No. 2 2 - 124378-S

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,
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.

APPELLANTS' SUPPLEMENTAL BRIEF

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

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

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INTRODUCTION

The Kansas Constitution protects civic activities such as registering citizens to vote and providing information about upcoming elections. In 2021, however, the Legislature passed a law making it a felony for a person to engage in these activities knowing that an observer could or would form the mistaken impression that the civic-minded individual was an election official. As a direct result of this law, several organizations with long histories of non-partisan engagement in the election process significantly curtailed or entirely shut down their voter outreach operations. The members of these organizations do not intend to represent themselves as election officials or provide false information to voters; they seek only to encourage people to vote and assist them in accessing the franchise. Nonetheless, every time they register a voter or answer a question about election procedure, they risk prosecution. Because Kansas has no legitimate interest in preventing good-faith efforts to bring Kansans into the political process, the offending provisions of the law in question must be struck down.

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ARGUMENTS AND AUTHORITY

Although Appellants have engaged and seek to continue engaging in conduct prohibited by K.S.A. 25-2438(a)(2) and (a)(3), the Court of Appeals dismissed their challenge to those provisions for lack of standing. This was error. The laws in question continue to cause ongoing harm to Appellants and to chill

conduct protected by the Kansas Constitution. The Court of Appeals therefore should have reached the merits of Appellants' constitutional challenge and held that Appellants are likely to succeed on their challenge to sections (a)(2) and (a)(3) as violating Appellants' rights under sections 3 and 11 of the Kansas Bill of Rights as well as for being unconstitutionally vague and overbroad.

I. Appellants have standing to challenge K.S.A. 25-2438(a)(2) and (a)(3)

Appellants' inability to conduct their usual activities safe from fear of prosecution is an injury sufficient to confer standing. Sections (a)(2) and (a)(3) of K.S.A. 25-2438 (the "Challenged Provisions") make it a level 7 felony to knowingly engage in conduct that either gives the appearance of being an election official or that would cause another person to believe the person engaging in such conduct is an election official. The Legislature chose not to limit the Challenged Provisions to conduct *intended* to cause such results, instead sweeping in any conduct—however well-intentioned—that a person knows could cause confusion. Appellants are four non-profit, non-partisan organizations that historically have engaged in constitutionally protected voter registration and education activities and hope to continue doing so. But Appellants have greatly restricted their core activities because they know—from experience—that members of the public will mistake their volunteers for election officials. That injury is sufficient to allow Appellants to maintain their challenge. And even if it were not, Appellants would have standing to obtain judicial review of whether the law is unconstitutionally

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overbroad. The Court of Appeals' determination that Appellants lack standing therefore cannot be supported.

a. Legal Standard

The Court of Appeals identified the correct legal standard for standing to seek pre-enforcement review but failed to correctly apply that standard. "In pre-enforcement questions the injury in fact component of the standing inquiry is satisfied when a party establishes 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" Op. at 11 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). Appellants intend to engage in voter registration and education activities that "[i]n large measure, the parties do not dispute . . . fall[] squarely within the ambit of the First Amendment." Op. at 13. Because Appellants' activities create a credible risk of prosecution under either K.S.A. 25-2438(a)(2) or (a)(3), they have standing to challenge those statutes.

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b. The Challenged Provisions do not require intent to deceive

The plain text of the Challenged Provisions criminalizes engaging in conduct known to cause confusion with respect to whether someone is an election official. As relevant, the statute prohibits "knowingly engaging" in conduct that either "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." K.S.A.

25-2438(a)(2), (a)(3). Because the law does not specify otherwise, the "knowingly" requirement applies to "all the material elements of the crime." K.S.A. 21-5202. Thus, a crime is committed when a person (1) knows they are engaging in conduct and (2) knows that an observer could or would interpret that conduct as that of an election official.

