No. 21-124378-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

Plaintiffs-Appellants

v.

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 APPELLEES

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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Oral Argument Requested: 15 minutes

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I. – NATURE OF THE CASE

This lawsuit represents an entirely manufactured dispute. Neither Plaintiffs-Appellants nor their agents are at any risk of prosecution for undertaking the kind of conduct that they claim renders them criminally vulnerable under the recently adopted statute prohibiting the false representation of an election official. Plaintiffs' constitutional attack on the new statute appears to be rooted far more in policy and politics – endeavoring to undermine the legislature's efforts at implementing reasonable election integrity measures, including minimizing voter confusion, helping safeguard the orderly administration of the election process, and enhancing public confidence in the fairness of that process – than in any legitimate concern about the chilling of their constitutionally protected rights.

Plaintiffs seek to temporarily enjoin a perfectly valid criminal statute that prohibits individuals from *knowingly* engaging in conduct that conveys the false impression that they are an election official. Despite the fact that this same conduct has been unlawful for more than a decade under a different statute, Plaintiffs insist they face an existential threat to their operations because the recently-passed statute allegedly adds a *subjective* component that could render them vulnerable to criminal prosecution if some naïve voter – notwithstanding all Plaintiffs' best efforts to avoid any misimpressions – happens to misconstrue their non-official status. This embellished fear finds no support in the statutory text and would require the Court to ignore well-settled legal principles about how constitutional challenges to statutes must be evaluated. Furthermore, there is absolutely no reasonable

basis for Plaintiffs to believe that they, or any of their members, are threatened with criminal liability (let alone *imminent* criminal prosecution) under the new statute. As a result, Plaintiffs do not even have standing to pursue this lawsuit.

II. – STATEMENT OF THE ISSUES

I. Did the district court commit reversible error in rejecting Plaintiffs' proposed interpretation of K.S.A. 25-2438(a)(2)-(3) as turning on the subjective views of the listener?

II. Did the district court err as a matter of law in concluding that Plaintiffs are not entitled to preliminary injunctive relief because they could not show a likelihood of success on the merits, and an irreparable injury in the absence of such relief, on their claim that K.S.A. 25-2438(a)(2)-(3) violates their freedom of speech under Section 11 of the Kansas Constitution's Bill of Rights?

III. Did the district court err as a matter of law in denying Plaintiffs' motion for a preliminary injunction on the grounds that K.S.A. 25-2438(a)(2)-(3) is unconstitutionally overbroad in contravention of Section 11 of the Kansas Constitution's Bill of Rights?

IV. Did the district court err as a matter of law in denying Plaintiffs' motion for a preliminary injunction on the grounds that K.S.A. 25-2438(a)(2)-(3) is void for vagueness pursuant to Section 10 of the Kansas Constitution's Bill of Rights?

V. Do the Plaintiffs have standing to pursue their constitutional challenge to K.S.A. 25-2438(a)(2)-(3)?

III. – RELEVANT FACTS

Plaintiffs have asserted a facial constitutional challenge to H.B. 2183, § 3(a)(2)-(3), now codified at K.S.A. 25-2438(a)(2)-(3), which prohibits individuals who are not election officials from *knowingly* engaging in conduct that either (i) gives the appearance of being an election official or (ii) that would cause another person to believe that such individual is an election official. Plaintiffs devote nearly eight pages of their opening brief – which, ironically, is *more than twenty pages longer* than the memorandum they filed in support of

their motion for a temporary injunction in the district court – to an irrelevant recitation of their organizational background, the legislative debates that culminated in the passage of this statute, and the level of voter turnout in Kansas in 2020. None of that discussion has any bearing on the issues before the Court. This case presents a relatively straightforward exercise of statutory interpretation, and the bulk of Plaintiffs' Statement of Facts section is little more than an exercise in distraction and rhetoric.

Plaintiffs readily acknowledged in the affidavits submitted in connection with their preliminary injunction motion that they *never knowingly* attempt to misrepresent election officials in any of their organizational activities. For example, Jacqueline Lightcap, the co-president of the League of Women Voters of Kansas (the "League"), explicitly stated: "At each in-person and virtual event, the Kansas League members have always represented themselves as such, and not local elections officials." (R. I, 115 at ¶ 25). Similarly, Davis Hammet, the president and executive director of Loud Light, conceded that he and his group's fellows and volunteers "always identified [themselves] as affiliated with Loud Light and not any governmental organization," (R. I, 123 at ¶ 23); (*accord* R. I, 122 at ¶¶ 19-20). Caleb Smith, the Integrated Voter Engagement Director at the Kansas Appleseed Center for Law and Justice, Inc. ("Kansas Appleseed"), likewise noted that the members of his organization "always correctly identify [themselves] as affiliated with Kansas Appleseed, and not any governmental office or body." (R. I, 131 at ¶ 18). And Ami Hyten, the executive director of the Topeka Independent Living Resource Center ("TILRC"), stated unequivocally, "Nobody – not myself, nor anyone else I'm aware of – wants to be mistaken for an election official, and to my knowledge, if anyone at the [TILRC] has been mistaken

for an election official, we have moved swiftly to correct that misunderstanding. Nor am I aware of anyone at the [TILRC] or elsewhere intentionally misrepresenting themselves as an election official." (R. I, 142 at ¶ 26).

Meanwhile, the Attorney General, who is the State's chief law enforcement officer, asserted without reservation in the proceedings below that individuals will be subject to criminal prosecution for violating subsections (a)(2) or (a)(3) of K.S.A. 25-2438 only if they knowingly engage in activities intended to falsely give the appearance, or cause others to believe, that they are election officials. (R. II, 110). In other words, he emphasized, the "focus . . . is on the speaker, not on the subjective views of any particular listener," and "the effect of the speaker's conduct on any listener will necessarily be judged under an objective standard." (R. II, 110-11). In making this definitive statement of prosecutorial intent, the Attorney General publicly disavowed the strained reading of the statute that the Plaintiffs advance in this lawsuit.

The district court, after carefully evaluating the statutory text, held that the Plaintiffs had "downplay[ed] the word 'knowingly' in [K.S.A. 25-2438(a)] almost to the point of ignoring it." (R. III, 11). The Court noted that the "statute requires a culpable state of mind on the part of the actor; there is no violation based solely on the subjective perception of a bystander." (*Id.*) Coupled with Plaintiffs' universal insistence that at no point had they, or would they, knowingly engage in the false misrepresentations proscribed by the statute, the Court found that their constitutional challenge could not withstand scrutiny. (R. III, 11-12) ("In light of their own evidence, it is difficult to credit Plaintiffs' fear of prosecution for knowingly engaging in false representation through certain conduct when

Plaintiffs insist their members always correctly identify themselves as affiliates of their own organizations and not as government officials.").

The Court next pointed out that the State has a clear and well-established interest in deterring election fraud and protecting the integrity, efficiency, and public confidence in the election process. (R. III, 12). Particularly given that the challenged statutory provisions do not expose Plaintiffs to any legal risk from undertaking the kind of activities in which they purport to engage, the Court concluded that Plaintiffs' claims must be evaluated under a rational basis standard, and the State's interests easily meet that standard. (R. III, 13). But the statute would also "pass more stringent scrutiny" if necessary, the Court found, and there was no conceivable basis for finding a violation of Section 11 of the Kansas Constitution's Bill of Rights. (*Id.*) For similar reasons, the Court also dispatched Plaintiffs' overbreadth and vagueness attacks on the statute. (R. III, 13-15).

IV. – ARGUMENT AND AUTHORITIES

The district court properly denied Plaintiffs' motion for a temporary injunction. Not only did the Court correctly interpret the proof requirements of K.S.A. 25-2438(a)(2) and (3) under the applicable principles of statutory construction, but it also rightly found that Plaintiffs had no basis – let alone a reasonable probability – for fearing an imminent, irreparable injury to any of their protected rights under the Kansas Constitution.

Issue 1: Did the district court commit reversible error in rejecting Plaintiffs' proposed interpretation of K.S.A. 25-2438(a)(2)-(3) as turning on the subjective views of the listener?

A. Standard of Review

The Court of Appeals reviews a district court's denial of a temporary injunction for abuse of discretion. *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee Cnty. Comm'rs*, 275 Kan. 525, 541, 66 P.3d 873 (2003). The burden is on the appellant to show that the district court abused its discretion. *Comanche Cnty. Hosp. v. Blue Cross of Kan., Inc.,* 228 Kan. 364, 367, 613 P.2d 950 (1980). The appellate court's review of issues of statutory construction, however, is unlimited. *Gen. Bldg. Contractors*, 275 Kan. at 533.[1]

B. Analysis

Plaintiffs claim that the legislature's new criminal prohibitions against individuals misrepresenting themselves as election officials will chill their free speech and association rights under Sections 3 and 11 of the Kansas Constitution because the statute allegedly has no intent element and thus leaves organizers "to guess as to when and whether their voter assistance and education activities might potentially be misperceived." (R. II, 231-32, at ¶ 4). Plaintiffs argue the statute's definition of "false representation of an election official" is inherently subjective, thereby exposing them to criminal liability just because a voter mistakenly believes that he/she is communicating with an election official, notwithstanding all of Plaintiffs' efforts to disabuse voters of any such mistaken impression. (R. II, 260-61, at ¶ 109). As a result, Plaintiffs aver, they are "hinder[ed] from engaging in virtually all" of the voter registration and other voter educational activities that are core to their missions. (*Id.*) Plaintiffs have misread the statute and ignored traditional canons of

[1] This same standard of review applies to all of the issues in this appeal, rendering it unnecessary to repeat the standard elsewhere in the brief.

statutory construction in advancing this outcome-oriented interpretation.

The thrust of Plaintiffs' legal argument is that subsections (a)(2) and (a)(3) of K.S.A. 25-2438 criminalizes communicative activity over which they have no control, i.e., how third-parties might perceive Plaintiffs' status, even if mistaken. The statute, reproduced below (adding our emphasis to key terms), does no such thing.

> (a) False representation of an election official is ***knowingly engaging*** in any of the following conduct by phone, mail, email, website or other online activity or by any other means of communication while not holding a position as an election official:
>
> (1) Representing oneself as an election official;
>
> (2) engaging in conduct that gives the appearance of being an election official; or
>
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official.
>
> (b) False representation of an election official is a severity level 7, nonperson felony.
>
> (c) As used in this section, "election official" means the secretary of state, or any employee thereof, any county election commissioner or county clerk, or any employee thereof, or any other person employed by any county election office.

The first sentence of the statute makes it clear that the only conduct being prohibited is an individual *knowingly engaging* in activities intended to falsely give the appearance that he/she is an election official or would cause a person to so believe. The focus, in other words, is on the *speaker*, not on the *subjective views of any particular listener*. Moreover, the effect of the speaker's conduct on any listener will necessarily be judged under an *objective* standard. The notion, therefore, that Plaintiffs' members might be prosecuted

because some naïve citizen misapprehended their non-official status is inconsistent with the statutory text.

Plaintiffs' claim is further undermined by the Kansas criminal code's definition of what it means to act "knowingly," which makes clear that no violation can occur unless the speaker is *affirmatively aware* that his/her actions will lead to the false appearance. Indeed, K.S.A. 21-5202(i) provides:

> A person acts "knowingly," or "with knowledge," with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. *A person acts "knowingly," or "with knowledge," with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result.* (emphasis added).

The subjective views of the listener are irrelevant.

The interpretation of the statute also must be considered in tandem with K.S.A. 21-5202(f), which dictates that, "[i]f the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears." Applied to K.S.A. 25-2438(a)(2), the term "knowingly" thus must apply to both engaging in the conduct *and* knowing that the conduct "gives the appearance of being an election official." Similarly, subsection (a)(3) must be read so that the term "knowingly" applies to both engaging in the conduct *and* knowing that the conduct "would cause another person" to believe the actor is an election official. *Cf. State v. Hobbs*, 301 Kan. 203, 210, 340 P.3d 1179 (2015) (holding that K.S.A. 21-5202(f) required prosecution to prove, for aggravated battery offense, that the defendant

both knowingly engaged in conduct and knew that the result of such conduct was reasonably certain). It is not enough for a prosecutor to simply show that a bystander could mistakenly interpret a defendant's words or actions.

Invoking their apparent mind-reader skills, Plaintiffs respond that they *know* from experience that, no matter how hard they try – as they insist they *always* do – to disabuse individuals that they are not election officials, some naïve voters will still believe them to hold such official status by virtue of the nature of their work. (Br. 16). It is difficult to see how a facial constitutional challenge can prevail based on a plaintiff's telepathic insights. But even assuming that Plaintiffs and their affiliates had such aptitude and could be certain that members of the public *will* perceive them to be election officials despite their making no effort at all to create such a misrepresentation, a criminal conviction still would not be constitutionally permissible without the prosecution establishing that the speaker actually harbored a culpable mental state. As the U.S. Supreme Court made clear in *Elonis v. United States*, 575 U.S. 723, 734 (2015), a basic principle of the criminal law is that "wrongdoing must be conscious to be criminal." (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). The Court explained:

> The central thought is that a defendant must be blameworthy in mind before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. Although there are exceptions, the "general rule" is that a guilty mind is a necessary element in the indictment and proof of every crime. We therefore generally "interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Id.* (citations and internal alterations omitted).

A court, in fact, must "read into the statute" the requisite "*mens rea* which is necessary to

separate wrongful conduct from otherwise innocent conduct." *Id.* at 736 (quotations omitted); *accord Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 644, 941 P.2d 1321 (1997) ("The court must give effect to the legislature's intent even though words, phrases or clauses at some place in the statute must be omitted or inserted.") (quotation omitted).

The notion, therefore, any individual would be prosecuted – as the Attorney General emphatically represented in his briefing below will not occur – (let alone be convicted) for violating K.S.A. 25-2438(a)(2) or (3) despite making no intent to misrepresent his/her non-official status strains all credulity and would necessitate a repudiation of the principles of statutory construction described above. This is all the more true when the individual has affirmatively corrected any misapprehension of persons with whom he/she interacts. No doubt, a prosecution under one of these subsections will be difficult. It will necessarily need to be reserved for individuals who (unlike the Plaintiffs, at least according to the representations in their pleadings and affidavits), are consciously deceiving voters into believing that they are election officials when they are not. But that high hurdle provides no basis for invalidating the statute.

Plaintiffs' surplusage/redundancy argument (Br. 18-19) also has no merit. There is no question that courts "should avoid interpreting a statute in a way that part of it becomes surplusage" because "it is presumed that the legislature does not intend to enact useless or meaningless legislation." *State v. Van Hoet*, 277 Kan. 815, 826-827, 89 P.3d 606 (2004). The district court, however, did no such thing. K.S.A. 25-2438(a) prohibits knowingly engaging in three distinct courses of conduct and a person could violate the statute by

knowingly engaging in acts that violate any one of them. For example, the legislature could easily assume that someone who identifies himself to those approaching a voter registration table as the Kansas Secretary of State would violate subsection (a)(1) by "representing" himself as an election official. Although this conduct may also violate Subsections (a)(2) and (a)(3), that overlap alone does not make the provisions superfluous. *See Agnew v. Gov't of D.C.*, 920 F.3d 49, 57 (D.C. Cir. 2019) ("That the terms also substantially overlap does not contravene the surplusage canon, which must be applied with the statutory context in mind; after all, sometimes drafters *do* repeat themselves.") (citations omitted); *In re BankVest Capital Corp.*, 360 F.3d 291, 301 (1st Cir. 2004) ("There may be substantial overlap among the provisions of [a law], but redundancy is not the same as surplusage."); *S.E.C. v. Familant*, 910 F. Supp.2d 83, 95 (D.D.C. 2012) ("Subsections may (and inevitably do) overlap, but the surplusage canon is invoked only when the intersection of subsections becomes so great that one subsection renders another meaningless."). By the same token, if an actor chose not to overtly represent himself as the Secretary of State, but rather engaged in more indirect and/or subtle conduct designed to create a false appearance of election official status – e.g., by distributing campaign literature on official county letterhead or being deliberately evasive as to their status when directing voters to engage in (or refrain from) conduct that is not mandated (or allowed) under state law – subsection (a)(1) would not be implicated but subsections (a)(2) or (a)(3) might be.[2]

[2] Plaintiffs' brief reference to legislative history (Br. 20) by citing to one legislator's disagreement with the new statute's necessity is of no persuasive value in evaluating the proper scope of the statute. Not only does the text speak for itself, but the full legislature clearly rejected the views of their colleague in passing the legislation.

And contrary to Plaintiffs' insistence, those hypotheticals neither "prove their point" nor sound the death knell of these two subsections. For all the reasons articulated above, the prosecution still would have to prove some sort of conscious effort by the actor to misrepresent his/her status as an election official to sustain a conviction under K.S.A. 25-2438(a)(2) or (3). To the extent there is any ambiguity on the issue, the rule of lenity would further protect Plaintiffs. *See State v. Chavez*, 292 Kan. 464, 468, 254 P.3d 539 (2011) ("When there is reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction.").

Issue 2: Did the district court err as a matter of law in concluding that Plaintiffs are not entitled to temporary injunctive relief because they could not show a likelihood of success on the merits, and an irreparable injury in the absence of such relief, on their claim that K.S.A. 25-2438(a)(2)-(3) violates their freedom of speech under Section 11 of the Kansas Constitution's Bill of Rights?

A. Legal Standard Governing a Motion for Temporary Injunction

Plaintiffs' entire claim to relief in their pursuit of a temporary injunction is grounded on a strained, and ultimately legally insupportable, construction of the proof requirements in K.S.A. 25-2438(a)(2) and (3). The district court rejected this unreasonable interpretation, and unless this Court takes a different view, all of Plaintiffs' legal theories collapse. But even if this Court concludes that the focus of these new statutory provisions is targeted at the subjective views of the listener and not at the mental state of the speaker/actor, Plaintiffs still would not be entitled to a temporary injunctive relief because there is no conceivable injury to them in light of the Attorney General's publicly stated position as to how this statute will be enforced. In other words, there is no likelihood of a prosecution under the Plaintiffs' theory.

In order to receive temporary injunctive relief, five separate factors must be established: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant lacks an adequate legal remedy, such as damages; (4) the movant's threatened injury outweighs the injury that the defendant will suffer under the injunction; and (5) the injunction will not be adverse to the public interest. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). The movant bears the heavy burden of proof in demonstrating the presence of each of these factors. *Schuck v. Rural Tel. Serv. Co., Inc.*, 286 Kan. 19, 24, 180 P.3d 571 (2008).

To constitute irreparable harm, the movant's injury must be "certain, great, actual, and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation omitted). "Irreparable harm is not harm that is merely serious or substantial." *Id.* Rather, "the party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (emphasis in original) (citation omitted). Moreover, a statute under challenge is generally treated as presumptively constitutional. *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.3d 823 (1989). The normal course is for the statute to remain in effect pending a final decision on the merits. *See Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977); *New Motor Vehicle Bd. of Cal. v. Fox*, 434 U.S. 1345, 1352 (1977). Only in the face of compelling equities with a demonstrable urgency can a litigant challenging a statute passed through the democratic process obtain a temporary injunction.

