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CASE NUMBER: 2021-CV-000299

IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE HUELSMANN, and PATRICIA LEWTER,

Plaintiffs,

v.

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

Defendants.

No. 2021-CV-000299

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

During the final days of the 2021 legislative session, the Kansas Legislature took extraordinary steps to put together and enact two omnibus election bills—Senate Substitute for House Bill 2183 ("H.B. 2183") and House Bill 2332 ("H.B. 2332")—that create new, significant obstacles that voter assistance organizations and voters must now overcome in Kansas elections. Though their proponents contend they protect election integrity, in reality these laws do little more than clamp down on the two things that made the 2020 election secure and successful: (1) voter assistance by pro-democracy advocates, and (2) voting by mail. For that reason, Plaintiffs, four non-partisan, long-standing Kansas voter assistance organizations—the League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center (the "Organizational Plaintiffs")—and three individual Kansas voters (the "Individual Plaintiffs") challenge four provisions set forth therein. Specifically, Plaintiffs ask the Court to declare unconstitutional and enjoin enforcement of:

> (1) a new "false representation of an election official" crime, which makes it a felony for anyone to knowingly engage in conduct that gives the appearance that they are an election official, or that would cause another person to believe they are one (the "Voter Education Restriction");
>
> (2) a standardless requirement that requires election officials to reject advance ballots with a voter signature that does not match the voter's signature on file in the county registration records (the "Signature Rejection Requirement");
>
> (3) a prohibition on any person who is not a resident of Kansas mailing or causing to be mailed applications for advance voting (the "Advocacy Ban"); and
>
> (4) a misdemeanor offense for transmitting or delivering more than ten advance voting ballots on behalf of other voters during an election (the "Delivery Assistance Ban").

As alleged in the Amended Petition, these provisions (collectively, the "Challenged Provisions") threaten Plaintiffs with prosecution for engaging in protected political speech, limit their ability to engage and assist voters through ballot collection efforts, and undermine their core missions by

forcing them to divert scarce resources to help voters counteract their burdens.

Kansas law has long required courts considering motions to dismiss to accept a plaintiff's allegations as true. Yet, Defendants' motion to dismiss (the "Motion") ignores the facts alleged in Plaintiffs' Amended Petition, instead proffering unsupported facts of Defendants' own in an attempt to turn the well-settled legal standard on its head by inviting this Court to prematurely rule on the merits of Plaintiffs' claims, at an inappropriately early stage and without the benefit of any evidentiary hearing. Defendants' legal arguments are no more sound. For example, Defendants ask the Court to make a blanket ruling that whenever counteracting voter fraud is alleged as the purported justification of a law, that law can never be found to violate the fundamental rights to speak or vote. Under Defendants' theory, the mere *possibility* that a law could limit voter fraud would shield it from challenge, no matter how burdensome it is on Kansans' fundamental rights. Defendants have no support for this position, either in the law in federal courts considering challenges under the U.S. Constitution, or in the law in Kansas for challenges (like this one) brought under the Kansas Constitution, both of which demand the highest protections against laws impeding fundamental rights.

When the proper legal standards are applied, Defendants' Motion does not withstand scrutiny, and must be rejected. Plaintiffs sufficiently allege that the Challenged Provisions harm them and their constituents in concrete, non-speculative ways, and that they violate the Kansas Constitution. If the Challenged Provisions are not enjoined, organizations that have served as the bedrock of democratic engagement in Kansas will no longer be able to carry out critical aspects of their missions, and voters across the state will find it more difficult to cast their ballots and have them counted. Because such a result would violate the Kansas Constitution, Plaintiffs must be given the opportunity to prove their case.

II. LEGAL STANDARDS

A. Subject Matter Jurisdiction

In a pre-discovery motion to dismiss under K.S.A. 50-212(b)(1), the Court "accept[s] the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom," and "[i]f those facts and inferences demonstrate . . . standing to sue," the motion must be denied. *Bd. of Cnty. Comm'rs of Sumner Cnty. v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494, 500 (2008). "[This] inquiry is limited to whether the allegations in the petition support . . . standing." *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795, 802 (2017). In direct contradiction of this binding precedent, Defendants suggest that in evaluating Plaintiffs' standing this Court may decline to take Plaintiffs' relevant factual allegations as true because Defendants are asserting a "factual attack." Defs.' Mem. in Support of Mot. to Dismiss ("Mot.") at 5. Defendants confuse the difference between a factual and facial standing challenge.

To assert a *factual* challenge, Defendants must offer actual *evidence* raising a dispute over Plaintiffs' allegations. *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 268, 275 P.3d 869, 878 (2012). Thus, the Kansas Supreme Court has explained that factual standing attacks cannot be asserted until *after* discovery commences. *Id.* at 267-70; *Bremby*, 286 Kan. at 762. This is true *even if* defendants submit evidence at the motion to dismiss stage: the Court must still resolve all factual disputes in the plaintiffs' favor until after at least an evidentiary hearing. *Aeroflex*, 294 Kan. at 270; *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795, 802 (2017). Because discovery has not commenced, and because Defendants here offer *no* evidence disputing Plaintiffs' standing-related allegations, their standing challenge is properly characterized as "facial" and the Court must accept Plaintiffs' allegations as true. *Id.*; *see also Labette Cnty. Med. Ctr. v. Kan. Dep't of Health & Env't*, No. 116, 416, 2017 WL 3203383, 399 P.3d 292, at *5 (Kan. Ct. App. July 28, 2017).

B. Failure to State a Claim

Motions to dismiss have "not been favored by" Kansas courts, *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140, 143 (2001), and the traditional test under which such motions are reviewed "is often stated and familiar," *Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784, 450 P.3d 330, 338 (2019). Courts "assume as true the well-pled facts," and "must resolve every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief. Dismissal is proper *only* when the allegations in the petition *clearly demonstrate* that the plaintiff does not have a claim." *Id.* (emphases added, citations omitted). "[I]f the facts alleged in plaintiffs' amended petition and the reasonable inferences arising from them stated a claim based on their theory 'or any other possible theory,'" the district court must deny the motion. *Id.* (quoting *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013)).

Defendants ask this Court to ignore this well-settled standard, and become the first Kansas court to adopt the standard set forth under Federal Rule of Civil Procedure 12(b)(6). Mot. at 3-4. They do this despite conceding that, in the more than 10 years since the U.S. Supreme Court altered the standard applicable to motions under Federal Rule 12(b)(6), the Kansas Supreme Court has maintained its well-established, less demanding standard discussed above. *Id.* This Court has no authority to depart from that controlling standard. *See, e.g.*, *State v. Brown*, 301 P.3d 789 (Kan. Ct. App. 2013) ("[A]bsent some indication the Kansas Supreme Court has begun a retreat from those decisions—and we are aware of none—they remain controlling authority."), *aff'd*, 399 P.3d 872 (Kan. 2017). No such retreat has been made, and Defendants do not argue as much, thus the well-established standard applies.[1]

[1] Defendants offer no persuasive reason to depart from the existing motion to dismiss standard. The only reasoning provided is that the pleading provisions of federal law and Kansas law are similar. Mot. at 3-4. But the Kansas Supreme Court has emphasized that Kansas courts have

Even if this Court could ignore binding precedent and did so here, it would be of no consequence: Plaintiffs' Amended Petition states "claim[s] to relief that [are] plausible on [their] face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As such, it easily meets the federal standard, too, and would survive a motion to dismiss under either Kansas' or the federal standard.

III. ARGUMENT

A. Plaintiffs have standing.

Plaintiffs have alleged all facts necessary to establish their standing as to each of their claims. The allegations in the Amended Petition demonstrate that (1) Plaintiffs are suffering (and will further suffer) cognizable injuries, and (2) there is a causal connection between those injuries and the Challenged Provisions. *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015).[2] Here, the Organizational Plaintiffs' allegations are sufficient to establish their standing under both direct-injury and associational-standing theories. The Individual Plaintiffs also have sufficiently alleged that they are harmed by the law they challenge. Notably, other than claiming that they have not yet taken action under the Challenged Provisions, Mot. at

authority to interpret "corresponding provisions" of Kansas law "independently of the manner in which federal courts" do, and that blindly following such corresponding federal provisions "seems inconsistent with the notion of state sovereignty." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 621, 440 P.3d 461, 470 (2019) (citing *State v. Lawson*, 296 Kan. 1084, 1091-92, 297 P. 3d 1164 (2013)). Defendants' argument also fails to take into account the severe disruption that changing the standard would have on state court practice. *See Williams*, 310 Kan. at 784 (explaining that Kansas's motion to dismiss standard is "familiar" and "often stated").

[2] Although Kansas courts have referred to the three-part federal standing test when discussing standing requirements, the Kansas Supreme Court has made clear that its two-part test applies. *Kansas Bldg.*, 302 Kan. at 679 ("[W]e have not explicitly abandoned our traditional state test in favor of the federal model. Moreover, as opposed to the United States Constitution, our State Constitution contains no case or controversy provision. The Kansas Constitution grants 'judicial power' exclusively to the courts.").

10-11—which, as explained below, is legally irrelevant—Defendants do not explicitly challenge Plaintiffs' satisfaction of the second, causation-related prong of the standing. This is for good reason: in pre-enforcement challenges to the constitutionality of a statute, "the causation element of standing" requires simply that defendants "possess authority to enforce the complained-of provision." *E.g.*, *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017). Defendants have rightly conceded that they possess such authority under K.S.A. 25-2435. Mot. at 12.

1. The Organizational Plaintiffs have direct standing to bring this challenge.

The Organizational Plaintiffs allege injuries sufficient to confer standing to challenge each of the Challenged Provisions on several grounds. *First*, with respect to their free speech and expression claims against the Voter Education Restriction, Delivery Assistance Ban, and Advocacy Ban, they have standing because, "but for the Act, they would behave in ways that the Act proscribes, and they, therefore, will imminently be forced to alter their behavior in response to the Act." *League of Women Voters v. Hargett* ("*LOWV*"), 400 F. Supp. 3d 706, 718 (M.D. Tenn. 2019) (citing *Clements v. Fashing*, 457 U.S. 957, 962 (1982)); *Moody v. Bd. of Cty. Comm'rs*, 237 Kan. 67, 69, 697 P.2d 1310 (1985) (quotations and citations omitted). Because the Challenged Provisions proscribe conduct in which Plaintiffs wish to engage in the future, their injury is neither "speculative [n]or imaginary." *Moody v. Bd. of Cnty. Comm'rs*, 237 Kan. 67, 69 (1985) (quotations and citations omitted).

Second, the Organizational Plaintiffs also have standing to challenge the Voter Education Restriction, Delivery Assistance Ban, and Advocacy Ban because those laws "imminently 'restrict [their] political activities within the state' and 'limit their ability to associate as political organizations.'" *LOWV*, 400 F. Supp. at 718 (quoting *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014)); *see, e.g.*, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (citing *Meese v. Keene*, 481 U.S. 465, 467 (1987)) (holding wildlife and animal

advocacy groups had standing to bring First Amendment claims due to chilling effect on petitioning created by provision imposing heightened requirements for certain initiatives). As explained below, each of these laws target activities that are core to Plaintiffs' missions and in associating with the voters they serve. As a result, Plaintiffs can independently establish standing under this theory. *See LOWV*, 400 F. Supp. at 718 (recognizing separate theories of standing).

