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CASE NUMBER: 2021-CV-000299

IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER,

Plaintiffs,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General,

Defendants.

Original Action No. 2021-CV-000299

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PARTIAL TEMPORARY INJUNCTION

INTRODUCTION

Plaintiffs—four nonpartisan Kansas voter engagement organizations—seek a limited, temporary injunction of subsections 3(a)(2) and 3(a)(3) of HB 2183 ("the Voter Education Restriction," or "the Restriction"), which took effect on July 1, 2021, and has already stopped some Plaintiffs from engaging in their core voter registration, education, and engagement activities (together, "voter-related activities") in advance of the July 13 registration deadline for the August Primary for fear of prosecution. The Restriction threatens to cause all Plaintiffs to roll back activities and limit their protected speech and activity each additional day it is in effect. Rather than acknowledge the seriousness of this ongoing infringement and ensure that Plaintiffs can engage in these critical voter-related activities, Defendants mischaracterize this challenge and the Restriction. When the Restriction is properly read, even Defendants' arguments would seem to concede that it is unconstitutional.

In fact, Defendants unwittingly highlight one of the core issues with the Restriction. Defendants' arguments are premised on the misguided presumption that the Restriction is constitutional *because* it only prohibits *intentional* false representation of an election official. But that is only what subsection 3(a)(1) prevents. Plaintiffs challenge subsections 3(a)(2) and 3(a)(3), both of which reach far beyond that limited circumstance, their plain language sweeping in any conduct that "gives the appearance of" or "would cause" another to believe someone is an election official, including Plaintiffs' protected speech. H.B. 2183, § 3(a)(2), (a)(3). That broad prohibition has already chilled Plaintiffs' engagement in protected activities. This Court must move quickly to prevent further harm and issue an injunction as swiftly as possible.

ARGUMENT

I. The Opposition is premised on a misguided interpretation of the Restriction.

As a threshold matter, Defendants' Opposition is premised on the misguided notion that

the Restriction applies only where the actor *intends* to falsely represent an election official. *See, e.g.*, Defs.' Resp. to Pls.' Mot. for Temp. Inj. ("Opp.") at 1, 14, 19. Unfortunately, it is not so limited. If it were, its definition of false representation of an election official could have simply been the conduct set forth in 3(a)(1): "[r]epresenting oneself as an election official." But the Legislature included two other alternative definitions, both of which turn, not on the intent of the person engaging in the conduct, but on the view of an observer: subsections 3(a)(2) and 3(a)(3) criminalize "knowingly engaging in . . . conduct that gives the appearance of being an election official [or] that would cause another person to believe a person engaging in such conduct is an election official." There is no language limiting them to conduct intentionally designed to give that impression or cause such a belief. To find as much would require reading words into the statute, which this Court cannot do. *See, e.g.*, *State v. Carmichael*, 247 Kan. 619, 623 (1990).[1]

Nor does the *mens rea* of "knowingly" save the Restriction, as Defendants imply. *E.g.*, Opp. at 8. A plain reading of the statue makes clear that "knowingly" applies to *any* conduct that gives the appearance of being an election official or would cause someone to believe as much. Plaintiffs *know* from past experiences that when their members, volunteers, and staff engage in voter-related activities, some voters mistakenly believe they are election officials, regardless of Plaintiffs' intent, and even when they expressly state they are not elections officials. *See* Mem. of Law in Support of Pls.' Mot. for Temp. Inj. ("Mot.") at 9-11; Aff. of Davis Hammet ("Hammet Aff."), Ex. 2, at ¶ 19; Aff. of Ami Hyten ("Hyten Aff."), Ex. 4, at ¶¶ 19, 26; Aff. of Jameson Shew, Ex. 5, at ¶ 11; Aff. of Paris Raite, Ex. 6, at ¶ 10; Aff. of Jacqueline Lightcap ("Lightcap Aff."),

[1] Contrary to Defendants' assertion, the rule of lenity does not support Defendants' atextual interpretation. Opp. at 29. That rule applies only to *ambiguous* criminal statutes. *Id.* The parties do not present two readings of an ambiguous statute; one reading (Plaintiffs') relies on the statute's text, while the other (Defendants') asks the Court to pretend the Legislature said something else.