The Court of Appeals improperly reads into the statute a requirement that the defendant *intends to cause* an observer's misapprehension. For example, the Court claims that "[t]he misidentification must be preceded by an act or acts . . . *with an eye toward the manifestation* of that specific result." Op. at 19 (emphasis added). Appellees likewise rewrite the Challenged Provisions to require intent; the first substantive sentences of their first substantive filing describe "a perfectly valid criminal statute that simply prohibits individuals from *knowingly* engaging in conduct *designed to convey* the false impression that they are an election official," (R. II, 97) (second emphasis added), and they more recently dismiss as "illogical" the argument that the Challenged Provisions allow prosecution "regardless of the fact that [the defendant] *had no intent* to create such a false impression." Appellees' Response to Appellants' Petition for Review ("Response") at 4. These arguments are based on the misapprehension that the Challenged Provisions are "designed to combat" activity with "nefarious or *deceptive* qualities," Op. at 15 (emphasis added), and that prosecution therefore "would need to be reserved for individuals who . . . are knowingly *deceiving*

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voters," Response at 6 (emphasis added). *See* DECEIT, Black's Law Dictionary (11th ed. 2019) ("The act of *intentionally* leading someone to believe something that is not true; an act *designed to deceive* or trick.") (emphasis added).

The Legislature could have limited the Challenged Provisions to deceptive or intentional conduct, but it did not. As the Court of Appeals recognized, "[a] person acts 'knowingly' . . . when such a person is aware that such person's conduct is reasonably certain to cause the result" prohibited by statute. Op. at 17 (quoting K.S.A. 21-5202). When the Legislature means to criminalize conduct involving the "conscious objective or desire . . . [to] cause the result," however, it does not use the "knowing" construction. It describes that type of *mens rea* using the words "with intent" or "intentionally." *See* K.S.A. 21-5202. And it does so elsewhere in the election code: the crime of "False impersonation as party officer" prohibits "willfully and falsely representing oneself to be an officer of any political party . . . *with the intent to deceive* any person." K.S.A. 25-2424 (emphasis added). The Challenged Provisions lack any such intent requirement, and neither the Court of Appeals nor Appellees may supply one. *See State v. Thomas*, 302 Kan. 440, 449, 353 P.3d 1134, 1140 (2015) (rejecting argument regarding *mens rea* requirement because "even should this court agree with [appellant's] reasoning, we have no authority to rewrite an unambiguous statute").

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c. Appellants' conduct falls squarely within the prohibition of the Challenged Provisions

The unrebutted affidavits submitted by the Appellants unequivocally

establish that they previously have engaged (and seek to engage) in conduct now prohibited by the Challenged Provisions. Because the Challenged Provisions lack an intent requirement, the prosecution need only show that the defendant knew that their conduct could or would cause confusion. Appellants engage in non-partisan activity such as registering voters and providing election information. Even though Appellants "embrace their respective callings and proudly display their affiliations while working in the community," Op. at 20; (R. I, 115 ¶ 25), sometimes people are confused. For example:

- The Executive Director of Appellant Topeka Independent Living Resource Center testified that "[a]s 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." (R. I, 140 ¶ 19.)
- The Integrated Voter Engagement Director for Appellant Kansas Appleseed testified that he and others "have been asked by citizens whether we were with one county board or another" and that "[a]t any given event, citizens will ask if Kansas Appleseed volunteers are affiliated with the local elections boards." (R. I, 131 ¶ 18.)
- The founder of Appellant Loud Light testified that he "vividly recall[s] individuals approaching [him during events] and

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asking in confusion whether [he] was with the county election office." (R. I, 122 ¶ 20.)

- The Co-President of Appellant League of Women Voters of Kansas described a festival last year at which the Sedgwick County Election booth was located next to the booth for the local League chapter, recognizing that "[a] Kansan strolling by during the busy festival could have easily mistaken the two booths for one another." (R. I, 114 ¶ 19.)

