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## **REVIEW OF THE LITIGATION STATUS OF CHALLENGED ELECTION LAWS**

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During the 2021 Legislative Session, the Legislature passed two bills amending state election laws. The first was 2021 House Bill No. 2183 (HB 2183). HB 2183 contained the following three provisions that were later challenged in Shawnee County District Court:

- K.S.A. 25-2438, which criminalized the false representation of an election official.
- K.S.A. 25-1124(h), which required county election officials to verify the signature match on all advance voting ballots before counting such ballots.
- K.S.A. 25-2437, which restricted the number of advance voting ballots an individual could deliver on behalf of other voters to 10.

The second bill was 2021 House Bill No. 2332 (HB 2332). HB 2332 also contained provisions that were later subject to a legal challenge. That lawsuit, brought in federal district court for the District of Kansas, challenged the provisions of K.S.A. 25-1122(k)(2) and (l)(1). Those subsections prohibited third parties from sending advance voting ballot applications to Kansas voters with personalized information already completed on the application form and prohibited third parties located outside of Kansas from sending any such applications to Kansas voters.

This memorandum reviews the litigation status of each of the challenged provisions. This includes the disposition of the case by the trial court and any appellate decisions, the current enforcement status of the provision, and the status of any further pending appeals.

### **False Representation of an Election Official (K.S.A. 25-2438)**

Section 3 of HB 2183 created the new election crime of false representation of an election official and was later codified as K.S.A. 25-2438. The new statute made it a severity level 7, nonperson felony to falsely represent oneself as an election official. The League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center (collectively the “Plaintiffs”) filed a lawsuit in June 2021 challenging the constitutionality of the new statute under Section 11 of the Kansas Bill of

Rights. Section 11 provides freedom of speech and freedom of the press under the Constitution of the State of Kansas. The Plaintiffs also moved for a temporary injunction to block the immediate enforcement of the statute.

In September 2021, Judge Watson denied the motion for a temporary injunction on the grounds that the Plaintiffs had failed to show the likelihood they would be successful on the merits of their claim. A demonstration of such likelihood is one of the legal standards that must be met for a court to issue a temporary injunction. The Plaintiffs appealed the decision to the Kansas Court of Appeals.

In June 2022, the Kansas Court of Appeals held that the Plaintiffs did not have standing to bring a legal challenge on K.S.A. 25-2438 and ordered the claim be dismissed. The appellate court did not address the issue of whether the statute violated the state constitution. Under Kansas case law, a plaintiff must demonstrate there is a cognizable injury suffered to bring a lawsuit. The appellate court held that the activities the Plaintiffs were engaging in were simply not of the same fraudulent nature that is prohibited by K.S.A. 25-2438. Since the Plaintiffs' conduct does not fall within the prohibited acts there is no credible threat of prosecution against such conduct. The appellate court ruled there is no cognizable or actual injury suffered by the Plaintiffs that would give them standing to bring the lawsuit in the first place. This decision leaves the statute in full force and effect. In August 2022, the Kansas Supreme Court granted the Plaintiffs' request to review this decision on appeal.

**Requiring a Signature Match for Advance Voting Ballots (K.S.A. 25-1124(h))**

Section 5 of HB 2183 amends K.S.A. 25-1124, which generally governs casting an advance voting ballot. The legislation added new subsection (h) to the statute prohibiting a county election official from accepting an advance voting ballot unless the voter's signature on the ballot envelope matched the signature on file with the county election office. Except for voters with a disability, any ballot where the signatures do not match will not be counted.

The Plaintiffs challenged this provision in the same lawsuit described above. The Plaintiffs allege that the signature matching requirement violates the state constitution in the following ways:

- It violates the right to vote under Article 5, § 1 of the Kansas Constitution and §§ 1 and 2 of the Kansas Bill of Rights.
- It violates the guarantee of equal protection under Article 5, § 1 of the Kansas Constitution and §§ 1 and 2 of the Kansas Bill of Rights.

- It violates the guarantee of due process under § 18 of the Kansas Bill of Rights.

In April 2022, Judge Watson dismissed the Plaintiffs' claims for failure to state a claim. The court ruled that the Plaintiffs had failed to establish that there were no set of circumstances under which the statute would be valid. Under this rational basis standard, the Plaintiffs failed to meet their burden to establish their legal claims. The Plaintiffs appealed.

