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CASE NUMBER: 2021-CV-000299

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 DEREK SCHMIDT, in his official capacity as Kansas Attorney General, *Defendants,*	Case No. 2021-CV-000299

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL TEMPORARY INJUNCTION

Defendants Scott Schwab and Derek Schmidt, each sued in their official capacities and acting by and through their undersigned counsel, respectfully submit this Response to Plaintiffs' Motion for Partial Temporary Injunction and memorandum in support thereof.

I. – Introduction

Plaintiffs in this action ask the Court to temporarily enjoin a perfectly valid criminal statute that simply prohibits individuals from *knowingly* engaging in conduct designed to convey the false impression that they are an election official. Despite the fact that this same conduct has been unlawful for more than a decade under a different statute, Plaintiffs now insist they face an "existential threat" to their operations (Mem. at 1) because the recently-passed statute allegedly

adds a *subjective* component that could render them vulnerable to criminal prosecution if a voter misconstrues their non-official status. This grossly embellished fear finds no support in the statutory text and would require the Court to ignore well-settled legal principles about how constitutional challenges to statutes must be evaluated. Furthermore, there is absolutely no reasonable basis for Plaintiffs to believe that they, or any of their members, are threatened with criminal liability (let alone *imminent* criminal prosecution) under the new statute. As a result, Plaintiffs do not even have standing to pursue this lawsuit. While Plaintiffs invoke free speech rights and claim that their planned communications with voters may be chilled by the statute, the reality is that Plaintiffs' constitutional attacks on the election official impersonation statute amount to little more than a thinly disguised effort to undermine the State's legitimate attempt to minimize voter confusion, help safeguard the orderly administration of the election process, and enhance public confidence in the fairness of the process. Defendants respectfully urge the Court not to be distracted by Plaintiffs' smoke and mirrors and to deny Plaintiffs' motion for a preliminary injunction.

II. – Plaintiffs Lack Standing to Pursue their Claims

None of Plaintiffs' claims regarding the new impersonation statute present a justiciable case or controversy sufficient to trigger the Court's subject matter jurisdiction. Plaintiffs lack standing to challenge this criminal statute given that there is no threat whatsoever of an imminent prosecution. Defendants have not made any statements or undertaken any efforts to suggest that they would prosecute individuals engaging in the type of voter outreach programs that Plaintiffs maintain are the hallmark of their work. There is, accordingly, no basis for the Court to exercise

jurisdiction over the claim at issue here, let alone enter a preliminary injunction blocking the new statute's enforcement.

Unlike the United States Constitution, the Kansas Constitution does not contain "case or controversy" language in its description of the scope of judicial power. However, Kansas courts have adopted such a limitation pursuant to the separation of powers doctrine inherent in the State's constitutional framework. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008). Kansas courts also may consider federal law when addressing justiciability. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014).

As part of the Kansas case-or-controversy requirement, courts mandate that (a) parties have standing; (b) issues are not moot; (c) issues are ripe, i.e., they have "taken fixed and final shape rather than remaining nebulous and contingent;" and (d) issues do not present a political question. *Id.* at 1119. These justiciability requirements are broadly rooted in the Kansas Constitution's prohibition against advisory opinions. *Morrison*, 285 Kan. 897–98. The fundamental principles at play are that "controversies provide factual context, arguments are sharpened by adversarial positions, and judgments resolve disputes rather than provide mere legal advice." *Id.* at 897. In the absence of such a genuine and concrete dispute, any judgment by the Court would be little more than an advisory opinion on an abstract question, which is "inoperative and nugatory" and which would "remain a dead letter . . . without any operation upon the rights of the parties." *Id.* (internal quotations omitted).

The doctrine of standing focuses on a party's right to assert a legal cause of action or to seek judicial enforcement of some legal duty or right. *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015). "While standing is a requirement for case-or-

controversy, i.e., justiciability, it is also a component of subject matter jurisdiction." *Id.* (quoting *Gannon*, 298 Kan. at 1122). A court must be vested with subject matter jurisdiction in order for it to properly act in a case. *State v. Bickford*, 234 Kan. 507, 508-09, 672 P.2d 607 (1983). Whether jurisdiction exists is a question of law. *Wichita Eagle & Beacon Publ'g Co., Inc. v. Simmons*, 274 Kan. 194, 205, 50 P.3d 66 (2002). "If a trial court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it." *Chelf v. State*, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011).

Here, Plaintiffs challenge the election official impersonation restriction on behalf of their respective members. Plaintiffs also allege each of their respective organizations will be injured once the restriction goes into effect on July 1, 2021.

A. – Associational Standing

For an association to have standing to sue on behalf of its members, a three-prong test must be satisfied: (1) the members must have standing to sue individually; (2) the interests the association seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017) (quoting *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013)).