Ex. 1, at ¶¶ 24-25. Accordingly, it is "reasonably certain" that if Plaintiffs continue to perform these activities while the Restriction remains in effect, such mistaken beliefs will occur again, placing them at risk under the statute. K.S.A. 21-5201(i).

Subsection 3(a)(1), which Plaintiffs do not challenge, further confirms this by expressly prohibiting *intentionally* representing oneself as an election official in any way. H.B. 2183, § 3(a)(1); *see also* Mot. at 22. Reading the Restriction as Defendants advocate would render 3(a)(1) superfluous. *But see Scott v. Werholtz*, 38 Kan. App. 2d 667, 678, 171 P.3d 646 (2007) (courts are "not permitted under the rules of statutory construction to treat any part of a statute as superfluous"). As much as Defendants (and, for that matter, Plaintiffs) would like for the Restriction to be so limited, it is not. The Court must apply the statute's plain language and the fundamental rule that the Legislature "says what it means and means what is says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

II. Plaintiffs have standing to challenge the Restriction.

A. Plaintiffs face a credible threat of prosecution.

Defendants' standing arguments are premised on the misguided notion that Plaintiffs have no credible fear of prosecution because "Defendants have not made any statements or undertaken any efforts to suggest that they would prosecute" Plaintiffs or others similarly situated. Opp. at 2. The legal bar is simply not that high. Defendants' argument must be rejected.

It is well established that, "so long as [it] is not speculative or imaginary," a threat of prosecution is sufficient for standing. *Moody v. Bd. of Cty. Comm'rs*, 237 Kan. 67, 69, 697 P.2d 1310 (1985) (quotations and citations omitted). There is no requirement that a plaintiff prove an actual enforcement action to challenge a law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). They need only show that the challenged law "facially restricts expressive activity by the class to which the plaintiff belongs," and then "courts will assume a credible threat of

prosecution in the absence of compelling contrary evidence." *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999); *see also North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (citations omitted); *Commodity Trend Serv. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) (noting this is a "quite forgiving" standard).[2]

The Restriction criminalizes conduct that knowingly "appear[s]" or "would cause another person to believe" a person is an election official, which necessarily includes Plaintiffs' voter-related activities. H.B. 2183, § 3(a)(2)-(3); *see supra* Section I; Mot. at 9-12. It is neither speculative nor imaginary for Plaintiffs to fear that they, their members, staff, and volunteers could be subject to prosecution as a result. In fact, for standing purposes, Plaintiffs are required only to show that their intended future conduct is "arguably proscribed" by the Restriction. *Susan B. Anthony List*, 573 U.S. at 162 (holding intended future conduct was "arguably proscribed" because challenged law "cover[ed] the subject matter of [the] intended speech"). Thus, even if the Restriction could be read to proscribe only conduct that is intended to mislead, Plaintiffs would still have standing so long *as it could also be read* to proscribe their protected conduct. *Cf. Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 301-02 (1979) (finding plaintiffs who "engaged in consumer publicity campaigns" faced a credible threat of prosecution under law prohibiting "untruthful, and deceptive publicity" even though they did not "plan to propagate untruths").

None of the cases Defendants cite hold otherwise. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006), bolsters Plaintiffs' position, as that court found it compelling that at least one plaintiff was specifically mentioned during the campaign for the challenged law.

[2] The parties agree that Kansas standing rules mirror the federal requirements, *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008), and courts consider federal law when applying them. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014).

