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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' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED PETITION FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

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Defendants Scott Schwab and Derek Schmidt, each sued in their official capacities, move to dismiss the Plaintiffs' Amended Petition for: (i) lack of subject matter jurisdiction pursuant to Kan. Stat. Ann. § 60-212(b)(1); and (ii) failure to state a claim upon which relief can be granted pursuant to Kan. Stat. Ann. § 60-212(b)(6).

I. – Introduction

Plaintiffs' Amended Petition challenges the constitutionality – under various provisions of the Kansas Constitution's Bill of Rights – of four election integrity statutes recently passed by the Kansas Legislature (over the governor's veto). The Petition is chock-full of hyperbolic rhetoric, completely irrelevant discussion about the supposedly "chaotic path to passage" of the two bills in which these measures are contained (i.e., Senate Substitute for House Bill 2183, and House Bill 2332), and policy-grounded attacks on the legislation from partisan activists and Democratic Party legislators whose views failed to carry the day at the statehouse. Employing Orwellian language that grossly mischaracterizes the statutes, Plaintiffs claim the challenged provisions will impede their ability to engage with members of the community and will somehow make it more difficult for individuals to vote. (Pet. ¶ 5). Not only are all of these allegations baseless, but Plaintiffs lack standing – either on their own or on behalf of their members or Kansas voters at large – to pursue any of the asserted claims. Moreover, the State's powerful interests in combating voter fraud, protecting the integrity of the electoral process, and ensuring the orderly administration of elections should, under well-entrenched case law, easily allow the Court to dispatch with all of Plaintiffs' myriad causes of action.

Each of the statutes at issue here – (i) a criminal prohibition on impersonating election officials, which Plaintiffs absurdly describe as a "Voter Education Restriction," (ii) a signature verification requirement for advance ballots submitted through the mail, which Plaintiffs call a

"Signature Rejection Requirement," (iii) a ballot harvesting restriction that prevents third-parties from delivering more than ten ballots of other individuals to the county election office in any election, which Plaintiffs characterize as a "Delivery Assistance Ban," and (iv) a restriction on third-parties not domiciled in Kansas from sending out advance ballot applications to Kansas voters, which Plaintiffs label an "Advocacy Ban," – are nondiscriminatory, common-sense measures that enhance the public's confidence in the integrity of our electoral process, an objective that the Supreme Court has described as "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Plaintiffs' legal attacks on these provisions have been waged against highly similar statutes throughout the country and, with only rare exceptions, have been squarely rejected. The claims in the case at bar should meet with the same fate.

II. – Standards Governing Motion to Dismiss

A. – Motion to Dismiss for Failure to State a Claim

Kan. Stat. Ann. § 60-212(b)(6) allows for dismissal of claims if the petition fails to state a claim upon which relief can be granted. *Univ. of Kan. Mem'l Corp. v. Kansas Power & Light Co.*, 31 Kan. App.2d 177, 179, 61 P.3d 741 (2003). Dismissal for failure to state a claim is justified "when the allegations in a petition clearly demonstrate a plaintiff does not have a claim." *Seaboard Corp. v. Marsh Inc.*, 295 Kan. 384, 392, 284 P.3d 314 (2012). Historically, the Kansas Supreme Court has held that, in reviewing the legal sufficiency of a claim in response to a motion to dismiss under Section 60-212(b)(6), a court "must decide the issue based only on the well-plead facts and allegations, which are generally drawn from the petition," and must also "resolve every factual dispute in the plaintiff's favor." *Halley v. Barbabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001) (citations omitted).

Recent developments in the federal standards for evaluating motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the language of which is identical to Kan. Stat. Ann. § 60-212(b)(6), counsel strongly in favor of applying the same federal standard to this action. Indeed, when first articulating the standard governing motions to dismiss in state court, the Kansas Supreme Court expressly relied on the then-applicable federal standard, noting that Kan. Stat. Ann. § 60-212(b)(6) had been patterned after its federal counterpart. *Monroe v. Darr*, 214 Kan. 426, 430, 520 P.2d 1197 (1974); *accord Back-Wenzel v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194 (2005) ("[B]ecause the Kansas Rules of Civil Procedure are patterned after the federal rules, Kansas appellate courts often turn to federal case law for persuasive guidance."). On the one occasion when the Kansas Supreme Court was asked to adopt the federal standard, the Court declined to do so only because the issue had not been properly preserved on appeal. *See Williams v. C-U-Out Bonds, LLC*, 310 Kan. 775, 785, 450 P.3d 330 (2019). But the Court clearly did not reject the argument on the merits. In light of the totally overlapping language in the controlling state and federal rules, and the re-interpretation of the federal standard recently adopted by the U.S. Supreme Court, it is time for Kansas to once again conform its standard to the Federal Rules of Civil Procedure.

Conformity with the notice-pleading requirements of Kan. Stan. Ann. § 60-208(a)(1) are enforced by way of a motion filed under Kan. Stat. Ann. § 60-212(b)(6). The U.S. Supreme Court – in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) – reinterpreted Federal Rule 8(a)(2), the counterpart to Kansas Rule 8(a)(1). The Court abandoned the long-held rule "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Instead, the Court in *Twombly*

and *Iqbal* directed that a two-step inquiry be undertaken. First, the reviewing court must disregard all recitals in the complaint that are mere legal conclusions. Second, the reviewing court must accept assertions in a complaint as true, for the purposes of a motion to dismiss, only if the trial judge finds those factual assertions plausible as a matter of judicial common sense.

In evaluating whether this standard is met, Plaintiffs' Petition must contain "enough facts to state a claim to relief that is plausible on its face," and Plaintiffs must "nudge [their] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Petition also must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 550. Equally insufficient is the "unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A claim has "facial plausibility" only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan-Arapahoe, LLP v. Bd. of Cnty. Com'rs of Cnty. of Arapahoe, Colo.*, 633 F. 3d 1022, 1025 (10th Cir. 2011). But this general rule is inapplicable where the plaintiff's allegations are simply legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). As the Supreme Court observed, "[w]here a Complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted).[1]

[1] To be clear, Defendants believe that Plaintiffs' claims in this action must be dismissed under either the historical Kansas standard or the revised federal standard now being advocated.

B. – Motion to Dismiss for Lack of Subject-Matter Jurisdiction

The standard governing a motion to dismiss for lack of subject-matter jurisdiction under Kan. Stat. Ann. § 60-212(b)(1) differs slightly from the standard governing a motion to dismiss for failure to state a claim. In light of the identical wording of the applicable rules, Kansas courts often look to federal law in articulating the standard. *See Parisi v. Unified Gov't of Wyandotte County*, No. 118,284, 2018 WL 5728439, at *4-5 (Kan. Ct. App. Nov. 2, 2018).

Motions to dismiss for lack of subject matter jurisdiction can take one of two forms. A defendant may assert a "facial challenge to the plaintiffs' allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint." *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). The district court must accept the allegations in the Complaint as true when analyzing a *facial* attack. *Id.* Alternatively, as is being done here, a defendant "may go beyond allegations contained in the Complaint and challenge the facts upon which subject matter jurisdiction depends." *Id.* The district court "does *not* presume the truthfulness of the complaint's factual allegations" in evaluating such a *factual* attack, but "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* The burden to establish these elements of standing rests with the plaintiff. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

III. – Argument

Plaintiffs' Amended Petition is a patchwork of different constitutional claims. It almost requires a scorecard to keep track of which particular constitutional theories are being invoked against each of the challenged provisions. The most logical and efficient way of describing the deficiencies in Plaintiffs' causes of action is to address the new legislative enactments one-by-

one. But before doing so, it is critical to address a more threshold problem confronting all the claims: Plaintiffs' lack of standing to pursue them.

A. – Plaintiffs Lack Standing to Pursue their Claims

None of Plaintiffs' claims challenging the election integrity statutes passed in H.B. 2183 and H.B. 2332 present a justiciable case or controversy sufficient to trigger the Court's subject matter jurisdiction. First, Plaintiffs fail to allege a plausible claim of diversion of resources to establish organizational standing. Second, Plaintiffs lack standing to challenge the new criminal laws enacted in H.B. 2183, § 3 (which prohibits falsely representing oneself as an election official) or H.B. 2332 (which, as relevant here, restricts persons/entities not residing or otherwise domiciled in Kansas from sending advance ballot applications to Kansas voters) given that (i) the conduct in which Plaintiffs allegedly intend to engage is not actually prohibited and (ii) there is no threat of an imminent prosecution. Third, Plaintiffs cannot establish a close relationship with constituents and do not allege that any constituents are hindered from addressing their own harms. There is thus no basis for the Court to exercise jurisdiction over the claims at issue here.

Unlike the U.S. Constitution, the Kansas Constitution contains no "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). Further, Kansas courts may consider federal law when addressing justiciability. *Gannon*, 298 Kan. at 1119.

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.* 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). "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).

In the case of an organization, legal standing may arise in two different contexts. First, the organization may enjoy standing solely as a representative of its members, which is generally referred to as "associational standing." *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Alternatively, the organization may have standing in its own right, which is typically known as "organizational standing." *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

In their Amended Petition, Plaintiffs plead three categories of purported injuries caused by the election integrity statutes: (i) harm to the Organizational Plaintiffs' respective members; (ii) harm to the Plaintiffs individually; and (iii) harm to the Organizational Plaintiffs' respective constituents across Kansas. In each category, the burden to establish standing rests solely with Plaintiffs. *Gannon*, 298 Kan. at 1123. Plaintiffs are unable to meet that burden with any of their claims.

