No. 21-124378-A

IN THE COURT OF APPEALS
OF THE STATE
OF KANSAS

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

vs.

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

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Teresa Watson, District Judge, District Court Case No. 2021-CV-000299

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I. NATURE OF THE CASE

Plaintiff-Appellants the League of Women Voters of Kansas (the "League"), Loud Light, Kansas Appleseed Center for Law & Justice, Inc. ("Kansas Appleseed"), and Topeka Independent Living Center (the "Center") (collectively, "Plaintiffs") are non-partisan non-profits with a mission of maximizing political engagement among eligible Kansans, which they accomplish through voter education, outreach, and registration efforts. They appeal the district court's September 16, 2021 denial of their motion to temporarily enjoin enforcement of the second and third definitions of "[f]alse representation of an election official"—a new felony created by the Legislature as part of the recently enacted House Bill 2183 ("HB 2183"). The entire relevant provision reads in full:

> New Sec. 3. (a) False representation of an election official is knowingly engaging in *any* of the following conduct by phone, mail, email, website or other online activity *or by any other means of communication* while not holding a position as an election official:
> (1) Representing oneself as an election official;
> (2) engaging in conduct that gives the appearance of being an election official; *or*
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official.

2021 Kan. Sess. Laws Ch. 96 (codified at KSA 25-2438) (emphases added).[1]

Plaintiffs do not challenge the first definition, which makes it a felony to knowingly "[r]epresent[] oneself as an election official." KSA 25-2438(a)(1). Plaintiffs challenge the alternative definitions in (a)(2) and (a)(3), which broadly make it a felony to knowingly 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. KSA 25-2438(a)(2),

[1] "Election official" means "the secretary of state, . . . any county election commissioner or county clerk, or any employee thereof, or any other person employed by any county election office." KSA 25-2438(c). Violation is a level 7, nonperson felony, punishable by up to 17 months in prison and fines of $100,000. *See* KSA 21-6611, 21-6804.

(a)(3) (the "Challenged Restrictions" or "Restrictions") (emphases added). These definitions put at risk of prosecution anyone who engages in conduct that they reasonably know *could* give another person the impression that they are an election official. By their terms, (a)(2) and (a)(3) make the scope of the crime they create dependent on how observers may perceive another's conduct, failing to provide adequate notice of their reach.

Plaintiffs have traditionally driven much of the voter registration and education in Kansas, often hand-in-hand with election officials who lack the resources to independently register and educate the breadth of Kansans eligible to vote. Plaintiffs know from experience that—despite their best efforts to communicate that they are *not* elections officials—some people with whom they interact (or who observe their activities) assume they are acting in an official capacity. As a result of the Challenged Restrictions, Plaintiffs canceled and curtailed voter engagement and registration activities across the state, out of fear that their actions could be misconstrued and result in criminal liability. This chilling of core political speech alone makes Plaintiffs highly likely to succeed on their claims under Sections 10 and 11 of the Kansas Constitution's Bill of Rights.

The district court's contrary conclusion relied on several legal errors in statutory construction. Most egregiously, the district court read a requirement into sections (a)(2) and (a)(3) that a person actually *intend to misrepresent* themselves as an election official. But that is what (a)(1) prohibits. Sections (a)(2) and (a)(3) offer *alternative* definitions. The district court read (a)(2) and (a)(3) out of the statute, both of which turn on how conduct is *perceived*, rather than the actor's intent (or lack thereof) to create that perception. Even Defendants have acknowledged (a)(2) and (a)(3) are distinct from (a)(1). In two separate briefs, Defendants stated: "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 [or any other election official], Subsection (a)(l) would not be implicated *but Subsections (a)(2) or (a)(3) might be.*" (R. III, 54 (emphasis added); Appellees' Opp. to Mot. to Transfer.) This is precisely Plaintiffs' point.

The Legislators who enacted the Challenged Restrictions, at least one District Attorney, and even Defendants have acknowledged (a)(2) and (a)(3) may reach innocent conduct that might cause an observer to misunderstand the actor's role. As Chief Justice John Roberts famously said, where the burden on free speech is debatable, the tie goes to the speaker, not the censor. *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474 (2007). A Kansas U.S. District Court affirmed this fundamental principle just last month in preliminarily enjoining parts of House Bill 2332 ("HB 2332")—enacted at the same time as HB 2183—on free speech grounds. *VoteAmerica v. Schwab*, No. CV 21-2253-KHV, 2021 WL 5415284, at *21 (D. Kan. Nov. 19, 2021) (holding potential loss of First Amendment rights "weighs strongly in favor of" a preliminary injunction). The Defendants here are also defendants in that suit, and the *VoteAmerica* opinion refutes several of the arguments that the district court in this case impermissibly adopted.

If anything, this case presents an even clearer case for an injunction because it is brought under the Kansas Constitution. As Kansas Supreme Court precedent makes clear, the Kansas Constitution is *at least as* protective of free speech and associational rights as the First Amendment, if not more so. *E.g.*, *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 663, 440 P.3d 461 (2019). The district court should be reversed, and an injunction should issue from this Court.

II. STATEMENT OF THE ISSUES

A. The district court erred as a matter of law in interpreting the Challenged Restrictions to prohibit only the intentional impersonation of election officials.

B. The district court erred as a matter of law in finding that Plaintiffs are unlikely to succeed on their claim under Section 11 of the Kansas Constitution's Bill of Rights.

C. The district court erred as a matter of law in finding that Plaintiffs are unlikely to succeed on their claim under Section 10 of the Kansas Constitution's Bill of Rights.

D. Plaintiffs satisfied the other requirements for a temporary injunction, including by showing that the Challenged Restrictions cause them irreparable harm and the public interest would be served by an injunction while this matter is pending.

III. STATEMENT OF THE FACTS

A. Plaintiffs Play an Important Role in Educating, Registering, and Assisting Kansans in Exercising Their Right to Vote.

The League, Loud Light, Kansas Appleseed, and the Center are non-partisan, non-profit organizations that have long operated in Kansas to educate eligible Kansans on how they may exercise their most fundamental rights. (R. I, 110-11, 118-19, 127-28.) Plaintiffs have devoted countless hours and significant resources to promoting and facilitating the participation of Kansans in the political process. (R. I, 110-11, 118-19, 127-28.)

Founded in 1920 as part of the suffragist movement, the League works to empower voters through informed political participation. (R. I, 116.) The League has approximately 1,300 dues-paying members across Kansas organized into nine local leagues. (R. I, 110.) Through its community activities, the League engages in conversations with voters and potential voters to convey its message about the importance of voting and political participation. (R. I, 111.) The League's work is vital to political engagement and enfranchisement in Kansas. In fact, in many Counties, the League's work constitutes the

bulk of the voter registration and education activities, with local officials relying heavily on the League to perform services that elsewhere might be done by the officials themselves. In Douglas County, officials even route questions from voters to the League. (R. I, 146-47.) The League's work speaks for itself. (*See, e.g.*, R. I, 111-12 (League registered more than 1,000 in Topeka-Shawnee County in the 2019 off-year cycle and conducted 240 registration drives in Johnson County between 2018 and 2020, including at a naturalization ceremony registering 213 new citizens).) During the pandemic, the League conducted socially distanced voter outreach, education, and registration, including by using flyers, banners, and handouts to encourage potential voters to visit websites run by the national League and local county election boards. (R. I, 112.) The League conservatively estimates it registered 2,000 new Kansas voters in the 2020 cycle through 354 activities, involving 1,123 volunteers, working a total of 2,079 hours. (R. I, 112.)

Loud Light is a Kansas-based non-partisan, non-profit whose mission is to engage, educate, and empower young voters and others from underrepresented populations to become visible, vocal forces for good in their communities. (R. I, 119.) Loud Light pursues its mission through social media, direct person-to-person contact with potential voters, presentations on college campuses and online, and educational mailers. (R. I, 119.) Loud Light's more than two-dozen paid student fellows (including eight Spanish-speakers) and numerous volunteers encourage young people to register and vote by tabling on campuses and in other locations, as well as through phone banking, canvassing, text banking, and other in-person events. (R. I, 120.) In 2020 alone, Loud Light helped to register 9,621 voters, made 12,508 phone calls, sent 466,680 text messages, and mailed 115,775 pieces of mail in pursuit of its mission. (R. I, 120.) Loud Light also produced a widely shared

educational video about Kansas's advance voting process, "Mail Voting Explained 2020," which was viewed more than 220,000 times online. (R. I, 121.)

Kansas Appleseed is dedicated to the belief that Kansans can build a state full of thriving, inclusive, and just communities. (R. I, 127-28.) It expends significant effort educating and engaging voters, particularly traditionally underrepresented populations in Southwest and Southeast Kansas. (R. I, 129.) Through mailers, social media, text banking, and community-building events, Kansas Appleseed educates these communities about ballot issues, the voting process, and engagement with candidates. (R. I, 129.) In 2020, Kansas Appleseed interacted with more than 13,000 voters using direct mail, digital communication, text banking, and virtual and in-person training and relationship-building events. (R. I, 130.) Voter turnout among Kansas Appleseed's target audience rose by 12 percent in the 2020 elections as compared to the 2016 election. (R. I, 130.)

The Center is a federally recognized not-for-profit Center for Independent Living operated and governed by people with disabilities. (R. I, 136, 157); *see also* 29 U.S.C. § 796f. Its mission is to advocate for justice, equality, and essential services to bring about a fully accessible and integrated society for people with disabilities. (R. I, 136.) The Center has provided voter registration materials at each of its public events for more than 40 years. (R. I, 137.) The Center recognizes that access to absentee ballots, the permanent absentee voter list, and advance balloting options are critical to increasing voter turnout in Kansas among individuals with disabilities. (R. I, 136-37.) It promotes these forms of voting and facilitates their use by collecting and delivering advance absentee ballots for disabled voters. (R. I, 136.) In 2019, to increase voter registration and participation among voters with disabilities, the Center generated a list of eligible Kansans in Topeka who were not yet registered, sent them registration forms and instructions on how to

complete them, and called them to offer individualized support. (R. I, 137.) From August through October, the Center supported 488 Kansans with disabilities and registered 96 new voters. (R. I, 138.) Due to the Center's work, one 85-year-old Kansan registered to vote for the very first time. (R. I, 138.) In 2020, despite the pandemic, the Center dedicated more than 350 staff hours to voter registration and education. (R. I, 138.)

