IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, KANSAS, ALEJANDRO RANGEL-LOPEZ, **Plaintiffs,** **vs.** **DEBORAH COX, FORD COUNTY CLERK, in her official capacity,** **Defendant.**	)))))))))))))	**Civil Action No.: 2:18-cv-02572-DDC**

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

The League of United Latin American Citizens, Kansas and Alejandro Rangel-Lopez (collectively, "Plaintiffs") brought this action to vindicate their constitutional and statutory voting rights and redress Defendant Deborah Cox's voter suppression tactics. Plaintiffs' First Amended Complaint alleges that Defendant's decisions to restrict in-person voting to a single, inaccessible polling location and maintain a single-site voting system to serve 13,136 registered voters violates their right to vote under the U.S. Constitution and the Voting Rights Act of 1965. Dkt. No. 7 (Am. Compl.), ¶¶22-29, 33. Plaintiffs seek declaratory relief and a permanent injunction against Defendant's maintenance of a single polling place in Dodge City *and* the continued use of the Western State Bank Expo Center as a voting location. Am. Compl. ¶¶ (a), (c). In response, Defendant's motion to dismiss focuses solely on her use of the Expo Center as a polling location and fails to address allegations concerning the single-site voting system she has perpetuated since becoming Ford County Clerk.

The Ford County Clerk's office supervises all elections in Ford County. For the last two decades it has only used one polling location—specifically, the Dodge City Civic Center. For years, that single polling site has been consistently overburdened due to the sheer number of voters assigned to vote there, forcing voters to contend with long lines and excessive wait times.

In September 2018, Defendant moved voting from the Civic Center to the Western State Bank Expo Center, located a mile outside of Dodge City. That decision turned Dodge City residents' already inconvenient voting experience into an unmitigated burden on their fundamental rights. The Expo Center is over an hour walk from the nearest bus stop; there is no sidewalk along

the route between the stop and the polling location. It is unacceptable and all but inaccessible to the Dodge City voters who lack personal transportation.[1]

Compounding matters, even voters who have access to vehicles were forced to contend with traffic and misinformation in the recently-passed election cycle. By her own admission, Defendant's office directed newly registered voters to the city's *previous* polling location rather than the Expo Center. This communication failure, coupled with the new polling location's inaccessibility, severely burdened Dodge City residents' rights to vote.

Defendant moves to dismiss the case arguing in turn that Plaintiffs' claims are moot and they have failed to state a claim. In particular, Defendant argues the case is moot because the November election is now behind us, overlooking the broader—and more troubling—allegations in the Complaint. In filing this motion, Defendant seeks to insulate her unlawful placement of polling locations from review by voluntarily pledging, but not promising, to open another polling location by 2020 (and even then only for something she calls a "large volume election," which she fails to define). Even if Defendant's pledge was credible and enforceable, it does not moot Plaintiffs' claims. Moreover, Plaintiffs have plausibly alleged violations of the Constitution and Section 2 of the Voting Rights Act entitling them to relief.

Cox's decision to move the polling site outside of Dodge City was as baseless as it was burdensome. Cox purportedly moved the City's only voting location out of town because she believed construction in the area would compromise voter safety. However, the city and school district continued to use the Civic Center for other high capacity events without a problem. For the reasons set forth below, Plaintiffs respectfully request that this Court deny Defendant's motion in

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[1] At the preliminary injunction hearing, Defendant testified that she has no idea how many Dodge City voters get to the polls by public transportation, how many Dodge Citians use public transportation, and that in her fifty-seven years as a Dodge City resident, she has never taken the City's public transportation. Dkt. No. 23, Transcript of Hearing, 92:5-25.

its entirety. In the alternative, Plaintiffs respectfully move the Court to hold the case in abeyance until the 2020 primary election.

BACKGROUND

Ford County has maintained a single polling location at the Civic Center in Dodge City since 1998. Am. Compl. ¶ 6. In or around February 2018, the City Board of Education approved plans to build a new administrative building at First Avenue and Morgan Boulevard, an open lot adjacent to the Civic Center. Ex. 1. The Board entered into a contract with GLMV Architecture and Hutton Construction Corporation projecting a substantial completion date of December 2019. Ex. 2. In late August, 2018, Defendant learned that construction on the administrative building was planned to begin before Election Day, November 6, 2018. Am. Compl. ¶ 6.

Defendant acknowledged the Expo Center was an inconvenient polling location, but insisted it was the only viable option. Am. Compl. ¶ 1; Transcript of Hearing ("Tr.") at 91:1-13, *LULAC et. al. v. Deborah Cox*, No. 18-2572, ECF No. 23. The Expo Center is twice as far away from Dodge City's largest employers than the Civic Center. Am. Compl. ¶11. It is also 1.3 miles from the nearest bus stop at 202 E McArtor Street. *Id.* The result is that voters without access to a vehicle (or other public transport) have to walk 90 minutes each way to reach the Expo Center. *Id.* at ¶ 16. Scores of residents—disproportionately, Hispanic, disabled, and low income persons—fit that description. Dodge City estimates that close to 40% of the city's population is public-transit reliant. *Id.* at ¶ 10. A number of voters were never notified that the polling location changed. *Id.* at ¶ 12. Close to 300 newly registered voters were incorrectly directed to vote at the Civic Center. *Id.* at ¶ 13.

Defendant's constituents have submitted complaints about her maintenance of a single polling location since at least October 2017. Am. Compl. ¶ 16; Tr. at 35:11-21; Ex. 3. However,

Defendant has insisted on maintaining a single polling place because of the traffic and parking limitations at schools and other public buildings that typically serve as voting centers. Ex. 4. Defendant has rebuffed offers from the USD 443 Superintendent to make schools suitable polling locations. Ex. 5. Moreover, Defendant claims that she has not had time to devise a plan to open additional locations because she is "still getting her feet under the table" despite being in her position since 2016 and working in the clerk's office for six years prior to her appointment. Ex. 4.

After Defendant notified voters that she was closing the only polling location in the city, she received even more complaints from constituents and voting rights advocacy groups. Defendant was dismissive of complaints from voting rights advocates, cancelling meetings with them and laughing out loud at their attempt to provide election protection services to Ford County voters. Hearing Tr.at 101:8-102:2; 102:25-1:03:20. Defendant also received significant negative press coverage for her decision to close the city's only polling location. *See, e.g.*, Ex. 3, Ex. 4. She responded by ejecting reporters from the Expo Center on Election Day. Ex. 6. Defendant has made no public announcement that she will open additional polling locations. Further, she has expressly declined to add additional locations for the 2019 municipal elections.

