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 INDEPENDENT LIVING RESOURCE CENTER, Plaintiffs-Appellants, v. SCOTT SCHWAB, in his official capacity as Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General, Defendants-Appellees.	Appellate Case No. 2021-124378-S Original Action No. 2021-CV-000299

DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION TO EXPEDITE REVIEW

Plaintiffs-Appellants (hereinafter, Plaintiffs) move – for the *second time* in this appeal – to expedite the Supreme Court's consideration of their meritless constitutional challenge to K.S.A. 25-2438(a)(2)-(a)(3), a statute prohibiting individuals from *knowingly* engaging in conduct that gives the appearance of being an election official that would cause another person to believe that the person engaging in such conduct is an election official. The motion has no merit and should be denied.

Plaintiffs request that the briefing schedule on both their Petition for Review (and any further briefing if the Petition is granted) be "truncated" to afford them relief prior to the November General Election. They make this entreaty the *day after having taken the*

full thirty days to file their Petition for Review following the Court of Appeals' June 17, 2022, opinion dismissing their appeal for lack of standing. In other words, Plaintiffs' own actions refute the urgency of their request. Such an abbreviated schedule would also be unfair to Defendants-Appellees (hereinafter Defendants), who deserve no less time to brief their position than Plaintiffs enjoyed.

Plaintiffs likewise neglect to mention that this Court already denied a virtually identical motion on October 18, 2021. Exhibit A (Order denying Plaintiffs' dual motion to transfer their appeal from the Court of Appeals to the Supreme Court and to expedite consideration of the appeal); Exhibit B (Plaintiffs' Sept. 22, 2021 motion).[1] And Plaintiffs' latest motion to expedite has no more legitimacy now than when the same request was advanced *more than ten months ago*. As Defendants noted in their response to the earlier motion, Plaintiffs are seeking to manufacture a crisis that exists only in their imagination. They are at no risk whatsoever of any prosecution based on their self-described historical or future planned voter engagement activities. Any concern they have of being charged with violating the statutes at issue is simply irrational. As the Court of Appeals noted in holding that Plaintiffs lacked standing to pursue these claims, subjective and irrational fears

[1] Compare pages 3-4 of Plaintiffs' current motion with page 20 of their September 22, 2021 motion. This is also not the first time that the lead law firm representing Plaintiffs (Elias Law Group LLP) failed to advise a court that it was filing a motion nearly identical to one that had been previously denied by that same court in an election dispute. *See Tex. Alliance for Retired Ams. v. Hughs*, No. 20-40643 (5th Cir. Mar. 11, 2021) (sanctioning Marc Elias $8,700 for failing to notify the court of appeals that he had filed a nearly identical motion several months earlier, which had been denied) (attached as Exhibits C and D). The Fifth Circuit noted in that case that Plaintiffs' "inexplicable failure to disclose the earlier denial of their motion violated their duty of candor to the court." *Id.* at 2.

of harm are insufficient to confer standing. Slip Op. at 15. Rather, there must be a "substantial" threat that is "certainly impending." *Id.* at 11, 16. There is *none* here, as the Court of Appeals explained in its comprehensive opinion.

The focus of the statutory text is clearly directed at the conduct and state of mind of the *actor/speaker*, not the *subjective views of the viewer/listener*. Plaintiffs' view of the statute effectively reads the word "knowingly" out of the text, and the dissent below barely grapples with this point. Much as Plaintiffs wish it were otherwise, there is nothing complex or high-stakes about this case. It is a pedestrian statutory interpretation dispute. Yet Plaintiffs appear desperate to have the Court adopt the most strained and uncharitable interpretation of K.S.A. 25-2438(a)(2)-(a)(3) possible, thus rendering Plaintiffs' activities legally problematic. There is no basis for doing so, however, and no need to put this case on the fast track.

Plaintiffs suggest that they have "made every effort to resolve this matter as quickly as possible." (Mot. at 3). The record belies this assertion. Plaintiffs initially filed their Petition and motion for temporary injunction prior to the statute's effective date, and the district court promptly informed the parties that it would schedule a hearing after briefing was complete. (R. II, 95). But Plaintiffs later amended their Petition on August 3, 2021, after preliminary injunction briefing was complete, presumably due to a concern that their Petition faced imminent dismissal. (R. II, 230). Plaintiffs then did not inform the district court until August 17, 2021 – after the court inquired on the subject – that they believed their Amended Petition did not alter the arguments raised in their motion for temporary injunction, even though they were based on the initial Petition. (R. II, 297). The district

court promptly considered the briefed issues, held a hearing on September 14, 2021, and issued a thorough and well-reasoned opinion two days later on September 16, 2021. (R. III, 2). Although Plaintiffs initially sought to expedite the appeal – which this Court denied, as described above – they then consumed the full briefing period on their Appellants' Brief and Reply Brief in the Court of Appeals. *See* Appellants' Opening Brief (filed December 8, 2021, thirty days after the completion of the transcript on November 8, 2021) and Reply Brief (filed January 21, 2022, fourteen days after Defendants filed their Appellees' Brief on January 7, 2022). Plaintiffs additionally used all of their thirty-day briefing allotment in preparing their Petition for Review. In short, Plaintiffs have hardly proceeded with alacrity, and any contention to the contrary rings hollow.

Plaintiffs' motion is filled with exaggerated rhetoric about the purported impact – on the promotion of justice, facilitation of democratic participation, and public trust in the integrity of the electoral process – of this Court's refusal to accelerate its evaluation of the Petition for Review. But the Court should not be distracted from the absence of any substance in Plaintiffs' underlying claims by such references to wholly nonexistent threats.

