No. 2 2 - 124378-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

v.

SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State, and DEREK SCHMIDT, in His Official Capacity as Kansas Attorney General,
Defendant-Appellees.

APPELLANTS' PETITION FOR REVIEW

Appeal from the Kansas Court of Appeals
Case No. 22-124378-A

Appeal from District Court of Shawnee County
District Court Case No. 2021-CV-000299

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PRAYER FOR REVIEW

Appellants are four non-profit, non-partisan organizations that have for decades comprised the non-governmental backbone of Kansas civic life.[1] All three judges on the appellate panel recognized that Appellants' voter registration and education activities constitute core political speech protected by Sections 3 and 11 of the Bill of Rights of the Kansas Constitution. At issue in this appeal is whether K.S.A. 25-2438(a)(2) and (a)(3) (the "Challenged Provisions")—which make it a felony for anyone to knowingly engage in conduct that "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," *id*.—threaten that protected speech. They do.

By their plain terms, the Challenged Provisions threaten Appellants with criminal liability if they know their conduct *could* cause another to mistake them for an election official. Because local election officials often lack the resources to broadly reach and fully engage voters, Appellants often work hand-in-hand with them to register and educate voters. And the unrefuted record evidence establishes that Appellants' regular voter registration and education activities *can and sometimes do* cause others to believe that they are election officials—even when Appellants do not intend that misapprehension and even take steps to prevent it. That knowledge satisfies the statute's *mens rea* requirement. As a

[1] Appellants are the Kansas League of Women Voters, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and the Topeka Independent Living Resource Center.

result, fear of prosecution under the Challenged Provisions has significantly reduced, and in some cases entirely halted, Appellants' important work.

Nevertheless, the Court of Appeals affirmed the denial of Appellants' motion to temporarily enjoin the Challenged Provisions in a 2-1 decision, finding Appellants lacked standing. To reach this conclusion, the majority interpreted the statute as if (a)(1), (a)(2), and (a)(3) all prohibit the same thing—knowingly misrepresenting oneself as an election official. But that interpretation is at odds with the plain language of the statute itself. It also violates the well-established rule that courts "should presume that the legislature does not intend to enact useless or meaningless legislation." *Mia. Cnty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy*, 292 Kan. 285, 323, 255 P.3d 1186, 1211 (2011); *see also Stanley v. Sullivan*, 300 Kan. 1015, 1021, 336 P.3d 870, 875 (2014) ("This court presumes that the legislature does not intend to enact superfluous or redundant legislation."). The decision also violated the bedrock rule that courts must not "add language that is not found in [a statute] or . . . exclude language that is found in it," *State v. Paul*, 285 Kan. 658, 661, 175 P.3d 840, 844 (2008), by reading the law as if it provides a safe harbor for persons acting without the intent to deceive. Nothing of this sort appears anywhere in the statute.

Based on this erroneous interpretation of the statutory text, the Court of Appeals concluded that Appellants are not at risk of prosecution under the statute. It therefore disregarded the unrebutted record evidence that Appellants

have severely curtailed their voter registration and education activities based on fears of prosecution, concluding that their fears are unreasonable. *But when the statute is read as written*, Appellants' fears are reasonable and well-founded. As the evidence proved, Appellants *know* that their voter registration and engagement activities have caused the types of misapprehensions that the Challenged Provisions' subjective standards now make criminal. That is all the statute requires.

The Court of Appeals left open the door for someone to bring this claim in the future, if they are actively targeted under the law. Slip op. at 11. But it is well established that litigants need not actually be prosecuted to challenge laws that chill protected speech. The decision below is at odds with this precedent, and for that reason alone should be reviewed by this Court. *See id.* at 27 (Hill, J., dissenting) (concluding he could not "say when [the majority's opinion] would ever permit a pre-enforcement action to test the constitutionality of a new law"). Absent review, Appellants are left in the untenable—and unconstitutional—position of either (1) risking prosecution by continuing their protected activities, or (2) ceasing that activity to avoid that risk. They have largely done the latter. The result is severe and ongoing harm not just to Appellants, but also countless Kansas voters who depend on them to exercise their fundamental rights.