Id. at 1091. Here, during the Conference Committee, Representative Miller specifically objected to the Restriction because it would encompass activities engaged in by the Kansas League. Ex. 18, at 4:21-5:7. As the court in *Walker* explained, "[i]t would be peculiar to hold, now, that such plaintiffs are not affected." 450 F.3d at 1091. Likewise, *Baker v. USD 229 Blue Valley*, 979 F.3d 866 (10th Cir. 2020), and *Phelps v. Hamilton*, 122 F.3d 1309 (10th Cir. 1997), are inapposite. In those cases, there was tangible evidence that the challenged law would *not* be enforced against the intended conduct. *Baker*, 979 F.3d at 870 (plaintiff had already received an exemption from the vaccination law she challenged); *Phelps*, 122 F.3d at 1315-16 & n.5 (plaintiffs criminal charges were either formally dismissed or dropped entirely). There is no such evidence here. Defendants have had every opportunity to assure Plaintiffs via affidavits or otherwise that neither they nor their members would be prosecuted, but they have not done so. The Secretary's general disavowal for prosecuting violations of the election code, Opp. at 7 n.1, is a meaningless feint. As another court recognized recently, the Secretary no longer focuses on prosecuting election law crimes because the Attorney General's office "now has an enforcement group more suited to the prosecution of election crimes." *Clark v. Schwab*, 416 F. Supp. 3d 1260, 1268 (D. Kan. 2019). The Attorney General has not disavowed the prosecution of the Restriction, and even if he did, either the Attorney General or the Secretary could well change their minds at any time in the future. *See Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018) (finding disavowal of prosecution insufficient to undermine the threat of prosecution where a district attorney could "change his mind").[3]

[3] Defendants rely on *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 535 (10th Cir. 2016), to suggest Plaintiffs have not sufficiently demonstrated an intent to engage in conduct criminalized by the Restriction. Opp. at 8. It is not an apt analogy. The plaintiffs there failed to present *any* evidence of intent to engage in conduct criminalized by the challenged law—including past conduct. *See id.* at 548. Plaintiffs here have provided reams of evidence describing in detail conduct that may now trigger the Restriction. Mot. at 9-12. Defendants also cite *Laird v. Tatum*,

Also unavailing are Defendants' assertions, Opp. at 6-7, that Plaintiffs will not be prosecuted because no one has attempted or threatened to prosecute *them* yet. *See Babbitt*, 442 U.S. at 302 (rejecting same argument and finding standing even when challenged law "ha[d] not yet been applied and may never be applied"). Given that Plaintiffs have not engaged in any voter-related activities since the Restriction took effect, it is not clear how any such prosecution could have occurred. "[I]t is not necessary that [someone] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Plaintiffs have demonstrated a credible threat of prosecution.

B. Plaintiffs have associational standing.

Defendants' challenge to Plaintiffs' associational standing should be rejected. Plaintiffs meet all requirements: (1) their members have standing; (2) the interests they seek to protect are germane to their purpose; and (3) neither the claim asserted nor relief requested requires individual members' participation. *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013).

First, Plaintiffs' members have standing to sue because they face a credible threat of prosecution if they engage in the core voter-related activities that trigger the Restriction. *Supra* Section II.A. In other words, they suffer a cognizable injury from the Restriction. *Moser*, 298 Kan. at 33; *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In a case like this one, which implicates First Amendment freedoms, "[P]laintiffs may establish that their claims are premised on an actual or imminent injury-in-fact in several [additional] ways." *League of*

408 U.S. 1, 13-14 (1972). But the plaintiffs in *Laird* relied on a chain of possibilities not present here. There, the intelligence-gathering operations of the Army chilled the exercise of their First Amendment rights because they feared the defendants might, in the future, make use of the data in some way that injured them. *Id.* at 11. The case did not involve a law that made their constitutionally-protected conduct criminal, nor was there a clear injury flowing from the possibility of a violation. *Id.*

Women Voters v. Hargett, 400 F. Supp. 3d 706, 718 (M.D. Tenn. 2019) (collecting cases). As Plaintiffs have done here, they may show the law will "imminently restrict [their] political activities within the state." *Id.* (quoting *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014)). Likewise, "but for the Act, they would behave in ways that the Act proscribes, and they, therefore, will imminently be forced to alter their behavior in response to the Act." *Id.* (citing *Clements v. Fashing*, 457 U.S. 957, 962 (1982)).

Tellingly, Defendants do not dispute that Plaintiffs' activities are protected speech *or* that such activities will be or have *already been curtailed*. *See* Opp. at 4-8; *see, e.g.*, Second Aff. of Davis Hammet ("2d Hammet Aff."), Ex. 40,[4] at ¶¶ 4-7; Second Aff. of Jacquelin Lightcap ("2d Lightcap Aff."), Ex. 41, at ¶¶ 3-6; Second Aff. of Ami Hyten ("2d Hyten Aff."), Ex. 42, ¶¶ 4-10. Thus, regardless of whether Defendants agree with Plaintiffs' interpretation of the Restriction or whether the Court finds a credible threat of prosecution, Plaintiffs' members are injured because they are engaging in less protected activity. *See Walker*, 450 F.3d at 1092-93.

