IN THE COURT OF APPEALS IN THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED, CENER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, Plaintiffs-Appellants, v. SCOTT SCHWAB, in his official capacity as Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General, Defendants-Appellees.	Appellate Case No. 2021-124378-A Original Action No. 2021-CV-000299

DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION TO TRANSFER TO SUPREME COURT AND EXPEDITE BRIEFING

The Plaintiffs-Appellants (hereinafter, Plaintiffs) in this case seek to manufacture a crisis that literally exists only in their imagination. They are at absolutely no risk of any prosecution based on their self-described historical or future planned activities. The fears they conjure are purely chimerical and they thrust at lions entirely of their own creation.

Seeking to leverage the timing of upcoming municipal elections in various parts of the State, Plaintiffs now ask the Supreme Court to immediately take jurisdiction over the case on the theory that the free speech issues are of such magnitude that the court of appeals apparently cannot be trusted to evaluate the legal questions in the first instance. But the reality is that the only legal issue at play here is a pedestrian statutory interpretation and

the district court's analysis was spot-on. There is no need whatsoever to either transfer this appeal or accelerate its briefing and resolution.

Background

Plaintiffs challenge the constitutionality of H.B. 2183, § 3(a)(2), (a)(3), a statute passed by the Legislature at the end of the 2021 session and designed to prohibit individuals from falsely representing themselves as election officials, thereby sowing confusion and distrust in the electorate and undermining public confidence in the electoral process. The statute defines the false representation of an election official as "knowingly engaging" in conduct, via any of a variety of means of communication while not serving as an election official, in which the defendant either (1) represents himself/herself as an election official; (2) "gives the appearance of being an election official;" or (3) "cause[s] another person to believe [the] person engaging in such conduct is an election official." Only the second and third prongs are at dispute in this appeal.

Absurdly mischaracterizing the statute as a "voter education restriction," Plaintiffs claim that their free speech and association rights are being chilled because the statute purportedly has no intent element and turns instead on the subjective viewpoint of anyone who might hear or see Plaintiffs' actions and draw the erroneous conclusion that Plaintiffs are election officials. Plaintiffs suggest that they are thus vulnerable to prosecution even if they have "no intent to deceive anyone, and even if they take every reasonable precaution to avoid such a misapprehension." (Mot. at 6).

In denying Plaintiffs' motion for a preliminary injunction, the district court rejected this cramped and unreasonable construction of the statute. Citing K.S.A. 21-5202(a), the

Court noted that a culpable mental state is an essential element of every crime. Order at 7. The Court further explained that the opening clause in H.B. 2183, § 3 makes clear that the statute is violated only when an individual *knowingly* engages in the prohibited conduct. *Id.* at 9. And the term "knowingly," the Court added, is expressly defined in K.S.A. 21-5202(i), which provides, in relevant part, that a "person acts knowingly, or with knowledge, with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result." In other words, "'knowingly' means that a person was 'reasonably certain that X action would lead to X result.'" Order at 8 (quoting *State v. Chavez*, 2016 WL 5867484, at * 18 (Kan. App. 2016) (unpublished) (citing *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 (2015)). Accordingly, the Court found that, "to be convicted of a crime as defined in Section 3(a)(2) or (3) requires that the *actor* – not the bystander – be reasonably certain that what he or she is doing gives the appearance of or causes another person to believe that he or she is" an election official. Order at 9 (emphasis in original).

The Court then noted that Plaintiffs' fears of prosecution for knowingly engaging in false representation of an election official could not be credited inasmuch as Plaintiffs insisted that their members make every effort to correctly identify themselves as affiliates of their own organizations and not as government officials. (*Id.* at 10). Meanwhile, the Court found that the State's interests in prohibiting this kind of misrepresentation are clear and well-recognized. (*Id.*).

No Basis for Transferring this Case

Plaintiffs hinge their motion to transfer on the supposed significant public interest in this case. It is certainly true that election law cases generally draw ample press attention and Plaintiffs here have no doubt labored mightily to ensure coverage of their suit. But the legal issue here is not particularly complicated, and the State has made it emphatically clear in the proceedings below that Plaintiffs' fears of prosecution are totally unfounded. When the false representation of an election official statute is interpreted in line with realistic linguistic principles and in conjunction with the State's criminal code (not to mention basic canons of construction that require the Court to construe a statute as constitutionally valid if there is any way to do so), Plaintiffs' entire claim dissolves. Plaintiffs, on the other hand, (rather oddly) insist on the most untenable possible reading of the challenged statute in order to concoct a faux crisis and rush litigation through the state courts. This Court should decline Plaintiffs' invitation to be part of that inappropriate endeavor, which would only serve to inject chaos into the electoral process and diminish the public's confidence in the law of this heavily litigated space.