1. – Associational Standing for the Organizational Plaintiffs

For an association to have standing to sue on behalf of its members, a three-prong test must be satisfied: (i) the association's members must have standing to sue individually; (ii) the interests that the association seeks to protect must be germane to its purpose; and (iii) neither the claim asserted nor the relief requested requires the 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 the Organizational 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: (i) it suffered a "cognizable injury;" and (ii) 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.*

When evaluating the first element of the standing test – the "cognizable injury" or "injury-in-fact" requirement – the Court looks to whether the Organizational 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.* (emphasis added) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). A credible threat does not exist when the threat is imaginary, subjective, 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. Noticeably absent from the Amended Petition is any claim of a member being threatened with actual criminal liability because of the election integrity statutes. Plaintiffs do not assert that either Defendants or any county prosecutors have made any public 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.[2] Nor could they so allege since no such statements have been made. And Plaintiffs bear the burden.

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). While Defendants possess the ultimate authority to enforce the election statutes (excluding Defendant Schwab concerning the prohibition on non-Kansans sending advance mail voting applications to Kansas voters, see footnote 4 below), there has been no action by Defendants to do so in this case.[3]

[2] Plaintiffs filed a Notice of Supplemental Information on August 6, 2021, in which they referenced a press release from Defendant Schmidt's office regarding enforcement of the State's new election integrity statutes. But as Defendants noted in an August 12 response thereto, the press release was wholly innocuous and did not in any way suggest potentially imminent prosecutions. To the contrary, the press release merely stated that "state election-integrity laws will be enforced and election crimes, like all other crimes, will be prosecuted when warranted by the evidence."

[3] 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 an injunction against the Secretary of State on *any* of the claims in the Amended Petition.

There is thus no causal connection between the alleged harm Plaintiffs claim on behalf of their members and any action taken by Defendants.

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 the specific conduct that is being criminalized under the statute. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016). When it comes to the election official impersonation statute, Plaintiffs make no such claim. According to their Amended Petition, neither Plaintiffs nor their respective members have any desire or intent to *knowingly* engage in conduct that misleads the recipients of their communications and outreach efforts into believing that Plaintiffs or their members are election officials. Instead, Plaintiffs' misguided concerns center on the *subjective beliefs* of the recipients of those communications. But the law is clear that misguided concerns of an injury that creates a chilling effect on a plaintiff's speech or conduct fall short of establishing standing. *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 . . . .").

Under Kansas law, "[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) (emphasis added). Surely Plaintiffs or their members do not intend to engage in conduct where they (i) *knowingly* cause a voter to believe that Plaintiffs or their members are election officials or employees of a county election office or (ii) *knowingly* engage

in conduct where it is reasonably certain that a Kansas voter will believe Plaintiffs or their members are election officials.[4]

The Organizational Plaintiffs allege that since the election official impersonation statute went into effect, they have cancelled voter registration drives and other events due to their fear of prosecution. (Pet. ¶¶ 16, 22, and 34). But Plaintiffs fail to plead facts establishing how their conduct at voter registration drives or engagement activities actually violates H.B. 2183 § 3(a). Plaintiffs do not assert, for example, that while conducting such events, they or their respective members plan on knowingly engaging in conduct that either (i) gives the appearance of being an election official or (ii) would cause another person to believe that the member is an election official. To the contrary, Plaintiffs' allegations simply reference the possibility of certain voters *mistakenly* believing that Plaintiffs are election officials, even when Plaintiffs explicitly disclaimed such status, or at least made no knowing effort to convey such an impression. (Pet. at 3, and ¶¶ 21, 28, 109). The term "knowingly" is what separates criminal activity under the statute from Plaintiffs' proposed activities.

The Organizational Plaintiffs' cancellation of their events was self-induced and based on subjective, as opposed to objective, fears of prosecution. Indeed, the Organizational Plaintiffs' self-professed missions center on educating Kansans about the importance of voting and the process for voting by mail. H.B. 2183 § 3 simply does not criminalize such efforts. The mere fact that a Kansas voter *may* entertain some subjective, mistaken belief that an individual Plaintiff or some other Organizational Plaintiffs' member is an election official does not equate to

[4] With regard to Plaintiffs' claims challenging the restrictions in H.B. 2332, § 3(*l*) involving non-Kansas domiciled entities' actions of mailing advance ballot applications (part of the so-called "Advocacy Ban"), only Defendant Schmidt, the attorney general of Kansas, is even authorized by § 3(*l*)(2) to investigate a complaint and/or file an action against a violator. Defendant Schwab lacks any enforcement authority under this statute. Any alleged injury, therefore, cannot possibly be traceable to him.

knowledge or awareness on the part of the member that his/her conduct is *reasonably certain* to cause misidentification of election official status. In short, Plaintiffs fail to show any imminent threat to themselves or their members based in reality. And because neither the individual Plaintiffs nor the Organizational Plaintiffs can show a particularized injury-in-fact or imminent threat of such injury fairly traceable to Defendants' actions, none of the Plaintiffs have standing to challenge H.B. 2183 § 3.

Similarly, Plaintiffs aver that the signature verification requirement is unconstitutional because "non-experts are significantly more *likely* to misidentify authentic signatures as forgeries. (Pet. ¶ 131). But Plaintiffs' hypothetical concerns about human errors do not meet Article III's requirements for standing. *See Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 389 (6th Cir. 2020) (*"MPRI"*). As was the case in *MPRI*, "plaintiffs' allegations boil down to fear of 'the ever present possibility that an election worker will make a mistake.'" *Id.* (quoting *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 983 (6th Cir. 2020)). This fear is wholly speculative fear and does not suffice to create standing.

Absent a credible threat of prosecution or an actual showing of imminent harm, Plaintiffs cannot invoke this Court's jurisdiction on behalf of themselves or their members. *See N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 4–5 (1st Cir. 2000) (courts are disinclined to provide either injunctive or declaratory relief to foreclose 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) ("[T]he 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 is purely hypothetical and amount to nothing more than a subjective worry. *See Laird*, 408 U.S. at 13–14. "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).

In addition to their inability to meet the first element of standing on *all* their claims, the Organizational Plaintiffs are unable to satisfy the second and third elements for associational standing on their challenge to the election official impersonation statute. As to the second element of associational standing, Plaintiffs must show the interests they seek to protect are germane to the Organizational Plaintiffs' purposes. *Kan. Nat'l Educ. Ass'n*, 305 Kan. at 747. It is unreasonable to presume the Organizational Plaintiffs' interests include a mission of *knowingly* engaging in conduct that is reasonably certain to cause a voter to believe their respective members are election officials or formal employees of county election offices. In fact, the Organizational Plaintiffs do not even make such a claim. They thus fail to satisfy their burden on the second element of associational standing.

Regarding the third prong for associational standing, the Organizational 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 the Organizational Plaintiffs' claims and consider whether such claims require individualized participation by their 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.").

The Organizational Plaintiffs allege that their members engage in various voter education and outreach activities, some of which are the same activities performed by election officials. The Organizational Plaintiffs also allege that there are times where a member is mistaken for an election official while engaging in certain outreach efforts. But context is critical and every scenario may yield a different result depending on the circumstances. Moreover, *each* member's knowledge regarding his/her conduct is crucial in determining whether he/she is engaging in conduct violative of H.B. 2183 § 3(a). The Court cannot evaluate whether the statute infringes on the rights of the Organizational Plaintiffs' members without reviewing the applicable facts. That kind of review necessarily requires the individualized participation of the Organizational Plaintiffs' members and does not lend itself to associational standing.

2. – Organizational Standing for the Organizational Plaintiffs

In addition to being unable to establish associational standing, the Organizational Plaintiffs similarly cannot show organizational standing. To demonstrate organizational standing, a Plaintiff must show that, as an organization, it "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). A direct conflict between Defendants' conduct and the Organizational Plaintiffs' respective missions must also be present to show organizational standing. *Id.*

The Organizational Plaintiffs cannot satisfy this burden. Absent from the Amended Petition are any legitimate instances of particularized harm to the Organizational Plaintiffs themselves. As noted in more detail below, the Organizational Plaintiffs' ability to educate Kansans

about the advance mail voting process and promote the importance of voting remains fully intact. The election integrity statutes in no way impair the message that Plaintiffs desire to communicate to Kansans. At most, the Organizational Plaintiffs are required to tinker with *the mechanics* of how they relay their communications. Logistical readjustments, however, do not an injury make. *See, e.g., Clark v. Edwards*, 468 F. Supp. 3d 725, 748 (M.D. La. 2020) ("Injury does not arise because of [an organization's] desire or preference for a different scheme of absentee by mail voting, nor because they adjust their organization's activities in response to the Virus and the Virus-related changes to the law. The law is not static. It cannot follow that every change in voting laws that causes voting advocacy groups to 'check and adjust' is an injury.").

The Organizational Plaintiffs also fail to show a plausible claim of diversion of resources to counteract any alleged impact of the election integrity statutes on their missions. With respect to the signature verification requirement, for example, the Organizational Plaintiffs claim that they will have to expend additional resources and time to develop and execute programs to educate voters and ensure that the signature verification process does not result in disenfranchisement. (Pet. ¶¶ 17, 24, and 35). Plaintiffs League of Women Voters of Kansas ("LWV"), Kansas Appleseed Center for Law and Justice ("Kansas Appleseed"), and Topeka Independent Living Resource Center ("TILRC") similarly allege that they will now have to expend more resources recruiting volunteers to assist with collection and delivery of ballots. (Pet. ¶¶ 18, 30, and 36). But such services were already part of their respective missions, i.e., educating Kansas voters on how to vote by mail, operating ballot cure programs and assisting voters in the cure process, and/or helping collect and deliver completed absentee ballots. (Pet. ¶¶ 11, 20, 26, and 32). The mere fact that Organizational Plaintiffs have to infuse additional resources to programs and/or missions that they are already implementing does not mean they have suffered an injury.