Plaintiffs also meet the causation and redressability requirements. For a pre-enforcement constitutional statutory challenge, "the causation element of standing" simply requires that defendants "possess authority to enforce the complained-of provision." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017). Defendants concede that they hold "ultimate authority to enforce the law," Opp. at 7, so the harms are fairly traceable to them, *see Calzone*, 866 F.3d at 869. And because enjoining enforcement of the Restriction would prohibit prosecution and allow Plaintiffs to continue their constitutional speech, the redressability element is likewise met.

Second, the interests Plaintiffs seek to protect are "germane to [their] purpose[s]." *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017); *Kan. Health Care Ass'n, Inc.*

[4] Exhibits 40 through 42 are attached to this reply memorandum.

v. Kansas Dep't of Soc. & Rehab. Servs., 958 F.2d 1018, 1021 (10th Cir. 1992). As voter engagement organizations that encourage civic participation, the voter-related activities the Restriction implicates are the core way Plaintiffs accomplish their missions. Lightcap Aff. ¶ 11; Hammet Aff. ¶ 8; Smith Aff. ¶ 8; Hyten Aff. ¶¶ 7-9. Defendants do not deny this. Opp. at 9 (describing activities as "important components" of Plaintiffs' work). Rather, they advance a convoluted theory that, to meet this prong, the Plaintiffs must have an interest in "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." Opp. at 9.

Defendants confuse what is *proscribed* by the Restriction with the *interests* Plaintiffs seek to protect: the ability to exercise their free speech right and to engage with Kansans through voter-related activities without the threat of prosecution. Pet. ¶¶ 15, 21, 27, 32; Lightcap Aff. ¶ 10; Hammet Aff. ¶ 8; Smith Aff. ¶ 9; Hyten Aff. ¶ 9. The cases Defendants cite elsewhere demonstrate their folly, making it clear the Court should consider the interest that Plaintiffs seek to *vindicate* by "bringing th[e] suit," and not the acts or prohibitions that implicate those interests. *See, e.g.*, *Kan. Health Care Ass'n,* 958 F.2d at 1021 (no dispute that organizations' "purpose of promoting the availability of long-term care for the elderly" was sufficiently germane to interest seeking injunction against State's Medicaid reimbursement plan); *Moser*, 298 Kan. at 34 (accepting parties' agreement that environmental group had germane purpose in case seeking to enjoin issuance of emission permit).

Third, neither the requested relief nor the asserted claim "require[s] participation of individual members." *312 Educ. Ass'n v. U.S.D. No. 312*, 273 Kan. 875, 884-86, 47 P.3d 383 (Kan. 2002). As Defendants concede, where declaratory and injunctive relief are sought, the "requested relief" does not require participation of individuals. Opp. at 9 (citing *Kan. Health Care*, 958 F.2d

at 1021–22). Defendants' suggestion that the "*claims*" Plaintiffs assert require individual participation does not change that. Opp. at 9. The Supreme Court has repeatedly explained that, when organizations seek facial relief against unconstitutional statutes on behalf of their members, it is *not* necessary for individual members to bring the claims. *E.g.*, *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 7 n.3 (1988). In such cases, "there is complete identity between the interests of the consortium and those of its member associations with respect to the issues raised in th[e] suit, and the necessary proof could be presented in a group context." *Id.* Thus, the claim that the Restriction is facially unconstitutional can be proved through evidence in a "group context." *N.Y. State Club Ass'n*, 487 U.S. at 10.[5]

