No. 21-124378-A

IN THE COURT OF APPEALS
OF THE STATE
OF KANSAS

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

vs.

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

REPLY BRIEF OF APPELLANTS

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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**Appearing Pro Hac Vice*

Oral Argument
15 Minutes

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I. NATURE OF THE CASE

The nature of the case is laid out in the Appellants' Brief at 1-3. Appellants file this Reply pursuant to Supreme Court Rule 6.05 to address the arguments made in Issues I, II and V of Appellees' Brief, which Appellants did not previously address. Specifically, Appellants address Appellees' assertion that Appellants lack standing because there is no credible threat that the Challenged Restrictions will be enforced against them. Appellants also respond to Appellees' arguments in their response as to how the Challenged Restrictions should be interpreted and the purported state interests that the Challenged Restrictions promote.

II. STATEMENT OF REPLY ISSUES

A. This matter should not be dismissed for lack of standing.

B. The Defendants' arguments about the meaning of the Challenged Restrictions are contrary to the statute's plain text and all canons of statutory construction.

C. The interests that the Defendants assert justify the Challenged Restrictions are not supported as a factual matter, and they are not sufficient to justify the burden on Plaintiffs' rights.

III. STATEMENT OF THE FACTS

Appellants (hereinafter, "Plaintiffs") rest on the facts as set forth in the Appellants' Brief. No new facts are needed to address the new issues raised in Appellees' (hereinafter, "Defendants") response.

IV. ARGUMENTS AND AUTHORITIES

A. This matter should not be dismissed for lack of standing.

Plaintiffs filed the present lawsuit on June 1, 2021, asserting that KSA 25-2438(a)(2) and (a)(3) (together, the "Challenged Restrictions"), which broadly make it a felony to knowingly engage in conduct that "gives the appearance of being an election

official" or "would cause another person to believe [the] person" is an election official, threaten Plaintiffs' voter education, assistance, and registration activities, because Plaintiffs know from experience that voters mistake them for election officials, even when Plaintiffs have no intention of causing that misapprehension. (R. I, 16.) In response, Defendants argue that Plaintiffs have manufactured a threat to their protected voter education, assistance, and registration activities, where no threat of prosecution exists and ask the Court to dismiss the appeal for want of jurisdiction because the Plaintiffs lack standing. *See* Appellees' Br. at 40-42. Defendants' argument is based on their contention that the Challenged Restrictions prohibit only the intentional impersonation of election officials and that, as a result, Plaintiffs are under no real threat of prosecution if they lack the motivating intent to impersonate. Appellees' Br. at 26-30.

But Plaintiffs have shown—through evidence and the plain text of the law—that a credible threat of prosecution exists. *See* Appellants' Br. at 14-19; *infra* § IV.B. Defendants offer *no* contrary evidence. Instead, they simply insist that no threat of prosecution exists, because "through his *briefing in this litigation*" the Attorney General has "affirmatively disavowed" any intent to prosecute Plaintiffs for their voter assistance activities. Appellees' Br. at 41 (emphasis added). Defendants' arguments in non-binding, unsworn legal papers are not "compelling contrary evidence" weighing against the probability that the Challenged Restrictions will be enforced against Plaintiffs. *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31-33 (1st Cir. 1999); *see also N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) (finding state's "litigation position" that it does not interpret statute to reach plaintiffs' activity, or its "promise" in litigation that the plaintiffs will face no criminal penalties for that activity, did not strip plaintiffs of standing where the statute could be read by its terms to reach the conduct in

question); *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir. 1987) (rejecting Attorney General's limiting construction of a statute advanced in litigation challenging its threat to free speech rights). In fact, Defendants' arguments are not evidence at all. Juries are routinely instructed as much. *See, e.g.*, *Wilson v. Williams*, 261 Kan. 703, 760, 933 P.2d 757 (1997). And the actual record evidence in this case weighs heavily to the contrary.