All three members of the appellate panel appeared to agree that the voter registration and education activities implicated by the Challenged Provisions are

core political speech, which under Kansas precedent, should be subject to strict scrutiny. Under that standard, they cannot possibly survive, because they are not narrowly tailored to serve a compelling governmental interest. But, by resolving the case on standing, the Court of Appeals left the Challenged Provisions in force, where they continue to chill core protected speech.

This Court should hear this appeal because it presents questions of great importance regarding both the protection afforded fundamental rights guaranteed by the Kansas Constitution and when a litigant whose protected speech has been chilled may properly sue to vindicate those rights. It is precisely the type of case in which the administration of justice requires the exercise of the Court's supervisory authority. *See* K.S.A. 20-3018. Failure to do so will have far reaching consequences, not just for Appellants and the voters who depend upon them, but for future litigants seeking to protect their free speech rights.

DATE OF DECISION

June 17, 2022.

STATEMENT OF ISSUES

1. **The Court of Appeals erred in holding that Appellants failed to establish a concrete injury sufficient for standing.**
2. **The Court of Appeals erred in declining to conclude that the Challenged Provisions violate Sections 3 and 11 of the Kansas Bill of Rights.**

STATEMENT OF FACTS

More than 1.3 million Kansans—nearly 71 percent of all registered voters—

voted in the 2020 election, making it one of the highest turnout years Kansas has ever seen. (R. II, 5.) The Deputy Assistant Secretary of State told the *New York Times* that "Kansas did not experience any widespread, systematic issues with voter fraud, intimidation, irregularities or voting problems," and the Secretary's office was similarly "very pleased with how the election has gone." (R. I, 588.) Nevertheless, in 2021, the Legislature enacted sweeping changes to Kansas election law. Among these was K.S.A. 25-2438, which was passed on party lines and over Governor Kelly's veto, and reads in relevant part:

> (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.

K.S.A. 25-2438.

Shortly after the law was enacted, Appellants filed suit in the District Court for Shawnee County, asserting that the Challenged Provisions—subsections (a)(2) and (a)(3) above—violate the free speech and associational rights guaranteed by Sections 3 and 11 of the Kansas Constitution's Bill of Rights. Appellants sought a temporary injunction of the Challenged Provisions before they went into effect on July 1, 2021, submitting detailed affidavits establishing the dangerous threat that the Provisions' vague and overbroad language pose to Appellants' missions and

work. (R. I, 110-11, 118-19, 127-28.) Unrebutted evidence showed that Appellants have severely restricted, and in some cases completely stopped, their voter engagement and registration activities for fear of prosecution under the new law. (R. II, 150, 155-56, 159-60, R. IV, 2-3, 16-17.) When they do engage, it is much harder to find members or volunteers willing to participate. (R. IV, 17-18.) This fear is based on experience: in the history of their work in Kansas, Appellants' members and volunteers have been mistaken for election officials, even when they have taken affirmative steps to make their affiliations clear. (R. I, 114, 122.) Those previously harmless misperceptions now carry with them the threat of a fine of up to $100,000 and up to 17 months in prison.

The motion for a temporary injunction sat fully briefed for nearly three months, before the district court denied it on September 16, 2021. (R. III, 16.) The district court's order ignored precedent establishing that strict scrutiny applies to laws that burden fundamental rights protected by the Kansas Constitution. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663-71, 440 P.3d 461, 493 (2019). Instead, the court applied a federal doctrine, known as *Anderson-Burdick,* never before applied by a Kansas appellate court, to find that Appellants were not likely to succeed on their claims under the Kansas Constitution. (R. III, 16.)

Appellants promptly sought relief from the Court of Appeals. In a split decision over the strong dissent of Judge Hill, that court found that Appellants lacked standing to bring a pre-enforcement challenge. As a result, the Court of

Appeals did not reach the merits, even though all three judges on the panel seemed to agree—unlike the district court below—that Appellants' voter registration and engagement activities constitute core political speech.