In fact, none of Plaintiffs' arguments regarding the necessity of expedited review have merit, if for no other reason than that the Plaintiffs are in no way constrained by these statutes from maintaining the same interactions with the public that they have (allegedly) always had. Plaintiffs are actually *better* positioned than they have ever been. In the wake of the Court of Appeals' recent decision, Plaintiffs are now armed with a published appellate opinion holding that the conduct in which they purport to engage exposes them to no legal risk. It is hard to conceive of better insulation from culpability.

Finally, even if this Court were to grant Plaintiffs' request to short-circuit briefing (which would be unnecessary and unfair to Defendants), and even if the Court were then to grant the Petition for Review (which Defendants maintain is unwarranted, for reasons that will be specified in their forthcoming Appellees' Response to Plaintiffs' Petition), and even if the Court were then to hear arguments and issue an opinion with lightning speed (none of which is even remotely crucial), there still would be a need to remand the case to the district court for a consideration of the equities in Plaintiffs' motion for a preliminary injunction. The idea, then, that Plaintiffs would somehow obtain the equitable relief they seek prior to mid-October is unrealistic even without expedited treatment of the case.

Accordingly, Plaintiffs' motion to expedite the Supreme Court's evaluation of its Petition for Review and subsequent briefing should be denied.

Respectfully Submitted,

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

I hereby certify that on this 26th day of July, I electronically filed the foregoing "Defendants-Appellees' Response to Plaintiffs-Appellants' Motion to Expedite Review" with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record.

/s/ Bradley J. Schlozman

Exhibit A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

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

v.

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

ORDER

The court has considered and denies Appellants' motion to transfer this appeal for final consideration under Supreme Court Rule 8.02 (2021 Kan. S. Ct. R. 53). Appellants' motion to expedite included within the motion to transfer is denied as moot. See also Supreme Court Rule 5.01(a) (2021 Kan. S. Ct. R. 31) ("Each motion must contain only a single subject.").

All responses are noted.

Dated this 18th day of October 2021.

FOR THE COURT

Marla Luckert

MARLA LUCKERT,
Chief Justice

Biles, J., not participating

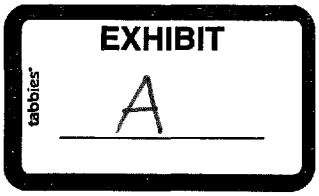

Exhibit B

IN COURT OF APPEALS IN THE STATE OF KANSAS

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

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

Pursuant to K.S.A. 20-3017 and Kansas Supreme Court Rule 8.02, Plaintiffs-Appellants move to transfer this appeal from the Kansas Court of Appeals to the Supreme Court for final determination. This matter is brought by the League of Women Voters of Kansas ("The League"), Loud Light, Kansas Appleseed Center for Law and Justice, Inc. ("Kansas Appleseed"), and Topeka Independent Living Resource Center ("The Center") (collectively, "Plaintiffs-Appellants"), each a nonpartisan organization focused on promoting the right to vote in Kansas, including specifically through voter engagement and registration activities.[1] At issue in this appeal is the district court's denial of Plaintiff-Appellants' motion for a limited, temporary injunction of Subsections (a)(2) and (a)(3) of H.B. 2183 § 3, which makes it a felony to not only knowingly misrepresent one's self as

[1] The case below also includes three individual plaintiffs—Charley Crabtree, Faye Huelsmann, and Patricia Lewter—but none are pursuing the claim at issue here. They therefore do not participate in this appeal.

an elections official but also to knowingly engage in conduct that "*gives the appearance*" or "would *cause another person to believe*" that one is an elections official (emphases added).[2] In other words, through this newly-enacted legislation, Kansas has now criminalized not just activity that is intended to lead someone to believe that the actor is an elections official, but also – broadly and without limit – any activity that could potentially lead to that misperception in an observer. And the line between criminal and innocent conduct ultimately turns *not* on whether the person who is subject to prosecution actually intended to create that misapprehension, but simply whether they knew that it is *possible* that someone else may perceive them that way, no matter how irrational or uniformed that observer's viewpoint.

The dangers of this exceedingly broad statute cannot be overstated. The public record is now littered with examples of how misunderstandings about the elections system and different actors' roles in it resulted in an unprecedented deluge of litigation that baselessly sowed doubt about the legitimacy of the results of the last presidential election. While each of these cases were rejected by the courts, the Voter Education Restriction now invites this same type of mischief in the form of felony criminal prosecutions of anyone whose behavior could create the misapprehension by a third-party that they are an election official.

The undisputed evidence that Plaintiffs-Appellants submitted to the district court established that they are extremely (and rationally) concerned that engaging in their ordinary voter education, outreach, and registration activities could subject them to criminal prosecution under this new law. Indeed, in their long experience conducting such activities in Kansas, they have often been mistaken for election officials, even though they have never attempted to cause that misapprehension and even when they have taken affirmative steps to make their non-governmental

[2] This restriction is referred to throughout this brief and the parties' papers below as the "Voter Education Restriction."

affiliations clear. Aff. of Ami Hyten, Ex. 4 ("Hyten Aff.") ¶¶ 17-20; Aff. of Davis Hammet, Ex. 2 ("Hammet Aff.") Hammet Aff. ¶¶ 19-20; Aff. of Caleb Smith, Ex. 3 ("Smith Aff.") ¶ 18; *see also* Aff. of Jameson Shew, Ex. 5 ("Shew Aff.") ¶¶ 6-9. Thus, Plaintiffs-Appellants and their members *know* that when they are engaged in voter-registration activities, they will frequently—and unintentionally—cause would-be voters to misperceive them as election officials. Defendants submitted no contrary evidence.