B. Analysis

Given that all of Plaintiffs' constitutional attacks on K.S.A. 25-2438(a)(2) and (3) are predicated on a misreading of what the statute permits and prohibits, there is no need for the Court to undertake a comprehensive analysis of Plaintiffs' causes of action alleging an infringement of their free speech and association rights. As long as Plaintiffs and their agents do not engage in conduct consciously designed to falsely represent themselves as election officials – as they insist they never do – there will be no violation of the statute. None of Plaintiffs' constitutional rights, let alone their core political speech interests, are being violated. Any chill Plaintiffs are experiencing is entirely manufactured, a product of their own imagination.

1. Anderson-Burdick Provides the Proper Level of Scrutiny

If the Court, notwithstanding Plaintiffs' misconstruction of the statute, nevertheless opts to determine the proper standard for evaluating their constitutional claims, the most deferential review should be employed. The Kansas Supreme Court has not spoken as to the proper legal standard in this context, and federal case law is not a model of clarity. But certain guidelines do exist.

Where a dispute revolves around the election process, courts typically apply the so-called *Anderson-Burdick* test. *See Anderson v. Celebrezze*, 460 U.S. 780 (1982); *Burdick v. Takushi*, 504 U.S. 428 (1992). On the other hand, if the statute/regulation/policy being challenged targets core political speech, courts often invoke the so-called *Meyer-Buckley* framework. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Am. Const. Law Found., Inc.*, 552 U.S. 182 (1999).

Anderson-Burdick utilizes a sliding scale / balancing test under which the court assesses the burden that a state's regulation imposes on a plaintiff's rights to free speech and/or association. "[W]hen those rights are subjected to severe restrictions, the regulation is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But when those rights are subjected to reasonable, nondiscriminatory restrictions, the law is exposed to a far less searching review that is "closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (citing *Burdick*, 504 U.S. at 434). "Regulations falling somewhere in between – i.e., regulations that impose a more-than-minimal but less-than-severe burden – require a 'flexible' analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Id.* (quotation omitted).

Meanwhile, courts must perform their review bearing in mind the fundamental principle that "states have wide latitude in determining how to manage their election procedures." *ACLU v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008). Indeed, when a state carries out its authority to regulate elections to ensure that they are fair and orderly, the resulting restrictions will "inevitably affect – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788; *accord Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008). These burdens "must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018).

Plaintiffs insist that their claim be subjected to "exacting scrutiny" because their activity amounts to core speech and thus is entitled to the highest level of constitutional protection. (Br. 22-32). The *Meyer-Buckley* test that Plaintiffs advocate applies "exacting scrutiny," which requires a law targeting expressive activity to be narrowly tailored to serve a sufficiently important governmental interest in order to pass muster. *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383-85 (2021) (evaluating constitutional challenge to California law requiring forced disclosure of names of organization's donors); *id.* at 2383 ("While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").

But *Meyer-Buckley* has no role here because, as Defendants have noted at length, nothing in K.S.A. 25-2438 actually infringes on Plaintiffs' constitutionally protected rights. When the statute is properly examined in light of its narrow scope, rather than the expansive reach that the Plaintiffs oddly urge the Court to embrace, there is no basis for suggesting that any core speech rights have been implicated or that any narrow tailoring of statutes is necessary. In fact, other than proscribe the conscious misrepresentation of one's status as an election official (i.e., lying) – which is clearly not protected activity, *see United States v. Alvarez*, 567 U.S. 709, 721 (2012) ("Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech" and are not protected by the First Amendment) – the statute does nothing to adversely impact Plaintiffs' free speech rights.

Plaintiffs dismiss the *Anderson-Burdick* balancing test as insufficiently protective of their rights under the Kansas Constitution, but they fail to identify – and Defendants are unaware of – *any* historical antecedent in which the Kansas Supreme Court has subjected an election integrity measure to the kind of scrutiny that Plaintiffs propose here. And for good reason. The need for such a balancing test is rooted in the recognition that, when a state carries out its authority to regulate elections to ensure that they are both fair and orderly, the resulting restrictions will inevitably affect, *inter alia*, an individual's "right to associate with others for political ends." *Anderson*, 460 U.S. at 788. But these inherent burdens "must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018).

To eschew deference to the State on election-related matters – which is functionally what Plaintiffs advocate here by insisting that *any* state regulation of the electoral process that might touch on an individual's speech or association rights must be subjected to strict scrutiny – would greatly compromise the State's ability to ensure the integrity, fairness, efficiency, and public confidence in its elections. And the *Anderson-Burdick* framework is fully capable of accommodating a constitutional challenge involving electoral processes, with the requisite level of scrutiny turning on the severity of the burden imposed by the challenged regulation.

2. Kansas Supreme Court Would Not Dictate Strict Scrutiny Review

Citing the Kansas Supreme Court's recent decision in *Hodes & Nauser v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 46 (2019), Plaintiffs alternatively insist that Kansas state law

affords them greater protection than federal law, and that our state supreme court would mandate that their constitutional claims be evaluated under a strict scrutiny review standard because of the alleged fundamental rights involved. (Br. 24). Plaintiffs read far too much into that decision.

The Court in *Hodes & Nauser* confronted a constitutional challenge to an abortion statute under Section 1 of the Kansas Constitution's Bill of Rights. Parsing the scope of the "inalienable natural rights" language in that provision, the Court held that the explicit protection of "natural rights" in Section 1 afforded broader safeguards (in particular, to the right of personal autonomy) than the Federal Constitution's Fourteenth Amendment. 309 Kan. at 624-25. The Court reached that conclusion only after taking a deep dive into both the historical roots of Section 1 and the understanding at common law as to the meaning of a "natural right" in this context. *Id.* at 622-72.[3]

[3] The Court also held that statutes involving "suspect classifications" or "fundamental interests," at least in the context of a natural right like personal autonomy, do not come cloaked in a presumption of constitutionality, but rather must be exposed to strict scrutiny inasmuch as "governmental infringement of a fundamental right is inherently suspect." *Hodes and Nauser*, 309 Kan. at 673. It is not clear, however, just how far the Court intended to extend this non-presumption of constitutionality in evaluating statutory attacks. Indeed, notwithstanding its decision in *Hodes and Nauser*, the Court last year expressly applied a presumption of constitutionality to a defendant's constitutional vagueness challenge to the so-called "Romeo and Juliet" law, which prohibits certain groups of juveniles from engaging in voluntary sexual intercourse. *Matter of A-B*, 313 Kan. 135, 138, 484 P.3d 226 (2021). In his concurring opinion, Justice Stegall questioned whether the Court had softened its approach on the presumption issue. *See id.* at 148 (Stegall, J. concurring) ("Is today's majority suggesting the right not to be convicted under a vague law is a second-class right? What about the right to equal protection under the law?"). Ultimately, this Court need not take up the issue inasmuch as Plaintiffs' constitutional claims all fail regardless of whether any presumptions are applied.

Plaintiffs here effectively seek to short-circuit the Supreme Court's detailed analysis by suggesting that they can dictate heightened scrutiny of their claims merely by alleging that a statute encroaches on their fundamental rights. According to Plaintiffs, the context of the asserted right is irrelevant. To them, strict scrutiny is like a talisman, ready to be trotted out any time they allege the violation of a constitutional provision intended to safeguard a fundamental right. That is not the law, and there is no basis for subjecting their claims in this case to strict scrutiny.

Plaintiffs' causes of action arising out of the election official impersonation statute allege violations of their freedom of speech and association under Sections 3 and 11 of the Kansas Constitution's Bill of Rights. Putting aside the fact that, as a matter of statutory text, the conduct in which Plaintiffs allegedly have engaged, and seek to continue, does not even contravene K.S.A. 25-2438(a) and that nothing in the statute prohibits Plaintiffs from undertaking activity in which they do not intend to misrepresent themselves as election officials, there is no historical or legal basis for evaluating Plaintiffs' constitutional claims differently under the Kansas and U.S. Constitutions.

In marked contrast to Section 1's "natural rights" language discussed in *Hodes & Nauser*, or Section 5's "inviolate" right to a jury trial elucidated in *Hilburn v. Enerpipe Ltd*., 309 Kan. 1127, 442 P.3d 509 (2019) (invalidating statutory cap on non-economic loss damages in personal injury actions as inconsistent with constitutional guarantee to jury trial), the rights to freedom of speech and association under Sections 3 and 11 of the Kansas Constitution's Bill of Rights are no broader than their federal constitutional analogue in the First Amendment (applied to the states through the Fourteenth Amendment). *Compare*

Kan. Const. Bill of Rights § 3 ("The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress."), *and* § 11 ("[A]ll persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such rights."), *with* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.").

The Kansas Supreme Court, in fact, has explicitly held that Section 11 of the Kansas Bill of Rights is "generally considered coextensive" with the First Amendment when it comes to free speech rights. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). The Court added that, like the First Amendment, the freedom of speech guarantee in Section 11 "is not without certain limitations." *Id.*

Furthermore, K.S.A. 25-2438(a) must be considered and construed as part of an election-related regulation. *See State Bd. of Nursing v. Ruebke*, 259 Kan. 599, Syl. ¶ 12, 913 P.2d 142 (1996) ("A statute must be interpreted in context in which it was enacted and in light of legislature's intent at that time."). If the contrary were true, the State would be severely hamstrung – if not often powerless – to enact legislation regulating the electoral process by the mere threat of a plaintiff raising a free speech / association challenge. As the U.S. Supreme Court clearly explained in *Burdick*, 504 U.S. at 433, while "voting is of the most fundamental significance under our constitutional structure," that does not mean that "the right to associate for political purposes through the ballot [is] absolute." (citations omitted). "Common sense, as well as constitutional law, compels the conclusion that

government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (citing *Storer v. Brown,* 415 U.S. 724, 730 (1974)).

In any event, the Court need not definitively determine the proper standard of review for examining Plaintiffs' attack on K.S.A. 25-2438(a) because the question is ultimately immaterial here. The statutory text, as properly interpreted in conjunction with canons of statutory construction and principles regarding requisite *mens rea* requirements in criminal statutes – as outlined in *Elonis*, 575 U.S. at 734 – not only prohibits no core speech, but it does not even prohibit the conduct in which Plaintiffs allegedly engage. No conceivable chilling of their speech and/or association rights, therefore, can result from this law. No matter what standard of review the Court applies to Plaintiffs' constitutional challenge to this statute must fail.

3. The State Has Strong and Legitimate Interests in K.S.A. 25-2438

Importantly, even in cases that do involve core political speech, the U.S. Supreme Court has emphasized the powerful interest that states have in preventing false statements and related election-related misconduct, particularly "during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1985). It is only when a state effectively bars substantially all speech, or at least the most effective means of communication, in pursuit of that objective has the Supreme Court exposed the law to exacting scrutiny and struck it down. *See id.* at 357 (striking down Ohio's prohibition

against distribution of anonymous campaign literature); *Meyer*, 486 U.S. at 422-28 (invalidating Colorado's restriction against paying circulators of initiative petitions, which had the effect of limiting the most effective means of reaching voters and impeding the proponents' ability to place their issues on the ballot). That is emphatically not what the Kansas statute does. And to the extent a statute is "readily susceptible" to a narrowing construction that will allow it to survive a First Amendment / free speech constitutional challenge, the Court is required to construe the law in such manner. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 397 (5th Cir. 2013) (citing *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

Legislators felt these new statutory provisions were useful tools in helping prevent individuals from engaging in conduct designed to mislead the public and committing election-related mischief under the guise of official status. The legislature, of course, had no legal obligation to develop a record of any problem before adopting the prophylactic legislation at issue here. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications" for electoral regulations before upholding them); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021) ("State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."); *id.* ("State's political system [need not] sustain some level of damage before the legislature [can] take corrective action.").

Plaintiffs suggest that Defendants were required to introduce evidence of these state interests in the district court. Not only is that argument belied by the U.S. Supreme Court precedent referenced above, but it also ignores the fact that Plaintiffs have raised a *facial* attack on the statute. "A facial challenge is an 'attack on a statute itself as opposed to a particular application' of that law." *State v. Hinnenkamp*, 57 Kan. App.2d 1, 4, 446 P.3d 1103 (2019) (quoting *Los Angeles v. Patel*, 576 U.S. 409, 415 (2015)). In contrast to as-applied claims, *there are no necessary findings of fact in a facial challenge*. *Id.* With facial attacks, "courts must interpret a statute in a manner that renders it constitutional if there is any reasonable construction that will maintain the Legislature's apparent intent." *Id.* Such claims are disfavored and are generally resolved early in the proceeding because they typically rest on speculation, run contrary to the principle of judicial restraint, and threaten to short-circuit the democratic process by preventing laws representing the will of the people from being implemented. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

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

4. Existence of Similar State Statute Is Irrelevant

Plaintiffs attach great significance to the fact Kansas already punishes the false impersonation of public officials through a statute that has been on the books for more than a decade. (Br. 28-29) (citing K.S.A. 21-5917(a) ("False impersonation is representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false")). But the presence of this statute certainly does not render K.S.A. 25-2438(a) non-narrowly tailored.

K.S.A. 25-2438 does not impact, let alone target, Plaintiffs' core speech rights and thus does not need to undergo exacting judicial scrutiny. Moreover, the idea that election-related criminal penalties currently on the books represent a baseline above which a legislature cannot go without justifying to a court why such greater sanction is necessary is fundamentally at odds with the separation of powers among the coordinate branches. A court simply has no warrant to second-guess legislative activity on that ground.

Nor does *McCullen v. Coakley*, 573 U.S. 464 (2014), inch Plaintiffs down the field. Although Plaintiffs seem to suggest that this case is on all fours with the instant action, (Br. 29), the two lawsuits have virtually nothing in common. *McCullen* entailed a challenge to a Massachusetts statute that made it a crime to knowingly stand on a public way or sidewalk within thirty-five feet of a facility where abortions were performed. These buffer zones, the Court held, deprived the petitioners of their primary methods of communicating with arriving patients and thereby seriously impeded their ability to communicate their message.

Id. at 486-90. That is light years from the restrictions in K.S.A. 25-2438, which essentially impose no restrictions on protected speech whatsoever.

At the end of the day, there is no need here for the Court to stake out a position on the proper level of scrutiny to apply in evaluating Plaintiffs' constitutional challenges. As the district court held, regardless of whether the "exacting scrutiny" test of *Meyer-Buckley*, the sliding-scale / balancing test of *Anderson-Burdick*, or some other rational basis test is utilized, the bottom line is that K.S.A. 25-2438 in no way diminishes Plaintiffs' ability to engage in any protected expressive activities. Plaintiffs endeavor to erect a straw man by advocating for the broadest conceivable reading of the statute and then lamenting an array of injuries that might flow therefrom. That is not the proper methodology for interpreting a statute or evaluating potential harm.

5. Plaintiffs' Case Law Citations Are Readily Distinguishable

As is true of so many issues in the heavily litigated election law space, there are lower court opinions on both sides of the legal dispute over the level of scrutiny to apply to restrictions on voter registration and absentee ballot distribution activities. But K.S.A. 25-2438, construed properly in scope and not with the strained and excessive interpretation advocated by Plaintiffs, has only the most tangential (if *any*) impact on those matters. The cases that Plaintiffs cite in support of their constitutional attack on K.S.A. 25-2438 are thus so attenuated from the facts at issue here that they are of little assistance in this case.

In *League of Women Voters v. Hargett*, 400 F. Supp.3d 706 (M.D. Tenn. 2019), for example, a state statute required that private organizations and individuals planning a voter registration drive in which more than 100 applications would be collected had to first

undergo government-provided training, file a sworn statement promising to obey all state laws and procedures governing voter registration, and agree not to retain any personal information obtained from voters in connection with their activities. *Id.* at 711-12. In issuing a preliminary injunction, the court held that these requirements went *far* beyond a "matter of election administration with a 'second-order effect on protected speech.'" *Id.* at 725. Rather, the statute represented a "direct regulation of communication and political association" by parties seeking to advocate political change, and its proscriptions were without justification. *Id.* at 725-26. It was a textbook case of targeting core political speech.

The plaintiffs in *Project Vote v. Blackwell*, 455 F. Supp.2d 694 (N.D. Ohio 2006), raised a First Amendment challenge to voter registration drive restrictions in Ohio that were virtually identical to those struck down in the aforementioned *League of Women Voters* case. *Id.* at 699. The court unsurprisingly issued a preliminary injunction, but it did so on the basis of *Anderson-Burdick* balancing, and not the strict scrutiny that Plaintiffs here claim applies. *See id.* at 701.

In *League of Women Voters of Fla. v. Browning*, 863 F. Supp.2d 1155 (N.D. Fla. 2012), meanwhile, the court enjoined a Florida statute that severely restricted the time frame in which an organization had to deliver a voter registration application to the county election office. *Id.* at 1158. While the correctness of the decision is debatable – the court, we believe, should have given greater latitude to the legislature and allowed the state to adopt implementing regulations that would have addressed any statutory ambiguities – the

important point here is that the court did *not* apply strict scrutiny. Instead, it evaluated the plaintiff's claims under the *Anderson-Burdick* framework. *Id.* at 1159.

In *VoteAmerica v. Schwab*, No. 21-2253-KHV, 2021 WL 5918918 (D. Kan. Dec. 15, 2021), the Court struck down a Kansas statute that prohibited *out-of-state* individuals and organizations (but not their *in-state* counterparts) from distributing advance mail ballot applications to Kansas voters. The Court applied strict scrutiny in evaluating the statute after concluding that it was content-based, viewpoint based, and speaker-based. *Id.* at *17. Needless to say, there is nothing like that at all in K.S.A. 25-2438.

Ironically, the two other federal district court decisions that Plaintiffs cite are not even particularly helpful to them. For example, in *Priorities USA v. Nessel*, 462 F. Supp.3d 792 (E.D. Mich. 2020), although the judge held that a Michigan law prohibiting third-parties from sending out absentee voter ballot applications triggered First Amendment protections under the *Meyer-Buckley* framework, *id.* at 812, the court later denied the plaintiffs injunctive relief, holding that "the state's interests in preventing fraud and abuse in the absentee ballot application process and maintaining public confidence in the absentee voting process are sufficiently important interests and are sufficiently related to the limitations and burdens set forth in [the statute] . . . that plaintiffs are unlikely to succe[ed] on their First Amendment challenge to the Absentee Ballot Law." *Priorities USA v. Nessel*, 487 F. Supp.3d 599, 615 (E.D. Mich. 2020).

Likewise, in *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp.3d 158, 176-77 (M.D.N.C. 2020), the plaintiffs mounted a First Amendment challenge to a North Carolina statute that effectively prohibited third-parties from marking another voter's absentee ballot or being in the presence of another voter when he/she marked the ballot.

The court held that, while "assisting voters in filling out ballot request forms is subject to the First Amendment," *Anderson-Burdick* balancing – not strict scrutiny – applies to such laws and "the burdens on Plaintiffs' First Amendments speech and association rights are justified by the State's interest in preventing fraud." *Id.* at 224.

The legal correctness of all of these federal district court decisions is dubious, and Defendants question the soundness of the courts' reasoning. What is clear, however, that none of the cited cases have any relevance to the instant action. They certainly do not support the invocation of a strict scrutiny standard to Plaintiffs' claims. The bottom line is that K.S.A. 25-2438 is a simple preventative measure designed to minimize voter confusion and ensure the orderly administration of the election process. It infringes on no one's free speech or association rights.