In addressing the first prong, a court considers whether Plaintiffs' members have standing to sue in their own right. *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1126, 307 P.3d 1255 (2013). To establish standing under Kansas law, a party must demonstrate that: (1) it suffered a "cognizable injury;" and (2) there is a causal connection between the injury and the challenged conduct. *Gannon*, 298 Kan. at 1123. In applying these two requirements, the

Kansas Supreme Court frequently refers to the federal judiciary's standing elements. *Id.* That is, the party invoking a court's jurisdiction "must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." *Id.* The burden to establish these elements of standing rests with Plaintiffs. *Id.*

When evaluating the first element of the standing test—the "cognizable injury" or "injury in fact" requirement—the Court looks to whether Plaintiffs' members "personally suffer[ed] some actual or threatened injury as a result of the challenged conduct." *Moser*, 298 Kan. at 33. "The injury must be particularized, meaning it must affect the [member] in a personal and individual way." *Id.* at 35 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Further, a member's purported injury "cannot be a 'generalized grievance' and must be more than 'merely a general interest common to all members of the public.'" *Gannon*, 298 Kan. at 1123 (citing *Lujan*, 504 U.S. at 575).

"When a plaintiff alleges injury from the potential enforcement of a law or regulation, courts find an injury in fact only 'under circumstances that render the threatened enforcement sufficiently imminent.'" *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). Specifically, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). A credible threat does not exist when the threat is imaginary, speculative, or hypothetical; instead, it must be well-founded and grounded in reality. *Id.*; *see also Morrison*,

285 Kan. at 890 (dispute must "be real and substantial," which means the controversy is "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"). "*The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." Id.* (emphasis added).

Plaintiffs' allegations fall short of establishing a particularized injury worthy of invoking this Court's jurisdiction. Plaintiffs' members concern themselves with possibilities where they *may* engage in activities that are the same as those activities engaged in by election officials or that *might* give the false appearance that the members are election officials. *See* Plaintiffs' Ex. 1, at 7. Noticeably absent from Plaintiffs' petition, however, is any claim of a member being threatened with actual criminal liability because of the election official impersonation restriction. Standing is determined at the time the action is commenced and courts "generally look to when the complaint was first filed, not to subsequent events to determine if a plaintiff has standing." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013) (internal quotations omitted). Moreover, a party "is not injured by an analysis that has yet to take place." *Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222, 1234 (10th Cir. 2020).

Unlike other pre-enforcement cases, Plaintiffs do not identify any prior instance where a member was arrested for engaging in Plaintiffs' outreach efforts. Nor is there any claim by Plaintiffs that their members were warned or threatened with civil or criminal liability when a voter mistakenly mistook a member to be an election official. Plaintiffs do not assert that either the Defendants or any county prosecutors have made public statements suggesting Plaintiffs or similarly situated individuals will be prosecuted if they continue with their voter education

outreach programs. While Defendants may have the ultimate authority to enforce the criminal statute,[1] there has been no action by Defendants at all to do so in this case. Consequently, there is no causal connection between the alleged harm Plaintiffs' claim and any action taken by Defendants.

Absent a credible threat of prosecution, Plaintiffs cannot invoke this Court's jurisdiction. *See N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 4–5 (1st Cir. 2000) ("In general, federal courts are disinclined to provide either injunctive or declaratory relief to foreclose federal criminal prosecutions in the absence of a reasonably clear and specific threat of prosecution."); *Phelps v. Hamilton*, 122 F.3d 1309, 1327 (10th Cir. 1997) ("[The plaintiffs offer no evidence to support their allegation that they are threatened with prosecution under the amendment."). Standing does not exist when Plaintiffs' concerns of future prosecution of its members are purely hypothetical and amount to nothing more than a subjective worry. *See Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]"). "If all it took to summon the jurisdiction of the . . . courts were a bare assertion that, as a result of government action, one is discouraged from speaking, there would be little left of the [constitutional standing] threshold in First Amendment cases." *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006).

[1] Although the Secretary of State technically has authority to prosecute election crimes, *see* Kan. Stat. Ann. § 25-2435, the current Secretary has formally disavowed any intent to prosecute cases out of his office and has repeatedly testified that his office is focused on administering its constitutional duties rather than prosecuting election crimes. *See, e.g., Clark v. Schwab*, 416 F. Supp.3d 1260, 1268 (2019). Nothing has changed in his position. There is, therefore, no conceivable grounds for the issuance of a preliminary injunction against the Secretary of State.

Moreover, to establish an injury in fact in the context of a pre-enforcement challenge to a criminal statute, Plaintiffs must demonstrate an intent to engage in such conduct being criminalized pursuant to the statute in question. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016). Plaintiffs make no such claim. Taking them at their word, Plaintiffs' members have no desire to *knowingly* engage in conduct that misleads the recipients of their communications and outreach efforts about them being election officials. Instead, Plaintiffs' misguided concerns center on the subjective belief of the recipient receiving the communication from one of Plaintiffs' respective members.

"A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result." Kan. Stat. Ann. § 21-5202(i). Surely Plaintiffs' members do not intend to engage in conduct where they (i) *knowingly* cause a voter to believe Plaintiffs' members are election officials or employees of a county election office or (ii) *knowingly* engage in conduct where it is reasonably certain a Kansas voter will believe Plaintiffs' members are election officials.

Indeed, Plaintiffs' self-professed missions center around educating Kansans about the importance of voting and the process for voting. HB 2183, § 3, simply does not criminalize such efforts. The mere fact that, on occasion, a Kansas voter *may* entertain some subjective, innocent belief that Plaintiffs' members are election officials does not equate to knowledge or awareness that the members' conduct is *reasonably certain* to cause misidentification of election official

status. In short, Plaintiffs fail to show any imminent threat to their members based in reality. And because Plaintiffs' members cannot show a particularized injury in fact or imminent threat of such injury fairly traceable to Defendants' actions, Plaintiffs lack standing to challenge the election official impersonation prohibitions on behalf of their members.

