January 1, 2026. *See* 2025 Kan. Sess. Laws 33, Ch. 8; K.S.A. 25-1132(b) (2026). Plaintiffs move the Court for a temporary injunction enjoining SB 4 during the pendency of this litigation. This injunction would maintain the process that Kansas has used for its elections since 2017, when election officials were required to count mailed advance ballots that were postmarked on or before Election Day, if received within three days. *See* K.S.A. 25-1132 (2017). After considering the extensive briefing and evidence submitted on this issue, the Court grants the temporary injunction requested by Plaintiffs.

I. Overview

The Court reviewed evidence and arguments at the motion hearing held on January 27, 2026. The Court also reviewed exhibits and notices of supplemental evidence and authority after the hearing was over. After closely reviewing all of the briefing and evidence, the Court grants the temporary injunction requested by Plaintiffs and issues a temporary order enjoining SB 4 from applying in upcoming elections. Thus, temporarily, K.S.A. 25-1132(b) (2026) will not take effect for upcoming elections. As explained at the end of this order, election officials will be required to follow K.S.A. 25-1132 (2021), which allowed for a three-day grace period for mailed advance ballots that were postmarked on or before Election Day, if received within three days thereafter.

This temporary injunction is not a final determination of any claim. But it is intended to prevent the Plaintiffs from suffering irreparable injury during the pendency of this lawsuit while Plaintiffs' claims are being litigated.

II. Findings of Fact

A. Plaintiffs challenge a recent law eliminating Kansas's prior three-day grace period for accepting and counting mail ballots.

1. At issue in this case is SB 4, enacted by the Legislature last year and codified at K.S.A. 25-1132(b). SB 4 repeals the grace period that previously allowed election officials to count advance ballots returned by mail but received after election day, so long as they were postmarked by election day and received in the mail within three days thereafter. *See* K.S.A. 25-1132(b) (2017).

2. The grace-period rule was in place in the last elections that Kansas had in 2025 and was the rule applied in Kansas elections for nearly ten years before. If SB 4 is enforced in Kansas’s upcoming elections, it will replace the grace period with a strict election day receipt deadline for all advance ballots—even if they were voted and mailed days or even weeks before—and will mandate that election officials reject any advance ballot returned by mail received any time after 7:00 p.m. on Election Day. K.S.A. 25-1132(b).

3. Plaintiffs are three registered Kansas voters, Dorothy Nary, Martha Hodgesmith, and Robert Mikesic (together, the “Voter Plaintiffs”), who rely heavily on advance mail ballots to vote, Ex. 5 (“Nary Decl.”) ¶¶ 4, 9; Ex. 6 (“Hodgesmith Decl.”) ¶¶ 9–11; Ex. 7 (“Mikesic Decl.”) ¶¶ 4, 10, and three nonpartisan, nonprofit civic organizations, Kansas Appleseed Center for Law and Justice, Inc. (“Kansas Appleseed”), Loud Light, and the Disability Rights Center of Kansas (“DRC”), which work to register, educate, and turn out voters and protect voting rights in Kansas (together, the “Organizational Plaintiffs”), particularly among communities reliant on advance mail ballot voting. Ex. 2 (“Reever Decl.”) ¶¶ 3–5; Ex. 3 (“Hammet Decl.”) ¶¶ 3–4; Ex. 4 (“Nichols Decl.”) ¶ 3.¹

4. Plaintiffs contend that unique features about Kansas, including worsening mail delays, the significant amount of rural voters in the state, and the short window that Kansas allows for advance voting, make it inevitable that SB 4

¹ Citations to “Ex.” are to exhibits submitted by Plaintiffs in support of their motion for a temporary injunction. The Secretary did not submit any evidence in support of his opposition to the motion.

will cause significant numbers of ballots that are timely voted and mailed by lawful Kansas voters to be rejected, due to arbitrary factors beyond their control. *See* Am. Pet. ¶¶ 10–11; 55–97; Mem. at 3–5. Plaintiffs allege that this violates several different provisions of the Kansas Constitution, specifically its guarantees of equal protection, due process, and the right to vote. Am Pet. ¶¶ 98–125 (Dkt. No. 22); Mem. at 9–14 (Dkt. No. 69).

5. Plaintiffs initiated this action in the District Court of Douglas County, Kansas, on May 5, 2025. Pet., Dkt. No. 1. Shortly thereafter, the Secretary noticed removal to federal court. Dkt. No. 41. Plaintiffs moved to remand, but that motion was not decided until October 16, 2025, when the federal district court granted the motion to remand. Order, *Kan. Appleseed Ctr. for L. & Just., Inc. v. Schwab*, No. 25-cv-02375-JWB-GEB (D. Kan. Oct. 16, 2025), ECF No. 55.

6. Two business days later, Plaintiffs moved for a briefing schedule that would allow the Court to decide any motion for a temporary injunction before SB 4’s effective date of January 1, 2026. Dkt No. 47. In response, the Secretary moved to dismiss and opposed any effort to set a briefing schedule on the timetable requested by Plaintiffs. Dkt No. 50. The Secretary represented to the Court that there was no need for such an expedited schedule because SB 4 would not be applied to any elections for many months, so the effective date of January 1 was “largely meaningless,” and that a hearing on the motion for a temporary injunction “in mid-to late January” would be more than sufficient, while permitting the parties to “enjoy the holiday season.” *Id.* at 2, 4. The parties accordingly agreed to a schedule

that aligned with that timetable and the Court subsequently scheduled a hearing for both motions on January 27, 2026.

7. The Court has now carefully reviewed the parties’ briefing on the motion for a temporary injunction; the evidence submitted in connection with that motion; and the arguments made by the parties at that hearing, and renders its decision on that basis.²

B. Advance voting has a long history in Kansas and thousands of voters regularly rely on it to participate in the State’s elections.

8. In 2024, Secretary Schwab wrote to the U.S. Postmaster General that he was “extremely concerned” that issues with USPS performance were “disenfranchis[ing]” Kansas voters. Ex. 9 at 1–2. He stressed that this had not been historically true: “Kansas has had mail voting in some form since the Civil War,” he wrote, but there has “never . . . [been] a lack of confidence in the delivery” of ballots, until “the 21st Century.” *Id.*

9. This new danger—and the undisputed evidence that voters who accept Kansas’s invitation to use and return advance ballots by mail to exercise their right to vote are increasingly at risk of having those ballots rejected due to unpredictable and extended mail delays—is at the heart of this lawsuit.

² At the hearing, the Court inquired if there were a specific date by which it must reach a decision on this motion before the forthcoming August primary election to avoid causing any undue interference with election administration, and the Secretary indicated that the time had not yet passed and he would inform the Court if he became aware of a relevant deadline. See Jan. 27, 2026 Hr’g Tr. at 100–03. The Secretary has not since identified any such deadline.

10. This issue arises, as the Secretary’s letter to the Postmaster General emphasized, in a state that has an unusually long history of recognizing the important role that absentee voting (now largely known in Kansas as “advance” voting) plays in ensuring that its citizens are able to vote that goes back to the Civil War.

11. During the Civil War, Kansas permitted soldiers to vote in the field and have their votes transmitted back for tallying. See *Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War* 115–17 (1915). After that, “[t]he first absentee voter[] act appears in [Kansas law in] 1868.” *Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177, 184 (1936). The 1868 law retained the Civil War Era practice and allowed “qualified electors absent from their township and ward, employed in the militia or volunteer service of the state or United States” to vote absentee. *Id.*; see also *supra Benton*, at 112–17; G.S. 1868, ch. 36, art. 4, §§ 45–56.

12. As society changed and voters became more mobile, Kansas adapted to ensure that its citizens could access the franchise. In 1901, it extended the right to vote absentee to railroad workers who were “unavoidably absent” from their polling place on election day. See *Lemons*, 63 P.2d at 184–85.

13. Throughout the early to middle part of the 1900s, Kansas extended the right in various ways, before passing a law in 1967 allowing any voter who would be absent from the county while the polls were open to vote absentee. See *Lemons*, 63 P.2d at 184–85 (discussing various absentee voting legislation, and noting that for each statute, “machinery [was] provided for the delivery of ballots and the ultimate

return thereof”); *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 835, 549 P.3d 363, 399 (2024) (hereinafter *LWV II*) (Biles, J., concurring in part and dissenting in part).

14. In 1984, Kansas recognized that access to mail voting is critical to ensure that voters with permanent physical disabilities or illnesses are able to vote and passed a law creating a permanent absentee voter list for such voters. *See* K.S.A. 25-1122(e)–(f) (1984) (now codified at K.S.A. 25-1122(h)–(i)). For permanent absentee voters, county election officers were required to mail the ballots “within five days of the receipt of the printed absentee ballots by the county election officer.” K.S.A. 25-1123 (1984). Permanent absentee ballots have now been an option for Kansans for over four decades, and Plaintiff Robert Mikesic is an example of a voter who is on that permanent absentee (now, “advance”) voter list. *See* Mikesic Decl. ¶¶ 5, 10.

15. Finally, in 1995, Kansas recognized that access to mail voting is key to ensuring that all of its citizens are able to exercise their right to vote and passed a law to that effect. *See* K.S.A. 25-1119 (1995). Starting at that time, “advance” ballots would be sent to voters “not more than 20 days before the election but within two business days of the receipt of such voter’s application by the election officer or the commencement of such 20-day period.” K.S.A. 25-1123 (1995). Thus, for three decades now, all Kansas voters have had the right to vote by advance ballot (though unless a voter is on the permanent advance voting list, they must submit an application to do so, each election). *Id.*; K.S.A. 25-1122 (setting forth advance ballot

application process). *See also* Kan. Const. art. 5, § 1 (guaranteeing that citizens “otherwise qualified to vote in Kansas for . . . the offices of president and vice-president. . . may vote for such officers either in person or by absentee ballot”).

16. Advance voting—and particularly advance voting by mail—is a powerful tool that can facilitate broader voter engagement, not only among voters who may otherwise struggle to vote due to disabilities or geography, but also by increasing turnout among underrepresented and underserved populations. *See* Reeve Decl. ¶ 6; Hammet Decl. ¶ 5; Nichols Decl. ¶ 7.

17. And, indeed, hundreds of thousands of Kansas voters have used advance ballots to vote in recent years. *See* Ex. 1 (“Herron Decl.”) at 15–16 (approximately 465,000 advance ballots were cast by Kansans by mail in the 2020 general election and approximately 147,000 in the 2024 general election); Ex. 9 at 1 (Secretary in letter to U.S. Postmaster General noting that, in the 2024 primary, “[o]ver 18 percent” of Kansas voters “exercise[d] their constitutional right to cast a ballot” by mail); Ex. 10 at 1 (Douglas County Clerk Shew emphasizing that “more voters are utilizing mail advance ballots”).

18. There are many different voters who rely on advance mail voting. This includes disabled or ill voters. *See, e.g.*, Ex. 22 (testimony from DRC before Legislature describing importance of voting by mail for people with disabilities); Nichols Decl. ¶ 7 (similar); Mikesic Decl. ¶ 9 (similar). This includes voters temporarily outside of the jurisdiction, such as college students. *See, e.g.*, Ex. 14 (testimony from the Secretary’s office about college students voting by mail); Ex. 8

(“Simons Decl.”) ¶¶ 4–5 (describing difficulty voting by mail as an out-of-state college student due to mail delays). This includes many of Kansas’s rural voters. *See, e.g.*, Herron Decl. ¶ 57 (showing rural voters are twice as likely to have mail ballots arrive during grace period than voters in urban counties); Ex. 21 (Hammet legislative testimony that voters in rural counties are twice as likely to have their ballots arrive in the grace period). It includes elderly voters, who may not have a permanent disability or illness, but who have mobility issues or other health problems that make voting in person difficult. *See, e.g.*, Nary Decl. ¶ 8; Hodgesmith Decl. ¶ 8. It also includes Kansans busy with caretaking responsibilities or inflexible jobs, who might only be able to vote because of the ability to do so by mail. *See* Herron Decl. ¶¶ 24–25 (describing how mail voting lessens the “cost of voting”).

19. For the same reason that many voters need or choose to vote by an advance ballot to begin with, many return them by mail. For some (*e.g.*, those temporarily outside of the jurisdiction or with disabilities, illnesses, or lack of easy access to transportation or other means of exercising their right to vote), returning their ballots by mail is the least burdensome option—but it may also be the only practical option. Nary Decl. ¶ 8; Hodgesmith Decl. ¶ 8; Mikesic Decl. ¶ 9; Simons Decl. ¶¶ 4–5. And, indeed, since it started absentee or advance voting more than 150 years ago, Kansas has consistently allowed for submission of those ballots by mail (or something similar to it). *See* Ex. 9 (the Secretary noting that “Kansas has had mail voting in some form since the Civil War”); *see also* Jan. 27, 2026 Hr’g Tr. at 5 (counsel for the Secretary noting that Kansas has been “very solicitous” of

voting by mail and has had voting by mail in some form since the Civil War).

20. Thus, Kansas voters who submit their lawful advance ballots by mail, who do their part and vote and timely return it, should be able to trust that their ballot will be counted. *See Jones v. United States Postal Serv.*, 488 F. Supp. 3d 103, 110 (S.D.N.Y. 2020), *order clarified*, No. 20 CIV. 6516 (VM), 2020 WL 6554904 (S.D.N.Y. Sept. 29, 2020) (“One of the evident ways by which our society fosters and guarantees voting rights is by absentee balloting, accommodating the exceptional needs of citizens unable to vote in person for various legitimate reasons -- illness, travel, education or employment out of the jurisdiction, or military or diplomatic service. . . . [A]ll voters, regardless of whether they submit their ballots in person or by mail, have a right to have their votes counted and their voices heard.”).

C. In the 2010s, mail delivery in Kansas began to deteriorate, and the Legislature acted to protect the right to vote and save voters from disenfranchisement.

21. In approximately 2011–12, USPS began implementing several significant changes to its services and processes in Kansas, and mail delivery services in the state started to deteriorate as a result. Ex. 10 at 1 (Testimony on SB 8 by Jamie Shew, Douglas County Clerk).

22. For example, USPS significantly reduced mail processing centers in Kansas and began routing all mail to five processing centers—only two of which were actually located in Kansas (in Wichita and Hutchinson). *Id.* The three others were located in Texas, Nebraska, and Missouri. *Id.*

23. The largest impact of these changes was slower delivery, such that

USPS no longer guaranteed one-to-two-day delivery for local first-class mail, but projected a two-to-five-day window for delivery of such mail. *Id.*; Ex. 12 at 1 (then-Secretary Kobach’s office similarly noting that these changes resulted in “an increase in the amount of time needed to transmit mail” in Kansas).

24. At the same time, USPS limited weekend processing, a result of which was that mail sent on Friday and Saturday might not actually begin processing until Monday, and election officials found that meant a decrease in delivered mail on Tuesdays. Ex. 10 at 1.

25. Election Days are on Tuesdays. And, as USPS implemented these changes, election offices in Kansas experienced an increase in ballots failing to arrive by Election Day, with many instead arriving on the Wednesday or Thursday after. *Id.*

26. At the time that all of this was happening, Kansas required advance mail ballots to arrive at county election offices by Election Day in order to be counted. *See* K.S.A. 25-1132 (1995).

27. This sparked a crisis—ballots that were being mailed by qualified voters, and when “it [was] clear the ballot was sent days before the election,” were being rejected because of postal delays beyond voters’ control. Ex. 10 at 1.

28. This crisis came to a head in the 2016 general election, when 1,449 advance ballots that were cast and postmarked before Election Day were rejected because they arrived afterward. Ex. 11.

29. Then-Secretary of State Kobach and nearly every member of the

Legislature appeared to agree that this was unacceptable and broadly supported legislation that would replace the strict Election Day-receipt deadline with a three-day grace period, to allow for the counting of ballots received after Election Day if they were postmarked on or before and received within three days of the election. *See* 2017 HB 2158 (effective July 1, 2017); *see also* Ex. 12 (Secretary Kobach stating he was “a proponent of this bill”).

30. That legislation (2017 HB 2158) was enacted nearly unanimously by the Legislature with a vote of 123–1. Ex. 12; Ex. 26. As a result, going forward, “the deadline for the receipt by mail of the advance voting ballots by the office of the county election officer” was “the last delivery of mail by the United States postal service on the third day following the date of the election.” K.S.A. 25-1132(b) (2017).

31. As reflected by the testimony submitted by election officials at the time, the grace period was enacted to ensure that voters were not disenfranchised by mail delays beyond their control—and the change was carefully crafted based on the evidence that maintaining the prior strict Election Day rule, which was “written during [a] different era of postal delivery,” would have that effect. Ex. 10 at 1.

32. The choice to extend the deadline by three days did not come out of thin air. The testimony to the Legislature, including from election officials, was that while Kansans could no longer presume that local First-Class mail would be delivered in a one-to-two day time frame—by 2017 that time had lengthened significantly to two-to-five days. And specific changes by USPS limiting weekend mail processing affected the number of ballots that were arriving by Election Day,

and many mail-in ballots were arriving the Wednesday and Thursday after Election Day. *See* Ex. 10 at 1.

33. In addition, in 2023, the Secretary’s office testified at the Legislature that the three-day grace period was responsive to the fact that Kansas election offices are not permitted to mail advance mail ballots to voters until 20 days before the election. Ex. 13 at 1 (Jan. 26, 2023 Testimony by Clay Barker, Deputy Ass’t Sec’y of State, Gen. Counsel on 2023 HB 2056) (“Considering this short timeframe, the legislature authorized advance by mail ballots postmarked by Election Day and received within three days following the election to be counted.”).

34. The three-day grace period acted as it was designed and allowed many thousands of ballots to be counted that otherwise would have been rejected. In the 2020 elections—the first presidential general election when the grace period was operative, which was held during the COVID-19 pandemic—more than 32,000 ballots arrived at county election offices within three days after Election Day and were counted as a result. Ex. 11. Approximately 1,000 ballots arrived during the grace period during the 2022 midterm general election, and another 2,110 ballots in the 2024 general election. Ex. 13; Ex. 14. Had the grace period not been in place during those elections, none of those ballots would have counted.

D. The undisputed evidence establishes that postal delays have not improved since 2017—they have gotten worse.

35. According to 2025 legislative testimony by the Secretary’s office, “[p]ostal service delivery has gotten even slower since 2017[.]” Ex. 14 at 2 (neutral testimony on SB 4).

36. A 2024 USPS audit found that the Kansas-Missouri district's on-time mail delivery rate had deteriorated to among the three or four worst in the nation (out of fifty districts). Ex. 15 at 3.

37. Thus, the USPS mail delay is even worse than in 2017, when the increasing mail delays caused the Legislature and Kansas election officials in 2017 to broadly agree that a three-day grace period was necessary to save voters from disenfranchisement. *See* Mem. at 3 n.2 (citing USPS Service Performance publication showing USPS delivered *only 51%* of first-class mail within a three-to-five-day service standard in second quarter of 2025).

38. Data from Douglas County for the August 6, 2024, primary shows how this is impacting Kansas elections. In that election, more than 12% of ballots in that county took ten days or longer to travel through the mail in one direction, and more than 5% took fifteen days or longer to travel in a single direction. Herron Decl. at 72, tbl. 20. In the end, Douglas County had to reject over 200 ballots because they were received after the grace period (*i.e.*, they were received on August 10 or later), even though they had been postmarked *in July*. Ex. 16.

39. Shortly thereafter, Secretary Schwab wrote to the U.S. Postmaster General stating that he was “extremely concerned” about USPS’s processing of ballots. Ex. 9. The Secretary reported that many ballots are “failing to reach the county election office on time, *even when voters have mailed them timely.*” *Id.* (emphasis added). He wrote that “[m]ultiple county election officials have notified my office that ballots were received from the local post office days, if not weeks,

after they were placed in the custody of the USPS under the assumption that they would be received and counted by county election officials.” *Id.* He was unequivocal: “it is unacceptable that voters, who follow the rules for requesting, voting, and returning their mail ballot, are disenfranchised” when USPS fails to deliver their ballots in a timely manner. *Id.* Finally, the Secretary emphasized that “Kansas has had mail voting in some form since the Civil War, but never has a lack of confidence in the delivery of our ballot been questioned as it has in the 21st Century.” *Id.*

40. Secretary Schwab also expressed his dissatisfaction with USPS on social media. In the runup to the 2024 general election, the Secretary opined that the “Pony Express is more efficient at this point” and he warned the public that voting by mail carries the “highest risk” of a ballot not being counted compared to other voting methods. Ex. 19; Ex. 20.

41. Other Kansas election officials have similarly stressed that this is a real and continuing problem. *See, e.g.*, Ex. 17 at 3 (Douglas County Clerk Shew has joked that “we could walk to people’s houses faster than [a ballot] gets there by mail,” and reported that his office has found that it can take an average of seven to nine days for ballots to reach voters in Douglas County).

42. The personal experience of voters also reflects this, including that of Plaintiff Robert Mikesic, who is on the permanent advance mail ballot list and yet did not receive his ballot for the November 2025 election until the day after the election, despite its having been sent (as shown by the postmark) *21 days before*, on the first day that his county was allowed to send it to him. Mikesic Decl. ¶¶ 5–6 &

Attachment A. And in 2022, Kansas voter Benjamin Simons, a college student temporarily residing out of state as he attends school in Oklahoma was unable to vote when his advance ballot arrived two weeks after election day. Simons Decl. ¶ 4.

43. The Secretary does not dispute any of this. Indeed, as counsel for the Secretary acknowledged at the hearing on this matter, “no one is here to argue that [USPS] deserves all kinds of awards in the State of Kansas for their delivery times,” and that he was “not going to, you know, deny the obvious.” Jan. 27, 2026, Hr’g Tr. at 21. Simply put, Kansas suffers from worsening and extraordinary mail delays—this is well supported by the evidence and not contested by the parties.

E. In 2025, the Legislature enacted Senate Bill 4.

44. In January 2025, the Legislature introduced a bill, SB 4, to repeal the three-day grace period and impose a strict 7:00 p.m. Election Day ballot receipt deadline. *See* 2025 Kansas Laws Ch. 8 (SB 4).

45. The Secretary’s office presented itself as “neutral” on the bill—but in comments, it offered to the House Committee on Elections it stressed several things. Ex. 14 (Testimony on SB 4, Feb. 11, 2025). First, the Secretary noted that in 2017, the three-day grace period was enacted to respond to increasingly slowing USPS delivery standards. Second, the Secretary noted that under Kansas law, election officials cannot begin sending advance ballots to voters until 20 days before the election. And third, the Secretary noted that in all the time that the grace period was in place, “[t]here has *never* been a mail ballot received in the 3-day period that was not requested and returned by a registered Kansas voter.” Ex. 14 at 1

(emphasis added).

46. The Secretary’s office also made clear that “[p]ostal service delivery has gotten even slower since 2017[,]” that Kansas’s rule that election officials shall not mail out advance ballots until 20 days before the election creates “a comparatively short time-period” in which ballots must make it to the voters and then back in time to be counted, and that “[i]f SB 4 becomes law, Kansas voters temporarily living out of state . . . (e.g., college students) may have increased difficulty in returning their advance by mail ballot by Election Day without the use of overnight delivery.” *Id.*

47. The Secretary’s office also testified that in most states mail-in ballots are sent to voters at least 30, or many 45 days, before Election Day. Ex. 14. In contrast, Kansas law prohibits mailing ballots to voters more than 20 days before the election. *Id.*; K.S.A. 25-1123(a). Under SB 4, Kansas has the most-compressed window for mail voting in the country. *See Table 7: When States Mail Out Absentee/Mail Ballots, Nat’l Conf. of State Legislatures* (Oct. 3, 2024), <https://www.ncsl.org/elections-and-campaigns/table-7-when-states-mail-out-absentee-mail-ballots> (obtained online July 14, 2026); *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots, Nat’l Conf. of State Legislatures* (Dec. 25, 2025), <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (obtained online July 14, 2026).

48. The Elections Committee of the Kansas County Clerks and Election Officers (KCCEOA), which represents all county clerks and election commissioners

in Kansas, actively opposed SB 4, submitting written testimony under the Election Day deadline for mail-in ballots, “valid voted ballots would not be counted[.]” *See* Test. of R. Piepho on SB 4 Before H. Comm. on Elections (Kan. Feb. 11, 2025), https://www.kslegislature.gov/b2025_26/committees/testimony/pdf/?apn=b2025_26/year2/house/committees/ctte_h_electns_1/testimony/published/ctte_h_electns_1_20250211_02_testimony.html (obtained online July 14, 2026).

49. The majority of the testimony before the Legislature was against SB 4, with witnesses stressing that postal delays had worsened since 2017 and that eliminating the grace period would disenfranchise significant numbers of Kansas voters, especially rural and disabled voters. *See, e.g.*, Ex. 21; Ex. 22.

50. Using data from the Secretary of State’s survey to County Election Officials, a representative of Plaintiff Loud Light testified that nearly 12% of the advance-mail ballots in Montgomery County would be discounted under SB 4. Ex. 21. In addition, over 10% of the advance-mail ballots in Nemaha County and over 10% of the advance-mail ballots in Seward Counties would be discounted under SB 4 (because the ballots arrived during the three-day grace period). *Id.* In other words, a substantial number of mail voters in those counties would have been disenfranchised under SB 4. *Id.* A representative from Plaintiff DRC testified about the significant impacts that SB 4 would likely have on Kansans with disabilities, who rely heavily on advance-mail voting. Ex. 22.

51. Despite this testimony, the Legislature enacted SB 4, repealing the grace period beginning with elections after January 1, 2026. 2025 Kan. Sess. Laws

Ch. 8; *see* K.S.A. 25-1132.

52. When SB 4 reached the Governor’s desk, she vetoed it, explaining that the grace period “was a bipartisan solution approved by the Legislature in 2017 to address [mail] delays . . . particularly in rural areas. The goal was to ensure that all Kansans had their votes counted, no matter where they lived.” Ex. 23. She described SB 4 as “an attack on rural Kansans who want to participate in the electoral process guaranteed by our Constitution,” and stated: “I will not sign legislation that deprives Kansans from having their vote counted.” *Id.*

53. The next day, the Legislature overrode the veto. Ex. 27. As a result, elections officials are now required to reject ballots cast by eligible voters and mailed by Election Day, unless the ballots are delivered by 7:00 p.m. on Election Day.

F. SB 4 imposes a substantial and highly variable risk of disenfranchisement.

54. In support of their motion for a temporary injunction, Plaintiffs submitted evidence that establishes that SB 4 imposes a substantial and highly variable risk of disenfranchisement. This includes public statements from the Secretary and County Clerk Shew, among others; evidence from an expert analyzing data provided by the Secretary’s office and other public sources; testimony before the Legislature when it considered SB 4; and declarations from the three Organizational Plaintiffs, three Voter Plaintiffs, and a college student affected by mail delays.

55. The Secretary provided no evidence relevant to this motion or these issues. Plaintiff's evidence is sufficiently credible and is un rebutted. As a result, the undisputed record establishes the following.

56. If SB 4 were in place for the past three major general elections, tens of thousands of lawful voters would have had their ballots disregarded and not counted. See Ex. 11; Ex. 13; Ex. 14. But the grace period did what it was designed to do, saving thousands of ballots from rejection that were postmarked before Election Day, but arrived sometime in the three days thereafter. Without the grace period, all of these voters would have been disenfranchised.

57. Moreover, when the Legislature was considering SB 4, the undisputable evidence was that mail delivery was getting worse, and that, if anything, the three-day grace period was no longer sufficient to save ballots from rejection.

58. Over 200 Douglas County ballots for the August 6, 2024, primary had to be thrown out because—despite being postmarked in July—they arrived after the three-day grace period. Ex. 16. This means, at a minimum, those ballots took over nine days to travel one way, ultimately arriving on August 10 or later. *See id.*

59. Plaintiff Robert Mikesic, a resident of Douglas County, has voted consistently in Kansas since 1984. He is also paralyzed from the mid-back down, uses a wheelchair, and cannot easily vote in person. Mikesic Decl. ¶¶ 3, 10. As a result, he is on the permanent advance voting list. *Id.* ¶ 5.

60. As noted above, in the November 2025 municipal elections, Douglas

County sent Mr. Mikesic his ballot on the first day that it was statutorily permitted to do so—October 15, a full 20 days before Election Day. *Id.* ¶ 6. This is evidenced by the postmark on the ballot. *Id.* (Attachment A to Mikesic Decl.). But that ballot was not delivered to Mr. Mikesic until the day *after* election day. *Id.* In other words, it took 21 days to arrive at his home.

61. These examples illustrate, as the Secretary complained to the Postmaster General, that voters who follow the rules for advance mail voting under Kansas law are nonetheless being disenfranchised by postal delays that are—clearly—entirely out of their control. *See* Ex. 9.

62. The evidence is also undisputed that a voter’s personal risk of disenfranchisement under SB 4 differs greatly based on where the voter happens to live. Dr. Michael Herron—an expert on voting data—analyzed 2024 general election data from the Secretary’s office and found “substantial variance across Kansas counties” in the rate at which ballots sent by mail arrived during the grace period. Herron Decl. ¶ 49. The Court rejects the Secretary’s attempt to discredit this un rebutted testimony. *See* Opp. at 11–13 (Dkt. No. 77).

63. For instance, in three Kansas (Seward, Nemaha, and Graham), over ten percent of mail ballots arrived during the grace period for the 2024 general election and thus would have been rejected under SB 4. Herron Decl. ¶ 50. Another seven counties (Lane, Chase, Edwards, Wallace, Pottawatomie, Dickinson, and Meade) had over five percent of mail ballots arrive during the grace period. *Id.* at 22, tbl. 4. By contrast, the statewide average rate of ballots arriving in the grace

period was 1.4%, and several counties had no ballots during the grace period. *Id.* ¶¶ 37, 51.

64. These disparities are not randomly distributed. The data shows that “the more rural a county, the greater the grace period rate in the 2024 general elections,” with Kansas’s most rural counties seeing more than double the rate of ballots arrive during the grace period compared to the most urban counties. *Id.* ¶ 57.

65. The Legislature was informed that SB 4 would disproportionately burden rural Kansans. *See* Ex. 21 (testimony from Davis Hammet of Loud Light stating, “According to the Secretary of State’s survey to County Election Officials, voters in rural counties benefitted the most from the 3-day mail processing period, with rural votes being twice as likely to be counted because of the 3-day grace period than non-rural votes.”).

66. Similarly, Kansans who temporarily reside outside their county of registration—such as college students—are also more likely to be disenfranchised by SB 4, both because they must rely on mail voting and are more likely to experience mail delays given their distance from county election offices. *See* Ex. 14.

67. Dr. Herron’s analysis shows that many voters registered in Sedgwick County temporarily reside elsewhere, and that in the 2024 general election, 1,575 Sedgwick County voters requested advance ballots to addresses more than 100 miles away from the County election office, and 316 requested ballots to addresses more than 1,000 miles away. Herron Decl. ¶ 76.

68. These voters face greater risks of being disenfranchised under SB 4 because, as Dr. Herron’s analysis shows, “the greater the distance an advance ballot had to travel in the 2024 general election, the more likely it was to arrive after election day[.]” *Id.* ¶ 98.

69. In testimony submitted to the Legislature, the Secretary’s office recognized that this risk could be particularly severe for voters located out of state, including specifically college students, recognizing that “[i]f SB 4 becomes law . . . [they] may have increased difficulty in returning their advance by mail ballot by Election Day without the use of overnight delivery.” Ex. 14.

70. For the last several years, out-of-state voters have been experiencing mail delays that could make voting by advance ballot impossible. This is illustrated by the experience of Benjamin Simons, a college student at Oklahoma State University who was unable to vote in 2022 after his advance ballot arrived two weeks after election day. Simons Decl. ¶ 4. As a result, Mr. Simons was compelled to take extraordinary steps in 2024 to ensure that he would not be disenfranchised again, with his mother physically driving his ballot to and from Oklahoma to ensure that it would be counted. *Id.* ¶ 5. This is obviously not a realistic option for most voters who are temporarily out of state.

71. But it is not just out-of-state voters who are at risk with the Election Day deadline in SB 4, nor can voters simply adjust their behavior. Again, even if a voter is on the permanent advance voting list, their county election official is not allowed to send them their ballot until 20 days before the election. Immediately, the

clock starts ticking, such that even modest delays can be the difference between getting a ballot back in time to be counted, or disenfranchisement. And that is in the best-case scenario, where a voter has already requested (or will automatically be sent) a ballot 20 days before an election. Many voters do not know they will need an advance ballot, or do not know how to ask for one, until the election is much closer. Very quickly, the evidence shows, with the elimination of the grace period, it is ever more likely that advance mail voters will have their ballots discounted under SB 4.

72. Finally, voters whose personal circumstances are such that they are more likely to have to depend on advance mail voting to vote, including disabled voters, are more likely to be disenfranchised by SB 4. *See* Ex. 22 (testimony from Mike Burgess of DRC stating “[M]any Kansans with disabilities utilize advance voting by mail. They would definitely be amongst the Kansans who could be negatively impacted by the change in this bill.”). This includes the Voter Plaintiffs here, *see* Nary Decl. ¶¶ 8–9; Hodgesmith Decl. ¶¶ 7–11; Mikesic Decl. ¶¶ 9–10, and it includes the constituents and voters that the Organizational Plaintiffs serve, Reeve Decl. ¶¶ 3, 6; Hammet Decl. ¶¶ 3–5; Nichols Decl. ¶¶ 3–4, 7.

73. The likelihood of significant voter disenfranchisement is supported by the data from Johnson County elections held on March 3, 2026. On that Election Day, three jurisdictions within Johnson County held special elections on local ballot issues conducted by mail voting. Approximately 30,000 ballots were cast across these elections, of which 1,008 were rejected for arriving after Election Day. Thus, approximately 1-in-30 ballots were discounted.

III. Conclusions of Law

The “purpose of a temporary or preliminary injunction is not to determine any controverted right, but to prevent injury to a claimed right *pending a final determination of the controversy on its merits.*” *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843, 853 (2007) (emphasis in original). Under K.S.A. 60-901 and K.S.A. 60-905, the Court may issue a temporary injunction after notice and a hearing.

To obtain temporary injunctive relief, the movant must show: (1) A substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; and (5) the impact of issuing the injunction will not be adverse to the public interest. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461 (2019) (*Hodes I*) (citing *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012)). To obtain injunctive relief, Plaintiffs must meet each these factors. *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491, 173 P.3d 642 (2007) (citing *Steffes*, 284 Kan. at 395).

Plaintiffs have alleged that SB 4 violates the Kansas Constitution’s guarantees of equal protection, due process, and the right to vote. *See generally* Am. Pet. For the reasons stated below, Plaintiffs have made a successful showing on all five prongs of the test for a temporary injunction.

A. There is a substantial likelihood that Plaintiffs will have success on the merits for at least one of their claims.

Plaintiffs have alleged that 2025 SB 4 violates the Kansas Constitution's guarantees of equal protection, due process, and the right to vote. *See generally* Am. Pet. If Plaintiffs show that they are substantially likely to prevail on the merits of any one of their claims and meet the other temporary injunction factors (which the Court discusses below), then they are entitled to a temporary injunction.

The Court concludes that Plaintiffs are substantially likely to prevail on each of their claims. In addition, the Court rejects the Secretary's other arguments on Plaintiffs' likelihood of success.

As an initial matter, in his opposition to Plaintiffs' motion for a temporary injunction, the Secretary briefly cross-references his motion to dismiss to suggest Plaintiffs lack standing, *see* Opp. at 2, and also makes a solitary and unsupported suggestion that the federal election-day statutes justify SB 4, *see id.* at 20. The Court affirmatively finds that Plaintiffs have standing to bring their claims. In addition, the U.S. Supreme Court recently rejected the Secretary's argument that federal election-day statutes preempt state statutes that allow a grace period for mail-in ballots. *See Watson v. Republican Nat'l Comm.*, No. 24-1260, 2026 WL 1855462, at *5 (U.S. June 29, 2026).

1. Plaintiffs are likely to prove that SB 4 violates the Kansas Constitution's guarantee of equal protection because whether a ballot will count depends on arbitrary factors such as mail delays and where a voter lives.

The Court finds that Plaintiffs are likely to succeed on their claim that SB 4

violates the Kansas Constitution’s guarantee of equal protection. *See* Kan. Const. Bill of Rights §§ 1–2. The Court evaluates these claims under the standard articulated by the Kansas Supreme Court in *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) (*LWV II*). This is the most recent case involving an equal-protection challenge to a ballot-counting procedure, and it involved similar state constitutional claims. In *LWV II*, the Supreme Court considered a district court’s decision to dismiss a challenge brought against a different Kansas election law involving the counting of advance mail ballots under the same constitutional provisions. 318 Kan. at 780–84.

In *LWV II*, the Supreme Court held that for an election law to comply with the equal protection guarantees of the Kansas Constitution, it “must be capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment.” *Id.* at 805 (emphasis added); *see also id.* at 806 (noting “equal protection requires ‘uniform treatment of persons standing in the same relation to the governmental action questioned or challenged’”) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). This test is results based: under “the proper legal standard,” the question is whether a voting law “achieve[s] reasonable uniformity on objective standards.” *Id.* (emphasis added); *see also id.* at 834 (Biles, J., concurring in part and dissenting in part) (explaining that those principles require that “the likelihood of having a ballot discarded . . . must be the same in Wyandotte County as in Gove County”).

The evidence for the motion for a temporary injunction supports a finding

that Plaintiffs are likely to succeed on this claim. Among other things, it shows that similarly situated voters (including those who mail their ballot back to election officials on the same day) will be subject to arbitrary and disparate treatment—some will have their ballots rejected when they arrive after 7:00 p.m. on Election Day due to unanticipated or extended mail delays, or simply where they happen to live. *See, e.g.*, Herron Decl. ¶¶ 47, 49, 57, 109, 117 (showing voters in rural areas and voters whose ballots must travel further from election offices will be disproportionately disenfranchised under SB 4); Ex. 14 (testimony from the Secretary’s office noting that voters temporarily out of state such as college students would be disproportionately affected by SB 4); Ex. 21 (legislative testimony that voters in rural counties are twice as likely to have their ballots arrive in the grace period).