6. Public Interest Does Not Justify Award of Temporary Injunctive Relief

In addition to demonstrating neither a likelihood of success on the merits nor a reasonable probability of irreparable injury, Plaintiffs are unable to meet the other elements necessary to secure a temporary injunction as well. Plaintiffs argue that Defendants did not address these issues below, (Br. 45), but that is nonsense. Defendants discussed them in their Response to Plaintiffs' motion. (R. II, 126).

Plaintiffs' inability to prove a likelihood of success on the merits of their claim renders it unnecessary for the Court to proceed further in its analysis of this appeal. But it is worth nothing that an injunction would be adverse to the public's interest.

A movant takes on a heightened burden when it requests temporary injunctive relief in the form of a facial challenge to a law enacted through the democratic process. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of

its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("a ruling of unconstitutionality frustrates the intent of the elected representatives of the people"). A court that too easily invalidates a statute that has made its way fully through the legislative process thus risks undermining public confidence in a government whose power was intended to flow from the citizenry itself.

Kansans, through their elected representatives, have determined that individuals who falsely represent themselves as election officials not only confuse the public, but potentially compromise the very integrity of the electoral process. The strength of this conviction is reflected by the vote totals in support of H.B. 2183 in the Kansas Legislature. Indeed, the statute passed overwhelmingly, receiving more than 2/3 support in both the House (85-38) and the Senate (28-12) as the governor's veto was overridden. It is beyond dispute that the State has a powerful interest in enforcing constitutional laws, and the constitutionality of the impersonation statute is presumed under settled precedent.

Plaintiffs' attempt to twist the words of the statute in an effort to strike down an entirely reasonable law targeted at minimizing voter confusion and preserving electoral integrity should not be countenanced. A temporary injunction in this case would be adverse to the public interest and wholly improper. The district court did not abuse its discretion in denying Plaintiffs' request for a temporary injunction.

Issue 3: Did the district court err as a matter of law in denying Plaintiffs' motion for a preliminary injunction on the grounds that K.S.A. 25-2438(a)(2)-(3) is unconstitutionally overbroad in contravention of Section 11 of the Kansas Constitution's Bill of Rights?

Plaintiffs next take issue with the district court's rejection of their claim that K.S.A. 25-2438 is unconstitutionally overbroad. (R. III, 13-14). A litigant challenging a statute as overbroad bears the burden of establishing that (1) constitutionally protected activity is a significant part of the statute's target, and (2) there is no satisfactory method to sever the statute's constitutional applications from its unconstitutional applications. *Matter of A.B.*, 313 Kan. 135, 142, 484 P.3d 226 (2021) (quoting *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015)). "The overbreadth doctrine should be employed sparingly and only as a last resort." *State v. Martens*, 279 Kan. 242, 253, 106 P.3d 28 (2005). An overbreadth challenge can only be successful if the challenged law "trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep." *State v. Whitesell*, 270 Kan. 259, 271, 1 P.3d 887 (2000) (citation omitted). "This court presumes statutes are constitutional" and "the party attacking the statute . . . has the burden of overcoming that presumption." *State v. White*, 53 Kan. App. 2d 44, 58, 384 P.3d 13 (2016) (citations omitted). Furthermore, this court's "duty" is "to uphold a statute under attack rather than defeat it[,]" and "[i]f there is any reasonable way to construe the statute as constitutionally valid, that should be done." *Id.* (quoting *Whitesell*, 270 Kan. 259, Syl. ¶ 1)).

The criminal impersonation statute does not target constitutionally protected speech. The statute simply helps prevent voter confusion and protects the integrity of the electoral

process by safeguarding against the deception of members of the public about voting procedures and processes by persons who "knowingly" misrepresent themselves as election officials and thereby attempt to confuse the citizenry with a false veneer of official status. The U.S. Supreme Court has held that, in such circumstances, where there is a legally cognizable harm potentially flowing from the false statements, such statements are *not* protected. *See Alvarez*, 567 U.S. at 721 ("Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech."); *see also Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact."). Moreover, as described in detail above, as long as Plaintiffs do not *knowingly* engage in conduct designed to falsely convey the impression that they are election officials, the statute is not even violated by any of the actions in which they intend to engage.

Plaintiffs attempt to manufacture an overbreadth challenge in multiple ways. First, Plaintiffs wrongly argue that when a law "*is susceptible to being wrongfully applied to punish protected speech*," the court should invalidate it on overbreadth grounds because individuals may "refrain from constitutionally protected speech or protection." (Br. 36). A court is *not* permitted to assume that a law will be wrongfully applied, but instead must presume that officials will follow the law under the "presumption of regularity." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001); *accord Sheldon v. Bd. of Educ.*, 134 Kan.

135, 4 P.2d 430, 434 (1931) ("Public officers . . . are presumed to be obeying and following the law in the discharge of their official duties[.]"); *Kosik v. Cloud Cnty. Comm. Coll.*, 250 Kan. 507, 517, 827 P.2d 59 (1992) (recognizing "presumption of regularlity" in Kansas). "[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties. *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926); *see also State, ex rel. Stephan v. Martin*, 230 Kan. 759, 775, 641 P.2d (1982) (Schroeder, J. dissenting).

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

Third, even if the Court concludes that K.S.A. 25-2438 is directed at constitutionally protected speech, and even if it further concludes that the statute's focus is on the subjective views of the listener rather than the knowing objectives of the speaker, the statute can still be interpreted to avoid running afoul of any constitutional mandate. "A statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected and, so construed, the statute will thereafter be immune from attack on the grounds of overbreadth." *State v. Thompson*, 237 Kan. 562, 564, 701 P.2d 694 (1985). All the Court need do is require, as the statute already implicitly

does, is to mandate that the speaker intend to give the false impression that he/she is an election official in order to violate the statute.

Plaintiffs argue (Br. 38) that such a construction is impermissible because it would effectively rewrite the statute. Not so. As described above, *supra* at 11, subsections (a)(2) and (a)(3) of K.S.A. 25-2438 target different types of conduct than subsection (a)(1). And to the extent that there is any ambiguity on the issue, the rule of lenity would further protect Plaintiffs from arbitrary or capricious enforcement. *See Chavez*, 292 at 464. Plus, the presence of redundancies in a statute (if that even is true here) is hardly a unique scenario and does nothing to undermine the statute's guidelines for fair and impartial enforcement. What the overbreadth doctrine does not allow, however, is – as Plaintiffs have proposed – for a court to adopt the most uncharitable reading of a statute possible and then strike down the statute altogether.

Finally, even assuming there are some circumstances in which the statute might sweep in some constitutionally protected speech, such a possibility provides no sound basis for striking down the statute pursuant to an overbreadth theory. "In order to maintain an appropriate balance, [the Supreme Court has] vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis in original). In other words, the mere fact that *some* impermissible applications of a law may be conceivable does not render that law unconstitutionally overbroad; there must be a realistic danger that the law will *significantly* compromise recognized free speech protections. This is particularly true where, as is the case here, *conduct* and not merely

speech is involved. *State v. Williams*, 299 Kan. 911, 920 329 P.3d 400 (2014). In this lawsuit, even if it is possible to conceive of hypothetical scenarios where Plaintiff's speech interests might be implicated at the margins, the impact is certainly not so substantial as to necessitate the wholesale invalidation of a statute directed at the plainly legitimate purpose of preserving the integrity of the State's electoral process.

Issue 4: Did the district court err as a matter of law in denying Plaintiffs' motion for a preliminary injunction on the grounds that K.S.A. 25-2438(a)(2)-(3) is void for vagueness pursuant to Section 10 of the Kansas Constitution's Bill of Rights?

Plaintiffs next urge that the district court erred in refusing to strike down the challenged election statute as unconstitutionally vague in contravention of Section 10 of the Kansas Constitution's Bill of Rights. (Br. 39). The key to a void for vagueness claim is whether the text of the statute "gives adequate warning as to the proscribed conduct." *State v. Jenkins*, 311 Kan. 39, 52, 455 P.3d 779 (2020) (quoting *State v. Richardson*, 289 Kan. 118, 124, 209 P.3d 696 (2009)). The "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *Williams*, 553 U.S. at 304. "Due process requires criminal statutes to convey a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice." *Jenkins*, 311 Kan. at 53 (quotation omitted). At its core, "the test for vagueness is a commonsense determination of fundamental fairness." *Richardson*, 289 Kan. at 124.

The Kansas Supreme Court has held that "the determinative question" when a statute is attacked on constitutional vagueness grounds is "whether a person of ordinary intelligence understands what conduct is prohibited by the statutory language at issue." *Id.* at

125 (quotation omitted). A two-pronged inquiry is employed in conducting this assessment: the Court asks "(1) whether the statute gives fair warning to those potentially subject to it; and (2) whether it adequately guards against arbitrary and unreasonable enforcement." *Jenkins*, 311 Kan. 53 (quotation omitted).

With regard to the first prong, Plaintiffs argue that the statute focuses entirely on others' subjective perceptions, thus making it impossible for Plaintiffs and their affiliates to know if they might be violating the law. As discussed at length in connection with Issue 1, however, this contention is inconsistent with the statutory text, as informed by the canons of statutory construction and fundamental principles relating to criminal statutes' *mens rea* requirements. The statute's prohibitions target only the conduct of the *speaker*, not the subjective views of the *listener*. The statute's reach is likewise limited to actions by the speaker in which he/she *knowingly* engaged in actions designed to convey the false impression that he/she is an election official. Admittedly, "the need for clarity of definition and the prevention of arbitrary and discriminatory enforcement is heightened for criminal statutes." *Richardson*, 289 Kan. at 125. But absent the requisite intent – which simply will not exist here if Plaintiffs are exercising the kind of caution they claim to embrace in their Amended Petition and affidavits accompanying their motion for a preliminary injunction – there would be *no reasonable basis* for a prosecution and there would be *no legitimate threat whatsoever* that one would occur.

Moreover, the Kansas Supreme Court has regularly held that a challenged statute "comes before the court cloaked in a presumption of constitutionality." *Leiker*, 245 Kan. at 363-64. As the Court noted earlier this year in turning away a constitutional challenge

to a criminal statute on vagueness and overbreadth grounds, "This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction." *Matter of A.B.*, 313 Kan. at 138 (quoting *Bollinger*, 302 Kan. at 318). The party challenging the statute has the burden of proving that the law clearly violates the constitution. *Leiker*, 245 Kan. at 363-64. This burden "is a 'weighty' one," *Downtown Bar & Grill*, 294 Kan. at 192, and Plaintiffs have not come even close to meeting that standard here.

As for the second prong of the void-for-vagueness test, it is difficult to see how there can be arbitrary enforcement of this impersonation statute. Plaintiffs suggest that the new law gives law enforcement officials arbitrary discretion to pick and choose who might be prosecuted under its provisions. (Br. 41; R. II, 282 at ¶¶ 219-21). This contention crumbles at the touch. The statutory text itself provides contours for, and cabins the discretion of, law enforcement charged with enforcing this new law. Naturally, as is true in any criminal case, the underlying facts will dictate whether a prosecution should be pursued and whether a defendant should be adjudged guilty. But "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306.

"Words inevitably contain germs of uncertainty," *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973), and legislation is rarely as precise as citizens, judges, or even lawmakers

would like it to be, particularly when it emerges from the rough-and-tumble nature of the legislative process. *See League of Women Voters of Fla. v. Browning*, 575 F. Supp.2d 1298, 1318 (S.D. Fla. 2008) (rejecting vagueness challenge to voter registration statute). The U.S. Supreme Court, however, has held that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 U.S. at 304 (citation omitted); *accord Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."); *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (Vagueness doctrine is not meant to "convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. Nor will statutes be "automatically invalidated simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Jenkins*, 311 Kan. at 53. The applicable standard "is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed." *Browning*, 575 F. Supp.2d at 1318 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

Plaintiffs cite *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), and *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996), in support of their vagueness theory. Neither case is analogous to the statute at issue here. The U.S. Supreme Court in *Coates* struck down a law that made it a crime for a group of individuals to assemble on a sidewalk and "conduct themselves in a manner annoying to persons passing by." 402 U.S. at 611. The law was unconstitutionally vague, the Court concluded, "because it subjects the exercise of the right

of assembly to an unascertainable standard." *Id.* at 614. Likewise, in *Bryan*, the Kansas Supreme Court declared invalid a stalking statute that was triggered when a person "alarms," "annoys," or "harasses" another individual. 259 Kan. 144. The Court highlighted the total absence of any definition or objective standard for the prohibited conduct. *Id.* at 149-55.[4] Nothing like that is even remotely present here.

In both *Coates* and *Bryan*, there was virtually no way for an individual to know how to model his/her behavior without falling within the ambit of the criminal prohibitions. Here, by contrast, the impersonation statute has clear language which, particularly when applied on an objective basis and focused on the intent of the speaker as it logically must, directs individuals with relative precision as to how to tailor their conduct to avoid running afoul of its commands. Even then, such precision is not actually necessary. Indeed, in *Grayned*, the U.S. Supreme Court upheld a noise ordinance restricting diversions "which disturb[] or tend[] to disturb the peace or good order of [a] school session or class." 408 U.S. at 108. Noting that "mathematical certainty from our language" was an elusive goal, and acknowledging that the ordinance's terms were "marked by flexibility and reasonable breadth, rather than meticulous specificity," the Court nevertheless reasoned that "it is clear what the ordinance as a whole prohibits." *Id.* at 110; *cf. State v. Valdiviezo-Martinez*, 486

[4] The same was true of *State v. Harris*, 311 Kan. 816, 467 P.3d 504 (2020), in which a divided Supreme Court invalidated as unconstitutionally vague a statute prohibiting possession of a weapon by convicted felons. The statute defined "weapon" to include a dagger, dirk, switchblade, stiletto, straight-edged razor, or "any other dangerous or deadly cutting instrument of like character." The majority noted that there was simply no way to know what kind of weapons might be covered by this law, *id.* at 824-25, a point reinforced by the diametrically different standards adopted by various law enforcement agencies in the State. *Id.* at 825-26.

P.3d 1256, 1267 (Kan. 2021) ("That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.") (quoting *State v. Hearn*, 244 Kan. 638, 641, 772 P.2d 758 (1989)).

Numerous statutes have survived facial vagueness challenges by the U.S. Supreme Court despite containing language far vaguer than that contained in K.S.A. 25-2438(a). *See, e.g., Hill v. Colorado,* 530 U.S. 703, 732 (2000) (rejecting vagueness challenge to ordinance making it a crime to "approach" another person, without his/her "consent," to engage in "oral protest, education, or counseling" within specified distance of health-care facility); *Boos v. Barry,* 485 U.S. 312, 332 (1988) (rejecting vagueness challenge to ordinance interpreted as regulating conduct near embassies "when the police reasonably believe that a threat to the security or peace of the embassy is present"); *Cameron v. Johnson,* 390 U.S. 611, 616 (1968) (rejecting vagueness challenge to ordinance prohibiting protests that "unreasonably interfere" with access to public buildings); *Kovacs v. Cooper,* 336 U.S. 77, 79 (1949) (rejecting vagueness challenge to sound ordinance forbidding "loud and raucous" sound amplification).

When measured against the yardstick of "ordinary intelligence," i.e., an "ordinary person exercising ordinary common sense," *Browning*, 575 F. Supp.2d at 1319, the new statute prohibiting false representations of election officials establishes sufficiently clear guidelines for enforcement to avoid the type of arbitrary and discriminatory application that can, in rare circumstances, render a statute void for vagueness. The district court was on solid legal ground in rejecting Plaintiffs' motion for a preliminary injunction on this

theory.

Issue 5: Do the Plaintiffs have standing to pursue their constitutional challenge to K.S.A. 25-2438(a)(2)-(3)?

As a final point, Plaintiffs do not even have standing to pursue this case. The district court declined to reach this issue, preferring instead to rule on the merits. (R. III, 14). But the Court has a legal duty at all times to ensure that it has jurisdiction, and the issue of standing – which is a component of subject matter jurisdiction – may be raised at any time. *See Creecy v. Kan. Dep't of Revenue*, 310 Kan. 454, 460, 447 P.3d 959 (2019); *see also Kan. Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 743, 387 P.3d 795 (2017) (standing issue may be raised at any time and does not require cross-appeal).

A. Standard of Review

Standing is a question of law, and an appellate court exercises unlimited review in evaluating a party's standing to pursue its claims. *Creecy*, 310 Kan. at 460.

B. Analysis

Plaintiffs lack both organizational and associational standing to challenge K.S.A. 25-2438(a)(2) and (3) because they have no credible fear of prosecution. A plaintiff who alleges injury from the potential enforcement of a statute can demonstrate "an injury in fact only 'under circumstances that render the threatened enforcement sufficiently imminent.'" *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). In particular, the plaintiff must allege an intent to engage in a course of conduct that is "arguably affected with a constitutional interest, but proscribed by a statute, and [for which] there exists a credible threat of

prosecution." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *accord Baker v. City of Overland Park*, No. 101,371, 2009 WL 3083843, at *6 (Kan. Ct. App. Sept. 25, 2009)

As an initial matter, the conduct in which Plaintiffs claim to engage does not violate the challenged statute and thus they cannot claim to credibly fear any prosecution based on those actions. Second, even if this Court adopts Plaintiffs' interpretation of the statute and finds that their proposed course of conduct implicated the two subsections at issue here, no official has expressed any intent to enforce the statute in that manner. To the contrary, the Attorney General, through his briefing in this litigation, has affirmatively disavowed the embellished reading of the statute that Plaintiffs propose. That representation suffices to negate any "credible threat" of prosecution that Plaintiffs might claim to have under their interpretation of K.S.A. 25-2438(a). *See Mink v. Suthers*, 482 F.3d 1244, 1254–55 (10th Cir. 2007) (district attorney's "no file" letter disavowing intent to prosecute the plaintiff removed any credible threat of prosecution, even though it was not binding on successors and did not eliminate all possibility of future prosecution.); *see also Bryant v. Woodall*, 363 F. Supp.3d 611, 619 (M.D.N.C. 2019) ("There is no requirement that state's disavowal of prosecution carry the force of law or come in any specific form. . . . [T]he disavowal must simply assure a reasonable person that there is no risk to them of engaging in protected conduct proscribed by the statute."). Just because Plaintiffs refuse to take "yes" for an answer does not make their concocted injury legitimate or their fears of an imminent prosecution rational.

A credible fear of enforcement does not exist when Plaintiffs do "not indicate[] an intention to violate the statute as currently interpreted by the defendants." *Ward v. Utah*, 321 F.3d 1263, 1268 (10th Cir. 2003). "The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Mink*, 482 F.3d at 1253. Plaintiffs cannot manufacture standing by insisting that they fear prosecution based on an interpretation of a statute that Defendants have repeatedly rejected. Their fear of enforcement must be *objectively credible*. Having failed to do so, they clearly lack standing and the claims at issue in this appeal may thus be dismissed as beyond the jurisdiction of the Court.

Respectfully submitted,

/s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2022, I electronically filed the foregoing Brief of Appellee with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also hereby certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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UNPUBLISHED OPINIONS CITED IN THE BRIEF

- *VoteAmerica v. Schwab*, No. 21-2253-KHV, 2021 WL 5918918 (D. Kan. Dec. 15, 2021)

- *Baker v. City of Overland Park*, No. 101, 2009 WL 3083843, (Kan. Ct. App. Sept. 25, 2009)

2021 WL 5918918
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

VOTEAMERICA and Voter Participation Center, Plaintiffs,
v.
Scott SCHWAB, in his official capacity as Secretary of State of the State of Kansas; Derek Schmidt, in his official capacity as Attorney General of the State of Kansas; Stephen M. Howe in his official capacity as District Attorney of Johnson County, Defendants.