A. – Plaintiffs' Interpretation of the Statute is Unnatural and Flawed

Badly misreading the statute, Plaintiffs argue that H.B. 2183, § 3(a)(2)-(3) defines "prohibited activity from the vantage of any person observing the activity," thus "creat[ing] a serious risk that, by registering, engaging, and educating voters, Plaintiffs" and their employees and volunteers "risk felony conviction merely because someone mistakes them for an election official – despite having no intent to deceive anyone, and even if they take every reasonable precaution to avoid such a misapprehension." (Mot. at 6). But the focus

of the statutory text is clearly directed at the conduct and state of mind of the *actor/speaker*, not the *subjective views of any particular viewer or listener*. As the district court noted, Plaintiffs' view of the statute effectively reads the word "knowingly" out of the text. Order at 9.

In fact, Plaintiffs' position suffers from multiple maladies. For one thing, Plaintiffs' own interpretation, in addition to disregarding the "knowingly" culpability element, would necessitate a modification of the text. Plaintiffs claim that the statute "mak[es] it a crime to knowingly engage in conduct that *could* have [the] effect" of others believing one is an election official. (Mot. at 11) (emphasis added). The statute, however, nowhere contains a speculative term like "could." To the contrary, the statutory terms are definitive. A person must knowingly engage in conduct that "*would cause*" another to believe the person is an election official, or knowingly engage in conduct that "*gives the appearance*" that the person is an election official. Under Plaintiffs' theory, the statute would have to read that an actor's conduct "could cause" another to believe that the actor is an election official or "may give[] the appearance" of such an erroneous fact.

Plaintiffs' construction would also be inconsistent with K.S.A. 21-5202(f). Under that provision, "[i]f the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears." Applied to H.B. 2183, § 3(a)(2), the term "knowingly" thus must apply to both engaging in the conduct *and* knowing that the conduct "gives the appearance of being an election official." Similarly, Section 3(a)(3) must be read so that

the term "knowingly" applies to both engaging in the conduct *and* knowing that the conduct "would cause another person" to believe the actor is an election official. *Cf. Hobbs*, 301 Kan. at 210 (holding that K.S.A. 21-5202(f) required prosecution to prove, for aggravated battery offense, that the defendant both knowingly engaged in conduct and knew that the result of such conduct was reasonably certain). It is not enough for a prosecutor to simply show that a bystander could mistakenly interpret a defendants' conduct. And to the extent there is any ambiguity in the statute, the rule of lenity would further safeguard Plaintiffs and their members. *See State v. Chavez*, 292 Kan. 464, 468, 254 P.3d 539 (2011) ("When there is reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction.").

In addition, even assuming Plaintiffs had telepathic skills and could be dead certain that members of the public *will* perceive them to be election officials despite their making no effort at all to create such a misrepresentation (as they emphatically claim not to make), a criminal prosecution still would not be constitutionally permissible without such intent. Indeed, as the U.S. Supreme Court made clear in *Elonis v. United States*, 575 U.S. 723, 734 (2015), a basic principle of the criminal law is that "wrongdoing must be conscious to be criminal." (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). The Court explained:

> The central thought is that a defendant must be blameworthy in mind before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea,* scienter, malice aforethought, guilty knowledge, and the like. Although there are exceptions, the "general rule" is that a guilty mind is a necessary element in the indictment and proof of every crime. We therefore generally "interpret criminal statutes to include

> broadly applicable scienter requirements, even where the statute by its terms does not contain them. *Id.* (citations and internal alterations omitted).

A court, in fact, must "read into the statute" the requisite "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* at 736 (quotations omitted); *accord Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 644, 941 P.2d 1321 (1997) ("The court must give effect to the legislature's intent even though words, phrases or clauses at some place in the statute must be omitted or inserted.") (quotation omitted). These fundamental principles clearly underscore why Judge Watson's embrace of the State's interpretation of H.B. 2183, § 3 is the proper and only reasonable construction of the statute.