The evidence further supports the conclusion that Plaintiffs are likely to show that, in enforcing SB 4, Kansas election officials will not reliably and uniformly count votes of lawful Kansas voters and that, at a minimum, thousands of voters will likely have their ballots rejected as a result—despite having timely voted and mailed those ballots (potentially weeks before Election Day). *See, e.g.*, Ex. 11; Ex. 13; Ex. 14 (describing how thousands of ballots arrived during grace period in 2020, 2022, and 2024 elections and would have been rejected if not for the grace period); Herron Decl. at 72, tbl. 20 (indicating that more than 12% of Douglas County ballots in the 2024 primary took ten or more days to travel to election officials); Ex. 16 (noting that even with the grace period in place, in Douglas County

more than 200 ballots had to be rejected because they arrived more than three days after the August 6, 2024, primary, *even though they had been postmarked in July*).

It is undisputed that hundreds of thousands of Kansas voters have relied on USPS to deliver their ballots. Herron Decl. at 15, tbl. 1; *id.* ¶ 39. It is also undisputed that, over the past decade, USPS delivery has become slower, less reliable, and more erratic. Ex. 9 (letter from the Secretary to USPS decrying worsening mail delays and how they are disenfranchising Kansas voters); Ex. 14 (testimony from the Secretary’s office pointing out that mail delays in Kansas had worsened since 2017); Ex. 18 (letter from Kansas and Missouri congressional delegation criticizing worsening mail delays). In fact, in the second quarter of 2025, USPS delivered only 51% of first-class, three-to-five-day service standard mail in the district on time. *See* Mem. at 3 n.2; *see also* Ex. 29 at 3–5 (USPS audit in 2023 confirming “significant delays” at the regional Kansas City Processing and Distribution Center); Ex. 15 at 3 (2024 audit ranking the Kansas-Missouri USPS district among the third or fourth worst-performing mail districts in the country (out of 50 districts)).

In 2017, a far less dire situation led the Legislature to conclude that a three-day grace period was necessary to ensure that thousands of voters would not have their ballots arbitrarily rejected without recourse. Ex. 10 (in testimony before Legislature when it was considering the grace period in 2017, noting “[t]he U.S. Postal Service no longer guarantees 1-2 day delivery for local mail, but now has a 2-5 day window for delivery of First Class local mail”). After that grace period was

enacted, it saved tens of thousands of voters' ballots from being rejected—and those voters from being disenfranchised—due to mail delays. *See* Ex. 11; Ex. 13; Ex. 14.

Even so, as mail delivery continued to worsen in the ensuing years, the grace period was not always sufficient to save voters' timely-mailed ballots from rejection. Ex. 11 (566 ballots arrived after the grace period in the 2018 general election, and 400 in the 2020 general election, and were not counted as a result); Ex. 14 (603 ballots arrived after the grace period in the 2024 general election, and were not counted as a result); Ex. 16 (more than 200 Douglas County ballots arrived after the grace period in the August 6, 2024, primary, and were not counted as a result—even though the ballots had been postmarked in July). These issues were of increasing concern to Kansas election officials, including the Secretary, as evidenced by his repeated public statements.

For instance, after the August 2024 primary, the Secretary wrote to the U.S. Postmaster General emphasizing that he was “extremely concerned” about USPS’s processing of ballots and how it was disenfranchising Kansas voters. Ex. 9. In that letter, the Secretary reported that many ballots are “failing to reach the county election office on time, *even when voters have mailed them timely.*” *Id.* (emphasis added). He wrote that “[m]ultiple county election officials have notified my office that ballots were received from the local post office days, if not weeks, after they were placed in the custody of the USPS under the assumption that they would be received and counted by county election officials.” *Id.* He was clear: “it is unacceptable that voters, who follow the rules for requesting, voting, and returning

their mail ballot, are disenfranchised” when USPS fails to deliver those ballots in a timely manner. *Id.* Finally, the Secretary emphasized that “Kansas has had mail voting in some form since the Civil War, but never has a lack of confidence in the delivery of our ballot been questioned as it has in the 21st Century.” *Id.*

The Secretary also criticized the USPS on social media, claiming that the “Pony Express is more efficient at this point[,]” Ex. 19, and he publicly warned voters that USPS delays meant that voting by mail came with the “highest risk” that the ballot would not be counted, Ex. 20.

Rather than addressing this worsening problem to save voters’ ballots from being rejected due to arbitrary circumstances often out of their control, the Legislature chose to repeal the grace period with 2025 SB 4. Ex. 27.

In the 2025 legislative proceedings, the Legislature was repeatedly warned—including by the Secretary’s office—that repealing the grace period would have negative consequences for voters, including by the Secretary’s office. In testimony before the Legislature, the Secretary’s office explained that (1) USPS “delivery has gotten ever slower since 2017 [when the grace period was enacted],” (2) Kansas’s “comparatively short time period in which ballots are mailed out and returned” makes returning ballots by election day more difficult for Kansas voters as compared to voters in other states, and (3) “Kansas voters temporarily living out of state who do not qualify for federal voting status (e.g., college students) may have increased difficulty in returning their advance by mail ballot by Election Day without the use of overnight delivery.” Ex. 14.

In addition, as the Secretary's office indicated in its testimony to the Legislature, the risk of disenfranchisement is particularly high for Kansas voters because of its extremely narrow window for mail voting. Kansas law does not permit election officials to mail advance ballots to voters until 20 days before an election. And under SB 4, Kansas now has the shortest turn-around period for mail voting in the country. *See* K.S.A. 25-1123(a). During that 20-day window, a ballot must go through the mail twice: first from the election office to a voter, and then back. In fact, the total time period for many Kansas voters will actually be shorter because Kansas voters may request advance mail ballots until seven days before most elections. *See* K.S.A. 25-1122(f). In many cases, that mail will leave the state even if it is mailed from a Kansas address to another Kansas address. Ex. 10.

Kansas election officials—including the Secretary—recommend allowing at least seven days for each leg of that journey, Ex. 20, creating a tight window for voters to receive and cast their ballot, which narrows harrowingly with any delay at any point in the process. *See* Jan. 27, 2026, Hr'g Tr. at 60–68 (describing narrow window using demonstrative exhibit entered into evidence). And for voters who request their ballot after the 20-day window has begun, it can be impossible for them to ensure that it will be received on time, even if they return it to election officials as soon as they receive it. *See* Herron Decl. at 72, tbl. 20.

To that point, the undisputed evidence showed that in the 2024 general election, 25% of advance Douglas County mail ballots spent seven days or more of total transit time in the mail, while 1.5% spent more than ten days in mail transit.

Id. at 67, tbl. 17. In the 2024 primary election, the effects were even more pronounced—more than 12% of ballots spent ten or more days in the mail going from the voter to the county election office. In other words, these ballots spent half or more of the 20-day maximum window to vote traveling the mail *in a single direction*. *Id.* at 72, tbl. 20. More than 5% of the 2024 primary mail ballots spent 15 days or longer traversing the mail in a single direction. *Id.*

If it can take 10 or 15 days for a ballot to travel one way between a county election office and a voter, then logically there is a substantial risk that a 20-day timeframe for the ballot to travel in both directions (in addition to whatever time the voter takes to consider and fill out their ballot) will be insufficient. This too is borne out by the evidence from the 2024 primary in Douglas County. That election took place on August 6, 2024, and it was held while the grace period was still operative. This means that a ballot postmarked on or before Election Day would be counted so long as it arrived by August 9. But in fact, more than 200 ballots that had been postmarked in July were rejected because they arrived on August 10 or later. Ex. 16. In other words, these 200 voters placed their ballots in the mail at least nine days before the deadline; but their votes did not count because their ballots were stuck in the mail for at least 10 days.

In light of these failures in the timely delivery of mail ballots, it is not surprising that Douglas County Clerk Shew has remarked, tongue-in-cheek, that “we could walk to people’s houses faster than [a ballot] gets there by mail.” Ex. 17 (adding that it took an average of 7–9 days for ballots to reach voters in Douglas

County).

These mail delays and their disenfranchising effects are also consistent with other evidence in the record about voters' experiences. For example, one of the Voter Plaintiffs' mail ballots for the 2025 municipal elections was mailed to him by his county on the first possible day that it could be mailed (*i.e.*, 20 days before the election). But it took 21 days for the ballot to reach him, arriving at his home the day after Election Day. Mikesic Decl. ¶ 6, Attachment A. And another voter was unable to vote in 2022 because his advance ballot (which he requested before Election Day to be sent to his Oklahoma college address), did not arrive until about two weeks after Election Day. Simons Decl. ¶ 4.

Finally, recent elections in Kansas show that many timely voted mail ballots will arrive after Election Day. During the 2020 general election—in which high numbers of voters cast their ballots by mail due to the pandemic—more than 32,000 advance ballots arrived after Election Day, but within the then-existing three-day grace period. Ex. 11. The same was true for roughly 1,000 ballots in the 2022 general election and for more than 2,100 ballots in the 2024 general election. Ex. 13; Ex. 14.

Recent elections in Johnson County—held after SB 4 went into effect—led to a similar result. On March 3, 2026, three jurisdictions within Johnson County held special elections on local ballot issues conducted by mail voting. Approximately 30,000 ballots were cast across these elections—1,008 of these ballots were rejected for arriving after Election Day.

None of this evidence is disputed by the Secretary (except the post-briefing Johnson County data³), nor has he offered any countervailing evidence.

In light of this factual record, the Court concludes that Plaintiffs have shown that SB 4's new strict Election Day deadline will make it entirely arbitrary whether a given mail-in ballot will be counted. For example, the evidence shows that, even if a voter mails their ballot ten days before Election Day (which a reasonable person would expect to be more than sufficient to ensure a timely delivery), it is unclear if the ballot will actually arrive before the deadline.

Nor is there any way that a voter can know in advance how long his or her ballot will take to transit the mail. For example, while more than 60% of the Douglas County ballots in the 2024 primary took four or fewer days to travel from a voter to election officials, more than 12% took ten or more days to make the same journey. Herron Decl. at 72, tbl. 20; *see also id.* ¶ 151 (Dr. Herron explaining that a Kansas voter cannot know in advance whether their ballot will be in the group that takes a relatively long or short time to transit the mail).

In other words, some voters who mail their ballot well before the election will not have their ballot counted solely because of poor USPS performance, even though thousands of other voters who mail their ballots on the same day (or even later) will have their votes counted. Again, this situation played out exactly as expected by

³ The Court includes this recent evidence from Johnson County over the Secretary's objection because of the importance of having up-to-date information for any injunction request, because it would be easy for the Secretary to dispute if the information was erroneous, and because of the lower evidentiary standards that apply in this context. But this is just one small piece of Plaintiffs' evidence. It corroborates the request for a temporary injunction; but it is not dispositive of the request.

Plaintiffs in the March 2026 elections in Johnson County.

The Secretary did not dispute this either. In fact, counsel conceded that SB 4 “may have a disparate impact on certain individuals,” calling that disparate impact “unfortunate but constitutionally irrelevant.” Jan. 27, 2026, Hr’g Tr. at 10. But in *LWV II*, the Kansas Supreme Court articulated an “arbitrary and disparate” treatment standard for equal-protection claims brought against voting laws under the Kansas Constitution. 318 Kan. at 805. As a result, the arbitrary and disparate impact of SB 4 is absolutely relevant to this constitutional inquiry.

The evidence demonstrates that whether a voter’s ballot will count or be rejected will depend entirely on arbitrary postal performance that is unpredictable and outside the voter’s control. In other words, “[a] voter’s right to vote, therefore, may hinge on random chance.” *Gallagher v. New York State Bd. of Elections*, 477 F. Supp. 3d 19, 48 (S.D.N.Y. 2020) (finding an equal-protection violation based on arbitrary postal delays). That is “arbitrary and disparate treatment”—see *LWV II*, 318 Kan. at 805—and thus there is a substantial likelihood that SB 4 violates the equal-protection guarantees of the Kansas Constitution Bill of Rights.

Plaintiffs are separately likely to prove that SB 4 violates the Kansas Constitution’s equal-protection guarantees because the undisputed evidence establishes that this arbitrary treatment occurs in unfair and non-uniform ways across Kansas and will impact some groups of voters more than others. See, e.g., Herron Decl. ¶¶ 57, 109, 117; Ex. 14; Ex. 21; Ex. 22. That lack of uniformity creates an independent violation of equal-protection principles. See *LWV II*, 318 Kan. at 807

(equal protection requires that a voting law “achieve reasonable uniformity”); *see also id.* at 834 (Biles, J., concurring in part and dissenting in part) (interpreting *LWV II* majority opinion to require that “the likelihood of having a ballot discarded . . . must be the same in Wyandotte County as in Gove County”); *Bush v. Gore*, 531 U.S. 98, 107, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) (finding an equal-protection violation when different counties used different standards to determine whether to count a ballot).

For instance, the Legislature heard testimony that rural votes were more than twice as likely to be saved by the three-day grace period than non-rural votes, and that in some counties, 10% to 12% of advance mail ballots arrived during that grace period (meaning that those voters would have been disenfranchised under SB 4). Ex. 21; *see also Gallagher*, 477 F. Supp. 3d at 47 (finding equal-protection violation where mail ballots in New York City were substantially more likely to be rejected for lack of a postmark in Brooklyn compared to Manhattan or Queens).

This is supported by the analysis of Dr. Michael Herron, who found 2024 general election data shows “substantial variance across Kansas counties” in the rate at which ballots sent by mail arrived during the grace period. Herron Decl. ¶ 49. While some counties saw over ten percent of all ballots sent by mail arrive during the grace period, other counties saw no mail ballots arrive during that period. *Id.* ¶ 47.

Moreover, voters in more rural counties will be exposed to a greater risk of mail delays and thus disenfranchisement. As Dr. Herron’s analysis shows, Kansans

living in the most rural counties were more than twice as likely to have their ballot arrive during the grace period than those living in the most urban counties. *Id.* ¶ 57. That finding closely matches testimony before the Legislature that “rural votes [were] twice as likely to be counted because of the 3-day grace period than non-rural votes.” *See* Ex. 21.

The evidence also shows that Kansas voters who temporarily reside out of state are more likely to be disenfranchised by SB 4 than voters residing within Kansas. Dr. Herron’s analysis demonstrates that the farther away a voter is from their county’s election office, the more likely it is that their ballot would be discarded under SB 4—a particularly acute problem for voters such as college students temporarily residing out of the county where they are registered. Herron Decl. ¶¶ 109, 117. This is consistent with testimony to the Legislature from the Secretary’s office, which warned that “[i]f SB4 becomes law, Kansas voters temporarily living out of state who do not qualify for federal voting status (e.g., college students) may have increased difficulty in returning their advance by mail ballot by Election Day. . . .” Ex. 14.

Moreover, other discrete groups will be particularly and disparately harmed by SB 4. For instance, seniors and Kansans with disabilities often have no other feasible and safe option to vote. Ex. 22; Nary Decl. ¶¶ 8–9; Hodgesmith Decl. ¶¶ 7–12; Mikesic Decl. ¶ 9; Nichols Decl. ¶¶ 6, 9.

The lack of uniformity in ballot rejection creates an independent violation of equal-protection principles. *See LWV II*, 318 Kan. at 807 (equal protection requires

that a voting law “achieve reasonable uniformity”); *id.* at 834 (Biles, J., concurring in part and dissenting in part) (interpreting majority opinion to require that “the likelihood of having a ballot discarded . . . must be the same in Wyandotte County as in Gove County”); *see also, e.g., Bush*, 531 U.S. at 107 (finding an equal-protection violation when different counties used different standards to determine whether to count a ballot); *Gallagher*, 477 F. Supp. 3d at 47 (finding equal protection violation after noting that mail ballots in New York City were substantially more likely to be rejected in Brooklyn compared to Manhattan or Queens).

In sum, the evidence before the Court establishes a substantial likelihood that SB 4 will result in arbitrary treatment of voters because ballots will be rejected due to postal delays outside the voters’ control, and the impact of these harms will be non-uniformly spread around the state. Accordingly, SB 4 appears to fail the test announced in *LWV II*, and Plaintiffs are substantially likely to prevail on their equal-protection claim.

The Court rejects the Secretary’s arguments that voters will simply adapt their behavior and that the voters only need to exercise a “modicum of diligence” to have their votes counted under SB 4. These arguments are contrary to the facts that the Plaintiffs have presented as part of this motion.

The Court also rejects the Secretary’s claims that the disparate treatment of voters is “constitutionally irrelevant.” *See* Jan. 27, 2026, Hr’g Tr. at 10. Because Kansas has decided to allow voting by mail, the system must comply with equal-

protection guarantees. *See LWV II*, 318 Kan. at 805 (reversing and remanding to determine whether Kansas’s signature verification rules for advance ballots complied with the Kansas Constitution’s equal-protection provisions); *see also, e.g., Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 n.7 (9th Cir. 2003) (“[W]hen a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause.”); *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (finding equal-protection violation when state denied early voting to nonmilitary voters even though it was under no obligation to permit early voting at all); *Eakin v. Adams Cnty. Bd. of Elections*, 149 F.4th 291, 308 (3d Cir. 2025) (“Even if no . . . right to vote by mail exists, we still must scrutinize [a state’s] mail-in voting regime to ensure that it complies with the Constitution.”); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause . . .”).

To hold otherwise would effectively allow Kansas to “induce its citizens to vote by mail, yet proceed to discard countless ballots for any number of reasons unrelated to a voter’s qualifications or the State’s legitimate interests.” *See Eakin*, 149 F.4th at 308. In fact, the Secretary has previously emphasized that “it is unacceptable that voters, who follow the rules for requesting, voting, and returning their mail ballot, are disenfranchised” when USPS fails to deliver their ballots in a timely manner. Ex. 9. Under the holding of *LWV II*, the Court rejects any

interpretation of the Kansas Constitution that would allow such a result.

2. There is a substantial likelihood that SB 4 violates the Kansas Constitution’s guarantees of due process.

In *LWV II*, the Supreme Court held that voting laws “must . . . comply with due process.” 318 Kan. at 806; *see* Kan. Const., Bill of Rights § 18 (“All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.”). The Supreme Court held that the State of Kansas fails to provide adequate process if it rejects a ballot without providing the voter “reasonable notice” and an “opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies.” *LWV II*, 318 Kan. at 806.

There is a substantial likelihood that SB 4 fails this standard. By its plain terms, SB 4 creates an unforgiving deadline—if a ballot fails to arrive by Election Day, it will be summarily rejected, it can never be validly counted, and there is no possibility of curing this issue. K.S.A. 25-1132. In contrast, Kansas permits voters to cure other types of defects until the “final county canvass”—which can be up to 13 days after election day. *See, e.g.*, K.S.A. 25-1124(b); K.S.A. 25-3104.

Under SB 4, a voter does not have a chance to have their late-arriving ballot count, even if it was postmarked well before Election Day and the voter otherwise complied with all Kansas requirements to vote. In fact, a ballot could be cast by a voter and postmarked 19 days before Election Day and still be deemed late by election officials—this voter would have no recourse to have their ballot counted.

See K.S.A. 25-1132(b). Plaintiffs are thus entitled to a temporary injunction because there is a substantial likelihood that SB 4 violates due process by providing no redemptive process to affected voters.

In evaluating due-process claims, Kansas courts apply the test from *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *State v. Wilkinson*, 269 Kan. 603, 609, 9 P.3d 1 (2000); see also *Creecy v. Kan. Dep't of Revenue*, 310 Kan. 454, 463, 447 P.3d 959 (2019).

To determine what procedures are constitutionally required to ensure due process, Kansas courts consider (1) the nature of the individual interests at stake, (2) the risk of erroneous deprivation of those interests and the value of additional safeguards, and (3) the burden on the State of imposing those additional safeguards. *Wilkinson*, 269 Kan. at 609. Although this test was not cited in *LWV II*, nothing in the opinion suggests that the Supreme Court has moved away from the *Mathews v. Eldridge* test for due-process challenges involving ballot issues. See *LWV II*, 318 Kan. at 828 (Rosen, J., concurring in part and dissenting in part) (citing *Wilkinson* and noting that “[t]he majority appears to agree the legislation denies a liberty interest”).

Under the *Mathews v. Eldridge* balancing test, it is appropriate to issue a temporary injunction that prohibits enforcement of SB 4, preserving the status quo so the three-day grace period remains in place during the pendency of this suit.

First, the liberty interest at stake is the ever-important right to vote in our democratic elections. See *Provance v. Shawnee Mission Unified Sch. Dist. No. 512*,

231 Kan. 636, 641, 648 P.2d 710 (1982) (describing the right as fundamental). Although the Supreme Court in *LWV II* concluded that the right to vote is not protected in the Kansas Constitution Bill of Rights, the court emphasized that this “does not mean that constitutional voting guarantees are somehow weak or ineffective. Quite the contrary. The article 5 right protected by the Kansas Constitution is an *enumerated political right*. As an expressly enumerated right, article 5 provides the strongest possible constitutional protections.” *LWV II*, 318 Kan. at 800 (emphasis in original). The court also left standing Kansas case law that that described the right to vote as fundamental. *See LWV II*, 318 Kan. at 799 (“Today’s decision does not conflict with any of our past precedent”); *Provance*, 231 Kan. at 641 (described the right to vote as “fundamental”). Thus, the right to vote undoubtedly involves a substantial liberty interest.

Second, the evidence shows that a three-day grace period is likely to save many ballots, as tens of thousands of ballots in recent elections arrived within that grace period and were counted as a result. Ex. 11; Ex. 13; Ex. 14.

And third, any burden to the State is minimal. The State of Kansas has employed this identical post-Election Day grace period for almost a decade.

In short, the three-day grace period for mail-in ballots has significant value in protecting mail ballots from unpredictable mail delays—and this safeguard has successfully saved ballots in Kansas from arbitrary disenfranchisement for nearly ten years. Under the *Mathews v. Eldridge* test, Plaintiffs are substantially likely to prevail on their due-process claim. *See also Raetzel v. Parks/Bellefont Absentee*

Election Bd., 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (“due process is not provided when the election procedures do not give some form of post-deprivation notice to the affected individual so that any defect in eligibility can be cured”); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (“Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.”).

3. There is a substantial likelihood that SB 4 violates the Kansas Constitution’s protections of the right to vote.

Although Plaintiffs need only show that they are likely to succeed on one of their claims, the Court also finds that Plaintiffs have established that there is a substantial likelihood that SB 4 violates the Kansas Constitution’s protections of the right to vote.

To begin, Kansas has long recognized the importance of the right to vote by mail or absentee ballot for its citizens. G.S. 1868, ch. 36, art. 4, §§ 45–56; *Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177, 184 (1936). Kansas’s history of enabling such voting goes as far back as the Civil War. Ex. 9; *see also Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War* 115–17 (1915). And for three decades now, any Kansas voter has been guaranteed the right to vote by advance ballot. K.S.A. 25-1119. Even the Kansas Constitution refers directly to absentee ballots in its voting provisions. Kan. Const. art. 5, § 1.

In *LWV II*, the Supreme Court held that the Kansas Constitution guarantees all qualified Kansans the right to vote in the State’s elections. *See* 318 Kan. at 800

(“As an expressly enumerated right, article 5 provides the strongest possible constitutional protections.”). Although *LWV II* does not describe the right to vote as fundamental, the Supreme Court has described the right to vote in that way. See, e.g., *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971) (describing the right to vote as “fundamental,” “pervasive of other basic civil and political rights,” and “the bed-rock of our free political system”); *Provance*, 231 Kan. at 641 (“We agree the right to vote for elected representatives is fundamental . . .”).

LWV II held that regulations or laws affecting the state constitutional right to vote should be analyzed under the test announced in *State v. Butts*, 31 Kan. 537, 2 P. 618 (1884). The *Butts* opinion recognized that there is no “special virtue in the mere day of election,” it states that citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and that a failure to do so does not mean that citizen has been disenfranchised. 31 Kan. 537, 2 P. at 622.

Thus, “*Butts* provides that the Legislature may validly make registration (or the provision of other ‘proper proofs’) a prerequisite to the act of voting, but in so doing, the Legislature cannot ‘under the pretext of securing evidence of voters’ qualifications . . . cast so much burden as really to be imposing additional qualifications’ on the right to suffrage.” *LWV II*, 318 Kan. at 801 (citing 31 Kan. at 554, 2 P. 618). “Accordingly, to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage.” *Id.* If

such a finding is made, such laws are per se unconstitutional, without the need for any balancing test. *Id.* at 801–02.

Plaintiffs have shown a substantial likelihood that SB 4 violates the Kansas Constitution’s protections of the right to vote.

In beginning this analysis, it is important to note that SB 4 involves the right of *qualified* voters to have their votes counted. This is because Kansas suffers from no meaningful voting fraud. Ex. 25 at 4 (quoting the Secretary’s testimony); *VoteAmerica v. Schwab*, 790 F. Supp. 3d 1255, 1275 (D. Kan. 2025). The Secretary’s office testified in February 2025 that “[t]here has *never* been a mail ballot received in the 3-day period that was not requested and returned by a registered Kansas voter.” Ex. 14 at 1 (emphasis added). Lastly, the Secretary has put forth no evidence of voting fraud here. Thus, this issue involves the right of *qualified voters* to have their votes counted. These voters have already demonstrated the “proper proofs” that they are qualified voters—but SB 4 allows for their votes to be discarded if their mail-in ballots are not received by Election Day.

Although this Election Day deadline may seem like a simple regulation on how votes are counted, the problem is that mail ballots cannot be mailed to qualified voters until 20 days before the election. And then, even if the ballots are returned in the mail the same day they are received, the ballots are discarded if they are not received by election officials by 7:00 p.m. on Election Day. Given the evidence of arbitrariness and the mailing delays that Plaintiffs have presented to the Court, there is a substantial likelihood that this regulation is an unreasonable

burden on the right to suffrage.

The Kansas Constitution sets out three requirements to be a qualified elector: one must be a U.S. citizen, 18 years or older, and a resident of the voting area in which he or she seeks to vote. Kan. Const. art. 5, § 1. SB 4 has nothing to do with any of those qualifications and thus is not a law enacted pursuant to the Legislature's authority to "provide by law for proper proofs of the right of suffrage." *Id.* art. 5, § 4.

Plaintiffs have shown a substantial likelihood that SB 4 imposes an extra-constitutional burden on the right to suffrage. This burden requires any mail-in ballot to survive a difficult-to-meet and unforgiving deadline, with no ability to correct the deficiency, and no ability to swear or affirm the circumstances of the mail-in ballot. If it's late, the vote is excluded, even if the voter is qualified and they mailed it as soon as they received it in the mail. This is harsh and arbitrary.

Kansas law specifically allows for this mail-in voting process, to accommodate those qualified voters that may need to or otherwise choose to vote by mail. But the 20-day process, with the unforgiving Election Day deadline, and the evidence of arbitrary delays in U.S. Mail, is substantially likely to be an extra-constitutional burden on the right to suffrage for voters who need to use mail-in voting. There is a substantial likelihood that qualified voters will have their ballots discarded based on factors beyond their control—this is an unreasonable burden on these Kansans' right to vote.

For these reasons, Plaintiffs have shown a substantial likelihood that SB 4

violates the Kansas Constitution’s protections of the right to vote.

B. There is a reasonable probability of Plaintiffs suffering an irreparable injury.

To be entitled to a temporary injunction, Plaintiffs must also show a “reasonable probability” of irreparable injury absent a temporary injunction, and a lack of any “adequate legal remedy, such as damages.” *Hodes & Nauser*, 309 Kan. at 619.

Once a plaintiff shows that a constitutional right will be abridged, no further showing of irreparable harm is required—a deprivation of a constitutional right is in and of itself irreparable harm. *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (citation omitted); *see also Mirabelli v. Bonta*, 607 U.S. 492, 497, 146 S. Ct. 797 224 L. Ed. 2d 310 (2026) (“The denial of plaintiffs’ constitutional rights during the potentially protracted appellate process constitutes irreparable harm.”). *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Adams By & Through Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (“A deprivation of a constitutional right is, itself, irreparable harm.”). *See also Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1118, 95 P.3d 655 (2004) (citing federal cases as persuasive authority for the nature-of-harm analysis); *Trust Women Found. Inc. v. Bennett*, 509 P.3d 599, at *7 (Kan. Ct. App. 2022) (unpublished) (“courts presume that irreparable injury results when a constitutional right is violated”).

“This is especially so in the context of the right to vote. Because there can be

no ‘do-over’ or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction.” *Fish*, 840 F.3d at 752 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)).

Plaintiffs need only show a “reasonable probability” of irreparable harm—a “much lower burden than the applicable burden of proof at a trial.” *State ex rel. Kobach v. Harper*, 65 Kan. App. 2d 680, 691, 571 P.3d 6 (2025) (quoting *Idbeis v. Wichita Surgical Specialists*, 285 Kan. 485, 492, 173 P.3d 642 (2007)).

The Voter Plaintiffs are threatened with irreparable injury to their fundamental right to vote in the upcoming 2026 elections absent an injunction. Each relies on voting advance ballots by mail. *See* Nary Decl. ¶¶ 4, 9; Hodgesmith Decl. ¶ 11; Mikesic Decl. ¶¶ 4–10. Further, Plaintiffs Nary, Hodgesmith, Mikesic are all disabled, elderly, and have limited mobility, so voting by mail is their safest and most reliable option to exercise their right to vote. Nary Decl. ¶ 9; Hodgesmith Decl. ¶¶ 9–11; Mikesic Decl. ¶ 10. Accordingly, if SB 4 is in effect during the upcoming 2026 elections, the Voter Plaintiffs will be at serious risk of having their ballots discounted if postal delays outside their control cause them to arrive after 7:00 p.m. on Election Day.

The constituents of each of the Organizational Plaintiffs will also face the same risk of irreparable harm for similar reasons as the Voter Plaintiffs. Nichols Decl. ¶ 7; Hammet Decl. ¶ 6; Reeve Decl. ¶ 7.

Lastly, the Organizational Plaintiffs will suffer direct, irreparable injuries to

their organizational interests because they must divert resources toward operating programs to mitigate the burdens of SB 4—resources that otherwise would be put toward other mission-critical activities. *See* Reeve Decl. ¶ 8; Hammet Decl. ¶¶ 7–8, 11; Nichols Decl. ¶¶ 8–16.

C. There is no adequate legal remedy for Plaintiffs’ injuries.

The potential harm that Voter Plaintiffs’ votes would not be counted in upcoming elections is one that cannot be compensated by a legal remedy like money damages. *Fish*, 840 F.3d at 753 (“[D]enial of the right to vote constitutes a strong showing of irreparable harm, and one which cannot be compensated by money damages.”). The same is true for the potential harms suffered by Organizational Plaintiffs, where they may have to divert resources toward operating programs to mitigate the burdens of SB 4. *See League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (“Courts routinely recognize that organizations suffer irreparable harm when a defendant’s conduct causes them to lose opportunities to conduct election-related activities, such as voter registration and education.”).

Thus, unless enjoined, there is a reasonable probability that SB 4 will impose irreparable injury, and Plaintiffs have no other adequate legal remedy.

D. The threat of suffering injury outweighs whatever damage the proposed injunction may cause Defendants.

Plaintiffs have shown the threat of irreparable injury to them from the new law that would prohibit election officials from counting ballots that arrive after

Election Day. The three-day rule has been in effect since 2017, and this injunction merely continues the election process that the State of Kansas has used for nearly a decade.

Given these circumstances, the balance of hardships in this case suggests a substantial threat of irreparable harm without temporary-injunctive action. The ongoing injury to Plaintiffs “outweighs whatever damage the preliminary injunction may cause Defendants’ inability to enforce what appears to be an unconstitutional statute.” *See Am. C.L. Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999).

The harm that SB 4 poses to the Voter Plaintiffs and the Organizational Plaintiffs’ constituents is of the most grave and fundamental nature in a democratic society—it threatens the arbitrary loss of their right to vote in upcoming elections. *See Fish*, 840 F.3d at 752. The Organizational Plaintiffs will also suffer irreparable injury by being forced to divert resources away from their mission-critical activities. Nichols Decl. ¶¶ 15–16; Hammet Decl. ¶ 12; Reeve Decl. ¶¶ 9–10.

In contrast, Defendants would merely follow the same election process for mail-in ballots that has been in place since 2017. Thus, any alleged harms to the Defendants stemming from an injunction do not compare to the threat of injury to Plaintiffs. *See Fish*, 840 F.3d at 755 (“There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [state] and local offices involved in elections.”).

E. The impact of issuing the injunction will not be adverse to the public interest.

The public's interest in not suffering a potential constitutional limitation is served more by maintaining the status quo than by permitting a law which may be unconstitutional to go into effect. In addition, "ensuring qualified voters exercise their right to vote is always in the public interest." *League of Women Voters of Mo.*, 336 F. Supp. 3d at 1006 (citation omitted); see *Fish*, 840 F.3d at 756 (holding "[t]he public interest in broad exercise of the right to vote will be furthered rather than harmed" by an injunction).

F. Scope of Relief

Having held that Plaintiffs are entitled to a temporary injunction, the Court must determine the appropriate scope of that relief. For the reasons stated below, a statewide, facial injunction against SB 4 is both necessary and appropriate.

Kansas district courts have the equitable authority to issue statewide injunctions of unconstitutional state laws. See, e.g., *Hodes I*, 309 Kan. at 614 (affirming the trial court's injunction temporarily enjoining the enforcement of S.B. 95). For this issue, a facial injunction with statewide effect is the appropriate scope of relief for the temporary injunction.

Defendant argues that Plaintiffs' facial challenge requires Plaintiffs to demonstrate that no set of circumstances exist under which S.B. 4 would be valid. But some federal jurisprudence explains that the "proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the

law is irrelevant.” *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015).

The Kansas Supreme Court has cited *Patel* with approval. *State v. Ryce*, 303 Kan. 899, 915, 368 P.3d 342 (2016), *adhered to on reh'g*, 306 Kan. 682, 396 P.3d 711 (2017) (“*Patel* emphasizes that the scope of circumstances we examine is determined and limited by the application of the statute—we do not consider the entire universe of possible scenarios, we must instead look to the circumstances actually affected by the challenged statute.”).

Here, the group of relevant voters affected by SB 4 are those who choose to vote using a mail-in ballot. With this group, literally any mail-ballot voter could be impacted by the arbitrary mail delays and have their ballot discarded with no recourse. For these voters, who are spread throughout the state, SB 4 is extremely relevant, making a statewide injunction appropriate.

Because of the statewide application of SB 4, and the likelihood that this will affect voters throughout the State, a facial injunction with statewide effect can be needed to redress the potential irreparable harm, including the constitutional injuries, imposed by SB 4.

IV. Conclusion

For these reasons, Plaintiffs’ Motion for a Temporary Injunction is GRANTED. SB 4 (now codified at K.S.A. 25-1132 (2026)) is TEMPORARILY ENJOINED from taking effect pending further order of this Court.

Accordingly, prior law governing the receipt of advance ballots sent by mail

before SB 4 remains in effect. *See* K.S.A. 25-1132 (2021). Subject to the deadline for receipt by the office of the county election officer as set forth in this subsection, all advance voting ballots received by mail by the office of the county election officer after the closing of the polls on the date of any election specified in K.S.A. 25-1122(f), and amendments thereto, and which are postmarked or are otherwise indicated by the United States Postal Service to have been mailed on or before the close of the polls on the date of the election, shall be delivered by the county election officer to a special election board or the county board of canvassers, as determined by the Secretary of State, for canvassing in a manner consistent, as nearly as may be, with other advance voting ballots. The deadline for the receipt by mail of the advance voting ballots by the office of the county election officer shall be the last delivery of mail by the United States Postal Service on the third day following the date of the election.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Carl Folsom, III', written over a horizontal line.

Carl Folsom, III
District Judge

EXHIBIT B

CLERK OF THE DOUGLAS COUNTY DISTRICT COURT
CASE NUMBER: DG-2025-CV-000206

SEALED

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

KANSAS APPLESEED CENTER)
 FOR LAW AND JUSTICE,)
 INC., ET AL,)
 Plaintiff,)
 vs.)

Case No.: DG-2025-CV-000206

SCOTT SCHWAB, IN HIS)
 OFFICIAL CAPACITY AS)
 THE KANSAS SECRETARY OF)
 STATE, ET AL,)
 Defendant.)

TRANSCRIPT OF MOTION TO DISMISS & TEMPORARY INJUNCTION

PROCEEDINGS had before the Honorable Carl Folsom
 III, District Judge of Douglas County, Kansas, at
 Lawrence, Kansas, on the 27th day of January, 2026.

APPEARANCES

The Plaintiffs, KANSAS APPLESEED CENTER, ET AL,
 appeared by and through their counsel, NICOLE
 REVENAUGH, Irigonegarary & Revenaugh, 1535 Southwest
 29th Street, Topeka, Kansas, 66611; & MARISSA O'GARA
 and ELISABETH FROST, Elias Law Group, 1700 7th Avenue,
 Suite 2100, Seattle, Washington, 98101.

The Defendants, SCOTT SCHWAB, ET AL, appeared by
 and through their counsel, BRADLEY SCHLOZMAN and
 KRYSTLE DALKE, Hinkle Law Firm LLC, 8711 Penrose Lane,
 #400, Lenexa, Kansas, 66219.

1 THE COURT: Court calls the case in the
2 matter of Kansas Appleseed Center for Law and Justice
3 Incorporated, et al, versus Scott Schwab, et al,
4 2025-CV-206. Will the parties enter your appearances,
5 please.