CIVIL ACTION No. 21-2253-KHV
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Signed 11/19/2021
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Filed 12/15/2021

West Codenotes

Validity Called into Doubt
Kan. Stat. Ann. § 25-1122(k)(2), (l)(1)

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MEMORANDUM AND ORDER NUNC PRO TUNC

KATHRYN H. VRATIL, United States District Judge

***1** VoteAmerica and Voter Participation Center bring suit for declaratory and injunctive relief against Scott Schwab in his official capacity as Kansas Secretary of State, Derek Schmidt in his official capacity as Kansas Attorney General and Stephen M. Howe in his official capacity as District Attorney of Johnson County. Complaint For Declaratory And Injunctive Relief (Doc. #1) filed June 2, 2021. Plaintiffs allege that defendants violated their First and Fourteenth Amendment rights and breached the Dormant Commerce Clause. Plaintiffs seek a preliminary injunction against enforcement of two provisions of HB 2332, which will be codified as K.S.A. § 25–1122: (1) Section 3(l)(1), which bars persons and organizations that are not residents of or domiciled in Kansas from mailing or causing to be mailed advance mail ballot applications to Kansas voters and (2) Section 3(k)(2), which criminalizes mailing personalized advance ballot applications.

On September 8, 2021, the Court held an evidentiary hearing on plaintiffs' motion for preliminary injunction. This matter is before the Court on Defendants' Motion To Dismiss Plaintiffs' Complaint (Doc. #26) filed July 9, 2021 [1] and Plaintiffs' Motion For Preliminary Injunction (Doc. #24) filed July 8, 2021.

I. Motion To Dismiss

In ruling on a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., the Court assumes as true all well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim which is plausible—not merely conceivable—on its face. Id. at 679–80, 129 S.Ct. 1937; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). To determine whether a complaint states a plausible claim for relief, the Court draws on its judicial experience and common sense. Iqbal, 556 U.S. at 679, 129 S.Ct. 1937.

The Court need not accept as true those allegations which state only legal conclusions. See id. at 678, 129 S.Ct. 1937. Plaintiffs make a facially plausible claim when they plead factual content from which the Court can reasonably infer that defendants are liable for the misconduct alleged. Id. However, plaintiffs must show more than a sheer possibility that defendants have acted unlawfully—it is not enough to plead facts that are "merely consistent with" defendants' liability. Id. (quoting Twombly, 550 U.S. at 557, 127 S.Ct. 1955). A pleading which offers labels and conclusions, a formulaic recitation of the elements of a cause of action

or naked assertions devoid of further factual enhancement will not stand. Id. Similarly, where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not "shown"—that the pleaders are entitled to relief. Id. at 679, 129 S.Ct. 1937. The degree of specificity necessary to establish plausibility and fair notice depends on context; what constitutes fair notice under Fed. R. Civ. P. 8(a)(2) depends on the type of case. Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008).

***2** When ruling on a Rule 12(b)(6) motion, the Court does not analyze potential evidence that the parties might produce or resolve factual disputes. Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 (10th Cir. 2002). A motion to dismiss does not ask the Court to analyze plaintiffs' likelihood of success on the merits; rather, the Court must find only a reason to believe that plaintiffs have a "reasonable likelihood of mustering factual support for the claims," Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007), and that their claims are "plausible." Twombly, 550 U.S. at 570, 127 S.Ct. 1955.

Highly summarized, plaintiffs' complaint alleges as follows: [2]

A. Voting In Kansas

Kansas law permits any eligible voter to cast an advance ballot. Kansas has two types of advance voting: advance voting in person (i.e., early voting) and advance mail voting. [3] Advance voting requires a voter to apply to a county election officer for a mail-in ballot. The Secretary of State coordinates advance voting statewide by creating uniform procedures and forms. County election officers administer voting locally by accepting and processing applications, providing ballots to eligible voters, receiving ballots that have been cast and ultimately accepting or rejecting ballots. County election officers also prepare and maintain lists of persons who have filed advance voting applications. During the 2020 election cycle, the advance voting application form was publicly available on the web sites of the Kansas Secretary of State, local election offices and various third parties.

To apply for an advance mail ballot, a voter must provide a Kansas driver's license number, a Kansas nondriver's ID card number or another specified form of identification. A county election officer must verify that the voter's signature matches the signature on file in voter registration records. Voters may cast advance ballots on or before Election Day, either by mailing completed ballots or dropping off their ballots at a local election office.

In 2020, Kansas voters of all political persuasions turned out in historic numbers. Particularly given COVID-19, Kansas also saw a steep increase in advance mail voting. More than 1.3 million Kansans voted in the 2020 general election, nearly six per cent more than in 2016. More Kansans voted by advance mail ballot in November of 2020 than the elections in 2016 and 2018 combined. Shortly after the 2020 election, the Secretary of State's office stated that "Kansas did not experience any widespread, systematic issues with voter fraud intimidation, irregularities or voting problems.... We are very pleased with how the election has gone up to this point."

In March of 2021, the Kansas Legislature introduced HB 2332 to regulate the advance ballot application process. Governor Laura Kelly vetoed the bill on April 23, 2021. On May 3, 2021, the Kansas Senate and House overrode the Governor's veto, and HB 2332 will become effective on January 1, 2022. HB 2332, § 11.

HB 2332 contains two provisions (collectively, "Ballot Application Restrictions") that are at issue in this action.

1. Out-of-State Distributor Ban

HB 2332 bans any person from mailing an advance voting application or causing an application to be mailed, unless the sender is a resident of Kansas or domiciled in Kansas. HB 2332, § 3(l)(1) (the "Out-of-State Distributor Ban"). This ban applies whether the sender is mailing a single application in response to a request from an individual Kansas voter or is engaged in mass mailing of unsolicited applications.

***3** The legislation imposes a civil penalty of $20.00 for "[e]ach instance in which a person mails an application for an advance voting ballot." HB 2332, § 3(l)(3). Anybody can file a complaint alleging a violation of the Out-of-State Distributor Ban, and the attorney general must investigate all complaints. HB 2332, § 3(l)(2). The attorney general may also file suit against anyone who violates this provision.

2. Personalized Application Prohibition

The "Personalized Application Prohibition" prohibits the mailing of any advance mail ballot application that has been personalized with a voter's information, even where the voter has personally provided that information. The Prohibition applies to any person who by mail solicits a registered voter to apply for an advance voting ballot and includes in such mailing an application for an advance voting ballot. HB 2332, § 3(k)(1).

Personalized application violations are class C nonperson misdemeanors, which are punishable by up to one month in jail and/or fines. HB 2332, § 3(k)(5); K.S.A. § 21-6602(a)(3). The Personalized Application Prohibition does not apply to state or county election officials or to entities which must provide information about elections under federal law. HB 2332, § 3(k)(4).

B. Parties

Plaintiffs are out-of-state, nonpartisan organizations which provide voter information, applications and forms to facilitate political engagement by voters, including advance mail ballot applications. Such organizations have long played a vital role in democracy by persuading citizens to engage with the political process.

VoteAmerica is a California-based 501(c)(3) nonprofit, nonpartisan organization. Its core mission is to help eligible voters engage in the electoral process, emphasizing voting by mail. VoteAmerica believes that voting by mail is the most effective way to ensure the broadest participation in elections. To empower voters to exercise their votes, VoteAmerica provides access to trusted election information, open platform technology and education programs. The VoteAmerica web site provides extensive guides and tools for voter registration, absentee, mail and advance voting and voting in person in all 50 states, including Kansas. Its resources for advance voting in Kansas include a guide to advance voting rules, deadlines, links to local election offices, instructions and other relevant resources.

VoteAmerica engages voters by pairing tools and resources on its web site with other modes of speech to help voters in the voting process. These communications guide voters to its on line tools and resources and facilitate further communications with Kansas voters about the political process. To amplify its message, VoteAmerica shares graphics, messaging and other communications products with partners.

VoteAmerica's primary resource for promoting advance voting in Kansas is an interactive Absentee and Mail Ballot request tool. The tool allows voters to provide their names, addresses, dates of birth, emails and phone numbers, and populate the ballot application forms with that information. Voters receive the application forms with the voter-provided information pre-completed. Voters then sign and complete the forms and send them to their local election officials. The tool automatically signs up voters for follow-up communications from VoteAmerica to help them vote in future elections. In addition to the VoteAmerica web site, the Absentee Mail Ballot request tool is available on the web sites of partner organizations of VoteAmerica.

***4** During the 2020 election cycle, the tool delivered personalized advance voting applications to Kansas voters by email. In four other states, voters have the option to receive a pre-printed personalized application by mail. VoteAmerica is actively planning to offer this personalized print-and-mail feature service to Kansas voters.

With its preprinted applications, VoteAmerica sends blank advance mail voting application forms and pre-addressed, postage-paid envelopes. Expanding the print-and-mail feature will enable VoteAmerica to reach a broader audience, including low-income and low propensity voters with fewer resources and decreased access to postage and printing.

During the 2020 election cycle, at least 7,700 Kansas voters used the VoteAmerica tool to receive a personalized ballot application. VoteAmerica helped more than 6,000 Kansans register to vote, and at least 28,500 Kansas voters currently subscribe to VoteAmerica's educational emails and reminder text messages. VoteAmerica is invested in scaling its technology and outreach programs to meet anticipated demand and plans to continue communicating educational messages, assistance and reminders about voting.

Before the Legislature enacted HB 2332, VoteAmerica planned to keep offering its tool to Kansas voters after January 1, 2022. Upon request, it also planned to use its print-and-mail feature to mail advance mail voting applications to Kansas voters.

Voter Participation Center ("VPC") is a Washington, D.C.-based 501(c)(3) nonprofit, nonpartisan organization. Its mission is to provide voter registration, early voting, vote by mail and get-out-to-vote resources and information to

traditionally underserved groups, including young voters, voters of color and unmarried women.

VPC has implemented direct mail programs to send mass mailers to its target demographic. These mass mailers contain resources for eligible voters to submit voter registrations and absentee ballot applications. VPC believes that direct mail is the most effective form of communicating with and helping Kansas voters. The mail campaign encourages advance voting. VPC uses Kansas' statewide voter registration files to identify registered voters who have not requested an advance ballot application, and in 2020, it sent nearly 1.2 million advance voting applications to Kansas voters. To facilitate these efforts, VPC has partnered with a 501(c)(4) organization called the Center for Voter Information. VPC requests updated voter records from state election officials to proactively remove voters who have already requested or submitted advance voting applications.

VPC mailers include a cover letter encouraging voters to request and cast advance ballots; printed copies of an advance ballot application from the Kansas Secretary of State web site; and pre-addressed, postage-paid envelopes addressed to the county election offices. VPC personalizes the voter's application with the information from the state-generated registration records. The cover letter clearly instructs the voter not to submit more than one request. The mailers encourage voting by mail and help voters do so. Mailers sent to Kansans during the 2020 election cycle included messages such as: "County election officials in Kansas encourage voters to use mail ballots in upcoming elections." "Voting by mail is EASY" and "You can even research the candidates as you vote." In the 2020 election cycle, an estimated 69,577 Kansas voters submitted VPC-provided advance voting applications to their county election officials.

***5** Before the Legislature enacted HB 2332, VPC planned to continue communicating and helping Kansas voters by mailing personalized advance mail voting applications after January 1, 2022, and during the 2022 election cycle.

Scott Schwab is the Kansas Secretary of State. As the State's chief elections official, Schwab oversees all Kansas elections and administers the State's election laws and regulations. He also issues guidance and instructions to county election officers.

Derek Schmidt is the Kansas Attorney General. As the State's chief law enforcement officer, Schmidt has the authority and discretion to investigate and prosecute violations of State law, including criminal violations. HB 2332 requires Schmidt to investigate complaints alleging violations of the Out-of-State Distributor Ban and permits him to prosecute such civil violations.

Stephen Howe is the District Attorney of Johnson County. Howe is responsible for investigating and prosecuting all criminal violations of state law in Johnson County. Because HB 2332's Personalized Application Prohibition violations are class C nonperson misdemeanors, Howe will prosecute these violations in Johnson County.

On June 2, 2021, plaintiffs filed suit against defendants in their official capacities, alleging violations of the First and Fourteenth Amendments and the Dormant Commerce Clause. Specifically, Count 1 alleges that the Ballot Application Restrictions violate the First Amendment by targeting plaintiffs' core political speech, i.e. their advocacy for advance mail voting, communicated through mailing of advance ballot application packets. Count 2 alleges that the Ballot Application Restrictions inhibit plaintiffs' First Amendment right to associate with others to encourage and help Kansas voters to vote by mail. Count 3 alleges that the Ballot Application Restrictions are overly broad, regulating and chilling a substantial amount of plaintiffs' constitutionally protected speech and associations. Finally, Count 4 alleges that the Out-of-State Distributor Ban violates the Dormant Commerce Clause by facially discriminating against non-Kansas residents, including plaintiffs, in restricting them from mailing advance voting applications to Kansas residents.

C. Analysis

As noted, plaintiffs bring four claims: (1) HB 2332 violates their First Amendment rights to freedom of speech (Count 1); (2) HB 2332 violates their First Amendment rights to freedom to associate (Count 2); (3) HB 2332 is overbroad (Count 3); and (4) the Out-of-State Distributor Ban of HB 2332 violates the Dormant Commerce Clause (Count 4). Pursuant to Rule 12(b)(6), defendants ask the Court to dismiss plaintiffs' complaint for failure to state a claim on which relief may be granted.

As to Count 1, defendants argue that the Ballot Application Restrictions apply only to non-expressive conduct, not to any form of speech, and that as a matter of law, they do not violate the First Amendment. As to Count 2, defendants argue that when a state invokes its constitutional authority

to regulate elections, the restrictions on individual rights to associate—which will inevitably ensue—do not violate the First Amendment. As to Count 3, defendants argue that as a matter of law, the restrictions in question are not overly broad in violation of the First Amendment. Finally, as to Count 4, defendants argue that the Dormant Commerce Clause does not apply to the restrictions aimed at minimizing voter confusion, eliminating voter fraud and preserving the limited resources of state election offices.

***6** The Court considers each claim in turn.

1. First Amendment Freedom of Speech Claim (Count 1)

Plaintiffs allege that the Ballot Application Restrictions violate their freedom of speech because they restrict their right to send packets which contain advance voting applications to Kansas voters and thus target core political speech. Complaint (Doc. #1), ¶ 55. Plaintiffs argue that in violation of the First Amendment, the Out-of-State Distributor Ban is content-based, viewpoint-based and speaker-based, and targets only non-resident speakers and pro-mail voting messages. Id., ¶¶ 82, 84. Plaintiffs also argue that the Personalized Application Prohibition singles out personalized advanced voting applications, without prohibiting other forms of speech. Id., ¶¶ 89–91.

Defendants ask the Court to dismiss Count 1 because HB 2332 "prohibits no spoken or written expression whatsoever" and applies to non-expressive conduct, not to speech—and most certainly not to core political speech. Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) filed July 9, 2021 at 17, 20. Accordingly, the Court first analyzes whether HB 2332 regulates speech—that is, whether the First Amendment even applies to plaintiffs' application packets and personalized ballot applications.

The First Amendment, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. The First Amendment "literally forbids the abridgement only of speech," but its protection is not limited to just spoken or written words. Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Conduct that is "sufficiently imbued with elements of communication"—known as "inherently expressive" conduct —falls within the scope of the First and Fourteenth Amendments. Id.; Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). In deciding whether particular conduct is "inherently expressive," courts look to whether the conduct shows "an intent to convey a particular message" and whether "the likelihood was great that the message would be understood by those who viewed it." Voting for Am., Inc. v. Steen, 732 F.3d 382, 388 (5th Cir. 2013) (quoting Johnson, 491 U.S. at 404, 109 S.Ct. 2533).

Citing Lichtenstein v. Hargett, 489 F. Supp. 3d 742 (M.D. Tenn. 2020), defendants argue that in mailing application packets and distributing personalized ballot applications, plaintiffs are not engaging in speech or expressive conduct. Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) at 16–17. Lichtenstein involved First Amendment challenges to a Tennessee statute which prohibited anyone except election officials from providing applications for absentee ballots. 489 F. Supp. 3d at 748. The district court held that the law did not prohibit spoken or written expression, and therefore did not restrict expressive conduct. Id. at 773. Plaintiffs correctly respond that Lichtenstein is not germane because their application packets include speech that communicates a pro-mail voting message. Furthermore, mailing the application packets is inherently expressive conduct that the First Amendment embraces. See League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); see also Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158 (M.D. N.C. 2020); Priorities USA v. Nessel, 462 F. Supp. 3d 792 (E.D. Mich. 2020).

***7** Accepting their factual allegations as true, plaintiffs have sufficiently alleged that HB 2332 violates their First Amendment rights to engage in free speech and expressive conduct. In other words, defendants are not entitled to dismissal of Count 1 on the theory that HB 2332 exclusively regulates conduct, not speech.

2. First Amendment Freedom Of Association Claim (Count 2)

Count 2 alleges that the Ballot Application Restrictions chill plaintiffs' associational rights under the First Amendment because they impede plaintiffs' ability to engage and broaden their network and association base for political change. Complaint (Doc. #1), ¶¶ 51, 60, 98–99; see also supra Section I.C.1. Defendants do not dispute that the restrictions hinder plaintiffs' right to associate but argue that as a matter of law, the State may do so in exercising its constitutional authority

to regulate elections. Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) at 18.

The right to associate to advance beliefs and ideas is at the heart of the First Amendment. NAACP v. Button, 371 U.S. 415, 430, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). An organization's attempt to broaden the base of public participation in and support for its activities is conduct "undeniably central to the exercise of the right of association." Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1202 (D.N.M. 2010), on reconsideration in part, No. CIV-08-0702 JB/WDS, 2010 WL 3834049 (D.N.M. July 28, 2010) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 214–15, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986)). The "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); see Kusper v. Pontikes, 414 U.S. 51, 56–57, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).

The freedom of association encompasses not only the right to associate with others but also the right to choose how one associates with others. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 653, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."). Public endeavors which "assist people with voter registration are intended to convey a message that voting is important," and which expend resources "to broaden the electorate to include allegedly under-served communities," qualify as expressive conduct which implicates the First Amendment freedom of association. Democracy N.C., 476 F. Supp. 3d at 223 (quoting Am. Ass'n of People with Disabilities, 690 F. Supp. 2d at 1215–16).

Here, plaintiffs allege that the Out-of-State Distributor Ban prevents them from "recruiting, consulting, and otherwise associating with Kansas organizations that distribute [advance mail voting] applications." Complaint (Doc. #1), ¶¶ 60, 98. Working with these Kansas organizations allows them to increase the number of voices which share the message that voters are entitled to and should participate in the democratic process. Id., ¶¶ 6, 10, 20. Plaintiffs allege that the Personalized Application Prohibition interferes with their associational rights by prohibiting them from working with Kansas organizations to provide the Absentee and Mail Voting tool and limits their ability to "associate for the purposes of assisting persons" in requesting an application for an advance ballot. Id., ¶¶ 99–100.