C. Plaintiffs have direct organizational standing.

Defendants' organizational standing arguments are equally misguided. An organization has direct standing if it shows a concrete harm to its interests resulting from the action challenged. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). As explained, Plaintiffs are directly injured by the Restriction, which has forced or will force them to cease protected operations that are critical to their missions. 2d Hammet Aff. ¶¶ 4-7; 2d Lightcap Aff. ¶¶ 3-6; 2d Hyten Aff. ¶¶ 4-10; *see also Havens Realty Corp.*, 455 U.S. at 369, 379 (holding "there can be no question" non-profit with mission of promoting desegregation in housing had organizational standing when its ability to "provide counseling and referral services for low-and moderate-income homeseekers" had been blocked); *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 354 (5th Cir. 1999) (finding standing to challenge state's impediment to the National

[5] The sole case Defendants cite for the proposition that individual members are necessary in this litigation is *312 Educ. Association*, where the claims involved individualized *money* damages that required evidence from each teacher to determine whether they were employed in the proper pay scale. 273 Kan. at 885. Such individualized examinations are unnecessary to prove Plaintiffs' claims. *N.Y. State Club*, 487 U.S. at 10; *Pennell*, 485 U.S. at 7 n.3.

Voter Registration Act when it impacted electoral advocacy organization's mission); *Hargett*, 400 F. Supp. 3d at 718 (holding organizations had standing to assert chilled speech and other First Amendment claims).

III. Plaintiffs are substantially likely to succeed on the merits of their claim.

A. The Restriction is an unconstitutional restraint on political speech.

The voter-related activities that Plaintiffs perform create a constant risk that their members and volunteers will be mistaken as election officials, regardless of their intent. Mot. at 9-12. By making it a crime to knowingly engage in conduct that could have that effect, the Restriction directly prohibits Plaintiffs from engaging in activities that constitute political speech protected by the Kansas Constitution's Bill of Rights. As a result, the Restriction reduces the quantum of political speech in Kansas, triggering strict scrutiny. *Id.* at 14-17. Because the Restriction cannot satisfy any level of heightened scrutiny, *id.* at 18-21, it is unconstitutional.

Notably, Defendants have not disputed that Plaintiffs' voter-related activities are core political speech. Accordingly, if Defendants' interpretation of the statutory text is wrong, there is no argument that the Restriction does not reduce the quantum of political speech in Kansas. Already, fear of criminal prosecution has caused Plaintiffs' voter-related activities to plummet: the League, Loud Light, and the Center have halted their voter-related activities altogether, significantly shrinking the quantum of political speech in Kansas. 2d Hammet Aff. ¶¶ 4-7; 2d Lightcap Aff. ¶¶ 3-6; 2d Hyten Aff. ¶¶ 4-10.

Because the Restriction "restricts the overall quantum of speech available to the election of voting process," it is subject to "strict scrutiny," *Chandler v. City of Arvada*, 292 F.3d 1236,

1241-42 (10th Cir. 2002), not the *Anderson-Burdick* framework.[6] *Anderson-Burdick* applies to election-mechanics regulations that burden the right to *vote*. The Restriction is not merely a regulation of voting procedures. It directly limits Kansans' ability to *engage in political speech*. *Hargett*, 400 F. Supp. 3d at 718 (rejecting same argument and concluding laws that limited organization's ability to perform voter registration, education, and engagement efforts falls under *Meyer-Buckley*). Thus, strict scrutiny applies. *Chandler*, 292 F.3d at 1241-42.

Defendants do not attempt to argue that the Restriction satisfies *any* level of heightened scrutiny, let alone strict scrutiny. Opp. at 20-22. Instead, they argue that the Court should not "second-guess legislative activity" if it is intended to prevent election fraud.[7] *Id.* at 21-22. But the scrutiny required by *Meyer* and *Buckley* require the Court do precisely that. At a minimum, because the Restriction is reducing the quantum of political speech in Kansas, the Restriction must be the least "problematic measures" that serves to prevent intentional election official impersonation. *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 204 (1999). Yet, as Defendants admit, K.S.A. 21-5917 *already* prohibited intentional election official impersonation before the Restriction was enacted, as does subsection 3(a)(1) of H.B. 2183, which Plaintiffs do not challenge. Because the Restriction was enacted to serve the *same* exact interest, *see* Opp. at 21 (identifying

[6] Defendants inappropriately rely on case law involving *disclosure requirements* to assert that the Restriction must be narrowly tailored only to a "sufficiently important governmental interest." Opp. at 17 (citing *Ams. for Prosperity Fund v. Bonta*, Nos. 19-251, 19-255, 2021 WL 2690268, at *6-7 (U.S. July 1, 2021)). But laws, like the Restriction, that directly reduce political speech must be "narrowly tailored to a *compelling* state interest." *Chandler*, 292 F.3d at 1242 (emphasis added).

