No. 21-124378-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; TOPEKA INDEPENDENT LIVING RESOURCE CENTER; CHARLEY CRABTREE; FAYE HUELSMANN; and PATRICIA LEWTER

Plaintiffs-Appellants

v.

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

Defendants-Appellees

APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR REVIEW

Appeal from the Kansas Court of Appeals
Case No. 21-124378-A

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

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I. – INTRODUCTION

Plaintiffs-Appellants are four organizations – League of Women Voters of Kansas ("LWV"); Loud Light; Kansas Appleseed Center for Law and Justice, Inc. ("Appleseed"); and Topeka Independent Living Resource Center ("TILRC") – and three individuals who assert a facial constitutional challenge to K.S.A. 25-2438(a)(2) and (a)(3), which prohibits individuals who are not election officials from *knowingly* engaging in conduct that either (i) gives the appearance of being an election official or (ii) would cause another person to believe that the individual engaging in such conduct is an election official. None of these Plaintiffs, however, have standing to bring such claims. Indeed, the attack on this statute is a purely manufactured dispute.

Neither Plaintiffs nor their agents are at *any* risk of prosecution for undertaking the kind of conduct that they maintain renders them criminally vulnerable under the challenged statute. Plaintiffs argue that the Legislature's amendment of this statute in 2021 added a *subjective* component that could trigger criminal liability if some naïve voter with whom they interact – notwithstanding their best efforts to avoid any misrepresentations – happens to misconstrue Plaintiffs as election officials. But this embellished fear finds no support in the statutory text and would require the Court to ignore well-settled legal principles about how constitutional challenges to statutes must be evaluated. Plaintiffs' construction of the statute effectively reads the word "knowingly" and its *mens rea* requirement right out of the text. The dissent, meanwhile, does not even grapple with this point.

Thus, even if Plaintiffs' fear was genuine and sincere, it would also be unsound and insubstantial. And the law is well settled that a plaintiff's subjective and irrational fear of

prosecution is not sufficient to confer standing. Slip Op. at 15-16; *Laird v. Tatum*, 408 U.S 1, 13-14 (1972) ("Allegations of a 'subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

Without question, there is no "certainly impending" injury here, as is required for standing – and the Court's jurisdiction – to be implicated. *See Sierra Club v. Moser*, 298 Kan. 22, 33-34, 310 P.3d 360 (2013). To the contrary, Plaintiffs are actually better situated than they have ever been because they 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 difficult to conceive of better insulation from culpability. Yet for inexplicable reasons, Plaintiffs refuse to take "yes" for an answer. Whatever Plaintiffs' motivations may be in advocating for the most strained and uncharitable interpretation of K.S.A. 25-2438(a)(2) and (a)(3), the bottom line is that this case simply does not warrant the Supreme Court's discretionary review.

II. – STATEMENT OF THE ISSUE

Did the Court of Appeals properly conclude that the Plaintiffs have suffered no cognizable injury from K.S.A. 25-2438(a)(2) and (a)(3) and thus lack standing to challenge to the constitutionality of the statute?

III. – STATEMENT OF RELEVANT FACTS

Plaintiffs acknowledged in the affidavits accompanying their preliminary injunction motion that they *never knowingly* attempt to misrepresent election officials in any of their organizational activities. For example, Jacqueline Lightcap, the co-president of the LWV, stated: "At each in-person and virtual event, the [LWV] members have always represented

themselves as such, and not local elections officials." (R. I, 115 at ¶ 25). Similarly, Davis Hammet, president and executive director of Loud Light, conceded that he and his group's fellows and volunteers "always identified [themselves] as affiliated with Loud Light and not any governmental organization," (R. I, 123 at ¶ 23; R. I, 122 at ¶¶ 19-20). Caleb Smith, the Integrated Voter Engagement Director at Appleseed, likewise noted that the members of his organization "always correctly identify [themselves] as affiliated with Kansas Appleseed, and not any governmental office or body." (R. I, 131 at ¶ 18). And Ami Hyten, the executive director of TILRC, stated unequivocally, "Nobody – not myself, nor anyone else I'm aware of – wants to be mistaken for an election official, and to my knowledge, if anyone at the [TILRC] has been mistaken for an election official, we have moved swiftly to correct that misunderstanding. Nor am I aware of anyone at the [TILRC] or elsewhere intentionally misrepresenting themselves as an election official." (R. I, 142 at ¶ 26).