As to the second element of associational standing, Plaintiffs must show the interests they seek to protect are germane to Plaintiffs' purposes. *Kan. Nat'l Educ. Ass'n*, 305 Kan. at 747. Defendants do not doubt that educating Kansans about the political process and encouraging voting among certain Kansas populations are important components of Plaintiffs' overall missions. But it is unreasonable to broaden such interests to include a mission of knowingly engaging in conduct where it is reasonably certain to cause a voter to believe Plaintiffs' members are election officials or formal employees of county election offices. In fact, Plaintiffs do not even make such a claim and they thus fail to satisfy their burden on the second element of associational standing.

Plaintiffs also fail to meet the third prong for associational standing. Plaintiffs must show that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* The mere fact that Plaintiffs seek only declaratory and injunctive relief does not automatically end the Court's inquiry. *See Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1021–22 (10th Cir. 1992). The Court must also evaluate the nature of Plaintiffs' claims and consider whether such claims require individualized participation by Plaintiffs' respective members. *See, e.g.*, *312 Educ. Ass'n v. U.S.D. No. 312*, 273 Kan. 875, 887, 47 P.3d 383 (2002) ("Evidence relating to each of such teachers may have to be separately examined. In order to properly litigate 312 E.A.'s claim, participation of individual

members from the association would appear to be required in order to resolve the claim asserted portion of the association representation test.").

Plaintiffs allege that their members engage in various voter education and outreach activities, some of which are the same activities performed by election officials. Plaintiffs also allege there are times where a member is mistaken for an election official while engaging in certain outreach efforts. However, there is no claim by Plaintiffs that the type of activity their members engage in correlates to misidentification by a voter or prospective voter. In other words, context matters and each scenario may yield a different result depending on the circumstances. Moreover, *each* member's knowledge is crucial in determining whether such members are engaging in conduct that may be contrary to the statute. The Court cannot evaluate whether the new impersonation statute infringes on the rights of Plaintiffs' members without reviewing each set of applicable facts. That kind of review requires individualized participation by Plaintiffs' members and does not lend itself to a preliminary injunction.

B. – Organizational Standing

In addition to being unable to establish associational standing, Plaintiffs similarly cannot show organizational standing. To establish organizational standing, each Plaintiff must show it, as an organization, "suffered a concrete and demonstrable interest to its activities which goes beyond a mere setback to abstract social interests." *Animal Legal Def. Fund v. Kelly*, 434 F. Supp.3d 974, 995–96 (D. Kan. 2020), *amended*, 2020 WL 1659855 (D. Kan. Apr. 3, 2020). A direct conflict between Defendants' conduct and Plaintiffs' respective missions must also be present to demonstrate organizational standing. *Id.*

Once again, Plaintiffs are unable to meet their burden to satisfy the standing requirements. Absent from Plaintiffs' petition are any legitimate instances of particularized harm to Plaintiffs. Plaintiffs fail to show they have actually diverted resources to counteract any alleged impact on their mission caused by the election official impersonation statute. At most, Plaintiffs have suggested that their plans to implement certain voter education outreach programs may be on hold while they seek injunctive relief from this Court. But any chilling effect on their missions has been self-induced because there is no imminent threat of criminal prosecution by Defendants or any other county prosecutor. Plaintiffs' unilateral decision to stay their voter education outreach programs, absent a credible risk of liability, does not equate to a legitimate claim that Plaintiffs diverted resources as a result of the new statute. "Diversion of organizational resources to litigation is a self-inflicted budgetary decision which does not qualify as an injury in fact for standing purposes." *Id.* In sum, Plaintiffs' claims regarding the election official impersonation statute fall far short of establishing a concrete injury to their respective organizations, and this Court thus lacks subject matter jurisdiction to review those claims.

III. – Legal Standard Governing Requests for a Preliminary Injunction

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A request for a temporary restraining order, meanwhile, carries even more "drastic consequences" since it occurs so early in the litigation. *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860 (1984). In order to receive temporary injunctive relief, five separate factors must be established: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the

movant lacks an adequate legal remedy, such as damages; (4) the movant's threatened injury outweighs the injury that the defendant will suffer under the injunction; and (5) the injunction will not be adverse to the public interest. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). The movant bears the heavy burden of proof in demonstrating the presence of each of these factors. *Schuck v. Rural Tel. Serv. Co., Inc.*, 286 Kan. 19, 24, 180 P.3d 571 (2008).

To constitute irreparable harm, the movant's injury must be "certain, great, actual, and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation omitted). "Irreparable harm is not harm that is merely serious or substantial." *Id.* Rather, "the party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (emphasis in original) (citation omitted).

Because statutes under challenge are generally treated as presumptively constitutional by the reviewing court (as discussed in Part IV.A.4. below), the normal course is for the statute to remain in effect pending a final decision on the merits by the court. *Cf. Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977); *New Motor Vehicle Board of California v. Fox*, 434 U.S. 1345, 1352 (1977). Only in the face of compelling equities with a demonstrable urgency can a litigant challenging a statute passed through the democratic process obtain a temporary injunction. In the case at bar, Plaintiffs have not come close to meeting that burden.