Defendants' public statements about the law have not been consistent with their legal arguments. When Douglas County District Attorney Suzanne Valdez announced on July 27, 2021 that her office would *not* prosecute the types of voter education, assistance, and registration activities in which Plaintiffs engage as violations of the Challenged Restrictions, (R. II, 293), Attorney General Schmidt responded within days with a press release making clear that he intended to step in where Valdez would not. (R. II, 291.) Valdez was unequivocal in (1) *her* view the Challenged Restrictions' clear textual scope reached these activities, and (2) *her* intentions not to prosecute Plaintiffs for that activity. (R. II, 293.) Valdez stated that: "This law criminalizes essential efforts by trusted nonpartisan groups like the League of Women Voters to engage Kansans on participation in accessible, accountable and fair elections. It is too vague and too broad and threatens to create felons out of dedicated defenders of democracy." (*Id.*) For that reason, Valdez's office announced it "will not prosecute" under the Challenged Restrictions. (*Id.*) In his August 2 press release issued in response, Attorney General Schmidt was equally clear that no one should take any comfort from Valdez's statement, declaring that "[t]he law of the State of Kansas is in effect statewide, including [in Valdez's home jurisdiction] in Douglas County," and emphasizing that his office would use its concurrent jurisdiction to prosecute any "election crimes," regardless of what local prosecutors decided. (R. II, 291.)

If, in fact, the Attorney General meant to convey the claim that Defendants

repeatedly make in their legal papers—that the law does not apply to the voter-assistance activities that Valdez specifically addressed—it is bewildering why he did not say that. His public statement appears crafted to have the exact opposite effect: it pointedly did *not* disclaim prosecution of these activities (or assert that in the Attorney General's view, the law did not even reach them), and it broadly asserted his intention to prosecute any potential "election crimes," with the clear implication being that the activities that Valdez refused to prosecute would fall into that category. This statement, moreover, was made several weeks *after* Plaintiffs initiated this litigation, in which they had already made it abundantly clear that they were curtailing extensive voter education, assistance, and registration activities out of their fear of prosecution under the law. (R. II, 150, 155-56, 159-60 R. IV, 2-14, 16-18.). "Given the above, it is not unreasonable, moving forward, for Plaintiffs to believe that [the State] will use its policy to squelch their speech; it is unreasonable for them to believe that it will not." *Austin v. Univ. of Fla. Bd. of Trs.*, no. 1:21cv184-MW/GRJ, slip op. at 30-32 (N.D. Fla Jan. 21, 2022), available at https://www.documentcloud.org/documents/21183760-motion-for-preliminary-injunction-ruling-01212022 (finding that, where University refused to "amend its policy to *make clear* that it will never consider viewpoint in denying a request [by its faculty] to testify," there was a credible threat of the policy being so enforced (emphasis added)).

At *no* point has the Attorney General or the Secretary taken any concrete steps to guarantee that the Challenged Restrictions—which the public, members of the legislature, and Attorney Valdez have all recognized could be applied to the Plaintiffs' protected conduct (R. I, 186-87 II, 293)—will not be used to prosecute Plaintiffs for engaging in these activities. Instead, outside of this litigation Defendants have consistently taken the opposite tack. Remarkably, nowhere in Defendants' response brief do they address their

public statements about the law, including the Attorney General's August 2, 2021 press release. Yet the Attorney General's public threat, refuting Attorney Valdez's assurances of safety that called out the League specifically, is alone enough to constitute a credible threat under even the cases upon which Defendants rely. *See, e.g.*, *Bryant v. Woodall*, 363 F. Supp. 3d 611, 619 (M.D.N.C. 2019) ("There is almost certainly a credible threat when the government actively threatens to prosecute individuals under a specific statute.").[1]

It is well established that, "so long as [it] is not speculative or imaginary," *any* threat of prosecution is sufficient for standing. *Moody v. Bd. of Cnty. Comm'rs*, 237 Kan. 67, 69, 697 P.2d 1310 (1985) (quotations and citations omitted). Because protected speech may be chilled by even the specter of prosecution, this standard is "quite forgiving" in the context of free-speech challenges.[2] *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 14, 15 (1st Cir. 1996). Plaintiffs need only show that the challenged law "facially restricts expressive activity by the class to which the plaintiff belongs," and then "courts will *assume* a credible threat of prosecution *in the absence of compelling contrary*

[1] In addition, as previously noted, a representative objected during the Conference Committee's consideration of the Challenged Restrictions that they would reach the activities of the League, a Plaintiff in this case. Appellants' Br. at 9 (citing R. I, 186-87). Given these repeated official references to Plaintiffs by name, "[i]t would be peculiar to hold, now, that such plaintiffs are not [even arguably] affected" by the Restrictions. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1091 (10th Cir. 2006).