6 MS. REVENAUGH: Morning, Your Honor.
7 Nicole Revenaugh, Elizabeth Frost and Marissa O'Gara
8 appear on behalf of the plaintiffs. Plaintiff Martha
9 Hodgesmith is here person as well as Davis Hamnet and
10 Melissa Steiner for plaintiff Loud Light.

11 MR. SCHLOZMAN: Good morning, Your Honor.
12 Brad Schlozman and Krystle Dalke for the defendants.

13 THE COURT: Good morning. We're scheduled
14 for two motions today. And I wanted to check with the
15 plaintiffs to see if there was going to be any
16 testimony that is presented on the injunction issue.
17 If not, I would like to take up the motion to dismiss
18 first. But are you planning to present testimony?

19 MS. REVENAUGH: No, Your Honor.

20 THE COURT: Okay. Is there any testimony
21 that the defendants are planning to present?

22 MR. SCHLOZMAN: No, Your Honor.

23 THE COURT: Then I would like to -- because
24 the issues are intertwined I would like to start with
25 the motion to dismiss. And then depending on how long

1 it takes we may take a short break and then we'll
2 finish up with the injunction motion.

3 So Mr. Schlozman or Ms. Dalke, whoever, whenever
4 you're ready you may proceed with argument.

5 MR. SCHLOZMAN: Good morning, Your Honor,
6 may it please The Court.

7 Plaintiffs here wage a facial constitutional
8 attack on SB 4, which is a law that the Kansas
9 legislature passed in March of 2025 to require that all
10 advanced voting ballots must be received in the County
11 election office or polling place no later than the
12 close of the polls. Now this matter has been briefed
13 extensively, I don't know how much The Court has read
14 the briefs so I'm going to, sort of, summarize the
15 arguments here. But at any point if you feel like,
16 "Hey I know this, I've read it," just let me know.

17 THE COURT: I've read it but I -- whatever
18 you want to argue I'm sure that would be helpful.

19 MR. SCHLOZMAN: Okay, terrific. Thank you,
20 Your Honor.

21 This case presents a classic public policy
22 dispute. There may be good arguments for having a
23 grace period and there may even be good arguments for
24 having a longer grace period than the State currently
25 allowed before the statute. But these are emphatically

1 public policy arguments. And there are also equally
2 good public policy arguments for not having a grace
3 period. And with respect, it is not the role of the
4 judiciary to inject itself into that dispute. The
5 Kansas Constitution unequivocally delegates to the
6 legislature the decision to determine the mode of
7 voting, and plaintiffs equal protection and their due
8 process claims simply have no merit in that regard.

9 THE COURT: What about the right to vote
10 with absentee ballot that's in Section 5?

11 MR. SCHLOZMAN: Well Your Honor, the
12 Section 5 claim is particularly weak because we believe
13 the Kansas Supreme Court rejected that claim in the
14 *League of Women Voters 2* case. And I'm referring to
15 *League of Women Voters 2* as the 2024 decision. So we
16 think that the court obviously there said that Sections
17 1 and 2 of the Kansas Constitution's Bill of Rights do
18 not protect the right to vote; the court was very clear
19 on that point. So the plaintiffs then pivot and say,
20 Okay, well we're not going to base it on Section 1 or
21 2, we're going to base it on Article 5 Section 1. But
22 Article 5 Section 1, if you look at that, just deals
23 with the qualification of voters. And the key part is
24 really the first sentence, "Every citizen of the U.S.
25 who's attained the age of 18 and resides in the voting

1 area in which he or she seeks to vote shall be deemed a
2 qualified elector." But if you look at that language,
3 Your Honor, the Supreme Court in *League of Women Voters*
4 2 very clearly said that to prevail on a claim -- and
5 I'm quoting here from page 801 of that decision -- "To
6 prevail on a claim that the Article 5 right to suffrage
7 has been violated, a plaintiff must show that the
8 legislature has imposed what amounts to a new
9 extraconstitutional qualification on the right to be an
10 elector." That is, the law must be shown to
11 unreasonably burden the right to suffrage.

12 So the plaintiffs say, well this new requirement
13 that the ballots be received no later than 7:00 PM on
14 election day amounts to a new, additional
15 qualification. That's the term used by the Kansas
16 Supreme Court. But Your Honor, that makes no sense. I
17 mean, first of all, other than a -- in Kansas we've
18 actually been very solicitous of voting by mail. And
19 you know, it first started off that we had some people
20 who were out during the Civil War who were out on the
21 battlefield and we allowed them to vote. It's a little
22 unclear as to what the process was for those people.
23 But the examples --

24 THE COURT: How does that work now if
25 someone is deployed? How -- if it takes, you know,

1 days and days, you know, five days on each end to --

2 MR. SCHLOZMAN: Sure. So first of all,
3 there is a federal statute now called UOCAVA, the
4 uniformed and overseas voters absentee -- excuse me,
5 Uniformed and Overseas Citizens Absentee Voting Act,
6 called UOCAVA. And that is a federal law that requires
7 that ballots be sent out to members of the military and
8 people who are, you know, living overseas 45 days
9 before the election. And actually there is no -- the
10 federal law is silent in terms of when the ballots must
11 be received. My understanding from the Kansas Election
12 Office is is that for UOCAVA voters those ballots must
13 be received no later than election day. So there is no
14 grace period for those individuals and the ballots by
15 federal law are sent out 45 days.

16 THE COURT: So the ballots are ready to go
17 and mailed out to military --

18 MR. SCHLOZMAN: That's correct, Your Honor.
19 That's one of the reasons why you have these hard
20 deadlines in terms of, you know, the candidate
21 qualifications and whatnot, because the ballots all
22 have to be printed and mailed out no later than 45 days
23 before the election due to the UOCAVA requirements.

24 So -- but to go back to your question, Your
25 Honor, the cases where the Kansas Supreme Court has

1 held amount to "Extra additional qualification" on the
2 right to vote. I mean, they are entirely different
3 than the context that we're dealing with here. So --

4 THE COURT: And I understand your argument
5 for qualification, and that's what the Article 5
6 Section 1 starts qualifications of electors.

7 MR. SCHLOZMAN: Yeah.

8 THE COURT: But then after that first
9 sentence later on it says " A person who is otherwise
10 a qualified elector may vote in the voting area of his
11 or her former residence either in person or by absentee
12 ballot, notwithstanding the fact that such person may
13 have become a nonresident of such voting area during a
14 period prescribed by law" -- and then it continues.
15 But it seems to -- I mean, the plaintiffs argue that
16 that codifies or establishes the right to vote by
17 absentee ballot. Am I wrong --

18 MR. SCHLOZMAN: Yeah. And Your Honor,
19 first of all, I talked about that in fact in -- if
20 you'll take a look at page 11 of our memorandum in
21 support of our motion to dismiss --

22 THE COURT: The footnote about that --

23 MR. SCHLOZMAN: Footnote 4.

24 THE COURT: So that's the -- do I get to
25 the history of why that language is there if the text

1 says absentee ballot? Should I go to the history of
2 why that was passed?

3 MR. SCHLOZMAN: Well the absentee ballot --
4 first of all, when you're looking at a constitutional
5 provision, the history and tradition and text of the
6 statute all matter. So that's the first point. But
7 the second point is that in that language -- I mean,
8 this is a term of art. So an absentee ballot is a
9 specialized term under Kansas law. And it refers to
10 military voters. So that's -- you know, we kind of use
11 the term advance ballots and absentee ballots
12 interchangeably but they're actually specialized terms
13 under Kansas law.

14 THE COURT: And where does that
15 definition -- like, where's the best place -- is that
16 in the footnote as well?

17 MR. SCHLOZMAN: Yeah, I believe we talked
18 about that in the footnote. And I think the -- we talk
19 about it is, I believe, 25-1215; that section and the
20 statutes that follow that.

21 THE COURT: Okay. Thank you. And I know I
22 keep sidetracking you, but --

23 MR. SCHLOZMAN: No no no, please, Your
24 Honor. This is your time. So --

25 So the cases then, Your Honor, that deal with the

1 additional extra qualifications focus on very different
2 scenarios. I mean we're talking about, you know, a
3 requirement for example that they addressed in the
4 *Doane* case back in 1916 where you had a -- in order to
5 be able to vote you had to be up-to-date on all of your
6 tax obligations. Or, you know, in the same case they
7 talked about certain residency requirements that didn't
8 seem to have any nexus to you why you would need to
9 have that in order to be able to vote. They had
10 another one in the *Beggs* case that we talk about that
11 you had to have -- you know, in a general election you
12 had to show your party affiliation. Which obviously,
13 you know, matters at the primary but shouldn't have any
14 requirement to the general election. So they
15 invalidated those requirements.

16 But the Supreme Court has -- first of all,
17 they've never struck down an election integrity statute
18 like this that deals really with what amounts to a
19 proper proofs requirement. And that would be
20 fundamentally inconsistent as well with the Article 4
21 Section 1 authority that's granted to the legislature
22 to determine the mode of voting. And the Supreme Court
23 in *League of Women Voters 2* talked about the extremely
24 broad authority that exists there. And, you know, the
25 court talked about I believe it was the *Butts* decision

1 many years ago I think that was, like, in 1888. It may
2 have even been Justice Brewer who later went on to the
3 U.S. Supreme Court. And you know, they talked about,
4 look when you're dealing with, like, registration
5 requirements it may be that certain people missed the
6 deadline and, you know, aren't around that day. I
7 mean, through no fault of their own. But that is not
8 anything that causes any constitutional infirmity. I
9 mean that's just, sort of, bad luck on their part,
10 perhaps. But, you know, the Constitution when you're
11 dealing with needing to adopt broadly applicable
12 election statutes -- and, you know, when you're dealing
13 with an election issue have to have rules, right? And
14 there's always going to be issues and people that fall
15 through the cracks and, you know, sort of specialized
16 circumstances. But we have to have neutrally, broadly
17 applicable and neutrally applied laws. And the fact
18 that it may have a disparate impact on certain
19 individuals is unfortunate but constitutionally
20 irrelevant.

21 THE COURT: So neutrally applied -- so the
22 disparate impact, if 10 or 12 percent of the folks in a
23 rural county, their mail in ballots are rejected,
24 that's just kind of the cost of doing business, I
25 guess? We need to have a deadline?

1 MR. SCHLOZMAN: Yes. I mean, well first of
2 all I would push back to suggest that it's anywhere
3 close to 10 or 12 percent. I mean, even when we talk
4 about some of the statistics -- and we'll get into
5 this, I assume, at the temporary injunction part of
6 this hearing. But, I mean, putting that to the side
7 for the moment: Yes, the fact that there are disparate
8 impacts -- I mean, as long as the statute is not
9 purposefully discriminatory, intentionally
10 discriminatory. And I know there's been a lot of
11 discussion here, Your Honor, about like, oh well this
12 is different, this requires a strict scrutiny because
13 we're dealing with fundamental rights. But again, with
14 respect, the Supreme Court address that point in *League*
15 *of Women Voters* 2 and rejected that argument. And they
16 made clear that we're not dealing -- that in Kansas
17 voting is a political right and that it does not
18 trigger strict scrutiny and so then it does not involve
19 somehow a fundamental right that mandates heightened
20 scrutiny. I mean, that issue has been addressed. And
21 I know the plaintiffs want to revisit that and maybe
22 they'll have an opportunity if the case goes back up
23 and is reheard by the Kansas Supreme Court on that
24 issue. But at this stage of the proceeding the Supreme
25 Court has spoken. And again, you know, we believe the

1 district court is bound by that decision. So --

2 THE COURT: Has the Supreme Court or any
3 other court or the text of the constitution, does it
4 define the absentee ballot the way you described it by
5 statute? Is that defined in the Constitution or has it
6 been -- has the Kansas Supreme Court said, this is what
7 that language means?

8 MR. SCHLOZMAN: Well, again, there's good
9 legislative history which I talk about in that
10 footnote. And it was designed to implement -- it was
11 part of a global statutory, constitutional, kind of,
12 across-the-board amendments I believe in 1974. And
13 there's, you know, very clear history on what they were
14 doing and they were implementing the Civil Rights Act
15 from, I believe it was what, 1970? Excuse me, the
16 Voting Rights Act of 1970. And the whole issue was is
17 that Kansas, like many states, had durational residency
18 requirements. And, you know, it was also a problem
19 because if you were away from your county -- say you
20 lived in Douglas County but you happen to be over in, I
21 don't know, Seward County -- that you might not be able
22 to vote. And so they -- or that you would move there,
23 you know, a week before the election. And so they --

24 THE COURT: So like a lot of the students
25 that we have in Lawrence.

1 MR. SCHLOZMAN: Sure, exactly, that's
2 right. And so now that statute, that constitutional
3 provision was designed to implement the Voting Rights
4 Act. And that's very clear in the report of the Kansas
5 legislature. They did a special report on -- a 1971
6 report which I cited there. And to the extent The
7 Court has any difficulty locating it, because I think
8 you sometimes have to contact the State historical
9 library, we would be happy to assist as well if you
10 need any of that. So that is -- I mean, the reference
11 to absentee ballots there is a red herring in this
12 case, because it's a very different term than what
13 we're dealing with in this case.

14 So let me then turn -- unless The Court has some
15 more questions on the right to vote claim, let me turn
16 then to the -- well first let me say a couple of
17 things. We believe here that the election day deadline
18 does functionally operate as a proper proof within the
19 meaning of Article 5 Section 4. And, you know, because
20 the Kansas Supreme Court in that case talked about the
21 muscular deference that has to be afforded to the
22 legislature in that kind of circumstances, we believe
23 that it is entirely appropriate and necessary in this
24 case as well.

25 THE COURT: What's the proof there? I

1 mean if -- and I'm looking at your -- Secretary
2 Schwab's letter to the postmaster general in 2024.

3 MR. SCHLOZMAN: Sure.

4 THE COURT: He said that, you know, nearly
5 a thousand ballots were received, practically half the
6 counties without a postmark or after the three-day
7 grace period. So those folks who, if they're proper
8 voters, you know, they're not otherwise prohibited, and
9 they're -- what's the proof that's going on there? If
10 they, you know, the 200 voters in Douglas County who
11 mailed their ballots in July and then they didn't get
12 there by the August 6th deadline, 2024. What's the --

13 MR. SCHLOZMAN: Well I think we're mixing
14 up concepts when we talk about proof in that case --

15 THE COURT: Well that's what I want to know
16 like, how is that a proper proof? Just because they
17 mailed it quickly enough or -- better mail service.

18 MR. SCHLOZMAN: Well the proper proof issue
19 is the need for the county and State to know whether
20 the ballot was, in fact, properly mailed. I mean, as
21 we talked about right now there's been a problem
22 because the postal service has not a particularly great
23 job of putting a postmark -- you know, a cancellation
24 on the mail when it comes. You know, sometimes it's a
25 delivery issue, sometimes it's smudged. We've had

1 litigation -- you know, like there was a case in
2 Nevada, for example, where the Nevada Supreme Court had
3 said that, you know, if the postmark is ambiguous and,
4 you know, maybe it's smudged, maybe it's non-existent,
5 that's not the fault of the voter. And so we're going
6 to order the State to accept that ballot. And so -- a
7 reminder this is not something that, sort of, Kansas is
8 in the minority and has been in the minority in
9 that brief experiment when they allowed it. I mean, 35
10 states require that it be received by election day.

11 But the whole point of this -- part of, much of
12 the point for the legislature in the legislative
13 history is look at -- just, we want to avoid that kind
14 of ambiguity and we want to be certain that when the
15 voter mailed that ballot it was received on time. And
16 it creates invitations for, sort of, mischief after the
17 election if a ballot comes in -- if a ballot is
18 received it doesn't have a postmark, it's smudged. You
19 know, how do we know for sure that that ballot, in
20 fact, was a legitimately voted ballot? And so the
21 legislature decided, like, look -- and on top of that
22 we want to have the certainty as well. I mean, we're
23 tired of having, you know, elections where, you know,
24 up to three days in each day on close elections -- and
25 it usually doesn't get so much of the public's

1 attention because it doesn't typically affect statewide
2 races. But, you know, when you get down to County
3 Commissioner, state representatives, it happens all the
4 time. You know, where you're like, well I don't know
5 who's going to win, let's see what comes in the mail
6 today. And then day two, and it can, sort of, seesaw
7 back-and-forth in terms of who the winner is.

8 THE COURT: Doesn't that just stress the
9 importance of counting everyone who -- you know, those
10 200 Douglas County folks who, you know, postmarked in
11 July of 2024. Like, if an election came down to less
12 than 200 votes doesn't that just stress the importance
13 of those people's vote? And, I mean, I don't know
14 what, kind of --

15 MR. SCHLOZMAN: Well Your Honor, I guess
16 what I would say response to that is first of all: This
17 is a policy argument. You have -- your point is not
18 without merit in terms of a policy matter. But that is
19 not anything that is constitutionally mandated. And
20 frankly, if we have this requirement we think, you
21 know, the plaintiffs argue and I know their expert
22 witness was arguing that, well, you know, if we look at
23 it, sort of, in a static type of situation and, you
24 know, now what's going to happen and where they're
25 going to have three less days. People will modify

1 their behavior. And, you know, they'll get it in
2 earlier. I mean, even on the information that the
3 expert witness put together, I don't think there was a
4 single one where the total transit time lasted more
5 than 21 days. Now we do have one affidavit from one
6 voter. And it's sort of, you know, interesting that
7 they have decided -- you know, they deliberately did
8 not put anyone on the stand today. That's, sort of, an
9 odd decision on their part. But even all of their data
10 from their -- I think they called it Ballot Scout, did
11 not show a single voter whose total transit time was
12 more than I believe 19 days.

13 So, you know, I think there's sort of a narrative
14 going on that, oh we're going to have all these people
15 who they mailed it -- you know, the election office
16 mailed it long before the election and it didn't arrive
17 in time. And the evidence simply doesn't bear that
18 out. But at the end of the day those voters have ample
19 opportunity to cast their ballot. There's a myriad of
20 ways that they can cast it. I mean, they can obviously
21 vote in person, they can vote early in person. If they
22 are disabled, we have mandatory curbside voting. You
23 don't even have to get out of your car. I know one of
24 the individuals had talked about that they suffer from
25 I think it's postpolio they said, well gee, you know,

1 it's very -- it's problematic for me to go to the polls
2 if there is, you know, long lines and a lot of people.
3 Well you can vote in your car. I mean, it is by
4 statute. And I know --

5 THE COURT: What if they don't drive?

6 MR. SCHLOZMAN: If they don't -- well then
7 they can also have a third party deliver their ballot.
8 But again -- and that just sort of goes to, kind of,
9 the additional point. I mean, there is that option for
10 them. But this idea that the legislature can't have a
11 deadline because there may be a certain number of
12 voters who would find it difficult in some way: The
13 Constitution does not require that. Again, these are
14 policy matters. And I don't dispute, Your Honor, that
15 there may be very good policy arguments for the
16 suggestions that you're making and that they're making.
17 But it's not constitutionally mandated. And I think
18 that would go down a very dangerous path if we had the
19 judiciary in the position of saying, well, you know, I
20 think this is a better idea because this would more
21 accommodate this category of voters or this would deal
22 would this other category of voters. And it also tends
23 to subordinate the interest of the legislature had, for
24 example, in the finality issues that I talked about, or
25 in the certainty about the postmark. I mean, I think

1 those can't just be put to the wayside because certain
2 voters would prefer to vote by mail.

3 And I would just add one other point here, Your
4 Honor, because I think this is really important. They
5 have waged a facial challenge to this vote, to this
6 statute. To the extent that there are certain voters
7 who may have truly unique circumstances -- I mean,
8 let's take the voter that you just identified. Again,
9 I think that there are plenty of alternatives. That
10 voter could go to the curbside, they could have a third
11 party bring the ballot in. They could still mail it
12 in. I mean, under all the data that the plaintiffs
13 provided from Dr. Herron, their expert, every single
14 ballot, you know, had a round-trip time of less than
15 20 days. So mailing is still a very viable option. In
16 fact, I think it was the 2024 primary, not a single one
17 had -- or almost none had more than 13 days. So, I
18 mean, you're dealing with -- they still had a week to
19 spare. So, I mean, the evidence, I think, has been
20 overstated in terms of the harm.

21 But even still, let's just assume hypothetically
22 that you had sort of the -- we'll call then, and I
23 don't mean any disrespect by this, but kind of a
24 unicorn voter. Where they just had, the circumstances
25 were just so unique that they just could not deal

1 with -- you know, they had to vote and they were in
2 some sort of rural area where the election -- the mail
3 just is always so slow. They can bring a facial --
4 excuse me, they can bring an as applied challenge to
5 the law. But what the plaintiffs have chosen instead
6 is to bring a facial challenge. And, you know, I know
7 that they have tried to discount the law on this area.
8 But if you read the cases for yourself -- and I urge
9 you to do so, Your Honor, because I feel like in some
10 ways, you know, we can just talk back-and-forth each
11 other to what the cases mean and they say this and we
12 say that. And I would just urge The Court to read
13 those decisions for itself if you haven't done so
14 already. But, like, the *State v. Jones* case -- which
15 was a 2021 decision from the Kansas Supreme Court --
16 and it made clear that in the facial challenges that
17 this test is is that the challenger must show that no
18 set of circumstances exist under which the act would be
19 valid. I mean, that is a very recent decision from the
20 Kansas Supreme Court.

21 Now the plaintiffs come back and they say, well
22 look there's a 10th Circuit decision from 2012. Well
23 Number 1: Obviously that's not binding, I mean, we're
24 dealing with the Kansas Supreme Court, which has spoken
25 unequivocally on the issue.

1 THE COURT: Let's break that down a little
2 bit.

3 MR. SCHLOZMAN: Sure, yeah.

4 THE COURT: So obviously that's the test
5 for a facial challenge. So no set of circumstances
6 where it would not be constitutional.

7 MR. SCHLOZMAN: Yeah.

8 THE COURT: So does that mean -- is there a
9 percentage on the number of ballots that that, you
10 know, they get lost in the mail. If we collect some of
11 those does that say that is not facially --

12 MR. SCHLOZMAN: Well I think, yeah, I think
13 that's the point Your Honor is that --

14 THE COURT: -- every ballot has to be thrown
15 out or they can't win a facial challenge?

16 MR. SCHLOZMAN: I think that if you had
17 a -- if the statute was so overwhelmingly
18 unconstitutional that -- yeah, I mean, if you had
19 something like 50 or 60 percent of the ballots could
20 never be counted in the circumstances. And we have
21 nothing even remotely -- I mean, in this case, I mean,
22 no one here is here to argue that the U.S. Postal
23 Service deserves all kind of awards in the State of
24 Kansas for their delivery times. I'm not going to, you
25 know, deny the obvious. But the reality is is that

1 when you look at the numbers we're dealing with,
2 overall, a very tiny fraction of voters who have had
3 difficulty complying with this. And sometimes it may
4 take longer than they would like and they may feel
5 like, gee I would benefit from more time. But their
6 ballots have been received.

7 And the other thing, Your Honor, I think that's
8 really important to point out. Like, we're getting a
9 little bit into the TI part of this. But they make
10 this point of, like, look at how many ballots arrived
11 after the election day under the pre-January 2026 law.
12 And, you know, when you look at that, first of all they
13 don't -- other than in Douglas County nowhere do they
14 even allege or plead that those ballots were -- you
15 know, they don't allege when they were actually sent.
16 So they would show, you know, here's the number of
17 ballots that were arrived in this county and that
18 county during the grace period. And I think they call
19 them grace period ballots. But, you know, were they
20 sent by the voter 20 days beforehand? Were they sent,
21 you know, the day before the election? We don't know
22 that. And, I mean, that would be a very critical fact
23 for them to be able to prevail on a temporary
24 injunction or anything else. So, I mean, they've got
25 some Douglas County statistics -- which, again I think

1 actually benefit us in the end. But even so, I mean,
2 that doesn't get you anywhere to a facial invalidation
3 of the statute on a statewide basis.

4 And so when you're your dealing with that case --
5 I mean, again, that's why they have outside of 1st
6 Amendment overbreadth cases and outside of certain 4th
7 Amendment cases where the Kansas Supreme Court has
8 recognized an exception to that as well, I believe in
9 the *Rice* case. And -- but outside of those two
10 contexts the Supreme Court has said over and over and
11 over that this is the problem when you try to bring a
12 facial claim. I mean, they have certain voters who --
13 maybe some of the individual plaintiffs if they didn't
14 like the circumstances and they thought that there was
15 -- that it was unavoidable for them, they could have
16 brought an as applied challenge. But that does not
17 work on a facial basis. And so I think that is
18 ultimately one of their biggest, and I believe
19 insurmountable, obstacles in this case is the nature of
20 the way that they brought the suit.

21 Okay. So let me turn then to equal protection.
22 The Section 2 of the Bill of Rights, which is the
23 source of their equal protection claim: The Kansas
24 Supreme Court stated in the *Rivera v. Schwab* case is
25 coextensive with the 14th Amendment. Now I know that

1 the plaintiffs have tried to distinguish that and they
2 said, oh well, you know, that is a political
3 gerrymandering claim. Yes, it was, but Your Honor,
4 again, please read the case for yourself. I mean, the
5 court was very, very express about how equal protection
6 claims are construed in the State of Kansas. There was
7 no ambiguity in the majority opinion by Justice
8 Stegall. I mean, he made it very clear, we construe
9 that statute to be coextensive with the 14th Amendment
10 and we look to Supreme Court and federal case law in
11 determining the scope of that parallel provision under
12 Section 2 and the Kansas Constitution Bill of Rights.
13 So in some ways I don't know why we're arguing about
14 that. I respect that they will, you know, want to
15 distinguish it again, and that's fine. But please,
16 Your Honor, read the case. And I think that you will
17 see that the better interpretation -- the only
18 interpretation, we believe -- is the one that I just
19 articulated.

20 Now the plaintiffs still argue that strict
21 scrutiny applies here because the equal protection
22 claim that they're asserting involves a fundamental
23 right. But again, with respect, I think that exact
24 argument was made and rejected in the *League of Women*
25 *Voters 2* case. And in fact if you read at page 793 it

1 says, "The league asserted that because the right to
2 vote is a fundamental right the government must show
3 the infringement withstands strict scrutiny and the
4 State should not sustain that burden." But the court
5 rejected that position categorically on that page and
6 said that the right to vote is not an enumerated,
7 natural right protected by Section 1 and it also
8 doesn't implicate Section 2. So, you know, this is an
9 issue -- I mean, this is a legal issue. The Court's
10 going to be able to review the cases for itself and
11 make that assessment. So I'll, sort of, leave it at
12 that on that point.

13 The other point then is is: So what is the proper
14 standard of review then? Well, you know, in equal
15 protection cases where there is not a fundamental right
16 at stake, the Supreme Court and U.S. Supreme Court --
17 and obviously that's what the Kansas Supreme Court has
18 directed us to use and the Kansas Supreme Court has
19 held the same anyway -- is that you have to have
20 purposeful discrimination before an equal protection
21 claim can succeed. And when there's no fundamental
22 right or protected classes implicated -- and I don't
23 think anyone here is suggesting that disabled or rural
24 voters are suspect/protected classes under the law, in
25 fact I cite a case law that they are not -- that The

1 Court looks to a reasonableness standard. And under
2 that standard, the classification will be upheld as
3 long as it is rationally related to any legitimate
4 state interest.

5 Now in this case the plaintiff say, like, well
6 yes but the Supreme Court came up with a very different
7 standard in the *League of Women Voters* case 2. But I
8 don't think that that's what they were doing there. I
9 mean, they talked about in response to the plaintiffs
10 argument that this was -- the *League of Women Voters* 2
11 case involved as well as in here an attack on the
12 signature verification requirements for advance
13 ballots. And the plaintiffs had argued that any
14 deviation in the counties that -- no matter how de
15 minimis automatically is going to trigger strict
16 scrutiny. And that is not the standard the court
17 adopted. The plaintiffs do site at numerous occasions
18 Justice Biles' dissent. But again, with respect,
19 Justice Biles' opinion did not carry the day. And I
20 don't believe that that's the law on that case.

21 And so the State does not have to authorize --
22 just because it allows for mail voting at all -- and
23 obviously it doesn't have to allow mail voting at all.
24 But the plaintiffs argue, well when it does though the
25 State can't curtail options that might have a

1 disproportionate impact on certain classes of voters.
2 And -- but there is no legal basis for that assertion.
3 I mean, as I believe I wrote in my brief the
4 Constitution does not dictate an in for a penny in for
5 a pound type of approach. The State's choice to permit
6 mail voting does not strip it of that authority to
7 define the contours under which the method is going to
8 be allowed or not allowed. I mean, states have to be
9 free to regulate these optional voting mechanisms,
10 including receipt deadlines, you know, subject only to
11 the governing constitutional framework. And, you know,
12 this again is a policy preference. This went back and
13 forth, there were arguments both ways on the issue.
14 But at the end of the day the legislature had decided
15 that this is what they were going to go with. This is
16 the way the law was for 150 years other than this brief
17 eight-year experiment. Now we had some exceptions at
18 times for military voters. But other than that, I
19 mean, this is -- you know, under the plaintiffs theory
20 the law operated in an unconstitutional manner for
21 150 years; and went unchallenged, by the way.

22 THE COURT: In Secretary Schwab's letter he
23 said that Kansas has had mail voting in some form since
24 the Civil War. But never had -- never has a lack of
25 confidence in the delivery of our ballots been in

1 question as it has been in the 21st century.

2 MR. SCHLOZMAN: Well can I just say too,
3 Your Honor --

4 THE COURT: So these mail issues weren't
5 necessarily around -- according to Secretary Schwab.

6 MR. SCHLOZMAN: Well, I mean, there's a lot
7 of rhetoric and hyperbole. And the secretary's guilty
8 of that as well. I mean, obviously he's my client, but
9 the fact of the matter is is the deference here is to
10 legislature, not to a single member of a coordinate
11 branch. So look, there is rarely unanimity on
12 statutes. I mean, we have -- if you took a poll of
13 county clerks who are the chief election officials in
14 each county, I dare say that you would find all kinds
15 of differences of opinion on all kinds of different
16 election statutes. The legislature gets to decide; the
17 constitutional delegation of authority is to them, not
18 to the Secretary of State, not to the Attorney General,
19 not to a County Clerk. I mean, the legislature gets to
20 dictate that and they have broad discretion in the
21 manner that they do so; almost unfettered discretion in
22 the absence of a "Additional qualification" as
23 interpreted by the Kansas Supreme Court.

24 So, you know, we're dealing with -- I mean, I
25 recognize that Secretary Schwab in an effort to try to,

1 you know, instill confidence in people to get them to
2 perhaps avoid voting by mail and use the -- vote
3 instead by in person or to use a mail drop box. You
4 know, that he's out there and he probably would be the
5 first to admit that he's engaged in certain rhetoric on
6 that point. But his personal opinions are besides the
7 point. I mean, I know that rhetorically it makes a
8 good argument for the plaintiffs to say, oh look, you
9 know, your Secretary of State made all these comments.
10 But it just doesn't matter from a constitutional
11 perspective. The whole point is that the legislatures
12 prerogatives. And the fact that they have may have --
13 and there are, I mean look, this was not adopted
14 unanimously. It passed over a gubernatorial veto. I
15 mean, this is quite common in Kansas, right? I mean,
16 you know, it's the majority controls. And so -- but
17 these are classic policy matters. And so to, you know,
18 to take out of context certain Secretary of State's
19 rhetorical criticism of the postal service -- and again
20 as I said at the outset, I'm not here to defend the
21 postal service. Let them do that. But, I mean, it
22 just doesn't have any legal relevance.

23 So the -- we think, you know, the court talked
24 about reasonable uniformity. They talked about
25 arbitrariness in their opinion. And the plaintiffs

1 seek to accentuate that. But if you look at the cases
2 that the Supreme Court -- that Justice Stegall's
3 majority opinion cited, I mean, those cases are just
4 general equal protection cases. When they talk about
5 the standard for rational basis they're using, you
6 know, concepts of; it can't be arbitrary, it can't be
7 capricious; that it can't, you know, randomly
8 disqualify or treat some individual differently.
9 That's not any new test, it's not a results oriented
10 test; it's just classic equal protection jurisprudence.
11 The cases he cited, you know, if you look at the see
12 citation for after that he makes those comments,
13 they're just classic equal protection cases. There's
14 nothing new or unique about them. And I would urge The
15 Court when you're going back and reviewing the case to
16 look at those cases as well. I mean, you'll see that,
17 I think, that the plaintiffs make much more of that
18 point than really is appropriate here.

19 The federal courts in these kind of cases have
20 applied an Anderson-Burdick framework. Now the
21 plaintiffs argue that, well no the Kansas Supreme Court
22 rejected that theory. I don't know that that's the
23 case, Your Honor. I mean, it's not -- look, it's not a
24 completely clear situation in terms of exactly whether
25 they were rejecting it. I mean, I think that there's

1 an argument that the plaintiffs were taking the
2 position that this -- again as I said, you know, any
3 deviation no matter how minor will end up triggering
4 strict scrutiny. And the Supreme Court categorically
5 rejected that.

6 And of course, you know, in the *League of Women*
7 *Voters* case you were also dealing with an issue,
8 signature verification, that required inherently
9 individualized determinations, right? I mean here you
10 don't have individualized determinations. I mean, it's
11 a flat, neutrally applied law. We're not looking at,
12 you know, each individual signature and adjusting, you
13 know, did John Doe, is that his signature, Mary Smith,
14 vice versa. Cure opportunities, you don't have that in
15 the context of a ballot deadline. So I think that
16 that -- but the federal courts have clearly applied the
17 Anderson-Burdick standard. And so to the extent that
18 it's not simply a strict reasonableness approach --
19 which is what, effectively, the court did in *League of*
20 *Women Voters* when it adopted its test for equal
21 protection -- then Anderson-Burdick, you know, also
22 works as well. They talk about what is the overall
23 burden on voters, you know, sort of the balancing test.

24 And the Supreme Court made clear too in the
25 *Crawford v. Marion County Election Board* case -- and

1 then they further, you know, reaffirmed it basically in
2 the DNC v. Brnovich case, which was a Section 2 case --
3 but they said in the *Marion County* case, in the
4 *Crawford* case, that this is an issue to be analyze
5 categorically. In other words: You don't look at the
6 impact on some individual voter. I mean, it may be I
7 think, you know, you look at what they said in *Crawford*
8 and they, you know, noted Justice Stephens in his
9 majority opinion. He said, look there may be some
10 individual voter who has a very difficult time getting
11 across town to the Bureau of Motor Vehicles. It may be
12 that someone lost their license. It may be that, you
13 know, it could be a very difficult trek. I mean, maybe
14 they're disabled, maybe they have a, you know, mobility
15 issues. Whatever the case is. But those are simply
16 the vagaries of life. And those individuals might be
17 able to bring an as applied challenge but they cannot
18 facially invalidate the statute with a facial attack on
19 the statute. The idea that the Supreme Court was
20 essentially jettisoning 50 years of precedent, you
21 know, without any analysis, you know, just sub silentio
22 I think is just very unlikely that that's the case.

23 And, you know, as I talked about earlier, there
24 are -- in this case it's hard to come up with the
25 severe burdens on these voters. I mean, I talked about

1 and I listed in our brief at pages 14 to 15, and I
2 won't repeat all of that here -- you know, all of the
3 different options that individuals have to vote,
4 including voting by mail. And, you know, in the
5 Douglas County case which is really, you know, the
6 Ballot Scout. And, you know, I question some of the
7 validity of that. We don't know how much of -- I mean,
8 I didn't even have their expert come and testify live.
9 I've never been part of a temporary injunction hearing
10 where they chose not to bring in a life witness. But
11 the fact of the matter is is that even if we assume for
12 argument's purposes that that fully captured
13 100 percent of the ballots that we're talking about and
14 that all of the data in the software program was
15 absolutely correct; again, there was ample time for
16 those voters to cast the ballot. They may -- if they
17 chose to vote by mail they may have had to, you know,
18 do a fairly quick turnaround in terms of when they
19 received their ballot. But they had ample opportunity
20 to vote by mail in addition to all of the different
21 ways that are available to them as far as alternatives.

22 THE COURT: So in the due process argument,
23 the idea is, you know, people conform their behavior
24 and have the opportunity to do that. And it appears
25 that, I think you would agree that Secretary Schwab was

1 telling people, don't use mail voting. So is that what
2 you would tell folks now with the data that Secretary
3 has, that if we're going to have an election day
4 deadline, how would you tell people to conform their
5 voting behaviors? Don't go in person?

6 MR. SCHLOZMAN: Well, I mean, first of all
7 I think the State's position has always been that for
8 people who live in rural areas it still is best and --
9 so that people are more comfortable knowing about where
10 their ballot is. I mean, to vote early, to have it you
11 know, drop it off in a drop box, to not place it in the
12 hands of a third party over whom neither you or the
13 State have any control; i.e., the U.S. Postal Service.
14 So, I mean, in terms of the safest course of action,
15 sure that is true. But the other part of it is, I
16 mean, Judge: If you know that it has to be in by X date
17 you will need to alter your behavior accordingly. So,
18 I mean, if you look at Douglas County again in the
19 Ballot Scout data even, everyone -- you know, I think
20 everyone it got in in time. I mean, some it took
21 longer than others. And, you know, again we're
22 assuming the validity and accuracy of all that data.
23 But for the 2024 primary it arrived on time. We have,
24 you know, voters who -- you know, where they think they
25 call it, again, their grace period voters I think is

1 the terminology they use.