In sum, in 2020 alone, Plaintiffs registered at least 11,000 Kansas voters, knocked on hundreds of doors, and conveyed their message of civic and political participation to tens of thousands of Kansans. Although Plaintiffs do not misrepresent themselves, their experience is that, even with clear identification, some still mistake them for election officials. For example, during a 2018 event in Pittsburg, Kansas, several community members asked Loud Light President Davis Hammet if he was with the Crawford County Board of Elections. (R. I, 122.) Those who asked were corrected, but other observers may have held the same belief and not asked (and persisted with their misapprehension). Similarly, League Co-President Martha Pint was mistaken for a Sedgwick County Board of Elections member at the River Fest in Wichita in August 2021. (R. I, 114.)

B. 2020's Election Was Secure With Historical Levels of Participation.

Despite the significant challenges presented by the pandemic, Kansas's 2020 general election was a resounding success. The state saw one of its highest rates of voter participation in history, with more than 1.3 million voters—nearly 71 percent of all registered voters—casting a ballot. (R. II, 5.) The Deputy Assistant Secretary of State confirmed: "Kansas voters just did a tremendous job in exercising their right to vote," with "a record number of ballots cast, a record number of registered voters, [and] a record number of advance by mail ballots—both sent and returned." (R. I, 580-81.)

Officials at all levels also lauded the election's integrity: "Kansas officials publicly declared that the 2020 election was successful, without 'any widespread, systematic issues [of] voter fraud, intimidation, irregularities, or voting problems.'" *VoteAmerica*, 2021 WL 5415284 at *21; (R. I, 583 (quoting Tr. of Prelim. Inj. Mot. Hr'g at 118, No. CV 21-2253-KHV, ECF No. 45).) The Secretary himself submitted testimony to the Legislature affirming that "[he didn't] know how Kansas could do it better." (R. I, 588, 602 at 11:48-12:18.) And, after a statewide audit for all 105 counties, the State Board of Canvassers reported that, "all votes have been accounted for and foul play, of any kind, was not found." (R. II, 7.) The Secretary explicitly told the Legislature, "[W]e don't need any drastic change in our election law." (R. I, 595, 604 at 16:55-17:18.)

C. The Legislature Nevertheless Moved Quickly to Pass HB 2183.

These assurances notwithstanding, as soon as the 2021 session began, the Legislature introduced several bills to make voting and voter registration and education more difficult. (R. I, 16-26; 121, 220-28, R. II, 92.) As originally introduced on January 28, 2021, HB 2183 was a narrow, one-page bill that limited executive and judicial authority to modify election procedures. (R. II, 16.) After it passed the House and was transmitted to the Senate, the Senate proceeded to drastically amend it, incorporating several provisions that the House had previously rejected. (R. I, 165-68, 218-19, R. II, 92.) The Challenged Restrictions at issue here were added as a floor amendment during a meeting of the Committee of the Whole on March 31, 2021. (R. I, 170, 173-77.)

This unusual procedure meant there was almost no opportunity to debate and absolutely no opportunity to consider testimony of voters or other community members. (R. I, 174.) But even the limited discussion of the Challenged Restrictions in the highly curtailed floor debate made clear that they were unnecessary to safeguard Kansas's

elections and threatened the type of voter outreach, education, and registration efforts by groups like Plaintiffs that helped ensure the resounding success of the 2020 election. When Senator Caryn Tyson introduced the Challenged Restrictions, neither she nor anyone else suggested there had been any problems with Kansans being misled into believing private citizens were election officials. (R. I, 173-77.) In fact, no one offered *any* explanation as to why the Restrictions were necessary. Preexisting law already made it a misdemeanor to falsely impersonate "a public officer" or "public employee" with "knowledge that such representation is false." KSA 21-5917.

Senator Jeff Pittman made this very point, objecting that no one had an opportunity to "look at the relative penalty versus other penalties" or "understand what the impact of this is versus impersonating an officer. . . ." (R. I, 174.) These objections continued when the Senate incorporated the Restrictions, passed the bill, and moved it to Conference Committee. There, Representative Vic Miller argued that the Restrictions were broad enough to encompass registration and education activities by the League specifically, calling the provisions "vague[]" and objecting that "subsections two and three get pretty murky." (R. I, 186-87.) He warned that the Restrictions raised constitutional concerns and requested that the Senate's representatives on the Committee remove the language to avoid constitutional problems. (R. I, 187.) But the Senate's representatives, led by Senator Larry Alley, would not agree, and HB 2183, with the Challenged Restrictions intact, was reported out of Conference and approved by both chambers on a nearly party line vote the same day, April 8, 2021. (R. I, 376-77, 695-96.)

When HB 2183 made its way to the desk of Governor Laura Kelly, she vetoed it, stating: "Although Kansans have cast millions of ballots over the last decade, there remains no evidence of significant voter fraud in Kansas. This bill is a solution to a

problem that doesn't exist. It is designed to disenfranchise Kansans, making it difficult for them to participate in the democratic process, not to stop voter fraud." (R. I, 526.) The Legislature overrode her veto on May 3, and the Restrictions went into effect on July 1, 2021. (R. I, 544-45, 563.)

D. The Challenged Restrictions Significantly Chill Plaintiffs' Activities.

The Challenged Restrictions have had an immediate impact on Plaintiffs' work. The League canceled dozens of voter registration drives. (R. II, 155-56, R. IV, 2-3.) Loud Light canceled its marquee registration efforts commemorating the 50th anniversary of the 26th Amendment. (R. II, 150, R. IV, 16.) It also severely curtailed its fall fellowship program, which focused on voter registration at college and university campuses. (R. II, 150, R. IV, 16-17.) The Center similarly ceased offering voter registration during its intake process and canceled the voter registration portions of its celebration of the passage of the Americans with Disabilities Act. (R. II, 159-60.) Each entity also had increased difficulties recruiting volunteers and members for these types of activities because of the threat of prosecution posed by the Challenged Restrictions. (R. IV, 17-18.) And the longer the Restrictions have been in place, the more difficult it has been for each of the Plaintiffs to engage in long term planning, recruiting, and fundraising. (R. IV, 3-14; R. IV, 17-18.)

The Challenged Restrictions have also caused a schism in interpretation between various enforcement arms of the state. Douglas County District Attorney Suzanne Valdez announced in late July: "This law criminalizes essential efforts by trusted nonpartisan groups like the League of Women Voters to engage Kansans on participation in accessible, accountable, and fair elections. It is too vague and too broad and threatens to create felons out of dedicated defenders of democracy." (R II, 293.) District Attorney Valdez refused to prosecute anyone under the law. Kansas Attorney General Derick Schmidt then issued his

own release in response, "assur[ing] Kansans that election crimes will still be prosecuted." (R. II, 291.) He made it clear that, the views of local prosecutors like Valdez notwithstanding, Kansas law "grants the attorney general concurrent jurisdiction to prosecute election crimes." (R. II, 291.)

E. Plaintiffs Filed Suit and Moved for a Partial Temporary Injunction.

Plaintiffs moved quickly to file this suit in Shawnee County District Court on June 1, 2021. (R. I, 16.) Shortly thereafter (and two weeks before the Challenged Restrictions' July 1 effective date), Plaintiffs filed a narrow motion to temporarily enjoin the Restrictions on the grounds that they violate Plaintiffs' rights under Sections 10 and 11 of the Kansas Constitution's Bill of Rights. (R. I, 69.)

Plaintiffs submitted hundreds of pages of uncontroverted evidence supporting their claims, including detailed affidavits that demonstrated the immense detrimental impact the Challenged Restrictions would have (and are having) on their voter education, outreach, and registration activities. (R. I, 107-161, R. II, 2-93, 147-161, R. IV, 1-19.) The evidence included testimony regarding Plaintiffs' personal experience that, when they engage in these activities, they are at times mistaken as election officials despite being careful to accurately identify themselves. (R. I, 122, 131.) At every step, Plaintiffs strove to obtain a quick decision. The district court denied their motion to expedite, and—although the parties jointly waived argument—no order came in July or August. After several attempts by Plaintiffs to prompt a ruling, the district court scheduled oral argument for September 14. It then issued its denial two days after that hearing. (R. III, 16.)

F. The District Court Denied the Temporary Injunction Motion.

By reading the word "knowingly" to require an element of mal-intent for all three definitions of "[f]alse representation of an election official" in KSA 25-2438(a), the district

court concluded that the law banned *only* intentionally false impersonation. (R. III, 10.) Based on this statutory interpretation, the district court found that the Challenged Restrictions did not threaten "Plaintiffs' free speech rights" or "protected conduct." (R. III, 10, 12.) It accordingly applied rational basis review. (R. III, 12.) Under this most forgiving test, the district court found that the Restrictions were rationally related to the compelling state interests of "deterring fraud, protecting the integrity and fairness of elections, and maintaining public confidence in the election process." (R. III, 13.)