[2] Although Kansas courts have occasionally referenced the three-part federal standing test, the Kansas Supreme Court has made clear that the Kansas Constitution dictates a more permissive standard than its federal counterpart. *See Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 679-80, 359 P.3d 33 (2015) ("[W]e have not explicitly abandoned our traditional state test in favor of the federal model."). Plaintiffs need demonstrate only that (1) they have suffered (and will continue to suffer) cognizable injuries, and (2) that there is a causal connection between those injuries and the Challenged Restrictions. *See id.* Thus, the fact that Plaintiffs satisfy the more stringent federal standard is all the more reason to reject Defendants' arguments on this point.

evidence." *Whitehouse*, 199 F.3d at 31 (emphases added). And because standing is a separate inquiry from the merits, Plaintiffs only need show that their intended future conduct is "*arguably* proscribed" by the Challenged Restrictions. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (emphasis added); *cf. Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 301-02 (1979) (finding plaintiffs who "engaged in consumer publicity campaigns" faced a credible threat of prosecution under law prohibiting "untruthful, and deceptive publicity" even though they did not "plan to propagate untruths"). Plaintiffs more than clear this bar, Defendants' counsel's assertions in argument notwithstanding.

Plaintiffs would even satisfy the standard if the Court were to accept Defendants' non-evidentiary assertions that they have no present intent to prosecute Plaintiffs as true. Defendants have taken no action to legally bind the State to this position such that future attorneys general or secretaries of state—like whomever is elected later this year to replace Attorney General Schmidt as he runs for governor—could not reverse position and bring charges against Plaintiffs under the Challenged Restrictions. *See Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018) (finding disavowal of prosecution insufficient to undermine the threat of prosecution where a district attorney could "change his mind"). Given the hyper politization of all things election related, how could the Plaintiffs rest assured that the prevailing prosecutorial sentiment could not shift swiftly against them under a new Attorney General? And, as noted, virtually everyone to look at the matter (other than the District Court and Defendants' counsel) have concluded that the text of the Challenged Restrictions is so broad and so vague that it does threaten precisely the type of protected activity engaged in by Plaintiffs. (R. I. 186-87, II, 293.)

It is well-settled that when free-speech activity is at stake, it is unnecessary to wait

and see how the restrictions will be enforced; there is simply too much "danger in putting faith in government representations of prosecutorial restraint." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 718 (M.D. Tenn. 2019) *("LOWV")*. Where the plain language of the Challenged Restrictions is broad enough to encompass Plaintiffs' voter-assistance activities, Plaintiffs have repeatedly been identified by name in connection with the law, (R. I. 186-87, II, 293), and Defendants have offered no actual evidence that they will not enforce the Challenged Restrictions as written, a credible fear of enforcement exists. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Plaintiffs thus have standing because, "but for the [Challenged Restrictions], they would behave in ways that the Act proscribes," and the Restrictions "imminently restrict their political activities within the state and limit their ability to associate as political organizations." *LOWV*, 400 F. Supp. at 718 (internal quotations, alterations, and citations omitted). Moreover, because Plaintiffs' members and constituents face similar injuries and all other relevant requirements are met, Plaintiffs separately possess associational standing to sue on their behalf. *See Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013). Defendants' contrary arguments—and their request that this matter be dismissed for lack of jurisdiction on standing grounds—should be rejected.

B. The Defendants' arguments about the meaning of the Challenged Restrictions are contrary to the statute's plain text and all canons of statutory construction.

The Defendants' substantive responses all rely on their contention that the Challenged Restrictions prohibit only the intentional impersonation of election officials. For the reasons discussed in Appellants' Brief at 14-20, such a reading is contrary to the plain text of the statute and all relevant canons of construction. Plaintiffs respond briefly

here to two additional arguments that Defendants make in their response brief not previously addressed by Plaintiffs, but which suffer from the same fatal defects.

1. The reach of KSA 25-2438(a)(1) is not plausibly limited to only "overt" misrepresentations.

First, in an effort to explain why the District Court's interpreting the Challenged Provisions set forth in KSA 25-2438(a)(2) and (a)(3) to reach only the intentional misrepresentation of oneself as an election official does not render redundant the *explicit* criminalization of knowingly "[r]epresenting oneself as an election official" set forth in KSA 25-2438(*a)(1*), Defendants argue that subsection (a)(1) applies only to *overt* misrepresentations. Appellees' Br. at 11. In contrast, Defendants argue, the Challenged Restrictions in subsections (a)(2) and (a)(3) outlaw "more indirect and/or subtle conduct designed to create a false appearance of election official status," such as distributing "campaign literature on official county letterhead." *Id.* But neither the text of subsection (a)(1) nor the canons of statutory construction support such a narrow reading.