2 THE COURT: Was I wrong about the 200
3 number? I thought I recall 200 voters where the votes
4 were discounted because they --

5 MR. SCHLOZMAN: I mean, I could look at the
6 data --

7 THE COURT: Well I can ask that for the
8 plaintiffs.

9 MR. SCHLOZMAN: Yeah, I mean, I can look it
10 up in his affidavit. But the point being, Your Honor:
11 What we don't know in that case is we don't know when
12 those ballots were sent by the voter. We know when
13 they arrived but we don't know in the -- we don't know
14 when they were actually sent by the voter. In
15 particular what I'm talking about here are the
16 statewide numbers is, you know -- when they talk about,
17 like, hear is in this county they had this number of I
18 think they call them grace period voters. And we don't
19 know what the transit time was, we just know that they
20 arrived in the grace period or after the grace period.
21 And that's as much as we know from his data, you know,
22 outside of Douglas County.

23 So I think that that is -- again, I mean, there
24 are, you know, there are many different ways to vote.
25 And if you know that the timeframe is tight then you

1 will alter your behavior accordingly. I mean, that is
2 sort of human behavior, right? I mean, if you have
3 been, sort of, casual about it and you know now, "Boy
4 it's got to be in by this date" you're going to take
5 the extra steps to make sure that that happens. Or
6 utilize some alternative methodology, you know, voting
7 in person, using a drop off box, I mean, you know,
8 whatever the case happens to be. And there's nothing
9 constitutionally inferno about what the State is doing
10 in that regard.

11 And I just keep coming back to that point is is,
12 you know, the plaintiffs have brought up all kind of
13 policy arguments, and they brought in affidavits. And
14 we'll talk about, you know, some of the affidavits from
15 the voters. And I don't discount, you know, that these
16 individuals, you know, would prefer to vote my mail and
17 that they feel like they have, you know, preferences
18 for that issue. And there are many legislators who
19 feel the same way, there are many citizens who feel the
20 same way. But those policy decisions are not a matter
21 for The Court, they're a matter for the legislature.
22 And if they don't like that then they can talk to the
23 folks in Topeka and urge them to take a different view.

24 THE COURT: But The Court can find, if
25 there's arbitrary or disparate treatment of folks, that

1 what the legislature has done violates equal
2 protection?

3 MR. SCHLOZMAN: Yes, certainly you can.
4 But I would respectfully submit in a facial challenge
5 no -- there's no basis for making that kind of
6 determination in this case. So yes, I mean, as a
7 purely legal matter does The Court have that authority?
8 Yes, of course you do. But I would submit that in this
9 case, given the nature of their claim, there would be
10 no basis for making that kind of determination.

11 Let me turn to due process at this point. So due
12 process rights are only implicated when there has been
13 a deprivation of life, liberty or property. And in the
14 absence of a protected property or liberty interest,
15 there can be no due process violation. We don't have
16 process, you know, claims for just the sake of process.
17 So the courts -- many courts have held and I cite those
18 in my brief, that there is no liberty interest in
19 voting by mail, let alone in a grace period. And so
20 the idea, I mean, that's why the court has -- the 11th
21 Circuit, the 5th Circuit, the 6th Circuit, the Federal
22 Court in Arizona, they've all held that there is no
23 liberty interest in voting by mail. If there's no
24 liberty interest in voting by mail I can't even
25 understand how there could be liberty interest in a

1 grace period. So to me that's an even weaker component
2 of the due process claim.

3 THE COURT: Is there a liberty interest in
4 the right to vote, generally?

5 MR. SCHLOZMAN: Say again?

6 THE COURT: Is there a liberty interest in
7 the right to vote generally?

8 MR. SCHLOZMAN: Actually, no. The -- I
9 mean, I think the courts are sort of split on that.
10 The -- probably one of the best cases for that, Your
11 Honor, is if you look at the 5th Circuit case, the
12 *Richardson v. Texas Secretary of State* case 978 F.3d
13 220, 978 F.3d 220. It's a 2020 decision from the 5th
14 Circuit. And it sort of talked about why the liberty
15 -- alleged interest in liberty -- the alleged liberty
16 interest in voting does not apply. Now you will find
17 some District Court decisions that have found a liberty
18 interest in voting. But at the federal appellate level
19 they've all rejected that position. And I think that
20 that is the better position. The plaintiffs --

21 THE COURT: Has a Kansas court addressed
22 that or -- directly or indirectly?

23 MR. SCHLOZMAN: So in the *League of Women*
24 *Voters 2* case, the majority did not address that
25 decision. The dissent talked about there being a

1 liberty interest. And the dissent suggested that the
2 majority had adopted a liberty interest by
3 recognizing -- excuse me, by allowing the plaintiffs to
4 proceed on their due process claim. But I think that
5 the plaintiffs here read way too much into that
6 dissent. So first of all: Obviously, you know, the
7 dissent is a poor mechanism for determining what the
8 holding of the majority opinion is. I mean, it's a
9 common tactic by the dissenters to reframe the opinion
10 and try to, you know, push their own interpretation on
11 it. But the reality is is that the plaintiffs had
12 argued in that case that, well we at least should have
13 because of the individualized determination on these
14 issues that, you know, and signature verification -- at
15 least let us try to prove our case. And the Supreme
16 Court, if you read the opinion -- and again, rather
17 than having each party, you know, kind of, represent
18 what it held, at the end of the hearing I'm sure you --

19 THE COURT: I've got in front of me.

20 MR. SCHLOZMAN: All right. Great. Read
21 the opinion. And I think that what you'll find is that
22 the court there was essentially saying, look we're
23 going to give you the opportunity to prove your case.
24 But they were responding to the plaintiffs argument and
25 just giving them the opportunity. I don't think there

1 was any holding -- and they certainly, you know, there
2 was no drive-by holding that, oh, you know, because
3 we're going to allow the plaintiff to conduct discovery
4 on that issue that we have now implicitly recognized a
5 liberty interest. I don't think you'll find that in
6 the majority opinion. And --

7 But the reality is is that whether or not there is
8 a liberty interest is ultimately irrelevant here. And
9 I think that the case that is so important, and I think
10 very, very meaningful, is the *New Georgia Project*,
11 which I cited and quoted at length, and the concurring
12 opinion by Judge Lagoa. And she makes clear there that
13 there is a fundamental difference between legislative
14 action and adjudicative action. And when you're
15 dealing with a case like *League of Women Voters* where
16 you are inherently having to make individualized
17 determinations, right? I mean, that's what you're
18 doing in that case. Each individual signature you're
19 having to say is this a -- does this particular
20 signature match? And if it doesn't, then what is the
21 voters opportunity to correct that, to cure it? You
22 don't have anything like that in this context. I mean,
23 where is the process that the voter would have to
24 challenge it? I mean, it's not like a cure mechanism;
25 it arrived too late and so now I'm going to be able to

1 go to and complain to someone --

2 THE COURT: There is no --

3 MR. SCHLOZMAN: That's exactly right. I
4 mean, it's a legislative deadline. So due process just
5 doesn't have any application here. So even if -- we
6 don't even need to reach the issue, Your Honor, we
7 would respectfully submit, you know, in terms of is
8 there a liberty interest in voting or not? I mean,
9 it's besides the point. Let's just assume for argument
10 sake that there is such an interest. And the fact of
11 the matter is is that at that point, I mean, they still
12 are not going to be able to prevail on that. I mean,
13 the election day statute is a law of general
14 applicability which affects everyone equally, in terms
15 of the statute itself. I mean, certain plaintiffs I
16 recognize are claiming that they have more difficulty
17 in complying with that. And again, if they want to
18 bring a as applied challenge then they're free to do
19 so. But, you know, we would submit that that is not a
20 meritorious due process claim.

21 And, you know, and I talked about the -- you know,
22 I quoted here the *Utah Republican Party v. Cox* case,
23 you know, where the 10th Circuit held that deadlines in
24 the election process invariably will burden some voters
25 for whom the earlier time is inconvenient. But those

1 burdens are assessed in light of the State's legitimate
2 interest in providing order, stability and legitimacy
3 to the electoral process. And we would submit that --

4 THE COURT: What's the legitimate interest
5 in waiting -- if the ballots are ready 45 days ahead of
6 time for military voters, what's the legitimate
7 interest in mailing it on that 20th day? Or saying --
8 actually I don't know if they all get mailed on the
9 20th -- like, 20 days before. I know that they're
10 allowed to mail them 20 days before.

11 MR. SCHLOZMAN: So let me answer that
12 question -- the latter question first --

13 THE COURT: Sure.

14 MR. SCHLOZMAN: -- which is that the
15 statute, and it's been this way for, you know, many,
16 many years -- as far as I've known, I mean, certainly
17 since the legislature started allowing no-excuse mail
18 balloting -- mail voting. The voters can apply I
19 believe is it up to 90 days?

20 THE COURT: 90 days.

21 MR. SCHLOZMAN: I think that's right. And
22 then the election office can begin sending them out
23 20 days before the election. And I suppose part of
24 that is, you know, a desire not to have a, sort of,
25 endless election cycle. You know, that we want to have

1 -- it started off by having a single election day and
2 then we're like, all right well now we're going to be
3 able to let you do it 20 days beforehand. But there
4 are some states that have a much longer period. And it
5 seems like, you know, the day the candidates announce
6 those voters can get to the polls and vote for him.
7 But at the end of the day, I mean, in terms of the --
8 so you can be on a permanent advance list. If you are
9 a disabled voter and, you know, the State just accepts
10 at face value your representation of disability, then
11 you can get on that list and the State will
12 automatically send you the advance ballot 20 days
13 beforehand.

14 THE COURT: So do they mail it 20 days
15 before? Is that the --

16 MR. SCHLOZMAN: Yes, yes. It goes out --
17 for the people on the --

18 THE COURT: Like, we know some clerk's
19 offices mail it, you know, 19 --

20 MR. SCHLOZMAN: It's statutorily required
21 that they have to send -- for the people on the
22 permanent list that they have to send it out 20 days
23 beforehand.

24 THE COURT: Do you have that statute
25 number? I had it up earlier. 25 --

1 MR. SCHLOZMAN: Right in front of me I
2 don't. But Krystle, if you'll write that down -- I'll
3 look and get back to you on that, Your Honor. I mean,
4 it's a clear Kansas statute. I just don't know it off
5 the top of my head.

6 THE COURT: My recollection was that it
7 said that you couldn't send it before the 20th day.
8 And so I didn't know whether -- but your understanding
9 of is the clerks can mail it 20 days before --

10 MR. SCHLOZMAN: Yeah, my understanding is
11 I'm not aware of any -- my understanding is that's the
12 way it's been and I'm not aware of any county election
13 office that does not send -- I mean, that's always been
14 the practice. And my understanding is that everyone
15 sends it 20 -- the people on the permanent list. You
16 can apply earlier and, you know, some people you get it
17 in, you know, 30, 45, you know, whatever it is, then
18 they will also mail those out. There's, like, a huge
19 batch of mail that ends up going on on the 20th day.

20 THE COURT: And I have it here. It's
21 25-1123, kind of, in the middle of subsection (a) it
22 says "No advanced voting ballots shall be transmitted
23 by the county election officer by any means prior to
24 the 20th day before the election." That's when they
25 can start. But your understanding is nobody waits --

1 MR. SCHLOZMAN: That's correct. Now again,
2 I know that the plaintiff had the affidavit from an
3 individual who has said that in one election that he
4 was on the permanent list and he did not get it. I
5 mean, I can't account for something that may have
6 fallen through the cracks. I mean, I think one thing
7 that everyone recognizes is no election is perfect.
8 You know, mistakes will always be made. So I don't
9 know what happened with this particular gentleman's
10 case. But the fact is is that that's the way it's
11 applied uniformly across 105 counties.

12 THE COURT: So to go back to my original
13 question: What's the State interest -- if they're ready
14 45 days before because of federal law and military
15 voters, what's the State interest in waiting until the
16 20th day before the election when folks out in Western
17 Kansas and some rural county might -- they might have
18 to turn it around the day they get it. And what's the
19 State -- and then having the cut off on election day.
20 Is it just orderly elections, that --

21 MR. SCHLOZMAN: Again, I think part of it,
22 Your Honor -- yes, orderly. But I think part of it too
23 is what I just referenced is the desire not to have a
24 permanent election cycle. You know, I mean, there's a
25 lot of criticism -- and I think quite warranted -- for

1 the states that have a much longer period where people
2 are voting, you know, well before the election and
3 circumstances change. And, you know, I mean, all you
4 need to do is look at, you know, any election, for that
5 matter, of late-breaking developments regarding the
6 candidate or regarding, you know, some issue. And I
7 think that the legislature has felt like, look we want
8 to allow enough time for this to occur but we don't
9 want to have an endless election cycle. And I suspect
10 -- and, you know, there's some states have slightly
11 longer. I think, you know, one state might have
12 slightly shorter. But, you know, and the plaintiffs
13 talk about how Kansas is at the outer edge. And some
14 states we're not talking about a tremendously longer
15 period. I mean, maybe it's a week or ten days. But I
16 think when you have it longer than that that really is
17 counterproductive for, many ways, the electorate.

18 And again, this can be done. I go back to
19 Douglas County data that they submitted themselves in
20 the 2024 primary. We don't know, you know, exactly
21 when the voters, you know, all turned it around. But
22 there was ample time for those individuals to cast
23 their vote by ballot. And if they were concerned that
24 the ballot will arrive in time in the County election
25 office, then yes they may well have to turn it around.

1 But they have plenty of options too. I mean, they can
2 vote in person on election day, they can vote in person
3 early, they can have a third party drop the ballot off
4 at the election office, in a drop box, at a earlier
5 polling place where early voting is going on --

6 THE COURT: Do you know how early folks can
7 vote?

8 MR. SCHLOZMAN: It depends on the county.
9 And so they -- I believe that it can be up to -- and
10 don't hold me to this. I mean, I don't want to, you
11 know, speculate.

12 THE COURT: If you know you know. And --

13 MR. SCHLOZMAN: I mean I know, like, some
14 places, you know, it can be -- it's like ten days.
15 Some places it may be two weeks. And I don't want to
16 misspeak. But some counties give, like, an extra week
17 for the mail balloting and others do not. And it's
18 given -- there's an outer limit on what counties can
19 do, but there's not a mandate that you must allow X
20 date, it's that you can start as early as this date.
21 And off the top of my head, Your Honor, I just don't
22 know the answer to that. I can get it to you.

23 So I guess I would just say too in, sort of,
24 conclusion because I think I've spoken plenty here --
25 is that the, I mean, this is a common sense provision.

1 It is now used in 35 states across the country. It is
2 a decision that is not universally popular. It is,
3 there were plenty of people who do not like the idea of
4 voting by mail at all, there are plenty of people who
5 do not like the idea -- who's never liked the idea --
6 of a grace period. Kansas experimented with that for
7 eight years. They determined that this was not -- the
8 legislature determined that that was not the route they
9 wanted to go. And for there to be a one-way ratchet is
10 simply not constitutionally correct. And I know the
11 plaintiffs have denied that, but the fact is we've gone
12 150 years without this. All of a sudden we have it and
13 now that they reverted back to -- the legislature
14 reverted back to the prior methodology they're claiming
15 a constitutional violation. And we simply think that
16 that's legally incorrect.

17 And the final point I would make, Your Honor, is
18 they have also alleged that a three-day grace period is
19 insufficient. So they actually want a seven-day grace
20 period. And that clearly is beyond anything this Court
21 can order and I would refer to The Court to the Montoya
22 v. State case from 2005. I mean, that's a clear
23 legislative decision and that would not be something
24 within The Court's authority.

25 THE COURT: Thank you.

1 MR. SCHLOZMAN: So thank you very much,
2 Your Honor.

3 THE COURT: Will you tell me your name
4 again?

5 MS. FROST: Absolutely. Good morning, Your
6 Honor, my name's Elizabeth Frost. And I'm here on
7 behalf of the plaintiffs, who are comprised of three
8 individual Kansas voters and three Kansas-based
9 organizations that facilitate the right to vote in
10 civil rights for Kansans across the State.

11 I have a lot to say in response to what the
12 Secretary of State's counsel said. But before I jump
13 into that I want to start by reading something from a
14 case that I think -- it's really important to remember
15 why we're here. We're here to talk about protecting
16 democracy and the fundamental right to vote. Nothing
17 is more essential to a true democracy than the right to
18 vote. And one of the ways that our society fosters and
19 guarantees voting rights is by absentee voting. That
20 is, in fact, often the only way for many people to
21 vote. Protecting the franchise of such citizens and
22 enforcing effective rules to do so should be no less an
23 essential obligation of the government than securing
24 voting in person. In fact, the law makes no
25 distinction. All voters, regardless of whether they

1 submit their ballots in person or by mail, have a right
2 to have their votes counted and their voices heard.
3 This case presents those principles. Now that's a
4 quote from a Judge in the Southern District of New York
5 actually applying the Federal Constitution, which we
6 know implies a more forgiving standard to state laws
7 because of issues of federalism and where federal
8 courts sit in judgment of state voting laws. But it
9 could be said about here.

10 SB 4 violates not only these principles but
11 multiple provisions of the Kansas Constitution under
12 binding Kansas Supreme Court precedent. It is the role
13 of the judiciary to decide whether Kansas laws violate
14 the Kansas Constitution. That was, in fact, the
15 holding of the Kansas Supreme Court in the *League of*
16 *Women Voters* case. Voting laws passed by the
17 legislature must comply with equal protection, they
18 must comply with due process. And if they are not a
19 proper proof under Article 5 Section 4, they cannot
20 violate the express fundamental right to vote; which as
21 the Kansas Supreme Court said, is an expressly
22 enumerated right and therefore provides the strongest
23 possible protections.

24 Before I jump into each of those claims, I also
25 want to underscore that at times the secretary's

1 counsel seemed to be confusing the various tests that
2 come out of *League of Women Voters*. There are actually
3 four different tests in that case. And it's really,
4 really important that we keep them separate, because I
5 think when you muddy the waters things get confused
6 very quickly. Those tests are the proper proofs test,
7 which the court applied to the right to vote claim for
8 the signature law that was at issue in that case. The,
9 for lack of better word, not proper proofs fundamental
10 right to vote test, which the court explained would
11 apply to a law that substantially burdened the right to
12 vote -- because the court was very clear it was not
13 overruling decades of precedent finding that the right
14 to vote was in fact a fundamental right expressly
15 enumerated and protected by the Kansas Constitution.
16 The court also announced an equal protection test that
17 applies specifically to laws that arbitrarily
18 disenfranchise voters; that is why the court did not
19 affirm the dismissal of all of plaintiff's challenges
20 to the signature verification law. And it also talked
21 about how you should apply due process to those kinds
22 of laws. That case is, of course, binding precedent.
23 And this Court must apply it.

24 I'll start with the proper proofs, because that
25 was where the secretary's counsel started, so I'll

1 follow the same path. The Kansas Supreme Court in
2 *League of Women Voters* said that any law, even a proper
3 proof that unreasonably burdens the right to vote of
4 suffrage, is an extra constitutional qualification.
5 That's at 801 of that decision.

6 The language in the Constitution about absentee
7 ballots: Which The Court is right to note, because I
8 think it is reflective of the fact that Kansas has an
9 unusually long history of recognizing how important
10 absentee voting is to the right to vote in general. It
11 allowed soldiers during the Civil War to vote absentee,
12 it was way ahead of a lot of other states in terms of
13 allowing the rest of the electorate to do it. And I
14 will say also, the definition the Secretary of State
15 points to about -- first I heard military voters, then
16 I heard something else. But it's not in the
17 Constitution. And obviously the idea that a statute
18 could define what the term means in the Constitution
19 doesn't make a whole lot of sense. It is true that the
20 language was adopted around the same time as Kansas was
21 contemplating being in compliance with the Voting
22 Rights Act. But I want to be clear, Kansas didn't have
23 to adopt that language into its Constitution, because
24 of course under the supremacy clause the Voting Rights
25 Act would apply anyway. And most state constitutions

1 do not include any reference to absentee voting.

2 Kansas is a real outlier in the space. And I think
3 that it is important when you look at, sort of, the
4 broader history of how Kansas has treated voting and
5 absentee voting in general, that's quite important.

6 I think I heard the secretary's counsel say now
7 that SB 4 is a proper proofs. And then I had a little
8 bit of trouble following why. But I think if we go
9 back again to what the Kansas Supreme Court said: The
10 Kansas Supreme Court actually said what a proper proof
11 is. It is a law that is meant to ascertain who is a
12 qualified elector under Article 5. That's at 801 of
13 that decision. A qualified elector is laid out in that
14 part of the Constitution. It's very clear. It
15 includes only three things: U.S. citizen, 18 plus, and
16 resides in the area in which they hope to vote. There
17 is nothing about SB 4 that addresses any of these
18 qualifications.

19 What the Secretary of State's counsel described as
20 making sure that the ballot was properly mailed is
21 obviously none of these things, and I believe the
22 State's counsel just conceded that ballots that are
23 postmarked we know are proper. So that also doesn't
24 really make sense when you look at what the legislature
25 was doing here, is you actually had a law that had a

1 mechanism for identifying when ballots were properly
2 mailed and then you got rid of it. The idea that you
3 could point to this provision in the Constitution --
4 and even more importantly what the Kansas Supreme Court
5 has said about it -- and allow the legislature to
6 knowingly toss ballots that are postmarked before
7 election day; in the Douglas County case well before
8 election day. It's actually not correct that we don't
9 know when those were postmarked. We know that they
10 were postmarked, by the latest, by July 31st and did
11 not arrive at the Douglas County Courthouse until
12 sometime after I believe it would have been August 9th.
13 We don't know how far before July 31st they might have
14 been postmarked, but we know they were postmarked in
15 July. And it's also correct that we don't know how far
16 after August 9th they arrived, just that they arrived
17 after August 9th.

18 THE COURT: So I was correct that there
19 were about 200 ballots in that primary, Douglas County
20 voters that would -- at least, likely otherwise,
21 they're proper voters. And their mail ballots were
22 mailed in July, and then they were received after the
23 three-day deadline and were not counted.

24 MS. FROST: Yes, Your Honor is absolutely
25 correct. And, you know, Douglas County was properly

1 outraged about that. And I think it's indicative of
2 how much worse the mail system is getting in Kansas.
3 Because while in prior elections, you know, you had not
4 so many ballots arriving even in the three days -- and
5 I can tell you about a third of the states at this
6 point have what we call extended receipt deadlines.
7 And in most of those states what they will tell you is
8 that actually -- the states have tended to make
9 decisions about where to put those things based on the
10 particular geography of their state and that, you know,
11 what's going on in the State and how their election
12 system interacts with vote by mail, right?

13 So for example in states like Washington, which
14 has an all-mail election, they have a much longer
15 deadline. In states like Alaska they have a much
16 longer deadline. Kansas's three days is very modest:
17 Alaska is ten days because there's a lot of communities
18 you can't reach except by float plane and they don't
19 fly most of the time. So, you know, in the grand
20 scheme of things Kansas's three day is very modest. I
21 think it served its purpose for quite a while, and the
22 mail has gotten worse since then. So I think we're
23 starting to see the wheels come off. And then, of
24 course, legislature has now withdrawn that, frankly,
25 protection that they enacted because they recognized

1 that there was a fundamental crisis when it came to the
2 right to vote because of mail issues.

3 The Secretary of State's argument that impact of a
4 law doesn't matter under the Kansas Equal Protection
5 Clause is also at odds with the Kansas Supreme Court's
6 opinion in *League of Women Voters*; which that opinion
7 -- which said if you have election law it needs to
8 comply with equal protection. And the court announced
9 a test for that. And it is an impacts test. So it
10 absolutely does matter if certain voters are more
11 likely to have the ballots rejected. That's an equal
12 protection violation on it's own.

13 THE COURT: Was that a facial challenge as
14 well?

15 MS. FROST: It was a facial challenge. And
16 this is actually something that I think is really
17 interesting: It was a facial challenge and the Supreme
18 Court did not apply the no set of circumstances test.
19 So the idea that the Kansas Supreme Court would have
20 created this test but leave out this no set of -- any
21 set of circumstances is frankly, I think, not credible.
22 The other thing about the no set of circumstances test,
23 of course, is that the federal courts have explained it
24 doesn't mean what a lot of litigants think it means.
25 The secretary's argument has been rejected. The Kansas

1 Supreme Court has chosen not to apply it, including in
2 the *League of Women Voters* case which is obviously the
3 most recent and most on point precedent that we have
4 from the Kansas Supreme Court in this area.

5 I think another thing that we should -- when you
6 think about the *League of Women Voters* case that's
7 really important is that we know that arbitrary impact
8 matters. Because the court remanded that case for the
9 plaintiffs to be able to prove on the evidence that the
10 signature verification requirement for absentee ballots
11 or for advance ballots could violate the Kansas
12 Constitution's equal protection clause, you know, if it
13 did have an arbitrary impact. And I think it's notable
14 -- and it's something that the Secretary of State has
15 emphasized a lot in that case -- that thus far the
16 signature verification requirement has disenfranchised
17 hundreds of voters. In this case, of course, we're
18 talking about a law that will disenfranchise thousands.
19 And the fact that the rejection and the
20 disenfranchisement will be due to circumstances outside
21 of voter's control is also an equal protection
22 violation and matters very much under that binding
23 precedent from the Kansas Supreme Court as well.

24 THE COURT: How do you address the
25 secretary's argument that it's not outside their

1 control? They could drive to the polls, they could
2 have someone else take it to the poll, their ballot,
3 and drop it off. How do you address that?

4 MS. FROST: So first of all a lot of voters
5 don't have access to transportation. And Kansas law
6 actually recognizes this by having a permanent advance
7 voting list and by allowing people to vote absentee.
8 Somebody who's out-of-state can't drive to the polls.
9 And the equal protection cases repeatedly stress that
10 if Kansas is going to induce voters to vote a certain
11 way -- and in this case they induce them to vote by
12 absentee mail and say they can return it by mail --
13 they can't treat those ballots arbitrarily and reject
14 them. I also think that what's relevant to this is
15 something that actually I would like to use a visual
16 aid for. I know we were first talking about the motion
17 to dismiss, but because the secretary's counsel talked
18 a little bit about the evidence I would like to respond
19 a little bit to that.

20 THE COURT: Before you do that, what's the
21 site for that claim that if the State's going to induce
22 the mail ballot that they have to, you know, make it
23 one that doesn't create an issue?

24 MS. FROST: Yeah, sure there's a lot of
25 them and they're in our briefs so I apologize. One of

1 them is *Obama v. Husted* from the 6th Circuit, again
2 applying the more strict, you know, federal rules. And
3 I apologize because --

4 THE COURT: When you say it's in your brief
5 is it on the injunction motion or the motion to
6 dismiss?

7 MS. FROST: I'm almost certain it's in
8 both. And actually when I sit down through I can go
9 and make sure I get those sites for you -- all the
10 sites for you that we have.

11 THE COURT: I found it on page 17 of
12 your -- the injunction motion. I'm sure it's in the
13 other one as well, though. But thank you.

14 MS. FROST: Okay, great.

15 May I approach, Your Honor.

16 THE COURT: You may.

17 MS. FROST: And I apologize, I'm going to
18 have to step away from the lectern. But I will try to
19 be loud.

20 THE COURT: And while you're doing that, is
21 there any objection if The Court makes this part of the
22 record so that any visual aids that a reviewing
23 appellate court, if needed, could see what I was
24 looking at? Is there any objection to that, counsel?

25 MR. SCHLOZMAN: So Your Honor, are you

1 asking in the context of the TI motion or the motion to
2 dismiss? I mean, I guess we would respectfully object
3 on the motion to dismiss part to the extent it's
4 bringing in data that's outside of the four corners of
5 the petition. We have no objection in terms of the TI
6 motion, though.

7 THE COURT: Okay. So for the TI motion
8 this can -- what I like to do when I receive these kind
9 of visual aids is just make them a part of the
10 electronic records so that a reviewing court can see
11 what I was looking at. And so there's no objection to
12 making that part of the docket?

13 MR. SCHLOZMAN: Correct.

14 THE COURT: But I understand your objection
15 about the motion to dismiss and not considering facts
16 with that.

17 So I will plan to do that. But go-ahead

18 MS. FROST: Okay, wonderful.

19 So what we have over here is a -- the Kansas
20 advance mail ballot timeline. And as Your Honor
21 recognized, Kansas does not actually allow election
22 officials to mail out ballots -- other than UOCAVA,
23 which of course would be a hundred and 50 percent
24 earlier under federal law -- until 20 days before the
25 election. I wasn't totally clear on what the

1 secretary's counsel was saying. To the extent the
2 secretary's counsel was saying that the counties
3 uniformly violate that law, there's no evidence of
4 that. And the Secretary of State obviously had
5 opportunity to present that. And we don't have any
6 reason to believe that's actually true; in fact out of
7 voters' experience has been the opposite as shown by
8 the evidence in there. So I think we do have to
9 actually assume that county officials are, in fact,
10 complying with the Kansas law which does not allow them
11 to mail out ballots 20 days before an election.

12 So what I want to do with this timeline is show --
13 we heard repeatedly and we see it in the briefs and we
14 heard it repeatedly in the argument that there's no big
15 deal here because all -- Kansas voters just need to
16 adapt. Just need to adapt. I will, sort of, point out
17 that the needing to adapt I think is itself a
18 concession that individual voters have an injury.
19 Because as one court pointed out in the *Nielsen* case in
20 the Northern District of Florida, having to vote at
21 sometime other than the time you want to vote actually
22 is an injury. And there's a lot of good reasons why a
23 lot of voters don't want to vote 20 days ahead of an
24 election. In fact, the secretary's counsel pointed it
25 right out; we've had a lot of recent elections where

1 there's been late breaking news about candidates. And
2 so voters do have a real interest in getting all the
3 information they possibly can before they vote. And
4 you would think Kansas has a real interest in voters
5 having that information so that their vote is informed.

6 But let's start with: The secretary's brief says
7 effectively -- sorry, I'll try not to run into that --
8 that if a voter knows that it may take a week to ten
9 days for their mail ballot to reach the county
10 elections office, they can just adapt. So let's talk
11 about what that actually looks like. And let's talk
12 start with the absolute best case scenario for a voter.
13 Say the voter is on the advanced ballots -- permanent
14 ballot list, which by the way not every Kansas voter
15 can get on, which is another, sort of, restrictive
16 feature of Kansas's vote by mail regime. And let's say
17 that their election official is totally on it, no one's
18 sick that day, like, there was no printing errors --
19 which, you know, of course happens in elections. And
20 the ballot does in fact go out at the 20-day mark.

21 And let's start with the seven days, the week, to
22 see what that, kind of, looks like for a voter. So we
23 have -- and I'll say, like, I'll count even the 20th.
24 Let's say they get it in the mail early enough that the
25 postal service picks it up on the 20th. So we've got

1 1, 2, 3, 4 -- well it's not going to move on a Sunday
2 -- 5, 6, 7. So now the voter has the ballot 13 days
3 before the cutoff, before election day. Let's give the
4 voter 24 hours to consider their choices and let's say
5 they get it back in the mail on Friday the 11th. So we
6 have 1, 2, 3, 4, 5, 6, 7. So here the voters -- great
7 news for this voter, their ballot got there on time.
8 But we can see here it got there with only two mail
9 days to spare, because there's this intervening Sunday.

10 So if anything went wrong or if, say, they needed
11 more than -- let's say that they're looking at a city
12 council election and they feel like they don't know
13 enough about the candidate so they wanted a little more
14 than 24 hours to figure out this? Then they're
15 suddenly getting into, sort of, hairy territory. So
16 then what happens if we then have the ten days? Let's
17 count it out. And, again, we're talking about the best
18 case scenario: The voter is on the advance ballot --
19 permanent ballot list, it goes out 20 days before. And
20 here we go: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. It gets
21 here on a Saturday, so we'll give them their 24 hours
22 to vote on a Sunday so we don't even lose a mail day
23 there. Gets back in the mail Monday, gets picked up 1,
24 2, 3, 4, 5, 6, 7 -- uh oh. Well they're out of time.

25 Now I readily admit that the 7 to 10 days -- you

1 know, for a voter sometimes it will be five going out,
2 sometimes it will even be three if they're in an urban
3 center and they're not too away from their election
4 official. But, you know, this week to 10 days seems to
5 be what everyone thinks is a relatively reasonable
6 thing and something that voters should be keeping in
7 mind and using that to adapt. Well as we can see even
8 in the best case scenario for a voter they can't
9 actually adapt within that framework and get their
10 ballot in time. In fact, the plaintiff Bob Mikesic,
11 was one of these best case scenario voters. He is on
12 the advance ballot list. And we know that because his
13 ballot that came to him is in evidence at Exhibit 7.
14 We know that, in fact, his county was totally on top of
15 it. They mailed it out 20 days before the election.
16 Bob didn't get his ballot until this first pink day,
17 the day after the election. His wife's ballot,
18 however, got there just fine. You know, a great
19 example of arbitrary treatment where voters simply
20 cannot predict.

21 Now the scenarios I've talked about until now have
22 been where voters were either on the permanent advance
23 voting list or request their ballots well before the
24 election and who's election officials send them out on
25 day one. But of course, most voters are not on the

1 permanent advance voting list. A lot of voters don't
2 know that they're going to need an advance ballots
3 until closer to the election. Frankly, a lot of voters
4 don't even know there's an election until closer to the
5 election. And Kansas allows voters to request mail
6 ballots up until seven days before the election. For
7 the voter who does what Kansas law invites them to do
8 and requests that ballot on the seventh day, under the
9 Secretary of State's own public statements and
10 directions to voters there's just no way they're
11 getting that ballot back and forth in time. Even for
12 the voter who requests it another week before the
13 deadline -- so we're two weeks out, 14 days here --
14 it's going to have some real problems. If you take the
15 Secretary of State's seven days as a rule of thumb,
16 well they're not going to make it either, right?
17 Because immediately you're going to run out of that
18 time.

19 Another thing that can delay getting the absentee
20 ballot is that unless you're on the advance -- the
21 permanent advance ballot list, Kansas does signature
22 verifications of advance ballot applications. So they
23 look at your ballot and decide that the signatures
24 don't match that could be another couple days until
25 that gets resolved, or more. And if we look at the

1 evidence from the 2024 Douglas primary, we know that
2 for nearly a quarter of the advance voters -- this
3 23 percent -- seven days was likely not enough.
4 23 percent of ballots took seven days or longer to
5 travel one way. For 12 percent of these voters, seven
6 days definitely wasn't enough; 12 percent took 10 days
7 or longer. And for five percent took 15 days or
8 longer. Those voters are just not going to make it. I
9 mean, there's just no way with the timeline that we're
10 dealing with. As Your Honor has pointed out, more than
11 200 ballots in Douglas County arrived after the grace
12 period despite having been sent by at least day six
13 here. Because what we know about them is that they
14 were postmarked in July and then the election fell here
15 and they didn't arrive until here because the grace
16 period was still in place.

17 Now that election was a small election and it was
18 limited to one urban county. We know a few things that
19 I think should color our view going forward as we
20 anticipate the likely broader impacts of SB 4 across
21 the state and in a bigger election. First: Urban
22 counties have faster mail than rural counties. We know
23 that. And second: Mail delivery has gotten even worse
24 since the 2024 Douglas election. Even so, we know that
25 every election within that better mail universe we had

1 thousands and thousands of ballots -- or we had
2 thousands of ballots -- sorry, that arrived during the
3 grace period and were only saved but for the grace of
4 the grace period.

5 Another thing I think we need to think about when
6 we're thinking about these statistics and those
7 thousands of numbers is that they cannot and they do
8 not reflect the voters who got their ballot and they
9 decided it was just too late to send it back, either
10 because they heard the secretary saying you need seven
11 days and they were like "I don't have seven days." Or
12 like Mr. Mikesic, who didn't get his ballot until after
13 election day. Or our college voter Ben Simon, who was
14 out of state and didn't get his ballot in time to send
15 it back. So there's going to be a number of voters
16 with some attrition here. So we should assume that all
17 of the numbers we've seen so far of thousands of voters
18 being disenfranchised -- sorry, thousands of voters who
19 would have been disenfranchised if the grace period did
20 not exist is going to be a conservative number.

21 And if we were to say, you know, take these
22 percentages from this -- again, not a lot of voters.
23 In a small election like that, the voters tend to be
24 actually more motivated to vote -- and in a urban
25 county, and try to imagine what it would look like in a

1 statewide election like the one Kansas is going to have
2 in November 2026. We have -- we can do a little bit of
3 math. So in 2022, a little over 130,000 Kansas voters
4 participated in that election using an advance ballot.
5 And I picked 2022 because I think it's probably
6 Kansas's most recent large election that has similar
7 characteristics to the one we're going to see later
8 this year. So if we see anything like what we saw in
9 Douglas County -- if we see 23 percent of ballots
10 taking seven days or longer, 12 percent ten days or
11 longer, 5 percent 15 days or longer -- we are talking
12 about roughly 30,000 advance ballots taking seven days
13 or longer to travel one way, over 15,000 taking ten
14 days or longer and about 6,500 to be taking 15 days or
15 longer. Now some of those ballots may arrive. But,
16 like, the ones that do it's just going to be dumb luck.

17 So those are, I think, the -- this is, I think,
18 what the evidence shows. When you hear the Secretary
19 of State say "Just adapt" I think you have to ask how
20 exactly are voters supposed to adapt? And I think the
21 reality is is Kansas has a very, very weak situation.
22 It has some of the absolute worst mail in the country,
23 and with SB 4 it now has the narrowest window in which
24 to participate in elections by advance voting, despite
25 the fact that it's inviting voters to engage in advance

1 voting, has made the choice to offer advance voting and
2 even recognizes advance voting in its Constitution.

3 THE COURT: Would this be a good time to
4 take a short break?

5 MS. FROST: Sure.

6 THE COURT: And I -- my plan is that
7 obviously we'll roll into the motion for temporary
8 injunction at some point and then you'll be going first
9 on that. So that's why I think the facts are helpful
10 for that. But we'll take about a ten-minute break, if
11 that works for you all, and come back.