ARGUMENTS AND AUTHORITY

Issue I: The Court of Appeals erred in holding that Appellants failed to establish a concrete injury sufficient for standing.

Courts have long recognized that, "a chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it arises from an objectively justified fear of real consequences." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) (quotations omitted). Plaintiffs in a suit for prospective relief "based on a 'chilling effect' on speech" can establish a sufficiently concrete injury for standing "by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced." *Id.* at 1089.

Appellants more than met this standard here. The Court of Appeals agreed that Appellants' activities constituted protected speech, and it did not question that the Challenged Provisions are deterring Appellants from exercising their rights. But the majority concluded that Appellants' fear of prosecution was not justified based on its conclusion that, as a matter of statutory construction, the

Challenged Provisions do not reach Appellants' conduct. Specifically, the majority found that because "appellants' conduct does not involve deceptive practices," their activities are beyond the reach of what K.S.A. 25-2438 is "designed to combat." Slip op. at 14-15. This was error and should be reversed.

A. The Court of Appeals erred in holding that Appellants' conduct is beyond the reach of the Challenged Provisions.

The Court of Appeals' interpretation of the Challenged Provisions ignores the statute's plain text and well-established canons of statutory construction. "In construing a statute, effect must be given, if possible, to every part of the statute." *State v. Switzer*, 244 Kan. 449, 456, 769 P.2d 645, 650 (1989) (*citing State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611 (1987)). Yet, the Court of Appeals treated K.S.A. 25-2438 as if (a)(1), (a)(2), and (a)(3) all prohibit the same conduct. Moreover, prior to the enactment of K.S.A. 25-2438, it was already a crime in Kansas to "false[ly] impersonat[e]" a government official with "knowledge that such representation is false." K.S.A. 21-5917(a). Both the existence of this established law and the Legislature's decision to provide three alternative definitions in (a)(1), (a)(2), and (a)(3) for what constitutes the new crime established by K.S.A. 25-2438 requires that it be read to reach a far wider universe of conduct than "knowingly . . . [r]epresenting oneself as an election official" alone.

The Court of Appeals concluded that Appellants "erroneously viewed [the Challenged Provisions] through the wrong lens" by "turn[ing] a blind eye to the requirement for . . . the conduct of the actor that was the . . . impetus for the

misidentification." Slip op. at 19. But it is the majority that misconstrues what "knowingly" modifies in (a)(2) and (a)(3), while also impermissibly reading out the subjective elements of those provisions. While (a)(1) focuses entirely on the conduct of the actor, (a)(2) and (a)(3) are far broader, criminalizing conduct that the actor knows may result in subjective misinterpretation by others. If the statute covered only knowingly deceptive conduct, there would be no reason to go beyond (a)(1) and pre-existing law. While the majority insists that "mere confusion on the part of a listener, standing alone, is not enough to" come within the reach of the statute, slip op. at 19, the law's plain language says otherwise: the only additional element is that the actor know that their conduct *could* cause that misapprehension—there is no requirement that they have any deceptive intent. K.S.A. 25-2438. Nor is there any safe harbor for good faith conduct, or even for those who affirmatively identify themselves. In finding to the contrary, the Court of Appeals both ignored the statute's plain text and inappropriately read into it language that is not there. Slip op. at 14-15 (finding that because Appellants "are driven solely by their aspiration to encourage more robust and informed civic engagement . . . the activities at issue lack the nefarious or deceptive qualities K.S.A. 2021 Supp. 25-2438 is designed to combat, placing the appellants beyond its reach").

B. The Challenged Provisions chill Appellants' speech because they are vague.

The Challenged Provisions are sufficiently vague that Appellants

reasonably fear prosecution under them. A statute is impermissibly vague when "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). When the Legislature debated the Challenged Provisions, Representative Vic Miller voiced concerns that the League's work would be caught up in the "vague" language of the statute. "Subsections two and three," he said during debate, "get pretty murky." (R. I, 100.). That murkiness opens the door to arbitrary enforcement against Appellants and has caused them to substantially reduce—and even quit altogether—their protected voter registration activities.