***8** Defendants have a legitimate interest in regulating elections. Utah Republican Party v. Cox, 892 F.3d 1066, 1084 (10th Cir. 2018); see Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (describing state interest generally as interest in "protecting the integrity and reliability of the electoral process"); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes."). Defendants, however, do not contest that plaintiffs have an associational interest in engaging with Kansas residents about advance mail voting. Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) at 18.

In Am. Ass'n of People with Disabilities v. Herrera, supra, nonprofit organizations engaged in voter-registration activities challenged a New Mexico law that allegedly burdened their right to expressive association. 690 F. Supp. 2d at 1190. Like defendants here, defendants in that case conceded that the statute restricted plaintiffs' ability to associate, but argued that the burdens imposed by the challenged laws were non-existent when weighed against the State's substantial interest in regulating elections. Id. at 1220. On a motion to dismiss, however, the district court properly refused to weigh the relative burdens of the restrictions. Id.

Accepting plaintiffs' allegations as true—as the Court must do in addressing a motion to dismiss—plaintiffs in this case have sufficiently alleged that HB 2332 violates their First Amendment rights to engage in free association. Defendants are not entitled to dismissal of Count 2 on the theory that HB 2332 only minimally burdens plaintiffs' right to associate, because on this record the Court cannot weigh the relative burdens of plaintiffs' First Amendment rights against the State's professed interest in regulating elections. Therefore the Court overrules defendants' motion to dismiss Count 2.

3. Overbreadth Claim (Count 3)

Count 3 alleges that the Ballot Application Restrictions are unconstitutionally overbroad, in violation of the First Amendment, because they "needlessly regulate a

substantial amount of constitutionally protected expression and associations," and "impermissibly chill [p]laintiffs' protected speech." Complaint (Doc. #1), ¶¶ 106–08. Plaintiffs bring both as-applied and facial overbreadth challenges. Plaintiffs argue that as applied to them, the restrictions are overbroad because (1) HB 2332 reaches a substantial amount of constitutionally protected activity in delivering their pro-mail voting message; (2) they cannot financially partner with other organizations to encourage Kansas voters to vote by mail; and (3) the threat of criminal and civil penalties impermissibly chills their speech. Id., ¶¶ 52–54, 59, 65, 109. For largely the same reasons, plaintiffs also raise a facial attack that HB 2332 necessarily chills the speech of others not before the Court. Id., ¶¶ 52, 73, 93, 108. Plaintiffs argue that HB 2332 reaches a substantial amount of constitutionally protected expression and exceeds any legitimate state interest in avoiding fraud, minimizing voter confusion and facilitating an orderly administration of the electoral process, and that they sufficiently state a claim under Rule 12(b)(6).

Defendants seek dismissal on the theory that as a matter of law, because plaintiffs may communicate their messages in other ways, the restrictions do not substantially impair their constitutional activity, as required to state a valid overbreadth claim. Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) at 25.

***9** Facial challenges and as-applied challenges can overlap conceptually. See Doe v. Reed, 561 U.S. 186, 194, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010). Where the "claim and the relief that would follow ... reach beyond the particular circumstances of the[ ] plaintiffs," "they must satisfy th[e] standards for a facial challenge to the extent of that reach." Id. Therefore, to determine whether plaintiffs have stated a valid claim upon which relief may be granted, the Court analyzes their claims under the heightened facial challenge standard. Id.; see United States v. Stevens, 559 U.S. 460, 472–73, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

In general, to succeed in a typical facial attack, plaintiffs must establish that "no set of circumstances exists [in] which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." Stevens, 559 U.S. at 473, 130 S.Ct. 1577 (citations omitted). Generally, facial challenges are strongly disfavored, but overbreadth challenges under the First Amendment are an exception to that rule because the "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); see Virginia v. Hicks, 539 U.S. 113, 118, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (First Amendment overbreadth doctrine exception to normal rule for facial challenges). The Supreme Court has cautioned, however, that the concept of substantial overbreadth is not readily reduced to an exact definition. Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

A court should address an overbreadth challenge when the law may chill the free speech rights of parties not before the court, especially when the statute imposes criminal sanctions. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1367 (10th Cir. 2000); see also Hicks, 539 U.S. at 118–20, 123 S.Ct. 2191. To succeed on an overbreadth challenge, plaintiffs must show that the "potential chilling effect on protected expression is both real and substantial." United States v. Brune, 767 F.3d 1009, 1018 (10th Cir. 2014) (quoting Jordan v. Pugh, 425 F.3d 820, 828 (10th Cir. 2005)). At the motion to dismiss stage, the Court need not determine whether the illegitimate applications of the statute substantially outweigh the legitimate applications of the statute. Animal Legal Def. Fund v. Reynolds, No. 419CV00124JEGHCA, 2019 WL 8301668, at *12 (S.D. Iowa Dec. 2, 2019). At this stage of the litigation, plaintiffs need only allege "a claim to relief that is plausible on its face," describing instances of arguable overbreadth of HB 2332. Twombly, 550 U.S. at 570, 127 S.Ct. 1955; Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).

a. Substantial Impairment Of Plaintiffs' Constitutionally Protected Rights

As noted above, plaintiffs allege that the Out-of-State Distributor Ban reaches a substantial amount of their constitutionally protected activity in delivering their pro-mail voting messages. HB 2332 bars plaintiffs from mailing application packets that contain applications for advance mail ballots to Kansas voters and also prohibits them from even "causing" such applications to be mailed. Complaint (Doc. #1), ¶¶ 52, 59, 109; HB 2332, § 3(l)(1). HB 2332 also prevents plaintiffs from extending financial support and encouragement to partner organizations who work to mail applications to Kansas voters or Kansas residents who mail applications to Kansas-based families. Complaint (Doc. #1), ¶¶ 52, 60. Under the Personalized Application Prohibition, plaintiffs cannot distribute applications for advance ballots

which contain personalized information from the State's voter database or the voter himself. Id., ¶¶ 29, 45. Plaintiffs allege that the penalties associated with both restrictions will chill their speech and associational rights, as they will be deterred from engaging in constitutionally protected speech.

b. Substantial Impairment Of Rights Of Other Parties

***10** Plaintiffs allege that HB 2332 substantially impairs and chills not only their speech, but the speech of others not before the Court. Specifically, plaintiffs allege that it will prevent out-of-state organizations from extending financial support and encouragement to Kansas partner organizations and residents who mail advance ballot applications to Kansas voters, and substantially impair the ability of Kansas-based organizations to advocate for voting by mail. Plaintiffs allege that HB 2332 authorizes penalties which, when applied to all out-of-state entities, will deprive society of an "uninhibited marketplace of ideas." Taxpayers for Vincent, 466 U.S. at 800, n.19, 104 S.Ct. 2118.

As noted, the Court has determined that plaintiffs asserted a plausible claim that HB 2332 implicates protected speech. Defendants counter that plaintiffs' examples are "hypothetical scenarios" and argue that the statute has several legitimate applications; plaintiffs, however, allege more than a single "discrete application of the statute that may be problematic." Free Speech Coal., Inc. v. Holder, 729 F. Supp. 2d 691, 733 (E.D. Pa. 2010), aff'd in part, vacated in part, remanded sub nom. Free Speech Coal., Inc. v. Att'y Gen. of U.S., 677 F.3d 519 (3d Cir. 2012).

c. Weighing The Legitimate State Interests

For a statute to be overly broad, the overbreadth must not only be real, but substantial, judged in relation to the statute's plainly legitimate sweep. New York v. Ferber, 458 U.S. 747, 771, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Defendants put forward three alleged interests in enacting HB 2332: avoiding fraud, minimizing voter confusion and facilitating an orderly administration of the electoral process. On a motion to dismiss, the Court does not determine whether potentially illegitimate applications substantially outweigh any legitimate applications of the statute.[4] Reynolds, 2019 WL 8301668, at *12. To state a plausible claim, plaintiffs need only allege a meaningful number of illegitimate applications. Id.; see also People for Ethical Treatment of Animals v. Hinckley, 526 F. Supp. 3d 218, 239 (S.D. Tex. 2021).

HB 2332 has clearly legitimate purposes: eliminating voter fraud, preventing voter confusion and preserving limited resources to maintain orderly administration of the electoral process. Plaintiffs, however, raise significant issues whether protected expression will fall prey to the statute. See Ferber, 458 U.S. at 773, 102 S.Ct. 3348. Accepting plaintiffs' allegations as true, they allege a "realistic chilling effect" on their First Amendment rights and those not before the Court. See Faustin v. City and Cnty. of Denver, Colo., 423 F.3d 1192, 1199–1200 (10th Cir. 2005); see also West, 206 F.3d at 1367. Plaintiffs plausibly allege that the First Amendment protects their pro-mail voting advocacy speech, and that HB 2332 prohibits the exercise of their First Amendment rights. Plaintiffs are not "brainstorming hypotheticals." See Nat'l Press Photographers Ass'n v. McCraw, 504 F. Supp. 3d 568, 586–87 (W.D. Tex. 2020).

Defendants are not entitled to dismissal of Count 3 on the ground that as a matter of law, HB 2332 does not substantially impair constitutional activities and is not overbroad.

4. Dormant Commerce Clause Claim (Count 4)

Plaintiffs allege that because HB 2332 restricts non-Kansas residents from mailing advance voting applications to Kansas residents, it violates the Dormant Commerce Clause by discriminating against and unjustifiably burdening interstate commerce. U.S. Const. art. I, § 8, cl.3; Complaint (Doc. #1), ¶¶ 115, 118; Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion To Dismiss (Doc. #31) filed July 30, 2021 at 25–26. Defendants argue that plaintiffs have not stated an actionable claim because the State has legitimate purposes of eliminating potential voter fraud, minimizing voter confusion and preserving limited resources, and that the State's right to regulate elections is beyond the reach of the Dormant Commerce Clause. Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) at 27–28; Defendants' Reply To Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion To Dismiss (Doc. #41) filed August 20, 2021 at 24. Defendants also argue that the State is exempt from the Dormant Commerce Clause because it is a market participant.

***11** Plaintiffs respond that a statute which mandates differential treatment of in-state and out-of-state entities is

per se invalid under the Dormant Commerce Clause; that the State's right to regulate elections is not exempt from scrutiny under the Dormant Commerce Clause; and that the State cannot show that nondiscriminatory alternatives would be insufficient to protect its alleged interests.

The Commerce Clause provides that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations and among the several States." U.S. Const. art. I, § 8, cl. 3. While the Commerce Clause is more frequently invoked as authority for federal legislation, the so-called Dormant Commerce Clause limits state legislation which adversely effects interstate commerce. See Hughes v. Oklahoma, 441 U.S. 322, 326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). The focus of a Dormant Commerce Clause challenge is whether a state law improperly interferes with interstate commerce. Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1135 (10th Cir. 2016); see W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) ("Th[e] negative aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors") (internal citations omitted).

Under the Dormant Commerce Clause, the Court must first analyze whether the statute "regulates evenhandedly with only 'incidental' effects on interstate commerce or discriminates against interstate commerce." Or. Waste Sys., Inc. v. Dept. of Env't Quality of Or., 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (quoting Hughes, 441 U.S. at 336, 99 S.Ct. 1727). Discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Id. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. Id. (citing Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344 n.6, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992)). A state regulation that discriminates against interstate commerce will survive constitutional challenge only if the state shows "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Direct Mktg. Ass'n, 814 F.3d at 1136 (citing Camps Newfound/ Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997)).

Defendants do not deny that plaintiffs are engaged in interstate commerce or that HB 2332 restricts non-Kansas residents from mailing advance voting applications to Kansans. [5] Defendants' Memorandum In Support Of Motion To Dismiss (Doc. #27) at 27. On this record, HB 2332 is not an even-handed regulation which only incidentally discriminates against non-residents such as plaintiffs. Accordingly, to survive constitutional challenge, defendants must show that HB 2332 advances legitimate local purposes that cannot be adequately served by reasonable, nondiscriminatory alternatives. In attempting to do so, defendants cite three goals of HB 2332: to "minimize voter confusion, eliminate potential voter fraud, and preserve limited resources from being expended on rectifying problems flowing from the same, including having to wade through duplicative advance mail voting applications." Id. at 27–28. Defendants argue that HB 2332 "limits the amount of advance mail voting applications a voter receives" and ensures the State's ability to verify the accuracy of the sender's disclosures through Kansas records. Id. at 28. Lastly, defendants argue that the goal of the Out-of-State Distributor Ban is not economic protectionism, and in fact, defendants would prefer that no third-party organizations be allowed to distribute advance voting applications. Id. at 29. Plaintiffs respond that the State's "legitimate interests" do not justify discrimination against non-residents because the restrictions (1) do not combat voter confusion or fraud, or preserve resources; (2) the Ban does not limit the number of advance voting applications a Kansas voter may receive; (3) voters may still receive and submit duplicate applications; and (4) defendants have no evidence that out-of-state distributors as a class behave differently from in-state distributors. Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion To Dismiss (Doc. #31) at 27–28. Defendants do not persuasively refute these points or establish why their legitimate local objectives could not be achieved by reasonable, nondiscriminatory alternatives.

***12** Plaintiffs sufficiently allege that the Out-of-State Distributor Ban is *per se* illegal, as it prevents out-of-state, but not in-state, residents from mailing advance ballot applications. Accepting plaintiffs' allegations and giving them the benefit of all favorable inferences, they sufficiently plead that the State's legitimate interests in regulating elections do not justify the discriminatory restrictions.

As noted, defendants also argue that the Dormant Commerce Clause does not apply to the State because it is a market participant. This exception "covers States that go beyond regulation and themselves participate in the market so as to exercise the right to favor their own citizens over others." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (internal citations omitted). This exception reflects "a basic distinction between States as market participants and States as market regulators." Id.

(internal citations omitted). In arguing that the state is a market participant, defendants go beyond the allegations of the complaint. See GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (court must exclude outside material unless motion converted to one for summary judgment under Rule 56). The Court does not consider this argument in deciding defendants' motion to dismiss.

Defendants are also not entitled to dismissal of Count 4 on the theory that as a matter of law the State has legitimate interests which cannot be served by reasonable, nondiscriminatory alternatives. On a motion to dismiss, the Court confines its inquiry to the allegations of plaintiffs' complaint and cannot evaluate the sufficiency or weight of interests which defendants invoke to defeat those allegations. Therefore, the Court overrules defendants' motion to dismiss Count 4.

II. Preliminary Injunction

Plaintiffs seek to preliminarily enjoin enforcement of HB 2332 because (1) they are substantially likely to succeed on the merit of their claims that the Ballot Application Restrictions violate the First Amendment and/or the Dormant Commerce Clause; (2) violation of First Amendment rights constitutes irreparable harm; (3) the injunction would not inflict substantial harm on defendants because HB 2332 does not serve important state interests; and (4) an injunction would further the public interest. Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) filed July 8, 2021 at 2–4.

Defendants oppose plaintiffs' motion. Defendants assert that plaintiffs' motion is flawed because (1) plaintiffs' claims have no substantive legal merit; (2) the State's regulatory interests outweigh any minor impact on the rights of plaintiffs and voters whom they represent; (3) plaintiffs have shown no risk of imminent harm to democracy; and (4) a preliminary injunction is not necessary because HB 2332 will not take effect until January 1, 2022 and advance ballot applications for the primaries in 2022 cannot be accepted until April 1, 2022. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) filed July 22, 2021 at 2–3; HB 2332, § 3, 11.

The purpose of a preliminary injunction is "to preserve the status quo pending the outcome of the case." Tri-State Generation & Transmission Ass'n Inc. v. Shoshone River Power Inc., 805 F.2d 351, 355 (10th Cir. 1986). A preliminary injunction is a drastic and extraordinary remedy, and courts do not grant it as a matter of right. Paul's Beauty Coll. v. United States, 885 F. Supp. 1468, 1471 (D. Kan. 1995); see Nova Health Sys. v. Edmondson, 460 F.3d 1295, 1298 (10th Cir. 2006) (preliminary injunction is extraordinary remedy, and right to relief must be clear and unequivocal). To obtain a preliminary injunction, plaintiffs must establish (1) a substantial likelihood that they will eventually prevail on the merits; (2) irreparable injury unless a preliminary injunction issues; (3) that the threatened injury outweighs whatever damage the proposed preliminary injunction may cause to defendants; and (4) that, if issued, a preliminary injunction, will not be contrary to the public interest. Tri-State Generation, 805 F.2d at 355. If the moving parties demonstrate that the second, third and fourth factors "tip strongly" in their favor, the test is modified and the moving parties "may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue for litigation and deserving of more deliberate investigation." Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc., 455 F.3d 1107, 1113 (10th Cir. 2006).

A. Findings Of Fact

***13** As noted, the Court conducted an evidentiary hearing on September 8, 2021. As witnesses, plaintiffs called Daniel McCarthy, Vice President of Finance and Operations for VoteAmerica and Thomas Lopach, President and Chief Executive Officer for VPC. Defendants called Bryan Caskey, Kansas Director of Elections; Andrew Howell, Shawnee County Elections Commissioner; and Connie Schmidt, retired Johnson County Elections Commissioner. Based on the evidence received at that hearing, the Court makes the following findings of fact:

Plaintiffs are out-of-state, nonpartisan organizations whose mission is to persuade citizens to engage with the political process, with a focus on advance mail voting.

VoteAmerica's mission is to "see an electorate where all voters are informed and participate time after time in our elections." It specifically seeks to engage low propensity voters who are usually "neglected by partisan efforts and partisan turnout." Transcript Of Preliminary Injunction Motion Hearing Before The Honorable Kathryn H. Vratil, United States Senior District Judge (Doc. #45) filed September 14, 2021 at 7–8. VoteAmerica provides a range of services to potential voters, including a database of election laws for each state, municipality and county; voter registration verification; mail-in ballot request tools; and election reminders. Id. at 8–

9. These services require VoteAmerica to work directly with secretaries of state and local election officials and administrators. Id. at 23.

VoteAmerica offers a vote by mail service, which allows citizens to go to its web site and fill out advance mail ballot request forms which contain their personal information (name, address, driver's license, etc.). Id. at 9. VoteAmerica then prints and mails the ballot request form to the voter. Id. VoteAmerica's goal is to encourage safe voting, especially for populations who may be disabled, who lack the technology to print and mail a ballot request form or who need to work on election day, and thus expand participation in the electoral process. Id. By November of 2021, VoteAmerica plans to fully develop the Kansas tool for advance mail voting services. Id. at 10, 12. Its goal is to offer the tool for the 2022 election cycle, as it has done in other states. Id. at 10, 12. To be successful, the mail ballot request tool requires significant planning and financial expense. Id. at 10–12. Other web sites with similar voting missions may embed VoteAmerica's tool on their platforms. Id. at 12. Such partnerships align with VoteAmerica's mission because as more voices share the pro-mail voting message, voters are more likely to listen. Id. at 12–13.

When voters request advance mail voting application packets, they receive personalized absentee ballot forms; blank absentee ballot forms; instruction forms that are personalized with local election office information; pro-voting messages such as "Your vote matters. Get this in on time;" and a free hotline number for nonpartisan advice. Id. at 13–16. VoteAmerica includes a blank absentee form so a voter can correct any errors in the personalized information or give the blank application to another voter. Id. at 17–18. VoteAmerica includes an envelope addressed to the local election office with pre-paid postage. Id. at 18. The personalized ballot application reduces the voter's burden in accessing the right to vote and increases the likelihood that the voter will submit the ballot application. Id. at 16–17. Mr. McCarthy believes that without the personalized ballot application, VoteAmerica will have lower response rates, especially among low-income and low-resource voters, and that its mission will suffer. [6] Id. at 20. The entire packet is vital to VoteAmerica's mission and serves to communicate and persuade voters to participate in the electoral process. Id. at 28.