As a result of the objective fear of prosecution that they now have, Plaintiffs-Appellants have suspended and foregone many of their previously-laid plans for voter engagement, education, and registration. For example, since the Voter Education Restriction was enacted, Plaintiffs-Appellants have been forced to cancel a host of previously planned voter registration events and activities throughout Kansas. *See* Second Aff. of Jacqueline Lightcap, Ex. 8 ("2d Lightcap Aff.") ¶¶ 3-4; Third Aff. of Jacqueline Lightcap, Ex. 11 ("3d Lightcap Aff.") ¶¶ 3-8. Many of these activities would have taken place in the run-up to the July 13, 2021 voter registration deadline for the August primaries, when new college students were enrolling on campus, and when new citizens were being naturalized. 2d Lightcap Aff., Ex. 8, ¶ 5. Those opportunities have been permanently lost, and as described below, further harm is imminent. Plaintiffs-Appellants—along with the countless Kansas voters that they would otherwise be free to engage with about their voting rights—are paying the price of the new law's overbroad language and highly subjective standard.

Plaintiffs-Appellants filed their limited motion for a temporary injunction before the Voter Education Restriction went into effect on July 1. At every turn, they urged the district court to resolve the motion as quickly as possible so that they could move forward with their constitutionally-protected activities. The district court failed to do so before the primary, causing Plaintiffs-Appellants to lose speech and associational opportunities that they will never get back.

The district court finally issued its order denying the motion last Thursday, September 16, 2021, and Plaintiffs-Appellants noticed this appeal the following day. At this point, the October 12, 2021 registration deadline for the November election is only three weeks away. Given the importance of these matters, and that rapidly approaching deadline, Plaintiffs-Appellants require a swift and definitive resolution of this matter by the only court with jurisdiction to issue an interpretation of the law that will be binding statewide.

Plaintiffs-Appellants request that this matter be quickly transferred to and decided by the Supreme Court so that, in these last few critical weeks before the November election, they are not required to choose between the exercise of their core free speech and associational rights and their objective and rational fear that, by engaging in those activities, they make themselves vulnerable to criminal prosecution. The district court's decision denying Plaintiffs-Appellants' request for a limited temporary injunction to protect those rights disregarded the undisputed evidence and erroneously resolved significant legal questions that implicate fundamental constitutional rights, including by downplaying—if not altogether disregarding—the fundamental nature of the right to speak and associate under the Kansas Constitution. Given the importance of these matters and the daily restrictions on Plaintiffs-Appellants' protected activities created by the new law, the quantum of speech surrounding the right to vote in Kansas is irreparably reduced, and transfer and an expedited decision are necessary.

NATURE OF THE CASE

On May 3, 2021, the Legislature passed H.B. 2183 over gubernatorial veto, effectuating several significant changes to laws relating to Kansas elections. Plaintiffs-Appellants are four nonpartisan Kansas voter engagement organizations. They seek a limited, temporary injunction of only one of H.B. 2183's wide-reaching changes in order to protect themselves from serious and imminent (indeed, already occurring) constitutional harm. Specifically, Plaintiffs-Appellants seek

to enjoin Subsections 3(a)(2) and 3(a)(3) of H.B. 2183, which took effect on July 1, 2021, and has already stopped some Plaintiffs from engaging in their core voter registration, education, and engagement activities (together, "voter-related activities") by posing a threat of felony prosecution. The threat of those injuries continues each day that an injunction is not in place.

The Voter Education Restriction causes these injuries through the creation of a brand new broadly worded felony crime that turns *not* on the intent of the person who may face criminal liability, but instead on the subjective viewpoint of anyone who might observe them and draw the erroneous conclusion that they are elections officials. This leaves Plaintiffs-Appellants and others like them with the impossible choice of either suspending their crucial voter-related activities or risking criminal prosecution should those activities be misconstrued by even the most casual observer. The new crime is titled, innocuously enough, "false representation of an election official." H.B. 2183 § 3(a). And Subsection (a)(1) of H.B. 2183—which Plaintiffs-Appellants do *not* challenge—criminalizes exactly that. *See id.* (criminalizing falsely "[r]epresenting oneself as an election official"). In doing so, Subsection (a)(1) effectively reiterates that conduct that was *already* criminal under Kansas Law, *see* K.S.A. 21-5917, is clearly so.

But H.B. 2183 does not stop there. It includes two additional Subsections separately defining conduct that may be deemed "representing oneself as an election official" in violation of the law, both of which reach far beyond intentionally and falsely doing so. Specifically, Section 3(a) of HB 2183 reads:

> (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.

The section therefore makes it a felony for any person to knowingly engage in conduct that "*gives the appearance*" or "would *cause another person to believe*" that the person is employed by the Secretary of State, county election commissioner, or county clerk. H.B. 2183 § 3(a)(2), (a)(3), (c) (emphases added). By defining the prohibited activity from the vantage of any person observing the activity, the new law creates a serious risk that, by registering, engaging, and educating voters, Plaintiffs, their employees, and their volunteers risk *felony conviction* merely because someone mistakes them for an election official—despite having no intent to deceive anyone, and even if they take every reasonable precaution to avoid such a misapprehension.

Subsections (a)(2) and (a)(3) of H.B. 2183 § 3 present an existential threat to Plaintiffs. As detailed extensively in affidavits presented to the court below, Plaintiffs engage in robust voter registration, education, and engagement efforts. *See* Hammet Aff., Ex. 2, ¶¶ 10, 25 (Loud Light); Hyten Aff., Ex. 4, ¶¶ 21-25 (The Center); Aff. of Gabriel Mullen, Ex. 7, ("Mullen Aff.") ¶¶ 8-11 (The Center); Lightcap Aff, Ex. 1, ¶¶ 18-22 (The League); Smith Aff., Ex. 3, ¶¶ 19, 21 (Kansas Appleseed). In fact, Kansas elections officials *themselves* rely heavily on the Plaintiff-Appellant organizations (and others like them) to register, educate and engage Kansas voters. For example, some Kansas counties work with precisely these types of organizations to engage in voter registration drives and education efforts, making it even more difficult for Plaintiffs-Appellants to ensure that none of their activity could ever cause an observer to believe that they are county officials. *See* Aff. of Jameson Shew, Ex. 5 ("Shew Aff.") ¶ 6 (Douglas County "rel[ies] on outside groups," including the Kansas League, "to do much of the civic engagement work in the