Dodge City will hold municipal elections for the Dodge City Community College Board of Trustees, USD 443 Board of Education, and City Commission in 2019. All three elections will significantly impact the composition of the government of Dodge City and its K-12 and post-secondary education systems. Defendant has shown no intention of using any additional voting places. If there is a primary election, as there was for the 2017 municipal offices, it will take place in August 2019. The general election for the municipal races will take place in November 2019. Both elections will take place when the Civic Center will, according to plans, again be surrounded by construction.

STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for lack of subject matter jurisdiction. A Rule 12(b)(1) motion can challenge the sufficiency of the pleadings to establish jurisdiction, a facial attack, or a lack of any factual support for subject matter jurisdiction despite the pleading's sufficiency, a factual attack. *Holt v. U.S.*, 46 F.3d 1000,1002-03 (10th Cir. 1995). With respect to a facial attack, the Court must accept the allegations in the complaint as true. *Id.* at 1003. For a factual attack, evidence outside the pleadings may be considered. *Id.* A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts without converting the motion to a Rule 56 summary judgment motion. *Cochran v. City of Wichita*, Case No. 18-1132-JWB, 2018 U.S. Dist. LEXIS 165825 (D. Kan. Sept. 26, 2018); *Harms v. IRS*, 146 F. Supp. 2d 1128, 1130 (D. Kan. 2001).

Rule 12(b)(6) provides for dismissal for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a motion to dismiss, the Court must treat all pleaded facts as true and draw all inferences that can be derived from the facts alleged in favor of the Plaintiff. *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). The Court restricts its consideration to facts contained within in the four corners of the complaint in deciding a motion to dismiss. *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010); *Johnson v. Hix Corp.*, Case No. 15-CV-07843-JAR, 2015 U.S. Dist. LEXIS 152249 at 6 (D. Kan. Nov. 10, 2015). Dismissal is only proper if the complaint "fails to state a claim without consideration of any

material outside the pleadings." *Klassen v. Univ. of Kan. Sch. of Med.*, 84 F. Sup. 3d 1228, 1255 (D. Kan. 2015) (*citing Childers v. Indep. Sch. Dist.*, 676 F.2d 1338, 1340 (10th Cir. 1982)).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT MOOT.

A case remains subject to federal court jurisdiction notwithstanding the seeming extinguishment of any live case or controversy if the Defendant voluntarily ceased the illegal activity or her conduct is capable of repetition yet evading review. *See Brown v. Bunham*, 822 F.3d 1151, 1166 (10th Cir. 2016). Both exceptions apply to this case. Defendant argues that the vague promises outlined in an affidavit she signed for the sole purpose of supporting her motion to dismiss render this case moot. But Defendant's voluntary cessation of unlawful actions does not meet the heavy burden of showing that she would not repeat that conduct, least of all because she has not committed to refrain from using the Expo Center as a polling location for future elections. Further, Defendant has never publicly announced her claimed intent to open a second polling location. Indeed, defendant notably failed to attach proof of any such announcement to her motion. Instead, Defendant cites Dodge City's *mea culpa* letter that it released in an effort to distance itself from her voter suppression.[2] Moreover, the challenged location is likely to be selected again in 2019 for the municipal election.

a. Defendant has not mooted Plaintiffs' claims by voluntarily discontinuing the challenged voting practices.

The voluntary cessation of a wrongful act does not moot a case. *Friends of the Earth, Inc. v. Laidlaw Env't Serv., Inc.*, 528 U.S. 167, 189 (2000); *Parents Involved in Cmty. Schs. v. Seattle*

[2] The Court should not be fooled by Defendant's transparent attempts to rely on the City's entirely voluntary actions to ameliorate the problems she has created. The City and the County, which is her employer and for which she is Clerk, are entirely separate governmental entities. She has no position with the City and they certainly are not acting on her behalf.

Sch. Dist. No. 1, 551 U.S. 701, 719 (2007). "Promises of reform or remedy aren't often sufficient to render a case moot as a constitutional matter." *Winzler v. Toyota Motor Sales U.S.A. Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012). That makes sense: "the risk always exists that, as soon the court turns its back, the defendant might renounce his promise and 'return to his old ways.'" Accordingly, courts will only find a case moot if the party seeking dismissal establishes that "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 634 (1953). The party asserting mootness bears the "heavy" and "formidable" burden of persuading the court that the challenged conduct will not resume or recur. *Laidlaw*, 528 U.S. at 189 ("the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent").

Whether or not a practice is likely to recur is a factual question. *See id.* at 193. Courts look beyond a defendant's assertions to determine whether she is likely to repeat the alleged offending conduct. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287-88 (2000) (rejecting mootness claim despite defendant's affidavit insisting that he had closed the nude dancing establishment at issue in the case). Courts conduct a fact-based assessment of the probability of recurrence and consider "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *W.T. Grant Co.*, 345 U.S. at 634.

Insistence that the challenged actions are legal can be indicative that the conduct is likely to recur. *See id.* (Defendant's vigorous defense of the challenged program's constitutionality undermined its assertion of mootness); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1954) (noting "respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan . . . thus 'an actual controversy, and adverse interests'"); *Ind. Employment Sec. Div. v. Burney*, 409 U.S. 540, 546 (1973) ("defendants hardly

provided. . . assurance that the behavior would not recur, as evident from the very fact that this appeal was taken from the adverse decision below"). Furthermore, "a public interest in having the legality of the practices settled [] militates against mootness." *W.T. Grant Co.*, 345 U.S. at 634.

In this case, Defendant has not made any attempt to carry her "formidable burden of showing" that she will discontinue use of the Expo Center as Plaintiffs' only in-person polling site. Further, Plaintiffs can more than reasonably expect Defendant to continue to maintain a single site for the 13,000 registered voters in Dodge City.

1. Courts In This Circuit Do Not Afford Government Actors Greater Solicitude When They Voluntarily Cease Unlawful Conduct.

Defendant makes much of the deference owed to government officials' assertions of discontinuance, but does not cite *any* supporting authority from this Court or Circuit. With good reason: that is not the law in this Court or Circuit. The Tenth Circuit has expressly declined to adopt a more relaxed standard where a public defendant who claims to have voluntarily ceased unlawful conduct. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 n.15 (10th Cir. 2010) ("We need not definitely opine here on what . . . greater solicitude is due administrative agencies in the application of the voluntary cessation exception. We are confident that, even under *the general practice* of courts in applying *Laidlaw*'s heavy-burden standard in the government context, the federal agencies' actions here do not bar our conclusion of mootness due to application of the voluntary cessation exception."). And even if the Circuit had adopted a standard of greater deference, "the tendency to trust public officials is [neither] complete . . . nor . . . automatically invoked." 13A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE, § 3533.7 (2d ed. 1984). A public official "cannot be trusted with the power to moot judicial proceedings simply by professing that they have mended their ways." *Id.* Thus, government officials like the Defendant bear the same heavy burden as private defendants in

demonstrating that challenged conduct is unlikely to recur. *See*, *e.g.*, *Parents Involved in Cmty. Sch.*, 551 U.S. at 719.

