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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2021-CV-000299
PII COMPLIANT

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
CIVIL DEPARTMENT

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Plaintiffs,* vs. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and KRIS KOBACH, in his official capacity as Kansas Attorney General, *Defendants.*	Case No. 2021-CV-000299

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF A CASE MANAGEMENT ORDER

Defendants Scott Schwab and Kris Kobach respectfully submit this Response to Plaintiffs' Motion for Entry of a Case Management Order. For the reasons set forth below, Plaintiffs' motion should be denied.

The only remaining causes of action in this lawsuit are Plaintiffs' due process and equal protection attacks on the State's signature verification requirements for advance mail ballots in K.S.A. 25-1124(h).[1] Despite the pendency of Defendants' Renewed Motion to Dismiss, which makes clear that Plaintiffs have no standing to pursue—and this Court thus has no subject-matter jurisdiction to adjudicate—those claims, Plaintiffs now ask the Court to set a case management

[1] The parties previously stipulated to an Order granting Plaintiffs' motion for a *temporary injunction* against enforcement of K.S.A. 25-2438(a)(2)-(a)(3), provisions addressing the false representation of election officials. *See* Order of 7/29/2024. The parties have now stipulated to a *permanent injunction* against the enforcement of those provisions, and a stipulated order to that effect is being finalized.

conference so that they may undertake full discovery on claims that will dissolve in the event of a favorable ruling for Defendants. Until the Court issues its ruling on Defendants' standing-grounded motion to dismiss, however, any discovery would be needlessly burdensome on the State and potentially irrelevant and wasteful. And Plaintiffs' cries of urgency ring hollow.

I. – Plaintiffs' Motion is Inconsistent with Local Rule 3.201(1)

As an initial matter, Plaintiffs' request for a case management order is in tension with the Local Rules of this Court. Local Rule 3.201(1) does not contemplate a case management order or conference prior to the filing of an Answer: "Counsel for all parties shall confer within thirty (30) days of the date of *service of the answer* . . . to prepare an agreed case management order." (emphasis added). While an Answer is ordinarily due within 21 days after service of the summons and petition, the filing of a motion to dismiss suspends that deadline until the motion is resolved. *See* K.S.A. 60-212(a)(1)(A)(i), (a)(2)(A).

By previous Order, this Court granted Defendants' unopposed motion to extend their deadline for filing an Answer until 21 days after the Court's resolution of the pending motion to dismiss. Only if the Court denies Defendants' that motion—a hopefully unlikely scenario in light of the analysis set forth in the motion as well as the case law interpreting the U.S. Supreme Court's decision in *FDA v. Alliance for Hippocratic Medicine* in the months since briefing was finalized—will Defendants be required to file an Answer. At this point, however, any discovery would be premature.

II. – Discovery Should be Stayed Until the Motion to Dismiss is Resolved

Even putting aside the directives of Local 3.201(1), this Court should still deny Plaintiffs' motion and stay any discovery until after resolving Defendants' pending motion to dismiss.

A. – Legal Standard

"The trial court is vested with broad discretion in supervising the course and scope of discovery," *Ryan v. Kan. Power & Light Co.*, 249 Kan. 1, 11, 815 P.2d 528 (1991) (citing *Berst v. Chipman*, 232 Kan. 180, 183, 653 P.2d 107 (1982)), and its "orders concerning discovery will not be disturbed on appeal in the absence of a clear abuse of discretion." *Manhattan Mall Co. v. Shult*, 254 Kan. 253, 256, 864 P.2d 1136 (1993). This "discretion is abused [only] if the judicial action is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court." *CitiMortgage, Inc. v. White*, No. 107,895, 2013 WL 5422317, at *12 (Kan. Ct. App. 2013) (citing *Fisher v. State*, 296 Kan. 808, Syl. ¶ 8, 295 P.3d 560 (2013)).

A district court may, on motion or on its own, limit discovery if it determines, *inter alia*, that "the importance of the discovery in resolving the issues" or "the burden or expense of the proposed discovery outweighs its likely benefit." K.S.A. 60-226(b). In a similar vein, the Court may enter a protective order forbidding discovery—including on a temporary basis—in order to protect a party from annoyance, embarrassment, oppression, undue burden, or expense. K.S.A. 60-226(c). Staying discovery pending the resolution of Defendants' motion to dismiss, particularly since that motion would fully resolve all issues in the case, would also facilitate the Kansas Rules of Civil Procedure's basic mandate that courts construe, administer, and employ such rules in a manner designed "to secure the just, speedy, and inexpensive determination of every action and proceeding." K.S.A. 60-102.

Under standards established by the federal courts in Kansas, a stay or delay in discovery is appropriate when, as is certainly true here, any of the following are met: (1) the case is likely to be finally concluded via the dispositive motion; (2) the facts sought through discovery would

not affect the resolution of the dispositive motion; or (3) discovery on all issues posed by the petition would be wasteful and burdensome. *See Wolf v. United States*, 157 F.R.D. 494, 495 (D. Kan. 1994); *Arenas v. SPX Cooling Techs., Inc.*, No. 21-2055-JAR, 2021 WL 1209717, at *1 (D. Kan. Mar. 31, 2021); *Fattaey v. Kan. State Univ.*, No. 15-9314-JAR, 2016 WL 3743104, at *1-2 (D. Kan. July 13, 2016). The presence of any one of these factors can justify the stay. *Kickapoo Tribe of Indians v. Nemaha Brown Watershed Joint Dist. No. 7*, No. 06-CV-2248, 2013 WL 3821201, at *1 (D. Kan. July 23, 2013).