community, including almost all of our voter registration drives"); *see also, e.g.*, Mot. Ex. 32 (listing various "Outposts," including local advocacy organizations, where Sedgwick County provides registration forms for voter registration activities). Shawnee County sends official materials and supplies to organizations holding voter registration drives to reassure voters that the organization's activities are legitimate and trustworthy. Hammet Aff., Ex. 1, ¶ 22. Douglas County does the same, where the county clerk "work[s] hand-in-hand with the Douglas County chapter of the League" to register and educate voters. Shew Aff., Ex. 5, ¶¶ 6-9. These efforts are so intertwined that, in Douglas County, the League is responsible for "the *majority* of voter registration drives," and the clerk's office often refers voters with questions about registration *directly* to the League's capable volunteers. *Id.* ¶¶ 6, 9 (emphasis added). These partnerships are critical to county efforts to ensure that smooth and secure elections take place. *Id.*

In doing this work, Plaintiffs-Appellants work hard to make it clear where they are from and that they are not elections officials. But confusion inevitably arises, given that each of these organizations, like many Kansas elections officials, actively encourage Kansans to vote, educate them about the voting process and issues and candidates on the ballot, and help them through the voting process. *See* Hammet Aff., Ex. 1, ¶ 18 ("[A]lmost all of [the] activities [that Loud Light engages in to achieve its mission] could potentially be mistaken for the kinds of activity that an election official may perform."); Shew Aff., Ex. 5, ¶ 11 (explaining that the League's volunteers "do work which many might perceive as falling under the purview of [the Douglas County Clerk's] office"). Despite Plaintiffs-Appellants' best efforts, they *know* that their voter-related activities have caused them to be mistaken for election officials, even when they have not intended that result and have worked to avoid it. Hyten Aff., Ex. 4, ¶¶ 17-20 (explaining that "anyone who has worked on voter education activities long enough knows, voters may innocently mistake people

who conduct the work we conduct as election officials," and because they cannot "know where the cut-off point is for being charged with this crime," it has put its "voter education activities [] effectively on hold"); Hammet Aff., Ex. 1, ¶¶ 19-20 (describing how Loud Light's founder was mistaken as an election official during an event in Pittsburg in 2018, despite doing nothing to suggest he was a county representative and clearly representing himself as a private, non-governmental actor); Smith Aff., Ex. 3, ¶ 18 (discussing similar incidents).

As the undisputed affidavits presented to (but disregarded by) the district court make clear, the Voter Education Restriction causes irreparable harm to Plaintiffs-Appellants and is also detrimental to the public at large because, for decades, thousands of Kansans have benefited from and relied on Plaintiffs-Appellants help to successfully exercise their right to vote. *See* Shew Aff., Ex. 5, ¶ 6; *see also* Mullen Aff., Ex. 7, ¶ 16 ("[M]any voters with disabilities actually rely on the Center to register and to help them sign up for a method of voting that works for them because they are unable to do so without assistance from an advocate they trust to have their best interest in mind—and that's what we do here.").

Absent immediate review of the district court's erroneous decision—which came three months after the temporary injunction motion was filed and long after the challenged provisions had begun to work long-lasting damage to Plaintiffs-Appellants and their robust voter engagement in the state—these organizations will have to make impossibly difficult choices about whether to severely curtail or even shut down their ordinary voter engagement and registration efforts leading up to the November election, or risk felony prosecution for proceeding with those activities. The deadline to register to vote in the August primary has already come and gone, as has the primary election itself. The deadline to register for the November election, October 12, is now *less than three weeks away*. Fear of prosecution under the Restriction has already prevented some Plaintiffs-

Appellants from registering, educating, and assisting voters. *See* 2d Aff. of Davis Hammet, Ex. 9 ("2d Hammet Aff.") ¶¶ 4-7 (explaining Loud Light canceled plans to register voters over Independence Day weekend and halted voter engagement activities after that); 2d Aff. Lightcap Aff., Ex. 8, ¶¶ 3-6 (describing more than a dozen voter registration drives that the Kansas League cancelled in July and August); 2d Aff. of Ami Hyten, Ex. 10 ("2d Hyten Aff.") ¶¶ 4-10 (explaining that, "for the first time in the Center's memory," it has been forced to suspend its voter registration and engagement activities). Without the Supreme Court's urgent review of the significant legal issues involved, the Restriction will continue to impose severe and irreparable harm on Plaintiffs-Appellants' fundamental, constitutional rights.

JURISDICTION

On September 16, 2021, the district court issued its order denying Plaintiffs-Appellants' Motion. The Supreme Court has jurisdiction to "correct, modify, vacate or reverse any act, order or judgment of a district court or court of appeals." K.S.A. 60-2101. And the Supreme Court may accept jurisdiction of the case for immediate review and final determination because, as explained below, "one or more of the conditions described in subsection (a) of K.S.A. 20-3016" are present here. K.S.A. 20-3017.

GROUNDS FOR TRANSFER

The Supreme Court may accept jurisdiction of an appeal for review and final determination when (1) "[o]ne or more of the issues in such case are not within the jurisdiction of the court of appeals," (2) "the subject matter of the case has significant public interest," (3) "the case involves legal questions of major public significance," or (4) "the caselaw of the court of appeals is such that the expeditious administration of justice requires such transfer." K.S.A. 20-3016(a), 20-3017. Immediate Supreme Court review may be justified when only one of those factors is present. *Id.*

Here, immediate Supreme Court review is imperative because both the subject matter of the appeal and the legal questions involved implicate significant public interests.