2. Plaintiffs Can Reasonably Expect Defendant to Limit In-Person Voting To The Expo Center in Future Elections.

Plaintiffs have every reason to expect that the challenged "wrong will be repeated." *W.T. Grant Co.*, 345 U.S. at 634. At the temporary restraining order hearing, Defendant repeatedly emphasized that: (1) the Expo Center is the only viable alternative polling location if the Civic Center is under construction; and (2) construction projects are unpredictable to the point of complete randomness. Defendant purportedly moved the city's only polling location to the Expo Center because construction on the school district's new administration building was scheduled to begin prior to Election Day. In justifying the switch, Defendant outlined the various ways that the construction made the prior location unusable. First, Cox was concerned that the construction would limit Civic Center parking, forcing voters "to walk through the construction or on the streets." Tr. 66:10-23. She also mentioned that the Expo Center would be safer in the event of ice or snow because voters could come right up to the entrance. Ex.3, Ex. 4.

Construction on the new administrative building is expected to last until at least December 2019. *See* Ex. 2. The project is likely to last even longer given the fact it had yet to begin as scheduled in late October. Therefore, it seems likely, if not probable, that the Civic Center will again be encumbered by construction during municipal elections scheduled for the first weeks of August and November 2019. Indeed, the fluid and unpredictable nature of the administrative building construction schedule could leave the Civic Center surrounded by construction during the 2020 primaries. Defendant has been emphatic that the Civic Center would be an inappropriate polling location if construction were underway. She has been equally resolute that the Expo Center was one of only two alternative buildings that could serve in the Civic Center's stead. Tr. 91:1-15.

Moreover, Defendant expressly declined to commit to opening a second polling location for the municipal elections in 2019. *See* Memo in Supp. at 6 n.2.

In short, the same conditions that gave rise to Plaintiffs' claims will exist for the next election—(1) anticipated construction near the Civic Center, (2) Defendant will only be operating a single polling location, and (3) Defendant will believe the Expo Center is her best alternative due to concerns about parking, ADA accessibility, and weather conditions. Defendant will be faced with the same dilemma that she claims necessitated her to move the polling location in the first place. Thus, these facts alone make it impossible for Defendant to make absolutely clear that the challenged conduct is not reasonably expected to recur.

3. Defendant Has Hardly Provided Assurances That She Will Not Continue to Confine Voters to a Single Polling Location or Assign them to the Expo Center in the Future.

Even if the Civic Center were not likely to be under construction in the future, Defendant has not shown that her assertion of discontinuance is genuine. Defendant continues to defend the legality and appropriateness of the Expo Center as a polling location. ECF No. 26-1, Cox Aff., at 2-3. Indeed, she devotes substantial space in her memorandum in support of her motion to dismiss arguing that no laws would restrain her from using the Expo Center as a polling location in the future. Defendant's continued "assert[ion] of the validity of her actions" hardly provides an assurance that her conduct will not recur. *Burney*, 409 U.S. at 546.

Further, many of the steps Defendant cites as evidence of sincere intent to redress Plaintiffs' complaints were taken by the City of Dodge City, *not* Defendant. For example, Defendant claims that she has publicly announced her intent to open a second polling location for the 2020 election. First, no such statement can be found on her website and Defendant failed to say anything about a second polling location during the November 1st TRO hearing. The closest

public statement Plaintiffs can locate is a comment in a newspaper story where Defendant is quoted as saying she is *open* to additional polling locations in the future. *See* Ex. 3.

But in any event, it is the city of Dodge City, not Defendant, that has openly committed to opening additional polling locations. Though Defendant cites the City's letter to the public as evidence that *she* will open additional polling locations in the future, the City's letter ultimately points a finger back at the Defendant as the single actor with authority to make that decision. It caveats: "the decision to relocate the polling location is the responsibility of the Ford County Clerk." ECF No. 26-1, at 8. Thus, a more accurate reading of the letter is that the city of Dodge City, like Plaintiffs, the Ford County Democratic Party, and Superintendent Dierksen, also implores Defendant to open additional polling sites.

Other communications from the City prove the point. Dodge City Mayor Ken Smoll released the City's first letter regarding the changed polling location on October 23, 2018. Ex. 7. In the letter, Mayor Smoll explained that "Elections are an issue that falls within the jurisdiction of the Ford County Clerk and/or the Secretary of State. The City of Dodge City has no authority over election issues." *Id.* The letter added that the Mayor did not consider it the City's "place to agree or disagree" on whether Defendant has suppressed citizens' right to vote. Thus, far from the close working relationship with the City that Defendant touts in her affidavit, Mayor Smoll's statement lays the issue squarely at Defendant's doorstep. Indeed, the Mayor's letter closes by directing concerns to Defendant, stating "if there are still unanswered questions or statements you wish to make, we are certain that the Ford County Clerk and the Kansas Secretary of State would be happy to answer your inquiries as all things 'elections' are within their direction and control." Another statement ceding influence over the decision.

The October 29 letter Defendant cites in support of her affidavit only reiterates the October 23 letter. It explains that the reason the city released a second letter was because City staff were still receiving comments and questions about Defendant's unlawful conduct. The letter makes clear that Defendant is responsible for the polling location not the city, again distancing itself from Cox's decision and outlining all of its efforts to minimize the burden that would be imposed on voters. Mayor Smoll explains that the city "discussed with the County Clerk the possibility of adding a second polling location" which notably did not result in Cox opening another place to vote for November 6th. The City of Dodge City does not claim that its "conversations" about additional polling locations with Defendant would be more fruitful than their October discussion to add a second voting place for November 6th. Instead, Mayor Smoll is merely "reiterat[ing] what was stated" to distance itself from Defendant's conduct and express that while the decision about polling locations is solely within the discretion of the clerk, the city was doing everything in its power to avoid similar situations in the future.

Further, Defendant's actions prior to and during the litigation similarly suggest that cessation is motivated by a desire to avoid liability and provide little assurance that she will not resume her unlawful conduct in the future. Defendant's actions before the suit was filed undermine the "bona fides of the expressed intent to comply." *W.T. Grant Co.*, 345 U.S. at 634. Defendant's dismissive attitude towards constituent concerns about access to voting is well-documented. For instance, Defendant reacted to the ACLU's letter offering election protection support by forwarding it to the Kansas Secretary of State's office with the message "LOL," rather than reading it and responding to it. As the court noted, Defendant's response is sufficiently troubling to raise the question "whether it manifests a disregard for the 'fundamental significance' that our Constitution places on the right to vote." TRO Order, ECF No.22, at 10.