IV. – Argument

A. – Plaintiffs are Not Substantially Likely to Prevail on the Merits

In an absurd mischaracterization of the statute, Plaintiffs label the Legislature's attempt to prohibit third parties from knowingly impersonating election officials as a "Voter Education Restriction." Resorting to hyperbolic rhetoric and embellished claims of injury that are divorced from reality and reflect little more than their naked partisan motivations, Plaintiffs claim that the impersonation restrictions will somehow "have an enormous and immediate chilling effect" on their ability to engage in political activity such as voter registration, education, and engagement efforts this summer and beyond. (Mem. at 9-12). The reason for this, Plaintiffs insist, is that "voters innocently mistake people who are knowledgeable about voter registration and election procedures as election officials," (*id.* at 10), thereby potentially triggering a criminal prosecution of Plaintiffs under the new impersonation statute. And "[b]ecause Plaintiffs cannot ensure that they will never be perceived as being an election official," they suggest that "they will be forced to significantly curtail, and in some instances shut down" the political outreach activities they have planned for this summer. (*Id.* at 12).

Plaintiffs predicate their pursuit of relief on three causes of action. They first theorize that the Legislature, by criminalizing the knowing impersonation of an election official, has impermissibly constrained core political speech in contravention of Section 11 of the Kansas Constitution's Bill of Rights. They next aver that the impersonation statute is unconstitutionally overbroad. Finally, they maintain that the statute is unconstitutionally vague. As will become evident below, Plaintiffs have deliberately misread the statute and their allegations of potential harms that flow from this perfectly valid legislative enactment are devoid of merit.

1. – The Statutory Text Undermines Plaintiffs' Claimed Injuries

Plaintiffs never once quote the full text of the new election official impersonation law with which they take issue. The omission is particularly glaring because the statute itself negates much of the thrust of their argument. The new law creates the crime of false representation of an election official and its full text is as follows:

> (a) False representation of an election official is ***knowingly engaging*** in any of the following conduct by phone, mail, email, website or other online activity or by any other means of communication while not holding a position as an election official:
>
> (1) Representing oneself as an election official;
>
> (2) engaging in conduct that gives the appearance of being an election official; or
>
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official.
>
> (b) False representation of an election official is a severity level 7, nonperson felony.
>
> (c) As used in this section, "election official" means the secretary of state, or any employee thereof, any county election commissioner or county clerk, or any employee thereof, or any other person employed by any county election office.

H.B. 2183, § 3 (emphasis added).

Although Plaintiffs dress up their criticism of this statute in colorful, constitutional garb, at bottom, they are claiming that the text is so opaque that it puts them "in an impossible bind: if they continue their work, they risk criminal prosecution triggered by subjective factors outside of their control (i.e., how others might react to their conduct)." (Mem. at 13). Nonsense. The very first sentence of the statute makes crystal clear that the only conduct prohibited is an individual *knowingly engaging* in activities intended to falsely give the appearance that he/she is an election official or would cause a person to so believe. The focus, in other words, is on the *speaker*, not

on the *subjective views of any particular listener*. Moreover, the effect of the speaker's conduct on any listener will necessarily be judged under an *objective* standard. The notion, therefore, that one of the Plaintiffs' members might be prosecuted under the statute because, "despite [his/her] best efforts" to avoid giving a false impression (*id.* at 10), some naïve citizen "misapprehended" the member's non-official role/status (*id.* at 12), is preposterous and would require a complete disregard of the statute's first sentence.

Plaintiffs' claim is further undermined by the Kansas criminal code's definition of what it means to act "knowingly." As noted in Part II's standing discussion above, Kansas law provides that a "person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result." Kan. Stat. Ann. § 21-5202(i). The focus is simply not on the subjective views of the listener. When the new impersonation law is interpreted in line with realistic linguistic principles and in tandem with the State's criminal code definitions, Plaintiffs' entire claim dissolves.

2. – Plaintiffs' Attacks on the Legislative Process Are Wholly Irrelevant

Before turning to Plaintiffs' constitutional claims, it bears mentioning that Plaintiffs have devoted more than four pages of their brief to criticizing the process by which the Legislature adopted the statute at issue here. (Mem. at 6-9). Drawing on the complaints of minority party legislators, liberal partisan activists, and others whose opposition to the legislation failed to carry the day, Plaintiffs suggest that there was something nefarious or unfair about the procedures that

the House and Senate employed in moving the passage of the bill through the Legislature. Plaintiffs, of course, allege no actual impropriety; they simply seek to color the record with policy grievances that the majority found unpersuasive. In so doing, they accomplish nothing other than to accentuate the nakedly partisan nature of this lawsuit.

In addition to being baseless, Plaintiffs' attacks are also utterly irrelevant. Under what is often referred to as the "enrolled bill doctrine," once a bill passes a legislative body and becomes law (either through gubernatorial presentment or legislative veto override), courts must assume that all rules of procedure in the legislative process were followed. As the Supreme Court of Washington has explained:

> Based upon separation of powers concerns, this court has traditionally abstained from considering internal legislative functions surrounding the passage of a bill. The legislature has plenary power to enact, amend, or repeal a statute, except as restrained by the state and federal constitutions. Just as the legislature may not go beyond the decree of the court when a decision is fair on its face, the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional. . . .
>
> The enrolled bill rule forbids an inquiry into the legislative procedures preceding the enactment of a statute that is properly signed and fair upon its face. The court will not go behind an enrolled enactment to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature. This doctrine is grounded in respect for the legislature's role as a coequal branch of government in no way inferior to the judicial branch, and a rejection of the theory that the judiciary is the only branch with sufficient integrity to insure the preservation of the constitution.