I. This appeal has significant public interest.

The Supreme Court's immediate review is necessary to protect the fundamental constitutional rights of Plaintiffs-Appellants and the Kansas voters whose fundamental rights are promoted and protected by Plaintiffs-Appellants' activities. As such, this appeal clearly implicates significant public interests and transfer is appropriate. *See* K.S.A. 20-3016(a)(2).

A. The appeal implicates Plaintiffs-Appellants' free speech and association rights.

The Voter Education Restriction, and the district court's decision allowing enforcement of it, infringe on Plaintiffs-Appellants' constitutionally protected speech in violation of Section 11 of the Kansas Constitution Bill of Rights. "[C]orrecting a violation of the law" is always within "the public interest." *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 66, 341 P.3d 607 (2014). That includes constitutional violations. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). This is particularly so where claims of freedoms of speech and association are at stake. *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) (describing an injunction vindicating free speech rights as "clearly in the public interest"); *Elam Constr., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest [] favors plaintiffs' assertion of their [free-speech] rights."); *Cate v. Oldham*, 707 F.2d 1176, 1190 (10th Cir. 1983) (noting the "strong public interest" in protecting free speech).

The Voter Education Restriction violates three separate free-speech doctrines: (1) it directly restricts political speech without sufficient justification, (2) its regulatory sweep is far too broad, and (3) it is impermissibly vague.

First, the Restriction prevents Plaintiffs-Appellants from engaging in most voter registration, education, and engagement activities without fear of prosecution. The voter-related activities that Plaintiffs-Appellants perform create a constant risk that their members and volunteers will be mistaken as election officials, regardless of their intent. *See, e.g.*, Hyten Aff., Ex. 4, ¶¶ 17-20 ("[A]nyone who has worked on voter education activities long enough knows, voters may innocently mistake people who conduct the work we conduct as election officials."); Smith Aff., Ex. 3, ¶¶ 17-18, 20-25 (explaining that Kansas Appleseed "has no way of knowing whether a voter may mistakenly presume that its staff and volunteers are elections officials"). By making it a crime to knowingly engage in conduct that could have that effect, the Restriction directly prohibits Plaintiffs-Appellants from engaging in activities that constitute political speech protected by the Kansas Constitution's Bill of Rights. In fact, extensive undisputed evidence Plaintiffs-Appellants presented to the district court demonstrated that fear of criminal prosecution has *already* caused their voter-related activities to plummet: the League, Loud Light, and the Center were forced to halt their voter-related activities altogether ahead of the district court's ruling out of fear that continuing them would make them, their volunteers, and their members vulnerable to felony prosecution. *See* 2d Hammet Aff., Ex. 9, ¶¶ 4-7; 2d Lightcap Aff., Ex. 8, ¶¶ 3-6; 3d Lightcap Aff., Ex. 11, ¶¶ 3-8; 2d Hyten Aff., Ex. 10, ¶¶ 4-10.

Second, the Voter Education Restriction is impermissibly vague. The Restriction makes it a felony to engage in conduct that causes another to believe they are an election official. H.B. 2183 § 3(a)(2), (a)(3), (c) (criminalizing conduct that knowingly "gives the appearance" or "would cause another person to believe" that the person is employed by the Secretary of State, county election commissioner, or county clerk). Based on Plaintiffs-Appellants' past experiences, they know that their voter-related activities cause some voters to make this mistake even when Plaintiffs-

Appellants affirmatively identify themselves and the perception is unreasonable. *See, e.g.*, Hyten Aff., Ex. 4, ¶¶ 17-20; Hammet Aff., Ex. 2, ¶¶ 19-20; Smith Aff., Ex. 3, ¶¶ 17-18, 20-25. When a restriction hinges the permissibility of speech on an observer's reaction, it is impermissibly vague and thus unconstitutional. *See State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996); *see also Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Third, the Voter Education Restriction is impermissibly overbroad. Plaintiffs-Appellants' voter-related activities fall within the Restriction's prohibitions and constitute protected core political speech. Such speech is, at a minimum, "a significant part of the law's target." *State v. Boettger*, 310 Kan. 800, 804, 450 P.3d 805 (2019). By creating the risk that Plaintiffs-Appellants may be subject to felony prosecution for engaging in voter-related activities even when they are *not* trying to impersonate election officials, the Restriction's impact on core political speech is "substantial" when "judged in relation to [its] plainly legitimate sweep." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) (quotations omitted). The Restriction is therefore unconstitutionally overbroad.

B. The appeal implicates the voting rights of Kansans who rely on Plaintiffs-Appellants' voter engagement efforts.

Plaintiffs-Appellants' constitutional rights are not the only constitutional rights implicated by this appeal—the Voter Education Restriction, and the district court's decision allowing enforcement of it, stand to curtail the fundamental right to vote of Kansans who have come to rely on the assistance of organizations like Plaintiffs-Appellants. The "broad exercise of the right to vote" is well within the "public interest." *Fish v. Kobach*, 840 F.3d 710, 756 (10th Cir. 2016). And Plaintiffs-Appellants' voter engagement activities play a vital role in helping Kansans exercise their fundamental right to vote. *See* Shew Aff., Ex. 5, ¶ 6 (Douglas County "rel[ies] on outside groups," including the Kansas League, "to do much of the civic engagement work in the

community, including almost all of our voter registration drives"); Mullen Aff., Ex. 7, ¶ 16 ("[M]any voters with disabilities actually rely on the Center to register and to help them sign up for a method of voting that works for them because they are unable to do so without assistance from an advocate they trust to have their best interest in mind—and that's what we do here."). If the district court's decision is not reviewed by the Supreme Court quickly, Plaintiffs-Appellants will be largely unable to assist thousands of Kansans in the fast-approaching November general election without fear of criminal prosecution.