Such confusion is an inevitable result of the close overlap between Appellants' activities and those of election officials as well as the close relationships between Appellants and election boards. The Clerk of Douglas County testified in an unrebutted affidavit as to the importance of these now-disrupted relationships: due to the small size of his office he must "rely on outside groups to do much of the civic engagement work in the community, including almost all of [the] voter registration drives," and "[t]o enable [Appellants] and others like them to perform this crucial service, [his] office often provides them with materials to execute their registration drives." (R. I, 146 ¶ 7.)

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The record accordingly establishes that Appellants *know* their voter registration, education, and outreach activity "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." K.S.A. 25-2438(a)(2), (3). Appellants do not

want to cause confusion, and "when misidentification occurred [they] did not hesitate to promptly set the record straight." Op. at 20. But the law as written does not care what Appellants want or what effort they take to correct confusion when it is brought to their attention. It is enough that they engage in activities when they know that "misperceptions happen on occasion." Op. at 21.

d. Appellants reasonably fear prosecution

The majority opinion of the Court of Appeals relied on its erroneous reading of the Challenged Provisions to dismiss Appellants' fear of prosecution as "merely imaginary or speculative." Op. at 22. According to that opinion, Appellants cannot reasonably fear prosecution because they "do not, nor have they ever, engaged in the conduct prohibited by" the Challenged Provisions. Op. at 22. The support that the Court musters for this conclusion demonstrates the faulty premise on which it relies. According to the Court, "the affidavit from the Director of the Center sums it up best, wherein she stated: 'To be clear, nobody—not myself, nor anyone else I'm aware of—*wants* to be mistaken for an election official . . . .'" (emphasis in opinion). The Court of Appeals' emphasis is misplaced; that the Appellants do not "*want*" to be mistaken for election officials is not a defense to prosecution so long as they *know* such mistakes will occur. As explained above, they do.

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The Court of Appeals also downplayed the Attorney General's threat to enforce the Challenged Provisions against Appellants. On July 27, 2021, the Douglas County District Attorney announced that she would not prosecute crimes under the Challenged Provisions, specifically identifying "essential efforts

by trusted nonpartisan groups *like the League of Women Voters*" as falling within the statute. (R. II, 293) (emphasis added). The Attorney General responded swiftly, publishing a press release "in light of" the Douglas County District Attorney's announcement in which he repeatedly emphasized his authority to enforce "election-integrity laws," "including in Douglas County." (R. II, 291.) In doing so, the Attorney General did not state that he disagreed with the Douglas County District Attorney's conclusion that the law as written reached the activities of the Appellant groups that brought this suit. It is under these circumstances that Appellants "contend the statement from the Attorney General is a shot across the bow intended to put them on notice that if they persist in their activities, prosecution is likely to result." Op. 21. Any reasonable party in Appellants' position would interpret this exchange as a threat of prosecution. The Douglas County District Attorney's statement clearly communicated her conclusion that the Appellants' intended conduct would violate the Challenged Provisions, and the Attorney General's statement clearly communicated his belief that the law is a valid election integrity measure that he fully intends to prosecute (no matter what local prosecutors do), and pointedly offered no comfort to groups like Appellants to indicate that the Attorney General views their conduct to fall outside of it. If he intended to convey that the "essential efforts by trusted nonpartisan groups *like the League of Women Voters*" to which the Douglas County statement referred were not reached by the statute, one would

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have expected a very different message. Appellants do not have "a mere subjective fear" given that one prosecutor announced that their intended conduct would violate the law and a second quickly responded by promising to enforce that law.

e. Appellants have standing to challenge the statute as overbroad

The Court of Appeals' decision was also in error because Appellants have standing to bring an overbreadth challenge even if their activities do not fall within the prohibition of the Challenged Provisions (which they do). The normal standing requirements do not apply to overbreadth challenges. *See State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400, 408 (2014). When a statute is challenged as overbroad, the "party challenging [the] law as overbroad need not establish a personal injury arising from that law." *City of Wichita v. Trotter*, 514 P.3d 1050, 1053 (Kan. 2022). It is enough that the challenger alleges "the mere existence of the statute could cause a person not before the Court to refrain from engaging in constitutionally protected speech or expression." *Williams*, 299 Kan. at 919, 329 P.3d at 408.