See N.A.A.C.P. v. City of Kyle, 626 F.3d 233, 238–39 (5th Cir. 2010) (recognizing that diversion of resources to activities cannot support organizational standing if the activities do not differ from the plaintiff's routine activities or projects). As was the case in *City of Kyle*, the Organizational Plaintiffs have only conjectured that the resources they will devote to their voter education programs, cure assistance, and ballot delivery services could have been spent on other unspecified activities or services. (Pet. ¶¶ 17, 24, and 35). Such conjecture falls short of meeting the threshold for organizational standing.

Moreover, a close reading of the Amended Petition suggests that the Organizational Plaintiffs' are using resources that they already have or are planning to receive – as opposed to needing to raise additional funds that were not anticipated – towards these educational ventures. *Cf. Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) (citing cases). "[A]n organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." *Id.* (internal quotations omitted). Essentially, the Organizational Plaintiffs are putting more resources in one bucket instead of another bucket, but both buckets are part of their current and ongoing missions. The Organizational Plaintiffs are not required to overhaul or scrap their current programs for an entirely different program. Thus, the Organizational Plaintiffs' claims of diversion of resources are insufficient to show an injury. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 459–60 (6th Cir. 2014) (recognizing that "it is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already[] . . . .").

The Organizational Plaintiffs suggest that their plans to implement certain voter education outreach programs have been cancelled or curtailed while they seek relief from this Court.

But as addressed above, any chilling effect on their missions has been entirely self-induced because there is no imminent threat of criminal prosecution by Defendants (or, for that matter, any other county prosecutor). The Organizational Plaintiffs' unilateral decision to stay or cancel their voter education outreach programs, absent a credible risk of liability, does not equate to a legitimate claim that they diverted resources as a result of the new election integrity laws. "Diversion of organizational resources to litigation is a self-inflicted budgetary decision which does not qualify as an injury in fact for standing purposes." *Animal Legal Def. Fund,* 434 F. Supp.3d at 996. In sum, the Organizational Plaintiffs' claims fall far short of establishing a concrete injury to their respective organizations, and this Court, therefore, lacks subject matter jurisdiction to review those claims.

3. – Organizational Plaintiffs' Standing On Behalf of Constituents

In addition to themselves and their respective members, Plaintiffs Loud Light, Kansas Appleseed, and presumably TILRC also challenge the new election integrity statutes on behalf of constituents across Kansas. (Pet. ¶¶ 25, 31, at 35). But the Amended Petition does not allege any actual relationship with Kansas voters worthy of invoking this Court's jurisdiction over the Organizational Plaintiffs' claims on behalf of those purported constituents.

Typically, a plaintiff may not assert the rights of others. *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004). This standing principle "assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Id.* When a plaintiff asserts standing on behalf of a third-party, two additional elements must be met: (i) the party asserting the right must have a close relationship with the person who possesses the right; and (ii) there must be a hindrance to the possessor's ability to protect his own interests. *Id.* at 130. In an unpublished decision, the

Kansas Court of Appeals – citing *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991), and *Naumoff v. Old*, 167 F. Supp.2d 1250, 1252 (D. Kan. 2001) – also included a third requirement: the litigant "must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute[.]" *State v. Wade*, No. 112,121, 2015 WL 5458557, at *2 (Kan. Ct. App. Sept. 18, 2015).

Plaintiffs Loud Light, Kansas Appleseed, and TILRC fail to meet their mark. As already addressed, Plaintiffs have not suffered an injury-in-fact. Nor have they made a plausible claim of any legitimate or close relationship with Kansas voters sufficient to satisfy third-party standing standards. Their generalized concerns about the broader Kansas electorate does not cut it. *See, e.g., Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp.3d 158, 189 (M.D.N.C. 2020) (rejecting organizational plaintiffs' argument that "[d]irectly assisting voters is . . . an essential means of how [the plaintiffs] build relationships and associate with voters, including our members," and that "[v]oters have already communicated to [plaintiffs] their concerns and their confusion[]"). Likewise, Plaintiffs' alleged inability to collect and deliver ballots from unnamed voters does not create the type of relationship necessary to establish third-party standing. *Id.* Moreover, the Amended Petition is devoid of any claim or suggestion that Kansas voters are hindered from protecting their own interests allegedly affected by the election integrity statutes at issue in this case. In sum, the Organizational Plaintiffs lack standing on behalf of any third-party constituent.

4. – Individual Plaintiffs' Standing

Plaintiffs Charley Crabtree, Fay Huelsmann, and Patricia Lewter (collectively, the "Individual Plaintiffs") challenge the ballot harvesting statute by claiming it inhibits their ability to provide delivery assistance to local nursing home residents and fellow community members.

(Pet. ¶¶ 37, 38, and 39). The Individual Plaintiffs contend they fear prosecution if they continue their usual practice of collecting and delivering more than ten completed ballots. But as noted above in Section III.A.1. regarding associational standing, no Plaintiff, including the Individual Plaintiffs, have been threatened with any form of prosecution or civil penalty by any Defendant. Thus, the Individual Plaintiffs do not face an imminent threat to satisfy Article III standing.

Additionally, Plaintiff Crabtree can continue his alleged efforts of supplying nursing home residents with advance ballot applications inasmuch as such conduct does not violate any election integrity statute at issue. Any cessation of such activities by Plaintiff Crabtree is self-induced and not caused by Defendants. Moreover, the act of collecting and/or delivering ballots is not a form of protected speech or expressive conduct requiring constitutional protection under the Kansas Constitution. *See* Section D below. No matter how one slices it, the Individual Plaintiffs lack standing to pursue their claims.

B. – The Election Official Impersonation Statute is Not Unconstitutional

Turning to the merits, Plaintiffs' first constitutional challenge is directed at the Legislature's attempt to prohibit individuals from knowingly impersonating election officials, *see* H.B. 2183, § 3, a provision that Plaintiffs mischaracterize as a "Voter Education Restriction." (Pet. ¶ 4). Plaintiffs claim the new criminal statute will chill their speech because it supposedly has no intent element and thus leaves organizers "to guess as to when and whether their voter assistance and education activities might potentially be misperceived." (*Id.*). Plaintiffs argue the statute's definition of "false representation of an election official" is inherently subjective, thereby exposing them to criminal liability just because a voter mistakenly believes that he/she is communicating with an election official. (*Id.* at ¶ 104). They assert that the impersonation statute contravenes their rights to free speech and association (Count I), and is both unconstitutionally over-

broad (Count IV) and vague (Count V). Plaintiffs have misread the statute and their allegations of potential harms that flow from this perfectly valid legislative enactment are devoid of merit.

1. – Freedom of Speech and Association (Count I)

Plaintiffs contend that the election official impersonation statute violates Sections 3 and 11 of the Kansas Constitution's Bill of Rights by "hindering [them] from engaging in virtually all" of the voter registration and other voter educational activities that are core to their missions. (*Id.*). Isolating on the statutory language that prohibits an individual from knowingly engaging in conduct that gives the (false) appearance of being an election official or that would cause another person to believe (falsely) that the individual engaging in such conduct is an election official, H.B. 2183, § 3(a)(2)-(3), Plaintiffs aver that their protected speech and association rights are inhibited because the new law criminalizes communicative activity over which they have no control, i.e., how third-parties might perceive Plaintiffs' status, even if mistaken. (*Id.* at ¶¶ 98-112). Plaintiffs' argument is built on a foundation of sand. Nothing in this statue diminishes, let alone prohibits, Plaintiffs from engaging in the voter registration/advocacy efforts that are purportedly critical to their mission.

a. – Court Need Not Grapple with Murky Legal Standard

Plaintiffs insist that their claim be subjected to "exacting scrutiny" because their activity amounts to "core speech" and thus is entitled to the highest level of constitutional protection. (*Id.* at ¶¶ 168-70). The Kansas Supreme Court has not spoken as to the proper legal standard in this context,[5] and federal case law is not exactly a model of clarity. Defendants are unaware of

[5] Plaintiffs misrepresent the Kansas Supreme Court's position (or lack thereof) on this issue. Citing a disciplinary case, *In re Comfort*, 284 Kan. 183, 159 P.3d 1011 (2007), Plaintiffs suggest that our Supreme Court has held that "political speech is entitled to the highest level of constitutional protection." (Pet. ¶ 169). But the passage quoted is not the Court's holding; it is, rather, the respondent's argument, which the Court rejected on the merits. 284 Kan. at 205.

any specific case addressing the proper level of scrutiny in a constitutional 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 Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Const. Law Found., Inc.*, 552 U.S. 182 (1999)). On the other hand, where a dispute revolves around the mechanics of the electoral process rather than pure speech, courts invoke the so-called *Anderson-Burdick* standard. *See Anderson v. Celebrezze*, 460 U.S. 780 (1982); *Burdick v. Takushi*, 504 U.S. 428 (1992)).

Focusing on core speech restrictions, the *Meyer-Buckley* test applies "exacting scrutiny," which requires a law targeting expressive activity to be narrowly tailored to serve a sufficiently important governmental interest in order to pass muster. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383-85 (2021) (evaluating constitutional challenge to California law requiring forced disclosure of names of organization's donors); *id.* at 2383 ("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 Cty. 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).

There is no need for the Court to wade into the murky waters of the correct legal standard here. The statutory text itself undermines Plaintiffs' free speech/freedom of association attack on the election official impersonation statute. The new statute is reproduced in full below:

> (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).

The very first sentence of the statute makes it abundantly clear that the only conduct being 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 be judged under an *objective* standard. The notion, therefore, that Plaintiffs' members might be prosecuted because some naïve citizen misapprehended a member's non-official status is preposterous and would necessitate a complete disregard of the statutory language.

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) (emphasis added).

Clearly, then, the focus is *not* on the subjective views of the listener.

In addition, Plaintiffs ignore the fact that, under Kansas law, except for a small category of cases set forth in Kan. Stat. Ann. § 21-5203 – none of which are applicable here – "a criminal intent is an essential element of every crime defined by the criminal code." *State v. Richardson*, 289 Kan. 118, 121, 209 P.3d 696 (2009). The Legislature has specifically directed as such.