The constitutional implications of this appeal render it of extraordinary public interest.

II. The appeal involves significant legal questions and the district court's decision, if left undisturbed, has the potential to set dangerous precedent infringing on fundamental rights.

The district court's decision also raises several significant legal questions of major public significance, each of which justifies the Supreme Court's urgent attention. *See* K.S.A. 20-3016(a)(3) (noting an appeal may be transferred to the Supreme Court if it involves "legal questions of major public significance").

A. The district court's interpretation of the Voter Education Restriction contradicts the statute's plain language and leaves the permissibility of certain political speech unclear.

By accepting Defendants' erroneous interpretation of the Voter Education Restriction, the district court misapplied the Supreme Court's principles of statutory interpretation. Until the proper reading of the statute is clarified, Plaintiffs-Appellants and others like them who would otherwise engage in voter outreach, education and registration activities, will be left wondering whether those protected speech and associational activities will risk them becoming the subject of a felony prosecution.

In denying the temporary injunction motion, the district court impermissibly read a limiting principle into the Restriction that does not exist in the statute's plain text. The Restriction includes

two specific subsections, both of which depend on the perspective of an observer: Subsections (a)(2) and (a)(3) criminalize "knowingly engaging in . . . conduct that gives the appearance of being an election official [or] that would cause another person to believe a person engaging in such conduct is an election official." The district court, however, effectively read the Restriction to apply only when a speaker *intends* to falsely represent themselves as an election official. *See, e.g.*, Mem. Decision & Order ("Ord.") at 8 (observing that "falsely representing that one is speaking on behalf of the government or impersonating a government officer is not protected conduct"). But there is no statutory language limiting either subsection to conduct *intentionally* designed to give that impression or cause such a belief.

The district court also disregarded Plaintiffs-Appellants' undisputed evidence. Focusing on the word "knowingly" in the statute, the district court found that "the actor must be aware of his or her conduct or circumstances and aware that the conduct is reasonably certain to cause the prohibited result," and then dismissed Plaintiffs-Appellants' evidence out of hand because their affidavits "stated that [their] members always identify themselves as members of their respective organizations and not as election officials." Ord. at 9. Respectfully, that reading of Plaintiffs-Appellants' evidence was incomplete and clearly erroneous. The evidence showed that Plaintiffs-Appellants' members *know* that when they engage in certain voter registration and education activities, would-be voters mistake them for election officials despite their efforts to disabuse them of that notion. *See* Hammet Aff., Ex. 2, ¶¶ 19-20 ("I have been mistaken for an election officer in the past, not because I represented myself as an election officer, but because voters innocently mistake people who are knowledgeable about voter registration and election procedures as election officials."); Smith Aff., Ex. 3, ¶ 18 (noting that Kansans have asked "whether we were [affiliated] with one county board or another during our voter engagement activities" and that "[w]hile we

always correctly identify ourselves as affiliated with Kansas Appleseed, and not any governmental office or body, this confusion persists in our communities"); Hyten Aff., Ex. 4, ¶ 19 ("As anyone who has worked on voter education activities long enough *knows*, voters may innocently mistake people who conduct the work we conduct as election officials.") (emphasis added).

Indeed, the Douglas County Clerk submitted an affidavit noting that he has "relied on the Douglas County League [of Women Voters] and other groups to fulfill outreach and registration functions my office does not have the resources to fulfill." Shew Aff., Ex. 5, ¶ 9. In doing so, he supplies League members with "official signs, banners and leaflets" that "are typically marked with the Douglas County Clerk's Office emblem or other identifying information for the Clerk's office." *Id.* ¶ 7. And as the Clerk explained, while League members are not "actual members of [the Douglas County Clerk's] office, they do work which many might perceive as falling under the purview of my office and its employees given that they use (as they should) official registration forms, education materials, and engage in the same type of education and registration work that my office[] does when we have the capacity." *Id.* ¶ 11.

Thus, as Plaintiffs-Appellants demonstrated below, they *know* that when they engage in voter registration and engagement work, they often give the "appearance of being an election official" or "would cause another person to believe" they are election officials. *That* is *precisely* the "result" that subsections (a)(2) and (a)(3) of H.B. 2183 § 3 criminalizes. The district court did not engage with this argument, instead erroneously limiting its interpretation of the statute to deceptive conduct. *See* Ord. at 9-10. By reading such a limiting principle into the Restriction, and disregarding the undisputed evidence, the district court erred as a matter of law. *See, e.g., State v. Carmichael*, 247 Kan. 619, 623 (1990) (noting that "courts cannot amend or change" statutory language, even when faced with a potential "omission").

The district court's strained reading of the Restriction also fails to follow basic canons of statutory interpretation because it renders Subsections (a)(2) and (a)(3) superfluous. Courts must apply the statute's plain language. *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016) (describing the fundamental rule that a legislature "says what it means and means what it says"). In doing so, courts are "not permitted under the rules of statutory construction to treat any part of a statute as superfluous." *Scott v. Werholtz*, 38 Kan. App. 2d 667, 677, 171 P.3d 646 (2007). But the district court's reading of the Restriction leaves no room to distinguish among the three subsections. If the Restriction applies only when the speaker intends to falsely represent an election official (as the district court held), then its definition of what constitutes false representation of an election official could have been limited to the conduct set forth in (a)(1): "[r]epresenting oneself as an election official." But subsections (a)(2) and (a)(3) go further and criminalize "conduct that gives the appearance of being an election official" and "conduct that would cause another person to believe a person engaging in such conduct is an election official." The district court's interpretation reads each subsection to criminalize the exact same conduct. That reading renders Subsections (a)(2) and (a)(3) superfluous. Just as courts cannot properly read into a statute a provision that is not there, they cannot erase the meaning of clearly distinct provisions.