Alternatively, the district court evaluated the Restrictions under the "flexible balancing" test used by federal courts for challenges brought based on the right to vote under the federal constitution (not laws that burden free speech). (R. III, 8-9.) That test, known as *Anderson-Burdick*, was first articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). It is grounded in principles of federalism that are implicated when federal courts evaluate state election laws, *see id.*, and has never been adopted or cited by the Kansas Supreme Court or Court of Appeals. When used by federal courts, *Anderson-Burdick* is a flexible balancing test in which the significance of the burden on the plaintiffs' rights dictates the standard of review. *Burdick*, 504 U.S. at 434. When the burden is slight, review is more forgiving; when it is severe, it can approximate strict scrutiny. Here, the district court's two analyses largely converged, because it found the burden imposed by the Restrictions was "slight at best," and the "government's important regulatory interests justify [the] reasonable, nondiscriminatory restrictions." (R. III, 12.)

The district court dispensed with Plaintiffs' overbreadth and vagueness arguments after only cursory analysis. In reiterating its conclusion that the Challenged Restrictions do "not infringe on Plaintiffs' free speech rights at all," the court found that

constitutionally protected activity was not the law's target, and the statute was not overly broad. (R. III, 12.) Similarly, it was not unconstitutionally vague, the court found, because it did not set a subjective standard but only outlawed intentional impersonation of an election official, giving adequate guidance of what the law criminalized. (R. III, 13.) At every stage, the district court's conclusions were based on its reading of the statutory text to always—and only—forbid knowing *intentional* impersonation of an election official.

The district court almost entirely ignored Plaintiffs' uncontroverted evidence regarding the impact the Restrictions had on their work—except to find that it did not believe that Plaintiffs' voter assistance activities would fall with the Restrictions' prohibitions—because Plaintiffs' evidence showed that they "always correctly identify themselves as affiliates of their own organizations and not as government officials." (R. III, 12.) This, conclusion, too, relied on the court's interpretation of the law to require—in (a)(1), (a)(2), and (a)(3)—that the person subject to its penalties intentionally mean to misrepresent themselves as an election official. (R III, 11-12.) And the court ignored Plaintiffs' evidence showing that they *know* that, despite, their efforts, they are nevertheless misperceived by some observers as election officials.

Having concluded that Plaintiffs had not demonstrated a likelihood of success on the merits, the court did not analyze the other temporary injunction factors. (R. III, 16.)

IV. ARGUMENTS AND AUTHORITIES

The district court abused its discretion in refusing to temporarily maintain "the relative positions of the parties until a full decision on the merits can be made." *Hodes*, 309 Kan. at 619. Plaintiffs demonstrated all that is necessary: (1) "a substantial likelihood of eventually prevailing on the merits"; (2) "a reasonable probability . . . that the plaintiff will suffer irreparable injury"; (3) no "adequate legal remedy, such as damages"; (4) a

"threat of injury to the plaintiff [that] outweighs whatever harm the injunction may cause the opposing party"; and (5) "the injunction [would] not be against the public interest." *Id.* The district court's significant legal errors led it to reach the wrong conclusion on the first factor. It then refused to consider the remaining factors, nearly all of which were uncontested by Defendants. This Court should reverse and temporarily enjoin the Challenged Restrictions. *See* KSA 60-2101(a).

A. The district court erred as a matter of law in interpreting the Challenged Restrictions to prohibit only the intentional impersonation of election officials.

1. Standard of Review and Preservation of the Issue

The district court's conclusion that Plaintiffs were unlikely to succeed on their claims was based on its legal error in interpreting the Challenged Restrictions. While this Court generally reviews a decision to grant or deny temporary injunctive relief for abuse of discretion, it exercises "de novo" review to the extent the appeal involves "questions of law" like the proper construction of KSA 25-2438. *Matter of M.M.*, 312 Kan. 872, 874, 482 P.3d 583, 585 (2021); *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee Cnty. Comm'rs, Shawnee Cnty.*, 275 Kan. 525, 533, 66 P.3d 873, 879 (2003); *Bd. of Cnty. Comm'rs of Leavenworth Cnty. v. Whitson*, 281 Kan. 678, 132 P.3d 920 (2006); *Hodes*, 309 Kan. at 623 & 673. Plaintiffs preserved this issue by arguing that the Challenged Restrictions prohibit any conduct that one knows will give the appearance that one is an election official or will cause someone to believe as much, regardless of whether the actor intends to deceive or acts to prevent or correct the misapprehension. (R. I, 77-78.) Plaintiffs further demonstrated how the plain language of the statute specifically implicates their voter-assistance activities, which they know from experience can cause observers to believe they are election officials despite their best efforts. (R. I, 85-88.) The

district court nonetheless ruled that the Challenged Restrictions did not implicate any of Plaintiffs voter-assistance activities. (R. III, 11-12.)

2. Analysis

The district court rested its conclusion that Plaintiffs' rights are not implicated by the Challenged Restrictions on an erroneous interpretation of the statutory text. To determine the meaning of a statute, Kansas courts must begin "with the plain language of the statute, giving common words their ordinary meaning." *Matter of M.M.*, 312 Kan. at 874. "When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words." *Id.*; *see also, e.g.*, *State v. Paul*, 285 Kan. 658, 661, 175 P.3d 840, 844 (2008) ("A statute should not be read to add language that is not found in it or to exclude language that is found in it.").

The district court erred at the outset, failing to apply the statute's plain, unambiguous language. As noted, the statute sets forth three alternative definitions for the criminal conduct that it calls "false representation of an election official." The district court decided that all three of those definitions mean the same thing: "knowingly" "[r]epresenting oneself as an election official." KSA 25-2438(a)(1). But Plaintiffs challenge only the definitions in (a)(2) and (a)(3), which make it a felony—*not* to knowingly represent oneself as an election official—but to "knowingly" "engag[e] in conduct that gives the appearance of being an election official," KSA 25-2438(a)(2), or "knowingly" "engag[e] in conduct that would cause another person to believe a person engaging in such conduct is an election official," KSA 25-2438(a)(3).

In the first (unchallenged) definition, "knowingly" modifies the misrepresentation itself—to be prosecuted, one must *know and intend that one is misrepresenting oneself*.

But in the latter two (challenged) definitions, "knowingly" attaches to *any* conduct that could give the *appearance* that the actor is an election official, or that would cause another person to believe as much. There is no textual requirement that the actor intend this misapprehension be formed; if there were, the first definition would be sufficient. Sections (a)(2) and (a)(3) go farther and criminalize any conduct that could potentially cause these types of misunderstandings in observers. There is no other logical reading.

Under Kansas law, a person acts "knowingly" when they are "aware of the nature of [their] conduct, aware that the circumstances exist," *or* "aware that [their] conduct is reasonably certain to cause the result." KSA 21-5202(i); *see also, e.g.*, *State v. Hendrickson*, 485 P.3d 729 (Kan. Ct. App. 2021). The undisputed evidence here demonstrates that, when Plaintiffs engage in their ordinary voter registration, education, and outreach activities, they are "aware" that "the nature of [their] conduct" sometimes causes observers to mistake them for the type of state or local employees that qualify as "election officials" under KSA 25-2438(c) even when Plaintiffs do not intend to cause that error (or even work to guard against it). (R. I, 114, 122, 140, 148, 153.)

That such misimpressions occur is understandable and to be expected: in Kansas, organizations like (and including) Plaintiffs are regularly called upon to work together with election officials to reach, register, and educate voters. (R. I, 146-48.) Sometimes officials even refer questions from the public to Plaintiffs for answers. (R. I, 146-48.) Plaintiffs *know* from experience that these interactions confuse some people into believing Plaintiffs are employed by elections officials. Among the literally thousands of Kansans whom Plaintiffs regularly interact with, it is inevitable that some will misunderstand the difference between Plaintiffs, who provide them with voter education and registration assistance, and employees of election offices who do much the same.

The district court's opinion failed to acknowledge any of this because it interpreted KSA 25-2438(a)'s use of the term "knowingly" to mean that *all* of the statute's alternative definitions apply *only* when a speaker *intends* to *falsely represent themself* as an election official. (*See* R. III, 10-11.) There is no such requirement in (a)(2) and (a)(3): if an actor simply knows their "conduct . . . gives the appearance of being an election official" or would cause someone to so believe, the provision is triggered. In two separate briefs, Defendants acknowledged this: "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 [or any other election official], Subsection (a)(l) would not be implicated *but Subsections (a)(2) or (a)(3) might be*." (R. III, 54 (emphasis added); Appellees' Opp. to Mot. to Transfer.) That is precisely Plaintiffs' point, and one basis for their argument that (a)(2) and (a)(3) facially restrict their protected activities. There is no way to escape this conclusion without impermissibly "add[ing] language that is not found in" the statute's plain text. *Paul*, 285 Kan. at 661.

The district court's finding that it was doubtful that any of Plaintiffs' protected activities fall within (a)(2)'s or (a)(3)'s prohibitions because Plaintiffs "always correctly identify themselves as affiliates of their own organizations and not as government officials," (R. III, 12), similarly is only sustainable if the Court reads into the statute language that simply is not there. The plain text of (a)(2) focuses on the outward "appearance" of Plaintiffs' actions, and the text of (a)(3) creates a violation for any "conduct that would cause someone to believe" the actor "is an election official" when the conduct occurs. There is no exception if an actor corrects any mistakes that occur. In fact, the statute's plain text does not even require that the actor be aware that a misapprehension has been caused, or even that the conduct actually cause a

misapprehension. The *possibility* of misapprehension is enough. *See* KSA 25-2438(a)(2), (a)(3).

