



**Testimony of  
J. Christian Adams**

**Before the Kansas  
Senate Federal and State Affairs Committee**

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Dear Chairman Thompson and Members of the Committee:

My name is Christian Adams, and I am the President of the Public Interest Legal Foundation. The Public Interest Legal Foundation is a 501(c)(3) charity. PILF exists to ensure compliance with state and federal law and to defend the Federalist Constitutional arrangement of election administration. I have litigated successfully cases related to late acceptance of mail ballots by states and the associated risk of allowing mail ballots. I also serve as a Commissioner on the United States Commission on Civil Rights and served as an attorney at the Department of Justice in the Voting Section.<sup>1</sup>

Kansas is currently one of only 14 states and the District of Columbia that allows election officials to receive and count ballots after Election Day. See Nat'l Conf. of State Legislatures, *The Evolution of Absentee/Mail Voting Laws*, 2020-22, Table 6 available at <https://perma.cc/8ABZ-YFXC?type=standard>; K.S.A. 25-1132(b). S.B. 4 would remove this post-election receipt of ballot loophole and bring Kansas into conformity with the vast majority of states.

We support this important change for numerous reasons, including (1) it is required by federal law, (2) it eliminates questions that arise with ballots that have missing or indiscernible postmarks, (3) it reduces concerns caused by sporadic mail delivery, and (4) it promotes public confidence by ensuring that every valid vote is received on Election Day.

*A. Federal law sets one "Election Day" by which ballots must be received*

Two provisions of the United States Constitution grant Congress the authority to set the date upon which federal elections occur. Article II, Section 1, Clause 4 states, "The Congress may determine the Time of chusing the Electors" for President." In addition, Article I, Section 4, Clause 1 states, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Exercising this authority, in 1845, Congress established a "'uniform time' for appointing presidential electors on the Tuesday after the first Monday in November." *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200, 204 (5th Cir. 2024) ("*Wetzel*") (citing Act of Jan. 23, 1845, ch. 1, 5 Stat. 721, now codified at 3 U.S.C. § 1). In 1872, Congress established the date for choosing the members of the House of Representatives "to occur on the presidential election day." *Wetzel*, 120 F.4th at 204 (citing Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28, now codified at 2 U.S.C. § 7). Following ratification of the 17th Amendment, Congress set the time for electing Senators to the same day. *Wetzel*, 120 F. 4th at 204 n.1 (citing Act of June 4, 1914, ch. 103, § 1, 38 Stat. 384). Thus, for over 100 years, the United States has elected its congressional representatives on a specific day every two years and presidential electors every four years.

Nevertheless, Kansas permits ballots to be received up to three days *after* Election Day. K.S.A. 25-1132(b). In its recent opinion, the Fifth Circuit Court of Appeals thoroughly explained why such a law violates federal law. The court explained that a ballot is "'cast' when the State takes custody of it," not when a voter marks it. *Wetzel*, 120 F.4th at 207. This makes sense: If a voter marks a ballot but never submits it, the ballot is obviously never "cast." Kansas law improperly allows voters to cast ballots three days *after* federal law permits.

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<sup>1</sup> I am not here expressing the views of the Commission but rather providing additional biographic information.

The Fifth Circuit further explained that the closing of the polls constitutes the finality of an election for voters selecting candidates, even though ballot counting may continue. *Id.* But so long as election officials continue to receive ballots, “the election is ongoing” and “[t]he result not yet fixed.” *Id.* Thus, a Kansas election remains ongoing three days after federal law requires it to end.

Moreover, Kansas law ignores that the consummation of an election must occur on Election Day. *Wetzel*, 120 F.4th at 208-09 (construing *Foster v. Love*, 522 U.S. 67, 72 n.4 (1997)). Similar to the finality for voters casting ballots, the Fifth Circuit interpreted Supreme Court precedent to mean that an election is “consummated” when “officials know there are X ballots to count because the proverbial ballot box is closed” and that “[r]eceipt of the last ballot . . . constitutes consummation of the election, and it must occur on Election Day.” *Id.* at 209. Yet by permitting the receipt of ballots after Election Day, Kansas has not consummated the election on the day prescribed by federal law. *Accord Maddox v. Bd. of State Camassers*, 149 P.2d 112 (Mont. 1944) (invalidating mail ballot law permitting receipt of ballots after the election).