The plain and ordinary meaning of "representing oneself as an election official" is not limited to explicitly stating that one is an election official. It encompasses any words or conduct designed to convey the message that one is an election official, no matter how indirect or subtle. *See Representation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A presentation of fact—either by words or by conduct—made to induce someone to act . . . esp. the manifestation to another that a fact . . . exists."). Defendants themselves recognize the broader meaning of "represent" and undermine their own argument when they assert that the "same conduct" that the Challenged Restrictions prohibit "has been unlawful for more than a decade under a different statute." Appellees' Br. at 1. Defendants are referencing KSA 21-5917(a), which outlaws "*representing oneself* to be a public officer

[or] public employee . . . with knowledge that such *representation* is false." *Id.* at 24 (emphases added). Thus, Defendants themselves necessarily acknowledge that such conduct *is* "representing oneself" as an official—what the plain text of KSA 25-2438(a)(1) *already* outlaws with respect to election officials.

To escape the conclusion that the district court interpreted the Challenged Restrictions to be redundant of subsection (a)(1), one would have to conclude either that the Legislature used the phrase "[r]epresenting oneself" to mean something *different* in the impersonation of an election official statute than in the impersonation of a public official statute, or that—contrary to controlling caselaw and Defendants' own arguments—"more indirect and/or subtle" activities like using a public officials' letterhead to falsely convey that one is the public official do not violate the impersonation of a public official statute. *See State v. Seck*, 274 Kan. 961, 961, 58 P.3d 730, 731 (2002) (upholding a disbarred lawyer's false impersonation conviction for sending a demand letter on letterhead that identified him as an attorney under the substantively identical predecessor of KSA 21-5917(a)). Neither possibility is plausible or consistent with the tenants of statutory construction.[3]

2. The Court cannot read a different "culpable state of mind" requirement into the statute in order to render it constitutional.

Defendants also make a new argument that, when deciding whether the Challenged Restrictions are constitutional, the Court must read a more culpable state-of-mind requirement into their text. Defendants make this argument in reliance on the

[3] Defendants do not even attempt to respond to Appellants' argument, made in their opening brief, that assigning different meanings to the phrase "representing oneself" in the public official impersonation statute and the election official impersonation statute would be contrary to rule that statutes on similar topics should be read *in pari materia*, or in relation to one another. Appellants' Br. at 18-19.

United States Supreme Court's decision in *Elonis v. United States*, Appellees' Br. at 9-10 (quoting 575 U.S. 723, 736 (2015)). Although the case is six years old, Defendants did not make this argument—or even cite *Elonis*—in opposition to the temporary injunction motion, raising it for the first time weeks later in a reply brief in support of an unrelated motion. (R. III, 53.) The argument was not before the district court when it made the ruling that is the subject of this appeal, and Defendants have thus waived it. *See Kansas Dept. of Revenue v. Coca Cola Co.*, 240 Kan. 548, 552, 731 P.2d 273 (1987) ("A point not raised before or presented to the trial court cannot be raised for the first time on appeal."). But even if the Court were to consider the argument, it, too, is unsustainable.

Simply put, Defendants misapprehend the Supreme Court's opinion and the federal rule of statutory interpretation that it applied. *Elonis* involved a federal statutory construction rule that is only applicable when defendants are charged under "federal criminal statutes that are silent on the required mental state." 575 U.S. at 736. The defendant in that case was charged with violating 18 U.S.C. § 875(c), which criminalized transmitting in interstate commerce "any communication containing any threat . . . to injure the person of another." 575 U.S. at 726-31. The defendant raised a First Amendment defense but, contrary to Defendants' claims, the Court did *not* hold that the Constitution requires courts to interpret statutes in any particular way, nor did it discuss when a criminal conviction is "constitutionally permissible."[4] Appellees' Br. at 9; *see* 575 U.S. at 741-42. Instead, the Court reasoned that Congress legislates against the backdrop of "the 'general rule' [] that a guilty mind is 'a necessary element in the indictment and