Brown v. Owen, 206 P.3d 310, 318-19 (Wash. 2009) (internal citations and alterations omitted). The fact that Plaintiffs wish their objections to the bill would have been afforded more time and met with a more receptive audience in the Legislature is simply immaterial to this case.

3. – The Criminal Impersonation Statute Does Not Diminish Plaintiffs' Core Political Speech

Turning to the merits, Plaintiffs first contend that the new criminal impersonation statute "reduce[s] the quantum of core political speech in Kansas," in contravention of Section 11 of the Kansas Constitution's Bill of Rights, by "prevent[ing] Plaintiffs from engaging in all voter registration, education, and engagement activities." (Mem. at 16). Plaintiffs aver that their work with potential voters entails registering voters, educating the public on the election process, and assisting members of the community in navigating such process, all of which Plaintiffs point out is inherently expressive activity. (*Id.*) The problem with Plaintiffs' argument is that it is built entirely on a foundation of sand. There is *nothing* in the election official impersonation statute that diminishes, let alone prohibits, Plaintiffs from engaging in the voter registration/advocacy efforts that are at the heart of their lawsuit.

a. – Court Need Not Grapple with Murky Legal Standard

Plaintiffs spill much ink attempting to convince the Court to adopt an "exacting scrutiny" standard in evaluating this aspect of their free speech claim. The Kansas Supreme Court has not spoken as to the appropriate legal standard, federal case law is not exactly a model of clarity in this area, and Defendants are unaware of any specific case addressing the proper level of scrutiny in a challenge to an impersonation statute such as the one at issue here. The parties are in general agreement that courts typically employ the so-called *Meyer-Buckley* framework to scrutinize state statutes and regulations targeting core political speech. *See, e.g., League of Women Voters v. Hargett*, 400 F. Supp.3d 706, 721-25 (M.D. Tenn. 2019) (citing *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. Am. Const. Law Found., Inc.*, 552 U.S. 182 (1999)). On the other hand, if a dispute revolves around the mechanics of the electoral process rather than

pure speech, courts invoke the so-called *Anderson-Burdick* standard. *See, e.g.*, *Lichtenstein v. Hargett*, 489 F. Supp.3d 742, 759-64 (M.D. Tenn. 2020) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1982), and *Burdick v. Takushi*, 504 U.S. 428 (1992)).

Focusing on core speech restrictions, the *Meyer-Buckley* test applies "exacting scrutiny," which requires that a law targeting expressive activity must be narrowly tailored to serve a sufficiently important governmental interest in order to pass muster. *See Americans for Prosperity Found. v. Bonta*, Nos. 19-251 and 19-255, 2021 WL 2690268, at *6-7 (U.S. July 1, 2021) (evaluating constitutional challenge to California law requiring forced disclosure of names of organization's donors); *id.* at * 7 ("While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").

Anderson-Burdick, meanwhile, utilizes a sliding scale / balancing test under which the court assesses the burden that a state's regulation imposes on a plaintiff's First Amendment rights. "[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the law is exposed to a far less searching review that is "closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434). "Regulations falling somewhere in between – i.e., regulations that impose a more-than-minimal but less-than-severe burden – require a 'flexible' analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (quotation omitted).

Lurking in the background at all times, however, is the fundamental principle that "states have wide latitude in determining how to manage their election procedures." *ACLU v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008). Indeed, when a state carries out its authority to regulate elections to ensure that they are fair and orderly, the resulting restrictions will "inevitably affect – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788; *accord Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008). These burdens "must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018).

Because the election official impersonation statute at issue does not actually infringe on Plaintiffs' constitutionally protected rights, the most deferential (i.e., rational basis) standard is appropriate here. Ultimately, however, there is no need in this lawsuit for the Court to grapple with any of the aforementioned amorphous standards. Indeed, regardless of whether the Court applies the "exacting scrutiny" standard of *Meyer-Buckley* or the sliding-scale / balancing test of *Anderson-Burdick*, the bottom line is that the challenged statute in no way diminishes Plaintiffs' ability to engage in protected expressive activities. Plaintiffs endeavor to erect a straw man by advocating for the broadest conceivable reading of the statute and then lamenting a parade of horribles that might flow therefrom. But as previously described, the statute does nothing more than proscribe an individual from *knowingly* engaging in conduct that would either give the appearance, or cause another person to believe, that he/she is an election official when the contrary is true. The impact on the listener is viewed objectively. The only subjective component to the law is the speaker's intent; if the speaker did not *knowingly* intend to convey

such a false impression, then the statute is not violated. Other than deliberately misrepresenting his/her status as an election official (i.e., lying) – which is clearly not protected activity – the impersonation statute does absolutely nothing to adversely impact Plaintiffs' free speech rights. Plaintiffs' proposed construction of the statute is unreasonable and inconsistent with the manner in which the Court must interpret statutes when their constitutionality has been challenged.

b. – Existence of Other Impersonation Statute Does Not Aid Plaintiffs

As Plaintiffs rightly point out, Kansas already punishes the impersonation of election officials through a statute that has been on the books for more than a decade. *See* Kan. Stat. Ann. § 21-5917(a) ("False impersonation is representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false"). A violation is punishable as a class B nonperson misdemeanor, *id.* § 21-5917(b), which carries a maximum sentence of six months' jail time and a $1,000 fine.