#### B. Use of postmarks is unreliable

Beyond its conflict with federal law, the Kansas law is highly problematic because ballot envelopes lacking postmarks, containing smeared postmarks, or containing other indicia of mailing raise questions about the validity of ballots received three days after Election Day. It is simply bad policy to allow ballots to arrive by mail lacking postmarks.

Following the 2024 Primary Election, Secretary of State Scott Schwab sent a letter to U.S. Postmaster General Louis DeJoy, informing him that election officials had received numerous mail ballots within the three-day period following the election that lacked a postmark. (A copy of this letter is attached to this testimony). Receiving ballots without postmarks is problematic because Kansas cannot determine when these ballots were mailed. As a result, numerous voters rely on the post office to perform one of its normal, administrative functions, but their votes cannot be counted due to the post office’s failures. Eliminating the three-day period would make it clear that ballots must be received on or before Election Day to be counted.

Then there’s the problem with the vague standard in the current law. As the law now stands, a ballot may be counted if the post office “otherwise indicated” that the ballot was mailed on or before the close of the polls on Election Day. K.S.A. 25-1132(b). This amorphous language opens a wide door for discretion among election administrators and creates opportunities for individuals seeking to disrupt or change election outcomes to file suits or challenges after an election result with which disagree.

Indeed, a recent Nevada Supreme Court decision addressing a similar issue illustrates the concerns such a law creates. Like Kansas, Nevada permits a ballot to be counted if it is postmarked on or before Election Day and received within a certain number of days following the election. Nev. Stat. § 293.269921.1(b). The statute further provides that where “the date of the postmark cannot be determined,” the ballot shall be counted if received on the third day following the election. *Id.* at 293.269921.3.

In 2024, the Nevada Secretary of State mandated that any mail ballot received within three days of the election, including ones without any postmark, must be counted. The Republican National

Committee challenged this mandate, arguing that the law only permitted the counting of ballots with indiscernible postmark dates, not missing postmarks entirely. *Republican Nat'l Comm. v. Aguilar*, No. 89149, 2024 WL 4601602 (Nev. Oct. 28, 2024). The Nevada Supreme Court rejected that argument and held that the Secretary of State was within his authority to interpret the statute to mean that a *missing* postmark constituted an *indiscernible* postmark. *Id.* at \*3. The Court also justified its opinion, in part, by citing to the “public policy” that validly cast ballots should be counted. *Id.* at \*3-4. Of course, the concern with ballots that contained no postmark at all is whether they actually *were validly cast in the first place*, but the Court disregarded this concern.

### C. Sporadic mail delivery

This change in the law would reduce concerns that arise with sporadic mail delivery. In his letter to Postmaster DeJoy, Secretary Schwab noted that county election officials were receiving ballots *weeks* (and sometimes *months*) after the post office received voters’ ballots. While eliminating the three-day grace period will not entirely resolve the issue of sporadic mail delivery, it will signal to voters that they cannot wait until the last possible minute to mail a ballot. Such a change will encourage voters to take responsibility that they return their ballots in a more timely manner, and perhaps make greater use of secure drop boxes rather than relying on the postal service.

### D. Promoting public confidence

Finally, this change is sound because it promotes public confidence in the electoral process. Every election, some states spend weeks after an election counting ballots, with election outcomes potentially shifting multiple times. Nothing reduces voter confidence more than ballot counting that takes place for days or weeks. Indeed, PILF published a report called “**From Worst to First**” about legislative changes Florida made since 2000 that makes the state the fastest in the nation to determine who won all the elections in the state.<sup>2</sup> It takes mere hours, not days.

Allowing mail ballots to count after the election undermines voter confidence because the outcome is delayed.

While Kansas does a good job of quickly counting ballots compared to other states, Kansas will not be immune from these problems forever. This concern is especially acute in close races. In such races, an outcome can flip three or four days after the polls close solely because mail-in ballots arrive after Election Day. These late arriving ballots raise integrity concerns among voters who question whether unlawful ballots have been added to alter the result after most votes have already been counted. Voters are more confident in the process and in the outcomes when all votes are received on Election Day, as it eliminates the possibility that fraudulent ballots are being added two to three days after polls close.

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<sup>2</sup> A summary, as well as a downloadable PDF of the report is available at [www.publicinterestlegal.org](http://www.publicinterestlegal.org) or at <https://publicinterestlegal.org/press/report-worst-to-first-why-election-day-still-means-something-in-florida/>.

*E.* Conclusion

In conclusion, S.B. 4 strengthens important state interests, including compliance with federal law, enhanced voter confidence, and streamlined election administration.