Even if this Court were to determine that the statute is ambiguous, the interpretive canons and legislative history both reinforce Plaintiffs' position for at least three reasons. *First*, the district court's interpretation violates the longstanding "cardinal rule of statutory construction" that no provision of a statute should be treated as superfluous or gratuitous. *Rhodenbaugh v. Kansas Empl. Sec. Bd. of Rev.*, 52 Kan. App. 2d 621, 626, 372 P.3d 1252, 1257 (Kan. App. 2016); *accord Driscoll v. Hershberger*, 172 Kan. 145, 155, 238 P.2d 493, 500 (1951) (courts are "not permitted . . . to treat any part of a statute as superfluous"); *State v. Rush*, 255 Kan. 672, 677, 877 P.2d 386, 389–90 (1994) ("Our responsibility . . . is to give effect to all portions of the statute."); *see also State v. Keel*, 302 Kan. 560, 574, 357 P.3d 251, 260 (2015) (citation omitted)). Here, KSA 25-2438(a) defines the proscribed conduct in three distinct subsections. If the statute was only meant to apply when the speaker intentionally "falsely represents" themselves, then (a)(1) would alone have been sufficient. But (a)(2) and (a)(3) create additional definitions. The district court's interpretation makes them redundant, reading the statute's separately enumerated definitions to simply state the same thing three times over. Just as courts cannot properly read into a statute a provision that is not there, they are "not permitted" to erase the meaning of clearly distinct provisions. *Driscoll*, 172 Kan. at 155.

Second, Plaintiffs' reading of the statute is further supported when KSA 25-2438 is considered *in pari materia* with KSA 21-5917, a criminal statute that already prohibits the intentional false imitation of government officials. "When interpreting the provisions of a statute, we generally presume that the Legislature acts with full knowledge of the statutory subject matter, including prior and existing law. . . ." *Matter of M.M.*, 312 Kan.

at 875 (quoting *Ed DeWitte Ins. Agency v. Fin. Assocs. Midwest*, 308 Kan. 1065, 1071, 427 P.3d 25 (2018)). Thus, when the Court seeks to discern legislative intent, statutes that have a similar or common objective should be read in relation to one another to bring their provisions into harmony. *Landrum v. Goering*, 306 Kan. 867, 877, 397 P.3d 1181, 1188 (2017) (citing 2B Singer & Singer, Statutes & Statutory Construction § 51:3 at 233 (7th ed. 2012)). Under KSA 21-5917(a), "[f]alse impersonation" is a misdemeanor offense defined simply as "representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required . . . with knowledge that such representation is false." The Legislature used language that closely parallels this statute in KSA 25-2438(a)(1), where it intended to outlaw the same sort of conduct—both provisions prohibit "[r]epresenting oneself" as an official. By contrast, the language used in the Challenged Restrictions sweeps much further, prohibiting any conduct that the actor knows may cause someone else to misunderstand the actor's role. Principles of statutory construction and basic logic reject the presumption that the Legislature, acting with "full knowledge" of the language used in KSA 21-5917 and KSA 25-2438(a)(1), utilized entirely different language in KSA 25-2438(a)(2) and (a)(3) only to intend that it be interpreted in the exact same manner. *See Matter of M.M.*, 312 Kan. at 875. Rather, "[t]hese differences, when considered as a whole, support the conclusion that the legislature said all it meant to say in [KSA 25-2438(a)(2) and (a)(3)] and that it intended" to criminalize a wider range of conduct. *Landrum*, 306 Kan. at 877.

Finally, contemporaneous statements made during the Legislature's brief consideration of the Challenged Restrictions demonstrate that it was well aware of the precise interpretation that now threatens Plaintiffs' protected activities. *See, e.g.*, *Higgins v. Abilene Mach., Inc.*, 288 Kan. 359, 363, 204 P.3d 1156, 1159 (2009) (noting that, when

available, court may consider "illuminating legislative history"). As noted above, the "false representation of an election official" offense was first introduced as a floor amendment during final consideration of HB 2183 in the Senate, so there was not significant discussion of the provision. (*See* R. I, 170, 173-77 (senators objecting to "bring[ing] felonies on the fly on the floor," and to the germaneness of the amendment).) However, during the Conference Committee's consideration of the bill, the broad scope of (a)(2) and (a)(3) were specifically discussed. In fact, one representative pointed out that the plain text of the provisions encompasses the voter registration and education activities engaged in by the League, a plaintiff in this very case. (R. I, 186.) If the Legislature intended to narrow the scope, it could have done so, but it passed the law without modification.

Thus, each relevant canon of construction requires the same conclusion: the law reaches good-faith voter engagement activities that may unintentionally give the false impression that the actor is an election official. The district court's contrary interpretation is the reason that it decided that that the Restrictions do not implicate Plaintiffs' rights under Sections 10 and 11 of the Kansas Bill of Rights and concluded that Plaintiffs were unlikely to succeed on their claims. (R. III, 16.) Because the district court's statutory interpretation cannot stand, each of the decisions that flowed from it must fall as well.

B. The district court erred as a matter of law in finding that Plaintiffs are unlikely to succeed on their claim under Section 11 of the Kansas Constitution's Bill of Rights.

1. Standard of Review and Preservation of the Issue

The district court's conclusion that Plaintiffs are not substantially likely to succeed in demonstrating that the Restrictions violate Section 11 of the Kansas Bill of Rights by restricting and chilling core political speech was based on several errors of law. This Court exercises "*de novo*" review over "questions of law." *Matter of M.M.*, 312 Kan. at 874; *Gen.*

Bldg. Contractors, L.L.C., 275 Kan. at 533; *Whitson*, 281 Kan. at 678; *Hodes*, 309 Kan. at 623 & 673. Plaintiffs preserved this issue, arguing that the Challenged Restrictions threaten their voter engagement, education, and registration activities, (R. I, 85-88); that strict scrutiny applies to encroachments on such core political speech activities under Section 11, (R. I, 90-91); and that the Restrictions cannot survive strict—or less demanding—scrutiny. (R. I, 92, 94-97.) Plaintiffs also argued that no presumption of constitutionality applies because the Restrictions implicate fundamental rights, (R. I, 90), and that they are at best unconstitutionally overbroad because they criminalize a significant amount of Section-11-protected expression relative to any valid applications they may have, (R. I, 97-99.) The district court reached contrary conclusions on each of these legal questions, (R. III, 6-14), which are subject to unlimited review on appeal. *Matter of M.M.*, 312 Kan. at 874 (interpretation of a statute); *Hodes*, 309 Kan. at 623 (application of constitutional scrutiny); *id.* at 673 (presumption of constitutionality).

2. Analysis

a. Plaintiffs' voter education, outreach, and registration activities are undisputedly core political expression protected by Section 11, which are chilled by the Challenged Restrictions.

No one in this action has disputed that Plaintiffs' voter education, outreach, and registration activities are protected by Section 11. Instead, the debate has been about whether Plaintiffs are likely to succeed on their claim that KSA 25-2438(a)(2)-(3) *infringes upon or threatens* those rights. (Appellees' Opp. to Mot. to Transfer at 19 (arguing the statute does not reach Plaintiffs' "protected expressive activities," not that they are not "protected"); *see also* R. III, 10.)

Indeed, the question of whether voter education, outreach, and registration activities come within Section 11 is not credibly debatable. Section 11 of the Kansas Bill of Rights guarantees that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." Kan. Const. Bill of Rights at 14, § 11. As the Kansas Supreme Court has recognized, Section 11's free-speech protections are "among the most fundamental personal rights and liberties of the people." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984). Further, while Section 11's protections are "generally considered coextensive" with the fundamental rights guaranteed to all Americans by the First Amendment, *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980), the Kansas Supreme Court has emphasized that this is a floor, not a ceiling. This is because Kansas courts have "the authority to interpret Kansas constitutional provisions independently of the manner in which federal courts interpret corresponding provisions" of the U.S. Constitution, which can "result in the Kansas Constitution protecting the rights of Kansans *more robustly* than" the federal constitution. *Hodes*, 309 Kan. at 621 (emphasis added).

Federal precedent would protect Plaintiffs' activities. The U.S. Supreme Court has long recognized that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Plaintiffs' activities involve the "expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. By urging Kansans to exercise their political rights, Plaintiffs are engaging in the type of "core political speech" for which constitutional protections are at their strongest. *See id.* at 422 & n.5; *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 191 (1999); *see also Project*

Vote v. Blackwell, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006) ("The interactive nature of voter registration drives is obvious: they convey the message that participation in the political process through voting is important to a democratic society. . . . The right to engage in these interactions . . . is clearly protected by the First Amendment.").

The uncontroverted evidence demonstrates Plaintiffs' efforts to register, educate, and assist voters involve communicating the value that Plaintiffs attribute to the democratic process, their belief in the capacity of voters to influence government, and their motivation to make government more responsive to all Kansans by diversifying and expanding the electorate. (R. I, 111, 119, 121, 128-29, 136.) These activities are squarely protected by the First Amendment (and thus, the Kansas Bill of Rights, too). *See, e.g.*, *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (finding Tennessee League of Women Voters and other organizations that educate the public about election laws and offer registration drives engage in core political speech); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158-59 (N.D. Fla. 2012) (finding Florida League of Women Voters "encouraging others to register to vote . . . is core First Amendment activity"); *Project Vote*, 455 F. Supp. 2d at 700 (finding "participation in voter registration implicate[d] a number of both expressive and associational rights" protected by the First Amendment); *see also VoteAmerica*, 2021 WL 5415284 at *16 (finding organizations that mail voter information and absentee ballot applications to Kansans are engaging in core political speech); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020) (similar); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (same).

b. The district court applied the wrong level of legal scrutiny.

Because the Challenged Restrictions implicate Plaintiffs' protected voter-assistance activities, the only questions remaining are: (1) what level of scrutiny applies, and (2) are Plaintiffs likely to succeed in proving the Challenged Restrictions fail that scrutiny? Because the free speech rights protected by Section 11 are fundamental, strict scrutiny applies under Kansas precedent. *See, e.g.*, *Hodes*, 309 Kan. at 663; *McKinney*, 236 Kan. 224, 234. But even if the district court could have properly ignored Kansas precedent in favor of federal precedent (a dubious proposition), it also misapplied the federal standard as a matter of law. Under either framework, the Challenged Restrictions are properly subject to strict, or—at the very least—"exacting" scrutiny, and they cannot survive either. The district court erred by applying the *Anderson-Burdick* balancing test—which has never been adopted or even cited by the Kansas Supreme Court or Court of Appeals and which applies only to "right-to-vote" claims, not free speech claims as at issue here. Even if *Anderson-Burdick* applied (as discussed, it does not), the encroachment on Plaintiffs' fundamental rights would require a more demanding level of scrutiny.