Plaintiffs' surplusage argument (Mot. at 16) similarly has no merit. There is no question that courts "should avoid interpreting a statute in a way that part of it becomes surplusage" because "it is presumed that the legislature does not intend to enact useless or meaningless legislation." *State v. Van Hoet*, 277 Kan. 815, 826-827, 89 P.3d 606 (2004). But the district court's decision does no such thing. The challenged statute prohibits knowingly engaging in three distinct courses of conduct and a person could violate the statute by knowingly engaging in acts that violate any one of them. For example, the legislature could easily assume that someone who identifies himself to those approaching a voter registration table as the Kansas Secretary of State would violate Subsection (a)(1) by "representing" himself as an election official. Although this conduct may also violate Subsections (a)(2) and (a)(3), that overlap alone does not make the provisions superfluous. *See Agnew v. Gov't of D.C.*, 920 F.3d 49, 57 (D.C. Cir. 2019) ("That the terms also substantially

overlap does not contravene the surplusage canon, which must be applied with the statutory context in mind; after all, sometimes drafters *do* repeat themselves.") (citations omitted); *In re BankVest Capital Corp.*, 360 F.3d 291, 301 (1st Cir. 2004) ("There may be substantial overlap among the provisions of [a law], but redundancy is not the same as surplusage."); *S.E.C. v. Familant*, 910 F. Supp.2d 83, 95 (D.D.C. 2012) ("Subsections may (and inevitably do) overlap, but the surplusage canon is invoked only when the intersection of subsections becomes so great that one subsection renders another meaningless."). By the same token, if an actor chose not to overtly represent himself as the Secretary of State, but still engaged in conduct that he knew would cause others to perceive him to be the Secretary of State, Subsection (a)(1) would not be implicated but Subsections (a)(2) or (a)(3) might be.

In sum, this case presents neither issues of significant public interest nor significant legal questions. It is little more than a garden-variety statutory construction dispute, the resolution of which is dictated by well-established precedent that the district court properly applied. Plaintiffs' supposed injuries are manufactured and built entirely on an intentional misreading of the statute. Accordingly, the motion to transfer should be denied.

B. – There is No Need to Expedite Briefing

Plaintiffs improperly include within their motion to transfer a motion to expedite the briefing schedule. (Mot. at 19-20). This dual request appears to contravene Supreme Court Rule 5.01(a), which directs that "[e]ach motion must contain only a single subject." But irrespective of that technical rules infraction, Plaintiffs' asserted reasons for requesting expedited consideration and briefing do not warrant granting such relief.

Plaintiffs claim that expedited consideration and briefing is appropriate because they are concerned that their conduct violates the statute. (*Id.*). But the district court's opinion, endorsing the Attorney General's own construction of the statute through this litigation, has made clear to Plaintiffs that the conduct in which they claim to want to engage does not violate the statute. Despite having questionable claims to standing in this case, Plaintiffs have effectively achieved what they wanted – a judicial opinion that their self-described historical and proposed future conduct is permissible. For reasons we will leave to others to discern, however, Plaintiffs refuse to take yes for an answer.

Plaintiffs also wrongly assert that they did everything in their power to get an expedited ruling in this case and that any delay was not of their own doing. (Mot. at 20). Plaintiffs initially filed their Petition and their motion for temporary injunction prior to the statute's effective date and the court promptly informed the parties that it would schedule a hearing after briefing was complete. (District Court Order, 6/21/2021) (attached hereto as Exhibit A). However, Plaintiffs omit from their motion that they then amended their Petition on August 3, 2021, after preliminary injunction briefing was complete, presumably due to a concern that their Petition faced imminent dismissal. Exacerbating that decision, Plaintiffs did not inform the district court until August 17, 2021 – after the Court inquired on the subject – that they believed their Amended Petition did not alter the arguments raised in their motion for temporary injunction, even though they were based on the initial Petition. (Pls.' Resp. to Court's Inquiry, 8/17/2021) (attached hereto as Exhibit B). The Court promptly considered the briefed issues, held a hearing on September 14, 2021, and issued a thorough and well-reasoned opinion two days later on September 16, 2021. Had

Plaintiffs not amended their Petition and then failed to inform the Court that the nature of those amendments did not affect their motion for a temporary injunction, a decision likely could have been issued sooner.

Finally, throughout both of their motions in this Court, Plaintiffs claim they sought only a "limited" temporary injunction. (Mot. at 1, 3-4). That is a mischaracterization. Plaintiffs sought, and continue to seek, a broad injunction that would invalidate H.B. 2183, § 3(a)(2) and (a)(3) in their entirety. The State has a strong interest in enforcing its laws, and the relief that Plaintiffs request would indisputably have an injurious effect on the State. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quoting *New Motor Vehicle Bd. Of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

CONCLUSION

For the reasons stated herein, Plaintiffs' motion to transfer the case to the Supreme Court and expedite briefing should be denied.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, I electronically filed the foregoing "Defendants-Appellees' Response to Plaintiffs-Appellants' Motion to Transfer to Supreme Court and Expedite Briefing" with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record.