Defendant claims the public attention on the case will ensure that she follows through with her promises. Memo in Supp. at 10. However Defendant has proven impervious to public criticism and takes umbrage at the suggestion that anyone should be able to review her decisions. Defendant has rebuffed meetings with voting rights advocates and ignored input about polling locations from her constituents. Am. Compl. ¶ 16; Tr. at 35:11-21; Ex. 3; Ex. 4. In a similar move to avert scrutiny and accountability, Defendant banished the media from the Expo Center. Ex. 6. Defendant's claim that she will suddenly reverse her practice of laughing out loud in response to voter concerns and alter her conduct in response to public disapproval is simply not credible, and certainly insufficient to support a summary disposition of this case.

Finally, the public interest in having the case decided militates against mootness. The public interest in resolving the legality of election practices that infringed on Plaintiffs' right to vote cannot be overstated, and is comparable to the public interest in other cases where the exception has been held to apply. *See Marie v. Mosier*, 122 F. Supp. 3d 1085, 1103 (D. Kan. 2015) (constitutional privacy right to marriage implicated the public interest); *Richardson v. Ramirez*, 418 U.S. 24, 34 (1974) (noting California Supreme Court properly recognized ex-felon voting rights posed question of broad public interest); *United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963) (racially discriminatory voter registration practices implicated public interest where the only assurance against them was non-binding statement from the board of elections). Declaratory judgment in this case does not simply serve as an advisory opinion—it will settle whether limiting voters to a single, inaccessible location violates the Constitution, an issue that has every factual precedent of recurrence. Ending litigation without any answers does not serve the public interest, it merely defers the question to the next election.

b. Plaintiffs' Injuries Are Capable of Repetition Yet Evading Review.

Challenges to recurrent conduct of short duration avoid mootness under the "capable of repetition yet evading review" exception. A claim is capable of repetition yet evading review where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)); *City of Herriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010). Full litigation on the merits is often not feasible in voting challenges where practices and procedures are often not announced until shortly before the election. *See*, *e.g.*, *Stroer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *City of Herriman*, 590 F.3d at 1181.

In this case, the merits of both the statutory and constitutional challenges could not have been fully resolved between the time when voters received notice that Defendant had closed the polling location at the Civic Center and the election. Defendant has a legal obligation to notify voters of a polling location change thirty (30) days before the election under K.S.A. 25-2701(d)(1). Defendant waited until just before the deadline before issuing notice,[3] so most voters learned of the change close to or after the deadline. Plaintiffs have no reason to think that Defendant would act differently and inform voters about polling location closures and changes with more time in the 2019 municipal and 2020 primary elections. This is particularly likely if she is waiting for certainty about the administrative building's construction schedule.

Moreover, as detailed in the preceding subsection, Defendant will by all indications face the precise dilemma that led her to close the Civic Center polling location and move voting to the

[3] Of course, the Defendant's stubborn reliance on the thirty-day notice period overlooks the emergency provision in that statute. She testified that she never even considered whether she could declare an emergency, thus obviating compliance with the thirty-day notice requirement. Tr. 94:16-95:4.

Expo Center in 2018. Because Defendant insists on continuing to maintain only one polling location for 2019 and has determined that there are no locations other than the Expo Center that can accommodate all of the city's voters, her decision to limit Election Day voting to an inaccessible building outside of town will likely recur.

c. Plaintiffs' Claims Are Not Prudentially Moot.

Defendant argues that even if the case is not constitutionally moot (which it is not), the Court should decline to proceed further through application of the doctrine of prudential mootness, or, as the Tenth Circuit called the doctrine when formally adopted, "equitable mootness." *In re Paige*, 584 F.3d 1327, 1331 (10th Cir. 2009). But Defendant goes too far. She argues that Plaintiffs have already obtained what they sought in the Amended Complaint: a new polling place in Dodge City. Even if a new polling place were all Plaintiffs are seeking as remedy (which it is not), Defendant has not committed to providing it. Plaintiffs are seeking more than the use of the Dodge City Civic Center as a polling place: in their Prayer for Relief, Plaintiffs ask that "this Court issue a permanent injunction requiring Defendant to open polling locations that are accessible by public transportation and can be easily accessed by voters." Am. Compl. ¶ (d).

Prudential mootness does not support Defendant's premature motion to dismiss. Putting to the side Defendant's dismissive tone in her consideration of Plaintiffs' claims for relief, she fails to acknowledge that this case involves more than a single election on November 6, 2018, and that in fact the case involves Defendant's efforts, in her official capacity, to hinder voting among the residents of Dodge City and her violation of Section 2 of the Voting Rights Act. Am. Compl. ¶¶ 23-34. The heart of Defendant's argument in support of the application of prudential mootness is that she has made a binding commitment to provide at least one more polling place by the 2020 elections, and that this commitment renders Plaintiffs' pleas for equitable relief superfluous. Defendant contorts her "commitment" to be much more than it really is; in point of fact, her

"commitment" is nothing more than a unilaterally revocable statement of intention—of which there is no record. She has committed to nothing.

Defendant cites the Court to its August 10, 2015, Memorandum and Order in *Marie v. Mosier*, 122 F.Supp.3d at 1106, in support of its prudential mootness claim. In that Order, the Court addressed whether injunctive relief was necessary because the State of Kansas had committed to follow the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ____ , 135 S.Ct. 2071 (2015). As the Court stated, "the prudent course of action is to let defendants finish their policies and practices to conform to Obergefell's new rule of constitutional law." *Marie*, 122 F. Supp. 3d at 1107. In essence, Defendant asks the Court and Plaintiffs to trust her— but here the trust would not be tested until, at the earliest, November 2020. One year after the 2015 Order, this Court found that Kansas' commitment to comply with *Obergefell* had fallen short, and it entered the permanent injunction sought by the plaintiffs. *Marie v. Mosier*, 196 F.Supp.3d 1202, 1213 (D. Kan. 2016).

So what, indeed, has Defendant committed to? Her affidavit states "I have publicly announced plans to have a second polling location no later than the next large-volume election in 2020." ECF No. 26-1, at 3. No quote as to precisely what she has said or where and when she said it, simply her own summary. In the prudential mootness section of her brief, Defendant emphasizes that she, and she alone, has the power to determine the location of polling sites: "Indeed, Plaintiffs take great umbrage at Defendant's 'unilateral' decision to relocate the polling site for the November 6, 2018, election. Compl. at ¶ 6. But Kansas law leaves such matters to the sole discretion of the county election clerk. See Kan. Stat. Ann. § 25-2701(a)." Memo in Supp. at 11. Defendant misreads the statute. K.S.A. 25-2701(a) only provides that the county election officer is to designate voting places pursuant to K.S.A. 25-2703, which states that "[t]he county

election officers shall provide suitable voting places…" There is nothing about the county election officer being solely in charge of the voting place designation process. Indeed, the requirement that the polling place be "suitable" allows for this Court to determine whether Defendant has complied, and will comply, with her statutory obligations.