12 MS. FROST: Great. Thank you very much.

13 (Recess taken)

14 THE COURT: We're back on the record after
15 a ten-minute break with all the parties present that
16 were here previously. So counsel, Ms. Frost, whenever
17 you're ready you may proceed.

18 MS. FROST: Thank you, Your Honor. And I
19 will try and move through this quickly, I know. It's
20 been a long morning.

21 I want to step back to the equal protection test
22 announced by the Kansas Supreme Court in *League of*
23 *Women Voters*. Just like the no set of circumstances
24 was not a part of that test that it applied to a facial
25 challenge, intentional discrimination is not a part of

1 that test. Nowhere in *League of Women Voters* for any
2 of these claims under equal protection, due process or
3 the right to vote did the court indicate at all that
4 intentional discrimination should be a part of the
5 test. And that is something the secretary argued to
6 that court as well. It's not surprising it's not a
7 part of the test because not even federal voting cases
8 that apply the federal equal protection clause apply
9 that to voting cases. For example, *Bush v. Gore* did
10 not require an intentional discrimination test. *Bush*
11 *v. Gore*, by the way, is the only equal protection
12 voting case that the Supreme Court has issued. The
13 secretary is not wrong that some federal courts have
14 applied *Anderson-Burdick* to equal protection cases in
15 the voting context, but none of them have been the
16 United States Supreme Court. So I think it does remain
17 to be seen whether that test is even valid for those
18 types of cases in the federal courts. But it's
19 certainly not valid in Kansas courts.

20 The Kansas Supreme Court did reject that test for
21 a couple -- we have to come to that conclusion for a
22 couple reasons. Number one: The Court of Appeals
23 explicitly rejected it. And in doing it it explained
24 that in *Hodes* the Kansas Supreme Court was clear that
25 these types of balancing burden tests are not great

1 tests for things that involve fundamental rights that
2 are protected by the Kansas Constitution. Kansas
3 courts have resisted this, kind of, balancing -- which
4 can often end up being outcome determinative, frankly,
5 by which way you look at the evidence -- in the space
6 of fundamental rights. When the Kansas Supreme Court
7 ruled in that case, after the Kansas Court of Appeals,
8 it said it was affirming in part and reversing in part.
9 And it reversed the district court's decision to apply
10 Anderson-Burdick and it also applied tests that were
11 obviously not Anderson-Burdick. So think it's a fair
12 assumption to make that the Kansas Supreme Court did,
13 in fact, reject the Anderson-Burdick test.

14 Even if intentional discrimination were an element
15 of equal protection -- and it is basically nowhere when
16 voting is involved -- the evidence here is overwhelming
17 that the legislature knew this would disenfranchise
18 thousands of specific types of voters. Those
19 allegations are in our complaint. Whether or not they
20 used the term intentional discrimination doesn't
21 matter. Under Kansas's very liberal pleading standard
22 at motion to dismiss, The Court actually can't dismiss
23 any of our claims unless there's no way that any of
24 these allegations could make a claim.

25 THE COURT: Does that -- I think the

1 secretary refers to *Rivera v. Schwab* and says we need
2 to apply this federal case law because it's a Section 2
3 challenge. What's your response to that?

4 MS. FROST: So *Rivera* was obviously decided
5 before *League of Women Voters*. And it involved a
6 different kind of allegation; it involved a vote
7 dilution allegation and a political gerrymandering
8 allegation in redistricting. Even if you looked at the
9 federal courts, different kinds of tests are applied to
10 gerrymandering and redistricting cases than voting
11 rights cases. They just are not looked at in the same
12 way. And I think you can't assume that *Rivera* applies
13 in the place of the language explicitly used by the
14 Kansas Supreme Court as to how courts are supposed to
15 treat voting challenges like this one, where the
16 challenge is that the way that Kansas is effectively
17 arbitrarily discarding ballots of lawful voters under
18 its own rules. And in fact *Rivera* itself made the
19 point -- and I think we mentioned this in our response
20 to the TI, I believe -- that that was not a case that
21 involved, like, a situation where voters votes weren't
22 being counted or an actual violation of the fundamental
23 right.

24 The secretary effectively consistently asks that
25 this Court ignore what the Supreme Court actually said

1 about how these cases are to be treated in favor of
2 instead some federal court or federal case application.
3 Which federal case is not totally clear. *Bush v. Gore*
4 didn't apply *Anderson-Burdick*, as I mentioned, despite
5 being the only equal protection case that the Supreme
6 Court has considered; and that was post
7 *Anderson-Burdick*. *Brnovich*, as the secretary's counsel
8 conceded, was a Voting Rights Act case; I know that
9 case very well because I litigated it in Arizona. It
10 also, by the way, was decided after a trial, so it's
11 not a great case to point to either in the equal
12 protection context, the constitutional context at all,
13 or on a motion to dismiss.

14 The characterization of the United States Supreme
15 Court's decision in *Crawford* is just wrong. First of
16 all: There's no majority opinion in that case, it was a
17 plurality. And if you read *Crawford* and all of the
18 variety of opinions that came out of it, there's
19 basically a site that will support any view of how this
20 is supposed to be done. The court was also extremely
21 clear that *Crawford* was a failure of proof case. It
22 was decided on a motion for summary judgment. Here our
23 amended complaint has an enormous amount of fact cited
24 in it; and of course when we get to the TI we have an
25 enormous amount of evidence. And so it's simply a

1 different case entirely.

2 Okay. Kansas Supreme Court in *League of Women*
3 *Voters* was also clear it wasn't overruling cases that
4 said the right to vote is a fundamental right. I have
5 to tell you I'm quite surprised that the Kansas chief
6 elective -- elections official doesn't view the right
7 to vote as fundamental. That's unfortunate, but the
8 Kansas Supreme Court is clear that it does not agree.
9 We don't have a declaration from the Secretary of State
10 saying that the things that he formally said about
11 voting should be disregarded or were untrue or were
12 hyperbole. In fact, we have no evidence at all from
13 the secretary's office. I think that repeatedly we've
14 heard stuff -- we've seen stuff in the briefing and
15 heard stuff in the argument that are effectively
16 factual assertions that are not appropriately
17 considered at the motion to dismiss stage where The
18 Court has to take the plaintiff's allegations as true;
19 and are obviously also not properly considered at the
20 TI stage because the secretary didn't submit any
21 evidence at all in support of his opposition to the TI.
22 So it's just simply the ipse dixit of counsel.

23 I think it's also striking that the Secretary of
24 State's attorney effectively conceded that with Senate
25 Bill 4, mail is not a reliable way to vote unless you

1 alter your behavior. But as we've seen, it's clear
2 that in a lot of cases the idea that a voter could
3 alter their behavior is a complete fantasy totally
4 disconnected from what's from happening on the ground.

5 I want to talk briefly about due process. The
6 right to vote is a liberty interest. This is clearly
7 the holding of the Kansas Supreme Court, otherwise the
8 remand of that case to the plaintiffs to prove their
9 claims on the evidence doesn't make sense. The
10 question of what's a liberty interest is a legal
11 question; it's not an evidentiary question. And I have
12 right here the Secretary of State's briefing before the
13 Kansas Supreme Court in that case; it's his
14 supplemental brief filed on July 24th, 2023, with the
15 Supreme Court of Kansas. And I'm reading from the
16 bottom of page 23 where the secretary admits that under
17 Kansas law motorists have a due process interest in not
18 being deprived of their drivers license. And so then
19 the secretary writes, in sum while voting interests are
20 important -- although apparently not as important as
21 maintaining your driver's license -- they do not
22 implicate the due process clause. For multiple reasons
23 therefore, plaintiff's due process claim was properly
24 dismissed by the District Court. That dismissal was
25 reversed by the Kansas Supreme Court. Its remand makes

1 no sense unless it found that the right to vote is a
2 liberty interest, which I think it clearly is.

3 THE COURT: To back up just a -- to the
4 *Rivera v. Schwab* question about the test there: If
5 voting is not a fundamental right under *League of Women*
6 *Voters* then does that change your answer as far as what
7 the test is for analyzing the equal protection?

8 MS. FROST: So -- and actually the outcome
9 is the same. And the reason is is because even if
10 voting is not a fundamental right under the Kansas
11 Constitution -- and again I think the Kansas Supreme
12 Court would be surprised to hear that given the lengths
13 they went to to make clear then they were not reversing
14 any of the decisions that found that the right to vote
15 is a fundamental right. But even so, when you're
16 looking at the due process analysis it doesn't just
17 apply to fundamental rights under the Constitution,
18 right? It applies to any rights that have, sort of,
19 come in to being whether by statute, by contract. And
20 Kansas citizens have a right to vote absentee. And so
21 even just on the statutory base alone, the first
22 element of the equal protection test is met.

23 So the last thing I want to say is this is not a
24 one-way ratchet. To be clear, while we in our amended
25 petition state that we believe the evidence would

1 support a much longer grace period, the TI only
2 requests that The Court issue a prohibitory injunction
3 to maintain the status quo that's been in place in
4 Kansas for nearly a decade now and require the election
5 officials continue to count ballots that are postmarked
6 before election day and arrive in the three days after
7 it. We are also not arguing that the legislature can
8 never change the law. This situation is quite, quite
9 unique and I think every situation that presents itself
10 it's going to be an evidentiary question. And I've not
11 seen a situation like this come up very often.

12 So the legislature actually recognized a
13 fundamental threat to voting rights in 2017 and moved
14 to protect against it. And that threat was so
15 existential and so, like, uncontroversial that it was
16 almost unanimous. Only one person in the entire Kansas
17 Legislature voted against it. The grace period was
18 supported by then Secretary of State Kris Koback and it
19 was just not a controversial thing at all. And it very
20 quickly proved the legislature was right; this was an
21 existential threat and the grace period was necessary
22 to protect the right to vote of Kansas voters. We saw
23 that immediately -- you know, we saw it particularly in
24 2020 when we had 32,000 ballots. But even in elections
25 outside the pandemic we're talking thousands of ballots

1 arriving during that period. In 2025, the legislature
2 repealed that protection not because reality changed,
3 not because the fundamental, existential threat to
4 voting rights had disappeared -- in fact, if anything
5 it had got worse -- but for reasons that were
6 completely illogical or debunked by the Secretary of
7 State himself.

8 So for example, when you look at the legislative
9 record, the proponents pointed to conspiracy theories
10 that elections were stolen or flipped by ballots
11 arriving after election day. The secretary's office
12 actually said that's not true and that most of the
13 change that you see as they're counting ballots is
14 actually from ballots that came in before election day.
15 So even that fantasy -- I mean, they're obviously not
16 being stolen because they're counting ballots cast by
17 voters, but even the idea that the reason you were
18 seeing that shift was because of the grace day ballots
19 was wrong. Representative Proctor, the House Elections
20 Committee Chair who sponsored SB 4, initially argued --
21 and this argument is very strange -- that rural voters
22 were disenfranchised by the grace period because their
23 ballots arrived without postmarks. But that's not a
24 reason to eliminate a rule that counts ballots that
25 have postmarks, that's a reason to go to postal service

1 and try and get them better at postmarking. At other
2 times, however, Representative Proctor admitted that
3 his true goal was to chip away at advance voting. That
4 obviously infringes on the fundamental right to vote.

5 I submit that the -- in this unusual case, the
6 legislative recognition of the harm is itself evident
7 that the strict election deadline imposes too high a
8 risk of arbitrary infringement to survive
9 constitutional scrutiny. And I think -- imagine, for
10 example, a state had a literacy test and they recognize
11 that it was discriminatory and they got rid of it. And
12 then for political reasons or because the people were
13 upset they got rid of it, they reversed themselves
14 several years later. A court would not look at that
15 and go, "Oh, well legislatures can just do what they
16 want." The fact that the legislature initially
17 recognized the risk and acted to solve it, right? Yeah
18 it was a great thing the legislature did. But if it's
19 going to decide to now impose the risk, it's doing it
20 knowingly. And I think there needs to be some showing
21 -- if there's any rule taken out of this in these very
22 unusual circumstances -- you would expect some showing
23 by the legislature that either something had changed so
24 the risk is now what it is or something justifiable
25 other than conspiracy theories and "We don't want

1 people to be able to reliably vote absentee."

2 THE COURT: Was the mail in vote for
3 Kansans that has been around since the Civil War in one
4 form or another, was it unconstitutional until 2017?

5 MS. FROST: So I think we can say this: It
6 probably was unconstitutional in 2017, because the
7 legislature looked at what was going on and decided
8 that they really needed to do something about this.
9 Was it constitutional in 1990 or, you know, 2000? I
10 can't tell you because I don't have evidence about what
11 was going on with the mail at that time. You know, I
12 grew up in the '70s and '80s. I remember I grew up in
13 Seattle, being able to drop something in the mail on
14 one side of Seattle and it was on the other side of
15 Seattle the next day. I don't think that is many
16 people's experience of the postal service now. And so
17 it's an evidentiary question, right? Like, is this
18 something that is arbitrarily disenfranchising voters?
19 So no we're not saying that it's been unconstitutional,
20 you know, for all of time. But we're saying that in
21 this circumstance the Kansas Supreme Court has laid out
22 a test: Here is the evidence, here is what's happening.
23 And under that test, it's unconstitutional.

24 I think it's also important to emphasize that the
25 Secretary of State's office itself gave testimony to

1 the legislature that USPS deliveries have gotten slower
2 since 2017, that Kansas' comparatively short time
3 period in which ballots are mailed out and returned
4 makes returning ballots by election day comparatively
5 more difficult for Kansas voters than voters in other
6 states, and that Kansas voters temporarily living out
7 of state such as college students may have increased
8 difficulty in returning their advance by mail ballot by
9 election day without the use of overnight delivery. So
10 effectively all -- many, many, many of the things we're
11 arguing now we weren't the first ones to recognize it.
12 The Secretary of State recognized it. The Secretary of
13 State has been banging the table about this issue for
14 years now, including going directly to the postmaster
15 general and pointing out that, in fact, voters who
16 timely mail their ballots were being disenfranchised.

17 I have clearly stated a due process claim. The
18 process that we're arguing is due is the process that
19 Kansas used for, you know, almost ten years before
20 this. The clerks, as we allege in the amended
21 petition, actually opposed repeal of the three-day
22 grace period. So the idea that there's some, sort of,
23 administrative burden in imposing it I think just is
24 absolutely absent here. We already talked about the
25 right to vote. This clearly isn't a proper proofs, but

1 even if it were the Kansas Supreme Court made clear
2 that when you are disenfranchising large numbers of
3 voters, even if you could call it a proper proofs,
4 you're going to violate the right to vote in the Kansas
5 Constitution.

6 And one last thing I want to make about that point
7 because I think it's really important. The Kansas
8 Supreme Court says about that right to vote you don't
9 even do strict scrutiny. When you are disenfranchising
10 large numbers of voters -- or, when you're imposing a
11 severe burden on the right to vote, under the Kansas
12 Constitution it's, like, higher than strict scrutiny.
13 Period. So I think we've stated a claim under all four
14 of these theories and the motion to dismiss should be
15 denied. Thank you.

16 THE COURT: As far as the injunction
17 motion, are the plaintiffs ready to argue that?

18 MS. FROST: Sure. [Laughs]

19 THE COURT: If you want to take a
20 short break.

21 MS. FROST: No, it's fine. It's fine.
22 I'll just roll into it.

23 THE COURT: And obviously a lot of the
24 legal issues overlap, and so I allowed some flexibility
25 with argument.

1 MS. FROST: Yeah, I'll actually say I don't
2 plan to speak for more than a few minutes on the
3 temporary injunction motion. Because I think first of
4 all: You read our papers. And second: A lot of these
5 overlap, just instead of allegations it's evidence.

6 I think one of the most remarkable things about
7 the briefing for you is that on our side of the ledger
8 we have, frankly, overwhelming evidence about the
9 issues that Kansas voters are facing as a result of SB
10 4. And on the other side of the ledger there's
11 nothing. There's no exhibits, there's no evidence.
12 The Secretary of State at times says, well you should
13 ignore this or you should review this this way. But
14 there's no contrary evidence, period. I think it's
15 clear given the quantum of the evidence that we're
16 likely to succeed on every single one of our claims.
17 However, to enter the TI The Court needs to only find
18 that we're likely to succeed on one of them.

19 The harm to Kansas voters is obviously
20 irreparable. I think that's a pretty simple one.
21 Courts universally recognize that when your right to
22 vote -- when your ballot is rejected you can't go back
23 and do the election again. And of course in this
24 particular circumstance even if your ballot is
25 postmarked, you know, at the 19-day mark there the SB 4

1 will actually require to reject it. So there's no
2 process at all -- there's no mechanism for saying "Well
3 hey, wait a minute, I'm a lawful voter. I mailed it as
4 soon as I possibly could." So there's absolutely
5 nothing that can be done about the injury at all.

6 The public interest and the equities merge in
7 this kind of a case. I think that, you know, it's --
8 Number 1: The Secretary of State's cases that he says
9 say that when a state can't enforce it's election laws
10 it's irreparably harmed. In fact, what the cases say
11 is that that's not true when the law is likely
12 unconstitutional. And Kansas, I think in particular,
13 has a very, very long history of recognizing the
14 importance of ensuring that every voter is able to
15 vote. There is a -- just, I beg your indulgence, one
16 minute -- there's a Kansas case from the Kansas Supreme
17 Court in 1940, *Burke v. State Board of Canvassers*, that
18 really emphasized the public interest in Kansas of
19 ensuring that ballots are counted; including, in
20 particular, absentee ballots.

21 So with that, Your Honor, I will rest on our
22 papers and I very much appreciate your time this
23 morning. Thank you.

24 THE COURT: Thank you.

25 And Mr. Schlozman, if you -- obviously if you have

1 any reply argument on the motion to dismiss you can do
2 that as well since they, kind of, overlap there --

3 MR. SCHLOZMAN: Sure. Thank you.

4 Your Honor, just a couple things. I'll start with
5 the motion to dismiss. Let me remind you that this is
6 an issue over -- in terms of the postal delays, it's an
7 issue over which the State has no control. This is not
8 the State of Kansas operating the U.S. Postal Service.
9 So it's a little unusual here that we have the
10 plaintiffs arguing that the State is somehow
11 responsible constitutionally by -- because of deficits
12 by some third-party; in this case, the postal service.
13 And I don't know where a lot of the evidence -- seems
14 like there's been a lot of discussion of that Kansas is
15 the very worst in the country. Like, I don't know
16 where all that evidence is coming in.

17 I mean, the fact is -- again, I'm not here to
18 defend the U.S. Postal Service. But there is a lot of
19 rhetoric, there's a lot of embellishment. I know at
20 one point the secretary -- and I talked to him about
21 it, you know, I think there was a comment about
22 everything that goes, you know, in the eastern part of
23 the State goes into a black hole because it goes to
24 Memphis. I mean, that's clearly not true; it's
25 hyperbole. And so, I mean, the idea that all of this

1 is getting attributed to the secretary as if he has the
2 ultimate power to dictate to the legislature; again, I
3 just repeat he has no more power to dictate to them
4 than the plaintiffs do, who also testified on behalf of
5 this bill. The legislature is entitled to deference
6 under our Constitution, and the fact that the Secretary
7 of State may make a comments in jest about the -- and
8 even if he meant it, it just doesn't matter in terms of
9 for constitutional purposes.

10 There's a lot of discussion, it seems like, that
11 the plaintiffs are arguing about what I'll call
12 drive-by rulings. And what I mean by that, you know,
13 when the Supreme Court -- or any appellate court for
14 that matter -- doesn't explicitly address an issue.
15 "Well it wouldn't have made sense for them to decide
16 this because they, you know, wouldn't have remanded
17 it." This happens all the time in the standing
18 context; the U.S. Supreme Court has been extremely
19 clear that they do not operate on the basis of stand by
20 -- excuse me, of drive-by ruling. So the fact is the
21 Kansas Supreme Court did not address the liberty issue
22 at all in their opinion. The court did not address
23 explicitly, you know, in terms of what it meant. I
24 think we have sort of a limited -- I think it's
25 probably what amounts to, like, one paragraph or so --

1 in terms of what the equal protection standard is.

2 So I don't always envy you today. You know,
3 you've got a tough job in terms of, you know,
4 construing exactly what they meant. I mean, I don't --
5 when they talk about, oh there was one line that we
6 weren't reversing everything -- I mean, the way I hear
7 by friend on the other side talk you would think that
8 the *League of Women Voters 2* decision was a huge
9 victory for them. And I would beg to differ when you
10 read that opinion. I think that the court set out a
11 very deferential standard, one that accorded the State
12 a tremendous amount of latitude. And there's all
13 these, sort of, well implicitly and they must have done
14 this, and so the fact that they didn't address this,
15 you know, means that there must be, you know, that the
16 lower courts' hands are tied. And I would just
17 respectfully submit that's not the way lower courts
18 construes Supreme Court decisions. And that's -- the
19 U.S. Supreme Court has made that clear over and over.
20 And I think I've talked about that in some of the
21 standing discussion.

22 The plaintiffs claim that the -- that we conceded
23 somehow that the signature verification requirement had
24 disenfranchised hundreds of voters. I mean, I don't
25 want to bleed into another case over here, that's

1 obviously not true. If anything, our whole point there
2 was that this has been a wonderful test and applied,
3 you know, in a manner that has greatly minimized the
4 number of voters that are impacted. I would also just
5 point out, Your Honor: Look at page 67, you know, when
6 they talk of Dr. Herron's report, the initial report.
7 And before I do that it's important -- one thing --

8 THE COURT: Which exhibit is that?

9 MR. SCHLOZMAN: This is the original
10 Exhibit 1.

11 THE COURT: Okay.

12 MR. SCHLOZMAN: Dr. Herron -- Mr. Herron
13 whatever, I don't know if he's a doctor or not, I must
14 -- and again, with respect, and I've never seen a case
15 where -- the State was basically sandbagged here. I've
16 never seen a case where in a reply brief the plaintiffs
17 try to introduce a brand-new exhibit by an expert
18 witness. That is completely procedurally improper. We
19 will file a motion to strike that. I mean, he's got
20 new arguments in there and new analysis that is totally
21 improper. And I would respectfully suggest that The
22 Court not consider that supplemental affidavit. And
23 it's just -- I mean, that is not appropriate for this
24 kind of case. You're allowed to -- you know, when we
25 respond to the initial exhibit that's fine. But you

1 don't get introduce a whole new exhibit in a reply
2 brief.

3 But I would just look at Table 17 from that -- on
4 page 67 of Exhibit 1. And this is the round-trip. And
5 I talked about this in our response to the motion for a
6 temporary injunction. I mean, they've made it seem
7 like this is just a huge number of voters who have been
8 adversely impacted in the delay. But if you look at
9 that, I mean, this is, again, total days in transit.
10 So this is a round-trip. And, I mean, you look there
11 and it's -- I mean, looks like there was one voter who
12 took more than 13 days. So, I mean, this is -- you
13 know, they brought this chart up here when they talked
14 about, oh my goodness all of a sudden it's even in the
15 best case scenarios. We're talking about, I think, and
16 you look at this, a relatively small number of people
17 who have even been impacted by this. And again, under
18 the facial challenge test I think they have a much
19 greater burden.

20 Which is also why it sort of dovetails with I
21 know they said, well gee, you know, the Supreme Court
22 didn't set the -- didn't talk about the facial
23 challenge discussion. I mean, yes it's true. They did
24 not discuss it, they did not reject it, they did not
25 suggest that it did not apply. It was argued a little

1 bit in a lower court and the Supreme Court did not take
2 it up. It was not a major feature of the appellate
3 briefs. But it certainly is now. And I would suggest,
4 Your Honor, that there is no basis for concluding that
5 the Supreme Court has decided to eliminate the facial
6 test challenge -- facial challenge test in election law
7 jurisprudence. It's just, I mean, it's been used in
8 many different courts at the state and federal level.
9 And so I think it is equally applicable here.

10 Let me -- they also talked about the Court of
11 Appeals decision. Well Your Honor, it is true the
12 Court of Appeals talked about the *Hodes & Nauser* case.
13 Number 1: When the Supreme Court granted the petition
14 for review the Court of Appeals decision became null
15 and void, right? So that opinion is of zero
16 significance, zero weight for anything. It is as if it
17 was never issue. It's true that the Supreme Court
18 reversed in part and affirmed in part, but that's all
19 they were doing is we had a claim involving a false
20 misrepresentation of an election official statute. And
21 there they were affirming what the lower court -- what
22 the Court of Appeals had done. And so that's the -- I
23 mean, I don't think there's any suggestion that they
24 were embracing what the Court of Appeals had done on
25 anything involving *Hodes & Nauser*. In fact, part of

1 the problem with Judge Hill's decision in the Court of
2 Appeals is he took this very broad test and his entire
3 proof for it was a see citation; see *Hodes & Nauser*. I
4 mean, there was no analysis whatsoever, and that was
5 one of the points that we emphasized when we got to the
6 Supreme Court.

7 In terms of they made a comment about
8 Representative Proctor, and who is the chairman of the
9 House elections committee, and that he had said at one
10 point that his goal was a desire to chip away at
11 advance voting. I don't -- I mean, I'm not familiar
12 with all of the testimony back and forth. And
13 legislators say one thing and, you know, mean another.
14 I mean, that's the whole nature of -- that's why the
15 Supreme Court has said you can't rely too heavily on
16 the comments of an individual legislator.

17 THE COURT: I think that was some, kind of,
18 video that surfaced, if I remember right.

19 MR. SCHLOZMAN: Okay. But here's the
20 thing, Your Honor. Let's assume, for purposes of this
21 argument, that he said it and that also that that
22 represented the views of the entire majority voting
23 block who adopted the legislation. From a
24 constitute -- not to say so what, that sounds glib. I
25 don't mean to minimize, you know, because I know there

1 are people here and even in the courtroom who feel very
2 strongly about this issue. But from a constitutional
3 perspective, the fact that he would want to eliminate
4 advance voting is not a disenfranchisement. I mean,
5 there's no constitutional right to be able to vote
6 early. The legislature in Article 4 Section 1 gets to
7 dictate what the mode of voting shall be. If they
8 decide they're going to eliminate advance voting, that
9 is okay constitutionally. So the fact that he may have
10 had that -- and I'm not saying he did, I'm not saying
11 anybody did. I'm just, you know, again we're arguing
12 for arguments sake here -- constitutionally that's
13 immaterial. And again, you know, neither the State nor
14 the judiciary get to dictate that.

15 Let me just talk briefly about some of the
16 affidavits for -- that the plaintiffs included. So I
17 don't mean to -- I don't want to criticize them. And
18 again, some of them may even be here in the courtroom.
19 But I don't think that this is -- that it's
20 constitutionally meaningful. There's an affidavit in
21 Exhibit 6 that they highlight from -- and again, facial
22 challenge here so I don't think it matters one bit
23 anyway. You know, one of the individuals, Martha
24 Hodgesmith, I mean, that she apparently has postpolio.
25 She claims she can't vote in person if there's

1 inclement weather or she has to stand in line. But
2 curbside voting is an option. And she gives no
3 indication that she would have a problem with mail
4 voting or that she's ever had a problem with the mail.

5 I mean, if you read the affidavit -- and again
6 the plaintiffs opted not to have any witnesses come in
7 court and testify so they're stuck with the language of
8 the affidavit and I don't think it proves anything. In
9 Exhibit 7 there is a affidavit -- and I know Ms. Frost
10 referenced him -- from Robert Mikesic, I may be
11 mispronouncing that. He claims that the ballot didn't
12 arrive in time for a November 2025 municipal election.
13 Of course he admits that he was able to vote just fine.
14 Again, I don't know what happened. I mean, it could
15 have been that it fell through the cracks. You know,
16 we have no idea what happened. I mean, it's curious
17 that in the course of that election -- and again, if
18 you look at the Table 17, you know, through the Ballot
19 Scout program, not a single person through the transit
20 time where it lasted more than 15 days. And you know,
21 but his ended up taking longer, I guess. I mean,
22 that's sort of curious that one individual, you know,
23 that they happen to have the evidence on. But again,
24 it's one individual. I mean, that does not support a
25 facial challenge.

1 They also bring, finally, a Exhibit 8, a student
2 voter named Benjamin Simons. Apparently he claims that
3 his advance ballot which he asked to be sent to him at
4 his college address in Oklahoma in 2022 arrived two
5 weeks after the election. There's no statement in the
6 affidavit as to when he requested it. He doesn't say
7 in that affidavit other than it was "Before the
8 election." It's also odd -- and again, we don't have
9 the opportunity to cross-examine this individual -- he
10 says, oh it was so important that I had my mother drive
11 all the way to Oklahoma to pick up my ballot and drive
12 home. Now I know everybody wants to visit their kids.
13 But there obviously were much easier and rational ways
14 to do it. I mean, this just doesn't make sense. I
15 mean, they've made a big deal in some of their
16 arguments too about, like, Sedgwick County and they
17 showed voters who are overseas. I mean, clearly if you
18 are going to vote and you're going to be away from
19 Kansas it's going to take longer. I mean, maybe you're
20 in Nome, Alaska? Maybe you're in off the Florida Keys?
21 Maybe you're overseas? If you got that then, you know,
22 you're going to end up having a tougher time. The
23 mail's going to take a lot longer. I don't think that
24 that is in any way unreasonable because a ballot may
25 take longer to go somewhere in different parts of the

1 United States outside the State of Kansas.

2 So at the end of the day, Your Honor, I think
3 these are mostly legal issues. I think they are mostly
4 public policy issues. And we've had a lot of
5 discussion here about, you know, whether this is a good
6 idea, whether it's a bad idea. And I think there's
7 arguments on both sides of the ledger there. But I
8 would respectfully submit that that's a decision that
9 is left to the discretion of the legislature and it is
10 outside the confines of the judiciary.

11 Thank you very much, Your Honor.

12 THE COURT: Thank you.

13 And then Ms. Frost, I'll give you the last word on
14 the injunction motion.

15 MS. FROST: Sure.

16 So I just want to correct some of the statements
17 about the evidence which were wrong. We're not talking
18 about one or two voters here; we know that thousands of
19 voters in prior elections have had their ballots saved
20 by the grace period. If SB 4 was in place those
21 ballots would have been rejected. Thousands of voters.
22 We know that over 200 voters in Douglas County who
23 mailed their ballots in July -- so at least at day six,
24 maybe earlier -- had their ballots not arrive until
25 after the grace period. We have the personal lived

1 experience of Mr. Mikesic, to whom the right to vote --
2 to whom participating in Kansas elections is incredibly
3 important. Kansas has ostensibly created a situation
4 that has invited him to be able to vote that day,
5 because for him voting in person is incredibly
6 difficult. And now we're told that it's no big deal if
7 the entire system is set up so that he can't reliably
8 believe that his ballot will, in fact, make it to the
9 election officials on time and be counted.

10 There are several cases in the federal courts --
11 which, again, apply a much more deferential standard to
12 state laws -- that address when ballots are, you know,
13 caught in postal delays, aren't postmarked, you know,
14 other issues related to COVID pandemic. Universally,
15 courts reject the idea that the State can go, "Not my
16 problem." Because at the end of the day the State can
17 fix this. The State can fix it with the fix it put in
18 place in 2017 when it first realized that this was an
19 existential threat to the right to vote, when it first
20 recognized a serious problem where it was inviting its
21 voters to participate in a system and then arbitrarily
22 disenfranchising them for no-fault of their own.
23 That's what matters. The State is aware that this is
24 happening; they can't close their eyes and ears to it
25 and say, "Not my problem." And at the end of the day

1 the case law is extremely clear on that.

2 THE COURT: What is the best site for the
3 concept of: If you invite the public to do -- you know,
4 to request their ballot seven days before but it takes,
5 you know, more than seven days to go both ways? What
6 -- is it that Southern District of New York case that
7 you quoted at the beginning --

8 MS. FROST: So that Southern District of
9 New York case, that one is one. There's a 6th Circuit
10 decision, *Obama v. Husted*. There's another decision
11 that we cite in briefing, which I promised you I would
12 have and then I didn't and I apologize for that.

13 THE COURT: No, you didn't -- I think I
14 asked you the same question earlier. So the *Husted*
15 case and the other cases that you cite?

16 MS. FROST: Oh, I got it, I'm remembering
17 it now. It's a case out of the 9th Circuit. I'm
18 sorry, it's now gone.

19 THE COURT: There's no controlling Kansas
20 case that says --

21 MS. FROST: There's no controlling --

22 THE COURT: -- if there is an invitation to
23 vote then, you know, it needs to be --

24 MS. FROST: So there's no case that says
25 that. However, the *League of Women Voters* -- because I

1 don't think it's been, sort of, presented in that same
2 way -- the *League of Women Voters* decision by the
3 Kansas Supreme Court was very clear, again, that the
4 right to vote is fundamental, it's an enumerated right
5 so it is subject to the strictest protections. The
6 court was clear in that case that it was applying a
7 different test to the signature verification because it
8 saw it as a proper proofs. But the court also said
9 very explicitly if a election law substantially burdens
10 voters -- and I can tell you that there's a case that
11 we cited out of the Northern District of Florida, I
12 believe it is the *Florida Democratic Party* case, which
13 says that disenfranchising thousands of voters is, by
14 definition, a substantial burden -- then it is, in
15 fact, a violation. So I think that within that is the
16 same concept; that -- because it ties it to the law,
17 right? It says that the law has this effect. And so
18 you can't have under that framework an election system
19 that -- where voters are abiding by the election
20 system, voters are doing everything they're being told
21 to do by the statutory structure that exists. And then
22 you're just saying, well I'm not going to count this
23 ballot, I'm not going to count that ballot, I'm not
24 going to count that ballot.

25 I think at the end of the day, Your Honor, we're

1 talking about the most fundamental question in a
2 democracy, which is: Is the democracy one that is set
3 up in a way that people can -- who choose to
4 participate in elections can be reasonably assured that
5 their ballot will count? Or is it one that is set up
6 so that, frankly, you never really know whether it's
7 going to count or not. Kansas recognized that this was
8 a real problem in 2017, it recognized that the right to
9 vote could not be protected unless something was done
10 about that. It reversed course in 2025 not because the
11 dragon was no longer at the door -- in fact if anything
12 the dragon has gotten bigger and meaner -- and pointed
13 to nothing that would justify disenfranchising voters,
14 particularly at this scale. We respectfully ask that
15 you deny the motion to dismiss and enter the
16 injunction.

17 THE COURT: Thank you.

18 I would like the parties to submit proposed orders
19 for The Court for each motion. So the -- on the motion
20 to dismiss it would just be proposed legal conclusions.
21 And then for the temporary injunction proposed findings
22 of facts and conclusions of law from each party. I
23 know there's been a lot of briefing on this but I would
24 like it -- something filed as an information document
25 where it's clearly marked "Proposed Order" and then

1 also submit it to The Court in Word form to, kind of,
2 help me draft an order for each of these issues. How
3 much time -- I understand that's a big undertaking but
4 you've also briefed a lot of it already. How much time
5 do you think you would need to submit something like
6 this?

7 MR. SCHLOZMAN: Your Honor, I'm getting --
8 I've got a 10th Circuit brief tomorrow, another brief
9 due on Monday and then I'm heading to the Middle East
10 for a two week vacation. So I'm happy to accommodate
11 your request, I would just ask for --

12 THE COURT: If I did, like, 30 days?

13 MR. SCHLOZMAN: Yes, that would be helpful
14 because I've just got a lot of travel coming up and I
15 would prefer not to be doing this on vacation.

16 THE COURT: And I understand that time is
17 of the essence and the parties were, you know, asking
18 before for it to be more expedited. But is 30 days a
19 reasonable amount of time for this?

20 MS. FROST: I think we are comfortable with
21 the schedule so long as the argument is not made that
22 it's too late to grant relief.

23 THE COURT: I didn't necessarily hear that.
24 But is there point of no return for -- as far as a
25 temporary injunction, that the train can't be stopped

1 anymore if I decide to grant the motion?

2 MR. SCHLOZMAN: I mean, I guess Your Honor,
3 in terms of timing -- I mean certainly, you know, this
4 would be a dramatic change to the procedures for our
5 elections. And you know, I guess, I mean, if you were
6 entering it -- I don't know when -- I want to talk with
7 my colleagues about, like, when the ballots have to
8 start going. Because there's -- it's a whole process,
9 I mean, right? It's, like, it's not just, oh we mail
10 it. The ballots need to be reviewed and everything
11 else and then UOCAVA. I mean, so the primary is
12 August -- what's it, the first Tuesday in August, I
13 think? What's 45 days out from that? I don't even --

14 THE COURT: Is there some instructional
15 material that goes out with it that would say hey --

16 MR. SCHLOZMAN: Well I mean, look, it's
17 just a -- if we're going to be able to.

18 THE COURT: This is -- this has to be in by
19 this day or you get three days? Is there anything like
20 that that goes out that would change what is sent?

21 MR. SCHLOZMAN: For the voters, I mean I --
22 Your Honor, I don't want to speak out of tone because
23 I'm going to be speculating in terms of --

24 THE COURT: Each clerk's office might do it
25 differently?

1 MR. SCHLOZMAN: I just don't know off the
2 top of my head. I mean, that's the honest answer. I
3 can get back to The Court on that issue, but I don't
4 want to mislead you by speculating here.

5 THE COURT: I have the first Tuesday in
6 August, August 4th; does that sound right?

7 MR. SCHLOZMAN: I think so. I mean, and
8 that would be July. I mean, you know, depending on how
9 quickly The Court rules, I mean, presumably it would
10 not be an issue. But it's -- you know, I don't know
11 how long you're going to take. I mean, if this is
12 something where it comes in and then you're get
13 something out in a week or two then that's probably not
14 an issue. If it takes longer, you know, a month or
15 two. That's why I'm kind of edging here because I
16 don't want to pressure you. But I also don't want to,
17 you know --

18 THE COURT: I would just encourage that if
19 you find out that there is a stop date, you know, you
20 can do a supplemental answer to The Court's question on
21 that.