Laws that turn on others' perceptions, rather than the intent of the actor, are regularly invalidated as unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (invalidating law criminalizing protests on public property that were "annoying to persons passing by" as unconstitutionally vague because "[c]onduct that annoys some people does not annoy others"); *State v. Bryan*, 259 Kan. 143, 155, 910 P.2d 213 (1996) (holding law making illegal activity that "alarms, annoys, or harasses" another person had unenforceable vague, subjective standard); *see also Ruff v. City of Leavenworth*, 858 F. Supp. 1546, 1558 (D. Kan. 1994) (invalidating prohibition on political campaigning by city employees because "City employees are left to speculate as to what conduct their employer might consider 'political' or 'campaigning' and what speech regarding City Commission elections their employer might consider 'public.'").

C. The Challenged Provisions are chilling Appellants' speech.

The Court of Appeals' erroneous conclusion that the statutory text could not reach Appellants' conduct led it to incorrectly hold that their fear of prosecution was unreasonable. Slip op. at 15. It therefore did not engage with the unrefuted record evidence establishing that Appellants have broadly curtailed their protected activity because of the Challenged Provisions.[2] This cannot be squared with the numerous decisions that recognize that chill of protected activity, in and of its own right, is a sufficient injury for standing purposes. *See*, *e.g.*, *Bell v. Keating*, 697 F.3d 445, 453 (7th Cir. 2012) ("Chilled speech is, unquestionably, an injury supporting standing."); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) ("Even if an official lacks actual power to punish, the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill." (citing *Bantam Books, Inc.*

[2] The undisputed record established that the Kansas League and Loud Light have almost completely curtailed the voter registration activities they previously conducted due to fear of prosecution under the Challenged Provisions. (R. II, 150, 155-56, R. IV, 2-3, 16-17.) The Topeka Independent Living Resource Center similarly ceased voter registration activities. (R. II, 159-60). All four Appellants have seen a decrease in the willingness of their members and constituents to engage in voter-facing activities out of fear of prosecution. (R. IV, 17-18.) And record evidence established—without contradiction—that these fears are well-founded: Appellants know from experience that, even despite their best efforts to make clear their role, "some people with whom they interact (or who observe their activities) assume they are acting in an official capacity." Appellants' Merits Br. at 2, 7. Indeed, many of Appellants' activities, such as registering voters and working to expand voter turnout, overlap with actions that election officials take. *Id*. at 2. Election officials in Douglas County even go so far as to route questions from voters directly to the League. (R. I, 146-47.)

v. Sullivan, 372 U.S. 58, 68 (1963))); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court."); *see also United States v. Hernandez-Cavillo*, --- F.4th ---, 2022 WL 2709736, at *11 (10th Cir. July 13, 2022) (Moritz, J.). This Court applies a broader standing test when considering overbreadth challenges "because the mere existence of the statute could cause a person not before the Court to refrain from engaging in constitutionally protected speech or expression." *State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400, 408 (2014) (citing *City of Wichita v. Wallace*, 246 Kan. 253, 267, 788 P.2d 270 (1990)).

As Judge Hill recognized in his dissent, the practical effect of the decision is that a plaintiff must first be "arrested, charged, tried, convicted, and sentenced to prison before they dare challenge this law." Slip op. at 26-27 (Hill, J., dissenting). This is contrary to the well-established rule that, generally, one need not be subject to "a threat, an actual arrest, prosecution, or other enforcement action" to challenge a law that impedes protected speech or conduct. *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 36 F. 4th 278 (D.C. Cir. 2022) (quoting *Susan B. Anthony List v. Driehaus* ("*SBA List*"), 573 U.S. 149, 158, (2014)). The majority acknowledged this in its opinion, *see* slip op. at 10-11, yet this is the precise effect of its decision.