Defendant says the Court should steer clear of any involvement in the voting place process, just as she has refused to consider the input of any other organization. But prudential mootness would support that argument only if the Defendant had demonstrated a commitment to providing the relief Plaintiffs seek.

Defendant has committed to nothing. She has promised to do nothing. She only points to ephemeral "plans" for a new polling place, and even then only when the next "large-volume" election takes place. In her affidavit she does not state that the new polling place will be provided by 2020, but her attorneys run with the statement and say that the new polling place will be available in 2020. Memo in Supp. at 4. Which does Defendant wish the Court to consider as evidence of her commitment: her affidavit or her attorneys' arguments? And she can always change her plans—unilaterally—without having to worry that she could be accused of breaking a commitment, because she has made no commitment.

d. Alternatively, the Court Should Hold the Case in Abeyance until Defendant Implements a Multiple Site Voting System.

To the extent this Court wishes to credit Defendant's unsupported proclamations that she will operate multiple polling locations for the 2020 primary elections and will not use the Expo Center for future elections—commitments Plaintiffs doubt Defendant will live up to— the Court should hold this matter in abeyance until Defendant has formally identified the polling locations that will be available for the 2020 election cycle. Doing so would place the Court in a clearer position to make a determination on Defendant's mootness arguments, and would ensure judicial

economy to the extent that Plaintiffs would not be called upon to refile a complaint in two years to resolve precisely the same dispute that the Court has already begun to consider here. *See Ryan v. Gonzales*, 568 U.S. 57, 74 (2013) ("[T]he decision to grant a stay, like the decision to grant an evidentiary hearing, is generally left to the sound discretion of district courts." (internal quotations and citations omitted); *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 668 F.3d 724, 732-33 (D.C. Cir. 2012) (noting that the district court must, in its exercise of discretion to issue a stay, "weigh competing interests and maintain an even balance [] between the court's interest in judicial economy and any possible hardship to the parties.") (internal quotations and citations omitted). Holding the action in abeyance would also be prudent in that Defendant's claimed commitment to remedy the Plaintiffs' harm could be assessed on an unhurried timeline, just before a looming election. Indeed, Defendant has argued that if this (or any) Court can hear this action *at all*, it should be outside of "close proximity" to or on "the eve of an election." *See* Defs' Response to Pl.'s Mot. for TRO, ECF No. 18, at 26-27 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). Plaintiffs in no way agree that Defendant's actions have mooted this case. But to the extent there is a needle to be threaded between claimed mootness and Defendant's likely claim that future attempts to hold her to her word will interfere with forthcoming elections, a stay affords the Court and the parties a reasonable path forward.

II. PLAINTIFFS HAVE CLEARLY STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

a. Plaintiffs Have Adequately Alleged That Defendant Cox's Decision to Move Dodge City's Only Polling Location For 13,000+ Voters Outside City Limits Placed an Unjustified Burden on the Right to Vote Under the First and Fourteenth Amendments.

Plaintiffs have pled factual allegations sufficient to state a claim that Defendant Cox unduly burdened the right to vote under the First and Fourteenth Amendments. As Defendant notes, a

constitutional challenge to state and local election law is evaluated under the framework established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). This framework requires a court to assess: (1) "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; (2) "the precise interests put forward by the State as justifications for the burden imposed by its rule"; and (3) not only "the legitimacy and strength of each of those interests," but also "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. Under *Anderson-Burdick*, the extent of the burden on plaintiffs' voting rights determines the level of scrutiny the court will place on the government's articulated goals for a given election regulation, and the appropriateness of the regulation to achieve those goals. *See* Memo in Supp. at 14 (*quoting Burdick*, 504 U.S. 434; *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016)). But there is no such thing as a *de minimis* burden on voting rights that would evade *Anderson-Burdick* review: no matter how small a burden on voting rights, the government must put forth an adequate justification for its conduct. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) ("However slight the burden [imposed on voters] may appear, it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (quoting *Crawford v. Marion County Election Bd.* 553 U.S. 181, 211 (2008)). Therefore, for Plaintiffs to survive a motion to dismiss, they need only allege that Defendant Cox's actions burdened their right to vote in a way that cannot be justified by a legitimate state interest.

Plaintiffs have alleged that all Dodge City voters, and particularly low-income, Hispanic voters, had their right to vote burdened when Dodge City's only polling location for more than 13,000 voters moved one mile outside of the city limits to a place with no accessible public

transportation or sidewalks amidst a series of confusing notices to voters. Plaintiffs have also alleged that Defendant Cox's stated reasons for moving the polling location to the new location— that there was construction at the old polling location impacting voter safety, that there needed to be only one polling location, and that the new location selected was the only ADA-compliant option— were inaccurate given the existing circumstances in Dodge City and wholly insufficient to justify the actions taken. If these allegations are true, Plaintiffs have stated a claim under the First and Fourteenth Amendments.

In Defendant's motion to dismiss for failure to state a claim, Defendant spends little time challenging the sufficiency of Plaintiffs' allegations. Instead, Defendant goes well beyond the four corners of the complaint, making repeated reference to a newly prepared affidavit relied upon for Defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) as well as a series of materials arising out of Plaintiff's previous motion for a temporary restraining order and Defendant's response to that motion. This is patently inappropriate in a 12(b)(6) motion. *See Bral Envtl. Servs. v. Shaw Envtl., Inc.*, Case No. 03-2300-JWL, 2003 U.S. Dist. LEXIS 17279, at *4-*5 (D. Kan. Sept. 30, 2003) ("it is generally unacceptable for a court to do so when deciding a Rule 12(b)(6) motion to dismiss.") (*citing Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 961 (10th Cir. 2001)). To the extent Defendant claims that the burden placed on voters by the polling location change was actually insignificant and that the government's interests were sufficient to justify the burden, these are detailed factual determinations that cannot be properly assessed on a motion to dismiss. *Am. Ass'n of Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1220 (D. N.M. 2010) (noting that for an *Anderson-Burdick* claim, "The Court should not resolve these factual disputes on a motion to dismiss, but rather will allow the Plaintiffs' claims […] to go forward to allow for further factual development.").

1. The Complaint Sufficiently Alleges that the Defendant's Decision to Move Dodge City's Polling Location to the Expo Center Placed an Undue Burden on Plaintiffs' First and Fourteenth Amendment Rights.