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The Court of Appeals failed to properly evaluate Appellants' standing to seek overbreadth review of the Challenged Provisions. The test articulated by the Court required Appellants to "prove that (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications." Op. at 25.

Accordingly (per the Court), the "advancement" of Appellants' overbreadth challenge "would be stymied" because "their outreach and advocacy efforts simply do not fall within the type of conduct the statute is designed to combat." Op. at 25.

The Court of Appeals' rationale for rejecting Appellants' overbreadth standing suffers from two fatal errors. First, the Court's test applies to the *merits* of an overbreadth challenge, not Appellants' *standing* to have their overbreadth claim heard. *See City of Wichita v. Trotter*, 60 Kan. App. 2d 339, 368, 494 P.3d 178, 198 (2021), *aff'd in part, rev'd in part*, 514 P.3d 1050 (Kan. 2022) (appellant "needed to prove [these] two things *to establish his argument* that [the statute] was unconstitutionally overbroad") (emphasis added); *Williams*, 299 Kan. at 920, 329 P.3d at 408–09 (holding that appellant had standing but did not satisfy two-part test); *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) ("For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing.").

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Second, in addition to applying the two-part test to the wrong aspect of Appellants' challenge, the Court misapplied it: to succeed on the merits Appellants do not need to establish that "*their* outreach and advocacy efforts . . . fall within the type of conduct" prohibited by the statute. Op. at 25 (emphasis

added). Instead, "[a] criminal statute may be unconstitutionally overbroad when it makes conduct punishable which *under some circumstances* is constitutionally protected from criminal sanctions." *City of Wichita*, 514 P.3d 1050, 1054 (emphasis added).[1]

II. The Challenged Provisions violate sections 3 and 11 of the Kansas Bill of Rights

a. The Challenged Provisions infringe on Appellants' constitutionally protected activity

As explained above, the Challenged Provisions create the risk that Appellants could be prosecuted for engaging in protected civic activities. Voter registration and education "are crucial parts of our democracy" protected by sections 3 and 11 of the Kansas Bill of Rights. Op. at 21. Appellees do not dispute this point, nor could they do so credibly. *See id.* (collecting cases). Appellees instead argue (and the district court found) that the Challenged Provisions do not infringe on protected activity because they proscribe only "the conscious misrepresentation of one's status as an election official (i.e., lying)—which is clearly not protected activity." Brief of Appellees in the Court of Appeals at 16; *see also* (R. III, 10) ("[F]alsely representing that one is speaking on behalf of the government or impersonating a government officer is not protected conduct.").

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[1] Such circumstances may exist. Both the district court and the Court of Appeals based their analysis in significant part on "appellants' standard practice in clearly identifying their respective affiliations." Op. at 21. Although Appellants, their members, and their volunteers clearly identify their affiliation when engaging in voter contact activities, activities such as registering voters and providing information about upcoming elections are protected activity even when conducted by individuals not affiliated with Appellants. Under the Challenged Provisions, any citizen engaging in such activities faces prosecution, even if they do not intend to cause the misapprehension.

The plain text of the Challenged Provisions is not so limited: it extends far beyond lying or impersonating a government officer to reach any conduct that could ((a)(2)) or would ((a)(3)) make someone believe the speaker was an election official, even if the speaker does not intend to convey that impression. The statutes therefore may reach the type of activities that are central to Appellants' missions—activities that none dispute are protected by the Kansas Constitution.

b. The Challenged Provisions are overbroad and vague

The Challenged Provisions must be struck down as both overbroad and vague because they criminalize a significant amount of constitutionally protected activity and provide little guidance to those wishing to engage in election activities without violating the law. A law is unconstitutionally overbroad where "(1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications." *Smith v. Martens*, 279 Kan. 242, 253, 106 P.3d 28 (2005). A law is unconstitutionally vague where it fails to "convey[] a sufficiently definite warning of the proscribed conduct." *In re Comfort*, 284 Kan. 183, 199, 159 P.3d 1011 (2007). The Challenged Provisions satisfy both tests.