Both the Court of Appeals and the district court held that Plaintiffs had downplayed the word "knowingly" in K.S.A. 25-2438(a) to such a degree that they virtually rendered it null. Slip Op. at 16-18 ("The primary impediment to the appellants' ability to establish a substantial threat of prosecution is found with the mens rea assigned to the offense. . . . [T]he legislature sought to subject only those individuals to prosecution who 'knowingly' engaged in the conduct prohibited by the provision. . . . The record before us lacks any evidence of such 'knowledge' but teems with evidence to the contrary."); (R. III, 11-12) ("In light of their own evidence, it is difficult to credit Plaintiffs' fear of prosecution for knowingly engaging in false representation through certain conduct when Plaintiffs insist their members always correctly identify themselves as affiliates of their own organizations

and not as government officials."); (R. III, 11) (Plaintiffs "downplay the word 'knowingly' in [K.S.A. 25-2438(a)] almost to the point of ignoring it.").

The Court of Appeals further underscored that "[t]he requirement for a cognizable or actual injury is not satisfied where there is no evidence that a credible, substantial threat of future prosecution exists." Slip Op. at 22. Plaintiffs are unable to meet this threshold, the Court noted, because "one must engage in the prohibited conduct" in order to be subject to prosecution. *Id.* Indeed, Plaintiffs "do not, nor have they ever, engaged in the conduct prohibited by" the statute. *Id.*

IV. – ARGUMENT AND AUTHORITIES

Plaintiffs' Petition for Review is predicated on a fundamentally flawed reading of K.S.A. 25-2438(a)(2) and (a)(3). Plaintiffs argue that they are at risk of prosecution merely if their conduct *could* cause some naïve individual to mistake them for an election official, regardless of the fact that they had no intent to create such a false impression and have even taken steps to both prevent and disabuse the third-party from thinking they had some sort of official status. (Pet. 1). In fact, Plaintiffs suggest that they could be exposed to criminal liability under this statute irrespective of how unreasonable a third-party's mistaken view may be. This construction is illogical.

The statute's use of the word "knowingly" makes it clear that the relevant focus is on the conduct and state of mind of the actor/speaker, not the subjective views of the viewer/listener. As the Court of Appeals majority noted below:

> The definitions of knowingly mean that a prosecuting attorney conducting a charging assessment, or a jury weighing evidence adduced at trial, would need to find that the appellants were aware of the nature of the conduct of

> which the State complains. In other words, the appellants had to undertake their civic engagement activities knowing that they were reasonably certain to give the impression to event attendees, or "*would*," not *could*, cause an event attendee to believe the appellants were election officials. (Emphasis added.) (Slip Op. at 18).

The mere confusion of a listener, therefore, will not subject Plaintiffs to criminal liability. *Id.* at 19.

Plaintiffs allege that they know from experience that, no matter how hard they try to avoid giving off the impression that they are election officials, some foolish voters will still believe them to hold such official status by virtue of the nature of their work. It is hard to see how a facial constitutional challenge can prevail based on a plaintiff's purported telepathic skills. But even if Plaintiffs had such aptitude, a criminal conviction still would not be constitutionally permissible without the prosecution establishing that Plaintiffs harbored a culpable mental state. As the U.S. Supreme Court held in *Elonis v. United States*, 575 U.S. 723, 734 (2015), a basic principle of the criminal law is that "wrongdoing must be conscious to be criminal." (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). The Court explained:

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

A court, in fact, must "read into the statute" the requisite "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* at 736 (quotations omit-

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

Moreover, any focus on third-parties in K.S.A. 25-2438(a)(2) and (a)(3) logically must be judged by an objective, reasonable person standard. It defies common sense to suggest that an individual might be subject to prosecution just because there may exist some particularly gullible member of the public who will construe the act or conduct of such individual in the most illogical or unreasonable manner possible. Why Plaintiffs are advocating for such a preposterous interpretation is a mystery.