In their Complaint, Plaintiffs allege that voters were faced with significant burdens as a result of Defendant's decision to change the polling location from the Civic Center to the Expo Center. Plaintiffs specifically note that the Expo Center is twice as far from Dodge City's largest employers, that the Expo Center was further away from the home of virtually every voter vis-à-vis the Civic Center, and that train traffic at key times would delay voters attempting to reach the Expo Center by 15-20 minutes. Am. Compl. ¶ 7. Plaintiffs also allege that the Expo Center is 1.3 miles from the nearest bus stop, has no sidewalk for the majority of the distance between the nearest bus stop and the Expo Center, and that using public transportation to reach the Expo Center would take approximately 90 minutes one-way. Am. Compl. ¶ 11.

Plaintiffs allege that the confluence of these circumstances burden a community where 40% of households do not own a car or share a vehicle with multiple family members, and where 36% of the county's population are likely to be public transit dependent. Am. Compl. ¶¶ 9-10, 26. Plaintiffs further allege that the change in voting location will have a significant burden on low-income workers with inflexible work schedules, who are more likely to be Hispanic, as well as those who are disabled. *Id.*

Finally, Plaintiffs allege that the lack of adequate notice of the polling place change, and confusing notices with the incorrect location sent out to certain newly registered voters, further confused Dodge City residents and burdened their right to vote. *Id.* at ¶13.

All of these allegations, if true, demonstrate a significant burden on voters under an *Anderson-Burdick* analysis. *See Common Cause Indiana v. Marion Cty. Election Bd*., 311 F. Supp. 3d 949, 956, 969 (S.D. Ind. 2018) (shutting down 4 out of 5 early voting locations imposes more

"severe" burdens on "voters who lack the financial means or flexible schedules"); *Mich. State A. Philip Randolph Inst. V. Johnson*, 833 F.3d 656, 666 (6th Cir. 2016) (increasing the time needed to vote for mainly African-American communities imposed a burden that, while "not severe," was also "not slight," and was unjustifiable); *Purcell v. Gonzalez*, 549 U.S. 1, 4- 5 (2007) ("voter confusion" can result in "consequent incentive to remain away from the polls").

Plaintiffs' Complaint also alleges that Defendant's stated reasons for moving Dodge City's only polling location to the Expo Center were inadequate to justify the decision. The Complaint alleges that Defendant's concerns about construction at the old polling place were unfounded because there was in fact no indication that construction was underway, and because the school district never actually told Defendant that planned construction would prevent the old polling place from being used. Am. Compl. ¶ 15. Furthermore, Plaintiffs allege that Defendant Cox's decision to continue to operate only one polling location purportedly because of ADA-compliance and staffing concerns is illegitimate because there are many ADA-compliant buildings in Dodge City and insufficient reason has been given for why multiple polling locations cannot be maintained. *Id.* at ¶¶ 16-17, 27-29. These specific allegations that Defendant did not have adequate justification for her decision, if credited, make out a claim under *Anderson-Burdick* analysis. *See Anderson*, 460 U.S. at 789 (courts evaluate not only "the legitimacy and strength of each of [the state's] interests," but also "the extent to which those interests make it necessary to burden the plaintiff's rights."); *Am. Ass'n of Disabilities*, 690 F. Supp. 2d at 1215 ("For the Plaintiffs' First-Amendment claims to survive [a] motion to dismiss, they need to allege only that the challenged law burdened their First-Amendment rights and that a legitimate state interest cannot justify those burdens."); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009).

2. Whether Plaintiffs' Constitutional Rights Were Unduly Burdened by Defendant's Decision to Move Dodge City's Polling Location to the

Expo Center is a Factual Determination Not Suitable for Resolution on a Motion to Dismiss.

In response, Defendant declares that the burdens on voting were actually minimal, and that the state's articulated interests were substantial enough to justify those burdens. But these are detailed factual matters that cannot be weighed in a motion to dismiss for failure to state claim. *See Am. Ass'n of Disabilities*, 690 F. Supp. 2d at 1220 ("[Defendant] largely argues that the burden imposed by the challenged laws are minimal or non-existent, and that the State's interests are substantial and therefore capable of justifying the burdens. The Court cannot, however, properly weigh those factual determinations on a motion to dismiss."). Defendant concedes as much in her brief. Memo in Supp. at 15. It would seem that Defendant is confused about the role Plaintiffs' motion for temporary restraining order, and the hearing on that motion, should play in determining the sufficiency of the claims alleged. The motion to dismiss stage requires significantly less than this prior proceeding. *See Pueblo of Pojoaque v. New Mexico,* 214 F. Supp. 3d 1028, 1059 (D. N.M. 2016); *Am. Ass'n of Disabilities*, 690 F. Supp. 2d at 1211, 1215. To the extent Defendant wishes to rebut the merits of Plaintiffs' claims using documents from the temporary restraining order proceeding or her own affidavit responding to Plaintiffs' allegations, she should do so after the parties have had an adequate opportunity for factual development in this case. Indeed, this Court agreed in its order denying Plaintiffs' motion for temporary restraining order that "plaintiffs may develop evidence that could support a finding that Ms. Cox has placed a substantial burden on voters." Order, ECF No. 22 at 8-9. Plaintiffs should be given the opportunity to do so since their allegations as plead clearly state a claim for relief.

3. The Court Cannot Assess the Extent of the Burden on the Right to Vote Imposed on Dodge City Voters at this Stage of the Proceeding.

Defendant declares that the burdens imposed on Dodge City voters were minimal every-day burdens that "arise from life's vagaries" and are insufficient to state a claim per se. Memo in Supp.

at 17, 19 (*citing Crawford*, 553 U.S. at 197). To the extent Defendant claims that there are certain types of burdens that are so insubstantial that the government does not need to justify them under *Anderson-Burdick*, the very cases Defendant cites for this proposition disagree. *Crawford*, 553 U.S. at 211; *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 705-06 (9th Cir. 2018) ("DNC") ("Even if the district court had been correct to classify the burden imposed […] as minimal, the law does not withstand scrutiny under the First Amendment"); *Ohio Democratic Party*, 834 F.3d at 632 (considering the state's justification for a law even after finding that the law was minimally burdensome).

But before even approaching this dispute, merely assessing the magnitude of the burdens an election law imposes is an "intense[ly] factual inquiry, requiring development of a full record." *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007). Indeed, in every case cited by Defendant as authority, Memo in Supp. at 15-21, the plaintiff's claims proceeded past the motion to dismiss stage so that the court could assess the extent of the burden a law imposed prior to determining the standard of review that would be applied to the plaintiff's claims. *Crawford*, 128 S. Ct. 1610, 1622 (hearing the case after discovery, and asking whether "the deposition evidence in the District Court" could "provide any concrete evidence of the burden imposed on voters."); *DNC*, 904 F.3d at 696 ("After a lengthy trial involving the testimony of 51 witnesses and over 230 evidentiary exhibits, the district court rejected each of DNC's claims."); *Ohio Democratic Party*, 834 F.3d at 623-24 ("Following a ten-day bench trial in November and December 2015, the district court issued its 120-page ruling on May 24, 2016, in the form of findings of fact and conclusions of law."); *Frank v. Walker*, 768 F.3d 744, 747 (7th Cir. 2014) (reviewing a full record from the district court on appeal).