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Protected activity is at least a significant part—if not the entirety—of the Challenged Provisions' target. The types of intentional misrepresentations that Appellees describe as falling outside of constitutional bounds are prohibited by K.S.A. 25-2438(a)(1), which criminalizes knowingly "[r]epresenting oneself as an election official." Anyone engaging in conduct intended to convey the impression

that they are an election official can be prosecuted under section (a)(1), which Appellants do not challenge. To give effect to the Challenged Provisions, they must cover conduct that is *not intended* to convey the impression of being an election official but may do so anyway—including protected conduct such as registering voters and providing information on elections that may yield confusion because it is the type of conduct in which election officials regularly engage. And there is no way of severing the law's constitutional from its unconstitutional applications short of rewriting the statute to impose an intent requirement.

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The Challenged Provisions furthermore fail to provide sufficient guidance to allow law-abiding Kansans to avoid proscribed conduct, as confirmed by the inability of Appellees—or anyone else—to describe the prohibited behavior. Appellees have yet to provide any explanation for what it means to "give[] the appearance of being an election official." K.S.A. 25-2438(a)(2). It cannot mean to actually represent oneself as an election official; that conduct falls under K.S.A. 25-2438(a)(1). Nor can it mean to engage in conduct that would cause someone to believe that one is an election official; that falls under K.S.A. 25-2438(a)(3). Section (a)(2) therefore must reach conduct that is not intended to and would not cause someone to believe that one is an election official. It is unclear what such conduct would be.

Section (a)(3) is equally unclear. Evaluating similar language in a similar

context—the definition of "express advocacy" in campaign ads as "[a] communication which, when viewed as a whole, *leads an ordinary person to believe* that he or she is being urged to vote for or against a particular candidate for office"—the U.S. District Court for the District of Kansas held that the definition created "an unconstitutionally vague standard" because it swept in any ad where "reasonable people could disagree whether the communication urges a vote for or against a particular candidate." *Kansans For Life, Inc. v. Gaede*, 38 F. Supp. 2d 928, 937 (D. Kan. 1999) (emphasis added). Here, a person could be prosecuted under section (a)(3) for engaging in conduct that they do not believe gives the impression of being an election official so long as they know someone else might reasonably disagree—an impossibly confusing standard that makes criminality dependent on the unintended effects conduct might have on third parties.

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c. The Challenged Provisions serve no meaningful government interest

Appellees make no attempt to explain what interest the government has in criminalizing conduct such as registering voters or providing election information. Instead, they rely on their mischaracterization of the statute to assert an interest in "prevent[ing] individuals from engaging in conduct *designed to mislead* the public." Response at 22 (emphasis added). As explained above, the Challenged Provisions are not limited to conduct "designed to mislead"; they instead criminalize conduct that results in confusion where there is no intent to

cause that result. Given the panoply of statutory provisions aimed at combating "election-related mischief"—including prohibitions on representing oneself as an election official, K.S.A. 25-2438(a)(1); intimidating voters "for the purpose of . . . causing such person to vote for, or not for, any candidate for office or question submitted at any election," K.S.A. 25-2415(a)(1); transmitting "false information intended to keep one or more voters from casting a ballot," K.S.A. 25-2415(a)(2); and destroying or failing to deliver a voter registration application to the appropriate election official, K.S.A. 25-2421a—the Challenged Provisions serve little purpose other than to discourage civic participation.

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CONCLUSION

Appellants respectfully ask this Court to reverse the Court of Appeals and enjoin enforcement of the Challenged Provisions so that Appellants and other civic-minded entities and organizations across Kansas can return to advocating for participation in the political process without fear of prosecution.

Respectfully submitted,

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