[7] Kansas's anti-fraud interest cannot save the Restriction. *See* Opp. at 21. Plaintiffs do not dispute that Kansas has an obligation to prevent election fraud and voter confusion. But it cannot trample on core political speech in doing so. The cases Defendants cite in asserting that Plaintiffs' rights should be weighed against Kansas' fraud-prevention interest did not involve First Amendment claims; they involved challenges to election-mechanics regulations. *See id*. When a law "regulates core political speech"—either "directly" or "not"—strict scrutiny applies. *Buckley*, 525 U.S. at 207 (Thomas, J., concurring). Because the Restriction serves Kansas's fraud prevention interests with only "an ax," not "a scalpel," it cannot stand. *Early v. Littlejohn*, 569 F.2d 219, 228 (5th Cir. 1978).

the Restriction as a "prophylactic measure" to stop people from "misrepresent[ing] themselves as election officials"), it is not sufficiently tailored to survive any level of heightened scrutiny.

Because it is Defendants' burden to demonstrate the Restriction is narrowly tailored to a compelling interest, *Hodes & Nauer, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461 (2019), their unsupported description of the Restriction's justification cannot save it from invalidation. *See* Opp. at 21-22. Defendants do not offer any evidence; instead, counsel describes uncited and unsupported incidents of misconduct they claim occurred in prior elections. *Id.* at 21-22. Bald assertions in a brief "are not evidence" and cannot satisfy Defendants' burden. *In re Estate of Murdock*, 20 Kan. App. 2d 170, 176, 884 P.2d 749 (1994). Because none of these incidents are mentioned in the legislative record, it is entirely unclear whether they were the reason for the Restriction's adoption, or merely *post hoc* rationalizations that cannot satisfy heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (identified governmental interest must be "genuine, not hypothesized or invented *post hoc* in response to litigation").

But even if Defendants had offered evidence, or if these stated incidents were in fact the reason the Legislature adopted the Restriction, it would *still* be unconstitutional because it is not narrowly tailored to prevent intentional impersonation, the only justification Defendants argue the Restriction was intended to serve. Mot. at 18-21. Thus, Plaintiffs are highly likely to succeed on their claim that the Restriction infringes on their protected speech.

B. The Restriction is impermissibly vague.

Defendants' response to Plaintiffs' vagueness argument—premised again on their atextual reading of the Restriction—should be rejected. Defendants are wrong to suggest that Plaintiffs can avoid violating the Restriction because, as Defendants claim, it "target[s] only the conduct of the speaker, not the subjective views of the listener" by prohibiting only "actions designed to convey the false impression" of state or county authority. Opp. at 23. As explained, *supra* Section I, that

is not what subsections 3(a)(2) or 3(a)(3) say. Defendants' assertion that the Restriction will only be "applied on an objective basis" is similarly unsupported. Opp. at 26. The Restriction makes it a felony to engage in conduct that causes another to believe they are an election official. Based on Plaintiffs' past experiences, their voter-related activities cause some voters to make this mistake even when Plaintiffs affirmatively identify themselves and the perception is unreasonable. *See* Mot. at 10-12. "[O]rdinary common sense" dictates the conclusion that such activities will produce that effect in the future as well. Opp. at 26.

Contrary to Defendants' assertion, Opp. at 23-24, this Court's obligation to presume the Restriction's constitutionality does not mean it can ignore the vagueness doctrine. By focusing entirely on the effect that Plaintiffs' conduct has on voters, regardless of Plaintiffs' intent or the reasonableness of the voter's perception, the Restriction is unconstitutionally vague not because "it will sometimes be difficult to determine" whether Plaintiffs are violating the law, *id.* at 24 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)), but because that question is *entirely out of Plaintiffs' hands*. This case is therefore nothing like *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972), where the Court rejected a challenge to a law prohibiting conduct that disturbed school activities simply because it was too difficult to determine the exact "quantum of disturbance" that was proscribed. As even Defendants acknowledge, when a restriction is crafted such that a person's conduct is converted into criminal conduct based on an observer's reaction, both U.S. Supreme Court and Kansas Supreme Court case law mandate that it be found unconstitutional. *See* Opp. at 25-26 (admitting that, under *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), and *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996), a government cannot criminalize conduct based on an observer's subjective reaction because such laws provide "no way for an individual to know how to model his/her behavior without falling within [their] ambit").