In March 2023, the Kansas Court of Appeals reversed the district court finding that the statute potentially infringed on the right to vote. The appellate court held that the right to vote is a fundamental right and any law that may infringe on that right cannot be presumed to be constitutional. Instead, laws that infringe on a fundamental right are subject to strict scrutiny. The district court had applied the wrong standard in analyzing the Plaintiffs' claims. The case was sent back to the district court with directions that the State be given the opportunity to show that the signature matching requirement satisfies the strict scrutiny standard. The State will have to demonstrate that this requirement is narrowly tailored to further a compelling interest of the State. The statute is currently still in full force and effect while its constitutionality is further argued and considered at the district court. In June 2023, the Kansas Supreme Court granted the State's request to review this decision on appeal.

**Restrictions on the Delivery of Advance Voting Ballots (K.S.A. 25-2437)**

Section 2 of HB 2183 created the new election crime of transmission or delivery of an advance voting ballot on behalf of another voter. This section was codified at K.S.A. 25-2437 and prohibits a person from transmitting or delivering more than 10 advance voting ballots on behalf of other voters. A violation of this restriction is a class B misdemeanor.

Procedurally, the Plaintiffs' challenge to this provision followed the same path as the signature matching requirement above. In addition to the right to vote under Article 5, § 1 of the Kansas Constitution and §§ 1 and 2 of the Kansas Bill of Rights, the Plaintiffs also claimed that the ballot collection restriction violated the rights of freedom of speech and association under §§ 3 and 11 of the Kansas Bill of Rights.

Judge Watson dismissed these claims as well in her April 2022 order and the Plaintiffs appealed. As part of its March 2023 decision, the Kansas Court of Appeals also reversed the district court with respect to these claims finding that the ballot collection restriction potentially infringed on the right to vote and was, therefore, also subject to strict scrutiny. These claims were also remanded to the district court so that the State could show that K.S.A. 25-2437 satisfied the strict scrutiny standard. This statute is also currently still in full force and effect

while its constitutionality is further argued and considered at the district court. As mentioned above, the Kansas Supreme Court granted the State's request to review this decision on appeal.

**Restrictions on Mailing Advance Voting Ballot Applications (K.S.A. 25-1122(k)(2) & (l)(1))**

Section 3 of HB 2332 amended K.S.A. 25-1122, which generally governs applications for an advance voting ballot. First, the legislation added new subsection (k) to regulate entities that send advance voting ballot applications to registered Kansas voters. Specifically, paragraph (2) prohibits such entities from completing any portion of such application prior to sending it to the voter. It is common practice for organizations to complete the basic personal information of the voter before mailing the application to the voter.

Second, the legislation also added new subsection (l) to require that such entities reside in or be domiciled in Kansas in order to send such applications to Kansas voters. The in-state residency requirement is paragraph (1) of the new subsection.

In June 2021, VoteAmerica and the Voter Participation Center (Plaintiffs) filed a lawsuit in federal district court for the District of Kansas challenging the constitutionality of both provisions. Unlike the state court case discussed above, this action was brought in federal court alleging violations of the Constitution of the United States. Specifically, the Plaintiffs claimed that these provisions violated the First Amendment's freedom of speech and association, were unconstitutionally overbroad, and were a violation of the Dormant Commerce Clause.

On December 15, 2021, Judge Vratil issued a preliminary order in the case denying the State's motion to dismiss the case and granting the Plaintiffs' request for a temporary injunction. The district court explained that the Plaintiffs had shown that the provisions posed a burden on their First Amendment rights which justified applying the more stringent legal standard of strict scrutiny. Under that standard the State must show that it has a compelling interest, and that the legislation is narrowly tailored to further that interest. Given this difficult legal standard, the court ruled the Plaintiffs were likely to succeed on the merits and issued the temporary injunction.

In February 2022, the parties agreed that subsection (l)(1), the prohibition on out-of-state entities sending applications to Kansas voters, constituted a violation of the Plaintiffs' constitutional rights. The district court then issued a permanent injunction with respect to the enforcement of that provision.

A trial was held on the constitutionality of subsection (k)(2) and the district court issued its decision in May 2023. The court held that the prohibition on personalizing the advance voting

ballot applications was a violation of the Plaintiffs’ constitutional rights of speech and association. Because the prohibition infringed on Plaintiffs’ First Amendment rights it was subject to strict scrutiny. The court concluded that the State had failed to satisfy its burden under that standard. Additionally, the court held that the statute was unconstitutionally overbroad in that it criminalized a substantial amount of protected speech and was not sufficiently limited to only legitimate purposes. The court permanently enjoined the enforcement of K.S.A. 25-1122(k)(2). The State has filed an appeal with the 10<sup>th</sup> Circuit Court of Appeals.