22 MR. SCHLOZMAN: Okay.

23 THE COURT: "Judge, we really need your
24 decision by X date." But unless that is presented I'll
25 try to get it within my normal timeline; although this

1 is a lot of issues and a lot of facts to go through.

2 MR. SCHLOZMAN: Sure, yeah. And I'll talk
3 with the election director who will have much better
4 insight into that. I mean, I don't think it's an
5 issue but I don't want to say no and then, you know,
6 him come down on me like a ton of bricks and say "What
7 the heck were you thinking?" So --

8 THE COURT: Okay. I guess with that
9 information, is 30 days a deadline that you find
10 reasonable for you're -- you know, I know you have
11 litigation around the country, it sounds like, on
12 issues like this. Is that a reasonable deadline for
13 the counsel that you have in this case?

14 MS. FROST: Yeah, we can get it done,
15 honestly, by any deadline. It's a priority for us.
16 But as long as we, you know, don't hear from the
17 Secretary of State next week that there's going to be
18 an issue then that's fine with us.

19 THE COURT: Well and obviously you don't
20 have to wait until the last day to get that done. So
21 if you want The Court to have that ahead of time to get
22 whenever you're ready. And you will be able to enjoy
23 your vacation Mr. Schlozman, if you can meet the 30-day
24 deadline. And so --

25 MR. SCHLOZMAN: Just so I understand then

1 for the motion to dismiss you're looking, for sort of,
2 the proposed conclusions of law? And then on the
3 temporary injunction, sort of, our response to their
4 statement of facts and -- I mean, the legal conclusions
5 are obviously going to merge with the motion to dismiss
6 issues.

7 THE COURT: Correct, yeah. And obviously
8 there won't be any findings of facts on the motion to
9 dismiss. But the -- so that proposed findings of fact
10 and conclusions of law would be for the injunction.

11 MR. SCHLOZMAN: Sure.

12 THE COURT: And I'll -- my thought is that
13 it would be two different documents; that I would have
14 an order for the motion to dismiss and an order for the
15 injunction, proposed order from both sides. And I
16 don't know if you all need the date that would be
17 30 days from now, I would have to do some math here.
18 But --

19 MS. FROST: I think we did some math and we
20 think it's February 27th, is our best guess. Does
21 anyone disagree with that?

22 MS. REVENAUGH: I just did plus 30 from
23 today. But --

24 THE COURT: That would be a Friday
25 deadline. So why don't we just give you until the 27th

1 of February and we don't have to the math on the
2 30 days. And does that work for you, Mr. Schlozman?

3 MR. SCHLOZMAN: Yes. February 27th is a
4 Friday. And -- oh, could we have until that Monday?

5 THE COURT: That Monday, March the 2nd?

6 MR. SCHLOZMAN: Yes. Because I'm going to
7 be out of town on that 27th.

8 THE COURT: That's fine with me. One
9 business day, for my purposes, won't make a big
10 difference. With the understanding that, you know, if
11 it gets to a point where you're like, "Now it's too
12 late," I want that information as soon as possible.

13 MR. SCHLOZMAN: Understand. I agree, yeah.

14 THE COURT: And so I will look for those
15 proposed orders, and I will try to make a decision as
16 soon as I can. I understand that it is an important
17 issue and that time is of the essence on this issue.

18 So if there's nothing else, I did -- my assistant
19 did file the demonstrative exhibits that were here so
20 that any reviewing court can see what I was looking at.
21 And I will get you all an opinion as soon as I can
22 after the proposed orders come in. Thank you.

23 MS. FROST: Thank you very much, Your
24 Honor.

25 MR. SCHLOZMAN: Thank you, Your Honor.

C E R T I F I C A T E

STATE OF KANSAS)
) ss:
COUNTY OF DOUGLAS)

I, John B. Cardaronella, a Certified Court Reporter of the 7th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in voice writing the above and foregoing proceedings in Case No. DG-2025-CV-000206, KANSAS APPLESEED CENTER, ET AL, Plaintiff, vs. SCOTT SCHWAB, ET AL, Respondent, heard on the 27th of January, 2026, before the Honorable Carl Folsom III, District Judge of the 7th Judicial District.

I further certify that at the request of BRADLEY SCHLOZMAN, attorney for the State, a transcript of my voice-written record was typed, and that the foregoing transcript, consisting of 106 typewritten pages, is a true copy of said MOTION TO DISMISS & TEMPORARY INJUNCTION.

SIGNED, sealed and delivered this 3rd of February, 2026.

/s/ John B. Cardaronella, CCR
JOHN B. CARDARONELLA, CCR

EXHIBIT C

**IN THE STATE OF KANSAS
SEVENTH JUDICIAL DISTRICT -- DOUGLAS COUNTY, KANSAS**

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

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity
as the Kansas Secretary of State et al.,

Defendants.

Case No. DG-2025-CV-000206

**SECRETARY SCHWAB'S PROPOSED ORDER DENYING PLAINTIFFS' MOTION
FOR TEMPORARY INJUNCTION**

This matter is before the Court on Plaintiffs' Motion for Temporary Injunction. The Court convened a non-evidentiary hearing on Plaintiffs' motion on January 27, 2026, after all parties agreed to forego the presentation of any evidence in connection with the motion. Plaintiffs and Defendant Schwab (the "Secretary") appeared through counsel. Defendant Shew took no position on Plaintiffs' motion and, with the Court's permission, did not appear. After hearing argument and being otherwise fully advised on the premises, the Court finds, concludes, and orders as follows:

I. Factual Background

A. Nature of the Action

1. On May 5, 2025, Plaintiffs Kansas Appleseed Center for Law and Justice, Inc.; Loud Light; and Disability Rights Center of Kansas filed a civil Petition for declaratory and injunctive relief against Defendant Scott Schwab, in his official capacity as the Kansas Secretary of State, and Defendant Jamie Shew, in his official capacity as the Douglas County Clerk.

2. On June 9, 2025, the organizational Plaintiffs and newly added individual Plaintiffs Dorothy Nary, Martha Hodgesmith, Robert Mikesic, and Benjamin Simons¹ filed a First Amended Petition for declaratory and injunctive relief against Defendants.

3. More than seven months after commencing their lawsuit, Plaintiffs filed this motion for a temporary injunction on December 9, 2025.

4. Plaintiffs wage a state facial constitutional attack against S.B. 4 (2025), a law the Kansas legislature passed in March 2025 (via gubernatorial veto override) to require that all advance voting ballots must be received in the county election office or polling place no later than the close of the polls. This law, which went into effect January 1, 2026, amends K.S.A. 25-1132(b) to eliminate the three-day grace period for county election offices to accept advance mail ballots.

5. This is the same deadline Kansas had in large measure for nearly 150 years, until 2017 when the legislature amended the statute to allow ballots to be received up to three days after Election Day if they were postmarked no later than Election Day. Having returned to its pre-2017 election methodology, Kansas is now one of 36 states in the country requiring ballots to be received by the close of the polls.²

6. Plaintiffs allege that the State's reversion to its longstanding Election Day deadline rule will have a disparate impact on rural and disabled voters who, they contend, rely heavily on the U.S. Postal Service ("USPS") to deliver their ballots. Plaintiffs contend that the USPS's poor track record on timely delivery of mail means that the elimination of the three-day grace period violates their equal protection, due process, and voting rights under the Kansas Constitution.

¹ The Court recently granted Plaintiffs' Motion to Dismiss Benjamin Simons without prejudice.

² See <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (National Conference of State Legislature Table) (listing specific statute of each state that requires Election Day receipt of advance mail ballots).

B. History of Mail Voting in Kansas

7. Kansas has had some form of mail voting for roughly 158 years. As described in detail below, these absentee voting laws evolved over time but were always extremely restrictive as to who could avail themselves of the opportunity to vote at any time other than Election Day. The State's absentee voting rules – the history of which is summarized in *Lemons v. Noller*, 144 Kan. 813, 63 P.2d 177 (1936), where the Kansas Supreme Court upheld their constitutionality – were the historical predecessors to Article 12 of Chapter 25 of today's Kansas Election Code.

8. Critically, however, the *absentee* voter laws are fundamentally distinct from the no-excuse *advance* voting laws that the legislature introduced in 1995, which are set forth in Article 11 of Chapter 25 of the Kansas Election Code and are now at issue in this case.

9. As the Supreme Court recounted in *Lemons*, the first absentee voting rights were introduced in the form of an 1864 constitutional amendment allowing members of the military to vote while outside the State on official duty. 144 Kan. at 819-20. The amendment empowered the legislature to sort out the mechanics. *Id.* at 820. In response, legislators adopted a bill essentially directing that a polling place be set up wherever the regiment was stationed and that poll books and ballots be transmitted via mail to the camp so that soldiers who were otherwise registered to vote could cast their absentee ballots. 1864 Sess. Laws, Ch. 59, §§ 3-10, at pp. 102-04. The cast ballots were then to be mailed back to the Secretary of State in Topeka. *Id.* at in Topeka. *Id.* at § 10, at p. 104.

10. The legislature subsequently amended the law in 1868 to extend absentee voting rights to all qualified electors who were employed in the militia or volunteer service of the State or federal government. *Lemons*, 144 Kan. at 825; 1868 Sess. Laws, Ch. 36, § 45, at p. 415. The law expanded again in 1901 to cover railroad employees who were unavoidably absent from their

township or ward on Election Day. *Lemons*, 144 Kan. at 825. And in 1911, legislators broadened its reach to encompass any qualified elector necessarily absent from his county on Election Day. *Id.*

11. Prior to 1919, all absentee ballots had to be returned to the county election office or Secretary of State *no later than Election Day*. In 1919, however, the legislature loosened this rule to allow voters eligible to vote via absentee ballot to return such ballot via mail to the county clerk or Secretary of State by the tenth day after the election. *See* S.B. 314, 38th Leg., Session 250, Ch. 189, §§ 1, 6 (1919).

12. But the legislature later repealed this law in 1943, at which point it required that the absentee ballots had to be received by the county clerk or Secretary of State by 9:00 a.m. on the day before Election Day. *See* H.B. 333, 50th Leg., Session 281, Ch. 159, § 6 (1943).

13. In 1967, the legislature substantially revised its absentee voting laws. *See* S.B. 391, 1967 Sess. Laws, Ch. 208, at pp. 402-08. Section 6 of the bill restricted absentee voting to those individuals who are to “be absent from the county in which [they] reside[]” on Election Day. The legislature further mandated in Section 9(b) that all absentee ballots had to be received at the county election office no later than 12:00 p.m. on the day before Election Day. *Accord* 1968 Sess. Laws, Ch. 406, § 144, at pp. 913-14.

14. In the ensuing years, the legislature further modified the absentee voting laws to expand the individuals who could vote absentee. For example, it adopted a statute in 1972 designed to implement a recent constitutional amendment to Article 5, Section 1 – which was adopted by the electorate to ensure compliance with the federal Voting Rights Act of 1970, Pub. L. No. 91-285, § 202 (codified at 52 U.S.C. § 10502(d)), which limited durational residency requirements and mandated that “each State shall provide by law for the casting of absentee ballots for President

and Vice President . . . by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election.” But the legislature reiterated the due date for such absentee ballots as 12:00 p.m. on the day before Election Day. *See* S.B. 441, 1972 Sess. Laws, Ch. 134, § 4(d), at pp. 525-26.

15. In 1973, the legislature amended the law to allow absentee ballots to be received at the county election office at any time prior to the close of the polls. *See* H.B. 1132, 1973 Sess. Laws, Ch. 154, § 2(d), at pp. 554-55. *Accord* H.B. 3107, 1976 Sess. Laws, Ch. 183, § 1(d), at p. 705.

16. The legislature modified the absentee voting laws several more times to make more individuals eligible to vote absentee who were “unable to vote at [their] polling place on [Election Day]” due to the basis for the exception – e.g., sickness or physical disability (H.B. 2793, 1978 Sess. Laws, Ch. 140, § 1(b), at p. 620); religious belief or practice (S.B. 863, 1980 Sess. Laws, Ch. 109, § 1(b), at p. 497); poll worker on Election Day (S.B. 341, 1981 Sess. Laws, Ch. 157, § 1(c), at p. 669). But the deadline for submitting such ballots did not change. Until 2017, it remained the close of polls on Election Day.

C. Advance Mail Voting

17. In 1995, the legislature greatly expanded the use of mail voting by adopting no-excuse advance mail voting in which citizens can vote early via the mail even if they are not absent from the State. *See* 1995 Kan. Sess. Laws, ch. 192, § 17. Advance voting is governed by its own chapter in the State Election Code. *See* K.S.A. 25-1114 *et seq.*

18. Kansas voters may request an advance mail ballot by filling out an advance ballot application. Voters may submit their applications to the county election office as early as ninety days before the election and as late as seven days before the election. K.S.A. 25-1122(f)(1)(B).

19. If a voter has submitted an advance mail ballot application more than twenty days before the election, the county election office mails an advance ballot to the voter on the twentieth day before the election. K.S.A. 25-1123(a). Applications received after this time must be processed within two days of receipt. *Id.* Plaintiffs presented no evidence that county election officials were not mailing advance ballots to voters within this time frame.

20. Voters with a permanent disability or illness may request to be placed on the State's permanent advance mail voter list, K.S.A. 25-1122(h), and do not have to apply for an advance mail ballot. Instead, county election officials will automatically send the advance mail ballots to such voters twenty days before the election.

21. Douglas County, in fact, automatically sends advance ballot applications to *all registered voters* in advance of every even-numbered-year general election.

22. Prior to 2017, all advance mail ballots had to be received by the close of the polls on Election Day in order to count.

23. In 2017, however, the legislature enacted H.B. 2158, which permitted advance mail ballots postmarked by Election Day to be counted if they arrived within three days of the election.

24. Over the next eight years, the processing time and handling of ballots by the USPS continued to be an issue, with many ballots containing an illegible postmark or lacking a postmark altogether.

25. In 2025, the legislature adopted S.B. 4, which removed the three-day grace period and restored the Election Day ballot receipt deadline that had been in effect for most of the State's

history. With the passage of this law, Kansas is now (once again) one of 36 states in the country requiring ballots to be received by the close of the polls on Election Day.

D. Additional Voting Options in Kansas

26. In addition to being able to vote by mail (without any required excuse), Kansas voters today can vote in person on either Election Day or up to twenty days before the election at an advance voting site. *See* K.S.A. 25-1123(a), 1122(g)(1). All polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and the Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA).

27. The State also mandates curbside voting so that voters do not have to exit their vehicles. K.S.A. 25-2909(d). With curbside voting, election officials hand-deliver a ballot to the voter in the precinct's parking lot and then personally transmit the ballot back into the polling place once it has been cast.

28. Voters may also direct any third party of their choice to return their cast ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

29. If a voter has requested an advance mail ballot and either did not receive it in time to vote and return it, or simply misplaced it, the voter may request a provisional replacement ballot from the county election officer. K.S.A. 25-1122(f). Such voters may also vote in person at the polling place via a provisional ballot. K.S.A. 25-2908(f). *See also* Pls.' Ex. 16.

E. Plaintiffs' Evidence and Statistics

30. Plaintiff Dorothy Nary suffers from spina bifida and claims that she has limited mobility and other health issues making it difficult to vote in person. Pls.' Ex. 5 (Nary Decl.) at ¶ 9. Ms. Nary claims to have observed mail delays in Douglas County and references an 11-day mail delay in delivery of Valentine's Day cards she sent to nearby friends. *Id.* at ¶ 10. Although she has

previously voted by advance mail ballot and plans to vote by advance mail ballot in the 2026 election, *id.* at ¶ 4, she does not allege to have suffered any mail delays or disenfranchisement in her prior voting practices.

31. Plaintiff Martha Hodgesmith suffers from post-polio syndrome and claims that she has difficulty voting in person due to her mobility issues. Pls.' Ex. 6 (Hodgesmith Decl.) at ¶¶ 9-10. However, she does not allege any prior experience with mail delays or issues with advance mail voting in her declaration.

32. Plaintiff Robert Mikesic typically votes by advance mail ballot and intends to vote by mail in the upcoming 2026 election. Pls.' Ex. 7 (Mikesic Decl.) at ¶ 4. Mr. Mikesic claims that his advance mail ballot for the November 2025 municipal election did not arrive until after the election was over. *Id.* at ¶¶ 5-6. But Plaintiffs do not provide evidence on what occurred to cause the delay – whether it was the mail or a mishap at the election office. Regardless, Mr. Mikesic was able to vote in person without issue during the November 2025 election. *Id.* at ¶ 5.

33. In 2020, when the COVID pandemic was at the forefront of the minds of most Kansans, the Secretary of State's Office reported that 32,367 advance mail ballots arrived at county election offices during the three-day grace period. Plaintiffs do not present any evidence as to when these 32,367 ballots were mailed.

34. During the 2022 general election, across the entire State of Kansas (i.e., all 105 counties), approximately 1,000 ballots were postmarked by Election Day and received during the grace period and thus properly counted. Pls.' Ex. 13.

35. The 2024 general election saw a significantly lower rate of advance mail voting as compared to 2020, with only 2,110 ballots (or 1.4% of timely postmarked ballots) arriving during

the three-day grace period after Election Day. Plaintiffs do not present any evidence as to when these 2,110 ballots were mailed. Pls.’ Ex. 1 at ¶¶ 36, 37.

36. Plaintiffs’ expert, Dr. Michael Herron, opines that some rural counties have higher percentages of mail ballots arriving during the grace period than other counties. Pls.’ Ex. 1 at ¶ 49.

37. Dr. Herron concedes, however, that the data upon which he relies is *not statistically significant* and based on “suggestive evidence.” Pls.’ Ex. 1 at ¶ 63 (“The conventional confidence level that one often finds in empirical research requires that an estimate have a p-value of 0.05 or lower to be considered statistically significant. The p-value associated with the slope estimate in Figure 4 is . . . slightly larger than 0.05. I conclude, therefore, that there is suggestive evidence from Figure 4 and Table 6 that, the more rural a Kansas County, the greater the county’s grace period rate in the 2024 general election, all things equal.”). While Dr. Herron attempted to back away from this statement through a “Supplemental Declaration,” this was a procedurally improper tactic by the Plaintiffs. Regardless, even if the Court were to consider it, it would not change the outcome of this motion. Indeed, the sample sizes he cites are so tiny that they have no statistical significance.

38. Plaintiffs also highlight transit times in Douglas County for the 2024 primary. They claim that in the August 6, 2024 primary, county election officials rejected more than 200 ballots that arrived more than three days after the election, even though the ballots had been postmarked in July. Their “proof” on this point consists of a single hearsay comment – in the form of a newspaper article that attributes the statistic to a purported non-quote comment from Defendant Shew. Pls.’ Reply Br. at 4 (quoting Pls.’ Ex. 16). This is inadmissible hearsay. *See State v. Hunter*, 241 Kan. 629, 637, 740 P.2d 559 (1987) (“A newspaper article. . . is actually a statement by a reporter of a purported statement made by the witness testifying . . . and thus fits the classical

definition of hearsay.”). It also passing strange, but ultimately quite revealing, that rather than point to any data from their expert witness or the Ballot Scout software (which, as discussed below, supposedly details the date on which advance ballots were mailed by both the county and voters), Plaintiffs opted to point only to a vague hearsay comment in a newspaper article.

39. Indeed, Plaintiffs present no evidence as to when exactly these 200 ballots were mailed in July 2024. Nor do they indicate *where* the ballots were postmarked. For example, many voters in Douglas County are likely students at the University of Kansas and may well have mailed their ballots from locations throughout the United States (or even beyond). Plaintiffs affirmatively chose not to call Mr. Shew at the temporary injunction hearing to shed light on this issue. Yet they bear the burden of proof and have failed to prove anything.

40. In 2024, Douglas County used an analytical tool called “Ballot Scout” to track mail ballots through the USPS. Douglas County is the only county in Kansas that uses this tool. Pls.’ Ex. 1, at ¶ 124.

41. Ballot Scout’s terms and conditions explicitly state, “We make no warranties or representations about the Site or the Services, including but not limited to *accuracy, completeness, timeliness, or reliability.*”³ (Emphasis added.)

42. Ballot Scout’s FAQs further point out that the system depends on ballot scans by the USPS, and “[o]ftentimes certain postal facilities may not have the scanning equipment to continue scanning the ballot or the USPS may be sorting the ballot in a way that does not move the ballot through the relevant scanning machines.”⁴

³ *Ballot Scout Terms of Service*, BALLOT SCOUT, <https://www.ballotscout.org/terms> (last visited Feb. 13, 2026).

⁴ *Ballot Scout FAQ*, BALLOT SCOUT, <https://www.ballotscout.org/faq-en> (last visited Feb. 13, 2026).

43. Although citing extensively to this software, Dr. Herron’s declaration does not even attempt to establish Ballot Scout’s reliability, completeness, or error rate; he simply parrots the company’s description of its product and then relies on a subset of advanced ballots which purport to have been tracked in both directions by this program. *See* Pls.’ Ex. 1 at ¶ 124 n.31, ¶¶ 125-36.

44. Plaintiffs presented no live testimony or sworn statement from either a Douglas County Election Official or a Ballot Scout representative describing the meaning and purported significance (or lack thereof) of the Ballot Scout data.

45. In any event, according to Dr. Herron’s analysis of the Ballot Scout data, only *four* ballots in the 2024 primary spent more than 17 days in total transit time, meaning “between the Douglas County elections office, voters, and back.” Pls.’ Ex. 1, Table 21 and ¶¶ 150, 152; *see also id.* at ¶ 140 (explaining “total transit time”). Not a single ballot spent more than 19 days in total transit. *Id.* Fifty-one of the 583 mail ballots (roughly 8.7%) had a total transit time of 15 days or more. *Id.*

46. Meanwhile, according to Dr. Herron, in the 2024 General Election, *no* Douglas County advance mail ballots spent more than 15 days in total transit. *See* Pls.’ Ex. 1, Table 17 and ¶¶ 140-41. In other words, all advance mail ballots tracked through the USPS with Ballot Scout in Douglas County were received within 15 days and would not have needed to rely on a grace period to be counted. Out of 3,731 advance mail ballots, only two ballots took longer than 12 days in transit between the Douglas County elections office, voters, and back. *Id.*

47. At the hearing, Plaintiffs’ counsel referenced data from the 2022 general election, stating a little over 130,000 Kansas voters participated in the election using an advance ballot, with approximately 1,000 ballots (0.77%) arriving during the grace period. Plaintiffs’ counsel then speculated that the upcoming 2026 election will have similar characteristics as the 2022 election.

Inexplicably, Plaintiffs’ counsel used Douglas County’s 2024 *primary* data on *one-way* mail transit times (according to Ballot Scout) – found in Pls.’ Ex. 1, Tables 19-20 – to project that roughly 30,000 (or 23%) advance ballots will take seven days or longer to travel one way, over 15,000 (or 12%) advance ballots will take ten days or longer, and about 6,500 (5%) advance ballots will take 15 days or longer. *See* Def. Schwab’s Ex. A (Jan. 27, 2026 hearing transcript) at pp. 65-68.

48. Even under these fabricated projections, Plaintiffs admit that some of these ballots might arrive by Election Day. But more importantly, Plaintiffs attempt to extrapolate sweeping conclusions regarding 2026 advanced mail voting total transit times by combining 2022 state-wide advanced voting numbers with incomplete (and unverified) 2024 one-way transit data from a primary election in a single county. In doing so, Plaintiffs grossly overstate what this data shows. This type of impermissible inference stacking based on cherry-picked and incomplete data is not permissible from an expert, much less Plaintiffs’ counsel.

49. In February 2025, the Deputy Secretary of State testified before the legislature that approximately 97% of all ballots cast are counted and reported on election night. Pls.’ Ex. 14. Roughly 2.5% of all ballots counted are provisional ballots that are added to the count at the county canvass. *Id.* In addition, 0.25% are advance mail ballots received on or before Election Day. Just 0.25% of all ballots counted are advance mail ballots received within the 3-day grace period. *Id.*

II. Legal Standard for Temporary Injunctions

Plaintiffs are not entitled to a temporary injunction, which is “an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). It is intended to “merely preserve[] the status quo until a final determination of a controversy can be made.” *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007) (quotation and emphasis omitted).

“Because the issuance of an injunction is contrary to delaying a decision until there is a fair opportunity to hear all the merits of the case, [Kansas] courts require extraordinary evidence to support such an order.” *State ex rel. Kobach v. Harper*, 65 Kan. App. 2d 680, 687, 571 P.3d 6 (2025). To obtain temporary injunctive relief, Plaintiffs bear the heavy burden of establishing *all* of the following elements: (1) they are substantially likely to succeed on the merits; (2) there is a reasonable probability that they will suffer irreparable future injury; (3) they lack an adequate legal remedy such as damages; (4) their threatened injury outweighs the injury that the defendant will suffer under the injunction; and (5) the injunction would not be adverse to the public interest. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012); *Schuck v. Rural Tel. Serv. Co., Inc.*, 286 Kan. 19, 24, 180 P.3d 571 (2008). This extraordinary remedy must be “used sparingly.” *Harper*, 65 Kan. App. 2d at 687.

III. Plaintiffs have no Substantial Likelihood of Success

At a minimum, Plaintiffs must show a “substantial likelihood of eventually prevailing,” which means they have “the burden to establish that [they are] more likely than not to prevail.” *Harper*, 65 Kan. App. 2d at 702. “This standard ensures that temporary relief is granted only when there is a significant chance of success, thereby protecting the interests of both parties until a final decision can be made.” *Id.* at 702-03.

Plaintiffs argue that S.B. 4 – which eliminates the three-day post-Election Day grace period for accepting mail ballots, returning Kansas to the practice it employed for nearly *150 years* prior to a brief eight-year experiment with a grace period and realigning Kansas with the 35 other states that eschew grace periods – contravenes Kansans’ right to vote, equal protection, and due process under the State Constitution. This legal theory cannot succeed.

A. Kansas courts presume statutes are constitutional and Plaintiffs’ facial attack requires a showing that no set of circumstances exist under which S.B. 4 is valid

Under the separation of powers doctrine and longstanding Kansas Supreme Court precedent, Kansas courts “presume a statute to be constitutional, resolve all doubts in favor of a statute’s validity, and require that a statute must clearly violate the constitution before it may be struck down.” *Kan. Nat’l Educ. Ass’n v. State*, 305 Kan. 739, 749-50, 387 P.3d 795 (2017); *accord Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021). “Courts may not ‘sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.’” *Christopher v. State ex rel. Kansas Juv. Just. Auth.*, 36 Kan. App. 2d 697, 709, 143 P.3d 685 (2006) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Accordingly, a “court should not strike down a statute unless the infringement of the superior law is clear beyond a reasonable doubt.” *Hall v. Dillon Cos., Inc.*, 286 Kan. 777, 789, 189 P.3d 508 (2008). Kansas has long applied this principle in the election context. *See Lemons*, 144 Kan. 813, 63 P.2d at 180 (“No statute should be declared unconstitutional unless the infringement of the superior law is clear, beyond substantial doubt.”) (quotation omitted).

The already difficult road Plaintiffs must travel to prevail in this case is even more arduous due to the *facial* nature of their claims. Plaintiffs are waging a wholesale constitutional challenge to S.B. 4. This requires them to “establish that *no set of circumstances exists under which the Act would be valid.*” *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)) (emphasis added). “The fact that the [challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Court has] not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *Id.* (quoting *Salerno*, 481 U.S. at 745) (cleaned up). Such claims are highly disfavored 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, 450-51 (2008); *State v. Bollinger*, 302 Kan. 309, 318-19, 352 P.3d 1003 (2015).

“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)). It thus does not necessitate any findings of fact and, instead, presents a question of law. *Id.* By contrast, “as its name suggests, an as-applied challenge contests the application of a statute to a particular set of circumstances, so resolving an as-applied challenge necessarily requires findings of fact.” *Id.* at 6 (citations omitted). The nature of Plaintiffs’ facial claims renders them ideally suited for resolution at the motion to dismiss stage of the case. This Court must simply assume that everything Plaintiffs have pled is true and then determine whether Plaintiffs are entitled to relief based on those allegations.

Plaintiffs argue that the “no-set-of-circumstances” test for facial statutory challenges does not apply because *League of Women Voters v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) (“*LWV II*”) did not discuss it when addressing a challenge to a signature verification requirement. This overlooks hornbook law on stare decisis. “The rule of stare decisis may not be extended to cover implications from what was decided in a former case, and thus, a case is not binding precedent if its holding is only implicit or assumed, or the issue was decided sub silentio.” 21 C.J.S. Courts § 218 (2025). In other words, “Constitutional rights are not defined by inferences from opinions which did not address the question at issue.” *Texas v. Cobb*, 532 U.S. 162, 169 (2001); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”). “In order for a decision

to be given stare decisis effect with respect to a particular issue, that issue must have been *actually decided* by the court.” *United Food & Com. Workers Union, Loc. 1564 of New Mexico v. Albertson’s, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000) (emphasis added) (citation omitted).

Moreover, just recently, both the Kansas Supreme Court and Court of Appeals reiterated the no-set-of-circumstances test. *State v. McCray*, 321 Kan. 316, 320, 579 P.3d 126 (2025) (“A successful facial challenge generally requires a litigant to establish that the law is unconstitutional in all its applications. Thus, for the State to prevail in a facial challenge, it need only demonstrate that the law is constitutional in at least some applications.”); *State v. Hall*, 65 Kan. App. 2d 369, 371-72, 564 P.3d 786 (2025) (holding that to prevail on a challenge under section 4 of the Kansas Constitution Bill of Rights, a criminal defendant must show that “no application of [the statute] could survive constitutional review under section 4 – a formidable legal task even with a fundamental right”), *rev. denied* June 27, 2025. This Court has no choice but to adhere to this precedent. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022) (“Courts are duty bound to follow this court’s precedent absent an indication that we are departing from that precedent[.]”).

B. Deferential Review is Constitutionally Mandated

1. – Article 4, Section 1 Confers Vast Discretion on Legislature

The Kansas Constitution expressly assigns to the legislature all decisions regarding the specific voting methodology to be used in state elections. Kan. Const. art. 4, § 1 (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added); *see also id.* art. 1, § 1 (in “elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly *in such manner as is prescribed by law*”) (emphasis added). The Kansas Supreme Court recently reinforced the scope of this provision. *See LWV II*, 318 Kan. at 797 (“Where popular elections are required – by either

statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.”) (citing Kan. Const. art. 4, § 1).

Just as is true of Article 5, § 4, which authorizes the legislature to require “proper proofs” to ensure that the right of suffrage extends only to eligible voters, *LWV II*, 318 Kan. at 801-02, the exclusive delegation to the legislature in Article 4, § 1 necessarily confers upon lawmakers the power to select *any reasonable* mode of voting for state elections. “[U]nless that power is abused the courts may not interfere.” *Id.* at 801 (quoting *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618 (1884)); *see also Sawyer v. Chapman*, 240 Kan. 409, 412, 729 P.2d 1220 (1986) (as long as voting is by ballot and the person casting vote may do so in secrecy, Article 4, § 1 empowers the legislature to “adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary”) (quoting *Taylor v. Bleakley*, 55 Kan. 1, 39 P. 1045, 1050 (1895)).

As the Kansas Supreme Court explained in *LWV II*, there can be no fundamental right to vote that is divorced from “concrete and specific provisions of the Constitution or statutes.” 318 Kan. at 800. It is an “enumerated political right.” *Id.* And neither the Kansas nor U.S. Constitution confers any right to vote by mail. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969) (any fundamental right to vote under the Federal Constitution is directed at the ability to *generally cast a ballot*, not the right to do so in the voter’s preferred manner, such as by mail); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.”); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (“[A]s long as the state

allows voting in person, there is no constitutional right to vote by mail.”); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (affirming dismissal of complaint for failure to state a claim where working mothers argued that because it is a hardship for them to vote in person on election day, the U.S. Constitution required Illinois to allow them to vote by absentee ballot, reasoning, “at bottom the plaintiffs are arguing that the Constitution requires all states to allow unlimited absentee voting, and the argument ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution”).

2. – References to “Absentee Ballots” in Article 5, Section 1 are Irrelevant

Before turning to Plaintiffs’ substantive claims, an aside is warranted to address a point of apparent confusion in one of their arguments. Plaintiffs have frequently invoked the term “absentee ballots,” including a reference to Art. 5, § 1 of the Kansas Constitution. That term, however, has no relevance here. Nothing in that provision touches the issue of *advance voting*. Absentee voting and advance voting are two entirely distinct concepts. Indeed, the Kansas Election Code (which is codified in Chapter 25 of the Kansas Statutes Annotated) has entirely separate Articles on these two voting methodologies. “Advance voting” is governed by Article 11, while “absentee voting” is governed by Article 12.

The Constitution’s reference to “absentee” simply underscores that citizens may vote absentee if they have either moved out of Kansas just before a Presidential election or moved out of their voting area (yet still reside in Kansas) prior to any election. The language was adopted in an amendment approved by the electorate on April 6, 1971, and was designed to implement a new requirement of the Voting Rights Act of 1970, Pub. L. No. 91-285, § 202 (codified at 52 U.S.C. § 10502(d)), which limited durational residency requirements and mandated that “each State shall provide by law for the casting of absentee ballots for President and Vice President . . . by all duly

qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election.” See Kan. Legislature, 1971 Report of Special Comm. on Party Convention Nominations and Election Law Changes, at 178-79 (Dec. 1971) (“The committee concludes that changes are necessary in order to implement the recent amendment to [Art. 5, § 1] . . . making other changes regarding the right to vote of those who have recently moved, in part necessitated by the federal voting rights act amendments of 1970.”).

The references to “absentee voting” in the Kansas Election Code are targeted exclusively at members of the armed services, their families, and citizens residing overseas. See K.S.A. 25-1215 *et seq.* This is not a mistake. These provisions reflect the State’s implementation of the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311. Nothing in the amendment of Art. 5, § 1 was intended to restrict the legislature’s Article 4, § 1 authority – beyond the limits identified in Art. 5, § 1 itself, of course – to regulate the process for casting and receiving ballots or to require *mail voting* at all.

The concept of “advance voting” was not even introduced until 1995, when the legislature adopted a new standalone chapter of the election code to allow for no-excuse advance voting (i.e., no requirement that the voter be outside the State or county of his/her residence on Election Day, or unable to vote at his/her assigned polling place due to some specified circumstance). See 1995 Kan. Sess. Laws ch. 192, § 17 (codified at K.S.A. 25-1114 *et seq.*). Plaintiffs’ attempt to conflate advance and absentee voting makes no sense. Indeed, if the concept of advance voting was already incorporated into absentee voting as Plaintiffs suggest, there would have been no need for the legislature to amend the Election Code to implement advance voting in 1995. In short, this Court

has no constitutional authority to interfere with the legislature’s policy choices in structuring the scope of such advance voting.

C. Plaintiffs’ Equal Protection Claim Fails as a Matter of Law

Plaintiffs first claim a violation of equal protection under Sections 1 and 2 of the Kansas Constitution’s Bill of Rights. Plaintiffs contend that the absence of a grace period for receiving advance mail ballots has a disparate impact on “voters living in rural areas and voters who are temporarily away from Kansas” because (i) such voters allegedly tend to rely more heavily on voting by mail than other Kansans, and (ii) the USPS’s on-time delivery track record is not at levels Plaintiffs and some Kansas state officials deem acceptable. Am. Pet. ¶¶ 10-11, 29, 59-74, 87, 106. Plaintiffs similarly allege that the elimination of the grace period violates the equal protection rights of disabled voters whose mobility issues necessitate that they vote by mail. *Id.* at ¶¶ 8, 26-28, 88-91. Plaintiffs argue the USPS’s slow delivery times will make it difficult for these voters to ensure that their mailed ballots are received at the county election office by the close of polls on Election Day.

1. – Plaintiffs fail to State an Equal Protection Claim under Section 1

Plaintiffs’ Section 1 claims are foreclosed by *LWV II*. There, the majority held the “‘right to vote’ is not an unenumerated ‘natural right’ protected by section 1 of the Kansas Constitution Bill of Rights. Rather, suffrage is universally understood as a political right.” 318 Kan. at 793 (collecting cases). Accordingly, the Supreme Court held, “the Court of Appeals erred when it analyzed the question under our existing section 1 jurisprudence.” *Id.* at 793-74. Justice Rosen’s dissent echoed this holding. *Id.* at 813 (Rosen, J., dissenting) (“The majority concludes voting is a political right, not a natural one, so section 1 offers it no protection. I agree.”).

2. – Section 2 is Coextensive with Fourteenth Amendment of U.S. Constitution

With respect to Plaintiffs’ Section 2 equal protection claim, Kansas appellate courts have long held that the scope and application of the Kansas Constitution’s equal protection rights is identical to that of the U.S. Constitution. *Rivera v. Schwab*, 315 Kan. 877, 893-94, 512 P.3d 168 (2022) (Section 2 of Kansas Constitution’s Bill of Rights is “coextensive” with equal protection guarantees of the Fourteenth Amendment). Nevertheless, Plaintiffs urge this Court to interpret the State Constitution’s equal protection guarantees in Section 2 more broadly than the parallel clause in the Federal Constitution. When forced to grapple with *Rivera* at oral argument before this Court, Plaintiffs argued that it does not apply here because it involved political gerrymandering and vote allegations in redistricting. *Rivera*, however, contains no such limitation.

Rivera explained that the Court’s decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), did *not* alter Kansas’ “historical and fundamental interpretation of the scope of equal protection found in section 2.” *Rivera*, 315 Kan. at 894. To the contrary, the Court in *Rivera* reiterated that “section 2 is ‘given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.’” *Id.* (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *State v. Wilson*, 101 Kan. 789, 795-96, 168 P. 679 (1917)). “Put even more clearly,” *Rivera* held, “the equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution.” 315 Kan. at 894. And if there were any doubt regarding *Rivera*’s continued application, in *LWV II*, the Supreme Court *quoted from Rivera* in explaining that Section 2 of the Kansas Constitution Bill of Rights is to be read coextensively with the U.S. Constitution. *LWV II*, 318 Kan. at 805.