(i) Because the free speech rights protected by Section 11 are "fundamental rights," strict scrutiny applies.

The Kansas Supreme Court has been clear: when a "fundamental right is implicated," the "most searching of [constitutional] standards—strict scrutiny—applies." *Hodes*, 309 Kan. at 663. The Kansas Supreme Court has also explicitly recognized that the freedoms of speech protected under Section 11 are "among the most fundamental personal rights and liberties of the people." *McKinney*, 236 Kan. 224, 234 (*citing New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Thus, Section 11 of the Kansas Bill of

Rights calls for the application of strict scrutiny even when less searching scrutiny would be appropriate under the First Amendment. *See Hodes*, 309 Kan. at 621 (recognizing fundamental rights may be "more robustly" protected under the Kansas Constitution). This is apparent not only from Kansas Supreme Court precedent, but also the broader language and intent of the Kansas Constitution. *See id.* at 620.

"[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed. . . ." *Hodes*, 309 Kan. at 622–23 (quoting *Wright v. Noell*, 16 Kan. 601, 607, 1876 WL 1081 (1876)). Here, Section 11's broad protection of speech by "*all* persons" covering "*all* subjects," Kan. Const. Bill of Rights at 14, § 11 (emphasis added), evokes a clear intent by the framers to preserve and protect the ability of the people to engage in activities associated with the interchange of ideas concerning political and social change.

The primacy of the need to protect core political speech in Kansas is further embodied in the contemporary history of the Constitution's passage. "When the words themselves do not make the drafters' intent clear, courts look to the historical record, remembering the polestar is the intention of the makers and adopters." *Hodes*, 309 Kan. at 622–23 (internal quotes and alterations omitted) (quoting *Hunt v. Eddy*, 150 Kan. 1, 5, 90 P.2d 747 (1939)). During the 1859 Wyandotte Convention, the Framers spoke openly of the need to ensure petitioners seeking to address the Convention would not "be debarred the right to express [their] views." Proceedings & Debates of the Kansas Constitutional Convention (Drapier ed., 1859), *reprinted in* Kansas Constitutional Convention 79-81 (1920). This history underscores the fundamental understanding,

dating back to the state's founding, that political activities aimed at influencing those with voting power are at the core of the freedoms protected by Section 11, and it confirms that the "intent of the Wyandotte Convention delegation and voters who ratified the Constitution" was that the right to such speech be protected to the utmost degree. *Hodes*, 309 Kan. at 669; *cf. McKinney*, 236 Kan. at 234. Thus, Section 11 demands strict scrutiny.

(ii) Even under the federal standard for First Amendment violations heightened scrutiny would apply.

Even if federal case law were to guide the Court in resolving Plaintiffs' Section 11 claims, it points to the same conclusion here: strict—or, at the very least, a similarly demanding "exacting"—scrutiny standard applies. Thus, to the extent the Kansas Constitution's protections are only coextensive with the First Amendment, federal case law reinforces the conclusion the Restrictions' encroachment on core political speech activities renders it constitutionally suspect.

As explained, the "interchange of ideas for the bringing about of political and social changes" are at the core of First Amendment protections. *Meyer*, 486 U.S. at 421 (quoting *Roth*, 354 U.S. at 484). And no one disputes that Plaintiffs' activities are the "type of interactive communication concerning political change" that is properly understood as "core political speech." *Id.* at 421-22. Federal courts have generally applied strict scrutiny to laws that directly restrict such activities. *See Buckley*, 525 U.S. at 207 (Thomas, J., concurring) ("When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny . . ."); *see also VoteAmerica*, 2021 WL 5415284 at *16 (same).

The U.S. Supreme Court has not always been perfectly precise in discussing the level of scrutiny the First Amendment requires for a law that chills and reduces the total

quantity of core speech without directly regulating the content of speech. The Court has been crystal clear, however, that such laws must pass extremely demanding standards to survive constitutional challenge. In *Meyer* and *Buckley*, the Court described the appropriate standard as "exacting scrutiny." *Meyer*, 486 U.S. at 423; *Buckley*, 525 U.S. at 204. Many courts, including the Tenth Circuit, have interpreted this as simply another term for strict scrutiny. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002). Following that precedent, the *VoteAmerica* court held just last month that "strict scrutiny must be applied 'where the government restricts the overall quantum of speech available to the election or voting process.'" 2021 WL 5415284 at *17 (quoting *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000)). Indeed, the Supreme Court itself has described *Meyer* as a decision "unanimously appl[ying] strict scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 n.10 (1995); *see also Buckley*, 525 U.S. at 207 (Thomas, J., concurring).

Even if exacting scrutiny were a little less "strict," the Challenged Restrictions could not survive, because they directly restrict Plaintiffs' core political speech and, indeed, have already had a chilling effect. *See supra*, § III.D.

(iii) The Challenged Restrictions cannot survive strict or exacting scrutiny.

To survive strict scrutiny, the Challenged Restrictions must serve a "compelling state interest" and be "narrowly tailored to further that interest." *Hodes*, 309 Kan. at 663. A compelling state interest is "one that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Id.* at 664 (quotation marks and citation omitted). "[N]arrowly tailored" means there are "no less restrictive alternatives" that would equally serve the state's compelling

interest. *State v. Smith*, 57 Kan. App. 2d 312, 322, 452 P.3d 382 (2019). Thus, if the Challenged Restrictions are "overinclusive" by reaching speech that the state does not have a compelling interest to restrict, they are unconstitutional. *See, e.g.*, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978). The state bears the burden on both of these points: "[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." *Hodes*, 309 Kan. at 669 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015)) (emphasis added).

The state cannot—and did not—demonstrate that the Challenged Restrictions either serve a compelling state interest or are narrowly tailored. The legislators that crafted the Challenged Restrictions provided no justification for them. (*See* R. I, 173-77.) Nor did the debate in the Conference Committee shed any light on the subject; instead, it highlighted the very constitutional concerns that Plaintiffs raise here. (R. I, 186-87.) The district court's conclusion that the Challenged Restrictions were intended to "deter[] fraud, protect[] the integrity and fairness of elections, and maintain[] public confidence in the election process" (R. III, 13), was not supported by any evidence. Moreover, the district court's conclusion that the Challenged Restrictions serve these interests was, again, built on that court's erroneous interpretation of the statute. (R. III, 13.)

The Restrictions that the Plaintiffs challenge go further than the district court concluded, criminalizing any activity or communication that might lead a third party to mistakenly conclude that the person was an election official. Even Defendants never argued—and the district court did not find—that the state has a compelling interest in criminalizing all such conduct. Moreover, the record established that there was no

compelling need for a new law prohibiting the conduct that the district court identified because Kansas *already* criminalized intentional impersonation of a public official, *see* KSA 21-5917, and there is no suggestion that this prohibition was ineffective. On the contrary, election officials at all levels recognized that Kansas's performance during the 2020 election was a model of democratic participation and electoral integrity. *See supra*, § III.B; *VoteAmerica*, 2021 WL 5415284 at *21 (noting that these precise statements "refute any compelling need" for the enactment of companion bill, HB 2332).

Even if the Court were to assume that the state had a compelling interest that could justify new criminal provisions to further deter fraud, that goal is accomplished by the first definition in KSA 25-2438(a)(1), which expressly makes intentional election official impersonation a felony. The U.S. Supreme Court encountered this exact scenario in *McCullen v. Coakley*, 573 U.S. 464, 490–91 (2014), in which it held that a law creating abortion clinic "buffer zones" could not meet the tailoring requirement *even under intermediate scrutiny* where the challenged law "itself contain[ed] a separate provision. . .unchallenged by petitioners—that prohibit[ed] much of th[e] conduct" the state's asserted interests sought to address, as did other "generic criminal statutes." *Id.* at 491-92. That is precisely the case here.

Even if one were to presume that the Challenged Restrictions were enacted to prevent inadvertent voter confusion—a justification Defendants have never offered and which is not supported in the record—the Constitution does not permit this sort of "[b]road prophylactic rule[] in the area of free expression." *Riley v. Natl. Fedn. of the Blind of N. C., Inc.*, 487 U.S. 781, 801 (1988) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)). The vast majority of Plaintiffs' efforts do not cause problems or confusion. The Constitution does not permit the state to paint with so broad a brush: "Precision of

regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* The Challenged Restrictions fail strict scrutiny.

Their fate remains the same even if "exacting scrutiny" applies. To survive exacting scrutiny, a law must (1) be "substantially related to important governmental interests" (2) that cannot be solved by "less problematic measures." *Buckley*, 525 U.S. at 202, 204. But as already discussed, the Challenged Restrictions are not sufficiently related to an important government interest that could not be served by less burdensome alternatives. Subsections (a)(2) and (a)(3) add nothing to (a)(1) or existing Kansas law that would further the state's interest in criminalizing intentional misrepresentation. And whatever interest the state might purport to have in preventing the benign scenario where an actor—who does not intend to misrepresent himself—is nevertheless mistaken by a third party as an election official, it is not an "important" one. *Id.* But even if it were, there are far "less problematic measures" that Kansas can enact to further this interest. *Id.* at 204; *see also Hargett*, 400 F. Supp. 3d at 732 (finding if the state "is concerned that [registration] drives are being done fraudulently . . . it can punish the fraud rather than subjecting everyone else to an intrusive prophylactic scheme").