To the extent Defendant cites these cases for the proposition that *quantifiable evidence* of the burdens experienced by particular voting subgroups is necessary for the Court to consider invalidating a facially neutral election regulation, Memo in Supp. at 17, Plaintiffs do not disagree. But none of the cases presented by Defendant permit dismissal as a matter of law for failure to provide such quantifiable evidence prior to discovery and development of the factual record. At this time, Plaintiffs need only articulate enough specific facts to plausibly allege that such quantifiable evidence exists. See *Twombly*, 550 U.S. at 570 (the complaint must only include "enough facts to state a claim to relief that is plausible on its face").

As Defendant acknowledges, Memo in Supp. at 15-16, 18, Plaintiffs have included the following allegations in their Complaint regarding the burden Defendant placed on voters: (1) the Expo Center location Defendant Cox selected as the only polling location for Dodge City is 1.3 miles away from a bus stop with no sidewalks in between (Comp. ¶ 11); (2) the Expo Center is difficult to reach for voters without a car (*Id.* ¶¶ 11, 25); (3) Ford County has a higher poverty rate than the rest of Kansas (*Id.* ¶ 8); (4) over 40% of households in Ford County do not own a car or share a single vehicle among multiple family members (*Id.* ¶ 10); (5) Ford County's workforce is overrepresented in low-wage industries where workers have inflexible and unpredictable schedules (*Id.* ¶ 8); (6) Dodge City Public Transportation estimates that 36% of Ford County had a potential need for public transportation (*Id.* ¶¶ 10-11); (7) trains block off traffic across town during peak commuting times in Dodge City (*Id.* ¶ 7); (8) having one polling location for all voters creates an overburdened polling place with long wait times (*Id.* ¶¶ 25-26); (9) low-income voters are particularly impacted by the polling location change and Hispanic residents in Ford County are twice as likely to be poor compared to their white neighbors (*Id.* ¶¶ 8, 10, 26); (10) lack of adequate notice of the polling place change, and confusing notices with the incorrect location sent out to

certain newly registered voters, further confused Dodge City residents (*Id.* ¶ 13). These allegations articulate significant problems with the Expo Center's sole use as a polling location during the last election sufficient to survive a motion to dismiss. See *Twombly*, 550 U.S. at 570.

But Defendant ignores these factual allegations in favor of introducing her own facts from outside Plaintiffs' complaint to suggest that the burdens suffered as a result of Defendant's actions were minimal on Election Day. Whether Dodge City provided public transportation to voters that mitigated the burden on voters without a car, Memo in Supp. at 16, or whether train traffic can be circumvented, *id.* at 15-16, or whether the Expo Center is actually further away from most common work places in Dodge City relative to the old location, *id.* at 16, or whether early voting options eased voter burdens, *id.*at 18, are all questions of fact the parties must develop after being given a fair opportunity to do so. Nor can any of these external factual assertions Defendant has martialed in its motion to dismiss actually be used to challenge whether Plaintiffs' Complaint stated a claim as a matter of law. *Bral Envtl. Servs.*, 2003 U.S. Dist. LEXIS 17279, at *4-*5.

In support of its position, Defendant notes that Plaintiffs have the burden of proof to demonstrate the actual burden a law imposes. Memo in Supp. at 15 (*citing DNC,* 904 F.3d at 703). That is indeed true, but the eventual burden Plaintiffs will need to satisfy at summary judgment or at trial does not justify Defendant's request that this Court engage in a premature assessment that Defendant's facts are more compelling than Plaintiffs' and therefore no real burden exists. *See Am. Ass'n of Disabilities*, 690 F. Supp. 2d at 1220.

Like Defendants, Plaintiffs have also gathered significant information from Election Day regarding the burdens on voters and Defendant's administration of voting at the Expo Center. With leave of this Court, Plaintiffs may seek to amend their complaint to include this and other information learned on Election Day. Regardless of whether the Court grants such a motion,

however, Plaintiffs' Complaint clearly makes out an *Anderson-Burdick* claim and Defendant will need to file a responsive pleading to raise any competing facts in reply.

Furthermore as previously noted, Defendant cannot simply declare that the decision to operate one polling location, or Defendant's choice of that polling location, or the existence of wait times at the polls, do not impose a meaningful burden on voters. Memo in Supp. at 23. As noted in *Am. Ass'n of Disabilities*, the Court is not yet positioned to answer that question:

> "[Defendant] suggests that the Court decide, as a matter of law, whether the other requirements […] impose an undue burden, but Plaintiffs explain that, although each requirement taken separately may not be particularly burdensome in isolation, the allegation is that the four requirements in the aggregate impose an undue burden on the Plaintiffs' First-Amendment rights. The Court agrees with the Plaintiffs, that the Court […] ultimately must address the burdens the law poses collectively. The Court should not resolve these factual disputes on a motion to dismiss, but rather will allow the Plaintiffs' claims that [the law] burdens their First-Amendment rights to go forward to allow for further factual development."

Id. at 1219-1220.

Plaintiffs look forward to developing the record in this matter, consistent with this Court's order denying Plaintiffs' temporary restraining order, Order, ECF No. 22, at 8-9, to demonstrate that the burdens alleged in the Complaint, in the aggregate, were indeed significant.

4. The Court Cannot Determine Whether There Was Adequate Justification for the Burdens Defendant Imposed on Voters at this Stage of the Proceeding.

The Complaint alleges that Defendant did not have adequate justification for selecting the Expo Center as Dodge City's polling location given the burdens that the location would place on voters and that Defendant's concerns about voter safety, ADA-compliance, and staffing were unfounded or illegitimate. Am. Compl. ¶¶ 15-18, 21, 27-29. Defendant asserts in its motion to dismiss that her reasoning for moving the polling location is entitled to deference as a matter of law notwithstanding Plaintiff's specific allegations that the decision to use the Expo Center cannot be justified. Memo in Supp. at 21-23. But no matter the magnitude of the burden imposed on

voters, Defendant must put forward an adequate justification for her actions. *See Anderson*, 460 U.S. at 789; *Common Cause*, 554 F.3d at 1352. It is not enough for Defendant to merely declare that her actions were justified in a motion to dismiss, otherwise "the protection against restrictions on First-Amendment rights would be weakened." *Am. Ass'n of Disabilities*, 690 F. Supp. 2d at 1220.