Finally, the Organizational Plaintiffs have standing to challenge the Delivery Assistance Ban and the Signature Rejection Requirement as violations of the fundamental right to vote—and, with respect to the Signature Rejection Requirement, a violation of equal protection and due process—because they have alleged a "concrete and demonstrable injury to [their] activities" resulting from the Challenged Provisions through diversion of resources and frustration to their respective missions. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (holding "there can be no question" non-profit organization with mission of promoting desegregation in housing had organizational standing when the challenged action impaired its ability to "provide counseling and referral services for low-and moderate-income homeseekers").

As explained further below, Plaintiffs' allegations demonstrate their standing to challenge each of the Challenged Provisions under at least one of the theories just discussed.

Voter Education Restriction. Each of the Organizational Plaintiffs have standing to challenge the Voter Education Restriction because it threatens them with felony prosecution merely for engaging in their regular voter registration and engagement activities, restricting and chilling their political speech and protected political activities. Defendants' assertions to the contrary—which are largely premised on a misreading of the statutory text—are incorrect.

H.B. 2183 sets forth a sweeping definition of "false representation of an election official." Am. Pet. ¶¶ 4, 67-72. This law threatens criminal penalties (up to 15-17 months in prison and a

fine of up to $100,000) against not only a person who knowingly "(1) [r]epresent[s] oneself as an election official," but also anyone who knowingly "(2) engag[es] in conduct that gives the appearance of being an election official; or (3) engag[es] in conduct that would cause another person to believe a person engaging in such conduct is an election official." H.B. 2183, New Sec. 3(a)(1)-(3); Am. Pet. ¶ 103. While Defendants press the misguided notion that the Restriction applies only where the actor *intends* to falsely represent an election official, Mot. at 11, the plain statutory text is not so limited. If it were, its definition of false representation of an election official could have simply been the conduct set forth in 3(a)(1) ("[r]epresenting oneself as an election official"). But the Legislature included two alternative definitions, both turning not on the intent of the person engaging in the conduct, but on the subjective view of an observer: subsections 3(a)(2) and 3(a)(3) criminalize "knowingly engaging in . . . conduct that gives the appearance of being an election official [or] that would cause another person to believe a person engaging in such conduct is an election official." Nothing in the text limits the provisions to conduct intentionally designed to give a false impression or cause such a false belief. To find as much would require reading words into the statute, which this Court cannot do. *See, e.g., State v. Carmichael*, 247 Kan. 619, 623 (1990). It would also treat subsections 3(a)(2) and 3(a)(3) as superfluous of subsection 3(a)(1), which is "not permitted under the rules of statutory construction." *Scott v. Weholtz,* 38 Kan. App. 2d 667, 677, 171 P.3d 646 (2007).

The *mens rea* of "knowingly" does not save the Restriction, contrary to Defendants' argument. Mot. at 11-12. A plain reading makes clear that "knowingly" applies to any conduct that gives the appearance of being an election official or would cause someone to believe as much. As alleged, and as discussed in detail in support of Plaintiffs' Motion for Partial Temporary Injunction, the Organizational Plaintiffs *know* based on their experience that when they engage in

voter education, registration, and engagement activities, they—or their employees and volunteers—are often mistakenly perceived by members of the public to be election officials, even when they take affirmative steps to dissuade observers of that perception. Am. Pet. ¶¶ 15, 21, 28, 33, 109-12. The Restriction directly injures them by broadly criminalizing their behavior, even in those circumstances.

Defendants are wrong to argue, *e.g.*, Mot. at 19, that Plaintiffs need allege *actual* enforcement of these provisions to have standing. It is well-settled that when free-speech activity is at stake, it is unnecessary to wait and see how the provisions will be enforced; there is simply too much "danger in putting faith in government representations of prosecutorial restraint." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *LOWV*, 400 F. Supp. 3d at 718. Plaintiffs need only allege, as they have here, that a law "facially restrict[s] expressive activity by the class to which the plaintiff belongs." *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999); *see also Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 988 (D. Kan. 2020), *amended*, No. CV 18-2657, 2020 WL 1659855 (D. Kan. Apr. 3, 2020) ("The threat of prosecution is generally credible where a challenged provision on its face prohibits the conduct in which plaintiffs wish to engage, and the state has not disavowed any intention of invoking the provision against them.") (quoting *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 901 (10th Cir. 2016)); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) (citations omitted) (standing existed where statute "appear[ed] by its terms to apply" to Plaintiffs, who "discontinued distributing its voter guide" as a result). The Organizational Plaintiffs have alleged that their voter engagement activities are proscribed by the Restriction given they know such activities are likely to be interpreted by some members of the public as activities undertaken by election officials. Am. Pet. ¶¶ 15-16, 21-22, 28, 33-34, 109-10. They have therefore alleged a credible threat of

prosecution and have standing to challenge the Restriction.[3]

But even if the Organizational Plaintiffs had not alleged a credible threat of prosecution, they would have standing on independent grounds because they have also adequately alleged that the Restriction has forced (and will continue to force) them to curtail their "political activities" and ability to "associate" with voters, an entirely distinct injury that confers standing in its own right. *LOWV*, 400 F. Supp. at 718; *see also Walker*, 450 F.3d at 1092 (holding Plaintiffs have standing where a law is "the *reason* they presently have no specific plans to" engage in allegedly protected conduct). The Amended Petition details how Organizational Plaintiffs have *already* had to curtail, and in many instances entirely end, their election related activities due to the Restriction. Am. Pet. ¶¶ 16 ("[T]he League and its local chapters have had to cancel voter registration drives and events due to fear of prosecution under the Restriction."); *id.* ¶ 22 ("Loud Light was forced to cancel its plans to register voters as part of its celebration of the 50th Anniversary of the 26th Amendment from July 1 to 3, and also cancelled all of its in-person voter registration events on July 13."); *id.* ¶ 34 ("[The Center] is no longer affirmatively offering voter registration or assistance during its intake process. It has also placed a freeze on offering voter registration at its public events . . . ."). These activities are essential to their core message and ability to communicate it to Kansan voters. *Id.* ¶¶ 11-12, 15, 19-22, 26-28, 32-33, 112. Accordingly, Plaintiffs have sufficiently alleged that the Restriction injures them by restricting and chilling their protected political activities, in addition to creating a credible threat of prosecution for engaging in those activities.[4]

[3] And, as Defendants recognize in their Motion, Mot. at 10, they "are not even the only parties in charge of enforcing many of the Act's provisions, so [any] promises [not to prosecute] would be especially immaterial" here. *LOWV*, 400 F. Supp. 3d at 719.

[4] Relying on *Clark v. Edwards*, 468 F. Supp. 3d 725, 748 (M.D. La. 2020), Defendants wrongly argue that the Challenged Provisions "do not impair [Plaintiffs'] message" but merely force them

Delivery Assistance Ban. Organizational Plaintiffs have standing to challenge the constitutionality of the Delivery Assistance Ban because it threatens them with prosecution for continuing to engage, assist, and communicate with voters by helping them deliver their ballots, restricts their political activities within the state, and forces them to divert scarce resources to counteract the burdensome effects of the Ban on Kansas voters.

First, the Ban "facially restrict[s]" and threatens Kansas Appleseed and the Center with prosecution for providing voter assistance they wish to perform (and have regularly performed) by delivering advanced ballots. *Whitehouse*, 199 F.3d at 31; *Animal Legal Def. Fund*, 434 F. Supp. 3d at 988. As alleged, both regularly assist voters, delivering more than ten advance ballots as part of their efforts to engage with voters and communicate the importance of democratic participation. Am. Pet. ¶¶ 26, 36. The Ban facially prohibits these important services, injuring these Plaintiffs by creating a reasonable fear of prosecution merely for providing help and assistance to voters.

Second, as with the Voter Education Restriction, Kansas Appleseed and the Center also have standing to challenge the Delivery Assistance Ban because they have alleged that it prevents them from engaging in their political activities and associating with Kansas voters. *See LOWV*, 400 F. Supp. at 718; *Walker*, 450 F.3d at 1092. The Amended Petition explains that providing ballot delivery assistance is an important way in which both of these organizations engage in elections and associate with voters. Am. Pet. ¶¶ 26, 30, 36, 37, 47. That is all Plaintiffs need to allege. *See LOVW*, 400 F. Supp. 3d at 718 (explaining that law restricting registration drives

to "tinker with the mechanics" of how they engage with voters. Mot. at 15-16. *Clark* is inapposite. There, the plaintiffs' theory of standing was based on an alleged diversion of resources to obtain additional protections for voters in the wake of COVID-19. The court explained that this diversion did not "*counteract*" the specific policies being challenged, instead it simply counteracted the effects of COVID-19. *Clark* at 749. Here, Plaintiffs' standing to challenge the Voter Education Restriction is based on the fact that the Restriction has directly restricted their protected political activities by criminalizing them.

injured plaintiffs by "restrict[ing] [their] political activities within the state" and "limit[ing] their ability to associate as political organizations"). Because the Ban directly regulates and restricts these important political activities, Kansas Appleseed and the Center have suffered a cognizable injury establishing standing.

Finally, Kansas Appleseed and the Center also have standing to advance their right-to-vote claims because the Ban causes them to divert their scarce resources to counteract the law's burdensome effects. *See* Am. Pet. ¶ 36 (alleging the Ban "requires that the Center expend more resources by using staff hours and enlisting additional volunteers in order to reach and serve the same number of disabled voters who require this type of assistance in future elections," which it "would expend on its other key services"); *id.* ¶ 30 (alleging the Ban requires Kansas Appleseed "to enlist far more volunteers to ensure that the same number of ballots are collected in future elections."). These are precisely the sort of resource diversions that courts consistently find sufficient for standing purposes. *E.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350-1351 (11th Cir. 2009) (holding organization had standing because it diverted volunteer activities from taking citizens to the polls to helping them obtain photo IDs for voting); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (holding organization had standing when it altered its strategy and redirected its focus to in-person voting instead of absentee voting after a change in the law); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019) ("In election law cases, an organization can establish standing by showing that it will need to divert resources from general voting initiatives or other missions of the organization to address the impacts of election laws or policies.") (citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014)).

Defendants are wrong to assert that Organizational Plaintiffs cannot be injured by being

forced to divert *more* of their scarce resources to activities in which they already engage. *See* Mot. at 16-17 (claiming "infus[ing] additional resources to programs and/or missions that [Plaintiffs] are already implementing" is not a cognizable injury). Courts routinely conclude that an organization suffers a cognizable injury when forced to divert its resources to counteract the effects of a challenged law or policy, regardless of whether it has engaged in similar activities in the past. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (reversing district court order accepting this same argument and holding diversion of resources towards activities that plaintiff organization already "regularly [] conducted" was a cognizable injury); *Fair Fight Action*, 413 F. Supp. 3d at 1267-68 (rejecting argument that plaintiffs' pre-existing "get-out-the-vote activities and voter-education programs" precluded them from claiming injury from having to divert further resources to such activities). And Defendants' reliance on *NAACP v. City of Kyle*, 626 F.3d 233 (5th Cir. 2010), does not save them. *See* Mot. at 17. There, the plaintiff's only claim of diversion of resources was lobbying against and monitoring the ordinance challenged in that suit. *City of Kyle* at 238-39. In contrast, in the instant case, Kansas Appleseed and the Center must divert resources to "mitigating [the] real-world impact" of a challenged law on the organization and the public. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 611-12 (5th Cir. 2017) (finding standing under such circumstances and distinguishing *City of Kyle* on this ground).