Indeed, in *Meyer* and *Buckley*, the Court applied exacting scrutiny to invalidate several restrictions that threatened to chill political speech in ways far more minor than the felony criminal restrictions at issue here. These included requirements that petition circulators wear identification badges, or disclose certain salary information. *Meyer*, 486 U.S. at 416; *Buckley*, 525 U.S. at 186. In comparison, the Challenged Restrictions' broad criminalization of voter education, outreach and registration activities—if they could possibly be anticipated to be misunderstood by an observer—threatens protected

expression to a greater degree with less justification. *See also, e.g.*, *Hargett*, 400 F. Supp. 3d at 725 (invalidating similar regulations under exacting scrutiny standard).

In short, because the Challenged Restrictions are unnecessary and reach far more activity than needed to serve any purported state interest, they are insufficiently tailored to survive strict or exacting scrutiny and are unconstitutional.

(iv) The district court not only improperly applied the *Anderson-Burdick* test, it misapplied it as well.

The district court did not apply strict or exacting scrutiny. Instead, it concluded that, "even assuming that Plaintiffs' free speech rights are somehow implicated . . . [and] any test other than rational basis could be applied, it would be the *Anderson-Burdick* 'flexible balancing' test." (R. III, 12.) This, too, was legal error.

The *Anderson-Burdick* test applies when plaintiffs challenge election restrictions on the ground that they burden their *right to vote* under the *federal* Constitution. *See Fish v. Schwab*, 957 F.3d 1105, 1121 (10th Cir. 2020). It does not apply when free speech rights are violated. In the right-to-vote context, it operates to create a sliding scale of scrutiny: the more extensive the burden on the plaintiffs' voting rights, the more searching the scrutiny and the more compelling the state's interest must be to justify the law. *Id.* at 1121-22. Still, in all cases—even when the burden on voting rights is slight—the test requires the court to take a hard look at the state's justifications for the rule and decide whether there is truly a fit between that justification and those restrictions, and if it is sufficient to justify the burdens on voting rights. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) ("However slight that burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (quotation marks and citations omitted); *Fish*, 957 F.3d

at 1133 (explaining that even if a state's interest is "legitimate in the abstract," the state must demonstrate why the interest makes it "necessary to burden voters' rights"). Notably, the *Anderson-Burdick* test has never been endorsed, adopted, or even cited by the Kansas Supreme Court or Court of Appeals—even in the right-to-vote context—and it is not applicable here for several reasons.

First, the Plaintiffs challenge a state law, in state court, raising claims under the state constitution. The federalism concerns that motivated the Supreme Court to create the *Anderson-Burdick* test simply are not present. *See, e.g.*, *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (explaining that the test is the product of the "confluence of interests" between the state's regulation of election mechanics and the *federal courts'* protection of *federal* rights). Moreover, as discussed above, the Kansas Supreme Court has articulated *its own test* for when fundamental rights guaranteed by the Kansas Constitution are implicated by a challenged law. *See supra*, § I.A.b(i). There is no reason to look to federal caselaw for a different test.

Second, Plaintiffs *do not challenge the Restrictions on the grounds that they burden the right to vote*. While they also impose burdens on that right (and significant ones, as the evidence demonstrates), at issue in this appeal is Plaintiffs' challenge to the Restrictions on the grounds that they violate their *free speech* rights. This type of claim—even when raised in federal courts in connection with election-related speech, is properly evaluated under the *Meyer-Buckley* First Amendment framework, not *Anderson-Burdick*. *See, e.g.*, *Hargett*, 400 F. Supp. 3d at 718 (rejecting reasoning virtually identical to the district court's and concluding that laws that limit an organization's ability to engage in core political speech such as voter registration, education, and engagement are analyzed under *Meyer-Buckley's* First Amendment framework, not *Anderson-Burdick*).

A Kansas federal district court came to this exact conclusion just last month in the *VoteAmerica* case. As the court explained, when a law "goes beyond invoking the State's constitutional authority to regulate election processes *and involves direct regulation of communication among private parties who are advocating for particular change*," it implicates the First Amendment, and the *Anderson-Burdick* framework is not applicable. *VoteAmerica*, 2021 WL 5415284 at *21 (emphasis added). And because the Challenged Restrictions at issue here, like the laws at issue in *VoteAmerica*, "significantly inhibit[] communication with voters about proposed political change and eliminates voting advocacy by plaintiffs," strict scrutiny applies. *Id.*

But even if *Anderson-Burdick* were the correct test, that standard, too, would properly render the Challenged Restrictions unconstitutional. The undisputed evidence demonstrates that, Plaintiffs have cancelled or scaled back nearly all of their core voter registration, engagement, and outreach activities as a direct result of their reasonable fear that engaging in that activity could subject them to criminal prosecution. Because this injury is severe, *Anderson-Burdick* dictates a standard of review that is functionally indistinguishable from strict scrutiny. *See Fish*, 957 F.3d at 1124-25; *cf. VoteAmerica*, 2021 WL 5415284 at *18 ("[O]n this record, the difference between strict scrutiny and the *Anderson-Burdick* balancing framework is not necessarily relevant. . . . [D]efendants have provided almost no factual basis for disputing plaintiffs' claims that HB 2332 will drastically limit the number of voices advocating for the politically controversial topic of voting by mail, limit the audience which proponents can reach[,] and make it less likely that proponents will gather the necessary support to continue sharing their message.").

Indeed, the Challenged Restrictions should still fall even if the Court were to find that the burden on Plaintiffs' rights were "slight" (it is not). This is because, in all

instances, even when a burden on a plaintiff's rights is minimal, *Anderson-Burdick* requires that the Court conduct a "means-fit" analysis, in which it must scrutinize "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests *make it necessary* to burden the plaintiff's rights." *Fish*, 957 F.3d at 1124 (emphasis added). The state has little (if any) interest in criminalizing innocent misapprehensions of an actor's official status. *See supra*, § I.A.b(iii). Indeed, the only interest that Defendants (or the district court) have identified to justify the Challenged Restrictions are those that are *already* wholly served by both KSA 21-5917 and the first definition in (a)(1) of KSA 25-2438. If the district court's interpretation of the statute is wrong (and for the reasons discussed, it plainly is) then even at the most deferential end of *Anderson-Burdick's* sliding scale, Defendants' stated interest in protecting the public from such intentional misrepresentation cannot justify the burdens imposed on Plaintiffs as a result of the Challenged Restrictions.

There is nothing inherently concerning about a situation in which someone incorrectly misunderstands another person's affiliation or role. Other Kansas laws implicitly recognize this. For example, Kansas law requires that a police imposter *intentionally* misrepresent himself as having governmental authority to be prosecuted—and even then, the penalty is classified as only a misdemeanor. *See* KSA 21-5917. Yet, under the Challenged Restrictions, Plaintiffs and others who engage in conduct that may cause some observers to misperceive them as election officials—wielding far less perceived authority than an intentional police imposter—are at risk of *felony* prosecution, even when they did not intend to misrepresent themselves. Because even Defendants have never argued that they have any legitimate (much less heightened or compelling) interest

in criminalizing conduct based on the mere misperception of an observer, the Challenged Restrictions fail *any* level of scrutiny.

c. Laws that implicate fundamental rights are not presumed constitutional.

The district court also erred in *presuming* the constitutionality of KSA 25-2438(a)(2) and (3). Even after acknowledging that the Kansas Supreme Court held just two years ago that statutes that have the effect of restricting fundamental rights are due no such presumption, *Hodes*, 309 Kan. at 673-74, the district court declared that, "[b]ecause there is no such declaration by the Kansas Supreme Court in regard to Section 11 [of the Kansas Constitution specifically], the general presumption of constitutionality applies to the challenged provision." (R. III, 6.) For this to be correct, the Kansas Supreme Court would have to declare that the protections the Kansas Constitution guarantees the rights of speech and association are not "fundamental." But, as noted, the Kansas Supreme Court has *already* held the opposite. *See McKinney*, 236 Kan. at 234.

Moreover, the Court has been clear that—at the very least—Section 11 rights are co-extensive with the First Amendment, under which protections for core political speech are at their "zenith." *Meyer*, 486 U.S. at 416; *Chandler*, 292 F.3d at 1241. It is illogical to posit that federal courts would view core political speech rights as "fundamental," but the Kansas Supreme Court would not, given the "more robust" protections afforded by the Kansas Constitution. *Hodes*, 309 Kan. at 621. The district court's legal error is especially significant because, if adopted by courts throughout the state, statutes that impede fundamental speech and association rights would be presumed constitutional—in direct contradiction to the Kansas Supreme Court's recent, unequivocally clear pronouncement

in *Hodes*. The district court's conclusion that courts must presume the constitutionality of statutes that implicate Section 11 rights must be reversed.

d. Even if valid applications of the Challenged Restrictions were imaginable, enough protected expression falls within their scope to render them unconstitutionally overbroad.

Finally, even if Defendants were able conceive of applications of the Challenged Restrictions that do not violate Section 11 of the Bill of Rights, it would not save them from facial invalidation. Expressive "freedoms need breathing space to survive," *City of Prairie Vill. v. Hogan*, 855 P.2d 949, 953 (Kan. 1993) (quoting *Button*, 371 U.S. at 433), and the "very existence" of a statute that is susceptible to being wrongfully applied to punish protected speech "may cause others not before the court to refrain from constitutionally protected speech or expression," *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Thus, a plaintiff need not show that every possible application of a statute violates Section 11 to prove it is unconstitutional on its face. Rather, a statute is overbroad, and thus facially unconstitutional, if it restricts "a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *VoteAmerica*, 2021 WL 5415284, at *21; *State v. Whitesell*, 270 Kan. 259, 271, 13 P.3d 887, 900 (2000).