These significant legal errors regarding the meaning of a new felony offense that is already chilling core political speech serve only to aggravate Plaintiffs' constitutional injuries.

B. The district court's decision is inconsistent with the Supreme Court's guidance regarding the significance of fundamental rights.

The district court also erred by applying a standard of review that is far below the demands of the Kansas Constitution and runs contrary to prior decisions of the Kansas Supreme Court, as well as federal cases considering speech and association challenges brought under the First Amendment. When a law impermissibly regulates and chills protected political speech by reducing

its overall quantity, it violates Section 11 of the Kansas Constitution Bill of Rights. Although the Supreme Court has not specified a standard for evaluating laws challenged under Section 11 specifically, it has explained that its free-speech protections are "generally . . . coextensive" with the fundamental rights guaranteed to all Americans by the First Amendment. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). And the Kansas Supreme Court has been clear that when "a fundamental right is implicated" under the Kansas Constitution, it often provides *more* protection than its federal counterpart. *See Hodes v. Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663-71, 440 P.3d 461 (2019) (applying a 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"); *see also e.g.*, *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860 (1984) (recognizing that the freedom of speech protected under the Kansas Constitution is "among the most fundamental personal rights and liberties of the people."); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (describing "free speech" as a "fundamental right"). Even under federal law, when laws regulate or threaten core political speech, like the Restriction does here, constitutional protections are at their "zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988); *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002) (applying "strict scrutiny" in challenges to laws that restrict "the overall quantum of speech available to the election or voting process.").

The district court's decision turns the Supreme Court's constitutional precedent on its head. First, in accepting Defendants' atextual reading of the statute at issue, the district court found that the Restriction imparts "no violation of Plaintiffs' free speech rights under Section 11." Ord. at 10. The court reached this conclusion after only a cursory assessment of the voluminous evidence that Plaintiffs-Appellants submitted in support of their Motion demonstrating the significant impact the

Restriction has had on their constitutionally protected activities. Then, instead of applying heighted or strict scrutiny to Plaintiffs-Appellants' claims (as it should have under relevant precedent), the district court found that the Restriction passed muster under either the "rational basis" or "'flexible balancing'" test articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Ord. at 11.

As noted above, this test is not the one that federal courts apply to speech and associational claims like those at issue here; *Anderson-Burdick* is applicable to right-to-vote claims and is driven by concerns about federalism that arise when federal courts review state election laws (clearly not the case here). But even more fundamentally, Plaintiffs-Appellants' claims are raised entirely under the Kansas Constitution—they raise no federal constitutional claims at all—and the district court's legal analysis is at fundamental odds with the line of precedent from the Kansas Supreme Court that firmly establishes that when fundamental rights like the freedoms of speech and association are abridged, Kansas courts apply strict or significantly heightened scrutiny. *See McKinney*, 236 Kan. at 234 ("Freedom of speech and of the press are secured against abridgment by the federal and state Constitutions. They are among the most fundamental personal rights and liberties of the people.").

For similar reasons, the district court significantly erred in *presuming* the constitutionality of H.B. 2183 § 3. Even after acknowledging that the Kansas Supreme Court held *just two years ago* that statutes that have the effect of restricting fundamental rights *are due no such presumption*, *Hodes*, 309 Kan. at 673-74, the district court declared that "[b]ecause there is no such declaration by the Kansas Supreme Court in regard to Section 11 [of the Kansas Constitution specifically], the general presumption of constitutionality applies to the challenged provision." Ord. at 4. The only way that this conclusion could possibly be correct would be if the Kansas Supreme Court were to

declare that the protections the Kansas Constitution guarantees the rights of speech and association are not "fundamental." But the Court *has already* clearly found that they are. *See McKinney*, 236 Kan. at 234. Even if that were not the case, the Court has been clear that at the very least they are co-extensive with federal free speech rights, which are protected by the "zenith" of constitutional scrutiny in federal court, *Meyer*, 486 U.S. at 416; *Chandler*, 292 F.3d at 1241. It is inconceivable that federal courts would view these rights as "fundamental," but for some reason (and the district court did not suggest what that might be) the Kansas Supreme Court would not. This legal error is especially significant because, if adopted by courts throughout the state, statutes that regulate fundamental free speech and association rights would be presumed constitutional—in direct contradiction to the Supreme Court's recent and unequivocally clear pronouncement in *Hodes*.

In short, by applying an improper standard that is lower than even the federal level of scrutiny for restrictions on core political speech, and by disregarding the fundamental interests inherent in the right to speak and associate under the Kansas Constitution, the district court's decision sends a clear signal that Kansas courts have departed from their previous full-throated protection of fundamental rights. Such a signal should be decisively disavowed and warrants immediate attention from the Supreme Court.

EXPEDITING TRANSFER AND BRIEFING SCHEDULE

Plaintiffs-Appellants additionally request expedited resolution of this transfer motion and that an expedited briefing schedule be set thereafter. Kansas Supreme Court Rule 7.01 provides that the Supreme Court "on motion may advance other cases as justice or the public interest may require." Justice and the public interest require expedited treatment in this case. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). This holds especially true in the context of voter outreach because "[t]he nature of elections, moreover, is that time is of the essence," and

"when each chance [to vote] is gone, it is gone." *Tennessee State Conf. of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 711 (M.D. Tenn. 2019). As detailed above, the Voter Education Restriction has already forced Plaintiffs-Appellants to forego many of their plans for voter education and registration both for the August primary and the lead up to the November election. *See* 2d Lightcap Aff., Ex. 8, ¶¶ 3-4; 3d Lightcap Aff., Ex. 11, ¶¶ 3-8; 3d Hammet Aff., Ex. 12, ¶¶ 4-6. The unique voter engagement that each of these activities would have produced is forever lost, and the number of such missed opportunities continues to grow with each passing day that the Voter Education Restriction hampers the Plaintiffs-Appellants' important work.