Defendants also incorrectly claim a "close reading" of Plaintiffs' allegations suggests their diversion of resources is insufficiently large to harm to satisfy standing requirements. Mot. at 17. This is simply wrong. There is no requirement that a resource diversion "be substantial; it need not measure more than an identifiable trifle.'" *OCA-Greater Houston*, 867 F.3d at 612 (citations omitted); *see also Crawford v. Marion Cnty. Election Bd*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (noting "the fact that the added cost has not been estimated and may be slight

does not affect standing, which requires only a minimal showing of injury"). The Organizational Plaintiffs have sufficiently alleged facts to establish standing to challenge the constitutionality of the Delivery Assistance Ban on right-to-vote grounds.

Advocacy Ban. Loud Light and Kansas Appleseed have standing to challenge the Advocacy Ban on free speech and association grounds because, as they allege in the Amended Petition, it threatens to impose crippling fines merely for using out-of-state vendors to send voters advance voting applications. *See* H.B. 2332, Sec. 3; Am. Pet. ¶ 4. Specifically, the Ban prevents all people and organizations, including non-partisan organizations, who are not residents of Kansas from mailing "or caus[ing] to be mailed" anything that includes an application to obtain an advance voting ballot, imposing a penalty of $20 per advance voting application sent from out of state. *Id.* Loud Light and Kansas Appleseed have alleged that the Advocacy Ban imposes on them a reasonable fear of prosecution for engaging in protected speech. *Id.* ¶¶ 23, 29.

Distributing absentee or mail ballot applications and assisting voters in returning them is core First Amendment activity. *See, e.g.*, *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020). The Advocacy Ban's $20 penalty for *each mailer* sent to voters from out of state imposes daunting penalties that injure these freedoms. Am. Pet. ¶ 29 (Advocacy Ban "places Kansas Appleseed at risk of being investigated and charged by the Attorney General if it mails absentee applications to voters and it continues to use the same out-of-state vendors it currently uses to send them."); *see id.* ¶¶ 119-21. Kansas Appleseed typically engages with out-of-state vendors for purposes of mailing advance voting materials because its cost-effectiveness allows them to reach more voters; Loud Light has done the same and may do so again in the future. *Id.* ¶¶ 29, 121; *see id.* ¶ 122 ("In doing so, Plaintiffs are able to interact with significantly more voters

and to fully express their core message of political and civic engagement."). They wish to continue doing so as they promote democratic engagement by sending Kansas voters applications for advance ballots, but they will violate the Advocacy Ban if they do.

The Advocacy Ban also injures Plaintiffs by restricting their ability to engage in one of their important political activities and ways in which they associate with voters in Kansas. Due to the Advocacy Ban, Plaintiffs are "unable to engage with out-of-state organizations and companies of their choice to develop and send informational mailers that include advance voting applications." Am. Pet. ¶ 23 ("The Advocacy Ban likewise significantly . . . limits the ways that [Loud Light] can engage with voters by dictating where the companies it can use to send mailers to voters must be located."); *id.* ¶ 122 ("Given the increase in advance voting, Plaintiffs view mailing advance voting applications as an important way to engage with their voters in the future . . . ."); *see also id.* ¶¶ 118, 123.

Finally, Loud Light and Kansas Appleseed have also sufficiently alleged that the Advocacy Ban injures them by forcing them to divert resources toward locating and using vendors from within the state, even though they have traditionally relied on other preferred vendors from out of state to send mailers to voters. *See* Am. Pet. ¶¶ 23, 29, 121-23.

Signature Rejection Requirement. Loud Light, the League, and the Center have standing to challenge the Signature Rejection Requirement because it forces them to divert resources to counteract its burdensome effect on Kansas voters. *Havens*, 455 U.S. at 378-79; *Billups*, 554 F.3d at 1350-1351; *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 624. The Requirement imposes a nonuniform and standardless requirement that canvassers reject mailed advance voting ballots if they perceive a mismatch between the signature on the ballot envelope and the signature on file in the county voter registration. H.B. 2183, Sec. 5; Am. Pet. ¶¶ 4, 127. This provision offers *no*

guidance to election officials other than that signature matching "may occur by electronic device or by human inspection." *Id.* ¶ 130. It thus expressly leaves Kansas's 105 county election officials entirely on their own to choose this verification process and the evidentiary standards that it will entail. *Id.* ¶¶ 4, 130. As the Amended Petition alleges, this new requirement guarantees arbitrary treatment of ballots cast by voters across this state, subjecting their fundamental right to vote to an inexpert and error-prone process. *Id.* ¶¶ 4, 17, 128-52.

These Organizational Plaintiffs will have to divert resources to counteract the disenfranchising and burdensome effects of the Requirement. For example, Loud Light has for years operated a program in which it identifies, contacts, and seeks to help voters "cure" their advanced ballots when they are rejected by election officials. Am. Pet. ¶¶ 20, 24. Now, because counties are required to reject any signatures that an official believes do not match, Loud Light will have to recruit and train *more* staff and volunteers to help *more* voters cure their ballots to avoid the disenfranchising effects of this policy because the number of rejected ballots is all but certain to *increase*. As alleged, Am Pet. ¶¶ 4, 17, 24, 128-52, this is because lay persons are prone to significant rates of error in identifying mismatched signatures, which is exacerbated further by commons patterns of handwriting variability. The League and the Center must similarly divert critical resources to counteract the Requirement. *Id.* ¶ 17 (alleging facts for diversion of resources by League); *id.* ¶ 35 (same, by Center). And all three organizations would have expended these resources on other important programs and initiatives but for the Requirement. *Id.* ¶¶ 17, 24, 35.

To the extent Defendants argue that these diversions of resources amount to mere "[l]ogistical readjustments" insufficient to confer standing, Mot. at 16 (citing *Clark v. Edwards*, 468 F. Supp. 3d 725, 748(2020)), case law offers them no support. As noted, *Clark* explicitly recognizes that "organizational plaintiffs . . . challenging policies that ha[ve] the effect of making

it more *difficult* to vote" have standing, *id.* at 749. (citing *Fair Fight Action*, 413 F. Supp. 3d at 1259). Here, the Signature Rejection Requirement injures Loud Light, the League, and the Center by forcing them to "redistribute resources from existing programs to ones specifically designed to address [those] challenged practices." *Fair Fight Action*, 413 F. Supp. at 1267. Accordingly, they have standing.

2. The Organizational Plaintiffs have associational standing.

The Organizational Plaintiffs have further alleged sufficient facts to confer associational standing to challenge the Voter Education Restriction, the Delivery Assistance Ban, and the Signature Rejection Requirement. As to each, the Amended Petition establishes that: (1) Plaintiffs' members and constituents have standing in their own right; (2) the interests they seek to protect are germane to their purposes; and (3) neither the claim asserted nor relief requested requires the individuals' participation. *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

a. Plaintiffs may sue on behalf of their constituents.

As a threshold matter, each of the Organizational Plaintiffs have standing to sue on behalf of their members and their *constituents*, and Defendants are wrong to suggest otherwise.[5] Mot. at 18-19. In *Hunt v. Washington State Apple Advertising Commission*, the seminal case in which the U.S. Supreme Court established associational standing, the Court held that the Washington State Apple Advertising Commission could sue on behalf of its *constituents* (apple growers in Washington) using an associational-standing theory, even though those constituents were not formal members of the organization. 432 U.S. at 345. In reaching this conclusion, the Supreme Court considered whether the constituents were the primary beneficiaries of the Commission,

[5] The League is a legal membership organization, while Loud Light, Kansas Appleseed, and the Center do not have formal members. *See* Am. Pet. ¶¶ 10, 19, 26, 32.

whether the constituents possessed some indicia of membership, and whether there was an identity of interests such that the organization provides the means by which they express their collective views and protect their collective interests. *Id.* Because this inquiry must not "exalt form over substance," *id.* 345, these guideposts are "non-exhaustive." *Disability Rights Pa. v. Pa. Dep't of Human Serv.*, No. 19-cv-737, 2020 WL 1491186, at *7 (M.D. Pa. Mar. 27, 2020). Courts have found that each case requires an independent investigation into all the relevant facts. *Id.*; *see also Citizens Coal Council v. Matt Canestrale Contracting, Inc*., 40 F. Supp. 3d 632, 640 (W.D. Pa. 2014) (same). The Supreme Court's decision in *Hunt* has been consistently interpreted to stand for the proposition that a non-membership organization can assert representational standing on behalf of its constituents even if it does not have members in legal form. *See, e.g., id.*; *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 280 (3d Cir. 2014) (rejecting a "formalistic" assessment of membership); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999).

Here, Loud Light, Kansas Appleseed, and the Center's allegations about their constituencies are more than sufficient to establish associational standing. *First*, they bring this litigation on behalf of their primary beneficiaries. Am. Pet. ¶ 19 ("Loud Light . . . engage[s], educate[s], and empower[s] individuals from underrepresented populations, and in particular, young voters, to become active in the political process"), *id.* ¶ 26 ("Appleseed's voter engagement work focuses on voter education and turnout in Southwest and Southeast Kansas where underrepresented populations, including voters experiencing food insecurity, immigrants, and minorities, are not afforded the same access to the ballot as others in Kansas"), *id.* ¶ 32 (the Center advocates for "justice, equality, and essential services" for people with disabilities). *Second*, these organizations also have substantial indicia of traditional membership. *E.g.*, *id.* ¶ 19 (Loud Light

"builds coalitions within the community advocate for positive policy changes for youth" to accomplish its goals); *id.* ¶ 26 ("Appleseed works with community partners to understand the root causes of problems, support strong grassroots coalitions, advocates for comprehensive solutions."); *id.* ¶ 32 (the Center "is a federally-recognized not-for-profit Center for Independent Living operated and governed by people who themselves have disabilities"). Finally, these organizations' activities are driven and tailored by the needs and interests of their specific constituencies so that those constituents best "express their collective views and protect their collective interests." *Hunt*, 432 U.S. at 345; *see* Am. Pet. ¶ 19 (discussing how Loud Light tailors its activities to those that will enable young voters to most effectively ensure their "needs are met within the community"); *id.* ¶ 26 (same, for residents of Southwest and Southeast Kansas); *id.* ¶ 32 (same, for people with disabilities). Thus, these organizations have sufficiently alleged facts necessary to assert claims on behalf of constituents.

Defendants wrongly rely on *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004), for the proposition that the organizations cannot sue on behalf of third parties. Mot. at 18. That case is wholly inapposite because it involves the separate doctrine of third-party standing, which is not at issue here. *Kowalski* involved "two attorneys who s[ought] to invoke the rights of hypothetical indigents." *Id.* at 127. That attempt invoked the "third-party standing" doctrine, which in certain circumstances allows an individual to assert a claim on behalf of another individual when the two share a close relationship and the second is hindered from asserting the suit on her own behalf. *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). That doctrine has no application here, where *organizations* are seeking to assert claims on behalf of their members and constituents.