***14** VoteAmerica plans to offer vote by mail services to Kansans in the 2022 election cycle. Though it did not offer the personalized request tool in 2020, about 7,700 Kansans requested advance voting application packets from VoteAmerica. Id. at 22. According to Mr. McCarthy, the Out-of-State Distributor Ban would end VoteAmerica's efforts in Kansas, as it could cost around $100,000 to become a resident of Kansas. Id. at 19. The ban on personalized ballot applications would detract from VoteAmerica's mission, as it would become more complicated for low-income, low-resource voters to access ballot applications. Id. at 20. The ban would also create coding issues, as VoteAmerica would need to hire an engineer to create a specific exception on its web site for Kansas residents. Id. Mr. McCarthy testified that overall, the most significant issue would be the isolation of Kansas residents; they would "always [have] an asterisk," lowering the potential impact of its communications. Id. at 21, 27.

Like VoteAmerica, VPC's mission is to engage low propensity voting groups (people of color, unmarried women and young people) at levels equal to their actual representation in the population. Id. at 39. VPC uses direct mail and digital means to achieve this mission. Ninety per cent of VPC's work is focused on direct mail programs, "bring[ing] democracy to people's doors." Id. at 40. In 2020, because that election cycle drastically increased VPC's digital footprint, VPC also partnered with a non-profit organization called the Center for Voter Information. Id. at 42. Moving forward, VPC plans to operate separately from the Center for Voter Information. Id.

VPC mailers include a cover letter which explains and encourages voting by mail; reminds the voter to submit only one ballot application request; identifies a web site to check the status of an application; includes a personalized ballot application obtained on a form from the Kansas Secretary of State; and includes a photocopy of a pre-paid return envelope to the election office. Id. at 42–45. To ensure the accuracy of the personalized information, VPC communicates with both the Kansas Secretary of State and the county election administrators. Id. at 47–48; Plaintiffs' Exhibits In Support Of Their Motion For Preliminary Injunction (Doc. #43-2 Exhibit 6 Emails). Mr. Lopach testified that these communications involve (1) checking to make sure VPC has used the proper forms and (2) letting election offices know how many forms VPC plans to mail to each county. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 52, 76–78. At the suggestion of election administrators from various states, VPC added the reminder to submit only one ballot application. Id. at 42.

Like Mr. McCarthy, Mr. Lopach testified that response rates significantly increase with the inclusion of personalized ballot

applications and pre-paid postage mailers. Id. at 45–46. Many voters do not own printers or may not be able to access the internet, and in mailing their application packets, such voters rely heavily on VPC resources. Id. at 50. VPC highlights each personalized ballot application to draw a voter's attention to (1) providing additional information where necessary, (2) verifying that personalized information is accurate and (3) the importance of submitting only one ballot application. Id. at 50, 57. By keeping up-to-date internal records on who has requested ballot applications, VPC tries to prevent voters from sending multiple ballot applications. Id. at 48.

For the 2022 election cycle, VPC plans to send voter registration mailings to roughly 70,000 Kansans, communicating with these voters every three to four months before the November election. Id. at 49. In 2020, VPC sent 371 million pieces of mail nationwide (voter registration applications, vote by mail applications and election day information pamphlets). Id. at 58. In 2022, these communications will include reminders to vote and information necessary to make an informed decision about voting in person on election day or in advance by mail. Id. at 49. Mr. Lopach testified that HB 2332 will inhibit VPC's ability to effectively engage with Kansans. Id. It will prevent VPC from mailing personalized ballot applications, thus reducing response rates and increasing the potential number of errors. Id. at 49, 60. The ban on out-of-state distributors will likely limit all of VPC's mail programs in Kansas, because VPC is not a Kansas resident and it cannot afford to become one. Id. at 49–50, 61.

***15** Since February of 2015, Mr. Caskey has been responsible for overseeing Kansas elections at the national and state levels and for assisting 105 county election offices at the local level. Id. at 62–63. He has been in the state election office since February of 1998. Id. at 63. Mr. Caskey testified that since 1996, any Kansas voter may vote before election day for any reason, either by mail or in person. Id. "Unlike many states which struggle to implement mail balloting for the first time, Kansas ... has 25 years of experience with mail ballots." Id. at 84. To vote by mail, a voter must complete an advance mail ballot application, which is available on line, in person, by mail or by email. Id. at 63–64. The process in each county is a little different. Id. at 64. Before 2020, a handful of counties sent advance mail voting applications to all registered voters. Id. In 2020, approximately 50 per cent of counties did so. Id.

In the primary election cycle in 2020, Mr. Caskey's office received twice as many phone calls compared to the 2016 election from all parts of the State. Id. at 66–68. Voters submitted three times as many advance ballot applications, compared to 2016, and more than 90 per cent of those voters submitted ballots. Id. at 75, 85. The added phone calls increased his office's workload. Id. at 67. The phone calls did not pertain to novel questions, but remained "consistent with previous elections." The only new questions had to do with COVID-19. Id. at 68. According to Mr. Caskey, the 2020 elections "were successful and ... were conducted according to Kansas law, and ... voters were allowed to vote privately, securely, accurately and had their vote counted for who they intended to vote for." Id. at 81–82; Plaintiffs' Exhibits In Support Of Their Motion For Preliminary Injunction (Doc. #43-2 Exhibit 7 11.16.20 Letter from Sec. of State).

Mr. Caskey testified that duplicate advance ballot applications impact the integrity of the election process because they take more time. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 69. He testified that while it typically takes one to three minutes to process an initial ballot application, a duplicate application "dramatically" increases the amount of time needed. Id. The Election Voter Information System ("ELVIS") tracks registered voters in Kansas in real time. Id. at 71. Outside organizations may request this information from Mr. Caskey's office. Id. As it gets closer to the election, however, more requests come in and it takes more time to update ELVIS. Id. at 72.

Mr. Caskey testified that his office will work with the "appropriate stakeholders" to determine what regulations under HB 2332 will look like. Id. at 74. The goal is for regulations to take effect before the primary election in August of 2022, which will require at least three or four months of processing time. Id.

Mr. Howell, Shawnee County Elections Commissioner, testified that before 2020, Shawnee County did not proactively mail advance ballot applications to all registered voters, but voters could use the election web site to retrieve applications. Id. at 89. In 2020, Shawnee County proactively mailed a blank application to each registered voter. Id. at 90. Because ELVIS updated the voter database every day, Shawnee County did not pre-populate the ballot application forms with personalized information. Id. at 92.

In 2020, Shawnee County received 24,699 advance mail ballot applications, of which 2,955 were duplicates. Shawnee

County had a budget overrun of $400,000 for the 2020 election, with around $20,000 due to duplicate ballot applications. Id. at 96. Every ballot application is tracked against ELVIS to ensure that no voter receives more than one mail ballot. If ELVIS indicates that a voter may be submitting a duplicate ballot application, a local election official must verify that the name, address and signature match the voter record on file and check identifying information, such as driver's license number and date of birth. Id. at 96–97. If the ballot application is not a duplicate, the official must process the application and mail a ballot to the voter within 48 hours. Id. at 104. A voter often has legitimate reasons to submit more than one ballot application, such as changes in personal information or mailing addresses. Id. at 102. If the ballot application is a true duplicate, the election official engages what is called a "cure process." Id. at 98. The first stage of the cure process is to contact the voter, either by email, mail or phone call, to make certain "that we know who the person is, we know who we're sending it to, and that it's handled correctly." Id. at 98–99. This process may take anywhere from five to ten minutes on average but may take up to 30 minutes if it is not easily resolved. Id. at 99. The cure process is not just limited to duplicate ballot applications; some applications enter the process because the application is missing information, a voter forgot to sign the application, a voter failed to include a driver's license number or other reasons. Id. at 102. In 2020, the Shawnee County election office hired 25 to 30 people to handle cure processes and process applications within the required 48 hours. Id. at 100–01. Mr. Howell's office did not anticipate receiving as many mail ballot applications as it did. Id. at 101.

***16** Ms. Schmidt served as the Johnson County Election Commissioner for 11 years, first from 1995 to 2005 and then again in 2020. Id. at 111. In 2020, Johnson County mailed more than 165,000 mail ballot applications and processed a little more than 200,000 applications. Id. at 112. Before 2020, Johnson County did not proactively send out actual advance mail voting applications to all registered voters. In 2020, it changed its policy. Id. at 113. In 2020, Johnson County received well more than three times as many ballot applications, compared to typical presidential election years. Id. at 112–13. Before 2020, Johnson County received some duplicate ballot applications, but not as many as it did in 2020. Id. at 113. The processing time for each duplicate application ranged from five to ten minutes. Id. at 114. After the 2020 election, Ms. Schmidt tweeted that the Kansas general election was both "historic and successful." Id. at 118.

B. Likelihood Of Success On The Merits

Plaintiffs contend that they are likely to succeed on the merits of their constitutional claims that HB 2332 violates their rights under the First and Fourteenth Amendments and the Dormant Commerce Clause. Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) at 11, 22; see also supra Section I.C.1–4. Defendants argue that plaintiffs are unlikely to succeed on the merits because their activities do not involve speech under the First Amendment (let alone core political speech), and the restrictions do not contravene the Dormant Commerce Clause. Defendants also argue that even if the restrictions implicate the First Amendment, they must be reviewed under the Anderson-Burdick test, Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), and that because HB 2332 imposes "reasonable, neutral, non-discriminatory prophylactic measures," plaintiffs will not be entitled to relief. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 16–17.

As noted above, plaintiffs sufficiently allege that HB 2332 violates their rights to engage in protected speech and expressive conduct under the First Amendment. The Court therefore addresses the likelihood that plaintiffs will eventually prevail on those claims.

1. What Level Of Scrutiny Is Warranted?

To determine the likelihood of plaintiffs' eventual success on the merits, the Court must determine which level of scrutiny applies: strict scrutiny or the Anderson-Burdick balancing test. See Chandler v. City of Arvada, Colo., 292 F.3d 1236, 1241 (10th Cir. 2002); Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson, 236 F.3d 1174, 1196 (10th Cir. 2000). Federal courts often disagree on what level of scrutiny applies to state election and voter registration laws. Plaintiffs argue that the Ballot Application Restrictions are subject to strict or "exacting scrutiny" because they restrict plaintiffs' ability to engage in core political speech. [7] Defendants argue that because the restrictions do not target speech, the Court should analyze them under the more flexible Anderson-Burdick balancing test. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 13; see Anderson, 460 U.S. at 789, 103 S.Ct. 1564; Burdick, 504 U.S. at 433–34, 112 S.Ct. 2059.

Although voting is of the "most fundamental significance under our constitutional structure," the right to vote in any manner and the right to associate for political purposes through the ballot is not absolute. Utah Republican Party, 892 F.3d at 1076–77 (quoting Burdick, 504 U.S. at 433, 112 S.Ct. 2059). The Constitution grants states the authority to regulate the "Times, Places, and Manner" of elections. Id. at 1076 (citing Tashjian, 479 U.S. at 217, 107 S.Ct. 544); U.S. Const. art. 1, § 4, cl.1. When a state invokes its constitutional authority to regulate elections, an individual's right to vote and associate with others may be affected. Anderson, 460 U.S. at 788, 103 S.Ct. 1564; see Timmons, 520 U.S. at 358, 117 S.Ct. 1364 ("States may, and inevitably must, enact reasonable regulations of parties, elections and ballots to reduce election- and campaign-related disorder"). An example of permissible regulation is a decision to close the polls at 7:00 pm instead of 8:00 pm. Utah Republican Party, 892 F.3d at 1077. In evaluating the validity of a state election regulation under Anderson-Burdick, a Court applies a flexible standard, "weigh[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against the precise interests which the State advances to justify the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden plaintiffs' rights. Fish v. Schwab, 957 F.3d 1105, 1122 (10th Cir. 2020) (citing Burdick, 504 U.S. at 434, 112 S.Ct. 2059). The degree of scrutiny "will wax and wane with the severity of the burden imposed on the right to vote in any given case; heavier burdens will require closer scrutiny; lighter burdens will be approved more easily." Fish, 957 F.3d at 1124 (quoting Burdick, 504 U.S. at 434, 112 S.Ct. 2059).

***17** The Supreme Court has declined to apply Anderson-Burdick to cases which govern election-related speech rather than the "mechanics of the electoral process." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); see also Lerman v. Bd. of Elections in City of New York, 232 F.3d 135, 146 (2d Cir. 2000) ("Restrictions on core political speech so plainly impose a severe burden that application of strict scrutiny clearly will be necessary") (citing Buckley v. Am. Const. L. Found. Inc., 525 U.S. 182, 208, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (Thomas, J., concurring)). Strict scrutiny applies to restrictions on core First Amendment activities. See Yes On Term Limits, Inc. v. Savage, 550 F.3d 1023, 1028–29 (10th Cir. 2008). Under strict scrutiny, a state must assert a significant and compelling government interest which is sufficiently narrowly tailored to serve that interest. See Perry Educ. Ass'n. v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); see also Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1181 (10th Cir. 2009) ("If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest.").

The Tenth Circuit has applied the Anderson-Burdick test, which it has characterized as a "highly fact specific inquiry," when deciding the "constitutionality of content-neutral regulation of the voting process." Libertarian Party of N.M. v. Herrera, 506 F.3d 1303, 1308 (10th Cir. 2007); Campbell v. Buckley, 203 F.3d 738, 745 (10th Cir. 2000). It acknowledges that strict scrutiny must be applied, however, "where the government restricts the overall quantum of speech available to the election or voting process." Campbell, 203 F.3d at 745. In fact, the Tenth Circuit has expressly identified circumstances which merit strict scrutiny: restrictions on campaign expenditures, the available pool of political petition circulators or other supporters of an initiative or candidate, or the anonymity of such supporters. Id. Other courts have noted that some laws which govern elections, particularly election-related speech and associations, go beyond the intersection between voting rights and election administration, and veer into the area where "the First Amendment 'has its fullest and most urgent application.' " Tennessee State Conf. of NAACP v. Hargett, 420 F. Supp. 3d 683, 701 (M.D. Tenn. 2019) (quoting Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989)).

HB 2332 addresses more than the time, place or manner of election administration, and impacts speech in a way that is not minimal. See Utah Republican Party, 892 F.3d at 1076–77. The Ballot Application Restrictions regulate First Amendment-protected activity in ways that are not merely incidental; in effect, they limit "the overall quantum of speech available." Campbell, 203 F.3d at 745; see McCullen v. Coakley, 573 U.S. 464, 489, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) ("Commenting on matters of public concern [is] classic form[ ] of speech that lie[s] at the heart of the First Amendment. When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.") (quoting Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997)). HB 2332 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—more voting by mail, especially in under-represented populations. HB 2332 significantly inhibits communication with voters about proposed political change and eliminates voting advocacy by plaintiffs and other out-of-state entities, based on the content of their message and the residency of the advocate. Accordingly, the Court applies strict scrutiny to evaluate plaintiffs' likelihood of success on the merits. Campbell, 203 F.3d at 745; McIntyre, 514 U.S. at 346, 115 S.Ct. 1511 (limitations on political expression subject to strict scrutiny) (citing Meyer v. Grant, 486 U.S. 414, 420, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)).

***18** Before the Court addresses plaintiffs' likelihood of success under the strict scrutiny standard, it notes that on this record, the difference between strict scrutiny and the Anderson-Burdick balancing framework is not necessarily relevant. Anderson-Burdick falls back to a "less-searching examination closer to rational basis" when the challenged law is "minimally burdensome" on the exercise of constitutional rights. Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016) (citing Burdick, 504 U.S. at 434, 112 S.Ct. 2059). If the burden is "severe," however, Anderson-Burdick leads to strict scrutiny, with restrictions failing unless they are narrowly tailored to advance compelling state interests. Id. (citing Burdick, 504 U.S. at 434, 112 S.Ct. 2059); Yes On Term Limits, 550 F.3d at 1028 (citing Republican Party of Minn. v. White, 536 U.S. 765, 774–75, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002)); Schmitt v. LaRose, 933 F.3d 628, 639 (6th Cir. 2019) ("The first, most critical step is to consider the severity of the restriction" and if law imposes severe burdens on plaintiffs' rights, apply strict scrutiny).

Plaintiffs have produced evidence of significant burdens associated with HB 2332, and defendants 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. See Chandler, 233 F. Supp. 2d at 1311 (citing Meyer, 486 U.S. at 422, 108 S.Ct. 1886; Meyer, 120 F.3d at 1099). HB 2332 will have the inevitable effect of reducing the total quantum of speech on an important public issue. Plaintiffs have shown a sufficiently heavy burden on First Amendment rights to justify a significantly more demanding standard of review than the "rational basis" standard which defendants seek to satisfy under Anderson-Burdick. For this reason, on this record, plaintiffs' likelihood of success on the merits does not depend on whether the Court applies the Anderson-Burdick balancing test.

2. Strict Scrutiny Analysis

To survive strict scrutiny, defendants must show that the restrictions of HB 2332 are narrowly tailored to serve a compelling state interest. Yes On Term Limits, 550 F.3d at 1028 (citing Republican Party of Minn., 536 U.S. at 774–75, 122 S.Ct. 2528). Here, defendants identify three government interests at issue: "avoiding fraud, minimizing voter confusion, and facilitating an orderly administration of the electoral process." Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 2. The Court analyzes each government interest in turn.

a. Preventing Voter Fraud

Defendants argue that HB 2332 prevents voter fraud because it limits the number of advance ballot applications that each Kansas voter may receive. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 15. They argue that when a voter receives more than one ballot application, it invites fraud, which the State has a strong interest in avoiding. Id. Fraud may affect the outcome of a close election, dilute the right of citizens to cast ballots that carry the appropriate weight and undermine public confidence in the fairness of elections and legitimacy of the announced outcome. Brnovich v. Democratic Nat'l Comm., —— U.S. ——, 141 S. Ct. 2321, 2340, 210 L.Ed.2d 753 (2021); see also Crawford, 553 U.S. at 191, 128 S.Ct. 1610.

Defendants' argument has superficial appeal, but it actually boils down to an issue of administrative efficiency. The state employs a rigorous process to make sure that no voter can receive a duplicate mail ballot. Apparently, these procedures are highly effective.[8] The real issue seems to be that the process of preventing duplicate ballots takes more time than the process of dealing with requests for initial ballots.

***19** While preventing voter fraud is a potentially compelling state interest, HB 2332 is not narrowly tailored to prevent voter fraud. HB 2332 does not limit the potential number of applications a voter may receive, because in-state residents may mail Kansas voters any number of advance ballot applications. In-state residents must disclose their name, address and (if the sender is an organization) the name of its

president, chief executive officer, or executive director. HB 2332, § 3(k)(1). It seems unlikely that such information deters voter fraud, but the record contains no evidence on that point. If such information does deter voter fraud, the State could allow out-of-state entities to exercise their First Amendment rights after they provide the same information. See Yes On Term Limits, 550 F.3d at 1030; see also Chandler, 292 F.3d at 1242–44. The record contains no evidence that duplicate ballot applications disproportionately originate with out-of-state organizations. When plaintiffs challenge a content-based speech restriction, the State must prove that proposed alternatives would not be as effective as the challenged statute. Ashcroft v. ACLU, 542 U.S. 656, 665, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). Defendants have not met that burden in this case.