Defendant appears to understand this, because in her motion she cites an affidavit providing factual arguments about why her decision to move Dodge City's polling location to the Expo Center was justified. But the very introduction of those materials introduces a factual dispute inappropriate on a motion to dismiss. *Bral Envtl. Servs.*, 2003 U.S. Dist. LEXIS 17279, at *4-*5. Plaintiffs have alleged all they need in order to proceed on their First and Fourteenth Amendment claims. *See* Am. Compl. ¶¶24-29; *Am. Ass'n of Disabilities*, 690 F. Supp. 2d at 1215 ("For the Plaintiffs' First-Amendment claims to survive [a] motion to dismiss, they need to allege only that the challenged law burdened their First-Amendment rights and that a legitimate state interest cannot justify those burdens.").

b. Plaintiffs Have Adequately Alleged That Defendant Cox's Decision to Move Dodge City's Only Polling Location For 13,000+ Voters Outside City Limits Disproportionately Harmed Hispanic Voters in Violation of Section 2 of the Voting Rights Act.

Plaintiffs have alleged in their Complaint that Defendant's decision to move Dodge City's only polling location outside the city to a place without public transportation access or sidewalks disproportionately harmed Hispanic voters because they are: (1) less likely to have a vehicle; (2) have lower incomes than white residents; and (3) work in industries with less flexible schedules than white residents. Memo in Supp. at 24 (*citing* Am. Compl. ¶¶ 31-33). Indeed, Plaintiffs specifically allege that Hispanic residents are twice as likely to be poor compared to their white neighbors, and are more likely than their white neighbors to rely on public transportation. Am.

Compl. ¶¶ 8, 10. This in turn, Plaintiffs allege, makes the polling location change that much more challenging for Hispanic voters as compared to white voters. *Id.* ¶ 33. These allegations, if true, state a claim that Defendant's decision to move Dodge City's polling place to the Expo Center violated Section 2 of the Voting Rights Act. *See Ohio Democratic Party*, 834 F.3d at 638 (noting that if disparate access to the political process for minority voters is causally linked to an election practice, the first element of a Section 2 claim is established).

The crux of Defendant's argument in favor of dismissal of Plaintiffs' Section 2 claim is that Plaintiffs have not provided quantifiable evidence of the harms Hispanic voters faced at the Expo Center, and have not demonstrated a nexus of causation between the harms that Hispanic voters suffered and Defendant's decision to use the Expo Center as a polling location. Memo in Supp. at 28. These steps are indeed required before the Court can proceed to assess whether a voting practice or procedure "has the effect, as it interacts with social and historical conditions, of causing racial inequality in the opportunity to vote." Memo in Supp. at 27 (*citing Ohio Democratic Party*, 834 F.3d at 638). Defendant correctly notes this requisite factual showing that must be made to ultimately prevail on a Section 2 claim, but then asserts that the same showing must be made in Plaintiffs' Complaint to avoid dismissal as a matter of law. Again, none of the cases Defendant cites for this proposition were resolved with anything less than the court's review of a full record after extensive factual discovery. *DNC*, 904 F.3d at 696; *Ohio Democratic Party*, 834 F.3d at 623-24; *Frank*, 768 F.3d at 747; *see also Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 594 (4th Cir. 2016) (a case Defendant suggests is factually similar to the case at bar, Memo in Supp. at 26, when in fact the district court decided that the plaintiff in that case had not presented sufficient evidence on their Section 2 claim *after a two-week bench trial*).

As the 1st Circuit has noted, "[i]t is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss." *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004). This is because plaintiffs should be allowed to develop evidence that substantiates their allegations before the court makes a determination on the merits of the claim, no matter how small a burden may seem on the face of the complaint. *See id.*("We are thus unwilling at the complaint stage to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 percent.").

In light of this practice, there do not appear to be any cases detailing the specific supporting facts that a plaintiff must allege in a Section 2 claim to satisfy *Iqbal* and *Twombly*. *See Luna v. Cnty. Of Kern*, Case No. 1:16-cv-00568-DAD-JLT, 2016 U.S. Dist. LEXIS 120208, at *11 (E.D. Ca Sept. 2, 2016). However, courts have regularly denied a defendant's motion to dismiss a Section 2 claim for a purported lack of factual sufficiency. *See*, *e.g.*, *Metts*, 363 F.3d at 11; *Luna*, 2016 U.S. Dist. LEXIS 120208, at *11; *Navajo Nation v. San Juan Cnty.*, Case No. 2:12-CV-00039, 2015 U.S. Dist. LEXIS 31195, at *14 (D. Utah Mar. 12, 2015). Those few cases where a motion to dismiss has been granted on a Section 2 claim, however, are illustrative. *See Vallejo v. City of Tucson,* Case No. CV 08-500 TUC DCB, 2009 U.S. Dist. LEXIS 54442, at *10 (D. Ariz. June 26, 2009) (dismissing a complaint claiming a Section 2 violation but containing no allegations suggesting that race was the reason why plaintiff's vote was denied); *Tex. Democratic Party v. Dallas County*, Case No. 3:08-CV-2117-P, 2009 U.S. Dist. LEXIS 130172, at *19 (N.D. Tex. April 17, 2009) (dismissing a complaint under Section 2 because plaintiffs did not raise an inference of causation when they challenged an online voting system without alleging that minorities even used the voting system or were impacted by it differently).

Plaintiffs have provided specific factual information about the disparities that separate white and Hispanic residents in Dodge City, and allege that Defendant Cox's choice of polling location, combined with those conditions, disproportionately impacted Hispanic voters and prevented them from making it to the polls. Am. Compl. ¶¶ 8, 10, 31-33. This is more than enough to survive a motion to dismiss on a Section 2 claim. *Luna*, 2016 U.S. Dist. LEXIS 120208, at *11. Whether or not Plaintiffs' claim will ultimately be successful, this Court should not "foreclose the *possibility* that a Section 2 claim can ever be made out" by an election administrators' decision to place a city's only polling location in a location outside of city limits with no sidewalks or public transportation. *Metts*, 363 F.3d at 11.

Defendant's bare declaration in its motion to dismiss that making Dodge City's only polling location the Expo Center for the 2018 general election had "no racial connections" is simply not something this Court can determine at this time. Nor should the Court consider Defendant's recital of the accommodations made for voters on election day or options Defendant provided for early voting. *See* Memo in Supp. at 29. These competing factual assertions are inappropriate to challenge Plaintiffs' complaint on a motion to dismiss. *Bral Envtl. Servs.*, 2003 U.S. Dist. LEXIS 17279, at *4-*5.

As previously noted, Plaintiffs have also gathered significant information from Election Day in Dodge City to bolster their claims and Plaintiffs intend to present that information to this Court if given the opportunity to do so. This motion to dismiss attempts to stifle Plaintiffs' claims prematurely, and yet at the same time introduces new factual disputes that this Court will be better able to adjudicate at a later stage of the proceeding. For these reasons, the motion should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notifications of such filing to the e-mail addresses of all counsel of record.

/s/ Lauren Bonds
Lauren Bonds