Regardless, even if this Court were to find otherwise—which is should not—the League is a formal membership organization with standing to sue on behalf of members and has alleged that

it does so here. *See* Am. Pet. ¶¶ 10-18. And it is well-settled that only one plaintiff with standing is necessary to assert a claim. *E.g., Crawford v. Marion Cnty. Election Bd.*, 472 F.3d at 951 (declining to reach arguments challenging other Plaintiffs' standing because political party had standing to sue both on its own behalf and on behalf of its members).

b. Organizational Plaintiffs' constituents and members have individual standing.

The Organizational Plaintiffs have alleged facts establishing that their individual members and constituents would have standing to make the same claims. For the Voter Education Restriction, Organizational Plaintiffs' individual members and constituents have standing to sue for the same reasons the organizations do: the Restriction threatens criminal prosecution against them, significantly inhibiting their ability to engage in political speech. *See supra* at 7-10; *see also* Am. Pet. ¶ 15 (explaining chilling effect on League's members); *see also id.* ¶ 21 (discussing chilling effect the Restriction will have on "Loud Light's dozens of student fellows and hundreds of volunteers' political speech"); *id.* ¶ 33 (same, for the Center's employees and volunteers).

This is also true for the Delivery Assistance Ban. With respect to the free speech and association theory, the Ban imposes a credible threat of prosecution against anyone—including Plaintiffs' members and constituents—who wish to help Kansas voters by collecting more than ten advance ballots in future elections. *See supra* at 11-13; *see* Am. Pet. ¶¶ 14, 18, 26, 30. Likewise, Plaintiffs have alleged that, by restricting the universe of individuals who can help them deliver ballots, the Ban imposes unjustified burdens on their members and constituents' ability to exercise their fundamental right to vote. *Id.* ¶ 31 ("Many of the individuals that Kansas Appleseed serves have relied on delivery assistance from the organization to cast their ballot."); *id.* ¶ 32 (explaining the Center returns ballots for people with disabilities who need assistance); *id.* ¶ 157 (explaining that voters who need assistance have "voluntarily chose[n] to provide trusted representatives of

community organizations like Kansas Appleseed, League members, [and] churches . . . to return to county election offices or other drop-off sites."). Those burdens would give Plaintiffs' members and constituents standing to sue on their own accord.

Finally, Plaintiffs' members and constituents would also have standing to challenge the Signature Rejection Requirement, which injures them by unjustifiably burdening their ability to exercise their fundamental right to vote. *Id.* ¶ 128 ("The Signature Rejection Requirement is certain to disenfranchise lawful Kansas voters . . . as well as Plaintiffs' members and constituents—and subject others to needless additional steps simply to ensure their lawfully cast ballot is counted."); *id.* ¶ 136 ("It is therefore inevitable that Kansas election officials who choose to inspect signatures by hand will erroneously determine voters' signatures are mismatched, leading to wrongful rejection of legitimate ballots and the disenfranchisement hundreds of eligible voters, as well as disparate rates of disenfranchisement across counties."). In particular, the Requirement harms members of the League, "many of whom are older and are at significant risk of having their ballots flagged erroneously as having a mismatched signature." *Id.* ¶ 17. It is also especially harmful to the Center's "constituency, who are more likely to vote by advance ballot and, as a result, are more likely to be put at risk of signature mismatch and also to face substantial burdens in attempting to cure such a mismatch due to challenges with transportation and communication with election officials." *Id.* ¶ 35.

Defendants' attempt to belittle the Requirement's disenfranchising effects as "hypothetical concerns about human errors" is both incorrect and irrelevant. Mot. at 13. The effects are by no means hypothetical. Plaintiffs' allegations—which at this stage the Court must accept as true, *Aeroflex*, 294 Kan. 258 at 268; *Bremby*, 286 Kan. at 762; *Kansas National Education Ass'n*, 305 Kan. 739 at 747—provide detailed information about how the standardless signature-matching

regime this provision creates will inevitably disenfranchise lawful voters. *See, e.g.*, Am. Pet. ¶¶ 131-32 (explaining how layperson signature matching is unreliable); *id.* ¶¶ 133-35 (explaining accurate signature matching is difficult due to signature variability among voters). Plaintiffs further explain how the risk of disenfranchisement is particularly high among voters with disabilities, such as the Center's members, and allege that many of those voters may not fall into the exception permitted for those who have a disability that prevents them from having a consistent signature. *Id.* at 35, 141-46. Courts across the country have consistently found such a risk of disenfranchisement to be constitutionally unacceptable *on the merits*, and certainly sufficient to demonstrate standing at the pleadings stage. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019) ("[E]ven if election officials uniformly and expertly judged signatures, rightful ballots still would be rejected just because of the inherent nature of signatures."); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206 (D.N.H. 2018) ("As will become evident, this signature-matching process is fundamentally flawed."); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339–40 (N.D. Ga. 2018) (enjoining signature matching because it violated due process guarantees); *Fla. Democratic Party v. Detzner*, No. 16-cv-607, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) (ballot rejection rules "ha[ve] categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time"); *League of United Latin American Citizens of Idaho v. Pate*, No. CVCV056403, 2019 WL 6358335, at *15–17 (Iowa Dist. Ct. Sept. 30, 2019) ("LULAC") (rejecting signature matching as violation of due process and equal protection).

Given the stage of this litigation, Defendants' reliance on *Memphis A. Philip Randolph Institute v. Hargett*, 978 F.3d 378 (6th Cir. 2020)—which involved evaluation of the sufficiency of plaintiffs' *evidence*—is misplaced. *See* Mot. at 13. Specifically, that court concluded that the

defendants had *rebutted* plaintiffs' evidence regarding the likelihood of signature rejection with affirmative evidence of their own. Of course, Defendants cannot present evidence at the pleading stage of this case. *Aeroflex*, 294 Kan. at 268. Their contention that Plaintiffs have failed to allege a cognizable injury based in "human error[]," Mot. at 13, is also not well founded. When a state disenfranchises voters, it denies them their fundamental right to vote. It makes little difference whether the disenfranchisement is deliberate or accidental. For this reason, many courts have found that election policies pose significant burdens on the fundamental right to vote when they cause voters to fall victim to election-worker "error." *See, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593-94 (6th Cir. 2012) (affirming preliminary injunction where voters right to vote was infringed due to poll worker error).

In sum, the Organizational Plaintiffs' members and constituents would have standing to challenge the Voter Education Restriction, Delivery Assistance Ban, and Signature Rejection Requirement.

c. The interests Organizational Plaintiffs seek to protect are germane to their purposes.

The Organizational Plaintiffs also satisfy the second prong of the associational standing test: the interests they seek to protect in this litigation are clearly "germane to [their] purpose[s]." *Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 747, 387 P.3d 795 (2017); *Kan. Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1021 (10th Cir. 1992). The Organizational Plaintiffs' missions are to engage Kansas voters and promote electoral participation. Am. Pet. ¶¶ 11, 19, 26, 32. By impeding their ability to engage with Kansas voters and burdening Kansas voters' ability to exercise their right to vote, the Challenged Provisions directly injure at the Organizational Plaintiffs' missions.

Notably, Defendants' challenge to the Organizational Plaintiffs' satisfaction of this prong

focuses solely on the Voter Education Restriction. Mot. at 14-15. They present a confused theory that Plaintiffs must have an interest in "knowingly engaging in conduct that is reasonably certain to cause a voter to believe [Plaintiffs'] members are election officials or formal employees of county election offices." *Id.* at 14. But this argument confuses what the Restriction *proscribes* (conduct causing another to believe the person is employed by the state or county) with the interests Plaintiffs seek to *protect* (encouraging and promoting electoral participation in Kansas). Am. Pet. ¶¶ 11, 19, 26, 32. The case Defendants cite demonstrates their folly. Mot. at 14 (citing *Kan. Health Care Ass'n*, 958 F.2d at 1021). In *Kansas Health Care Association*, there was no dispute that the plaintiff organization's "purpose of promoting the availability of long-term care for the elderly," *id.* at 1021, was germane to its interest in seeking injunction against the State's Medicaid reimbursement plan. This case confirms that, in this inquiry, the Court considers the interest that Plaintiffs seek to vindicate by "initiating this action," not the acts or prohibitions that implicate those interests. *Bremby*, 286 Kan. at 763 (group's purpose of "preserving and enhancing the quality of life in [certain] counties" was germane to "interests that the association s[ought] to protect by initiating th[e] action—namely, ensuring that any landfill that is located in [one of the counties] meets environmental standards"). That is clearly the case here.

d. Neither the claims asserted nor relief requested requires individual participation.

Finally, the Organizational Plaintiffs can assert claims on behalf of their members and constituents because neither the requested relief nor the asserted claim requires those individuals' participation in this litigation. *See 312 Educ. Ass'n v. U.S.D. No. 312*, 273 Kan. 875, 884-86, 47 P.3d 383 (Kan. 2002). As Defendants concede, where declaratory and injunctive relief are sought, the requested relief does not require participation of individuals. Mot. at 14 (citing *Kan. Health Care Ass'n, Inc.*, 958 F.2d at 1021-22). Defendants' argument as to this prong again focuses only

on the Voter Education Restriction, Mot. at 14-15, asserting that Plaintiffs' *claims* require individual participation because each member or constituent will violate the Restriction differently, *see id.* This is incorrect.

When organizations seek facial injunctive relief against unconstitutional statutes on behalf of their members, it is *not* necessary for individual members to bring the claims. *E.g., N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 7 n.3 (1988). This is because, in such cases, "there is complete identity between the interests of the [organization] and those of its member[s] . . . with respect to the issues raised in th[e] suit, and the necessary proof could be presented in a group context." *N.Y. State Club Ass'n*, 487 U.S. at 10. Plaintiffs' claims that the Challenged Provisions are facially unconstitutional can be proved through evidence in a "group context." *Id*. The sole case Defendants cite for the proposition that individual members are necessary in this litigation, *312 Educ. Association*, involved individualized money damages that required evidence from *each* teacher to determine whether they were employed in the proper pay scale. 273 Kan. at 885; *see* Mot. at 14-15. Such individualized examinations are not needed here to prove the Organizational Plaintiffs' claims. *N.Y. State Club*, 487 U.S. at 10; *Pennell*, 485 U.S. at 7 n.3.

3. The Individual Plaintiffs have independent standing to challenge the Delivery Assistance Ban.

In 2020 alone, Plaintiff Charley Crabtree assisted more than 75 voters living in Douglas County nursing homes as part of his pursuit to engage with voters and convey his message and belief in the importance of civic engagement. Am. Pet. ¶ 37. Similarly, but for the Ban, Plaintiffs Patricia Lewter and Faye Huelsmann, sisters of a religious institute of women of the Roman Catholic Church in Concordia, would assist more than ten friends and neighbors in their group home. *Id.* ¶¶ 38-39. To them, the ability to do so is critical to their wish to encourage their peers

to get involved in the democratic process and their commitment to "building a community of loving, helpful neighbors united by faith." *Id.* Accordingly, even if the Organizational Plaintiffs did not have standing to bring a claim against the Delivery Assistance Ban (they do), the Individual Plaintiffs' allegations are sufficient to establish standing because the Ban directly impedes them from engaging in activities they wish to perform in the future.