Oddly, Plaintiffs seem to think that the existence of Section 21-5917(a) somehow aids their case against the new impersonation statute on the theory that the presence of the former renders the latter non-narrowly tailored. (Mem. at 18). There is no merit to this argument. For one thing, the new statute does not impact, let alone target, Plaintiffs' core speech rights and thus does not need to undergo exacting judicial scrutiny. Moreover, the idea that election-related criminal penalties currently on the books represent a baseline above which a legislature cannot go without justifying to a court why such greater sanction is necessary is fundamentally at odds with the separation of powers among the coordinate branches. A court simply has no warrant to second-guess legislative activity on that ground. The U.S. Supreme Court has likewise held that

it does not require an "elaborate, empirical verification of the weightiness of the State's asserted justifications" for electoral regulations. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Earlier this week, in fact, the Supreme Court – in rejecting claims virtually identical to some that Plaintiffs have raised in their Petition in this case (i.e., ballot harvesting restrictions) – noted that "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257 and 19-1258, 2021 WL 2690267, at *20 (U.S. July 1, 2021); *accord Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."); *id.* ("State's political system [need not] sustain some level of damage before the legislature [can] take corrective action.").

The new election official impersonation statute is a reasonable prophylactic measure that was designed to enhance the integrity of the electoral process by preventing individuals from misleading members of the public about such process while falsely conveying an air of authority as they misrepresent themselves as election officials. Legislators passed this statute because, among other reasons, they heard repeatedly from county election officials across the state that voters were receiving official-looking letters containing confusing and/or inaccurate information about critical electoral matters (e.g., registration, ballot application issues, voting times and procedures, etc.) that were generating significant confusion among the electorate. The letters often contained at least a hint of official status imprimatur, a tactic no doubt designed by their architects to create a sense of urgency among voters. Other nefarious individuals and/or organizations also hosted official-sounding websites – with the names of key election officials

prominently mentioned therein – that asked voters to complete information for advance ballots. Legislators were concerned that, if the literature and/or websites suggested that they came from election officials and not private organizations, there would be likely voter confusion and a compromising of election integrity (not to mention, incidentally, the potential for information harvesting that the voters did not intend to provide). In fact, legislators learned from numerous county election officials that voters were often receiving multiple advance ballot applications that they felt they were obligated to complete. Election officials reported that voters were sending in multiple (i.e., duplicate) advance ballot applications; some were submitted by the voters themselves while others were submitted on their behalf by third-party organizations. The result was chaos, anger and confusion. The legislature's desire to negate, or at least minimize, the potential problems in this area was entirely within their constitutional authority and the means they adopted to do so did not cross any constitutional boundaries.

4. – The Criminal Impersonation Statute is Not Void for Vagueness

Plaintiffs next maintain that the new criminal impersonation statute is unconstitutionally vague. (Mem. at 23-25). A claim that a statute is void for vagueness requires a court to interpret the statutory text in order "to determine whether it gives adequate warning as to the proscribed conduct." *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020) (quoting *State v. Richardson*, 289 Kan. 118, 124, 209 P.3d 696 (2009)). The "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). Indeed, "[d]ue process requires criminal statutes to convey a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice." *Jenkins*, 311 Kan. at 53 (quotation omitted). At its core, "the test

for vagueness is a commonsense determination of fundamental fairness." *Richardson*, 289 Kan. at 124.

Our Supreme Court has held that "the determinative question" when statutes are attacked on constitutional vagueness grounds is "whether a person of ordinary intelligence understands what conduct is prohibited by the statutory language at issue." *Id.* at 125 (quotation omitted). A two-pronged inquiry is employed in conducting this assessment: the Court asks "(1) whether the statute gives fair warning to those potentially subject to it; and (2) whether it adequately guards against arbitrary and unreasonable enforcement." *Jenkins*, 311 Kan. 53 (quotation omitted).

With regard to the first prong, Plaintiffs argue that the statute "focuses entirely on others' subjective perceptions," thereby rendering it "impossible for Plaintiffs to know when they might be violating it." (Mem. at 24). This contention totally ignores the statutory text. The statute's prohibitions target only the conduct of the *speaker*, not the subjective views of the *listener*. The statute's reach is likewise limited to actions by the speaker in which he/she *knowingly* engaged in actions designed to convey the false impression that he/she is an election official. Admittedly, "the need for clarity of definition and the prevention of arbitrary and discriminatory enforcement is heightened for criminal statutes." *Richardson*, 289 Kan. at 125. But absent the requisite intent – which simply will not exist here if Plaintiffs are exercising the kind of caution they claim to embrace in their motion – there would simply be *no reasonable basis* for a prosecution and there would be *no legitimate threat whatsoever* that one would occur.