See Kan. Stat. Ann. § 21-5202(d) ("If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."). When the new false representation of an election official law is interpreted in line with realistic linguistic principles and in conjunction with the State's criminal code definitions, Plaintiffs' entire claim dissolves.

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. *See Burdick*, 504 U.S. at 434 ("when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."). Ultimately, however, there is no need in this lawsuit for the Court to stake out a position on the proper standard. Regardless of whether the "exacting scrutiny" test of *Meyer-Buckley* or the sliding-scale / balancing test of *Anderson-Burdick* is applied, the bottom line is that the challenged statute in no way diminishes Plaintiffs' ability to engage in any 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 that is not a proper canon of statutory construction.

This 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. In fact, 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.

Importantly, even in the core political speech line of cases upon which Plaintiffs rely, the U.S. Supreme Court has emphasized states' powerful interest in preventing both fraud and false statements, particularly "during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1985). It is only when a state effectively bars substantially all speech, or at least the most effective means of communication, in pursuit of that objective has the Supreme Court exposed the law to exacting scrutiny and struck it down. *See id.* at 357 (striking down Ohio's prohibition against distribution of anonymous campaign literature); *Meyer*, 486 U.S. at 422-28 (invalidating Colorado's restriction against paying circulators of initiative petitions, which had the effect of limiting the most effective means of reaching voters and impeding the proponents' ability to place their issues on the ballot). Despite Plaintiffs' protestations to the contrary, that is emphatically not what the Kansas election official impersonation statute does. Moreover, to the extent a statute is "readily susceptible" to a narrowing construction that will allow it to survive a First Amendment / free speech constitutional challenge, the Court is required to construe the law in such manner. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 397 (5th Cir. 2013) (citing *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

Legislators felt this statute was a useful tool in helping stop individuals from engaging in conduct designed to mislead the public and committing election-related mischief under the guise of official status. Although legislators had no legal obligation to develop a record of the problem before adopting prophylactic legislation, their concerns were hardly theoretical. There were reports throughout the country of disreputable persons falsely claiming to be election officials in

order to intimidate voters, interfere with the ballot collection process, or engage in other anti-social behavior. *See, e.g.*, Elizabeth Jenney, *Scammers Impersonate Election Officials in MD*, Patch.com (Oct. 30, 2020), *available at* https://patch.com/maryland/across-md/ scammers-impersonate-election-officials-md-attorney-general; City of Phoenix Alert on Election Impersonation (Aug. 12, 2015), available at https://www.phoenix.gov/news/cityclerk/900. In Kansas, legislators heard similar concerns from county election officials across the State.

It is hardly unreasonable for the State to require individuals engaging in voter registration and other educational activities to take certain, minimal steps to ensure that voters do not confuse such activists with election officials. Likewise, it is not too much to ask that they not include official county logos on mailings or other communications without also including a disclaimer of non-official status. These are not significant burdens. The statute does not prevent Plaintiffs from actually engaging in *any* communicative activity; the only thing it does is prevent them from misrepresenting themselves as election officials in their work, which is unequivocally not something they have a constitutional right to do. That easily satisfies any constitutional scrutiny.

To suggest, as Plaintiffs do (Pet. ¶ 4), that they are at risk of prosecution "even when they explicitly state that they are not elections officials [because sometimes] voters nevertheless come to the erroneous conclusion" is nonsense. Plaintiffs are attempting to manufacture a non-existent crisis that has absolutely zero connection to reality. The effort may be consistent with Plaintiffs' partisan agenda, but it is not supported by any legislative actions. Plaintiffs' proposed construction of the statute is unreasonable and at odds with how 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 H.B. 2183, § 3 on the theory that the presence of the former renders the latter non-narrowly tailored. (Pet. ¶ 116). 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). Just last month, in fact, the Supreme Court squarely reaffirmed 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.*, 141 S. Ct. 2321, 2348 (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, *inter alia*, they heard repeatedly from county election officials across the state that many 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.), 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).

Legislators also learned from numerous county election officials that voters were often receiving multiple advance ballot applications and felt obliged to complete them, wreaking even more chaos. 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 legislature's desire to negate, or at least minimize, the

potential problems in this area was indisputably within their constitutional authority and the means they adopted to do so did not cross any constitutional boundaries.

2. – Overbreadth (Count IV)

Plaintiffs next claim that the election official impersonation statute is unconstitutionally overbroad by restricting a substantial amount of constitutionally protected speech. (Pet. ¶ 212). The new law, they aver, "would ban virtually all voter assistance, education, and encouragement activities that Plaintiffs engage in, and the provision provides no way to separate out applications that are constitutional from those that are unconstitutional." (*Id.* at ¶ 213). This cause of action is wholly implausible.

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.").

H.B. 2183, § 3 is in no way targeted at any constitutionally protected speech. The law is intended to protect the integrity of the electoral process. It does so in large part 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 state-

ments, 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."); *United States v. Chappell*, 691 F.3d 388, 392-93 (4th Cir. 2012) (statute prohibiting individuals from falsely representing themselves as law enforcement officers was not facially unconstitutional under First Amendment); *United States v. Bonin*, 932 F.3d 523, 536 (7th Cir. 2019) (First Amendment not implicated in statute prohibiting individuals from impersonating U.S. Marshals). In any event, 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 even violated.

To the extent that Plaintiffs believe their actions (rather than their words) might convey a misleading impression about their status to persons with whom they interact, their free speech rights diminish as well. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."

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, and as state law requires it to do*, *see* Kan. Stat. Ann. § 21-5202(d), is to mandate that the speaker intend to give the false impression that he/she is an election official in order to violate the statute.

Plaintiffs argued in their motion for a temporary injunction that such a construction is impermissible because it would effectively rewrite the statute. They maintained that reading an intent component into the new law 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."). Plus, 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 – 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 the statute might sweep in some constitutionally protected speech, that is not a basis for striking down the 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." *United States v. Williams*, 553 U.S. 285, 292 (2008) (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, the impact is 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.

3. – Vagueness (Count V)

Plaintiffs also claim that the election official impersonation statute is unconstitutionally vague. (Pet. ¶¶ 218-21). 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." *Williams*, 553 U.S. at 304. 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, thus making it impossible for Plaintiffs to know if they might be violating the law. 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 Petition – there would 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.*, 313 Kan. 135, 138, 484 P.3d 226 (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 suggest that the new law gives law enforcement officials arbitrary discretion to pick and choose who might be prosecuted under its provisions. (Pet. ¶¶ 219-21). 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. Naturally, as is true of every criminal case, the underlying facts will dictate whether a prosecution should be pursued and whether a defendant should be 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." *Williams*, 553 U.S. 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."); *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (Vagueness doctrine is not meant to "convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. 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)).

Numerous statutes have survived facial vagueness challenges by the U.S. Supreme Court despite containing arguably ambiguous language. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 732 (2000) (rejecting vagueness challenge to ordinance making it a crime to "approach" another person, without his/her "consent," to engage in "oral protest, education, or counseling" within specified distance of health-care facility); *Boos v. Barry*, 485 U.S. 312, 332 (1988) (rejecting vagueness challenge to ordinance interpreted as regulating conduct near embassies "when the police reasonably believe that a threat to the security or peace of the embassy is present"); *Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (rejecting vagueness challenge to ordinance prohibiting protests that "unreasonably interfere" with access to public buildings); *Kovacs v. Cooper*, 336 U.S. 77, 79 (1949) (rejecting vagueness challenge to sound ordinance forbidding "loud and raucous" sound amplification).

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. This claim must be dismissed.

C. – Absentee Ballot Signature Verification Requirements Are Not Constitutionally Suspect

The second voter integrity provision that Plaintiffs challenge in this case is the absentee ballot signature verification mandate in H.B. 2183, § 5(h). (Pet. ¶¶ 73-77, 127-52). The new law provides as follows:

> Subject to the provisions of subsection (b), no county election officer shall accept an advance voting ballot transmitted by mail unless the county election officer verifies that the signature of the person on the advance voting ballot envelope matches the signature on file in the county voter registration records, except that verification of the voter's signature shall not be required if a voter has a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form. Signature verification may occur by electronic device or by human inspection. In the event that the signature of a person on the advance voting ballot envelope does not match the signature on file in the county voter registration records, the ballot shall not be counted.

H.B. 2183, § 5(h). Plaintiffs claim that the new requirement is unnecessary, unreliable, and lacks proper standards to ensure uniformity across counties. They argue that it imposes such a severe burden on voters as to amount to disenfranchisement, in violation of the right to vote protected by Article V of the Kansas Constitution as well as Sections 1-2 of the Kansas Constitution's Bill of Rights (Count II). They further claim the lack of uniform standard contravenes voters' equal protection rights under those same state constitutional provisions (Count III). Finally, they argue that the lack of procedures violates their rights to due process in contravention of Section 18 of the Kansas Constitution's Bill of Rights (Count VI). None of these claims have any merit.

1. – Right to Vote (Count II)

With no basis for their claim other than complete conjecture, Plaintiffs wildly speculate that the new law "is certain to disenfranchise lawful Kansas voters" who opt to vote via advance

ballot. (Pet. ¶ 128). They claim that verification by laypersons is inherently unreliable, making mistakes inevitable. (*Id.* at ¶¶ 131-36). Despite the fact that the statute expressly exempts disabled individuals from this requirement to the extent they have "a disability preventing the voter from signing the ballot or preventing the voter from having a signature consistent with such voter's registration form," Plaintiffs insist the exemption is inadequate to "ameliorate the burdens imposed" on such persons. (*Id.* at ¶ 136). Although the statute further mandates a cure mechanism under which the county election office must "attempt to contact each person who submits an advance voting ballot where there is no signature or where the signature does not match with the signature on file and allow such voter the opportunity to correct the deficiency before the commencement of the final county canvass," H.B. 2183, § 5(b), Plaintiffs cynically aver that "there is no guarantee that such voters will be actually contacted, and even when they are, virtually every aspect of that contact and any opportunity to cure are left to the discretion of county election officials." (Pet. ¶ 149). Under the governing legal standard, none of these allegations are sufficient to survive a motion to dismiss.