In claiming otherwise, Defendants repeat the same misguided argument that they have not actually prosecuted or threatened to prosecute anyone under the Delivery Assistance Ban. Mot. at 21. But as explained previously, because the Ban directly prohibits the activity in which these Plaintiffs want to engage, Plaintiffs need not allege that Defendants have actually threatened prosecution under this law. *See supra* at 9-10. Defendants' separate argument that Mr. Crabtree's choice not to subject himself to criminal prosecution by limiting the number of voters he assists to avoid being prosecuted under the Ban is somehow "self-induced and not caused by Defendants" makes no sense. Mot. at 20. If Mr. Crabtree continues to help more than 10 voters, he will violate the Ban. His choice not to do so is clearly caused by the Ban, and Defendants' authority to enforce it. Finally, Defendants' assertion that this activity is not expressive conduct, *id.*, simply mistakes the standing inquiry (*i.e.*, does the Ban force Mr. Crabtree to limit his activity) for the merits inquiry (*i.e.*, does not result in a violation of his constitutional rights). The only question relevant for standing is whether the Ban limits Mr. Crabtree's ability to engage in *activity* he wishes to perform; the question of whether that limitation is *lawful* has no impact on his standing. *See Davis v. United States*, 564 U.S. 229, 249 n. 10 (2011) (rejecting argument because it confused an asserted "weakness on the merits with the absence of [] standing").

4. Plaintiffs' claims against the Advocacy Ban are ripe.

Defendants' final jurisdictional argument—that the Court cannot reach Plaintiffs' challenge to the Advocacy Ban because it is not ripe—also cannot withstand scrutiny. Mot. at 52-

54. Ripeness determinations are generally guided by a two-factor test, considering (1) the fitness of the issue for judicial resolution and (2) the hardship to the parties of withholding review. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). While Defendants nominally identify this "customary ripeness analysis," they fail to acknowledge that courts explicitly relax this inquiry "in circumstances such as this where a facial challenge, implicating First Amendment values, is brought." *Id.* (citing *ACORN v. Tulsa*, 835 F.2d 735, 739 (10th Cir. 1987)); *Martin Tractor Co. v. Federal Election Comm'n*, 627 F.2d 375, 380 (D.C. Cir.). "Thus, [the] ripeness inquiry in the context of *this* facial challenge . . . focuses on three elements: (1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review." *New Mexicans for Bill Richardson*, 64 F.3d at 1500 (citing *Sierra Club v. Yeutter*, 911 F.2d 1405, 1416 (10th Cir.1990) (emphasis added)).

As to the first two factors, delaying litigation would cause Plaintiffs hardship because it would create a "direct and immediate dilemma for the parties." *Id.* at 1500. Defendants' argument to the contrary, Mot. at 54, belies even the case law that they cite. In *New Mexicans for Bill Richardson*, on which Defendants rely, the state argued that the plaintiff's challenge to a law prohibiting funds solicited for or received by a federal campaign from being used in a state election campaign was not ripe because, at the time of filing suit, the plaintiff—a member of the U.S. House of Representatives—had not announced an intention to run for state office. 64 F.3d at 1500. Rejecting this argument and holding the case *was* ripe, the court explained that, because the plaintiff had not ruled out running for state office, the challenged law was impacting "how, and the extent to which" he could raise contributions. *Id.* In other words, the law injured the plaintiff in the present because it was forcing him to raise money "differently than he ha[d] in the past,

rendering his ability to . . . exercise his constitutionally protected rights[] less effective." *Id.*; *see also* 13A Wright, Miller & Cooper, Fed. Practice & Procedure § 3532.3 at 159 ("First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe."). So too, here. As the Amended Petition alleges, the Advocacy Ban forces Plaintiffs to alter their plans with respect to how they "express their core message of political and civic engagement" because they are not able to use the same cost-effective out-of-state mail vendors they have in the past when they send advance voting applications. Am. Pet. ¶¶ 121-23. As a result, their ability to "interact with" and share their message with voters is diminished. *Id.*

With regard to fitness of the controversy for judicial review, Defendants incorrectly argue that the claims against the Advocacy Ban are not ripe because "there is no pending enforcement action under investigation or fine of Plaintiffs' respective members." Mot. at 53. Again, the case law lends them no support. "The principle that one does not have to await the consummation of threatened injury to obtain preventive relief is particularly true in the election context, where we [the Supreme Court] often have allowed preenforcement challenges to restrictions on speech." *New Mexicans for Bill Richardson*, 64 F.3d at 1501 (citations and quotations omitted).

Defendants further suggest that the claim is not sufficiently fit for resolution because "Defendant Schwab has not had a chance to draft implementing regulations that will provide guidance for both Plaintiffs and the Court in interpreting the contours and constitutionality of [the statue]." Mot. at 63. But Plaintiffs "are not challenging how the Act's requirements are going to be enforced; they are challenging what those requirements are. The record necessary to support such a challenge can be assembled [over the course of this litigation], whether or not any enforcement or rulemaking has taken place." *Tenn. State Conf. of the N.A.A.C.P. v. Hargett*, 441

F. Supp. 3d 609, 628 (M.D. Tenn. 2019) (citing *Hill v. Snyder*, 878 F.3d 193, 213–14 (6th Cir. 2017)). As in *Hargett*, the "defendants have provided no persuasive basis for concluding that litigating the Act now, rather than later, would result in an undue hardship to them. Waiting, on the other hand, would be likely to cause significant hardship for the plaintiffs," *id.*, who only have one chance to plan for and execute their plans for the next election cycle, which will likely begin during the course of the litigation. Plaintiffs' Advocacy Ban claims are therefore ripe.

B. Plaintiffs have stated claims upon which relief can be granted.

Plaintiffs' Amended Petition pleads six distinct claims for relief: violations of the right to free speech and association under the Kansas Constitution Bill of Rights, sections 3 and 11 (Count I), violations of the right to vote under Article 5, section 1, and the Bill of Rights, sections 1 and 2 (Count II), violations of equal protection under the Bill of Rights, sections 1 and 2 and Article 5, section 1 (Count III), overbreadth (Count IV), vagueness (Count V), and due process under the Bill of Rights, section 18 (Count VI). *See* Am. Pet. ¶¶ 168-230.

Defendants' arguments for dismissal under K.S.A. 50-212(b)(6) are almost entirely premised on the procedurally improper (and incorrect) assertion that the Challenged Provisions do not impair or infringe fundamental rights at all, or at most impose *de minimis* burdens. *See* Mot. at 21, 39, 44, 43, 45-46, 47-48, 48-49, 54. In doing so, Defendants ask the Court to *ignore* Plaintiffs' factual allegations, or, at the very least, to view those allegations in a light unfavorable to Plaintiffs, and offer the Court their *own* unsupported factual assertions instead. *Id.* at 26-27 (referring, without citation, to "reports" of "disreputable persons" engaging in election official impersonation in other states); *id.* at 29 (claiming, without citing any support, that Kansas legislators heard about incidents of voters receiving letters "containing confusing and/or inaccurate information"); *id.* at 57 (asserting, without citing any support, that counties received "angry and confused" calls from voters).

But as the Kansas Supreme Court recently explained, whether and how severely a law impacts a fundamental right is a *factual question*. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 672, 440 P.3d 461 (2019) (explaining proper level of scrutiny depends on a preliminary assessment as to whether a law impairs a right, which requires "factual findings"). At this stage, the Court must accept as true Plaintiffs' allegations regarding the laws' impact on their rights and must view any factual disputes in the light most favorable to Plaintiffs. *Williams*, 310 Kan. at 784. Controlling Kansas precedent makes clear that ignoring Plaintiffs' allegations in favor of the competing, unsupported factual assertions Defendants offer would be reversible error. *Id.*

Because Plaintiffs allege facts indicating the Challenged Provisions violate the Kansas Constitution, there is no basis for dismissing Plaintiffs' claims.

1. Strict scrutiny is the proper standard for Plaintiffs' claims involving fundamental rights.

As a threshold matter, it is important to clarify the legal standard that applies to Plaintiffs' claims because Defendants incorrectly argue that the burdens imposed by the Challenged Provisions are so insignificant, that the Court should dispose of Plaintiffs claims at the pleading stage by effectively applying a form of rational basis review. Specifically, Defendants suggest that, even if fundamental rights have been impaired, the balancing test employed by federal courts in election law cases—the *Anderson-Burdick* balancing test—applies to Plaintiffs' free speech and right-to-vote claims and, under that test, Plaintiffs' claims must be dismissed. Mot. at 22-23, 38, 48. This argument is incorrect under both state and federal law.

In *Hodes & Nauser* the Kansas Supreme Court clarified that the approach courts are to take when evaluating claims asserting violations of fundamental rights, as is the case here, is to apply strict scrutiny. 309 Kan. at 624. Specifically recognizing that "section 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States

Constitution and that our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards," the Court held that the "most searching of [] standards—strict scrutiny—applies when" a law "implicate[s]" a "fundamental right." *Id.* at 624, 663. "[O]nce a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional. Then, the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it." *Id.* at 669 (citing *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)).

Here, Plaintiffs assert that the Challenged Provisions infringe upon their rights to speak, associate, or vote, all of which are fundamental. *See, e.g., Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860, 869 (1984) (recognizing that the freedom of speech under the Kansas Constitution is "among the most fundamental personal rights and liberties of the people." (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *Moore v. Shanahan*, 207 Kan. 1, 649, 486 P.2d 506, 511 (1971) (explaining that "[s]ince the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized."). Similarly, strict scrutiny applies to Plaintiffs' equal protection claim, which asserts disparate treatment of individuals exercising their fundamental right to vote. *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1063 (1987) (explaining "strict scrutiny" applies "in cases involving suspect classifications . . . *and fundamental rights*" (emphasis added)); *see also Hodes & Nauser*, 309 Kan. at 667 (explaining that *Farley* applied "intermediate scrutiny" even though the case "did not involve a natural right"). Accordingly, this Court can and should provide the highest level of scrutiny—strict scrutiny—when evaluating Plaintiffs' claims one of the Challenged Provisions violates their speech rights (e.g., the Voter Education Restriction, Advocacy Ban, and Delivery

Assistance Ban), as well as the right to vote.

Defendants' contrary suggestion that the federal *Anderson-Burdick* standard should apply even if freedom of speech and association and the right to vote rights have been impaired is incorrect. While Kansas courts have at times adopted standards used in federal case law when applying analogous federal constitutional provisions, they do so "in cases where a party asserts violations of both Constitutions *without making unique arguments* about sections 1 and 2 [of the Kansas Bill of Rights]." *Hodes & Nauser*, 309 Kan. at 620 (emphasis added). That is not the case here, where Plaintiffs assert that the Kansas Constitution is more protective of the fundamental rights to speak, associate, and vote than the U.S. Constitution.

What is more, the Kansas Supreme Court's reasoning in support of its decision to apply strict scrutiny in *Hodes & Nauser* fully applies here. There, the parties disputed whether, in challenges to abortion restrictions, Kansas courts should apply the federal "undue burden" standard (an effort by federal courts to "realign[] the 'other side of the equation, which is the interest of the state in the protection of potential life'"), or the more demanding strict scrutiny. 309 Kan. at 664. Choosing the latter, the court explained that it is the Kansas courts' "obligation to protect (1) the intent of the Wyandotte Convention delegation and voters who ratified the [Kansas] Constitution and (2) the inalienable natural rights of all Kansans today. And the strict scrutiny test best protects those natural rights that we today hold to be fundamental." *Id.* at 669. That logic applies equally here. Likewise, the federalism concerns that federal courts must take into account when deciding which level of scrutiny to apply to a challenge to a state elections law do not apply in state court. *See id.* at 621 ("[A]llowing the federal courts to interpret the Kansas Constitution seems inconsistent with the notion of state sovereignty."); *Moore*, 207 Kan. 1 ("[T]his court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas."