[4] Though they misread *Elonis*, Defendants' acknowledgement that a conviction under the Challenged Restrictions would not be "constitutionally permissible" without the prosecution *also* showing the defendant's intent to deceive, Appellees' Br. at 9, is a concession that the statute *as written* is unconstitutional.

proof of every crime," *Elonis*, 575 U.S. at 734 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)). Because there was not "any indication" that Congress intended to *depart* from that rule when it enacted 18 U.S.C. § 875(c), *id.*, the Court concluded that the statute implicitly required a showing that the defendant knew "the facts that ma[d]e his conduct fit the definition of the offense"—there, that his communication would be viewed as a threat. *Id.* at 735, 740 (quoting *Staples v. United States*, 511 U.S. 600, 608 n. 3 (1994)).

By contrast, the Plaintiffs here bring a pre-enforcement challenge to a state statute that contains an *explicit*, different mental state requirement than the one Defendants would have the court infer. Unlike 18 U.S.C. § 875(c), the Challenged Restrictions are *not* "silent on the required mental state" for a violation and there *is* an "indication" of the *mens rea* the Legislature intended, *id.* at 734, 736. The statute's text expressly specifies that it is violated when an individual engages in conduct that he "*know*[*s*]" "gives the appearance of being an election official" or "would cause another person to believe a person engaging in such conduct is an election official"—not when the individual "intends" such a result. KSA 25-2438(a)(2)-(3) (emphasis added); *see also* KSA 21-5202 (distinguishing the "knowing[]" and "intentional[]" mental states).

But even if the Restrictions were silent about the required state of mind, *Elonis* would at most support reading into the statute only the same mental state requirement that its text currently contains—that Plaintiffs "*know* the facts that make [their] conduct fit the definition of the offense." *Elonis*, 575 U.S. at 735 (emphasis added) (quoting *Staples*, 511 U.S. at 608 n.3). Plaintiffs *know* their voter-assistance activities sometimes give the appearance that Plaintiffs are election officials and cause people to so believe.

In short, the intentional or purposeful mental state requirement that Defendants ask the Court to read into the Challenged Restrictions is a different *mens rea* than the one

the Supreme Court applied in *Elonis* and, more importantly, than the one the Kansas Legislature explicitly prescribed in the statute at issue in this case. *Elonis* thus provides no support for Defendants' incorrect statutory interpretation.

C. The interests that the Defendants assert support the Challenged Restrictions fail as a factual matter, and they are not sufficient to justify the burden on Plaintiffs' rights.

Although the Defendants primarily defend the Challenged Restrictions by arguing that they do not implicate Plaintiffs' fundamental rights, they also argue, without any support in the record, that "[s]trong and [l]egitimate [i]nterests" underly the Challenged Provisions, and that they accordingly survive heightened constitutional scrutiny. Appellees' Br. at 21. Plaintiffs have already explained why (1) strict scrutiny (or at the very least, exacting scrutiny) applies to the Challenged Restrictions, and (2) the interests asserted by the Defendants do not suffice under any level of scrutiny in any event. *See* S. Ct. R. 6.05; Appellants' Br. at 24-35. Defendants now make a new (and equally incorrect) argument that "theoretical" state interests are sufficient to justify the Challenged Restrictions, even without any factual support.

Defendants have little choice but to take this position, as none of their purported state interests are supported by the record. *See* Appellees' Br. 21-23. But under any standard of scrutiny, Defendants are wrong. When strict scrutiny applies because "the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000); *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 235, 689 P.2d 860, 870 (1984) ("Where a statute restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."). "[T]he state must *demonstrate* that it

addresses an actual problem." *Rideout v. Gardner*, 123 F. Supp. 3d 218, 231 (D.N.H. 2015) (emphasis added) (collecting cases), *aff'd*, 838 F.3d 65 (1st Cir. 2016); *see also, e.g.*, *McKinney*, 236 Kan. at 235 (vacating injunction prohibiting certain expressive activities on school property because there was "no evidence to show" that a "significant state interest" had been threatened). "To satisfy this requirement, the government ordinarily must point to sufficient evidence in the law's legislative history or in the record before the court to show that the problem exists." *Id.* at 232 (citing *Turner Broad. Syst., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994)). "Anecdote and supposition cannot substitute for evidence of a real problem." *Id.* (internal quotation marks omitted).