Kansas courts treat overbreadth as a two-part inquiry, holding a statute is unconstitutional if (1) "protected activity is a significant part of the law's target," and (2) "'there exists no satisfactory method of severing' constitutional applications of the law from unconstitutional ones." *State v. Boettger*, 310 Kan. 800, 804, 450 P.3d 805, 808 (2019) (quoting *Whitesell*, 270 Kan. at 270). Because the district court read the Challenged Restrictions to prohibit only intentional misrepresentation, it erroneously

concluded that the statute did not implicate *any* protected activity. For reasons already discussed, this was error. To be sure, the first definition, found in subsection (a)(1), proscribes intentionally impersonating an election official. But the plain language of (a)(2) and (a)(3) reaches far more broadly, "creat[ing] a criminal prohibition of alarming breadth" that encompasses a vast amount of protected speech. *United States v. Stevens*, 559 U.S. 460, 474 (2010). Plaintiffs can never know for sure when, in performing their voter education, registration, and engagement activities, someone might misperceive them as an election official. But they do know, based on their experience, that this happens, despite their best efforts to accurately identify themselves. (R. I, 114, 122, 140, 148, 153.) As a result, virtually all of Plaintiffs' constitutionally protected get-out-the-vote activities "would cause"—and indeed, at times have caused—the people they interact with to sometimes "believe" Plaintiffs are election officials. These activities are undisputedly "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421–22; *see supra*, § I.A.a.

By comparison, the legitimate sweep of the Challenged Restrictions is very limited, if it exists at all. *Hicks*, 539 U.S. at 119. If (a)(2) and (a)(3) are not redundant of subsection (a)(1), *see supra* § IV.A.2, they must be read to target behavior *other than* the type of intentional misrepresentation that the district court relied on in upholding the law. Even assuming some constitutional applications of the Challenged Restrictions as properly read exist, they are far outweighed by the protected activity that falls within their ambit, such that "protected activity" is, at the very least, a "significant part" of their "target." *Boettger*, 310 Kan. at 804. Even if the statute were ambiguous as to its reach, that ambiguity would have to be accounted for in judging its overbreadth. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.6 (1982) ("In making that

[overbreadth] determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis").

Nor is there a "satisfactory method of severing" the Restrictions' "constitutional applications" from their unconstitutional ones. *Boettger*, 310 Kan. at 804. Simply put, the courts' "function is to interpret legislation, not rewrite it." *State v. Beard*, 197 Kan. 275, 278, 416 P.2d 783 (1966). It cannot properly read text into the statute in the manner that the district court did to render it constitutional, and Defendants have identified no other reasonable method of narrowing the statute to only constitutional applications. The Restrictions are thus not "readily susceptible"—or susceptible at all—to a limiting construction that would reduce their overbreadth. *Stevens*, 559 U.S. at 481 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997)). They therefore are, at minimum, overbroad, and thus facially violate Section 11. This Court should accordingly reverse the district court's determination that Plaintiffs are unlikely to succeed on their claim that the Challenged Restrictions violate Section 11 of the Bill of Rights.

C. The district court erred as a matter of law in finding that Plaintiffs are unlikely to succeed on their claim under Section 10 of the Kansas Constitution's Bill of Rights.

1. Standard of Review and Preservation of the Issue

In their temporary injunction motion, Plaintiffs explained that the Challenged Restrictions are unconstitutionally vague because they turn on the subjective impressions of third parties that cannot be reliably anticipated. (R. I, 99-101.) Because the district court misconstrued the statute to prohibit only the intentional impersonation of an election official, it rejected this argument, concluding that the Challenged Restrictions gave sufficient notice of what conduct they prohibit. (R. III, 14-15.) This Court owes no

deference to the district court's legal reasoning, which it reviews *de novo*. *State v. Ryce*, 306 Kan. 682, 694 (2017); *Dissmeyer v. State*, 292 Kan. 37, 39 (2011).

2. Analysis

a. Laws that fail to give a person of ordinary intelligence notice of what they prohibit and an opportunity to conform his conduct to the law violate Section 10 of the Bill of Rights.

Plaintiffs are also likely to succeed in their separate claim that the Challenged Restrictions violate Section 10 of the Kansas Bill of Rights because they are impermissibly vague. The district court erred in concluding otherwise.

"While closely related, overbreadth and vagueness are distinct concepts." *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630, 634 (1980). Whereas an overbroad law "makes conduct punishable which under some circumstances is constitutionally protected from criminal sanctions," a vague statute "leaves persons of common intelligence to guess at its meaning and whether particular conduct is a crime." *Id.* Both classes of laws have the potential to independently and unconstitutionally chill protected speech. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) (quoting *Button*, 371 U.S. at 433).[2] When the two concepts are present together, they reinforce each other in what some courts have dubbed "[o]verbreadth from indeterminacy." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1505 (11th Cir. 1990). This is because overbroad laws with "ambiguous meanings cause citizens to

[2] The Kansas Supreme Court has "held that the test whether a statute is so vague and indefinite and therefore fails to inform the accused of the nature and cause of the charges against him as required by Section 10 of the Kansas Bill of Rights is the same as that applicable in determining whether a statute violates the due process clause of the Fourteenth Amendment" of the U.S. Constitution. *State v. Stauffer Commc'ns, Inc.*, 225 Kan. 540, 545 (1979).

steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Flipside, Hoffman Ests.*, 455 U.S. at 495 n.6 (quotations and alterations omitted) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Such chilling is antithetical to our free society, and the Kansas Constitution accordingly permits the State to regulate speech only "narrow[ly]," and with "specificity." *Gooding*, 405 U.S. at 521-22 (quoting *Button*, 371 U.S. at 433).

Apart from the chilling effect that vague restrictions impose on protected expression, the constitutional prohibition against vague laws "is [also] a basic principle of due process" protected by Section 10 of the Kansas Constitution's Bill of Rights. *City of Wichita v. Wallace*, 246 Kan. 253, 258, 788 P.2d 270, 274 (1990) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1990)). The doctrine is based on "at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television Stations*, 567 U.S. at 253. A concomitant of the latter concern is that vague laws "also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). Vague laws empower "relatively unaccountable police, prosecutors, and judges" to determine what is and is not a criminal offense through their enforcement decisions, "eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.* (citations omitted).

b. The Challenged Restrictions are unconstitutionally vague because they turn on subjective impressions of third parties, making it impossible to anticipate what

conduct is prohibited and inviting arbitrary enforcement.

The Challenged Restrictions lie at the intersection of two categories of laws that both separately require a more "rigorous" vagueness inquiry. *Fox Television Stations*, 567 U.S. at 253-54. First, "[w]hen speech is involved," *id.*, a "more stringent vagueness test" applies because vague restrictions have a prophylactic effect on expression; the threat of arbitrary or discriminatory enforcement is likely to chill the speech of many who will never ultimately be prosecuted. *Vill. of Hoffman*, 455 U.S. at 499; *see also City of Wichita*, 246 Kan. at 259. Second, the Challenged Restrictions impose harsh penalties and make felons of those who transgress them. As the severity of the consequences for violating a vague law increase, so too does the incentive for citizens to refrain from the regulated activity entirely ensure they do not inadvertently cross the blurred line between legal and illegal conduct. *See City of Wichita*, 246 Kan. at 259. Courts accordingly "recognize[] that the standards of certainty in a statute punishing criminal offenses are higher than those depending primarily upon civil sanction for enforcement." *Id.*

The Challenged Restrictions cannot survive this doubly searching inquiry because they do not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* at 259-59 (quoting *Grayned*, 408 U.S. at 108). This is because a violation is not dependent on a person's objective conduct, but rather the subjective perceptions of a third party. Yet, no person can fully predict or control what another person thinks, feels, or believes. What conduct a given individual will interpret that an election official is shaped by his or her unique background, education, and past experiences, all of which Plaintiffs cannot fully anticipate in every instance. And the uncontroverted evidence demonstrates that even when Plaintiffs clearly identify

themselves, it is not always effective at preventing voters' mistaken beliefs. (R. I, 114, 122, 140, 148, 153.) Short of refraining from the interaction all together, a person simply cannot know how to conclusively avoid making another person think certain thoughts.

Both the U.S. and Kansas Supreme Courts have recognized as much when invalidating similar criminal laws that premised violations on the subjective impressions of third parties. In *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), for instance, the U.S. Supreme Court held unconstitutionally vague a law that criminalized assembling on sidewalks to engage in conduct that was "annoying to persons passing by." The Court explained that "[c]onduct that annoys some people does not annoy others," and, because an actor cannot fully control or predict how his actions will make a third party feel, "no standard of conduct is specified at all." *Id.* Just as one cannot fully know what conduct will annoy a given passerby, one cannot always know with certainty what conduct will give the appearance or belief that one is an election official to a particular individual.

For many of the same reasons, the Kansas Supreme Court in *State v. Bryan*, 259 Kan. 143, 147, 910 P.2d 212 (1996), struck down a statute that prohibited "alarming, annoying, or harassing" another person. The court concluded that, much like the Challenged Restrictions, the law improperly used a standard focused on the "subjective state of mind of the victim." *Id.* at 147, 155. "The danger in this situation is obvious": a "victim may be of such a state of mind that conduct which would never annoy, alarm, or harass a reasonable person would seriously annoy, alarm, or harass this victim." *Id.* "[T]he defendant would be guilty of . . . a felony offense," even though "a reasonable person in the same situation would not be alarmed, annoyed, or harassed by the defendant's conduct." *Id.* Ultimately, no one can fully anticipate what another person will think or feel, the court reasoned, making it impossible to avoid violating the law. *Id.* The

same is true, here: other than refraining from certain constitutionally protected activities, Plaintiffs have no way of ensuring they will not violate the Challenged Restrictions. This is precisely the sort of expression-chilling threat that the Kansas Constitution guards against. *City of Wichita*, 246 Kan. at 259.