(cleaned up)).

Nonetheless, even if this Court were to find that the *Anderson-Burdick* standard advanced by Defendants applies to some or all of Plaintiffs' claims, Mot. at 19, 35, Defendants' Motion should still be denied. Defendants' motion papers misunderstand how the federal court's *Anderson-Burdick* test is applied. Under that test, when a plaintiff alleges an unconstitutional burden on their right to vote, courts weigh the magnitude of the burden against the asserted stated interest, with the level of scrutiny depending on the severity or gravity of the burden on the right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). "However slight that burden may appear," the law must be supported by state interests "sufficiently weighty to justify the limitation." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling opinion) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). This is not a rational basis test. And the level of scrutiny applied *depends* on the extent of the burden, which Plaintiffs' have alleged is severe.

This Court cannot fairly assess the severity of that burden without the benefit of a factual record. This is what the Kansas Supreme Court held in *Hodes & Nauser*, 309 Kan. at 672; *see also Williams*, 310 Kan. at 784. It is also what federal courts have repeatedly found in applying *Anderson-Burdick*. *E.g.*, *Duke v. Cleland*, 5 F.3d 1399, 1405 (11th Cir. 1993) (explaining it was "impossible [] to undertake the proper" balancing analysis without a record); *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (reversing trial court's dismissal because burden could not be weighed against state interest at motion to dismiss stage). As a result, Defendants' assertions that the case should be dismissed based on *Defendants'* contention that the Challenged Provisions do not impair fundamental rights *at all* must be rejected in light of Petitioners' allegations to the contrary. *See* Am. Pet ¶¶ 4-6, 15-18, 21-25, 28-31, 33-39, 103-13, 118, 121-23, 128-141, 145-67,

177, 178, 181, 184, 195, 198, 207. Similarly, just as the extent to which a law burdens a fundamental right is a factual question, so too is "[t]he existence of a state interest" justifying it. *Duke*, 5 F.3d at 1405 n. 6; *see also Workers of Kansas v. Franklin*, 262 Kan. 840, 863, 942 P.2d 591, 608 (1997) (concluding rational basis was satisfied only *after* "[t]he State [offered] facts . . . reasonably justif[ying] the [challenged] statute"). And Plaintiffs specifically dispute the existence of a sufficient state interest with respect to each of the Challenged Provisions under any standard of review. Am. Pet. ¶¶ 6, 71, 113, 115, 125, 177, 179, 182-83, 186, 197, 200. Therefore, even if *Anderson-Burdick* were applicable here (it is not), relevant questions of fact would still make dismissal improper at this stage. *See Workers of Kansas*, 262 Kan. at 863. For this reason, courts regularly conclude that *Anderson-Burdick* claims are not properly dismissed at the initial motion to dismiss stage. *See, e.g.*, *Duke*, 5 F.3d at 1405 n.6; *see also Soltysik*, 910 F.3d at 447; *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008).

2. Plaintiffs state a claim that the Voter Education Restriction, Delivery Assistance Ban, and Advocacy Ban each violate the fundamental right of free speech and association.

The Amended Petition also alleges facts sufficient to show that the Voter Education Restriction, the Delivery Assistance Ban, and the Advocacy Ban unconstitutionally infringe the Kansas Constitution's fundamental rights of free speech and association.

a. H.B. 2183's Voter Education Restriction abridges free speech and association.

As explained, to state a claim that the Voter Education Restriction abridges Plaintiffs' free speech and association under the Kansas Bill of Rights, Sections 3, 11, Plaintiffs must allege that the Restriction infringes upon Plaintiffs' ability to exercise those rights by limiting political conversation and association or diminishing the overall quantum of speech available to election or voting processes. *Hodes & Nauser*, 309 Kan. at 669 (citing *Reed*, 576 U.S. 163); *Chandler v. City*

of Arvada, 292 F.3d 1236, 1241 (10th Cir. 2002). They have done so.

Specifically, Plaintiffs have alleged that the broad criminal prohibition of conduct that gives the appearance of being an election official or would cause another person to believe a person is an election official prevents Plaintiffs from engaging in nearly all of their voter education, registration, and engagement activities. Am. Pet. ¶¶ 15, 21, 22, 28, 33, 113, 178. These activities are core political speech because they necessarily "involve[] the type of interactive communication concerning political change.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). For this very reason, courts around the country have agreed that these activities constitute speech protected by the First Amendment to the U.S. Constitution. *See LOWV*, 400 F. Supp. 3d at 720; *League of Women Voters of Fla. v. Browning* ("*LOWV of Fla.*"), 863 F. Supp. 2d 1155, 1158-59 (N.D. Fla. 2012); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006); *Hernandez v. Woodard*, 714 F. Supp. 963, 973 (N.D. Ill. 1989). In fact, the Voter Education Restriction and its threat of criminal prosecution has *already* forced Plaintiffs to curtail, and even end, their voter-related activities. *See* Am. Pet. ¶¶ 16, 22, 34, 110. Because Plaintiffs allege that the Restriction limits their ability to communicate their message and reduces the total quantum of speech on a public issue, they have met their burden at the pleading stage. *Chandler*, 292 F.3d at 1243.

If anything, it would be *Defendants*' burden to show the Restriction satisfies strict scrutiny, *Hodes & Nauser*, 309 Kan. at 669, which they do not even attempt to do—for good reason. As alleged, Kansas law *already* prohibits intentional election-official impersonation. K.S.A. 21-5917; H.B. 2183, New Sec. 3(a)(1). The Restriction's outlawing of acts that are *not* intended to mislead does not further the state's interest in preventing impersonation at all. And to the extent the Restriction is intended to prevent voter confusion, the state can easily do so through other policies

that do not criminalize routine voter-engagement activities. *See* Am. Pet. ¶ 115.[6]

Defendants' only response is to offer the same unreasonable interpretation of the Restriction discussed throughout this brief. *See* Mot. at 23-25. But as explained, Defendants' reading directly contravenes the plain text, would require the Court to read words into the statute, and would treat multiple provisions as superfluous. *See supra* at 7-9. The Court should deny Defendants' Motion to dismiss the free speech and association claims against the Restriction.

b. H.B. 2183's Delivery Assistance Ban abridges free speech and association.

Plaintiffs also plead sufficient facts to support their claim that the Delivery Assistance Ban violates the Kansas Constitution's right of free speech and association. The Ban's criminal prohibition directly restricts Plaintiffs' core political speech and expressive conduct by severely diminishing their capacity and ability to assist voters.

As the Amended Petition explains, providing assistance to voters by collecting and delivering their ballots, assistance Plaintiffs have in the past provided (and wish to provide in the future), is a critical means by which Plaintiffs engage with and communicate their message to Kansas voters. *See* Am. Pet. ¶¶ 18, 26, 36, 37, 38, 39. For example, it is how Mr. Crabtree engages with voters and "effectively communicate[s] his message of civic participation." Am. Pet. ¶ 37. It is also how Sisters Huelsmann and Lewter seek to communicate their commitment to building a community of loving, helpful neighbors united by faith and encourage their peers to vote. *Id.* ¶¶ 38-39, 164. It is a key means by which Kansas Appleseed and the Center interact with and assist Kansas voters. *Id.* ¶ 157. As such, Plaintiffs have plainly alleged facts sufficient to show that the

[6] At the very least, the Restriction is subject to "exacting scrutiny," which requires a government to prove its law is (1) "substantially related to important government interests" and (2) cannot be solved by "less problematic measures." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 202, 204 (2002). For the reasons just discussed, Plaintiffs have alleged that the Restriction also fails this test.

Ban's facial restriction on assisting more than ten voters infringes upon their ability to communicate their message and reduces the total quantum of speech on a public issue. *Chandler*, 292 F.3d at 1242-43. In response, Defendants baldly assert that these allegations do not implicate core political speech because they implicate no speech at all. Mot. at 47, an assertion that is contrary to Plaintiffs' own factual allegations.

Defendants similarly attempt to engage the Court in an inappropriate factual analysis in contending that the Ban sufficiently serves the state's anti-fraud interests to justify its burden on voters. Mot. at 50-51. To the extent the provision is meant to guard against voter fraud, there is absolutely no indication that there is a compelling need to limit the ability of Kansans to offer ballot delivery assistance. Indeed, despite the fact that over 450,000 people voted by mail using an advance voting ballot in 2020—the largest number in the 25 years since it first became available—and the significant difficulties posed by the COVID-19 pandemic, the Secretary and various local election officers confirmed that the 2020 Election was safe, secure, and fraud-free. *See also* Am. Pet. ¶¶ 2, 42-50. And, "[u]nlike many states which struggled to implement mail balloting for the first time, Kansas's election system has 25 years of experience with mail ballots and has developed the institutional knowledge, procedures, and infrastructure to securely process the anticipated increase in mail ballot use at the general election." *Id.* ¶ 45; *see also id.* *Id.* ¶ 50 ("I don't know how Kansas could do it better.") ("We don't need a drastic change in our election law."). *Id.*

Defendants further offer no reason to believe that limiting ballot delivery to *ten* voters is by any means a tailored solution. The Court should also reject their attempt to turn dicta from *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), into a bright line rule that any law limiting ballot collection is justified by a state's anti-fraud interests, regardless of the legal claim that a plaintiff brings. *Brnovich* involved a claim under Section 2 of the Voting Rights Act,

which is not at issue in this case. It has nothing to say about Kansas courts' ability and obligation to ensure that acts of the Legislature comply with the State Constitution. *See Hodes & Nauser*, 309 Kan. at 621; *Moore*, 207 Kan. 1. But even if *Brnovich* were viewed as persuasive authority, the state-interest inquiry remains a factual one inappropriate for resolution at this stage. *See Workers of Kansas*, 262 Kan. at 863.

Finally, even if the *Anderson-Burdick* test applied here—which, as explained, *supra* at 30-34, it does not—the question of the severity of the burden imposed by the Ban, again, is a *factual* one that cannot be resolved in a motion to dismiss. *Hodes & Nauser,* 309 Kan. at 672; *see Williams*, 310 Kan. at 784. In addition to determining the severity of the burden, the Court would *also* need to resolve additional factual questions to determine whether the governmental interest Kansas is seeking to protect through the Ban outweighs the harms it imposes. Such factual inquiries are inappropriate at the pleading stage. *Id.* And as explained, *supra* at 4, 33, Defendants' assertion that "any balancing required by *Anderson-Burdick* must be resolved in favor of the State," Mot. 51, directly contradicts the governing standard, which requires the exact opposite. *Williams*, 310 Kan. at 784. Dismissal is inappropriate at this stage.

c. H.B. 2332's Advocacy Ban abridges free speech and association.