The parties here agree that Plaintiffs' right to vote claim is controlled by the *Anderson-Burdick* test described in detail in Part III.B.1, and virtually every court to consider constitutional attacks on election-related signature verification requirements has flatly rejected such causes of action. *See, e.g., Richardson v. Texas Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378 (6th Cir. 2020); *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008); *League of Women Voters v. LaRose*, 489 F. Supp.3d 719 (S.D. Ohio 2020); *Howard County Citizens for Open Gov't v. Howard County Bd. of Elections*, 30 A.2d 245 (Md. Ct. Spec. App. 2011).

a. – The Signature Verification Requirement Does Not Severely Burden Plaintiffs' Right to Vote

With regard to the burden of the signature verification requirement on Plaintiffs and their members, to the extent one exists at all, it is extremely *de minimis*. As the Fifth Circuit recently observed:

> Signature-verification requirements, like photo-ID requirements, help to ensure the veracity of a ballot by identifying eligible voters. Signature-verification requirements are even less burdensome than photo-ID requirements, as they do not require a voter to secure or to assemble any documentation. True, some voters may have difficulty signing their names on ballots. But in *Crawford*, even though some voters might find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification, that difficulty did not render the photo-ID law a severe burden on the right to vote.
>
> Even if some voters have trouble duplicating their signatures, that problem is neither so serious nor so frequent as to raise any question about the constitutionality of the signature-verification requirement. No citizen has a Fourteenth Amendment right to be free from the usual burdens of voting. And mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect.

Richardson, 978 F.3d at 236-37 (quoting *Crawford*, 553 U.S. 181 (2008)) (internal alternations omitted). Kansas also mitigates any potential burden the new signature verification requirement might impose on voters in a number of ways. First, the State mandates – by statute – that county election officials contact any voter whose advance ballot appears to contain a signature mismatch (or lack of signature) and give that individual an opportunity to cure the deficiency. H.B. 2183, § 5(b). Second, the statute exempts disabled individuals from its reach to the extent their disability prevents them from signing the ballot or having a verifiable signature on file with the county election office. *Id.* § 5(h). Third, directly refuting much of Plaintiffs' claimed harms, the statute allows any voter who has an illness or disability preventing him/her from signing the ballot to request assistance from some third-party in marking the ballot. *Id.* § 5(c), (e). Fourth,

for individuals who are concerned that they will be unable to provide a matching signature, the State allows them to vote in person either on Election Day itself or during the extensive advance voting period. These mitigation measures remove any doubt that the supposed burdens on voting Plaintiffs claim are nothing more than fanciful conjecture with little nexus to reality. Identical measures in other states have been deemed sufficient to render ballot signature verification requirements a non-severe burden. *See Richardson*, 978 F.3d at 237; *Hargett*, 978 F.3d at 388.

Furthermore, as the Supreme Court recently held, the proper judicial inquiry is not on the burden to a handful of individual voters who might be adversely affected by the statute; it is, rather, on the electorate "as a whole." *Brnovich*, 141 S. Ct. at 2339. Reinforcing this point in turning away a constitutional challenge to a signature verification law similar to the one here, the Fifth Circuit noted, "If the Court were 'to deem ordinary and widespread burdens like these severe' based solely on their impact on a small number of voters, we 'would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.'" *Richardson*, 978 F.3d at 236 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)). There is no legitimate basis for disputing that Kansas' signature verification requirement is no more burdensome on the right to vote than was the photo-ID mandate upheld by the Supreme Court in *Crawford*. In short, the new law is a reasonable and nondiscriminatory restriction on the right to vote.

b. – Kansas' Signature Verification Requirement Is Amply Justified by the State's Strong Regulatory Interests

The next prong of the *Anderson-Burdick* test looks to the State's regulatory interests in the challenged statute. Where, as is the case here, the burdens on voting are not severe, the law is subjected to a highly deferential rational basis review, and "the State's important regulatory

interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434. This only makes sense given that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Id.* at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Kansas has a number of well-recognized interests in requiring that signatures on mailed-in advance ballots be verified before they will be counted. The primary regulatory interest is in avoiding fraud. As the Supreme Court recently observed, although "every voting rule imposes a burden of some sort," a "strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich*, 141 S. Ct. at 2340. The risk of voter fraud is particularly acute with mail-in voting. *See Crawford*, 553 U.S. at 195-96 ("flagrant examples of [voter] fraud . . . have been documented throughout this Nation's history by respected historians and journalists, and . . . Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election."); *Richardson*, 978 F.3d at 239 ("Texas's signature-verification requirement is not designed to stymie voter fraud only in the abstract. It seeks to stop voter fraud where the problem is most acute – in the context of mail-in voting."); Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections ("Baker-Carter Commission"), *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").

Plaintiffs take the Legislature to task for not providing "evidence of fraud or other issues that would support requiring signature matching in any of the counties, much less statewide." (Pet. ¶¶ 71, 194). But there is no such requirement:

> [W]e do not force states to shoulder the burden of demonstrating empirically the objective effects of election laws. States may respond to potential deficiencies in the electoral process with foresight rather than reactively. States have thus never been required to justify their prophylactic measures to decrease occasions for voter fraud.

Richardson, 978 F.3d at 240 (quoting *Munro*, 479 U.S. at 195-96, and *Tex. LULAC v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020)); *accord Timmons*, 520 U.S. at 364 ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.")

In addition to preventing fraud, which safeguards the integrity of the electoral process, Kansas also has a powerful interest in promoting the orderly administration of all elections. This interest was expressly endorsed by the Supreme Court in *Doe v. Reed*, 561 U.S. 186 (2010). The Court there noted:

> [T]he State's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is essential to the proper functioning of a democracy.

Id. at 198.

In sum, Plaintiffs have demonstrated no burden to voting whatsoever from the signature verification requirement. Even if they could show that some voters' mailed-in ballots were rejected due to a signature mismatch and that the cure opportunities in the law proved inadequate for those individuals, the burden on the electorate "as a whole" would still be minimal. And the State's regulatory interests are strong enough to easily outweigh such burden under the rational

basis review dictated by *Anderson-Burdick*. That these Plaintiffs might have adopted a different law or drawn up a different regulatory scheme is beside the point. What Plaintiffs are ultimately asking the Court to do is to micromanage Kansas' electoral regulatory scheme and second-guess the Legislature's policy decisions. That is not the Court's role. Plaintiffs' Count II with respect to the signature verification requirements must be dismissed.

2. – Equal Protection (Count III)

Plaintiffs further attack the signature verification mandate on equal protection grounds, claiming that the lack of standards for judging signatures confers too much discretion on election officials and provides no uniformity for each of the State's 105 counties. (Pet. ¶¶ 73-77). They suggest that accurate signature matching is a difficult task often susceptible to error. (*Id.* at ¶¶ 131-36). Citing *Bush v. Gore*, 531 U.S. 98 (2000), they maintain that the law's allowance of no, or at least different, standards in counties across the State violates their equal protection rights under the Kansas Constitution. (Pet. ¶¶ 206-08).

The Ninth Circuit rejected a similar constitutional challenge to a signature verification regulatory scheme in *Lemons*, 538 F.3d at 1105-07. The court of appeals noted that the Supreme Court went to great lengths in *Bush* to underscore the narrow scope of its ruling ("limited to the present circumstances") and had found an Equal Protection Clause violation "only because it was a *court-ordered* recount." *Id.* at 1106 (quoting *Bush*, 531 U.S. 106-07, 109) (emphasis added). In addition, the Ninth Circuit held that the requirement that referendum signatures be matched to an individual's signature on file with the county registration office in and of itself represented a sufficiently uniform standard to survive an equal protection challenge. *Id.* The fact that a few signatures might have been rejected in error, meanwhile, was deemed to be little more than "isolated discrepancies" that did "not demonstrate the absence of a uniform standard." *Id.* This ruling was

hardly surprising. After all, elections in every state are ultimately administered by individual counties, and "[a]rguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected." *N.E. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016). It is also inevitable – human nature being what it is – that certain signature verifiers will do a better than job than others. But that is simply not constitutionally significant. *See Lemons*, 538 F.3d at 1107.

Given that the statute only took effect on July 1, 2021 – after Plaintiffs filed their original Petition – Plaintiffs have not, and cannot, allege any evidence of improperly rejected ballots. But even if they had adduced such evidence, the fact that similarly situated persons may be treated differently is not, in and of itself, sufficient to establish an equal protection violation. The law simply does not require absolute precision, nor does it mandate that all of Kansas' 105 counties employ identical standards on every jot and tittle of their election administration practices.[6] Every state's electoral system is administered on a county-by-county basis. To suggest that *de minimis* deviations from one county to another – particularly on matters that involve human judgment and discretion – trigger Equal Protection Clause violations would be both unprecedented and revolutionary. It would, for example, totally upend the county canvassing procedures. Neither the federal nor the state constitution requires anything so radical.