Moreover, the Kansas Supreme Court has regularly held that a challenged statute "comes before the court cloaked in a presumption of constitutionality." *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989). As the Court underscored earlier this year in turning away a

constitutional challenge to a criminal statute on vagueness and overbreadth grounds, "This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction." *Matter of A.B.*, 484 P.3d 226, 230 (2021) (quoting *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015)). The party challenging the statute has the burden of proving that the law clearly violates the constitution. *Leiker*, 245 Kan. at 363-64. This burden "is a 'weighty' one." *Downtown Bar & Grill*, 294 Kan. at 192. Plaintiffs have not come even close to meeting that standard here.

As for the second prong of the void-for-vagueness test, it is difficult to see how there can be arbitrary enforcement of this impersonation statute. Plaintiffs aver that the new law "gives those enforcing it free reign to pick and choose who might be prosecuted under its provisions." (Mem. at 25). This contention crumbles at the touch. The statutory text itself provides contours for, and cabins the discretion of, law enforcement charged with enforcing this new law. As is true of every case, of course, the underlying facts will dictate whether a prosecution should be pursued and the defendant ultimately adjudged guilty. But "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United Williams*, 553 at 306.

"Words inevitably contain germs of uncertainty," *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973), and legislation is rarely as precise as citizens, judges, or even lawmakers would like it to be, particularly when it emerges from the rough-and-tumble nature of the legislative process. *See League of Women Voters of Fla. v. Browning*, 575 F. Supp.2d 1298, 1318 (S.D. Fla. 2008)

(rejecting vagueness challenge to voter registration statute). The U.S. Supreme Court, however, has held that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 U.S. at 304 (citation omitted); *accord Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). Nor will statutes be "automatically invalidated simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Jenkins*, 311 Kan. at 53. The applicable standard "is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed." *Browning*, 575 F. Supp.2d at 1318 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

Plaintiffs cite *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), and *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996), in support of their vagueness theory. Neither case is analogous to the statute at issue here. The U.S. Supreme Court in *Coates* struck down a law that made it a crime for a group of individuals to assemble on a sidewalk and "conduct themselves in a manner annoying to persons passing by." 402 U.S. at 611. The law was unconstitutionally vague, the Court concluded, "because it subjects the exercise of the right of assembly to an unascertainable standard." *Id.* at 614. Likewise, in *Bryan*, the Kansas Supreme Court declared invalid a stalking statute that was triggered when a person "alarms," "annoys," or "harasses" another individual. 259 Kan. 144. The Court highlighted the total absence of any definition or objective standard for the prohibited conduct. *Id.* at 149-55.[2] Nothing like that is even remotely present here.

[2] The same was true of *State v. Harris*, 311 Kan. 816, 467 P.3d 504 (2020), in which a divided Supreme Court invalidated as unconstitutionally vague a statute prohibiting possession of weapon by convicted felons. The statute defined "weapon" to include a dagger, dirk, switchblade, stiletto, straight-edged razor, or "any other dangerous or deadly cutting instrument of like character." The majority noted

In both *Coates* and *Bryan*, there was virtually no way for an individual to know how to model his/her behavior without falling within the ambit of the criminal prohibitions. Here, by contrast, the impersonation statute has clear language which, particularly when applied on an objective basis and focused on the intent of the speaker as it logically must, directs individuals with relative precision as to how to tailor their conduct to avoid running afoul of its commands. Even then, such precision is not actually necessary. Indeed, in *Grayned*, the U.S. Supreme Court upheld a noise ordinance that restricted diversions "which disturb[] or tend[] to disturb the peace or good order of [a] school session or class." 408 U.S. at 108. Noting that "mathematical certainty from our language" was an elusive goal, and acknowledging that the ordinance's terms were "marked by flexibility and reasonable breadth, rather than meticulous specificity," the Court nevertheless reasoned that "it is clear what the ordinance as a whole prohibits." *Id.* at 110; *cf. State v. Valdiviezo-Martinez*, 486 P.3d 1256, 1267 (Kan. 2021) ("That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.") (quoting *State v. Hearn*, 244 Kan. 638, 641, 772 P.2d 758 (1989)).

In sum, when measured against the yardstick of "ordinary intelligence," i.e., an "ordinary person exercising ordinary common sense," *Browning*, 575 F. Supp.2d at 1319, the new criminal impersonation statute unquestionably establishes sufficiently clear guidelines for enforcement to avoid the type of arbitrary and discriminatory application that can, in rare circumstances, render a statute void for vagueness. There is, therefore, no basis for affording Plaintiffs relief here.

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that there was simply no way to know what kind of weapons might be covered by this law, *id.* at 824-25, a point reinforced by the diametrically different standards adopted by various law enforcement agencies in the State. *Id.* at 825-26.

5. – The Criminal Impersonation Statute is Not Unconstitutionally Overbroad

Plaintiffs alternatively claim that the criminal impersonation statute is unconstitutionally overbroad by "proscrib[ing] an unacceptably large amount of constitutionally protected speech." (Mem. at 21). Plaintiffs suggest that they will be at risk of prosecution every time they interact with members of the community on matters of voter education, registration, or other engagement activities "because there is always a chance an observer might mistake them for a state or county employee." (*Id.* at 22). The chilling effect of this alleged fear, Plaintiffs insist, will effectively trigger a ban on such protected activities. (*Id.*). This claim rings entirely hollow.