Additionally, because the Challenged Restrictions lack "explicit standards for those who" would enforce them, they "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.* (quoting *Grayned*, 408 U.S. at 108–09). Such a construction is always contrary to the precepts of divided and representative government, but the Challenged Restrictions threaten unique harm because they regulate in the field of political speech. Because Plaintiffs' voter-assistance activities virtually *always* carry the risk that their employees or volunteers may be perceived as election officials, the Challenged Restrictions "allow[] policemen, prosecutors and juries to pursue their personal predilections" in choosing which purported violations to prosecute. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)); *cf. Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) ("Without [objective, workable standards], an election judge's own politics may shape his views.").

Nor can the State rehabilitate the statute with assurances that Kansas will prosecute only its most serious or egregious violations. Courts cannot "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 474 (2010). Even presuming the State's good faith, the Challenged Restrictions will chill an unacceptable amount of constitutionally protected speech because many of Plaintiffs' staff, members, and volunteers—particularly those who come from marginalized communities who have

experienced bias in law enforcement, (*see* R. I, 598-99)—will be unwilling to roll the dice by placing themselves at the mercy of that unbridled discretion.

"At its heart the test for vagueness is a commonsense determination of fundamental fairness." *City of Wichita*, 246 Kan. At 259 (quoting *State v. Kirby*, 222 Kan. 1, 4, 563 P.2d 408 (1977)). Simply put, it is unjust to hold an individual accountable for subjective impressions of a third party that the person cannot reliably predict or control. Worse still, in this case, the severe penalties for violating the indefinite prohibition also operate to chill core political speech: already Plaintiffs greatly reduced their constitutionally protected activities out of fear that they will accidently commit a felony while trying to assist other Kansans to exercise their fundamental right to vote. And, by creating a mechanism that is so easily susceptible to targeted enforcement, the law further serves to undermine public confidence in our electoral system, striking at the very integrity of our democratic institutions. The Challenged Restrictions are precisely the type of dangerous laws that Section 10 of the Bill of Rights was designed to protect against, and the district court erred by concluding Plaintiffs were unlikely to succeed on this claim.

D. Plaintiffs satisfied the other requirements for a temporary injunction, including by showing that the Challenged Restrictions cause them irreparable harm and the public interest is served by an injunction while this matter is pending.

1. Standard of Review and Preservation of the Issue

To obtain a temporary injunction, a litigant must demonstrate: (1) "a substantial likelihood of eventually prevailing on the merits"; (2) "a reasonable probability . . . that the plaintiff will suffer irreparable injury"; (3) no "adequate legal remedy, such as damages"; (4) a "threat of injury to the plaintiff [that] outweighs whatever harm the

injunction may cause the opposing party"; and (5) "the injunction [would] not be against the public interest." *Hodes*, 309 Kan. At 619.

Plaintiffs argued that they would suffer irreparable harm from the infringement of their constitutionally protected free speech and associational rights and that the public interest in enjoining an unconstitutional statute greatly outweighed any damage done to the State. (R. I, 101-02.) Defendants did not address these arguments, waving any arguments in opposition. (*See* R. II, 126-27.) The district court's opinion likewise did not reach the equitable factors of the temporary injunction standard, resting instead solely on the likelihood of success prong. (R. III, 16.)

The denial of an injunction is reviewed for an abuse of discretion. *E.g.*, *Bd. Of Cnty. Comm'rs of Leavenworth Cnty. V. Whitson*, 281 Kan. 678, 683, 132 P.3d 920 (2006). "Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801, 810 (2011). Appellate courts may engage in analysis of injunction factors that the district court ignored so long as there is evidence in the record to support such inquiry. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 171 (4th Cir. 2019), *as amended* (Oct. 31, 2019).

2. Analysis

a. The Challenged Restrictions have caused and continue to cause Plaintiffs irreparable harm.

There is ample evidence in the record for the Court to determine that Plaintiffs have suffered irreparable harm—and will continue to do so absent an injunction—as a result of the Challenged Restrictions. "The loss of [free-speech] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *VoteAmerica*, 2021 WL 5415284, at *21 (quoting *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016), and *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016).

The affidavits submitted in support of Plaintiffs' Motion—with which the district court hardly engaged—confirm this reality. Specifically, immediately after the Challenged Restrictions went into effect on July 1, Plaintiffs had to drastically scale down, and in most cases completely terminate, their voter education and engagement activities. (R. I, 115 (stating the Restrictions "will make it harder, and in some cases impossible, for the Kansas League to achieve its mission moving forward because it directly hinders the League's ability to engage in voter registration, education, and outreach."), R. I, 124-25 (Loud Light "bec[a]me completely inoperable as of July 1."); R. I, 140 (discussing the Center's plans for events on July 17 and beyond, but explaining that, due to the Challenged Restrictions, its "voter education activities are effectively on hold"); R. I, 132 ("[I]t is becoming increasingly clear that the new law will greatly hinder our ability to engage in the kind of community-based voter registration, education, and engagement activities that further our mission and allow us to spread our message of political and civil engagement.").)

The impact that this lost activity had on the 2021 election, and that it will have on all future elections, is irreparable, because "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *see also VoteAmerica*, 2021 WL 5415284, at *21 ("Such losses are ones that money damages cannot redress, so this factor weighs strongly in favor of an injunction.") (citing *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1259 (D. Utah 2017)). These activities are so critical to Plaintiffs' missions that the Restrictions have had the effect of halting an enormous quantum of Plaintiffs' work. (R. II, 150 (as a direct result of the Restrictions "Loud Light has made the difficult decision to halt *all* voter engagement activities"), R. II, 155 ("The Kansas League has had to suspend all voter registration and education events due to fear of prosecution for its members and volunteers"); R. II, 159 ("[F]or the first time in the Center's memory, we have been forced to suspend these critical [voter registration] activities to protect the Center and our advocates from felony prosecution."), R. IV, 15 ("[S]ince the Restriction went into effect, Loud Light has been forced to shutter numerous planned voter engagement activities and our staff and volunteers have missed out on tens of thousands of opportunities to interact with Kansans, help them register to vote, and persuade them to participate.").)

The impact has been cumulative as well, with Plaintiffs' ability to engage new volunteers, plan for upcoming activities, and raise funds all increasingly hampered the longer the Restrictions are in effect. (R. II, 150 ("The longer the Restriction stays in place, the more dire the consequences for Loud Light. Our programs take a long time to coordinate and plan, and the uncertainty caused by the Restriction means we do not know which programs we will be able to execute in the coming months. The Restriction will also harm Loud Light financially as our ability to apply for grants and raise fund has been

diminished without the ability to conduct these core voter engagement activities."), R. II, 159 ("[E]very intake we complete [without offering voter registration] represents another missed opportunity to educate and engage disabled voters in their franchise.").) As the undisputed record demonstrates, "[t]he harm of having to miss each one of these opportunities extends much further than just the single voter contact or engagement." (R. IV, 18, *see also id.* ("[W]hen [Loud Light] miss[es] an opportunity to engage with a voter, we know we may not *ever* be able to reach them to advance our core message. This includes many of the voters who we have missed or will miss this summer and fall and who now may not ultimately vote this year, in 2022, or even beyond.").)

The district court did not engage with this evidence in any substantial way in its opinion. Because it read the statute in an incorrect and narrow manner, *see supra*, § IV.A.2, the court never analyzed the irreparable harm prong of the temporary injunction analysis at all. This Court can and should find that this factor strongly favors entry of a temporary injunction.

b. The public interest would be served by an injunction.

The harm Plaintiffs have encountered far outweighs any injury to the State. A "threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage [a] preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute." *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *VoteAmerica*, 2021 WL 5415284, at *21 ("Injury to plaintiffs who are deprived of First Amendment rights almost always outweighs the potential harm to the government if an injunction is granted."). It is unclear how enjoining enforcement of the Restrictions could "damage" Defendants, particularly given that both KSA 21-5917

and KSA 25-2438(a)(1) already operate (and would continue to operate even with an injunction) to criminalize intentional misrepresentation of an election official.

Likewise, by issuing an injunction, this Court will be "correcting a violation of the law," which is itself "*in* the public interest." *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 66, 341 P.3d 607 (emphasis added). This is particularly so when the Court is "[v]indicating [free-speech] freedoms." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) (describing such an injunction as "clearly in the public interest" (emphasis added)); *see also Johnson*, 194 F.3d at 1163 ("[T]he preliminary injunction will not be adverse to the public interest as it will protect [] free expression."); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest [] favors plaintiffs' assertion of their [free-speech] rights."). In *VoteAmerica*, the court issued an injunction halting enforcement of HB 2332 despite Defendants' contention there that "public confidence in government will be undermined if the Court invalidates a statute that has made its way through the legislative process." 2021 WL 5415284, at *21. Indeed, once a court concludes that a challenged statute "unconstitutionally limit[s] free speech," "enjoining [its] enforcement is an appropriate remedy not adverse to the public interest." *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001). And because there are no legal remedies available such as monetary damages, Plaintiffs lack an adequate remedy at law. *Hodes*, 309 Kan. at 619.

Finally, an injunction would also serve the public interest because Plaintiffs' voter-related activities play a pivotal role in helping Kansans exercise their fundamental right to vote. (R. I, 146 (Douglas County "rel[ies] on outside groups," including the League, "to do much of the civic engagement work in the community, including almost all of our voter registration drives"), R. I, 159 ("[M]any voters with disabilities actually rely on the Center

to register and to help them sign up for a method of voting that works for them because they are unable to do so without assistance from an advocate they trust to have their best interest in mind—and that's what we do here."), R. IV, 18 ("Loud Light's mission and voter program recognizes and relies on the reality that registering young and marginalized voters is about 'meeting them where they are.' In other words, we know that many voters, for a variety of reasons, are unable to successfully seek out information and resources to get involved in civic life.").) Without an injunction, thousands of Kansans will continue to lose access to the information and assistance that Plaintiffs provide ahead of the 2022 elections and beyond.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and enjoin enforcement of KSA 25-2438(a)(2) and (3) until final judgment is entered in this case.

Respectfully submitted, this 8th day of December, 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, to the following:

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