As Plaintiffs acknowledge, (Pet. ¶ 129 n.3), signature verification requirements in connection with advance ballots are hardly unknown in Kansas. Indeed, the State has long required voters to sign advance ballots before submitting them to a county election office. *See* Kan. Stat. Ann. § 25-1121(b). The recent legislative enactment simply *requires* that the signatures on bal-

[6] The Secretary of State is also planning on conducting certain statewide training on this issue for election officials.

lots returned *by mail* be *verified* by matching the signature on the ballot with the signature on file in the county election office. Verification of advance ballot signature has always been *recommended* under the Kansas Election Standards Manual (prepared by the Secretary of State pursuant to his authority under Kan. Stat. Ann. § 25-1131).[7] In fact, the Secretary of State has always *required* each county election office "to attempt to contact each person who submits an advance voting ballot where there is no signature, or where the signature does not match with the signature on file and allow the voter the opportunity to correct the deficiency prior to the meeting of the county board of canvassers." The practice has been to make at least three attempted contacts with the voter. To suggest, therefore, that county election officials have no experience in administering a signature verification requirement is not accurate.

The bottom line is that Plaintiffs' equal protection attack on the signature verification requirements in H.B. 2183, § 5(h) has no merit as a matter of law and must be dismissed.

3. – Due Process (Count VI)

In their final effort to kill the signature verification requirement, Plaintiffs suggest that the law's failure "to provide any standard by which county election officials are to evaluate a voter's ballot" constitutes a violation of voters' due process rights. (Pet. ¶ 229-230). The flaw in this claim is that the right to vote does not implicate any property or liberty interest protected by the Fourteenth Amendment's Due Process Clause or its apparent analogue in Section 18 of our state constitution's bill of rights.[8] "In the absence of a protected property or liberty interest, there

[7] The discussion on signature verification is found on page II-49 of Chapter 2 of the manual, which is available at this link: https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-II-Election-Administration.pdf.

[8] Whereas the U.S. Constitution's Fourteenth Amendment directs that no state shall "deprive any person of life, liberty, or property, without due process of law," Section 18 of the Kansas Constitution's Bill of Rights merely states that "[a]ll persons, for injuries suffered in person, reputation or property, shall

can be no due process violation." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 544 216 P.3d 158 (2009) (citing *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City,* 265 Kan. 779, 809, 962 P.2d 543 (1998)).

At least with respect to the federal Constitution, a "liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation of interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests arising out of the U.S. Constitution encompass "the right to contract, to engage in the common occupations of life, to gain useful knowledge, to marry and establish a home to bring up children, to worship God, and to enjoy those privileges long recognized as essential to the orderly pursuit of happiness." *Richardson*, 978 F.3d at 230 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 546, 572 (1972). State-created liberty interests, on the other hand, are "generally limited to freedom from restraint." *Id.* (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

While the right to vote may be a fundamental right implicating, for example, the Equal Protection Clause, it is *not* a constitutionally-protected liberty interest. *Id.* at 231; *accord New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008). And invoking a liberty interest in the context of a signature verification requirement is even more of a stretch. Having held that there is not even a constitutional right to vote via absentee ballot, *see McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-09 (1969), it is unfathomable that the Supreme Court would find a liber-

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have remedy by due course of law, and justice administered without delay." Nowhere is a liberty interest mentioned in the Kansas Constitution. The Kansas Supreme Court does not appear to have squarely dealt with a challenge to the scope of this clause, no doubt because most litigants bring claims on behalf of both the U.S. Constitution and the Kansas Constitution. Eager to avoid the assertion of any federal claims and the removal of this case to federal court, however, Plaintiffs have assiduously avoided any reference to the U.S. Constitution's Due Process Clause. Because the right to vote does not entail a liberty interest at all, Defendants will simply assume, *arguendo*, a liberty component is part of the state constitution for purposes of this motion to dismiss.

ty interest in avoiding signature verification requirements in connection with such ballots. In short, Plaintiffs' due process rights are not at stake here and this claim must be dismissed.[9]

D. – Ballot Harvesting/Delivery Restrictions are Not Unconstitutional

In their splatter-approach Amended Petition, Plaintiffs next take aim at the State's new restrictions on ballot harvesting, misrepresented as a "Delivery Assistance Ban." (Pet. ¶¶ 153-67). This election integrity measure, H.B. 2183, § 2, requires that any person delivering an advance ballot of some other person to a county election office or polling place must submit a written statement on a form prescribed by the Secretary of State that contains attestations from the voter and the delivery agent that no undue influence was exercised on the voter. *Id.* § 2(a). The statute further restricts individuals from transmitting to a county election office or polling place more than ten advance voting ballots during any particular election. Id. § 2(c). Plaintiffs claim that the new law contravenes their freedom of speech and association (Count I) as well as their right to vote (Count II).

Although Plaintiffs argue that their free speech/association cause of action is subject to "exacting scrutiny" because core political speech is being targeted, (Pet. ¶¶ 184-88), this theory falls flat. Ballot collection restrictions simply do not target speech or even expressive conduct. The law in no way prohibits Plaintiffs from engaging in any interactions with voters regarding advance ballots. Plaintiffs are entirely free to encourage voters to request an advance ballot, to provide a website link or other education about how to return advance ballots, and to underscore the importance of voting (by whatever means). The only thing being restricted under this statute is the specific conduct of delivering a third-party's ballot to election officials. "[C]ompleting a

[9] In the event the Court somehow finds a liberty interest, the claim would be subject to *Anderson-Burdick* balancing – not *Mathews v. Eldridge*, 424 U.S. 319 (1976) – and would need to be rejected for the same reasons articulated in Part III.C.1.

ballot request for another voter, and collecting and returning ballots of another voter, do not communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny." *DCCC v. Ziriax*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020); *accord Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (rejecting argument that the act of collecting early ballots is expressive conduct that conveys any message about voting; concluding that this type of conduct cannot reasonably be construed "as conveying a symbolic message of any sort"); *Lichtenstein*, 489 F. Supp.3d at 765-77 (same); *New Ga. Project*, 487 F. Supp.3d at 1300-02 (same); *Steen*, 732 F.3d at 393 (collecting voter registrations is not protected speech). As the party invoking the First Amendment (or, as relevant here, its Kansas Constitution counterpart), Plaintiffs have the burden of proving its applicability, *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and they simply cannot do so.

Plaintiffs' constitutional challenges to the ballot collection restrictions in Counts I and II, therefore, are properly analyzed under the *Anderson-Burdick* standard set forth above. Plaintiffs contend that the law's restrictions will have an adverse impact on the State's "most vulnerable citizens" who purportedly have a great need for "ballot collection and delivery assistance." (Pet. ¶ 154). While the premise of this theory is highly condescending to those communities, and it is entirely speculative whether certain segments of the population actually use ballot collection assistance in statistically significant greater numbers than others, those issues are ultimately irrelevant because the claim still fails as a legal matter.

First, any burden on voting from the ballot harvesting restrictions in H.B. 2183, § 2 (to the extent there *is* one) is extremely minimal. Putting a stamp on an advance ballot envelope is hardly so great a hardship as to trigger constitutional protections. If, as the Supreme Court held, having to travel to the local DMV office to obtain a voter ID "does not qualify as a substantial

burden on the right to vote, or even represent a significant increase over the usual burdens of voting," *Crawford*, 553 U.S. at 198, then surely requiring a voter to mail in his/her own advance ballot does not contravene the Constitution. Of course, the Kansas statute does not even require *that*; it simply limits the number of ballots that any one person can collect and deliver from other individuals. Moreover, as the Supreme Court held last month in repudiating a legal challenge to a ballot harvesting law in Arizona far more restrictive than the Kansas version (e.g., the Arizona statute does not allow *any* third-party collection/delivery), the relevant judicial inquiry is on the burden to the electorate "as a whole," not on the burden to a handful of individual voters who might be adversely affected by the statute. *Brnovich*, 141 S. Ct. at 2339; *see also id.* ("[E]ven neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

A state is not required to allow any absentee voting at all. *McDonald*, 394 U.S. at 809. By choosing to offer such a feature, therefore, a state has "increase[d] options, not restrictions." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J., concurring). "Of course, there will always be other voters for whom, through no fault of the state, getting to the polls is difficult or even impossible. But . . . that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that the state has in fact precluded voters from voting – that the voter has been prohibited from voting by the State." *Id.* (cleaned up) (quoting *McDonald*, 394 U.S. at 808 & n.7, 810).

In any event, when a state invokes its constitutional 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. But these burdens "must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party*, 892 F.3d at 1077. That is why a state's "important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions" on election procedures. *Anderson*, 460 U.S. at 789.

The State's restrictions on third-parties' collection and delivery of advance ballots are rooted in extremely strong interests of combating voter fraud and facilitating public confidence in the election process. To quote the Supreme Court's recent decision in *Brnovich*:

> "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*) (internal quotation marks omitted). Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that "[a]bsentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005).
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> The Commission warned that "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," and it recommended that "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.* The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to "the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." *Id.*, at 47. [The Arizona law] is even more permissive in that it also authorizes ballot-handling by a voter's household member and caregiver.
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> The Court of Appeals thought that the State's justifications . . . were tenuous in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona. . . . But prevention of fraud is not the only legitimate interest

> served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders. [The Voting Rights Act] Section 2's command that the political processes remain equally open surely does not demand that "a State's political system sustain some level of damage before the legislature [can] take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States. For example, the North Carolina Board of Elections invalidated the results of a 2018 race for a seat in the House of Representatives for evidence of fraudulent mail-in ballots. The Arizona Legislature was not obligated to wait for something similar to happen closer to home.

Brnovich, 141 S. Ct. at 2347-48 (final alteration in original).

Considering the State's unequivocally strong interest in restricting the potential mischief that can accompany advance ballots, particularly when ballots are returned to election officials by individuals other than the voters themselves, any balancing required by *Anderson-Burdick* must be resolved in favor of the State. Even if the plaintiffs could somehow show a disparate burden on certain groups, the State's justifications in avoiding voter fraud would more than suffice to uphold the law. *See Brnovich*, 141 S. Ct. at 2347; *accord DCCC*, 487 F. Supp.3d at 1235; *New Ga. Project*, 484 F. Supp.3d at 1299-1300. Accordingly, Plaintiffs' constitutional challenges to this law under Counts I and II must be dismissed.