3. – The Governing Legal Standard for Equal Protection Claims

In *LWV II*, our Supreme Court addressed an equal protection challenge to Kansas’ signature verification requirement for advance mail ballots and articulated the applicable standard generally governing equal protection challenges attacks on election integrity laws:

Equal protection requires similarly situated individuals should be treated alike. It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. To comply with equal protection in the context of providing “proper proofs” of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with reasonable uniformity upon objective standards so that no voter is subject to arbitrary and disparate treatment. *LWV II*, 318 Kan. at 805 (internal quotations and citations omitted).

LWV II thus provides the starting point for determining the proper equal protection standard here.⁵ Plaintiffs argue this is a “results-based” test that radically transformed equal protection jurisprudence. They maintain that, because disabled and rural voters tend to vote via mail more than other members of the Kansas electorate, the elimination of a grace period would deprive such voters of their right to equal protection under the law. If adopted, this theory would represent a fundamental shift – *sub silentio* no less – in how both the U.S. and Kansas Supreme Courts have long interpreted the requirements to prevail on an equal protection claim. This Court cannot take that leap.

Nor is there any legal basis for treating rural residents or disabled voters as suspect classes for purposes of equal protection. *See Guttman v. Khalsa*, 669 F.3d 1101, 1116 (10th Cir. 2012);

⁵ In addition to the *LWV II* test, Plaintiffs argue that strict scrutiny applies. But *LWV II* categorically rebuffed that contention. 318 Kan. at 808. Plaintiffs insist that because this case involves the regulation of voting, a more muscular standard of review must apply. Again, that theory was rejected in *Rivera* and *LWV II*. As the Supreme Court explained, there is no unenumerated right to vote divorced from “concrete and specific provisions of the Constitution or statutes.” *LWV II*, 318 Kan. at 799-800; *accord Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (“[T]he right to vote, *per se*, is not a constitutionally protected right.”). It is instead an “enumerated political right,” *LWV II*, 318 Kan. at 800, and the legislature may select any reasonable mode of voting and appropriate prophylactics to safeguard the integrity of the electoral process. *Id.* at 801.

Dunn v. Penfield, 2024 WL 1723705, at *11 (D.S.D. Jan. 22, 2024). This is critical because if no suspect class is at issue, “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Guttman*, 669 F.3d at 1116. “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.” *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001). The same is true for individuals living outside urban centers. In sum, whatever rights voters have to cast their ballot via mail are a matter of legislative grace. Plaintiffs’ public policy arguments do not alter the applicable standard of review. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (refusing to elevate the level of scrutiny for laws affecting the mentally disabled, despite changing social attitudes, indicating that levels of scrutiny are doctrinal and not responsive to cultural shifts alone).

In the absence of proof that a challenged statute was adopted with a *discriminatory purpose targeted at a suspect class*, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976) – which is clearly not present here – the law is reviewed under a rational basis standard. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). The fact that the law might have a disparate impact on particular individuals (or even a suspect class) does not suffice to trigger an equal protection violation. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *accord Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308, *supplemented*, 279 Kan. 817, 112 P.3d 923 (2005) (“In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose.”); *Crawford v. Kan. Dep’t of Rev.*, 46 Kan. App. 2d 464, 468, 263 P.3d 828 (2011) (“Evidence that similarly situated persons were treated differently is not, in and of itself, sufficient to establish an equal protection violation; an element of intentional or purposeful discrimination must also be present.”) (citing *Snowden v.*

Hughes, 321 U.S. 1, 8 (1944), and *Pork Motel, Corp. v. Kan. Dep’t of Health & Env’t*, 234 Kan. 374, 387, 673 P.2d 1126 (1983)). “The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Feeney*, 442 U.S. at 272.

Under the *LWV II* standard, S.B. 4’s Election Day ballot receipt deadline is a uniform, objective standard under which no voter is subject to arbitrary and disparate treatment. 318 Kan. at 805. Plaintiffs allege no intentional discrimination from S.B. 4, nor could they. This legislation is a quintessential, neutrally applied statute that is administered identically (and objectively) to every voter. There are no individualized determinations to be made. No category of the electorate is treated differently than any other. The law applies equally to everyone. While Plaintiffs focus on the Kansas Supreme Court’s use of the phrase “achieve reasonable uniformity” in *LWV II*, 318 Kan. at 807, and suggest some sort of disparate impact test might be at play, this Court must reject their attempt to isolate this phrase out of context. The Supreme Court was simply describing the test to be applied on remand for evaluating the regulations governing the signature verification process for advance mail ballots – which had not yet been analyzed in the case and which the plaintiffs alleged utilized a standard that was not reasonably uniform among the counties. It is inconceivable that the Supreme Court was jettisoning fifty years of consistent equal protection jurisprudence with no explanation whatsoever.

Under that long line of equal protection case law, where there is nary a suggestion that the law was adopted for a discriminatory purpose, a rational basis standard must be applied in a manner that affords substantial deference to the State. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 193-94, 273 P.3d 709 (2012). Plaintiffs argue that the law would be fairer if mail ballots could be disseminated earlier than twenty days prior to the election, and if timely postmarked ballots could be received up to a week after the election. But even assuming these one-sided policy arguments

are correct, the State has no legal obligation to choose a “better” or less burdensome method for pursuing its policy objectives. “[T]he relationship between the classification and the legislative objective it serves need not be narrowly tailored to the objective. A rational connection between the two will suffice.” *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 370, 361 P.3d 504 (2015). “Relevance is the only relationship required between the classification and the objective.” *Id.* (quotation and alteration omitted). In other words, the “standard is met so long as the statute produces effects that advance, rather than retard or have no bearing on, the attainment of the objective.” *Id.* (quotations omitted); accord *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (“The equal protection obligation . . . is not an obligation to provide the best governance possible. This is a necessary result of different institutional competences, and its reasons are obvious.”).

None of Plaintiffs’ policy objections to S.B. 4 equate to an equal protection violation, much less one requiring this Court to facially invalidate a duly enacted statute. The Kansas legislature’s decision to bring the State back into alignment with 35 other states – returning to a requirement that ruled the day in Kansas for roughly *150 years*, other than a grace period allowance for certain military voters in the 1920s and 1930s, and the brief 2017-2025 grace period experiment at issue here – may or may not accord with the policy preferences of the full electorate. But that is simply immaterial to the constitutional analysis. See *USD No. 380 v. McMillen*, 252 Kan. 451, 461, 845 P.2d 676 (1993) (“[I]f a legislative enactment is constitutional, it is not for this court to set policy or to substitute its opinion for that of the legislature no matter how strongly individual members of the court may personally feel on the issue.”). Additionally, this Court rejects the notion that the Kansas Constitution imposes a one-way ratchet – that the legislature, after briefly experimenting with a change to its electoral mechanics, can never revert to the original procedures.

There can be no dispute that the Election Day ballot receipt deadline implemented by S.B. 4 applies in a neutral, even-handed manner to all Kansas voters. *Every voter* who opts to vote by mail must return the ballot to the county election office or a polling place no later than 7:00 PM on Election Day. No exceptions. “Equal protection requires similarly situated individuals should be treated alike.” *LWV II*, 318 Kan. at 805 (quotation omitted). “It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Id.* (quotation omitted). All that is necessary for the State to show is that the law in question is “being applied with reasonable uniformity so that no voter is subject to arbitrary and disparate treatment.” *Id.* Moreover, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” *Id.* (citing *Butts*, 31 Kan. at 555-56). This is all the more true in light of Plaintiffs’ *facial* challenge. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (to succeed in a facial attack, plaintiffs must establish that “no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep.”); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (“A facial challenge must fail where the statute has a plainly legitimate sweep.”) (quotations omitted).

S.B. 4 imposes *no* legitimate burden – let alone a *severe* burden – on any voter in the State. Kansas voters have myriad options for exercising the franchise. In addition to voting by mail, they can vote in person on either Election Day or up to twenty days before the election at an advance voting site. K.S.A. 25-1123(a), 1122(g)(1). All such polling places are handicapped-accessible and compliant with both the Americans with Disabilities Act and Help America Vote Act. *See* K.S.A. 25-2710; 28 C.F.R. § 35.150 (ADA); 52 U.S.C. § 21081(a)(3) (HAVA). The State even mandates curbside voting so that voters do not have to exit their vehicle; election officials literally will bring

a ballot to the voter in the precinct's parking lot. K.S.A. 25-2909(d). Voters may also direct a third party to return their ballot to a county election office, polling place, or drop box. K.S.A. 25-2437.

As for voting by mail, it is still freely available. Counties begin processing advance mail ballot applications ninety days before the election, K.S.A. 25-1122(f)(1)(B), and then mail advance ballots to voters beginning twenty days before the election. K.S.A. 25-1123(a). Voters with a permanent disability or illness may be placed on the permanent advance mail voter list, K.S.A. 25-1122(h), and do not even have to apply for an advance mail ballot; their ballot will be automatically sent to them twenty days before the election. Anyone not on the permanent list, meanwhile, must have their advance ballot application processed within two days of receipt. K.S.A. 25-1123(a). Douglas County, in fact, *automatically sends advance ballot applications to all registered voters* in advance of every even-numbered-year general election.

While Plaintiffs lament the USPS's delivery pace, that is *legally irrelevant*. First, the legislature has no constitutional obligation to even allow mail voting. The fact that it does so does not constrain it from imposing conditions (including an Election Day receipt deadline) on the practice. Second, Kansas cannot be held to violate an elector's equal protection rights just because some third-party over whom the State has no control – the USPS – is not exactly a model of operational efficiency. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (State must not be held responsible under Fourteenth Amendment for conduct it cannot control).

Third, with a modicum of diligence, all voters can ensure that their ballots are counted. If a voter knows it could potentially take as much as a week or ten days for his mailed ballot to reach the county election office, then that voter simply needs to send it in early rather than waiting close to Election Day. As the U.S. Supreme Court pointed out in rejecting a request to extend a ballot

receipt deadline, voters who request a ballot at the last minute (and thus risk it not being counted) suffer the typical burden of a late-requesting voter, *not a burden imposed by state law*. *RNC v. DNC*, 589 U.S. 423, 425 (2020). An election deadline is not unconstitutional merely because an individual “fail[ed] to take timely steps to effectuate” his vote. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *accord DNC v. Wisc. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (rejecting all of the same arguments Plaintiffs advance in this case, noting state’s interest in enforcing Election Day ballot receipt deadline, and holding that voters who delay the submission of their ballot have no right to demand that it be counted); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (“Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting. ... And the burden on a voter to ensure that a ballot is postmarked by Election Day is not meaningfully smaller than the burden of, say, dropping the ballot in a drop box at one’s polling place on Election Day.”); *accord Mays v. LaRose*, 951 F.3d 775, 782-91 (6th Cir. 2020) (plaintiffs are no more burdened than any elector when they fail to take steps necessary to ensure the timely return of their ballots); *All. for Retired Ams. v. Sec’y of State*, 240 A.3d 45, 51-55 (Me. 2020) (same); *cf. Tully v. Okeson*, 977 F.3d 608, 615-18 (7th Cir. 2020) (requiring voters to vote in person during COVID-19 pandemic did not contravene Equal Protection Clause). In short, there is no constitutional right to procrastination.

Meanwhile, the federal district court cases Plaintiffs cite in support of their position offer them no refuge. Even assuming those cases were properly decided, they involved “as-applied” challenges to election officials’ refusal to accept and count timely-postmarked, but late-arriving ballots *in electoral ecosystems that included a grace period*. See *DCCC v. Kosinski*, 614 F.Supp.3d 20, 56 (S.D.N.Y. 2022); *Gallagher v. N.Y. State Bd. of Elections*, 477 F.Supp.3d 19, 46-48

(S.D.N.Y. 2020). None suggested a State would have to accept late-arriving ballots *where the law provided no grace period*. Never has the equal protection clause been held to impose such a requirement.

Plaintiffs' citations to *Bush v. Gore*, 531 U.S. 98 (2000), and *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506 (1971), are likewise inapposite. In *Bush*, the U.S. Supreme Court invalidated the Florida Supreme Court's mandated recount of the 2000 presidential election as lacking "sufficient guarantees of equal treatment" because the recount directive failed to provide *any* standard for election officials to use when determining the intent of the voter. 531 U.S. at 106-07. In the absence of such a uniform standard, Florida counties employed "varying standards to determine what was a legal vote," resulting in recount outcomes that were "markedly disproportionate to the difference in population between the counties." *Id.* at 107. Here, by contrast, S.B. 4 is indisputably administered in an even-handed and objective manner. All voters play by the same rules.

As for *Moore*, it involved an analysis of the Kansas Constitution's one-subject rule for constitutional amendments in Article 14, Section 1, and an assessment of whether an individual voter has standing to challenge the Secretary of State's decision to submit a proposed amendment to the electorate for approval. *Moore*, 207 Kan. at 645-46. That opinion has nothing to do with the instant action.

A recent decision of the Michigan Court of Appeals turning away a state constitutional challenge (including on equal protection grounds) to an Election Day receipt deadline for absentee ballots is particularly illuminating. *See League of Women Voters v. Sec'y of State*, 959 N.W.2d 1 (Mich. Ct. App.), *appeal denied*, 946 N.W.2d 307 (Mich. 2020). The court explained that the receipt deadline is a facially nondiscriminatory law equally applicable to all voters who choose to

vote absentee by mail. *Id.* at 15. “Although mail may be processed more expeditiously in some areas and less expeditiously in others, the Legislature has opted to impose a received-by deadline rather than a mailed-by deadline for absent-voter ballots. That determination was a policy decision, and the [State Constitution] grants the Legislature the authority to provide for a system of absentee voting.” *Id.* And while all deadlines carry the possibility that a voter’s ballot will arrive too late to be counted, the court noted, “there must be a deadline – at some point, the ballots must be counted and a winner declared. What that deadline should be is a policy decision.” *Id.* at 12.

If – as the U.S. Supreme Court has held – the obligation of voters to travel across town to the DMV and gather documents for a photo 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 insisting that a voter either arrange for a third party to deliver his ballot, mail the ballot in early enough to account for potentially slow USPS delivery, or simply vote in person is not so severe a burden as to contravene any constitutional rights.

4. – Plaintiffs’ Evidence of USPS Slow Delivery Times Is Irrelevant

Although the threshold legal shortcomings in Plaintiffs’ motion are sufficient to dispose of their request for injunctive relief, the Court will nevertheless address Plaintiffs’ allegations about USPS delays in certain Kansas counties. Noting that 2,110 (or 1.4%) of the (timely postmarked) mail ballots counted statewide in the 2024 General Election arrived during the then-operative three-day grace period, Pls.’ Ex. 1 at ¶¶ 36, 37, and pointing to the higher grace-period-receipt numbers in certain rural counties, *id.* at ¶ 49, Plaintiffs posit that none of these votes would have counted (and voters would thus be “disenfranchised”) under S.B. 4. This argument is flawed on multiple levels.

First, the basic premise of Plaintiffs’ argument is a logical fallacy. It assumes voters would behave identically under the new statute as they did when the grace period was in effect. That is obviously unsound. When the law sets a clear deadline, voters adapt their conduct to meet it. The elimination of the grace period does not demonstrate disenfranchisement under the new law; it merely reflects how voters behaved when the grace period existed. Courts do not evaluate election regulations based on such static and unrealistic assumptions about human behavior. The Kansas Constitution does not require states to preserve outdated rules simply because some voters previously relied on them.

Second, as explained above, Plaintiffs’ cherry-picked and incomplete data does not support the extraordinary relief they seek. Contrary to their fabricated projections for the 2026 general election, Plaintiffs’ own expert’s declaration shows that the vast majority (if not all) of advance mail ballots will be timely received on or before Election Day. Indeed, *no* ballot from the Douglas County 2024 primary spent more than 19 days in total transit time, *no* ballot from the 2024 general election spent more than 15 total days in total transit time, and only *two* ballots from the 2024 general election spent more than 12 total days in total transit. *See* Pls.’ Ex. 1, Tables 17 and 21 and ¶¶ 140 and 154.

Third, the rural county grace-period-receipt percentages trumpeted by Plaintiffs’ expert in his affidavit – Pls.’ Ex. 1 at ¶ 49 – contains no data on when those ballots were mailed, only when they were received. Fourth, and relatedly, these percentages are based on such small numbers of ballots that they reveal nothing useful in terms of a county-to-county comparison. The tiniest fluctuations can completely change the numbers. *See Brnovich v. DNC*, 594 U.S. 647, 671 (2021) (“[T]he 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. The size of any

disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified.”) (citing *Frank v. Walker*, 768 F.3d 744, 752 n.3 (7th Cir. 2014)); *Lemons v. Bradbury*, 538 F.3d 1098, 1106-07 (9th Cir. 2008) (minor deviations in the signature rejection rates of different counties do not constitute an equal protection violation).

Plaintiffs’ expert *concedes* that the data upon which he relies is *not statistically significant*. See Pls.’ Ex. 1 at ¶ 63 (“The conventional confidence level that one often finds in empirical research requires that an estimate have a p-value of 0.05 or lower to be considered statistically significant. The p-value associated with the slope estimate in Figure 4 is . . . slightly larger than 0.05.”).⁶ He thus retreats to claiming that there is merely “suggestive evidence” to support his point, but this is not the kind of evidence on which a temporary injunction can be grounded.

Fifth, Plaintiffs rely on an analytical tool called “Ballot Scout” – which purports to track mail ballots through the Postal Service – to argue that delivery in Douglas County is often plagued by delays, a problem that manifested itself in 2024. Douglas is the only county in Kansas that uses this tool and Plaintiffs offer no comparative data. Data from a single county cannot support a claim for statewide injunctive relief. Moreover, not only has this software never (so far as the Court is aware) been deemed sufficiently reliable to be admitted as proof of mailing or receipt date in any court case, but the manufacturer itself publicly confesses its limited utility. While it may assist voters in tracking their ballots, Ballot Scout’s terms and conditions explicitly state, “We make no warranties or representations about the Site or the Services, including but not limited to *accuracy, completeness, timeliness, or reliability*.” (Emphasis added.) Ballot Scout’s FAQs further point out

⁶ He also acknowledges that his chart purporting to show greater grace period rates in rural counties often fails to support his theory. See Pls.’ Ex. 1 at ¶ 58 (“Aggregating counties by [Rural-Urban Continuum Code, as Table 5 does,] loses information.”). Indeed, the Court notes in his Table how many data plots are *below* the line in the State’s more rural counties.

that the system depends on ballot scans by the USPS, and “[o]ftentimes certain postal facilities may not have the scanning equipment to continue scanning the ballot or the USPS may be sorting the ballot in a way that does not move the ballot through the relevant scanning machines.”

Even Plaintiffs’ expert does not attempt to establish the product’s reliability, completeness, or error rate; he simply parrots the company’s description of its product and then relies on a subset of advanced ballots which purport to have been tracked in both directions by this program. *See* Pls.’ Ex. 1 at ¶ 124 n.31, ¶¶ 125-36. Although the rules of evidence are less strictly applied in a temporary injunction hearing than in a final trial, *Wyatt v. Mickey*, 126 Kan. 690, 217 P. 304, 306 (1928), they are not irrelevant. “[W]hen the primary evidence introduced [to support a preliminary injunction] is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for a preliminary injunction.” 11A Charles A. Wright et al., *Federal Practice and Procedure: Civil* § 2949 (3d. ed. 2025).

Putting Plaintiffs’ evidentiary deficiencies to the side, nothing in their expert’s analysis justifies a facial invalidation of S.B. 4. Assuming the accuracy of the mail transit figures in Plaintiffs’ expert Declaration – an assumption to which Plaintiffs are not entitled, particularly considering they did not disclose any of the underlying data used to prepare those tables and statistics and chose not to call their expert as a witness at the hearing – no unconstitutional burdens are evident. For example, Table 17 in Ex. 1 of the expert’s report (and the accompanying ¶¶ 140-41) shows the purportedly *roundtrip* transit time for a mail ballot from the time it leaves the county election office and arrives in the voter’s mailbox, and then from the time a voter mails it back until it arrives in the county election office for the 2024 General Election. Only 58 of the county’s 3,731 mail ballots (or a mere 1.6%) took 10 days or longer in *total transit time*. And only two took 13 days or longer. That means if a voter promptly requests an advance mail ballot – which can be

requested as early as 90 days before the election, and which the county mails as early as 20 days before the election, including *automatically* to everyone on the permanent disabled list, *see* K.S.A. 25-1122(f)(1)(B), (h) and K.S.A. 25-1123(a) – and mails that ballot back without delay, there is *ample* time for it to be received at the election office by Election Day and counted. Voters, in fact, would have at least a week to spare.

Plaintiffs also highlight the roundtrip transit times in Douglas County for the 2024 Primary Election. Assuming the data’s validity, 51 of the 583 mail ballots (roughly 8.7%) had a total transit time of 15 days or more. But that does not move the needle. While those figures may not win the Postal Service any performance awards, Table 21 in Ex. 1 (and the accompanying ¶ 152) ultimately shows that if voters promptly return their mail ballots back to the election office following receipt, there is always enough time for their ballots to be delivered by Election Day. Plaintiffs’ own evidence reveals that only *four* ballots in the 2024 primary spent more than 17 days in total transit to and from the Douglas County election office. And not a single ballot spent more than 19 days in transit.⁷

Finally, Plaintiffs point to various statements from both the Secretary and Defendant Shew (often filled with hyperbole and sarcasm) critical of the Postal Service’s delivery performance in Kansas. (Mot. at 3, 11). None of this establishes a constitutional violation. These are merely policy arguments from officials outside of the legislative branch. Plus, the testimony of the Secretary’s General Counsel, Clay Barker, before the House Committee on Elections discussed arguments

⁷ Plaintiffs also reference the number of voters in Sedgwick County who request advance mail ballots to be sent to locations thousands of miles away. Kansas law accommodates those requests. K.S.A. 25-1123(a)(2). But the relevance of this point is lost on the Court. The State is obviously not expected to adopt a system that guarantees the same speed of mail delivery for voters who have their ballot sent to an address in Sedgwick County as elect to have their ballots sent to far flung corners of the country (or world for that matter).

both *for* and *against* eliminating the grace period. In *support* of requiring an Election Day deadline, he noted:

- “Allowing ballots not in the possession of election officers at close of polls to be counted creates public doubt, undermining confidence in the election system. Currently only 18 states have a grace period after the election during which mail ballots may be received and counted.”
- “Voters who rely on the 3-day period may not have their ballots counted because of slow delivery or lack of postmark.”
- “With the ability to drop off or have someone else carry a mail ballot to an election office, polling place (early or election day) or remote box, voters have available means to submit mail ballots by close of polls.”
- “It reduces administrative burden on election staff.” (Pls.’ Ex. 14 at 1-2).

A recent piece from no less than the *New York Times* Editorial Board further highlights the limited utility of grace period for advance mail ballots. *See How California is Damaging Faith in Government*, N.Y. TIMES, Feb. 19, 2026. *See* Exhibit B.⁸ There, the editors discussed the harm to the nation from California’s policies permitting mail ballots to arrive after Election Day. The editors explained that California’s decision to adopt a three-day grace period, later extended to seven days, had actually proved counterproductive. Because human beings tend to procrastinate until a deadline, the editors noted, more voters ultimately ended up mailing their ballots later in the cycle, undermining the law’s effectiveness:

Consider: In 2012, when ballots had to be received by Election Day, 0.5 percent of ballots were rejected because of lateness – and the share was an identical 0.5 percent in 2022, when the grace period was seven days. How could that be? As any college student (or journalist) knows, human beings tend to procrastinate until a deadline. The longer grace period led more voters to mail their ballots later.

...

⁸ It is also available at https://www.nytimes.com/2026/02/19/opinion/california-elections-vote-count-slow.html?campaign_id=39&emc=edit_ty_20260219&instance_id=171312&nl=opinion-today®i_id=117282&segment_id=215501&user_id=a462c74aa213c4ec35f6455e8ce59445.

California's leaders are making a mistake that Democrats have made in a range of policy areas over the past decade. In the name of laudable goals like equity and access, they have adopted policies that may initially sound sensible – in this instance, trying to protect every mail-in ballot – but that end up being counterproductive because they undermine the government's effectiveness. *Id.*

The *New York Times* house editors lamented this result, recognizing that “[w]hen elections are quickly decided it builds confidence in the democratic process. When uncertainty lingers for days, Americans wonder why government today can often seem less competent than it once was.” *Id.* The editors encouraged California to bring its “elections out of the pre-telegraph era and back into the 21st Century,” where “the rapid resolutions of U.S. elections was the norm.” *Id.* Suffice to say, when even a natural ally like the *New York Times* repudiates Plaintiffs’ theory, the weakness in their position is illuminated with particular intensity.

The United States Supreme Court has long recognized that “individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.” *Whalen v. Roe*, 429 U.S. 589, 597 (1977). “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.” *Id.* at 597 n.20 (quotation omitted). Furthermore, “[u]nder the Kansas Constitution, the primary lawmaking body is the legislature.” *Woodruff v. City of Ottawa*, 263 Kan. 557, 561, 951 P.2d 953 (1997). “Courts must respect legislative expressions when determining or forming public policy.” *Id.* This is especially true here, where the Kansas Constitution delegates the mode, form, and rules governing elections to the legislature. *LWV II*, 318 Kan. at 797. The bottom line is that “the question of the wisdom, justice, or expediency of the legislation is for the legislature and not for the courts.” *Bolz v. State Farm Mut. Auto. Ins. Co.*, 274 Kan. 420, 424, 52 P.3d 898 (2002).

5. – Plaintiffs Claims Also Fail Under *Anderson-Burdick* Type Balancing

Even if this Court were to find the reasonableness standard applied by the Kansas Supreme Court in *LWV II* or the general rational basis test for equal protection claims not involving suspect classes inapplicable, a balancing test along the lines of the *Anderson-Burdick* standard utilized by the federal judiciary would govern and the Court would reach the same result. Under this standard, courts “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the state as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982)). “[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the challenged law is exposed to far less searching review that is “closer to rational basis and the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434); *Fish v. Schwab*, 957 F.3d 1105, 1124-25 (10th Cir. 2020) (same).

For all the reasons this Court previously stated, elimination of the three-day grace period does not legally burden Plaintiffs’ equal protection rights under the Kansas Constitution. 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 (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).

6. – Kansas’ Interests in S.B. 4 are Legitimate and Strong

When – as is true of an Election Day ballot receipt deadline – “the alleged burdens are not severe, a compelling state interest is not required.” *New Ga. Project*, 976 F.3d at 1282 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Even so, Kansas has very compelling interests in such a law. First, there is the need to remain compliant with the Federal Election Day statutes described in Section III.F below. Second, eliminating the grace period ensures prompt tabulation of all votes and facilitates public confidence in the finality of results. Close elections are a regular feature of down-ballot races in every state (including Kansas), and a grace period for mail ballots means the outcome can teeter back and forth every day based on what mail arrives into the election office.⁹ Delayed counting of ballots received days after the election fuels mistrust and speculation, especially in tight contests. Third, enforcing an Election Day ballot receipt deadline simplifies logistics and enhances efficiency. Processing late-arriving mail ballots necessitates additional manpower, resources, and contingency planning, all of which complicate election administration. Fourth, eliminating the grace period helps prevent election fraud. Mail ballots arriving late are harder to verify, raising concerns about post-election tampering. This is especially true when the USPS has failed to include a postmark on the ballot. The revised law will avoid problems potentially arising from missing, unclear, or even altered postmarks.¹⁰ *See RNC v.*

⁹ The Public Interest Legal Foundation has prepared a “Tied Election Chart” that catalogues many of these elections. *See* <https://publicinterestlegal.org/tied-elections/>.

¹⁰ The Kansas Legislature received testimony on these interests during its consideration of S.B. 4. *See* Written Testimony of the Public Interest Legal Foundation, Opportunity Solutions Project, and Honest

Aguilar, 2024 WL 4601602, at *2-4 (Nev. Oct. 28, 2024) (ordering mail ballots received after Election Day to be accepted despite a missing or indeterminate postmark).

All of these interests have been recognized as powerful and “more than enough to uphold [the State’s] reasonable ballot-receipt restriction” and “justify the deadline.” *New Ga. Project*, 976 F.3d at 1282; *accord Common Cause Ind.*, 977 F.3d at 664-66; *All. for Retired Ams.*, 240 A.3d at 52-55. Moreover, the State is not required to provide any “elaborate, empirical verification of the weightiness of [its] asserted justifications.” *Timmons*, 520 U.S. at 364. The fact that Kansas, so far as we know, has been lucky enough to avoid systemic fraud from mail ballots does not mean it is constrained from adopting this type of prophylactic measure. *See id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (“Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.”)). In sum, Plaintiffs’ equal protection claim falls well short of the mark. The Court thus declines Plaintiffs’ request for temporary injunctive relief.

D. Plaintiffs’ Due Process Claim Fails as a Matter of Law

Plaintiffs next claim that Kansas’ imposition of a neutrally applicable Election Day ballot deadline violates their due process rights under Section 18 of the Kansas Constitution’s Bill of Rights. This claim, too, lacks merit.

As a threshold matter, due process rights are implicated only when there has been a deprivation of life, liberty, or property. *Interest of A.S.*, 319 Kan. 396, 402-03, 555 P.3d 732 (2024). “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). Here, as federal appellate courts have uniformly held, there is no liberty interest in voting by mail, let alone in a grace period.

Elections Project (available at https://www.kslegislature.gov/li/b2025_26/measures/S.B.4/testimony); *see also* Oral Testimony at <https://www.youtube.com/live/dOAuHaYvxik?si=akvLMq038V8c1f6R>.

See *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 231 (5th Cir. 2020) (no liberty interest in right to vote); *New Ga. Project*, 976 F.3d at 1282 (same); *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (same). Invoking *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 3d 1354 (D. Ariz. 1990), Plaintiffs urge the Court to disregard these decisions. But the Fifth Circuit explained in detail why that decision was wrongly decided and why no appellate court has ever embraced it. *Richardson*, 978 F.3d at 232-33.

Plaintiffs also rely on *LWV II*, where the Kansas Supreme Court remanded the plaintiffs’ due process challenge to the State’s signature verification requirements for advance mail ballots for the purpose of determining if voters are provided “reasonable notice” of their signature mismatch and “an opportunity to be heard at a meaningful time and in a meaningful manner” in order to contest the preliminary mismatch assessment. 318 Kan. at 807. But the Supreme Court never addressed the liberty issue in its majority opinion and, as discussed above, there is no precedential value to an opinion that did not explicitly address an issue.¹¹

In any event, Plaintiffs fail to recognize the distinctions between an Election Day ballot receipt deadline and the signature verification requirement at issue in *LWV II*. Plaintiffs argue that the due process defect with S.B. 4 is that, if a ballot fails to arrive by Election Day, it can never be validly counted; there is no possibility of cure. An Election Day receipt deadline, however, does not implicate the type of individualized, discretionary determinations that can trigger due-process scrutiny. Unlike signature-verification processes or case-specific eligibility judgments – where election officials assess voter-specific information and thus must be guided by adequate procedural safeguards – an across-the-board receipt deadline is a neutral, bright-line rule that applies equally to every voter. There is no individualized decision to review, no adjudicative process to second

¹¹ Plaintiffs reference a comment by Justice Rosen – *in his dissent* – about the presence of a liberty interest. Am. Pet. ¶ 113. The majority, however, never said anything of the sort.

guess, and no risk of an erroneous deprivation dependent on administrative discretion.

To recast a uniform statutory deadline as a due-process problem would effectively grant courts a roving commission to revise election laws whenever litigants dislike the policy choices of the legislature. Such an approach collapses the line between permissible policy disagreements and constitutional violations, inviting judicial intrusion into core legislative functions and destabilizing the predictable administration of elections. Under no plausible reading of *LWV II* can it be said that the Kansas Supreme Court intended such a result. Instead, here, due process is satisfied once the legislature provides reasonable notice of the ballot receipt deadline, explains the procedures to cast a valid ballot by mail, and provides a fair opportunity to comply on or before Election Day.

Plaintiffs nevertheless propose a three-part balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976), but our Supreme Court rejected that theory when formulating the standard for due process challenges involving electoral mechanics in *LWV II*. The Court highlighted that the legislature’s broad constitutional authority to require “proper proofs” under Article 5 means the State must enjoy great latitude in implementing that process. *LWV II*, 318 Kan. at 805-06. Further, the U.S. Supreme Court has directed that due process attacks on voting processes are best analyzed under a balancing test along the lines of *Anderson-Burdick*, see *Richardson*, 978 F.3d at 234, and the Kansas Supreme Court construes Sections 2 and 18 of the State Constitution as “coextensive” with their federal counterparts. *Rivera*, 315 Kan. at 894; *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019). That means *Eldridge* has no role here:

The flaw in using *Eldridge* is that election laws, by nature, inevitably affect the individual’s right to vote. Under *Eldridge*, however, courts may accord the private interest at stake, namely the right to vote, significant weight. Therefore, the *Eldridge* test would inevitably result in courts’ weighing the pros and cons of various balloting systems, thereby tying the hands of States seeking to assure that elections are operated equitably and efficiently. Unlike *Eldridge*, the *Anderson / Burdick* approach recognizes that the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. Because

Anderson/Burdick – unlike *Eldridge* – appropriately accounts for the state’s interest in regulating voting, it provides the appropriate test for procedural due process claims challenging election laws.

Richardson, 978 F.3d at 235 (cleaned up) (quotations omitted).

This no doubt explains why *every* federal appellate court to address the issue has reached the same conclusion. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194-95 (9th Cir. 2021) (rejecting use of *Eldridge* test in election law challenges); *Memphis A. Philip Randolph Inst.*, 978 F.3d at 387-391 (same); *New Ga. Project*, 976 F.3d at 1282 (refusing to apply *Eldridge* in constitutional attacks on voting law because doing so “would stretch concepts of due process to their breaking point”). *See also Lawson*, 977 F.3d at 664 (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex. It is rational to require absentee votes to be received by Election Day, just as in-person voting ends on Election Day.”).

In any event, whether or not there is a liberty interest in mail voting is irrelevant. Plaintiffs’ due process cause of action fails either way. Judge Lagoa described the point in her concurrence in *New Georgia Project*, a case in which the Eleventh Circuit rejected the identical theory Plaintiffs advance here. As she explained, “[e]ven if Plaintiffs are being deprived of that [liberty] interest, they are being deprived of it by *legislative* action, not by *adjudicative* action.” *New Ga. Project*, 976 F.3d at 1288 (Lagoa, J., concurring). The Supreme Court has long distinguished between the two when deciding what due process requires. *Id.* For this reason, Judge Lagoa underscored, the traditional *Mathews v. Eldridge* test that Plaintiffs urge the Court to adopt (Am. Pet. ¶ 111) has no role to play in this context:

When a state deprives persons of liberty or property through *legislative* action—an action passed by the legislative process that applies “to more than a few people”—then “the affected persons are not entitled to *any* process beyond that provided by the legislative process.” *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020) (emphasis in original) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); see also *Bi-Metallic*, 239 U.S. at 445 (“General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”)). On the other hand, when a state deprives persons of a liberty interest through an *adjudicative* action—an action that concerns only a “relatively small number of persons” who are “exceptionally affected, in each case upon individual grounds”—then the affected individuals may be entitled to additional process above and beyond that provided by the legislative process. *Bi-Metallic*, 239 U.S. at 446. Only in the latter situation do courts apply the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Id. at 1288-89 (cleaned up).

Kansas’ Election Day ballot receipt deadline is a law of “general applicability which affects all [Kansans] equally.” *Id.* at 1289. It was adopted by the legislature as part of its basic legislative function. Thus, “even if Plaintiffs are being deprived of a constitutionally protected liberty interest, they are being deprived of that interest by *legislative* action.” *Id.* There is no individualized determination required before a late-arriving ballot will be rejected under the law. Nor is any individualized determination due. *Id.* The only “process” to which Kansas voters are entitled “before their late-arriving ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case.” *Id.*

Even if procedural due process were relevant, there is no process deficiency. Not only is the electorate fully apprised of the receipt deadline when submitting mail ballots, but voters are afforded myriad other reasonable options for exercising the franchise. As the Tenth Circuit observed, deadlines in the election process “will invariably burden some voters . . . for whom the earlier time is inconvenient,” but these burdens are assessed in light of “a state’s legitimate interest in providing order, stability, and legitimacy to the electoral process.” *Utah Republican Party v.*

Cox, 892 F.3d 1066, 1077 (10th Cir. 2018); *see also Burdick*, 504 U.S. at 438 (“Reasonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth.”). In the context of mail-in voting, once the State has provided reasonable notice of the ballot deadline, explanation of the procedures to cast a valid ballot by mail, and a fair opportunity to comply on or before Election Day, due process is satisfied.

S.B. 4 simply imposes a due date for the receipt of ballots in the event a voter opts to vote by mail. Plaintiffs argue the elimination of the grace period “is neither a reliable nor a fair way to administer voting by mail.” Am. Pet. at ¶ 114. Putting aside the fact that 35 other states employ the same rule (as did Kansas itself for nearly all of its history), Plaintiffs are asserting a *policy-grounded* argument that does not come within the vicinity of stating a due process claim. Whether a grace period is beneficial or problematic (or a combination of the two) is not for the judiciary to decide. It is a legislative judgment, one which our State Constitution explicitly assigns to the discretion of the legislature.