More importantly, though Plaintiffs-Appellants have made every effort to resolve this matter as speedily as possible, the normally applicable appellate timeline would not allow this case to be decided until long after the October 12, 2021 deadline for voter registration. *See* Kansas Supreme Court Rule 8.02. In other words, if this case is not determined on an expedited schedule, Plaintiffs-Appellants will—through no fault of their own—be effectively denied *all* opportunity to obtain meaningful review of the Voter Education Restriction prior to the upcoming general election. This would be a particularly unjust outcome because it is not only Plaintiffs-Appellants' rights that are at stake; the democratic participation that Plaintiffs-Appellants facilitate aids in producing representative election results and reinforcing public trust in the integrity of the electoral process. Thus, expedited consideration is needed not only to promote justice by affording Plaintiffs-Appellants the review to which they are entitled, but also to protect the public's interest in ensuring that important questions with ramifications for the upcoming election are decided at a time when they are still meaningful, before an election takes place under the shadow of a potentially unconstitutional restriction.

CONCLUSION

For the reasons stated herein, Plaintiffs-Appellants request that this appeal be transferred to the Kansas Supreme Court for final determination on an expedited basis and that the briefing schedule be truncated to afford Plaintiffs-Appellants relief prior to the November election.

Respectfully submitted, this 22nd day of September 2021.

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** Pro Hac Vice Motions Pending*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted by email on September 22, 2021 to:

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Exhibit C

United States Court of Appeals for the Fifth Circuit

No. 20-40643

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; DCCC,

Plaintiffs—Appellees,

versus

RUTH HUGHS, *in her official capacity as the Texas Secretary of State*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:20-CV-128

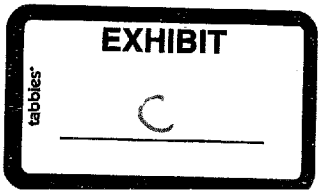
Before CLEMENT, ELROD, and HAYNES, *Circuit Judges*.

PER CURIAM:*

IT IS ORDERED that Appellees' opposed motion to supplement the record with attached declarations is DENIED.

IT IS FURTHER ORDERED that Appellant's opposed motion to strike portions of Appellees' brief that improperly reference non-record material is GRANTED.

* Judge Haynes concurs in the first two orders but would deny the motion for sanctions.



IT IS FURTHER ORDERED that Appellant's opposed motion to sanction Appellees' counsel is GRANTED. Appellees did not notify the court that their latest motion to supplement the record filed on February 10, 2021 was nearly identical to the motion to supplement the record filed several months ago by the same attorneys, on September 29, 2020. Critically, Appellees likewise failed to notify the court that their previous and nearly identical motion was denied. This inexplicable failure to disclose the earlier denial of their motion violated their duty of candor to the court. Moreover, to the extent that their motion, without directly saying so, sought reconsideration of their already denied motion, the motion was filed beyond the fourteen-day window for filing motions for reconsideration set forth in Federal Rule of Appellate Procedure 40(a)(1) and Fifth Circuit Rules 27.2 and 40, and they did not seek permission to file out of time.

Appellees' only explanation for their redundant and misleading submission is that they construed the original denial of their motion to supplement the record as an order that applied only to the emergency stay proceedings. However, Appellees' original motion to supplement the record on appeal was not limited to the stay proceeding, nor was the order denying it so limited. There is no legal basis to support Appellees' *post hoc* contention that motions to supplement the record apply only to one stage of an appeal.[1]

If Appellees had any confusion about the application of the order, they could have and should have disclosed the previously denied motion in their new motion. Moreover, after Appellant notified Appellees that they

[1] When the panel granted a stay in this case in September 2020, it deferred a merits determination as to Appellees' standing. *See Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567–68 (5th Cir. 2020). But it had not deferred the entirely distinct question of whether Appellees could supplement the record on appeal. By the time the opinion was published, Appellees' motion to supplement the record had already been denied without caveat.

intended to file a motion for sanctions based on this lack of candor and violation of local rules, Appellees could have withdrawn their motion. But they did not. Instead, they stood by a motion that multiplied the proceedings unreasonably and vexatiously.

Sanctions are warranted in this case to deter future violations. The attorneys listed on the February 10, 2021 motion to supplement the record shall pay: (i) the reasonable attorney's fees and court costs incurred by Appellant with respect to Appellees' duplicative February 10, 2021 motion, to be determined by this court following the filing of an affidavit by Appellant and any response by Appellees, and (ii) double costs. *See* 28 U.S.C. § 1927; *Automation Support, Inc. v. Humble Design, L.L.C.*, 982 F.3d 392, 395 (5th Cir. 2020); *Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992); *Renobato v. Merrill Lynch & Co.*, 153 F. App'x 925, 928 (5th Cir. 2005).

The attorneys listed on the motion are also encouraged albeit not required to review Rule 3.3 of the Model Rules of Professional Conduct (Candor Toward the Tribunal) and complete one hour of Continuing Legal Education in the area of Ethics and Professionalism, specifically candor with the court. Further violations of this court's rules may subject the attorneys to further sanctions under this court's inherent powers.

Exhibit D

United States Court of Appeals for the Fifth Circuit

No. 20-40643

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; DCCC,

Plaintiffs—Appellees,

versus

RUTH HUGHS, *in her official capacity as the Texas Secretary of State*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:20-CV-128

ORDER:

IT IS ORDERED that Appellant's motion for determination of attorneys' fees in the amount of $8,700 is GRANTED. Appellant shall submit a bill of costs with respect to Appellees' duplicative motion on or before December 27, 2021.

LYLE W. CAYCE, CLERK
United States Court of Appeals
for the Fifth Circuit
/s/ Lyle W. Cayce

ENTERED AT THE DIRECTION OF THE COURT