Plaintiffs allege sufficient facts demonstrating that the Advocacy Ban abridges the Kansas Constitution's guarantee of free speech and association. As explained, the Amended Petition alleges that Loud Light and Kansas Appleseed engage with out-of-state vendors to send mailers promoting advance voting as a means of conveying their message of encouraging democratic participation, and that they would like to be able to use those vendors to send advance voting applications by mail to advance this message in future elections, Am. Pet. ¶ 23. Because promoting absentee voting by distributing such applications involves "interactive communication concerning political change," *Meyer*, 486 U.S. at 421-22, various courts have already concluded that such

efforts are protected political speech. *Democracy N.C.*, 476 F. Supp. 3d at 158; *Priorities USA*, 462 F. Supp. 3d at 812. This conclusion applies with extra force under the Kansas Bill of Rights, which provides distinct and greater rights than the First Amendment. *Hodes & Nauser*, 309 Kan. at 624. Thus, the Advocacy Ban's prohibition on out-of-state individuals sending advance voting applications by mail limits Plaintiffs' core political speech and expression. Am. Pet. ¶¶ 23, 29, 118, 122. In arguing otherwise, Defendants again rely on federal case law, which is less protective of speech rights than the Kansas Constitution. In any event, as Defendants note, the federal analysis in this context focuses on whether the conduct at issue involves an "intent to convey a particularized message" and the likelihood the recipient would understand that message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *see* Mot. at 55. By sending voters mailers with absentee applications, Plaintiffs are conveying to voters their views about the importance of voting and democratic participation, which is core political speech. *Supra* at 14-15.

Further, relying on *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 776 (M.D. Tenn. 2020), Defendants argue, again, that the Advocacy Ban proscribes only conduct, not speech, and thus the "proper standard" is "the *Anderson-Burdick* test." Mot. at 57. This argument should be rejected. Beyond ignoring the factual allegations described above demonstrating how the Advocacy Ban limits their ability to engage in political *speech*, *Lichtenstein*, offers little support. There, although the Court concluded that a Tennessee statute limiting third-party distribution of absentee voting applications proscribed conduct, not speech, the court reached its decision after *receiving evidence* about the laws' impact, and even then concluded, "[t]he issue is a fairly close one." *Lichtenstein*, 489 F. Supp. at 767. Thus, if anything, *Lichtenstein* supports the proposition that determining the extent of Advocacy Ban's limits on Plaintiffs' core political speech requires a factual inquiry in light of the Ban's own circumstances, not that distributing applications does not implicate speech.

Because the Advocacy Ban restricts core political speech, strict scrutiny applies, making a motion to dismiss this claim inappropriate. In any event, the Ban could not satisfy strict (or exacting) scrutiny at the pleadings stage because, as Plaintiffs have alleged, there is no reasonable, much less compelling, justification for imposing an unlimited blanket ban on out-of-state individuals sending advancing voting applications to voters. In fact, even if it were appropriate to give any weight to Defendants' unsupported argument that the Advocacy Ban was enacted to address voter confusion due to receiving applications from third parties, which it is not, Mot. at 26, the facts alleged in Plaintiffs' Petition explain why that is incorrect: such purported confusion was in fact addressed through new qualifications, disclosures and other requirements for organizations and individuals who mail advance ballot application materials. Am. Pet. ¶ 86. As for the Advocacy Ban, the sponsor of the provision in the House of Representatives explained during a hearing that the provision was added simply for the purpose of ensuring that out-of-state organizations and individuals are "prohibited from, basically, getting involved in Kansas elections and trying to mail advance voter ballots." *Id.* ¶ 91. In any event, even assuming the provision is aimed at avoiding confusion, and even assuming that such an interest is compelling, Defendants offer no good reason why a blanket ban on a single residency-based class of individuals is a narrowly tailored means to achieve it.

3. Plaintiffs state a claim that the Delivery Assistance Ban and Signature Rejection Requirement violate the fundamental right to vote.

Plaintiffs have also sufficiently alleged the Delivery Assistance Ban and the Signature Rejection Requirement violate the fundamental right to vote under the Kansas Constitution. In *Hodes & Nauser*, the Kansas Supreme Court explained that infringement of a fundamental right can be shown by demonstrating either that the challenged law makes it more difficult *or* impossible for certain Kansans to exercise that right. 309 Kan. at 672. Plaintiffs' allegations do both.

a. The Delivery Assistance Ban violates the fundamental right to vote.

Plaintiffs allege that the Delivery Assistance Ban severely burdens the right to vote by significantly limiting the pool of individuals who can assist voters in delivering completed ballots to election officials. As fewer people can collect and deliver ballots, voters will face greater obstacles casting their ballots. Am. Pet. ¶ 198. Plaintiffs allege specific facts explaining how the Ban imposes this burden. *Id.* ¶ 154 (discussing how "many of Kansas's most vulnerable citizens" rely on "ballot collection and delivery assistance"); *id.* ¶¶ 154-65 (detailing populations that have relied on delivery assistance to cast their ballots). The Delivery Assistance Ban impedes Kansans' fundamental right to vote, thus strict scrutiny applies, and there is no evidence upon which the Court could rely to make a determination that the State has met its burden under strict serutiny. *Supra* at 37-38.

Even if the *Anderson-Burdick* test applies, Plaintiffs have alleged sufficient facts to state a claim as they have alleged that the burdens imposed by the Delivery Assistance Ban, Am. Pet. ¶¶ 154-67, 198-99, cannot be justified by any governmental interest, *id.* ¶¶ 200-01. Defendants wrongly assert that "any burden on voting" caused by the Ban is "extremely minimal." Mot. at 48. But this simply presents a factual dispute that is inappropriate at the pleadings stage. The extent to which the Ban burdens the right to vote is a factual question. *Hodes & Nauser*, 309 Kan. at 672; *see Williams*, 310 Kan. at 784. Accepting Plaintiffs' allegations as true, the Ban imposes, at the very least, significant burdens on Kansas voters. Accordingly, under any understanding of the applicable standard, Plaintiffs have stated a claim that the Delivery Assistance Ban violates the fundamental right to vote under the Kansas Constitution.

b. H.B. 2183's Signature Rejection Requirement violates the right to vote.

Plaintiffs also state a claim that the Signature Rejection Requirement violates the

fundamental right to vote under the Kansas Constitution. Plaintiffs alleged that "[a]s a result of the Requirement, numerous lawful Kansas voters will be disenfranchised, including Plaintiffs' members and constituents, or will have to undergo additional steps to ensure that their vote will count." Am. Pet. ¶ 196. Plaintiffs allege in detail why, if Kansans are subjected to this arbitrary and standardless signature-matching process, they will be disenfranchised. *Id.* ¶¶ 131-33 (detailing why signature matching is inherently unreliable and why non-experts are significantly more likely to misidentify authentic signatures as forgeries); *id.* ¶¶ 135-36, 142-43 (detailing voters who are more at risk and that wrongful rejections and disenfranchisement are "inevitable"). In fact, courts across the country have found that similar signature-matching regimes impose unacceptable burdens on the right to vote due to the risk of arbitrary disenfranchisement they create. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1320; *Saucedo*, 335 F. Supp. 3d at 206; *Martin*, 341 F. Supp. 3d at 1339–40; *Fla. Democratic Party*, 2016 WL 6090943, at *7; *LULAC*, 2019 WL 6358335, at *15–17. Plaintiffs' allegations state a claim for relief against the Signature Rejection Requirement.

Defendants' attack on the sufficiency of the allegations against the Requirement largely mirror their attack on the Delivery Assistance Ban, claiming that any burden imposed is "*de minimis*," Mot. at 39. They fail for the same reason: this is a factual dispute inappropriate at the motion to dismiss stage. This is particularly so here, where the Petition pleads several facts that, when viewed in the light most favorable to Plaintiffs, establish that Kansas voters will be severely burdened and disenfranchised at no fault of their own due to the Signature Rejection Requirement. *See* Am. Pet. ¶¶ 131-46. In their desperate attempt to convince the Court that there is no burden, Defendants again misleadingly argue that the U.S. Supreme Court has "held" that 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.'" Mot. at 40 (quoting *Brnovich*,

141 S. Ct. at 2339). This is incorrect. In fact, the Supreme Court has repeatedly held that the impact of a provision on the voters it effects is the appropriate inquiry, *e.g.*, *Crawford*, 553 U.S. at 199-203, and it does this again in *Brnovich* itself, *see* 141 S. Ct. at 2339. Further, and as noted, *Brnovich* involved the full-trial adjudication of a claim under a federal statute; it thus has *no* application to a claim under the fundamental right to vote in the Kansas Constitution, let alone at the pleadings stage.

4. Plaintiffs state claims that the Voter Education Restriction and Advocacy Ban are unconstitutionally overbroad and vague.

Plaintiffs sufficiently allege that the Voter Education Restriction and the Advocacy Ban are unconstitutionally overbroad and vague. While closely related, overbreadth and vagueness are distinct concepts. *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630, 634 (1980). "[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected," and a "vague statute leaves persons of common intelligence to guess at its meaning." *City of Wichita v. Wallace*, 246 Kan. 253, 264 (1990). Plaintiffs' allegations are sufficient to state a claim under both doctrines.

a. The Voter Education Restriction and Advocacy Ban are unconstitutionally overbroad.

Plaintiffs plead sufficient facts showing that the Voter Education Restriction and Advocacy Ban are overbroad. "An overbroad statute makes conduct punishable which under some circumstances is constitutionally protected from criminal sanctions." *Moody*, 237 Kan. at 71–72 (citing *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630 (1980)). An overbreadth challenge succeeds when (1) the protected activity at issue is a significant part of a law's target and (2) there exists no satisfactory method of severing that law's constitutionality from its unconstitutional applications. *Id.*

With respect to the Voter Education Restriction, Plaintiffs have alleged that the Restriction

bans virtually all of the voter assistance, education, and encouragement activities that Plaintiffs engage in: every time they do so, they create an unavoidable risk that their employees or volunteers will be mistaken for a state or county employee. *Supra* at 7-10; *Dissmeyer v. State*, 292 Kan. 37, 42, 249 P.3d 444 (2011) ("The effect of the [Restriction] is to ban practically every" third-party voter registration, education, or engagement program in the state.). In asserting otherwise, Defendants confusingly argue that the Restriction is "not targeted at constitutionally protected speech" because the "law is intended to protect the integrity of the electoral process." Mot. at 30. This argument misunderstands the meaning of "target" for purposes of an overbreadth challenge. Whether a law targets protected speech for purposes of this analysis is determined by the scope of its restriction, not the intent of the Legislature. *Huffman*, 228 Kan. at 189 (explaining inquiry focuses on the "conduct punishable"). Because the Restriction covers Plaintiffs' constitutionally protected voter-related activities, such activities are unquestionably a significant part of the law's target.