Even under Defendants' proffered *Anderson-Burdick* standard, the requirement that the Court carefully weigh the precise state interest advanced by a regulation against the burden on Plaintiffs' rights requires the state to prove both that the regulation actually serves state interests *and* that the state interests "make it necessary to burden the plaintiff's rights." *E.g.*, *Duke v. Cleland*, 5 F.3d 1399, 1405 n. 6 (11th Cir. 1993) ("The existence of a state interest, however, is a matter of proof."); *see also, e.g.*, *Fish v. Schwab*, 957 F.3d 1105, 1132 (10th Cir. 2020) (striking down proof of citizenship law under *Anderson-Burdick* because there was no "concrete evidence" in the "record" that state interest made it necessary to burden voting rights). Thus, even if the Court agrees with Defendants that *Anderson-Burdick* governs the inquiry here—and, for the reasons explained, Appellants' Br. 31-35, it should not—Defendants are simply incorrect that they have no evidentiary burden to establish the actual state interests underlying the

Challenged Restrictions.[5]

Rather than point to any real evidence, Defendants rely solely on two internet news articles from different states (one of which is from half a decade before the Challenged Restrictions were enacted) and purported (but unspecified and unsubstantiated) "concerns from county election officials across the State" that legislators supposedly heard but were never mentioned anywhere in the legislative or judicial record. Appellees' Br. 23. That is not the type of "actual" or "concrete" problem that courts require when reviewing the constitutionality of statutes that burden fundamental rights. Defendants are therefore left with their "theoretical" justifications that the statute is needed to prevent fraud and mischief among the electorate, but Plaintiffs have already explained why those fail the means-end or "tailoring" requirement under any standard of constitutional review. *See* Appellants' Br. 27-34.

Defendants' further contention that the Court should ignore the Legislature's failure to "develop a record of any problem" also comes up short. Appellees' Br. 22. Even beyond the clear relevance of such an omission for purposes of heightened constitutional

[5] Citing *State v. Hinnenkamp*, 57 Kan. App.2d 1, 446 P.3d 1103 (2019), Defendants also advance a confusing argument that the "facial" nature of Plaintiffs' challenge renders it unnecessary for Defendants to introduce "evidence of the[ir] state interests," Appellees Br. 23, but this argument distorts the case law and misunderstands the nature of facial constitutional challenges. *Hinnenkamp* is entirely inapposite: there, the Court of Appeals explained that a criminal defendant did not need to have obtained findings of fact in the district court to, for the first time on appeal, assert her specific facial challenge to the constitutionality of a statute that required her to submit to random drug testing as a condition of her sentence. *Id.* at 4. The court explicitly relied on the fact that the defendant's challenge turned on "admitted facts not dependent on the circumstances of any search she may have experienced." *Id.* at 5. The case does *not* indicate that Defendants' asserted state interests—which Plaintiffs do *not* admit are served by the Challenged Restrictions—need not be factually supported. The opposite was held true in the cases just cited, which involved facial challenges to the constitutionality of statutes. *See Playboy*, 529 U.S. at 827; *Rideout*, 123 F. Supp. 3d at 227 n.6; *Turner*, 512 U.S. at 668; *Fish*, 957 F.3d at 1136.

review, the Kansas Supreme Court has explicitly recognized that an "examination of the legislative record" is relevant to whether legitimate state interests exist under even the most deferential form of review. *See State v. Limon*, 280 Kan. 275, 293, 122 P.3d 22 (2005) (striking down heightened penalties for same-sex sodomy under rational basis review because "there is nothing in the legislative record regarding the legislative purpose for adding the opposite sex requirement"). Here, the scant record that the Legislature *did* develop points only to the fact that legislators *knew* that the Challenged Restrictions would have precisely the impact on Plaintiffs that they have had. *See* Appellants' Br. 9.

The Court should not accept Defendants' invitation to turn a blind eye to the facts and circumstances surrounding the enactment of the Challenged Restrictions—which have and continue to suppress Plaintiffs' ability to engage with and enfranchise Kansas' most vulnerable citizens. *See also Storer v. Brown*, 415 U.S. 724, 730 (1974) (courts must carefully "consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged").

V. CONCLUSION

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

Respectfully submitted, this 21st day of January, 2022.

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

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