C. The Restriction is impermissibly overbroad.

Defendants' overbreadth arguments should also be rejected for several reasons. As explained, Plaintiffs' voter-related activities fall within the Restriction's prohibitions and constitute protected core political speech. As such, such speech is, at a minimum, "a significant part of the law's target." *State v. Boettger*, 310 Kan. 800, 804, 450 P.3d 805 (2019).

That the Restriction might have been "intended to protect the integrity of the electoral process" does not change the fact that its expansive language prohibits a significant amount of core political speech. Opp. at 27. Nor does the fact that a government may constitutionally prohibit a small subset of "false statements" that cause specific, "legally cognizable harm[s]." *Id.* at 27-28. Plaintiffs do not contest that subsection 3(a)(1) falls within that power (which is why they do not challenge that provision). But in the subsequent subsections, the Restriction goes too far, prohibiting not just intentional impersonation, but *any conduct* that can cause voters to misunderstand the speaker's authority. *See supra* Section I. As stated in *United States v. Alvarez*—upon which Defendants rely, Opp. at 28—the Restriction's "sweeping, quite unprecedented reach" puts "it in conflict with the First Amendment." 567 U.S. 709, 722 (2012) (plurality op.).

Nor can the Restriction be saved through a narrowing construction. Opp. at 28-29. As explained above, *supra* Section I, the rule against superfluity prohibits the Court from construing the Restriction to mirror subsection 3(a)(1). *Scott*, 48 Kan. App. 2d at 678. Defendants' unsupported assertion that doing so would be "hardly [] unique" has no basis in law. Opp. at 29. Their inventive attempt to avoid this result by artificially narrowing subsection 3(a)(1)'s scope by asserting that "representing" oneself as an election official requires "explicitly claim[ing]" to be one fairs no better. Opp. at 28. One can make a "misrepresentation" of authority not just by "written or spoken words" but also through "*conduct* that amounts to [a] false assertion." Misrepresentation, Black's Law Dictionary (11th ed. 2019) (emphasis added). Thus, contrary to Defendants' claim,

"indirect and/or subtle conduct designed to create a false appearance of election official status" *would* violate subsection 3(a)(1). Opp. at 29. By prohibiting Plaintiffs from engaging in their voter-related activities even when they are *not* trying to impersonate election officials, the Restriction's impact on core political speech is "substantial" when "judged in relation to [its] plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quotations omitted). The Restriction is therefore unconstitutionally overbroad.

IV. The remaining factors weigh strongly in favor of a temporary injunction.

The remaining temporary injunction factors strongly support Plaintiffs' request. Mot. at 25-28. Defendants do not respond directly to any of Plaintiffs' arguments on these factors, and the Court should consider them waived. *See, e.g.*, *In re Gershater*, 270 Kan. 620, 627-28, 17 P.3d 929 (2001). Their only response is that the public has an interest in enforcement of duly enacted laws. Opp. at 30. But as Plaintiffs have demonstrated, because the Restriction violates the Kansas Constitution, an injunction against it would actually *serve* the public interest, as whatever interest the public has in the enforcement of a law is lost when it is found unconstitutional. Mot. at 27; *see Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001).[8]

CONCLUSION

For the reasons stated herein and in Plaintiffs' Motion, the Court should enjoin enforcement of the Voter Education Restriction until the parties reach final judgment in this case.

Respectfully submitted, this 6th day of July, 2021.

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Pedro L. Irigonegaray (#08079)

[8] Defendants suggest Plaintiffs have asked for a "temporary restraining order." Opp. at 11. This is incorrect. Plaintiffs seek a temporary injunction under K.S.A. 60-905, not a TRO under K.S.A. 60-903. *See* Mot. at 28.

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