A litigant challenging a statute as overbroad bears the burden of establishing that (1) constitutionally protected activity is a significant part of the statute's target, and (2) there is no satisfactory method to sever the statute's constitutional applications from its unconstitutional applications. *Matter of A.B.*, 484 P.3d at 232 (citing *State v. Boettger*, 310 Kan. 800, 804, 450 P.3d 805 (2019)). The overbreadth doctrine is "strong medicine" and thus must be applied "with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982); *accord State v. Martens*, 279 Kan. 242, 253, 106 P.3d 28 (2005) ("The overbreadth doctrine should be employed sparingly and only as a last resort.").

The criminal impersonation statute at issue here is simply not targeted at constitutionally protected speech. The law is intended to protect the integrity of the electoral process. It does so by safeguarding against the deception of members of the public about voting procedures and processes by persons who knowingly misrepresent themselves as election officials and thereby attempt to confuse the citizenry with a false veneer of official status. The U.S. Supreme Court has held that, in such circumstances, where there is a legally cognizable harm potentially flowing

from the false statements, such statements are *not* protected. *See United States v. Alvarez*, 567 U.S. 709, 721 (2012) ("Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech."); *see also Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact."). Moreover, as described in detail above, as long as Plaintiffs do not *knowingly* engage in conduct designed to falsely convey the impression that they are election officials, the statute is not violated in any event.

Even if the Court somehow concludes that the criminal impersonation statute is directed at constitutionally protected speech, and even if it further concludes that the statute's focus is on the subjective views of the listener rather than the knowing objectives of the speaker, the statute can still be interpreted to avoid running afoul of any constitutional mandate. "A statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected and, so construed, the statute will thereafter be immune from attack on the grounds of overbreadth." *State v. Thompson*, 237 Kan. 562, 564, 701 P.2d 694 (1985). All the Court need do is require, *as the statute already implicitly does*, that the speaker intend to give the false impression that he/she is an election official.

Plaintiffs argue such a construction is impermissible because it would effectively rewrite the statute. (Mem. at 22). They claim that adding an intent component would render subsections (a)(2) and (a)(3) redundant of subsection (a)(1). Not so. Subsection (a)(1) is directed at actors who *explicitly* claim (falsely) to be an election official, whereas subsections (a)(2) and (a)(3) are

targeted at individuals who engage in more *indirect and/or subtle conduct* designed to create a false appearance of election official status. And an intent element is already inherent in the statute. To the extent that there is any ambiguity on the issue – and Defendants do not believe there is – the rule of lenity would further protect Plaintiffs. *See State v. Chavez*, 292 Kan. 464, 468, 254 P.3d 539 (2011) ("When there is reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction."). Moreover, the presence of redundancies in a statute (if that even is true here) is hardly a unique scenario and certainly does nothing to undermine the statute's guidelines for fair and impartial enforcement. What the overbreadth doctrine does not allow, however, is – as Plaintiffs have proposed here – for a court to adopt the most uncharitable reading of a statute possible and then strike down the statute altogether.

Finally, even assuming there are some circumstances in which a statute might sweep in some constitutionally protected speech, that is not a basis for striking down a statute pursuant to an overbreadth theory. "In order to maintain an appropriate balance, [the Supreme Court has] vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292 (emphasis in original). In other words, the mere fact that *some* impermissible applications of a law may be conceivable does not render that law unconstitutionally overbroad; there must be a realistic danger that the law will *significantly* compromise recognized free speech protections. This is particularly true where, as is the case here, *conduct* and not merely speech is involved. *State v. Williams*, 299 Kan. 911, 920 329 P.3d 400 (2014). In this lawsuit, even if it is possible to conceive of hypothetical scenarios where Plaintiff's speech interests might be implicated at

the margins, they are certainly not so substantial as to necessitate the wholesale invalidation of a statute directed at the plainly legitimate purpose of preserving the integrity of the State's electoral process.

B. – An Injunction Would be Adverse to the Public's Interest

A movant takes on a heightened burden when it requests temporary injunctive relief in the form of a facial challenge to a law enacted through the democratic process. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quoting *New Motor Vehicle Bd. of Cal. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) ("a ruling of unconstitutionality frustrates the intent of the elected representatives of the people"). A court that too easily invalidates a statute that has made its way fully through the legislative process thus risks undermining public confidence in a government whose power was intended to flow from the citizenry itself.

Kansans, through their elected representatives, have determined that the impersonation of election officials not only is likely to confuse the public, but has the potential to compromise the very integrity of the electoral process. The strength of this conviction is reflected by the vote totals in support of H.B. 2183 in the Kansas Legislature. Indeed, the statute at issue here passed overwhelmingly, receiving more than 2/3 support in both the House (85-38) and the Senate (28-12) as the governor's veto was overridden. It is beyond dispute that the State has a powerful interest in enforcing constitutional laws, and the constitutionality of the impersonation statute is presumed under settled precedent.

Plaintiffs' partisan-motivated attempt to twist the words of the statute in an effort to strike down an entirely reasonable law targeted at minimizing voter confusion and preserving electoral integrity should not be countenanced. A temporary injunction in this case would be adverse to the public interest and wholly improper. Defendants accordingly request that Plaintiffs' motion be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2021, 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 and was e-mailed to:

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