In Yes On Term Limits, supra, Oklahoma residents challenged a law that created a residency requirement for initiative petition circulators. Yes on Term Limits, Inc. v. Savage, 2007 WL 2670178 at *1 (W.D. Okla. 2007). Initially, the district court found that the state's restriction on non-resident petition circulation was narrowly tailored to serve the compelling state interest of promoting the integrity of the electoral system, with an emphasis on eliminating fraud. Id. at *7–8. The state's main evidence consisted of the allegedly fraudulent practices of a "handful of non-resident circulators." Yes On Term Limits, 550 F.3d at 1030–31. The Tenth Circuit overturned the district court's ruling, finding that the evidence did not support a finding that as a class, non-resident circulators were more likely than resident circulators to engage in fraud. Id. at 1031. It therefore held that Oklahoma had failed to prove that banning all non-resident circulators was a narrowly tailored means to prevent fraud. Id. at 1029, 1031.

On this record, defendants have not shown that HB 2332 is narrowly tailored to prevent voting fraud. The record contains no evidence that out-of-state entities are more likely than in-state entities to encourage voter fraud or that HB 2332 is necessary to prevent Kansas voters from receiving duplicate mail ballots. Plaintiffs will likely demonstrate that HB 2332 impermissibly restricts their ability to engage in protected First Amendment activity and that it is not narrowly tailored to serve the admittedly compelling state interest of preventing voter fraud.

b. Minimizing Voter Confusion

Defendants argue that HB 2332 prevents voter confusion, as it limits the number of advance ballot applications that a Kansas voter may receive and reduces any mistaken belief that the applications originated from election officials. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 17. The State's interest in minimizing voter confusion is connected to its broader legitimate interest in protecting election integrity. Fish v. Kobach, 189 F. Supp. 3d 1107, 1148 (D. Kan. 2016), aff'd, 840 F.3d 710 (10th Cir. 2016).

With respect to voter confusion, Mr. Caskey testified that local election offices received more phone calls in 2020 than in 2016—an increase which he attributed to voter confusion. Mr. Howell also testified that "after talking with voters," it became clear that plaintiffs and similar entities caused the duplicate ballot applications. [9]

Although minimizing voter confusion is a compelling interest, HB 2332 is not narrowly tailored to serve that interest. Local election offices received more phone calls in 2020, but other than calls about COVID-19, the questions received "were consistent with previous elections." Id. at 68. The 2020 election had the highest return rate of ballot applications and a record number of advance ballot votes; in fact, the number of mail-in ballots tripled. Id. at 85. Such evidence of voter confusion is not persuasive, given the record turnout and the fact that other than COVID-19, voter questions were not different from in previous elections. Id. at 68. Furthermore, even if some voters were confused about receiving duplicate ballot applications, defendants presented no evidence on how limiting participation by out-of-state speakers or mailing of personalized ballot applications would serve to prevent that confusion.

***20** In short, defendants have not shown that HB 2332 is narrowly tailored to alleviate voter confusion. Plaintiffs are likely to demonstrate that HB 2332 restricts their ability to engage in protected First Amendment activity and is not narrowly tailored to serve a compelling state interest.

c. Ensuring Orderly Administration Of Elections

Defendants argue that HB 2332 ensures orderly administration of elections because it prevents local election offices from spending limited resources to wade through duplicate applications for mail ballots. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc.

#29) at 27. Preserving the integrity and administration of the electoral process is a compelling state interest. Fish, 957 F.3d at 1133.

As noted, defendant's witnesses testified about the amount of time which they require to process a ballot application and ensure it is not a duplicate. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 96–99. When a ballot application is received, the election official has 48 hours to confirm that the application is not a duplicate, process it and mail a ballot to the voter. Id. at 104. Local election officials employ ELVIS to ensure that no voter who submits more than one ballot application receives more than one ballot. An official takes one to three minutes to process an initial application. Id. at 69. If ELVIS indicates that a voter has already submitted an application, the process may take on average five to ten minutes (up to 30 minutes) to determine whether the application is a true duplicate. Id. at 99, 114. As noted above, in 2020, both the Shawnee County and Johnson County election offices received duplicate ballot applications. Shawnee County hired 25 to 30 people to handle ballot applications and because its office did not anticipate so many advance applications, Shawnee County went $20,000 over budget in handling duplicate applications. Id. at 96, 100–01. Duplicate ballot applications significantly slowed down the Johnson County election office work flow, even with the additional 30 to 40 "temps" hired to help manage the applications. Id. at 114–15.

While orderly administration of elections is an important government interest, HB 2332 is not narrowly tailored to serve that interest. Defendants argue that HB 2332 will limit the number of duplicate ballot applications which the local election offices receive, and in turn decrease the amount of resources required to process the applications. On this record, however, it is not clear that out-of-state entities contribute to duplicate applications in any meaningful way. The 2020 election cycle presented historic challenges defendants have not tied to advance mail ballot applications that originated with out-of-state residents. Id. at 95–97. Before 2020, few local election offices mailed advance ballot applications to all registered voters. In 2020, for the first time, both Shawnee County and Johnson County proactively did so. Id. at 89, 113. Approximately 50 per cent of all counties in Kansas did so. Id. at 64. The record contains no evidence about the source of duplicate ballot applications or whether voters submitted duplicate requests because of COVID-19, anticipated delays in postal delivery service or increased interest in voting itself. The 2020 election cycle had a record number of Kansans register to vote, cast votes in advance, cast votes by mail and return their actual ballots. Id. at 85. The 2020 election cycle was not similar to the election cycles in 2008, 2012 or 2016 and the record does not address the obvious reasons for the lack of similarity. Accordingly, while defendants' evidence is credible, it is not persuasive.

***21** Kansas officials publicly declared that the 2020 election was successful, without "any widespread, systematic issues [of] voter fraud, intimidation, irregularities, or voting problems." Secretary Schwab Responds to November Election Delay Suggestion, Kansas Secretary of State (July 30, 2020), https://sos.ks.gov/media-center/media-releases/2020/07-30-20-secretary-schwab-responds-to-november-election-delay-suggestion.html; Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 118. Mr. Caskey testified that the Kansas elections system has 25 years of experience with mail ballot applications, developing institutional knowledge, procedures and infrastructure to "securely process the anticipated increase in mail ballots." Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 83–84. Both statements refute any compelling need to enact HB 2332, and defendants have not shown that HB 2332 is narrowly tailored to ensure the orderly administration of elections. Plaintiffs will likely demonstrate that HB 2332 restricts their ability to engage in protected First Amendment activity and that it is not narrowly tailored to serve a compelling state interest.

Defendants have therefore failed to prove that HB 2332 is narrowly tailored to achieve any of the State's allegedly compelling interests. Given the evidence before the Court, plaintiffs have shown that they are likely to succeed on the merits of their freedom of speech First Amendment claim (Count 1).

For purposes of preliminary injunctive relief, the Court need not inquire into the likely merit of plaintiffs' other three claims.

C. Likelihood Of Irreparable Harm

Because they are likely to prevail on the merits of their First Amendment freedom of speech claim, plaintiffs argue that absent an injunction, they will suffer irreparable harm. Defendants argue that plaintiffs will not suffer any harm at all because the statute does not take effect until early 2022, and the election offices cannot accept applications until April 1, 2022.

The Supreme Court and the Tenth Circuit have instructed that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Verlo v. Martinez, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)); Heideman v. S. Salt Lake City, 348 F.3d 1182, 1190 (10th Cir. 2003); see also Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012) ("[W]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

Precedent dictates that the Court must treat alleged First Amendment harms "gingerly." Heideman, 348 F.3d at 1190. Plaintiffs have sufficiently pled that unless enjoined, HB 2332 will limit Kansas voters in navigating the path to ballot access and interfere with plaintiffs' First Amendment rights. See Verlo, 820 F.3d at 1127. Such losses are ones that money damages cannot redress, so this factor weighs strongly in favor of an injunction. See United Utah Party v. Cox, 268 F. Supp. 3d 1227, 1259 (D. Utah 2017).

D. Balance Of The Equities

Plaintiffs argue that the prospect of substantial harm to them dramatically outweighs any harm which an injunction would impose on defendants. Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary Injunction (Doc. #25) at 29. Defendants argue that plaintiffs will suffer no harm, especially compared to the harm which the State will suffer if an injunction is granted because whenever a State is "enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 29–30 (citing Maryland v. King, 567 U.S. 1301, 1303, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012)).

Injury to plaintiffs who are deprived of First Amendment rights almost always outweighs the potential harm to the government if an injunction is granted. Verlo v. City & Cnty. of Denver, Co., 124 F. Supp. 3d 1083, 1095 (D. Colo. 2015), aff'd sub nom. Verlo v. Martinez, 820 F.3d 1113 (10th Cir. 2016). Here, the restrictions would substantially impair, if not effectively eliminate, plaintiffs' ability to convey their message to their target audience in a timely and effective manner. For VoteAmerica, including the personalized ballot application in their communications packet is the most "effective way to communicate that you find it important for someone to do something." Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 16. For VPC, these distributions increased the voters' likelihood of returning the ballot applications to their local Kansas election offices. Id. at 46–47. The response rate would drop significantly without these packets, as most of VPC's targeted audience do not own printers or cannot access the internet to secure an advance ballot application. Id. at 50.

***22** In countering these injuries, the State has not provided evidence that any potential injury from an injunction is fairly traceable to plaintiffs or other out-of-state organizations. See Verlo, 820 F.3d at 1127. At the evidentiary hearing and at oral argument, defendants cited no evidence that duplicate ballot applications disproportionately originate with out-of-state speakers or that voter confusion results from plaintiffs' mailings, as opposed to mailings by in-state organizations or topics that have nothing to do with voting by mail. Mr. Caskey stated that county officials received ballot applications with improper information but did not tie those incorrect applications to plaintiffs or to other out-of-state organizations.[10] Defendants also failed to present evidence that the time required to process duplicate applications in 2020 exceeded processing times in 2008, 2012 or 2016 on account of specific problems which HB 2332 purports to address. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 75, 85. Defendants posited no numbers which showed anything more than "light administrative burdens," which might not even be solved by an out-of-state ban, since Kansans may still solicit applications by mail from in-state residents. See Fish, 840 F.3d at 754–55.

HB 2332 does not appear to address any immediate problem and delayed implementation is not likely to cause material harm, even if it is eventually found to be constitutional and enforceable. Awad, 670 F.3d at 1132. In weighing the balance of equities, the substantial denial of fundamental constitutional rights clearly outweighs the prospect of demonstrated administrative burdens on the Kansas Secretary of State and local election offices. See Fish, 840 F.3d at 755.

Plaintiffs make a strong showing that their threatened injury outweighs any potential harm to defendants in granting this injunction.

E. The Public Interest

Plaintiffs argue that implementation of HB 2332 will also harm the public and that it is always in the public interest to prevent a violation of a party's constitutional rights. Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary

Injunction (Doc. #25) at 30; see also Verlo, 820 F.3d at 1127. Defendants argue that public confidence in government will be undermined if the Court invalidates a statute that has made its way through the legislative process. Defendants' Response To Plaintiffs' Motion For A Preliminary Injunction (Doc. #29) at 30.

The Tenth Circuit repeatedly acknowledges the strong public interest in protecting First Amendment rights. Awad, 670 F.3d at 1132; Verlo, 820 F.3d at 1127–28 (citing Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1237 (10th Cir. 2005)); Am. C.L. Union v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999). With the other three factors leaning in favor of granting the preliminary injunction and the critical constitutional issues which still need to be decided, the public interest factor also leans in favor of granting the preliminary injunction.

IT IS THERFORE ORDERED that Defendants' Motion To Dismiss Plaintiffs' Complaint (Doc. #26) filed July 9, 2021 is **OVERRULED**.

IT IS FURTHERED ORDERED that Plaintiffs' Motion For Preliminary Injunction (Doc. #24) filed July 8, 2021 is **SUSTAINED**. The Court hereby enjoins enforcement of Sections 3(k)(2) and 3(1)(1) of HB 2332. Pending further order of the Court, this Order shall remain effective until the conclusion of the case.

All Citations

--- F.Supp.3d ----, 2021 WL 5918918

Footnotes

1 On August 27, 2021, the Court overruled Defendants' Motion To Dismiss (Doc. #26) in part, finding that plaintiffs' complaint was not subject to dismissal for lack of subject matter jurisdiction. The Court reserved ruling on defendants' arguments with regard to failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P.

2 The Court assumes that the reader is familiar with the allegations of plaintiffs' complaint and does not attempt to recite them in their entirety.

3 All references to advance voting are references to advance voting by mail. This case does not involve early voting in person.

4 The Court recognizes that on a motion for summary judgment or at trial, it would consider evidence on the statute's limiting construction when determining what constitutes an illegitimate application of the statute. See West v. Derby Unified School Dist. No. 260, 23 F. Supp. 2d 1223, 1234 (D. Kan. 1998), aff'd, 206 F.3d 1358 (10th Cir. 2000).

5 Defendants attempt to argue that under the Elections Clause, Article I, Section 4, Clause 1 of the Constitution, States may prescribe the "Times, Places, and Manner of holding Elections," and that this authority forecloses plaintiffs' cause of action. Defendants raise this argument for the first time in their reply brief, Defendants' Reply To Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion To Dismiss (Doc. #41) at 24 and therefore the Court does not consider it. See United States v. Gurule, 461 F.3d 1238, 1248 (10th Cir. 2006) (courts generally do not consider arguments raised for the first time in reply brief); see also Novosteel SA v. U.S., Bethlehem Steel Corp., 284 F.3d 1261, 1274 (Fed. Cir. 2002) (reply brief does not provide moving party new opportunity to present yet another issue for court consideration).

6 VoteAmerica monitors response rates by tracking "voter files" during an election cycle to see whether voters have returned their ballot applications to their local election offices. Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 29.

7 Specifically, plaintiffs argue that strict scrutiny applies because HB 2332 (1) abridges their core political speech, (2) limits their speech based on content, viewpoint and speaker identity and (3) curbs the overall quantum of speech available to the election or voting process. Complaint (Doc. #1), ¶¶ 60–61, 69–72, 80–82, 88–89.

8 Defendants presented no evidence of any voter fraud effectuated through advance voting by mail, or a single instance in which a voter received duplicate mail ballots. On October 8, 2021, when the Court asked defense counsel about what evidence supported the legislature's rationale for HB 2332, he responded that the State had no legal duty to present evidence of its rationale, citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). In Beach Commc'ns, the Supreme Court held that a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if any reasonably conceivable state of facts could provide a rational basis for the classification. Id. at 313–14, 113 S.Ct. 2096. It also held that "for purposes of rational-basis review," equal protection does not demand that the legislature or governing decisionmaker articulate the purpose or rationale for the classification. Id. at 315, 113 S.Ct. 2096. This case is distinguishable, however, from Beach Commc'ns. This is not an Equal Protection case and the Ballot Application Restrictions are not subject to rational-basis review under Anderson-Burdick or any other test.

9 Defendants did not call any witness who claimed to be a "confused voter" or who received numerous ballot applications. Transcript Of Oral Arguments Re: Preliminary Injunction Before The Honorable Kathryn H. Vratil, United States Senior District Judge at 45.

10 Such a connection is theoretical at best, because in 2020 out-of-state organizations mailed ballot applications and "approximately 50 percent of the counties sent out an application to every registered voter." Transcript Of Preliminary Injunction Motion Hearing (Doc. #45) at 64.

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216 P.3d 191 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Linus L. BAKER, et al., Appellants,
v.
CITY OF OVERLAND PARK, et al., Appellees.

No. 101,371.
|
Sept. 25, 2009.

Appeal from Johnson District Court; Gerald T. Elliott, Judge.

Attorneys and Law Firms

Linus L. Baker, appellant pro se.

Heather S. Woodson, Neil R. Shortlidge, Mark D. Hinderks, and Leena D. Phadke, of Stinson Morrison Hecker LLP, of Overland Park, for appellees.

Before MALONE, P.J., GREEN and STANDRIDGE, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Linus L. Baker appeals the district court's dismissal of his action seeking declaratory, injunctive, and monetary relief. For the reasons stated below, we affirm the court's decision to dismiss.

Facts

On March 27, 2007, Baker drove his sport utility vehicle (SUV) north on Highway 69 in Overland Park, Kansas. After Baker either had entered or was nearing a construction zone on Highway 69, he passed two signs posted on both sides of the road stating: "Do Not Pass."

Baker's SUV was the only vehicle in his lane, which was being closed due to the construction. In the lane next to Baker were the other northbound drivers. As a result of the closure of Baker's lane, traffic in the lane next to Baker was backed up and traveling about 10 to 20 miles per hour. Baker, traveling at approximately 60 miles per hour, sped past these drivers in violation of the Do Not Pass signs and drove to where his lane physically closed, where he finally merged. An officer stopped Baker and ticketed him for passing the other vehicles in violation of Overland Park's no passing zone ordinance, Overland Park Municipal Code (O.P.M.C.) 12.04.044 (2006).

Baker challenged his ticket, and in an appeal from the municipal court conviction, Baker succeeded in convincing the district court that O.P.M.C. 12.04.044 was designed for common two-lane, two-direction roadways, not larger divided highways with multiple lanes like Highway 69. According to the district court, the application of O.P.M.C. 12.04.044 to divided highways with multiple lanes led to an absurd construction of the ordinance and resulted in unsafe road conditions. In addition, the court ruled that O.P.M.C. 12.04.044 was vague as applied to divided highways with multiple lanes, leaving drivers on such highways to guess what maneuvers were prohibited in no passing zones. For these reasons, the district court dismissed the charge against Baker.

After the criminal charge was dismissed, Baker filed a civil action, which is the subject of this appeal. Baker claimed that, under Kansas law, O.P.M.C. 12.04.044 as applied to multiple-lane divided roadways was vague and denied due him process of the law. Named defendants in the suit were City of Overland Park (the City), Overland Park Chief of Police John M. Douglass, and Overland Park Prosecutor Katie Kliem (collectively Defendants).

In an amended petition, Baker additionally alleged that application of O.P.M.C. 12.04.044 to multiple-lane divided highways like Highway 69 created unsafe driving conditions and subjected him to reprosecution. For these claims, Baker sought declaratory and injunctive relief prohibiting the use of no-passing zones and enforcement of O.P.M.C. 12.04.044 on multiple-lane divided highways, as well as compensatory damages. Baker also sought to represent a class of Overland Park drivers that previously had been prosecuted under O.P.M.C. 12.04.044, claiming that they were also subject to reprosecution and that they were entitled to have their convictions vacated, their fines reimbursed, and their court costs paid.

***2** Defendants filed a motion to dismiss, claiming, among other things, that Baker's request for declaratory relief failed to present a case or controversy and that his claim for injunctive relief failed because Baker's successful dismissal of his criminal charge proved he had an adequate remedy at law. Defendants also maintained Baker was not entitled to damages or an injunction because he had not alleged any identifiable cause of action or basis of liability.