The notion that an individual could be convicted for violating K.S.A. 25-2438(a)(2) or (3) despite making every effort to avoid any potential misrepresentation of his/her non-official status strains all credulity and would necessitate a repudiation of the principles of statutory construction described above. This is all the more true when the individual has affirmatively corrected any misinterpretations of official status about which he/she became aware while interacting with the public (as Plaintiffs insist they do). No doubt, a prosecution under this statute would present a high hurdle. It would need to be reserved for individuals who (unlike Plaintiffs, according to the representations in their pleadings and affidavits), are knowingly deceiving voters into believing that they are election officials when they are not. But that obstacle provides no basis for invalidating the statute.

Moreover, this Court has long followed the canon of statutory construction that calls on judges to "interpret a statute in a manner that renders it constitutional if there is any

reasonable construction that will maintain the legislature's apparent intent." *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014). In advocating for an interpretation that disregards any element of culpability and instead suggests that a conviction may be grounded on the subjective views of a single simple-minded citizen who (i) believes that only governmental election officials can speak on voting/election matters and (ii) is impervious to Plaintiffs' efforts to correct any misperceptions about Plaintiffs' non-official status, Plaintiffs glibly cast aside this "constitutional avoidance" principle. But the law does not require the Court to ignore all plausible statutory interpretations that would avoid constitutional infirmities. To the contrary, the law mandates that the Court embrace such interpretations. And to the extent there is any ambiguity in the reach of this statute, the rule of lenity would further protect Plaintiffs. *See State v. Chavez*, 292 Kan. 464, 468, 254 P.3d 539 (2011) ("When there is reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction.")

Plaintiffs spill much ink about the alleged chilled speech they are experiencing due to their misinterpretation of the scope of this statute. (Pet. 9-12). Their injuries, however, are self-inflicted. Charitably characterizing their conduct, Plaintiffs voluntarily chose to limit certain activities based on their flawed reading of the statute's prohibitions. But their "concern fails to rise above a mere subjective fear, and such is not sufficient to carry their burden." Slip Op. at 22. "Again, those whose fears of prosecution are merely imaginary or speculative are not to be accepted as appropriate plaintiffs." *Id.* (citations omitted).

Judge Hill's dissent, meanwhile, ignores the undisputed facts and makes little effort to root his standing theory on any actual injury. He proposes a theory seemingly so broad

that a plaintiffs' mere subjective fear of culpability – no matter how irrational or untethered from statutory text – would provide a ticket into the courthouse. Like the Plaintiffs, he also minimizes the importance of the statute's *mens rea* requirement ("knowingly") and does not address the canon of construction dictating that (with rare exceptions for strict liability crimes) a statute be interpreted in such a way that the defendant must be blameworthy in mind before he can be found guilty. *See Elonis*, 575 U.S. at 734. With respect, his dissent is as flawed as Plaintiffs' Petition and is wholly unpersuasive.

In sum, there is no good reason for this Court to exercise its discretionary authority to review this case. At best, the case presents little more than a pedestrian issue of statutory interpretation and, even then, none of the Plaintiffs have experienced a cognizable injury sufficient to confer legal standing upon them to challenge the statute. The panel majority's reasoning for its holding on standing strictly adhered to this Court's established precedent. Plaintiffs, meanwhile, have misread the statute, needlessly foregone perfectly legal conduct, and inappropriately attempted to draw this Court into their quest to strike down a vast swath of the State's election integrity statute. The bottom line is that nothing here presents any issues of particular public importance, consequence, or attention. Accordingly, Defendants urge the Court to deny the Petition for Review.

Respectfully submitted,

/s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I certify that on this 15th day of August 2022, I electronically filed the foregoing Appellees' Response to Appellants' Petition for 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. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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