/s/ Bradley J. Schlozman

Exhibit A (Shawnee County Order)

ELECTRONICALLY FILED
2021 Jun 21 AM 9:40
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT,
CASE NUMBER: 2021-CV-000299

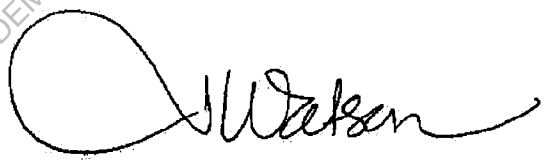
Court: Shawnee County District Court

Case Number: 2021-CV-000299

Case Title: League of Women Voters of Kansas, et al. vs. Scott Schwab - Kansas Secretary of State, et al.

Type: order

SO ORDERED.



/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

LEAGUE OF WOMEN VOTERS OF KANSAS, et al.,

Plaintiffs

Case No. 2021-CV-299

vs.

SCOTT SCHWAB - KANSAS SECRETARY OF STATE, et al.,

Defendants

ORDER

The Court has reviewed the Plaintiffs' petition and the motion for partial temporary injunction. Once the motion for partial temporary injunction is fully briefed, the Court will contact the parties to set the matter for hearing.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

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Exhibit B (Plaintiffs' Response to the Court's Inquiry of August 13, 2021)

ELECTRONICALLY FILED
2021 Aug 17 AM 10:06
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
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.	Original Action No. 2021-CV-000299

PLAINTIFFS' RESPONSE TO THE COURT'S INQUIRY OF AUGUST 13, 2021

In response to the Court's August 13, 2021, invitation for briefing from the parties on the impact of Plaintiffs' Amended Petition, filed August 2, 2021, on Plaintiffs' Motion for a Partial Temporary Injunction ("TI Motion"), Plaintiffs provide the following response:

1. Plaintiffs have conferred with counsel for Defendants, and the parties stipulate that Plaintiffs' Amended Petition does not impact the previously filed TI Motion.

2. Plaintiffs' original Petition and Amended Petition both challenge four newly enacted provisions of Kansas law, three distinct provisions from House Bill 2183 ("HB 2183"), which took effect on July 1, 2021, and one provision from House Bill 2332 ("HB 2332"), which will become operative on January 1, 2022.

3. Plaintiffs' TI Motion focuses on just one of the provisions challenged in both the original Petition and the Amended Petition, the "Voter Education Restriction," which makes it a

felony to engage in conduct that "gives the appearance of being an election official" or "would cause another person to believe [the] person" is an election official. HB 2183 § 3(a)(2), (3)(a)(3) (to be codified at K.S.A. 25-2436).

4. As demonstrated in their TI Motion and supporting affidavits, the basis for Plaintiffs' challenge to the Voter Education Restriction is that it criminalizes core elements of their political speech activities, including registering, educating, and engaging voters. This challenge was asserted in the original Petition, and the Amended Petition ***does not alter this challenge at all***.

5. Rather, the Amended Petition—in paragraphs 16, 22, and 34—merely incorporates the facts concerning the real and increasingly damaging impact of the Voter Education Restriction on Plaintiffs into the operative petition. These same facts were previously submitted to the Court on June 18 and July 6 in the affidavits supporting Plaintiffs' TI Motion. *See* Exs. 1 to 7, 40 to 42.

6. In other words, the amendments made to the Petition as it relates to the claim at issue in the TI Motion does nothing more than conform Plaintiffs' operative petition with the facts already in the record. *Compare, for example*, Am. Pet. ¶ 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 canceled all of its in-person voter registration events on July 13, which was the date of the registration deadline for the August 3 primary."), *with* 2d. Aff. of Davis Hammet, Ex. 40 to TI Mot. ("As the July 1 deadline drew near, Loud Light . . . alter[ed] our plans for Independence Day weekend. Unfortunately, the Voter Education Restriction meant that Loud Light was unable to register voters on that weekend, which marked the 50th anniversary of the ratification of the 26th amendment to the U.S. Constitution, which lowered the voting age to 18."). No other changes were made to the Voter Education Restriction challenge from the original

Petition to the Amended Petition.

7. The other changes in the Amended Petition—the addition of three individual plaintiffs and the explanation of harms they will suffer as a result of the legislature's curtailment of ballot collection as well as facts about the diversion of resources that will occur as a result of the new signature matching regime—focus on other portions of HB 2183, New Section 2 (the "Delivery Assistance Ban") and New Section 5 ("Signature Rejection Requirements"). These provisions are not at issue in Plaintiffs' TI Motion.

Respectfully submitted, this 16th day of August, 2021.

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