E. The Ban on Mailing Advance Mail Voting Applications Does Not Violate the Constitution

Plaintiffs next challenge H.B. 2332 § 3(*l*)(1)'s ban on out-of-state persons or entities mailing advance mail voting applications to Kansas residents, which they misleadingly label an "Advocacy Ban." (Pet. ¶¶ 118–126). Specifically, they allege the statute's prohibition on such mailings violates their freedom of speech and association rights (Count I), is unconstitutionally overbroad (Count IV), and is unconstitutionally vague (Count V).

1. – Plaintiffs Challenges to H.B. 2332 § 3(*l*)(1) are Not Ripe

As a threshold matter, the Court lacks jurisdiction even to reach the merits of these claims because none of them are ripe for review. Ripeness is a justiciability doctrine "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 170, 210 P.3d 105 (2009) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003)). "[T]he doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (internal quotations omitted).

Although the standing and ripeness doctrines enjoy similarities in that both are rooted in the "case or controversy" requirement and both look to "whether the challenged harm has been sufficiently realized at the time of trial," *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004), they are not the same. The Court's determination as to whether a dispute is ripe "focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention." *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008) (quoting *Morgan*, 365 F.3d at 890). In other words, the ripeness doctrine "addresses a *timing* question: *when* in time is it appropriate for a court to take up the asserted claim." *Id.* (quotation omitted) (emphasis in original).

Two primary factors guide the Court's evaluation as to whether the case is ripe for disposition: (i) the fitness of the issue for judicial resolution; and (ii) the hardship to the parties of withholding judicial consideration. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir. 1990) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In examining this first factor, the Court looks to "whether determination of the merits turns upon strictly legal issues or *requires*

facts that may not yet be sufficiently developed." *Tex. Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018) (emphasis in original). The second factor probes what harm, if any, might befall Plaintiffs from the Court delaying consideration of the issue and the direct impact on Plaintiffs' day-to-day activities. *Yeutter*, 911 F.2d at 1415. The real question is whether withholding review places Plaintiffs in "a direct and immediate dilemma." *Tex. Brine Co*., 879 F.3d at 1230.

With regard to the first factor, the constitutionality of § 3(*l*)(1) is clearly not fit for judicial resolution at this time. H.B. 2332 does not go into effect until January 1, 2022, and Defendant Schwab has not even had a chance to draft implementing regulations – as the statute calls upon him to do, *id.* § 3(m) – that likely will provide guidance for both Plaintiffs and the Court in interpreting the contours and constitutionality of the statute. Without the benefit of such regulations, the exact legal parameters of § 3(*l*)(1) are unknown. The facts underlying any potential dispute are likewise mostly unknown since they have not yet occurred. As such, any ruling by the Court on Plaintiffs' vagueness claim would be premature.

Second, there is no pending enforcement action under investigation or fine of Plaintiffs' respective members. Nor could there be. Thus, any allegation by Plaintiffs that they fear possible exposure or risk in the future is a far cry from the type of actual, matured claim necessary to warrant judicial intervention. "In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1250 (10th Cir. 2011), *aff'd*, 569 U.S. 614 (2013). "[A] regulation is not ordinarily considered . . . 'ripe' for judicial review . . . until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the

claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808. Were the Court to adjudicate Plaintiffs' dispute on the merits at this time, the case would be largely undeveloped and would represent exactly the type of anticipation of contingent events that the ripeness doctrine was intended to forestall. *Morgan*, 365 F.3d at 891.

Further, Plaintiffs will not suffer any undue hardship from the Court's delay of a decision on the merits until Plaintiffs face a *real threat* of liability, should that ever occur. Any injury that Plaintiffs *might* suffer in the future is complete speculation. The Court's postponement of a decision until Plaintiffs *do* suffer some particularized, concrete injury (if they *ever* do) does not constitute an independent harm. *Morgan*, 365 F.3d at 891. In sum, Plaintiffs' claims concerning the so-called Advocacy Ban are unripe for review and must be dismissed for lack of subject matter jurisdiction.

2. – Freedom of Speech and Association (Count I)

Plaintiffs broadly claim that their inability to directly mail, or indirectly cause to be mailed through third-party service contracts, advance mail voting applications to Kansans diminishes their ability to engage in core political speech by encouraging Kansans to participate in the democratic process. Plaintiffs' claims ring hollow. A proper review establishes H.B. 2332 § 3(*l*)(1) merely limits Plaintiffs' *conduct* as opposed to any protected speech.

Defendants incorporate here their discussion on the appropriate standards set forth in Part III.B.1. The only thing that H.B. 2332, § 3(*l*)(1) addresses is the mailing of advance mail voting applications. There is no bar whatsoever to Plaintiffs' ability to send mailers communicating the importance of voting through the mail-in process or encouraging such absentee voting methods in future elections. Plaintiffs may even direct Kansans on where to obtain advance mail voting applications and provide instructions on how to fill them out. Plaintiffs may continue their voter

education efforts via mail in all respects. Plaintiffs, to the extent they are not domiciled in Kansas, simply may not mail, or cause to be mailed, the advance mail voting application directly to the Kansas voter – a logistical prohibition implemented to prevent voter confusion and voter fraud as opposed to a prohibition on the communication itself. *See, e.g.*, *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 776 (M.D. Tenn. 2020).

This case is similar to *Lichtenstein* where the federal court upheld a Tennessee law prohibiting distribution of absentee ballot applications by third-parties. In doing so, the court astutely recognized that the ban on distribution of absentee voter applications was not a ban on core political speech. *Id.* at 773. "[I]t does not restrict anyone from interacting with anyone about anything." *Id.* at 770. The court detailed a long list of ways the plaintiff could encourage a person to vote using the absentee ballot application. *Id.* at 764–65. "[H]owever one slices it, the Law prohibits no spoken or written expression whatsoever and also leaves open a very wide swath of conduct, prohibiting just one very discrete kind of act." *Id.* at 765.

While the First Amendment theoretically protects both speech and certain types of conduct, "only conduct that is 'inherently expressive' is entitled to First Amendment protection." *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006)). In assessing whether particular conduct has "sufficient 'communicative elements' to be embraced by the First Amendment, courts look to whether the conduct shows an 'intent to convey a particular message' and whether 'the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Just as was true in *Lichtenstein*, there is no constitutionally protected speech or conduct being impacted by the advance ballot distribution restrictions in this case:

> [I]f unaware of any words accompanying such distribution, an observer would not have any particular reason to associate any specific message with the action of giving someone an absentee-ballot application. . . . And the observer perhaps could speculate that there is not really any discernable message at all. The Supreme Court has advised that if an observer cannot tell, without accompanying words, that the action conveys the message that plaintiff claims it conveys, then the action is not inherently expressive.

Lichtenstein, 489 F. Supp.3d at 768; *see also Voting for Am., Inc. v. Andrale*, 488 F. App'x 890, 898 & n.13 (5th Cir. 2012) (rejecting First Amendment challenge to state statute restricting non-election officials' distribution of absentee ballots, concluding that the law did not curtail any core speech rights); *League of Women Voters v. Browning*, 575 F. Supp.2d 1298, 1319 (S.D. Fla. 2008) (collection and handling of voter registration applications is not inherently expressive activity).

H.B. 2332 in no way prevents Plaintiffs from publishing or mailing content that educates Kansans on how to vote in person or by mail. Nor does it prohibit Plaintiffs from providing information on where and how to obtain an advance ballot application. It likewise does not impede Plaintiffs from posting or mailing content, or otherwise advocating in favor of the absentee voting process. The number of ways for Plaintiffs to communicate their message to Kansas voters is virtually limitless. The abstract messages they claim to want to convey – encourage all eligible voters to vote by advance mail ballots, reassure all Kansans that voting by mail is safe and secure, and emphasize the importance of democratic participation by every eligible citizen – are not hampered whatsoever by the statute. The fact that every avenue of expressive conduct remains available to them to impart those messages to voters totally undercuts their claim that the restrictions impermissibly restrict or even threaten core speech. While Plaintiffs seek to fit the statutory prohibitions into a free speech box, the reality is that "[c]onduct does not become speech for First Amendment purposes merely because the person engaging in the conduct in-

tends to express an idea." *Steen*, 732 F.3d 388 (citing *Rumsfeld*, 547 U.S. at 66); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (recognizing that while a person or party may express beliefs or ideas through a ballot, "[b]allots serve primarily to elect candidates, not as forums for political expression."); *DCCC v. Ziriax*, 487 F. Supp.3d 1207, 1235 (N.D. Okla. 2020) ("[C]ompleting a ballot request for another voter, and collecting and returning ballots of another voter, do no communicate any particular message. Those actions are not expressive, and are not subject to strict scrutiny.").

The proper standard, therefore, is the *Anderson-Burdick* test, described at length above. And as previously noted, the burden on Plaintiffs' advocacy work, to the extent there is one, is extremely minimal. Yet the State's interests in imposing restrictions on one's ability to mail advance mail voting applications to voters are substantial, outweighing any minor inconveniences that Plaintiffs may experience, particularly when subjected (as they must be) to a highly deferential rational basis review. *See Burdick*, 504 U.S. at 434.

The State's primary regulatory interests are the avoidance of confusion and the facilitation of an orderly and efficient administrative process in carrying out the election. Indeed, in 2020, county election officials across the State reported receiving multiple (duplicate) advance ballot applications from individuals who had themselves received multiple advance ballots application forms (often partially completed) from different out-of-state organizations. Voters were calling in to county clerks' offices angry and confused, not knowing how to handle the different forms, and frequently feeling compelled to send *all* the applications in. The result was chaos that greatly taxed the time and resources of already short-staffed and overworked county election offices. Unsurprisingly, this regulatory interest in orderly election administration was expressly endorsed by the Supreme Court in *Doe v. Reed*, 561 U.S. 186, 198 (2010).