In addition to filing a response to Defendants' motion to dismiss, Baker moved for class certification and filed a motion to substitute parties as additional class representatives, claiming the latter would be necessary if the district court concluded Baker did not have standing or otherwise could not represent the putative class. At a subsequent hearing, Baker affirmatively agreed that Defendants' motion to dismiss should be heard and ruled upon before the court considered Baker's motions "[w]ith the caveat" that deficiencies "could be cured" if Baker was found not to have a claim.

The district court subsequently granted Defendants' motion and dismissed the case in its entirety. Specifically, the court determined that Baker's claim for declaratory relief failed because there was no actual controversy between the parties, Baker's claim for injunctive relief failed because Baker had an adequate remedy at law, and Baker's claim for monetary relief failed because Baker suffered no damages.

Baker filed a motion for reconsideration, arguing the district court had misconstrued his request for relief. According to Baker, the City's continued use of the no passing zones created a controversy because it subjected him to unsafe driving conditions. Baker also claimed the district court should have ruled upon his motions for class certification and to add or substitute parties before considering Defendants' motion to dismiss. The district court denied Baker's motion to reconsider.

Analysis

Upon appellate review of a district court's order granting a motion to dismiss for failure to state a claim, an appellate court is required to assume that the facts alleged by the plaintiff are true, along with any references reasonably to be drawn therefrom. The court must also decide whether those facts and inferences state a claim on the theories presented by the plaintiff and also on any other possible theory. *McCormick v. Board of Shawnee County Comm'rs,* 272 Kan. 627, Syl. ¶ 1, 35 P.3d 815 (2001), *cert. denied* 537 U.S. 841, 123 S.Ct. 170, 154 L.Ed.2d 65 (2002). The court, however, is not required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself. *McCormick,* 272 Kan. 627, Syl. ¶ 10, 35 P.3d 815.

In this appeal, Baker asserts (1) the district court erred in ruling that no controversy existed to support a claim for declaratory relief and (2) the district court erred in ruling that Baker had an adequate remedy at law precluding injunctive relief. We address each of Baker's claims of error in turn.

A. There is No Controversy to Support Baker's Claims for Declaratory Relief

***3** "The standard of review on whether a declaratory judgment action rises to the level of an actual controversy is abuse of discretion. [Citation omitted.]" *T.S.I. Holdings, Inc. v. Jenkins,* 260 Kan. 703, 721–22, 924 P.2d 1239 (1996). The district court abuses its discretion when judicial action is arbitrary, fanciful, or unreasonable. *State v. Reed,* 282 Kan. 272, 280, 144 P.3d 677 (2006).

In 1993, the Kansas Legislature enacted certain provisions of the Uniform Declaratory Judgments Act into K.S.A. 60–1701 *et seq.* See *Williams v. DesLauriers,* 38 Kan.App.2d 629, 632, 172 P.3d 42 (2007). The Kansas Act requires us to interpret and construe the Uniform Declaratory Judgments Act with a purpose to "make uniform the law of those states which enact similar provisions of the uniform declaratory judgments act, and to harmonize, as far as possible, [Kansas law] with federal laws and regulations on the subject of declaratory judgments and decrees." K.S.A. 60–1716.

In Kansas, declaratory relief is only available if there is an actual controversy between the plaintiff and the adverse party. See *In re Estate of Keller,* 273 Kan. 981, 984–85, 46 P.3d 1135 (2002); see also 28 U.S.C. § 2201 (2006) (declaratory relief generally is authorized "[i]n a case of actual controversy within [a court's] jurisdiction"). An actual controversy exists for purposes of declaratory judgment when there are " 'at least two parties who can assert rights which have developed or will arise against each other....' [Citations omitted.]" *In re Estate of Keller,* 273 Kan. at 984, 46 P.3d 1135. In meeting these standards, a declaratory judgment action must satisfy the following four requirements: (1) the plaintiff must have standing (injury in fact); (2) the issues to be determined must not be moot; (3) the issues to be determined must be ripe,

having taken fixed and final shape rather than remaining nebulous and contingent; and (4) the issues presented do not present a political question. See *Comprehensive Health of Planned Parenthood v. Kline,* 287 Kan. 372, 406, 197 P.3d 370 (2008) (standing requires injury in fact); *State ex rel. Morrison v. Sebelius,* 285 Kan. 875, 896–97, 179 P.3d 366 (2008) (identifying four components of Kansas' case-or-controversy requirement, which apply to all cases, including declaratory judgment actions).

Based on the organizational structure within which Baker framed his assertion that a controversy truly does exist in his case, we will analyze the controversy issue for Baker's individual claims separately from the claims asserted by putative class members.

1. No Actual Controversy Exists Between Baker (Individually) and Defendants

Baker identifies no less than four controversies between himself and Defendants. First, Baker maintains he suffered a *past* controversy or injury for "being prosecuted and fined." Next, Baker asserts other purported injuries/controversies that he maintains are *ongoing* between himself and Defendants.

a. Past Prosecution for Violating O.P.M.C 12.04.044

***4** Any controversy between Baker and Defendants for his past prosecution is moot. An issue is considered moot if the evidence is clear and convincing that any controversy between the parties has ended. See *In re M.R.,* 272 Kan. 1335, 1339, 38 P.3d 694 (2002).

Here, the charge against Baker for violating O.P.M.C. 12.04.044 was dismissed. Baker did not appeal. Thus, this issue is considered moot; there is no controversy between Baker and Defendants regarding his traffic citation that supports a claim for prospective relief. Baker's citation to *Farha v. City of Wichita,* No. 91,744, unpublished opinion filed February 4, 2005, *rev. denied* 279 Kan. 1005 (2005), is inapposite. In that case, the plaintiff was granted standing to challenge a court costs schedule under which the plaintiff had *paid a fine.* Since Baker did not pay a fine here, *Farha* provides no support to Baker to obtain declaratory relief for his past prosecution.

b. Baker's Purported Ongoing Injuries/Controversies

After alleging in his amended petition that the city prosecuted him for violating O.P.M.C. 12.04.044 and that he succeeded in having the charge dismissed, Baker set forth the following three allegations that he now maintains should be construed as ongoing controversies:

- Baker alleged that the application of O.P.M.C. 12.04.044 to multiple-lane divided roadways "creates unsafe and dangerous conditions." On appeal, Baker contends that he is being "forced to endure" the unsafe no passing zone traffic schemes and that this amounts to a controversy sufficient for declaratory relief.

- Baker alleged he is "subject to further prosecution[ ]." On appeal, Baker maintains the "future prosecution of [him]" is a controversy or injury.

- Baker alleged that O.P.M.C. 12.04.044 does not provide sufficient notice of what constitutes prohibited conduct and encourages enforcement by not setting clear standards a court can use to measure compliance. On appeal, Baker maintains that "because the no passing zone ordinance is being attacked as vague, [he] has standing on that basis."

Generally, standing under the Kansas Constitution requires that the plaintiff allege " 'such a personal stake in the outcome of a controversy as to warrant invocation of jurisdiction and to justify exercise of the court's remedial powers on his or her behalf.' [Citation omitted.]" *Board of Sumner County Comm'rs v. Bremby,* 286 Kan. 745, 750–51, 189 P.3d 494 (2008). Consistent with these constitutional standing requirements, the Kansas version of the Uniform Declaratory Judgments Act identifies those who may seek declaratory relief to include "[a]ny person ... whose *rights ... are affected* by a statute, *municipal ordinance,* contract or franchise." (Emphasis added.) K.S.A. 60–1704.

Baker maintains "[t]he standing rules should be relaxed where declaratory relief is sought." Standing in the context of a declaratory judgment action, however, requires the plaintiff to allege and/or demonstrate actual present harm *or* a significant possibility of future harm. *Fieger v. Michigan Supreme Court,* 553 F.3d 955, 962 (6th Cir.2009). Consequently, while a plaintiff seeking declaratory relief is not required to "have suffered the full harm expected," the requirement of standing still must be satisfied for a justiciable controversy to exist. *Khodara Environmental, Inc. v. Blakey,* 376 F.3d 187, 193 (3d Cir.2004); see *Cornucopia Institute v. U.S. Dept. of Agriculture,* 560 F.3d 673, 676 (7th Cir.2009); accord *Robinson v. Kansas State High School Activities Ass'n,* 260 Kan. 136, 140, 917 P.2d 836 (1996) (fathers

seeking declaratory relief had "minimal standing" required to challenge high school athletics rules prohibiting sons from participating in certain nonschool activities; even though sons had not yet done anything that would result in loss of eligibility under challenged rules, sons had avoided participating in nonschool activities out of fear of losing eligibility for school activities); *Acupuncture Society of Kansas v. Kansas State Bd. of Healing Arts,* 226 Kan. 639, 646–47, 602 P.2d 1311 (1979) (prerequisite of sufficient actual controversy met by chiropractors challenging statute prohibiting them from practicing acupuncture; acupuncture had been adopted by chiropractors as a modality of their treatment and opinion of attorney general was that chiropractors would be subject to prosecution if they continued to practice acupuncture).

***5** To that end, an action seeking a declaration that an ordinance is unconstitutional must, at the very least, establish that the ordinance "will likely cause tangible detriment to conduct or *activities that are presently occurring or are likely to occur in the near future.*" (Emphasis added.) *Mt. Emmons Min. Co. v. Town of Crested Butte,* 690 P.2d 231, 240 (Colo.1984).

Here, Defendants maintain Baker did not "allege that [the City] continues to use no passing zones under O.P.M.C. 12.04.044 on multi-lane one way roadways." Baker alleged that the City "has" applied O.P.M.C. 12.04.044 to multiple-lane divided roadways "for many years," however, and this allegation reasonably implies that the City continued to do so. Thus, Defendants' argument has no merit.

Nevertheless, the district court's finding that a controversy did not exist can be affirmed because Baker's allegations in his amended petition failed to even place him at the *scene* of his purported ongoing injuries. At the very least, Baker was required to allege that he *presently* was driving multiple-lane divided roadways in Overland Park or that he *likely would be doing so in the near future.* See *Mt. Emmons Min. Co.,* 690 P.2d at 240. Baker never did so. The closest Baker came to alleging such facts is in his claim that he and the putative class members were "subject to further prosecutions." The court need not, however, accept Baker's "allegations of future injury which are overly generalized, conclusory, or speculative." See *Stevens v. Harper,* 213 F.R.D. 358, 370 (E.D.Cal.2002); *McCormick,* 272 Kan. 627, Syl. ¶ 10, 35 P.3d 815. Baker's bald assertion that he was subject to future prosecution was far too general to be construed as an allegation that Baker was using multiple-lane divided roadways in Overland Park or intended to do so in the near future. Therefore, Baker did not have standing to seek declaratory relief on any of his purported ongoing claims. See *Mt. Emmons Min. Co.,* 690 P.2d at 240.

There are additional reasons Baker does not have standing to obtain declaratory relief with regard to purported injuries to him in the form of unsafe driving conditions, future prosecution, and vagueness.

Unsafe Driving Conditions: Although standing in no way depends on the merits of the plaintiff's claim, it often turns on the nature and source of the claim asserted. *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, by alleging that he is being subjected to unsafe driving conditions, Baker essentially is alleging that he is *in danger* of suffering physical harm as a result of O.P.M.C. 12.04.044.

Fear or anxiety of future harm can constitute an injury-in-fact sufficient to confer standing. *Ross v. Bank of America, N.A. (USA),* 524 F.3d 217, 222 (2d Cir.2008). To defeat Defendants' motion to dismiss, however, Baker must have alleged facts which, if believed true, would establish that the future physical harm he feared was *significantly probable* or *likely to occur.* See *Fieger,* 553 F.3d at 962; *Mt. Emmons Min. Co.,* 690 P.2d at 240; see also *Port Wash. Teachers v. Bd. of Educ. Port Wash.,* 478 F.3d 494, 500 (2d Cir.2007) (fear of future harm must be actual and well-founded).

***6** Here, Baker's amended petition contains no allegations which, if believed, would establish that Baker faced an appreciable likelihood of physical danger in the near future. Thus, for this reason in particular, Baker does not have standing to assert his claim that O.P.M.C. 12.04.044 creates unsafe driving conditions.

Future Prosecution: Declaratory judgment can be used to settle rights before any rule, ordinance, or statute is violated. See *State Association of Chiropractors v. Anderson,* 186 Kan. 130, 135, 348 P.2d 1042 (1960). In preenforcement actions seeking declaratory relief, our Supreme Court seems willing to find that an ongoing controversy exists if the facts indicate (1) the plaintiff's desire to act contrary to the rule in question and (2) a realistic prospect of injury. See, *e.g., Robinson,* 260 Kan. at 140, 917 P.2d 836 (fathers had "minimal standing" required to challenge rules prohibiting extracurricular activities of sons where sons had avoided participating in extracurricular activities out of fear of losing eligibility for school activities); *Acupuncture Society of*

Kansas, 226 Kan. at 646–47, 602 P.2d 1311 (controversy existed for chiropractors to challenge statute prohibiting them from practicing acupuncture); *cf. Rhode Island Ass'n of Realtors, Inc. v. Whitehouse,* 199 F.3d 26, 30–31 (1st Cir.1999) (requiring *intention* to engage in proscribed conduct and *credible threat of prosecution*) (citing *Babbitt v. Farm Workers,* 442 U.S. 289, 298, 60 L.Ed.2d 895, 99 S.Ct. 2301 [1979]).

Here, Baker's amended petition does not allege any facts indicating that he intends to, desires to, or anticipates violating O.P.M.C. 12.04.044 in the future. All Baker alleges is that he is "subject to further prosecution[ ]." In order to be subject to prosecution, however, one must engage in the prohibited conduct. Baker's amended petition gave no indication that he will or, at the very least, desired to engage in conduct violative of O.P.M.C. 12.04 .044 in the future (driving in the left lane in a no-passing zone). Thus, Baker's bald assertion that he is subject to further prosecution need not be accepted by this court as proof of a likely injury. See *McCormick,* 272 Kan. 627, Syl. ¶ 10, 35 P.3d 815; accord *Stevens,* 213 F.R.D. at 370.

Beyond his allegation that he is subject to prosecution, all Baker has left for his future prosecution claim are his allegations that he previously violated O.P.M.C. 12.04.044 and that the City prosecuted him. Standing alone, these allegations raise nothing more than a speculation of future prosecution, not a realistic prospect of injury.

Vagueness: Finally, in support of his one-sentence argument that he has standing to challenge O.P.M.C. 12.04.044 because he attacks it as vague, Baker cites the United States Supreme Court's opinion in *Warth.* The part of *Warth* cited to by Baker mentions only general standing principles and does not mention vagueness at all. See 422 U.S. at 499. Merely alleging a statute is vague does not establish an injury-in-fact.

2. No Actual Controversy Exists Between the Putative Class and Defendants

*7 Referring to the putative class of Overland Park automobile drivers previously prosecuted under O.P.M.C. 12.04.044, Baker sought to be the representative party in a claim that the putative class was entitled to have their sentences vacated and fines reimbursed. In his brief, Baker admits that the district correctly found that "[he] had no actual controversy on [this] issue and was attempting to assert the rights of other drivers."

Nevertheless, Baker argues that his action should not have been dismissed because a controversy existed between the putative class and the City over the prior convictions of the putative class members. Baker argues that after the district court found there was no controversy between himself and the City regarding the prior prosecutions of the putative class members, the court should have "[ruled] upon the motion for class certification and the motion to add or substitute class representatives to avoid dismissal of the action."

A district court has substantial discretion in controlling the proceedings before it. *In re A.A.,* 38 Kan.App.2d 1100, 1105, 176 P.3d 237, *rev. denied* 286 Kan. 1177 (2008). Here, Baker has not shown an abuse of discretion, nor can he. At the hearing on Defendants' motion to dismiss, Baker agreed that the district court should rule on the motion to dismiss *before ruling on his other motions.* Baker apparently was unaware that *if the district court ruled that he—as the proposed class representative—did not have standing to assert a claim on behalf of the noncertified class, the court was required to dismiss both the individual and the class action claims.* See *Steele v. Security Benefit Life Ins. Co.,* 226 Kan. 631, 636, 602 P.2d 1305 (1979) ("It is clear that a noncertified class cannot succeed to the adversary position formerly occupied by the no longer aggrieved representative plaintiff whose own claim has become moot."); *Chamberlain v. Farm Bureau Mut. Ins. Co.,* 36 Kan.App.2d 163, 178, 137 P.3d 1081, *rev. denied* 282 Kan. 788 (2006) (rejecting proposed class representatives' contentions that district court erred by refusing to allow substitution after determining neither proposed class representative had standing; "[i]f the claims of a proposed class representative became moot before the ruling on class certification, both the individual and class action claims must be dismissed").

Thus, by agreeing that the district court should rule on the motion to dismiss first, Baker invited the ruling he now seeks to challenge. Therefore, his argument fails. See *State v. Hebert,* 277 Kan. 61, 78, 82 P.3d 470 (2004).

3. We Conclude There is No Controversy to Support Any of Baker's Individual or Class Claims for Declaratory Relief

Baker was required to show that the district court abused its discretion in ruling that his declaratory judgment action did not rise to the level of an actual controversy. *T.S.I. Holdings, Inc. v. Jenkins,* 260 Kan. 703, 721–22, 924 P.2d 1239 (1996). Baker has not done so. As such, we affirm the district court's decision to dismiss Baker's claim for declaratory judgment.

B. The District Court's Decision That Baker Had an Adequate Remedy at Law Which Precluded Injunctive Relief

***8** Baker challenges the district court's ruling that his success in having his previous criminal charge dismissed demonstrated Baker had an adequate remedy at law precluding injunctive relief. Focusing not on the threat of future prosecution but on his claim that application of O.P.M.C. 12.04.044 creates unsafe driving conditions, Baker maintains he does not have an adequate remedy at law to address this injury.

To show that he was entitled to injunctive relief, Baker was required to allege facts which, if true, would establish the following four elements: (1) there is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. See *Empire Mfg. Co. v. Empire Candle, Inc.*, 273 Kan. 72, 86, 41 P.3d 798 (2002); see also *Sampel v. Balbernie*, 20 Kan.App.2d 527, 530–31, 889 P.2d 804 (1995) (reviewing district court's dismissal of claim seeking injunctive relief).

We agree with Baker that, as a general rule, an action for damages is inadequate to prevent threatened physical harm and, in some circumstances, such threatened physical harm could constitute an irreparable injury. See *Balbernie*, 20 Kan.App.2d at 531, 889 P.2d 804 (with regard to request for injunction prohibiting father from forcibly entering mother's property to assault and batter her, court found action for damages inadequate to prevent such threatened physical harm). Thus, inasmuch as Baker alleges there is a reasonable probability that he will be subject to physical harm due to O.P.M.C. 12.04.044, Baker does not appear to have an adequate remedy at law, and the district court erred in concluding otherwise.

Nevertheless, we find Baker's claim for injunctive relief with regard to unsafe driving conditions is completely without merit. This is because Baker has failed to establish *any* likelihood of future physical harm, let alone a reasonable probability of physical harm as required to prove such a claim in Kansas. Here, Baker was required to allege that he faced a *reasonable probability* of irreparable future injury. See *Empire Mfg. Co.*, 273 Kan. at 86, 41 P.3d 798. Baker has not done so. Thus, the district court correctly found that Baker's amended petition failed to assert a right to injunctive relief, even if the court assigned the wrong reason for its ruling.

Affirmed.

All Citations

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