B. – Immediate Discovery is Unnecessary

All three of these exceptions to this general policy apply in this case. Defendants' motion to dismiss targets the only claims remaining in the lawsuit and, if granted, the case would be fully concluded. Discovery will have no impact on the resolution of this Court's decision. And forcing the State to proceed through extensive discovery at this stage would be both wasteful and burdensome. *See Watters v. Kan. Dep't for Child. & Fams.*, No. 112,415, 2015 WL 9456744, at *9 (Kan. Ct. App. 2015) (acknowledging that it would "conserve judicial resources" to seek a ruling on a motion to dismiss prior to discovery motions because "granting the motion to dismiss would make the discovery motions moot").

Plaintiffs' only bases for insisting on accelerated discovery are that (i) the issues in the case are "important" and (ii) more than three years has passed since Plaintiffs first filed their Petition. (Mot. at 2). As for the first theory, that proves nothing. It is hardly uncommon for individuals without constitutional standing to assert claims raising allegedly "important" issues. If the perceived public importance of an issue were enough to accelerate discovery, then needless and wasteful discovery would be injected into almost every case.

Plaintiffs' cries of urgency also fall flat. Although the Supreme Court issued its mandate nearly five months ago, Plaintiffs *never once* sought to move the case along on remand. To the contrary, they proposed putting the case on ice for at least five months until after the election. And the next statewide election (the 2026 Primary) is *nearly twenty months away*.

Nor is there any substantive reason to expedite this case. Plaintiffs preposterously argue that "[t]the challenged provisions have made significant changes to Kansas law," (Mot. at 2), yet signature verification requirements on advance mail ballots have existed since at least 2019 when the State began requiring county election officials to attempt to contact any voter who submitted an advance ballot with a signature that did not match at least one on file in the local election office. *See* 2019 Kan. Sess. Laws. Ch. 36, § 1 (amending K.S.A. 25-1124(b). In fact, one of the individuals central to this litigation (Plaintiff Loud Light president Davis Hammet) spoke out in favor of the 2019 legislation. *See* Wichita Eagle, "*Bill would give voters chance to fix errors on advance ballots,"* Feb. 24, 2019, at A1.

Even more disconnected from reality is Plaintiffs' suggestion that the challenged law will arbitrarily disenfranchise voters. (Mot. at 3). As Defendants noted in their pending motion to dismiss (at p. 14), according to public records, *only 105 ballots in the entire state* were rejected due to a signature mismatch in the 2022 General Election. Although numbers are not reported to the State for the 2024 primary, informal inquiries from the Secretary of State indicate that *less than two dozen* ballots were rejected based on signature mismatches in that contest. Indeed, in the State's most populous county—Johnson County—there were only *two*.[2] While numbers for the 2024 General Election, which saw record turnout, have yet to be finalized, it appears that far fewer ballots were rejected ballots due to a signature mismatch than even in the 2022 General

[2] https://www.jocoelection.org/sites/default/files/2024-08/PR2024%20Canvass%20Summary.pdf

Election. In Johnson County, for example, only *11* were rejected this November compared to 37 in November 2022.[3]

Yet Plaintiffs have asserted a *facial* constitutional challenge to the signature verification requirement. As our Supreme Court recently explained in *State v. Jones*, 313 Kan. 917, 931, 492 P.3d 433 (2021), "A facial challenge to the constitutionality of legislation is the most difficult to mount successfully, since the challenger must establish that no set of circumstances exist under which the act would be valid. Moreover, the fact that the challenged legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an overbreadth doctrine outside the limited context of the First Amendment." (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (internal alterations omitted). It seems unfathomable that Plaintiffs can prevail under this standard.

In sum, there is no sound basis for proceeding with discovery until Defendants' motion to dismiss for lack of standing is resolved. The issues therein require the Court's careful attention and there is no need to rush. This is particularly true given that recent judicial decisions after Defendants' renewed motion to dismiss was fully briefed have further reinforced the absence of organizational standing by Plaintiffs.[4] Plus, Defendants are concerned that discovery is likely to be contentious, with the Court being regularly called upon to referee disputes among the parties. It would be best to avoid that friction, as can be done here if the case is resolved on Defendants' motion to dismiss.

[3] https://www.jocoelection.org/sites/default/files/2024-11/GN2024_GeneralCanvassSummary.pdf

[4] Among the most recent opinions that interpret the scope of the U.S. Supreme Court's decision in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), and that underscore the correctness of Defendants' motion, include: *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1173-81 (9th Cir. 2024); *Judicial Watch, Inc. v. Ill. State Bd. of Elections*, 2024 WL 4721512, at *6-7 (N.D. Ill. Oct. 28, 2024); and *Legal Aid Chicago v. Hunter Props.*, 2024 WL 4346615, at *6-14 (N.D. Ill. Sept. 30, 2024).

III. – Conclusion

For the foregoing reasons, Plaintiffs' motion for entry of a case management order during the pendency of Defendants' motion to dismiss should be denied.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December 2024, a true and correct copy of the above and foregoing was electronically filed with the Clerk of the District Court by using the eFlex filing system, which will transmit a copy to all counsel of record.

By: /s/ Bradley J. Schlozman