In addition, having multiple advance ballot applications being sent in by the same person is a recipe for potential fraud, which the State also has a strong interest in avoiding. In an ideal world, no voter who submits multiple advance mail ballot applications would receive multiple advance ballots. No doubt, election officials identify many of the duplicate submissions from the list of applicants they must maintain. *See* Kan. Stat. Ann. § 25-1122(i). But in a state with 105 counties, many of whose election offices are substantially understaffed and overworked, it is inevitable that duplicates will fall through the cracks. And the more that entities are allowed to inundate Kansas voters with duplicate applications (rather than simply advising such voters how to obtain them), the greater the potential for problems and abuse. "Fraud is a real risk that accompanies mail-in voting even if [a state has] had the good fortune to avoid it." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). More importantly, "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.*; *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.* ("a State's political system [need not] sustain some level of damage before the legislature [can] take corrective action.").

The problem is especially acute when out-of-state entities are responsible for sending the duplicate advance ballot applications and potentially engaging in other nefarious activities. It is infinitely more difficult for the State to identify, monitor, and exercise oversight of individuals and organizations not located in Kansas. Not surprisingly, every complaint that legislators responsible for this bill heard from voters and county election officials about duplicate advance ballot applications involved out-of-state organizations.

The same regulatory interests at issue in *Lichtenstein*, which the court unsurprisingly embraced wholeheartedly as legitimate measures to increase election integrity and decrease voter confusion, are also at play here:

> Among other things, there is a rational basis to believe that by prohibiting everyone (other than election commission employees) from distributing absentee-ballot applications, the State can: (a) increase the integrity of the absentee ballot process by, among other things, better ensuring that an absentee-ballot application is being submitted by someone who truly wants to submit the application, that the applicant does not miss out on voting absentee (and perhaps, as a direct result, voting at all) due to misleading addressing or other information provided by a distributor, and that the applicant is not mistakenly provided by election officials with multiple absentee ballots; and (b) decrease the risk of voter confusion arising from, among other things, voters' receipt of (i) applications mistakenly believed by some recipients to be from election officials, (ii) applications from multiple distributors, or (iii) incorrect addressing or other information from the distributor regarding absentee voting.

Lichtenstein, 489 F. Supp.3d at 783-84.

At bottom, the restriction on non-Kansans mailing advance mail voting applications to Kansas residents is entirely reasonable. It is a non-discriminatory preventative measure that leaves open virtually every conceivable type of written and/or verbal expression except one – the distribution of advance ballot applications by third-parties not domiciled in Kansas. While we question the premise that *any* voters might be negatively affected by the law, even if they are, that would not justify an invalidation of the statute. Not only is there no narrow tailoring requirement under *Anderson-Burdick*, but as the Supreme Court recently explained, the State's "entire system of voting" – not just the impact on a small segment of the electorate – must be examined "when assessing the burden imposed by a challenged provision." *Brnovich,* 141 S. Ct. at 2339. Accordingly, Plaintiffs' challenge to § 3(*l*)(1) in Count I must be dismissed.

3. – Overbreadth (Count IV)

Plaintiffs claim H.B. 2332 § 3(*l*)(1) is unconstitutionally overbroad as well in that it prevents Plaintiffs from engaging out-of-state vendors for the purpose of mailing advance mail voting applications to Kansas voters, thereby limiting their protected speech. (Pet. ¶ 214). Plaintiffs aver it is impossible to distinguish unconstitutional contracts from their constitutional counterparts. *Id.* Once again Plaintiffs are mistaken about what constitutes core political speech. The act of mailing an advance mail voting application simply does not constitute expressive conduct.

It appears Plaintiffs are raising an as-applied overbreadth claim. Defendants incorporate their prior recitation of the applicable standards for reviewing an overbreadth challenge discussed in Part III.B.2 of this Memorandum.

An overbreadth challenge is designed to protect impairment to a constitutionally protected activity. *See Hicks,* 539 U.S. at 118–19. When considering an as-applied overbreadth challenge, courts recognize that the statute in question may be constitutional in many of its applications, but is not so as applied to the plaintiff and applicable circumstances. *See N.M. Youth Organized v. Herrera,* 611 F.3d 669, 677 n.5 (10th Cir. 2010). But as already addressed in Part III.E.2, the act of mailing or causing to be mailed an advance mail voting application to a Kansas voter is not protected speech. There are also an infinite number of ways for Plaintiffs to communicate their message to Kansas voters that are not limited by § 3(*l*)(1).

Additionally, as Kansas-domiciled entities, Plaintiffs are free to send advance mail voting applications to Kansas voters as long as the applications are not partially completed. There is also no prohibition on Plaintiffs contracting with Kansas vendors to mail advance mail voting applications to Kansas residents. Nor have Plaintiffs alleged that such in-state vendors do not

exist. Thus, Plaintiffs retain an array of options for effecting their desire to send advance mail voting applications to Kansas voters.

Regardless, even if the law touches on political speech protected by the First Amendment or its Kansas analogue, declaring the statute invalid would be inappropriate given the State's interests in preventing voter confusion, preserving resources, and operating smooth elections without devoting time to resolving issues related to duplicate applications. "The Supreme Court has noted that 'there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1199 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119). "[T]he responsibility for conducting a fair, open, and safe election . . . is the primary and substantial responsibility of the Executive and Legislative branches of the [state] government." *Democracy N. Carolina*, 476 F. Supp.3d at 169. H.B. 2332 § 3(*l*)(1) is not unconstitutionally overbroad and Plaintiffs' claim must be dismissed.

4. – Vagueness (Count V)

In what appears to be a last ditch effort to strike down the ban on out-of-state entities sending advance mail voting applications to Kansas voters, Plaintiffs launch a vagueness attack on H.B. 2332 § 3(*l*)(1). Application of common sense easily forecloses relief on this claim. Defendants incorporate herein their recitation of the legal standards for a vagueness challenge from Part III.B.3.

H.B. 2332 § 3(*l*)(1) provides: "No person shall mail or cause to be mailed an application for an advance voting ballot, unless such person is a resident of this state or is otherwise domiciled in this state." The focal point of the statute is on the person mailing or causing the

mailing of an advance mail voting application. It would be absurd to interpret § 3(*l*)(1) as prohibiting a Kansas resident or entity domiciled in Kansas, such as Plaintiffs, from mailing an absentee voting application to a Kansas voter. Moreover, much of Plaintiffs' fears regarding the so-called Advocacy Ban are unwarranted. Plaintiffs spill much ink regarding their self-professed inability to mail application materials to help voters register to vote by mail in the form of postcards. (Pet. ¶ 121). But a postcard is not an absentee voter application and may continue to be mailed by Plaintiffs or Plaintiffs' service providers.

Plaintiffs also allege § 3(*l*)(1) hampers their ability to engage out-of-state vendors for the purpose of educating Kansas voters on applying for advance voting. (Pet. ¶ 123). But § 3(*l*)(1) does no such thing. The express text of the statute, and any reasonable interpretation thereof, establishes that only the mailing of, or the act of causing to be mailed, an advance mail voting application by a non-Kansas resident is prohibited. Plaintiffs are free to mail postcards and other educational materials to Kansas voters. Plaintiffs are likewise unconstrained in their ability to contract with out-of-state vendors to print and mail Plaintiffs' postcards and other educational materials about advance mail voting in Kansas.

Plaintiffs further claim confusion about whether the statute allows them "to work at all with nonresident vendors or organizations when they produce advance voting application mailers, and whether all forms of advance voting applications, such as web links or scannable QR codes that lead to online advance voting applications, are prohibited." (Pet. 222). As explained in Part III.B.3. above, Plaintiffs ask way too much of the vagueness doctrine. Legislatures are not required to draft statutes with the kind of absolute precision that Plaintiffs here demand, addressing every conceivable fact pattern. *See Hill*, 530 U.S. at 733 ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in

the vast majority of its intended applications.") (internal quotations omitted); *see also Williams*, 553 U.S. at 305-06 (lower court's "basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.").

"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 at 230; *Bollinger*, 302 Kan. at 318. Here, a person of ordinary intelligence is capable of understanding what minimal conduct is restricted by § 3(*l*)(1), i.e., a non-Kansas person or entity may not mail or direct the mailing of an advance mail voting application to a Kansas resident. Moreover, it is difficult to see how there could have been arbitrary enforcement of this statute by Defendant Schmidt, as he is the only person authorized to investigate a complaint and file an action for a violation of § 3(*l*)(1), *see* H.B. 2332 § 3(*l*)(2), and he has done nothing to date.

Plaintiffs' concerns regarding the so-called vagueness of § 3(*l*)(1) also reinforce Defendants' arguments as to why Plaintiffs' claims are unripe. Defendant Schwab has not even had a chance to draft implementing regulations that will provide guidance for both Plaintiffs and the Court in interpreting the contours and constitutionality of § 3(*l*)(1). Indeed, it is entirely possible that such regulations may provide the guidance, at least in part, that Plaintiffs are looking for. As such, any ruling by the Court on Plaintiffs' vagueness claim would be premature. Plaintiffs' vagueness challenge to § 3(*l*)(1) thus must be dismissed.

IV. – Conclusion

In sum, this case presents no justiciable controversy given that Plaintiffs have no standing to bring their claims, the so-called "Advocacy Ban" claims are not even ripe for review, and not a single one of Plaintiffs' claims has legal merit in light of the highly deferential standard that governs these type of election-integrity statutes. Plaintiffs have flung every imaginable claim at the State's new election integrity statutes, desperately hoping that something – *anything* – will stick. Nothing can. Defendants thus request that the Court dismiss Plaintiffs' Amended Petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 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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