This Court should accept review and reverse.

Issue II: The Court of Appeals erred in declining to conclude that the Challenged Provisions violate Sections 3 and 11 of the Kansas Bill of Rights.

Appellants allege that the Challenged Provisions impermissibly restrict their rights to free speech and association protected by Sections 3 and 11 of the Kansas Bill of Rights. Section 3 guarantees "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 of grievances." Kans. Const. Bill of Rights, § 3. Section 11 promises that "all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." *Id.,* § 11. By disposing of the case on standing, the Court of Appeals left unresolved important questions about how laws that impede these provisions are properly reviewed by Kansas courts. This provides further reason for this Court to accept review. *See* K.S.A. 20-3018.

When a law impermissibly regulates and chills protected political speech by reducing its overall quantity, it violates the provisions of the Kansas Constitution cited above. Though this Court has not set a specific standard for evaluating such a law, it has explained that the Kansas Constitution's free-speech protections are "generally . . . coextensive" with those of the First Amendment. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). These protections are "among the most fundamental personal rights and liberties of the people." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860

(1984). As a result, the proper standard of review is at least as searching—and potentially even more rigorous—than that applied by the federal courts to violations of the federal constitution. *See Hodes & Nauser*, 309 Kan. at 669, 440 P.3d at 496 (applying more rigorous standard of scrutiny than under federal law "because it is our obligation to protect" the intentions of those who drafted and adopted the Kansas Constitution, as well as "the inalienable natural rights of all Kansans").

Even under federal law, when laws regulate or threaten core political speech, constitutional protections are at their "zenith." *Meyer v. Grant*, 486 U.S. 414, 416 (1988). As a result, federal courts generally apply strict or (the largely indistinguishable) "exacting" scrutiny to challenges like this one. *See, e.g.*, *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) (applying "strict scrutiny" to laws that restrict "the overall quantum of speech available to the election or voting process"). To survive strict scrutiny, a law must serve a "compelling state interest and be narrowly tailored to further that interest." *Hodes & Nauser*, 309 Kan. at 663. A compelling interest is "one that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Id.* at 664 (quotation marks and citation omitted). "[N]arrowly tailored" means there are "no less restrictive alternatives" that would further the identified issue. *State v. Smith*, 57 Kan. App. 2d 312, 322, 452 P.3d 382 (2019). *Appellees* bear the burden of

proving this test is met. *Hodes & Nauser*, 309 Kan. at 669.

All three judges on the appellate panel appeared to agree that Appellants' voter registration and education efforts are constitutionally protected. Slip op. at 13 ("In large measure, the parties do not dispute that the appellants' conduct falls squarely within the ambit of the First Amendment. Their position in this regard aligns with conclusions reached by several federal courts when called on to analyze similar issues." (majority op.) (citing cases)); *id*. at 30 ("[T]he majority appears to concede that these four groups' conduct falls within the ambit of the First Amendment . . . I will not hesitate to say so: the groups' activities involve the exercise of free speech.") (J. Hill, dissenting). Had the Court of Appeals reached the merits, it is inconceivable that the Challenged Provisions could have survived scrutiny, because they are not narrowly tailored to any compelling state interest. For one, Kansas has criminalized intentional impersonation of a government official, K.S.A. 21-5917, since 2011. And K.S.A. 25-2438(a)(1) expressly prohibits intentional impersonation of an election official.

CONCLUSION

This case presents issues of great importance under circumstances requiring this Court's supervisory review as contemplated by K.S.A. 20-3018. Appellants respectfully ask this Court to accept review to address these crucially important issues and ensure that the Challenged Provisions do not continue to chill protected speech vital to the health of Kansas's democracy.

Respectfully submitted,

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MEMORANDUM OPINION
COURT OF APPEALS OPINION ATTACHED HERE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Appellants' petition was served on Derrick Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov, on the DAY of MONTH, YEAR.

/s/ Pedro L. Irigongaray
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