As for the second element, the Restriction provides no way to separate its constitutional applications from unconstitutional ones. Subsections (a)(2) and (a)(3) criminalize any "conduct that gives" or "would" give the appearance that the person being observed is an "employee" of the Secretary or a county election commission or county clerk. As explained, the only way to read these provisions narrowly is to read into the text a requirement that the person *intend* to give that misimpression. *Supra* at 8. Doing so not only would exceed this Court's role to interpret legislation, it would make subsections (a)(2) and (a)(3) superfluous *Id.*

Defendants' assertion that Plaintiffs' voter-related activities are conduct, not speech, is also wrong. Mot. at 31 (citing *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)). As explained, *supra* at 35-36, Plaintiffs' voter education, registration, and engagement activities necessarily involve

"interactive communication concerning political change," making it core political speech. *Meyer*, 486 U.S. at 421-22; *see also LOWV*, 400 F. Supp. 3d at 720; *LOWV of Fla.*, 863 F. Supp. 2d at 1158-59; *Project Vote*, 455 F. Supp. 2d at 706; *Hernandez*, 714 F. Supp. at 973. Defendants' motion to dismiss the overbreadth claim against the Restriction should be denied.

The allegations in the Amended Petition sufficiently establish that the Advocacy Ban, too, is unconstitutionally overbroad. The Ban's sweeping language directly limits the amount of protected political expression in which Plaintiffs can engage by substantially limiting the universe of vendors they can use to express their core message. And because its unambiguous language allows no narrowing construction, there is no way to separate its constitutional applications from its unconstitutional ones. *See, e.g.*, *Huffman*, 228 Kan. at 189. In attempting to defend the Ban, Defendants incorrectly assert that "[t]he act of mailing an advance mail voting application simply does not constitute" speech. Mot. at 60. But, for same reasons explained, this assertion is far from a foregone conclusion, *supra* at 14, 39, and Plaintiffs have alleged sufficient facts that support the argument that this is a protected activity under the Kansas Constitution. *Supra* at 38-40. Moreover, the Petition explains how the Ban's limitation of Plaintiffs' ability to choose their vendors limits the number voters they can engage with, and impedes the reach of their message. Am. Pet. ¶¶ 29, 92, 118, 122, 123. Defendants' only other argument is to fall back on their affirmative factual assertions about the law's justification. Mot. at 61. But the question of whether a law's justifications can save it from an overbreadth challenge requires an examination of how well it actually serves the interests Defendants identify, a fact-intensive inquiry not appropriate at this stage. *See Workers of Kansas*, 262 Kan. at 863.[7]

[7] For this reason, *Faustin v. City & Cnty. of Denver.*, 423 F.3d 1192, 1199 (10th Cir. 2005), which evaluated the plaintiffs' *evidence* at the summary judgment stage, provides Defendants no support.

Plaintiffs sufficiently allege that the Voter Education Restriction and Advocacy Ban are unconstitutionally overbroad.

b. The Voter Education Restriction and Advocacy Ban are unconstitutionally vague.

The Amended Petition also states a claim that the Voter Education Restriction and Advocacy Ban are unconstitutionally vague. "[I]n determining whether a [law] is void for vagueness, the following two inquiries are appropriate: (1) whether [it] gives fair warning to those persons potentially subject to it, and (2) whether [it] adequately guards against arbitrary and discriminatory enforcement." *City of Wichita v. Wallace*, 246 Kan. 253, 259, 788 P.2d 270 (1990) (quotations omitted). In this case, the Court must scrutinize both laws with a particularly skeptical eye because they regulate speech, making "precision of drafting and clarity of purpose" even more "essential." *Id.* at 259 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975)). Moreover, the Voter Education Restriction triggers even *more* scrutiny because it subjects Kansans to criminal penalties. *Id.*

The Restriction easily fails the two anti-vagueness requirements. Because it focuses entirely on others' subjective perceptions, it is impossible for Plaintiffs to know when they (or their employees and volunteers) might be violating it. *See State v. Bryan*, 259 Kan. 143, 155, 910 P.2d 212 (1996) (invalidating law that focused on the "subjective state of mind of the victim"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (same). It similarly fails the second requirement against inviting arbitrary or discriminatory enforcement: because Plaintiffs' voter-related activities *always* create a risk that their employees or volunteers will be misperceived as state or county employees, those enforcing the Restriction are free to pick and choose who to prosecute under the law's provisions. Beyond continuing to press their incorrect reading of the Restriction, Mot. at 33-34, Defendants argue that Plaintiffs' allegations are insufficient because

the Kansas Supreme Court presumes that laws are constitutional. Mot. at 34 (citing *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989)). But that presumption does not shield the Restriction from constitutional challenge. While Plaintiffs have the burden of proving the Restriction violates the Constitution, they have met their burden at the pleading stage by alleging facts that, taken as true, demonstrate it is unconstitutionally vague.

The Petition also sufficiently alleges that the Advocacy Ban is unconstitutionally vague. As the Petition explains, "[i]t is unclear under the language of the law whether Plaintiffs and others within the state may permissibly 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 under the provision." Am. Pet. ¶ 222; *see also id.* ¶ 224 ("[T]he provision includes no standards regarding enforcement, opening the door for arbitrary and discretionary enforcement of the provision."). Defendants assert that Plaintiffs' "fears" of unknowingly violating the Advocacy Ban are "unwarranted" because Plaintiffs should trust those enforcing the law to read the law narrowly. Mot. at 62. But this Court cannot "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480. Because it is not clear whether Plaintiffs may still include items in mailers that direct a voter *to* an application—such as through QR codes or weblinks—Plaintiffs cannot determine whether they are conforming their behavior to the law when promoting their message of political participation. *See* Am. Pet. ¶ 222. Finally, Defendants again improperly turn to the presumption of constitutionality in support, but for the reasons explained, *supra* at 46, that offers them no help.

5. Plaintiffs state claims that the Signature Rejection Requirement violates equal protection and due process.

Finally, Plaintiffs' allegations are sufficient to state a claim that the Signature Rejection

Requirement violates equal protection and due process.

a. The Signature Rejection Requirement violates equal protection.

As explained, strict scrutiny applies in equal protection cases involving "fundamental rights expressly or implicitly guaranteed by the [Kansas] Constitution . . . include voting." *Farley*, 241 Kan. at 669; *Hodes & Nauser*, 309 Kan. at 667. The Signature Rejection Requirement triggers strict scrutiny because it "explicitly and arbitrarily endorses multiple, standardless processes for verifying signatures, placing voters across the state's 105 counties at differing risks of disenfranchisement." Am. Pet. ¶ 207. Moreover, by permitting counties to verify signatures by electronic device or by human inspection, a variation built into the face of the law, the law accepts differing treatment of ballots which will certainly result in different rates of rejection in each county. *Id.* The Requirement further "fails to provide any guidance for the implementation of those processes. Accordingly, different counties will have different procedures for verifying signatures that will result unequal treatment of ballots across the state." *Id.* The facts alleged in the Petition further demonstrate how votes will be subject to varied treatment. *See, e.g., id.* ¶ 135 ("Voters who are elderly, disabled, suffer from poor health, are young, or are non-native English speakers are particularly likely to have greater signature variability and therefore are especially likely to have their properly cast ballots rejected."); *id.* ¶ 138 ("[T]he option for machine verification . . . reinforces the variability of signature matching across counties as there is simply no guarantee that cash-strapped counties will employ this expensive equipment."); *see also id.* ¶¶ 149-51 ("As Loud Light's ballot cure program in past elections demonstrates, election officials in counties that have previously engaged in signature matching have often failed to contact voters . . . to cure any perceived signature mismatch.").

Defendants attempt to undermine these allegations by asking for more facts which, as discussed, are inappropriate. In particular, Defendants confusingly assert that "Plaintiffs have not,

and cannot, allege any evidence of improperly rejected ballots." Mot. at 44. Plaintiffs have no obligation to offer evidence at this stage of litigation. *E.g.*, *Aeroflex*, 294 Kan. at 268. Moreover, no evidence is needed to show that the Requirement on its face invites differential adjudication of Kansans' ballots, H.B. 2183, Sec. 5 (matching "may occur by electronic device or by human inspection"), and it follows, as the Petition alleges, that votes will be rejected disparately. *See* Am. Pet. ¶¶ 17, 136, 138-151. For the same reason, Defendants' reliance on *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), for the proposition that "isolated discrepancies" do not violate equal protection, Mot. at 43, has no bearing on this case. The challenge to the Requirement targets not merely "isolated discrepancies," but the Requirement's explicit endorsement of differential treatment of ballots and therefore mismatches throughout the state. Further, the court in *Lemons* reached its conclusion only after considering plaintiffs' evidence at "at a hearing on the merits." 538 F.3d at 1101. The parties here have not yet even commenced discovery.

In short, Plaintiffs sufficiently allege that the Signature Rejection Requirement subjects Kansans to disparate treatment with respect to the fundamental right to vote in violation of equal protection.

b. The Signature Rejection Requirement violates due process.

Plaintiffs' Petition also sufficiently alleges that the Signature Rejection Requirement violates due process under the Kansas Constitution. "In reviewing a procedural due process claim, the court must first determine whether a protected liberty or property interest is involved and, if it is, the court must then determine the nature and extent of the process which is due." *State v. Wilkinson*, 269 Kan. 603, 608–09, 9 P.3d 1, 5 (2000) (citing *Murphy v. Nelson*, 260 Kan. 589, 598, 921 P.2d 1225 (1996)). The question of the procedural protection that must accompany a deprivation of a particular liberty or property interest is resolved by a balancing test, weighing (1) the individual interest at stake, (2) the risk of erroneous deprivation of the interest through the

procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Plaintiffs' allegations demonstrate that Kansas's standardless Signature Rejection Requirement will "erroneously and arbitrarily deprive Kansans" of the fundamental liberty interest in the right to vote. Am. Pet. ¶ 229. The Requirement "fails to provide any standard by which county election officials are to evaluate a voter's ballot." *Id.* ¶ 230. Because it lacks any "uniform standards for rejecting or accepting signatures," the Requirement puts Kansans' right to vote at significant risk of deprivation without any procedural protections. *E.g.*, *id.* ¶¶ 131-32 (explaining that erroneous signature conclusions are common); *id.* ¶¶ 133-35 (describing various factors that cause handwriting variance, increasing likelihood of erroneous rejections if no training or standards are provided to election officials).

Defendants' assertion that having one's vote counted is somehow *not* a constitutionally protected liberty interest is wrong. Mot. at 45-46. This assertion is at direct odds with the fact that the "right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner . . . and is the bed-rock of our free political system." *Moore*, 207 Kan. at 649. As the U.S. Supreme Court has explained, the fundamental right to vote includes not just to "put a ballot in a box," but also "to have one's vote counted." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (quoting *United States v. Mosley*, 238 U.S. 383, 386 (1915)). For this reason, most courts have rejected Defendants' exact argument, explaining that once a state offers an absentee voting scheme, as Kansas has for over 25 years, it "create[s] a sufficient liberty interest in exercising their right to vote in such a manner." *Frederick v. Lawson*, 481 F. Supp. 3d 774, 792-93 (S.D. Ind. 2020)

(recognizing "the vast majority of courts addressing this issue" agree); *see also Democracy N.C. v. N.C. St. Bd. of Elections*, 476 F. Supp. 3d at 227 ; *Martin*, 341 F. Supp. 3d at 1338; *Saucedo*, 335 F. Supp. 3d at 217; *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1356 (D. Ariz. 1990); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006).

Here, when taken as true (as they must be at this stage), Plaintiffs' factual allegations are sufficient to state a claim that the Signature Rejection Requirement fails to adequately protect Kansans' right to vote in violation of the Kansas Constitution's due process requirements.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted, this 3rd day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted via the Court's electronic filing system and by email, to the following:

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