The Court notes that Plaintiffs’ expansive theory is virtually unbounded. If they were to prevail, even the current grace period would be inadequate. Further, any time a single voter missed a ballot receipt deadline, that individual voter could seek an individualized determination of whether this violated due process under *Eldridge*. The Kansas Constitution imposes no such requirements. Accordingly, the Court declines to grant injunctive relief on this claim.

E. Right to Vote

In their final claim, Plaintiffs allege that S.B. 4 contravenes their right to vote under Article 5, Section 1 of the Kansas Constitution as well as Sections 1 and 2 of our Constitution’s Bill of Rights. Plaintiffs’ Amended Petition acknowledges that their claims grounded in Sections 1 and 2

of the Bill of Rights are foreclosed by *LWV II*. But Plaintiffs nevertheless argue that they still have a viable right to relief under Article 5, Section 1.

Plaintiffs aver that Article 5, Section 1 mandates that their right to vote theory be reviewed under a strict scrutiny standard. They insist that this provision does not address proper proofs, it stands alone. And any voting regulation that does not involve proper proofs, Plaintiffs contend, must survive the highest form of scrutiny. This Court rejects these arguments for multiple reasons.

First, this argument ignores *LWV II*, where the Kansas Supreme Court clearly set forth the standard for evaluating a challenge to a voting law pursuant to Article 5, Section 1. The Court explained that strict scrutiny does not apply to such a claim. *LWV II*, 318 Kan. at 802. Instead, “to prevail on a claim that the article 5 right to suffrage has been violated, a plaintiff must show that the Legislature has imposed what amounts to a new, extra-constitutional qualification on the right to be an elector—that is, the law must be shown to unreasonably burden the right to suffrage.” *Id.* at 801. Plaintiffs argue that S.B. 4 is an extra-constitutional qualification, but they never state what the additional qualification is. Nor could they. The kind of extra-constitutional qualifications sufficient to invalidate a law under Article 5, Section 1, include, for example, a requirement to be up-to-date on all tax obligations, *see State v. Doane*, 98 Kan. 435, 158 P. 38, 40 (1916), certain residency requirements, *see id.*, and a party affiliation declaration mandate for the general election. *See State ex rel. Smith v. Beggs*, 126 Kan. 811, 814-15, 271 P. 400 (1928).

In this case, there is *no* additional qualification on any voter. The law simply imposes a neutrally applicable Election Day receipt deadline for mail ballots. There is nothing problematic, let alone unconstitutional, about that. As the Supreme Court held in *LWV II*, “citizens wishing to exercise the right of suffrage must meet the reasonable requirements of the Legislature, and . . . a failure to do so does not mean that citizen has been disenfranchised.” 318 Kan. at 804. *Accord*

Butts, 31 Kan. at 554 (“Requiring a party to be registered is not in any true sense imposing an additional qualification any more than requiring a voter to go to a specific place for the purpose of voting[.]”); *Lawson*, 977 F.3d at 664-65 (“Deadlines are essential to elections, as to other endeavors such as filing notices of appeal or tax returns. That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits.”).

Second, Plaintiffs’ theory ignores Article 4, Section 1, in which the Constitution confers broad discretion on the legislature to regulate the structure and administration of elections. *See id.* (“Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide.*”) (emphasis added). As the Supreme Court recently noted, “Where popular elections are required – by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere) – the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.” *LWV II*, 318 Kan. at 797. The vast delegation of authority in Article 4, Section 1, to select any reasonable mode of voting for state elections necessarily warrants great deference. Indeed, such principle follows naturally from *LWV II*’s adoption of a highly deferential standard for another constitutionally delegated electoral power to the legislature – the right to impose “proper proofs” pursuant to Article 5, § 4 – an authority deemed to encompass “any *reasonable* provision for ascertaining who is entitled to vote.” *LWV II*, 318 Kan. at 801.

Third, an Election Day ballot receipt deadline *does* functionally operate as a “proper proof” within the meaning of Article 5, Section 4. Part of the purpose behind S.B. 4 was the legislators’ concern that mail ballots were arriving after Election Day with no postmark, a postmark so smudged or illegible that it was impossible to reliably determine the date of mailing, or a stamp from a private postage meter (or similar business device) on which the date could be manipulated

with ease. That meant that officials often had no dependable way to determine whether the voter had acted within the authorized voting window. By requiring that ballots be received by Election Day, S.B. 4 helps ensure that only those voters who exercised their right to vote within the time prescribed by law are included in the count, thereby safeguarding both voter eligibility requirements and the integrity of the electoral process.

Fourth, Article 5, Section 1 merely states that “every citizen of the United States who has attained the age of eighteen and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector.” It is silent on the legislature’s authority to impose rules (or to delegate power to the Executive Branch to adopt regulations) to facilitate and maintain the integrity of the electoral process. That is why, as the Court in *LWV II* explained, the Constitution must be interpreted under the “principle that a specific provision controls over a more general one.” *LWV II*, 318 Kan. at 797. And the specific provisions in Article 4, Section 1 and Article 5, Section 4 offer the critical details. *Id.* (“[W]hile setting forth the specific and required qualifications for all electors in the Constitution, the people empowered the Legislature to ‘provide by law for proper proofs of the right of suffrage.’ See Kan. Const. art. 5, §§ 1, 4.”).

Fifth, the idea that substantial latitude and flexibility govern every election integrity law that targets voter eligibility, but anything outside that realm must be subjected to strict scrutiny – where the legislature can hardly act without turning the tightest corners and having a state court second-guess (and ultimately micromanage) its actions – is untenable. If anything, the legislature should enjoy even greater autonomy in these areas. In fact, it does, by virtue of Article 4, Section 1 discussed above.

At the end of the day, Plaintiffs’ right to vote claim is grounded in one-sided public policy arguments in favor of a grace period. But a robust policy debate does not a constitutional violation

make. “In the end, as a legal matter, it is just not enough to conclude that if some ballots are likely to be rejected because of a rule, the burden on many voters will be severe.” *New. Ga. Project*, 976 F.3d at 1281 (quotation omitted).

Plaintiffs also overlook the fact that Kansas’ advance voting statutes flow from the bedrock principle that under our State Constitution, whether to allow advanced voting *at all* is a legislative decision. Kan. Const. Art. 4, § 1 (“All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.”). Plaintiffs contend that while a state need not authorize voting by mail at all, once it does, it may not curtail that option in ways that disproportionately affect certain voters. But that argument mistakes policy discretion for constitutional compulsion. The Constitution does not embrace an “in for a penny, in for a pound” approach to election administration. A state’s choice to permit mail voting does not strip it of the authority to define the contours under which that method will operate or to revise those conditions over time. States remain free to regulate optional voting mechanisms, including receipt deadlines, subject only to the governing constitutional framework.

Under Plaintiffs’ reasoning, Kansas’ election system operated unconstitutionally for most of 158 years since some form of mail voting has been permitted. The Court is unpersuaded. At no time has the absence of a grace period ever even been challenged before now. *See Chiafalo v. Washington*, 591 U.S. 578, 592-93 (2020) (“Long settled and established practice may have great weight in a proper interpretation of constitutional provisions” about the operation of government) (quotation omitted). While this latest legislative development may not comport with Plaintiffs’ policy preferences, the idea that the legislature, after briefly experimenting with a change to its electoral mechanics, can never revert to the original procedures – is without constitutional support.

Nor are Plaintiffs on solid ground in their effort to characterize Kansas' 20-day advance voting window as "the most restrictive in the country." In reality, of the states that allow no-excuse advance voting (which at least 14 do not),¹² Colorado, Iowa, and Utah have similar deadlines. *See* Colo. Rev. Stat. § 1-7.5-107(3)(a)(I) and (4)(b)(II) (ballots must be mailed not sooner than 22 days and no later than 18 days before Election Day; ballot must be received by Election Day); Iowa Code Ann. §§ 53.8(1) and 53.17(1) (ballots must be mailed not more than 20 days before Election Day; ballots must be received by Election Day); Utah Code Ann. §§ 20A-3a-202(2)(a) and 20A-3a-204 (3)(a) (ballots must be mailed no sooner than 21 days before election and must be received by Election Day).

Unsurprisingly, federal appellate courts addressing this issue have unanimously reversed district court decisions enjoining Election Day ballot receipt deadlines. For example, in staying a lower court's injunction of Arizona's law requiring early voters to sign their ballots by 7:00 p.m. on Election Day, the Ninth Circuit held: "All ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020); *see also Common Cause Ind.*, 977 F.3d at 664-65 ("That some ballots are bound to arrive after *any* deadline does not justify judicial extensions of statutory time limits."); *New Ga. Project*, 976 F.3d at 1281 ("Georgia's Election Day deadline does not implicate the right to vote at all. Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots."); *cf. Carson v. Simon*, 978 F.3d 1051, 1059-60 (8th Cir. 2020) (state court consent decree extending deadline for counting absentee ballots beyond Election

¹² *See* <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee>.

Day violated U.S. Constitution’s Electors Clause). The rationale underlying these cases is especially applicable here considering, as noted above, Kansas provides a myriad of other ways to vote, including methodologies that accommodate the voters upon whom Plaintiffs focus. *See Brnovich*, 594 U.S. at 671 (“[W]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.”).

In short, S.B. 4 imposes no unconstitutional burden on Plaintiffs’ right to vote. For all these reasons, Plaintiffs are not substantially likely to succeed on the merits of this claim.

F. Plaintiffs’ Claims are Preempted by Federal Law

Finally, Plaintiffs’ claims are also all preempted by federal law, specifically, the so-called Election Day statutes described below. The Supremacy Clause dictates that a valid federal law is “the supreme Law of the Land[.]” U.S. Const. art. VI, cl. 2. If a plaintiff’s claim rests on a state law that is preempted by federal law, then the claim fails as a matter of law. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128 (10th Cir. 2007) (recognizing that all preempted state law is “without effect”). The grace period Plaintiffs demand would allow mail-in ballots to be accepted after the federally-prescribed Election Day for selection of the President and members of Congress. As the Fifth Circuit recently explained, such a grace period cannot be reconciled with the federal Election Day statutes. *RNC v. Wetzel*, 120 F.4th 200 (2024), *cert. granted* 146 S. Ct. 355. Indeed, this issue is fundamental to the entire federal electoral process. *See Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

The Federal Constitution’s Elections Clause, found in Art. I, § 4, cl. 1, provides that states shall prescribe the “Times, Places and Manner” of congressional elections, “but the Congress may at any time by Law make or alter such Regulations. . . .” Similarly, the Electors Clause, found in

Art. II, § 1, cl. 4, empowers Congress to set the time for choosing presidential electors. These Clauses collectively entrust Congress with final say over the rules governing federal elections. State election regulations, whether enacted by the legislature or mandated by state constitutions or courts, must yield to conflicting federal requirements. *Foster v. Love*, 522 U.S. 67, 69 (1997).

By statute, Congress has fixed the date of federal general elections as the Tuesday following the first Monday in November in applicable years by enacting three separate statutes: 2 U.S.C. § 7 (“The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress”); 2 U.S.C. § 1 (providing for U.S. Senators to be chosen at the regular November election coincident with the House elections); 3 U.S.C. § 1 (“The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.”). Election Day, meanwhile, is defined as “the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 21.¹³ These statutes, known as the Election Day statutes, create a uniform Election Day for Congress and the Presidency that is required throughout the country. *Foster*, 522 U.S. at 70. Their purpose is to limit states’ ability to influence voting by allowing varying election days. *Foster*, 522 U.S. at 73-74.

In *Foster*, the Supreme Court struck down Louisiana’s open primary statute for congressional elections because it allowed the final selection of a candidate to occur in October. *Id.* at 72. Under Louisiana law, if one candidate won by a majority in the October primary, then no further action took place to elect the official on Election Day in November. *Id.* at 70. Louisiana’s

¹³ Prior to 2022, the definition of Election Day was embedded in 3 U.S.C. § 1. Congress amended the statute, however, in 2022 in the Electoral Count Reform Act, part of the Consolidated Appropriations Act, 2023 (Pub. L. No. 117-328), and shifted the definition to 3 U.S.C. § 21.

law “clearly violate[d]” the federal Election Day statutes because in speaking of “‘the election’ of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make the final selection of an officeholder;” and by establishing “‘the day’ on which these actions must take place, the statutes simply regulate the time of the election” *Id.* at 71-72. Importantly, the *Foster* Court recognized that Congress intended all steps necessary to choose the elected official – the casting of ballots by voters and the acceptance/receipt of the ballots by election officials – to occur within the single, congressionally fixed Election Day. *Id.*

The same principles announced in *Foster* are applicable here. A state law permitting mail-in ballots to be accepted after Election Day runs afoul of Congress’ directive for a uniform Election Day and contravenes the State’s federally mandated obligation to complete the voting process by receiving all ballots by the close of the polls on that day. If an election is consummated only after additional mail-in ballots trickle in days later, Election Day has effectively been extended beyond the day Congress fixed, and the federal requirement of finality is undermined.

In *Wetzel*, the Fifth Circuit addressed a Mississippi law allowing state officials to accept and count mail-in ballots received during a five-day grace period. 120 F.4th at 204. The court noted that the “upshot” of the federal Election Day statutes is that they require all elections for Congress and the Presidency to be held on a single day. *Id.* Looking at *Foster* for guidance, the court considered three definitional elements in connection with the term “election”: (1) official action; (2) finality; and (3) consummation. *Id.* at 206-07.

With respect to “official action,” the court recognized that the “election” of a member of Congress “plainly refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder.” *Id.* at 207 (quoting *Foster*, 522 U.S. at 71). That is, a ballot is only “‘cast’ when the State takes custody of it.” *Id.* As to “finality,” Supreme Court precedent provides

that the word “election” indicates a “final choice of an officer by the duly qualified electors.” *Id.* (quoting *Newberry v. United States*, 256 U.S. 232, 250 (1921)). “A voter’s *selection* of a candidate differs from the public’s *election* of the candidate[.]” and it is nonsensical to claim an electorate has officially elected an officeholder before all voters’ selections (i.e., properly cast ballots) are received. *Id.* This means that “the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen.” *Id.*

Lastly, “consummation” of the election cannot occur prior to or after the federal Election Day. *Id.* at 208-09. The Fifth Circuit focused on the action of *receipt*, not *counting*, of the ballots in the ballot box to consummate the election. *Id.* It is commonplace for ballots to be counted after Election Day. “*Receipt* of the last ballot, by contrast, constitutes consummation of the election, and it must occur on Election Day.” *Id.* at 209. Based on this reasoning, the court held Mississippi’s grace period conflicted with, and was preempted by, federal law. *Id.* at 215.

The same conflict would exist here if Kansas election officials were forced to accept mail-in ballots delivered after Election Day. The fact that Plaintiffs attempt to ground their claims in the Kansas Constitution is irrelevant. The Supremacy Clause applies to “any Thing in the Constitution or Laws of any State” that conflicts with federal law. U.S. Const. art. VI, cl. 2. To the extent that the Kansas Constitution, as capaciously and unreasonably interpreted by Plaintiffs, requires extending federal elections beyond the timeline set by Congress in the Election Day statutes, such a state constitutional mandate would be without effect. *See Emerson*, 503 F.3d at 1128-29.

Conflict preemption exists where “compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377

(2015) (quotation omitted). The State cannot simultaneously enforce a policy requiring that mail-in ballots be counted if they are received after Election Day (as Plaintiffs insist), while also maintaining legal fidelity to the federal Election Day statutes discussed above. Faced with this conflict, compliance with both state and federal law would be impossible. As such, the state law must yield. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (Elections Clause makes Congress’ regulations paramount, and any conflicting state rule is preempted and “ceases to be operative[.]”).

IV. Plaintiffs Cannot Establish Irreparable Harm

Not only have Plaintiffs failed to establish a likelihood of success on the merits, but they also cannot demonstrate a reasonable probability that they will suffer irreparable harm in the absence of an injunction. Under this standard, “purely speculative harm will not suffice.” *Harper*, 65 Kan. App. 2d at 691. And the path Plaintiffs must travel here is more difficult still because of the facial nature of their constitutional attack.

Plaintiffs point to a few voters who have allegedly experienced very slow mail delivery. For one voter, it was a Valentine’s Day card. For another, it was an advance mail ballot in connection with a municipal election. But whether one resides in an urban or rural community, it is safe to say that virtually *every American* at one point or another in their lives has received a piece of mail that spent multiple weeks or longer winding its way through the postal system prior to delivery. Such isolated incidents cannot justify the facial invalidation of a neutrally applicable statute. Constitutional law is not developed through anecdotes.

Plaintiffs cite no case law holding that a duly enacted Election Day ballot receipt deadline establishes irreparable harm, and the Court is unaware of any. In support of their argument, Plaintiffs invoke (i) a vacated – and subsequently reversed – decision of the Court of Appeals

discussing organizational standing, *League of Women Voters v. Schwab*, 63 Kan. App. 2d 187, 525 P.3d 803 (2023), and (ii) a federal district court case alleging violations of the National Voter Registration Act, *League of Women Voters v. Ashcroft*, 336 F. Supp. 3d 998 (W.D. Mo. 2018). But neither case is relevant to this dispute. The Kansas Court of Appeals recently criticized the very tactic Plaintiffs employ here – seeking to establish irreparable harm by “cherry-picking a case because of one sentence in the opinion that may support a party’s cause.” *Harper*, 65 Kan. App. 2d at 698. Plaintiffs suffer no irreparable harm from S.B. 4. To the contrary, it is the *State* which suffers irreparable injury when a court enjoins a duly enacted ballot receipt deadline.

Plaintiffs’ extensive delay in pursuing this temporary injunction reinforces that S.B. 4 poses no actual threat to them. *See Noble v. Butler*, 25 Kan. 645, 651 (1881) (“Courts of equity require that persons shall themselves exercise reasonable diligence in the protection of their rights, and that they shall not depend slothfully upon the action of courts of equity.”); 11A Charles A. Wright et al., *Federal Practice and Procedure: Civil* § 2948.1 (3d. ed. 2025) (“A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.”); *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (although “there is no categorical rule that delay bars the issuance of an injunction,” such delay “cuts against finding irreparable injury”). The legislature passed S.B. 4 on March 25, 2025. Plaintiffs filed their Petition challenging it on May 5, 2025, and did not request temporary injunctive relief until *more than seven months later*. They clearly felt no sense of urgency.

V. An Injunction Would be Adverse to the Public Interest

The requirements to establish that the threatened injury to the plaintiff outweighs the harm to the defendant and that the injunction will not be adverse to the public interest merge when the

government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The U.S. Supreme Court has recognized that unless a statute is unconstitutional, a state experiences serious and irreparable harm when a court “bar[s] the State from conducting this year’s elections pursuant to a statute enacted by the Legislature.” *Abbott v. Perez*, 585 U.S. 579, 603 (2018). The Ninth Circuit echoed this sentiment in granting Arizona’s request for a stay of the lower court’s temporary injunction of that state’s Election Day signature deadline. *See Hobbs*, 976 F.3d at 1086; *accord New Ga. Project*, 976 F.3d at 1283.

The “inability to enforce [the Legislature’s] duly enacted plans clearly inflicts irreparable harm on the State.” *Abbott*, 585 U.S. at 603 n.17. Counting mail-in ballots received after the statutory deadline injures the State because it “necessarily means that otherwise invalid ballots will be entered in the vote totals that determine whether the Electors will be elected or not.” *Carson*, 978 F.3d at 1061 (quotation omitted) (cleaned up). Simply stated, “[t]he counting of votes that are of questionable legality threatens irreparable harm.” *Id.* (quotation omitted). *See also Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025) (“any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury”) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)); *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1254 (10th Cir. 2017) (“When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.”) (quotation omitted).

As explained above, the State has compelling interests in an Election Day ballot receipt deadline, including complying with federal Election Day statutes, ensuring prompt tabulation of all votes, facilitating public confidence in the finality of results and the integrity of the electoral process, simplifying logistics, enhancing efficiency, and preventing fraud. S.B. 4 helps effectuate

these goals. While Plaintiffs raise policy objections to the statute, they are unable to demonstrate anything constitutionally infirm with the law.

VI. The Court Lacks Authority to Issue a Statewide Injunction

Even if the Court were to issue an injunction, its scope and impact would be significantly limited. Kansas law mandates that any injunction be specific and “binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise.” K.S.A. 60-906. This limitation is consistent with traditional principles of equitable relief, as injunctions are designed to provide complete relief to the plaintiffs before the court and not to regulate the conduct of nonparties. *Trump*, 606 U.S. at 851-52 (explaining that universal injunctions improperly protect nonparties and that “complete relief” is relief administered “between the parties,” with any benefit to others only incidental).

Plaintiffs have sued only the Secretary of State and Douglas County Clerk in this lawsuit. No other county election official is named. By explicit statutory command, the Secretary has no operational control over county election officers. The legislature has deliberately established a highly decentralized electoral framework. Kansas law provides that “[e]ach county election officer shall be the sole public officer responsible for planning, conducting and coordinating elections held within such officer’s county,” and shall be “responsible for ensuring those elections comply with federal and state law and rules and regulations.” K.S.A. 25-126(b). The Secretary, meanwhile, merely is responsible for “assisting and advising county election officers in conducting elections in compliance with federal and state laws and rules and regulations.” K.S.A. 25-126(a).

Kansas administrative rules further reinforce county-level responsibility for acceptance and counting of advance voting ballots. For example, K.A.R. 7-36-5 provides “[e]ach county

election officer shall adopt procedures to ensure that ballots received after the time the polls close on election day shall not be counted.” Thus, the act of enforcement at issue – accepting ballots received after Election Day – is implemented locally through county procedures and personnel, not through statewide operational control by the Secretary.

Accordingly, any injunction issued by the Court would lack statewide impact and apply only to Douglas County. Given this limited application, the Court finds that issuing an injunction would create an inconsistency among county election offices due to potentially varying receipt deadlines and have a negative impact on advance mail voters.

VII. Conclusion

Plaintiffs have failed to meet their high burden to justify the issuance of a temporary injunction facially invalidating an Election Day receipt deadline. Plaintiffs have not demonstrated a likelihood of success on the merits, nor have they shown a reasonable probability that they will suffer an irreparable future injury, let alone one that outweighs the injuries to the State and the public in having a fair and orderly election administered with certainty and finality on Election Day.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs’ Motion for Temporary Injunction is DENIED.

DATE: _____

The Honorable Carl Folsom III
Division 7, Douglas County District Court

Submitted by:

By: /s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I certify that on March 2, 2026, I authorized the electronic filing of the foregoing with the Clerk of the Court using the eFlex filing system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list.

By: /s/ Bradley J. Schlozman

EXHIBIT A

1 permanent advance voting list. A lot of voters don't
2 know that they're going to need an advance ballots
3 until closer to the election. Frankly, a lot of voters
4 don't even know there's an election until closer to the
5 election. And Kansas allows voters to request mail
6 ballots up until seven days before the election. For
7 the voter who does what Kansas law invites them to do
8 and requests that ballot on the seventh day, under the
9 Secretary of State's own public statements and
10 directions to voters there's just no way they're
11 getting that ballot back and forth in time. Even for
12 the voter who requests it another week before the
13 deadline -- so we're two weeks out, 14 days here --
14 it's going to have some real problems. If you take the
15 Secretary of State's seven days as a rule of thumb,
16 well they're not going to make it either, right?
17 Because immediately you're going to run out of that
18 time.

19 Another thing that can delay getting the absentee
20 ballot is that unless you're on the advance -- the
21 permanent advance ballot list, Kansas does signature
22 verifications of advance ballot applications. So they
23 look at your ballot and decide that the signatures
24 don't match that could be another couple days until
25 that gets resolved, or more. And if we look at the

1 evidence from the 2024 Douglas primary, we know that
2 for nearly a quarter of the advance voters -- this
3 23 percent -- seven days was likely not enough.
4 23 percent of ballots took seven days or longer to
5 travel one way. For 12 percent of these voters, seven
6 days definitely wasn't enough; 12 percent took 10 days
7 or longer. And for five percent took 15 days or
8 longer. Those voters are just not going to make it. I
9 mean, there's just no way with the timeline that we're
10 dealing with. As Your Honor has pointed out, more than
11 200 ballots in Douglas County arrived after the grace
12 period despite having been sent by at least day six
13 here. Because what we know about them is that they
14 were postmarked in July and then the election fell here
15 and they didn't arrive until here because the grace
16 period was still in place.

17 Now that election was a small election and it was
18 limited to one urban county. We know a few things that
19 I think should color our view going forward as we
20 anticipate the likely broader impacts of SB 4 across
21 the state and in a bigger election. First: Urban
22 counties have faster mail than rural counties. We know
23 that. And second: Mail delivery has gotten even worse
24 since the 2024 Douglas election. Even so, we know that
25 every election within that better mail universe we had

1 thousands and thousands of ballots -- or we had
2 thousands of ballots -- sorry, that arrived during the
3 grace period and were only saved but for the grace of
4 the grace period.

5 Another thing I think we need to think about when
6 we're thinking about these statistics and those
7 thousands of numbers is that they cannot and they do
8 not reflect the voters who got their ballot and they
9 decided it was just too late to send it back, either
10 because they heard the secretary saying you need seven
11 days and they were like "I don't have seven days." Or
12 like Mr. Mikesic, who didn't get his ballot until after
13 election day. Or our college voter Ben Simon, who was
14 out of state and didn't get his ballot in time to send
15 it back. So there's going to be a number of voters
16 with some attrition here. So we should assume that all
17 of the numbers we've seen so far of thousands of voters
18 being disenfranchised -- sorry, thousands of voters who
19 would have been disenfranchised if the grace period did
20 not exist is going to be a conservative number.

21 And if we were to say, you know, take these
22 percentages from this -- again, not a lot of voters.
23 In a small election like that, the voters tend to be
24 actually more motivated to vote -- and in a urban
25 county, and try to imagine what it would look like in a

1 statewide election like the one Kansas is going to have
2 in November 2026. We have -- we can do a little bit of
3 math. So in 2022, a little over 130,000 Kansas voters
4 participated in that election using an advance ballot.
5 And I picked 2022 because I think it's probably
6 Kansas's most recent large election that has similar
7 characteristics to the one we're going to see later
8 this year. So if we see anything like what we saw in
9 Douglas County -- if we see 23 percent of ballots
10 taking seven days or longer, 12 percent ten days or
11 longer, 5 percent 15 days or longer -- we are talking
12 about roughly 30,000 advance ballots taking seven days
13 or longer to travel one way, over 15,000 taking ten
14 days or longer and about 6,500 to be taking 15 days or
15 longer. Now some of those ballots may arrive. But,
16 like, the ones that do it's just going to be dumb luck.

17 So those are, I think, the -- this is, I think,
18 what the evidence shows. When you hear the Secretary
19 of State say "Just adapt" I think you have to ask how
20 exactly are voters supposed to adapt? And I think the
21 reality is is Kansas has a very, very weak situation.
22 It has some of the absolute worst mail in the country,
23 and with SB 4 it now has the narrowest window in which
24 to participate in elections by advance voting, despite
25 the fact that it's inviting voters to engage in advance

EXHIBIT B

THE EDITORIAL BOARD

How California Is Damaging Faith in Government

Feb. 19, 2026

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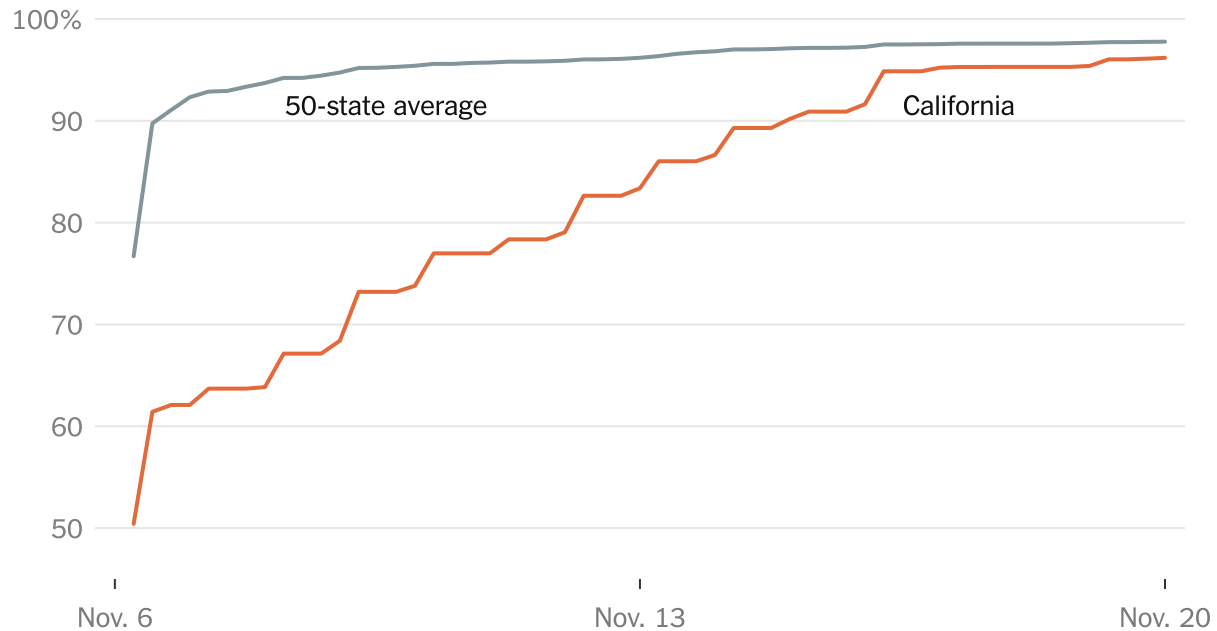
Long before the existence of modern technology — before the internet or even television — Americans quickly learned the results of major elections. By the late 1800s, telegraphs made it possible for people to read results in the next day's newspapers. By the 1920s, radio networks reported outcomes on election night. Even in close races, with a notable exception of the Bush versus Gore contest of 2000, American voters usually knew within a day who had won the presidency, control of Congress and most other major offices. For more than a century, the rapid resolution of U.S. elections was the norm.

No longer. In each of the past three congressional election cycles, Americans waited at least a week to find out whether Democrats or Republicans controlled the House of Representatives. The main reason has been California, the nation's most populous state, home to 52 House districts. It allows mail-in ballots to arrive up to

seven days after Election Day and counts ballots with agonizing slowness. After this year's midterms, the country may once again spend days waiting for California.

California's go-slow approach to vote counting

Percentage of ballots reported during the two weeks after Election Day 2024



Source: The New York Times

California adopted its rules with the admirable intention of maximizing voting access. But the system has failed. Its benefits are close to nil: Turnout in California has fallen further behind the national average since the state changed its rules. And the costs of the new system are real. When elections are quickly decided, it builds confidence in the democratic process. When uncertainty lingers for days, Americans wonder why government today can often seem less competent than it once was.

California's delays also play into the hands of bad-faith political leaders, including President Trump, who lie about vote counting and fraud to sow doubt in any election outcome they do not like. (For example, the speaker of the House, Mike Johnson, claimed that ballots counted after Election Day in 2024 in California

“magically whittled away” the leads of three Republican candidates.) To be clear: Only the people who tell these lies are responsible for them. But California is playing into the hands of the misinformation peddlers for no good reason.

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Several other states also sometimes take days to count their votes, including Arizona, Nevada, New York and Washington. They and California are outliers compared with other states and other high-income democracies, which count ballots both quickly and accurately. Lawmakers in these outlier states should change their systems to resolve elections quickly. Ideally, lawmakers would act in time for this year’s congressional elections. If they are unable to, they should make the changes before the 2028 elections.

California’s slow counting of votes has its roots in a 2014 law. Until then, the state required mail-in ballots to arrive by Election Day. That year, California introduced a three-day grace period for any ballots postmarked by Election Day, in response to the closing of some U.S. Postal Service facilities. The state has since extended the period to seven days. The goal is to ensure that even a highly unusual mail delay does not disenfranchise anybody.

The changes have not accomplished that goal. Consider: In 2012, when ballots had to be received by Election Day, 0.5 percent of ballots were rejected because of lateness — and the share was an identical 0.5 percent in 2022, when the grace period was seven days. How could that be? As any college student (or journalist) knows, human beings tend to procrastinate until a deadline. The longer grace period led more voters to mail their ballots later.

California exacerbates the problem by using an onerous process for confirming signatures on mail-in ballots and taking days to count many votes. As a result, outcomes remain unclear for days. In other states that count votes slowly, the

details vary, but they all involve mail-in or drop-off ballots.

The crucial point is that none of these systems is superior to those in the many states that count their ballots rapidly. Slow-counting states do not have higher turnout, on average. Nor do they have more secure elections; voter fraud is extremely rare nationwide.

California's leaders are making a mistake that Democrats have made in a range of policy areas over the past decade. In the name of laudable goals like equity and access, they have adopted policies that may initially sound sensible — in this instance, trying to protect every mail-in ballot — but that end up being counterproductive because they undermine the government's effectiveness. The slow counting of votes is a classic example of the perfect being the enemy of the good.

Defenders of the system argue that it would be a mistake to change the rules in response to baseless Republican conspiracy theories. Some California officials have gone so far as to suggest they do not care that Americans must wait days to learn election outcomes. National impatience is “not our problem,” California's secretary of state, Shirley Weber, said in 2024.

Neither of these arguments is valid. It makes no sense to cling to a subpar system because it happens to be subject to unfair fearmongering. When Mr. Trump's critics automatically adopt the opposite stance of his, even when it is wrong on the merits, they often end up doing him a political favor.

Several states offer better models, with Colorado having arguably the best. Like California, Colorado mails every registered voter a paper ballot weeks before Election Day. It then gives its citizens many options for returning the ballots. The state encourages voters to take their ballots to one of more than 400 drop boxes, which are open 24 hours a day for more than two weeks, or mail back the ballots, as long as they arrive by 7 p.m. on Election Day. People can also vote the traditional way, at a polling place.

Colorado offers an eight-day grace period for some voters, such as military troops stationed outside the state. Yet their share of the vote is so small that they affect only the closest of races, which would probably be subject to a weekslong recount anyway. Colorado gets the balance right: easy access to voting, without orienting the entire system around a tiny number of voters who might theoretically be subject to an extreme postal delay.

Colorado's results are impressive. In 2014, the first elections after it adopted its system, turnout jumped nearly three percentage points even as nationwide turnout fell more than four percentage points. In 2024, 73 percent of eligible Colorado residents voted — a higher share than in California (62 percent), Arizona, Nevada, New York or Washington. Colorado also counts ballots quickly, and the outcome of almost every race is clear on election night.

Some California officials have claimed that their state's large population makes it impossible for them to be so efficient, but that is as unpersuasive as their other excuses. Larger states have more tax dollars available for election administration. Florida, for example, counted 99 percent of its votes by the end of election night in 2024.

Gov. Gavin Newsom of California has recently begun to speak out about the importance of Democratic-run states offering a counterpoint to the chaotic, antidemocratic approach of the Trump administration. He has said that California should provide “a policy blueprint for others to follow,” and he has taken promising, if tentative, steps on housing construction and other areas. No doubt, his motives are partly personal, intended to help his presidential ambitions. So be it. Personal ambition sometimes inspires productive change.

Here, then, is one more item for Mr. Newsom's agenda in his final year as governor: Bring California's elections out of the pretelegraph era and back into the 21st century.

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EXHIBIT D

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Bradley Joseph Schlozman Filings

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☐	☐ 15247785		Kansas Appleseed Center for Law and Justice, Inc., et al vs. Scott Schwab, in his official capacity as the Kansas Secretary of State, et al	DG-2025-CV-000206	03-02-2026 04:51:33 PM	PRO: Temporary	Douglas County District Court	Filed-Presented to Judge
			PRO: Temporary Secretary Schwab's Proposed Order Denying Plaintiffs' Motion for Temporary Injunction					
			NEW Receipt					
☐	☐ 15247675		Kansas Appleseed Center for Law and Justice, Inc., et al vs. Scott Schwab, in his official capacity as the Kansas Secretary of State, et al	DG-2025-CV-000206	03-02-2026 04:49:50 PM	PRO: Dismiss	Douglas County District Court	Filed-Presented to Judge
			PRO: Dismiss Secretary Schwab's Proposed Order Granting Motion to Dismiss					
			NEW Receipt					

Number of Filings: 2

- Message from the court/clerk

1

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EXHIBIT D

EXHIBIT E

From: [Schlozman, Brad J.](#)
To: cfolsom@dgcoks.gov; division7@dgcoks.gov
Cc: [Jarmer, Ashley N.](#); kevin@sbhlaw.com; johnb@sbhlaw.com; [Dalke, Krystle M.](#); [Branden Lewiston](#); [Elisabeth Frost](#); [Pedro Irigonegaray](#); [Micah Tempel](#); [Joshua Abbuhl](#); [Nicki Rose](#); [Nicole Revenaugh](#); ryan@itrlaw.com
Subject: DG-2025-cv-000206, Word Versions of Proposed Orders on Def. Schwab"s Motion to Dismiss and Pls." Motion for TI
Date: Monday, March 2, 2026 7:49:59 PM
Attachments: [KS Appleseed v. Schwab -- Def. Schwab"s Proposed Order Granting Motion to Dismiss \(3-2-2026\).docx](#)
[KS Appleseed v. Schwab -- Def. Schwab"s Proposed Order Denying Pls." Mot. for Temp. Injunction \(3-2-2026\).docx](#)

Dear Judge Folsom:

Defendant Schwab today filed Proposed Orders (i) granting Defendant Schwab's motion to dismiss for failure to state a claim and lack of standing, and (ii) denying Plaintiffs' motion for a temporary injunction. These Proposed Orders will be served on all parties once the Clerk's Office processes them. Pursuant to the Court's request at the recent motions hearing, counsel for Defendant Schwab is now providing the Court with a Microsoft Word version of the two filed Proposed Orders. Thank you.

Respectfully,

Brad Schlozman



Bradley J. Schlozman | Member

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EXHIBIT E