No. 22-124378-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., TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Plaintiffs-Appellants,

vs.

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

APPELLANTS' REPLY BRIEF

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

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

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INTRODUCTION

As written, the Challenged Provisions, K.S.A. 25-2438(a)(2) and (a)(3), make it a felony for a person to engage in constitutionally-protected conduct, such as registering or educating voters, if the person knows an observer may believe that they are an election official, even if they do not intend to create that misapprehension. Appellants' challenge is grounded in the plain text of the Challenged Provisions; their statutory context, including definitions provided by the Legislature and usage across similar statutes; and Appellants' experiences being mistaken for election officials as they engage in voter education and registration work, as documented through record evidence.

Appellees' supplemental brief seeks to defend a different statute than the one that appears in the Kansas code, and parries arguments Appellants have not made. But this Court must consider the law that the Legislature actually enacted, and the arguments that Appellants assert—not strawmen in their place. Under this Court's precedents, the Court of Appeals' conclusion that Appellants lacked standing was erroneous and should be reversed, and the district court's denial of Appellants' motion for a temporary injunction was an abuse of discretion.[1]

[1] Many of the arguments Appellees make in their supplemental brief have previously been addressed in briefing at the Court of Appeals, which is before this Court together with the supplemental briefs. Kan. R. App. P. 8.03(i)(2). Rather than restate those arguments, Appellants briefly respond to a few new or particularly egregious assertions that Appellees make in their newest brief.

ARGUMENTS AND AUTHORITY

I. Appellees mischaracterize Appellants' position regarding the *mens rea* element of the Challenged Provisions.

Rather than engage with the arguments that Appellants have made, Appellees misstate and mischaracterize them. For example, Appellees claim that Appellants "labor under a mistaken belief that the actor's state of mind is irrelevant," Appellees' Resp. to Appellants' Suppl. Br. ("Opp.") at 4, but this is flatly contradicted by Appellants' briefing.

As Appellants have repeatedly argued, the Challenged Provisions *have* a *mens rea* requirement; the problem is that it does *not* require an *intention* to be mistaken as an election official, but simply the *knowledge* that one's conduct is reasonably certain to cause that mistake. *See, e.g.*, Appellants' Suppl. Br. at 5. Appellants "have greatly restricted their core activities because they *know*—from experience—that members of the public will mistake their volunteers for election officials." *Id.* at 2. Nearly every page of Appellants' Supplemental Brief refers to the "knowing" state of mind required by the statute. *See also, e.g.*, *id.* at 1, 3, 4, 5, 6, 7, 8, 12, 13, 14. And Appellants have always maintained the actor's *state of mind is* a necessary element; it is their *intent* that is irrelevant. *See id.* at 5 (explaining difference in Legislature's use of "knowing" and "intentional" in drafting statutes); *see also* Appellants' Ct. App. Merits Br. at 14-20; Appellants' Ct. App. Reply Br. at 7-11.

Appellees all but admit that observers *do* mistake Appellants as election officials but denigrate the people who make such mistakes as "naïve," "gullible," or the "lowest common denominator." Opp. at 5. This is unfair to the people of Kansas. The reality is that "confusion is an inevitable result of the close overlap between Appellants' activities and those of election officials," Appellants' Suppl. Br. at 7, and it is not surprising that such mistakes are regularly made. Indeed, the Legislature anticipated that this would be an issue and even discussed it in considering the Challenged Provisions. (R. I, 186) ("I know in particular the League of Women Voters has voter registration drives and they do have voter registration tables. And I can certainly see where this description would – would cover such an activity.").

Appellees' claim that Appellants must "resort to telepathy" or be "mind-readers" to "*know* from prior interactions . . . that they are improperly perceived to be election officials," Opp. at 5, is at odds with the undisputed factual record. Appellants know that they are improperly perceived to be election officials because that has been communicated to them. (R. I, 131 ¶ 18; R. I, 122 ¶ 20); Appellants' Suppl. Br. at 6. It defies common sense to assume that every observer who has had that misapprehension has told Appellants about it. It is sufficient that Appellants have had enough such interactions to know that when they engage in voter registration and education efforts, they are engaging in activity that "gives the appearance of being an election official"

or "would cause another person to believe a person engaging in such conduct is an election official." K.S.A. 25-2438(a)(2), (a)(3).

II. The plain language of the Challenged Provisions supports Appellants' standing.

For the reasons discussed above and in prior briefing, because the plain language of the Challenged Provisions puts Appellants at risk of prosecution if they continue to engage in their ordinary voter registration and education efforts, they have standing to bring their claims. *See also, e.g.*, Appellants' Suppl. Br. at 2-11; Appellants' Ct. App. Reply Br. at 1-7.

Knowing that conduct will cause certain results is not the same as *intending* to cause those results. *See* Appellants' Suppl. Br. at 5. The Legislature has made the distinction clear: to cause a result "with knowledge" means to be aware the result will likely occur; to cause it "with intent" means to *desire* that it occur. K.S.A. 21-5202(h), (i). By its terms, Section (a)(3) of the Challenged Provisions criminalizes "knowingly . . . engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official." K.S.A. 25-2438(a)(3).

Notably, the statute does *not* state that belief must be reasonable, only that the actor must know their conduct would cause it. The Legislature regularly passes statutes that include a "reasonableness" limit; it did not do so here. *Compare* K.S.A. 25-2438(a)(2), (a)(3), *with* K.S.A. 21-5714 (making it

unlawful "for any person to distribute or possess with the intent to distribute any substance which is not a controlled substance . . . under circumstances which would give *a reasonable person reason to believe* that the substance is a controlled substance" (emphasis added)); *see also* K.S.A. 21-5427(a)(1) ("Stalking is . . . [r]ecklessly engaging in a course of conduct targeted at a specific person which would cause *a reasonable person* . . . to fear for such person's safety.") (emphasis added).[2]

Appellees' attempt to import a reasonableness element from the statutory definition of "knowingly," Opp. at 3, misreads that definition. "A person acts 'knowingly' . . . with respect to a result of such person's conduct when such person is aware that such person's conduct is *reasonably certain to cause the result*." K.S.A. 21-5202(i). Here, "reasonably certain" is a measure of probability—not a requirement that the result itself must be reasonable. *See, e.g.*, *State v. Carr*, 300 Kan. 1, 81, 331 P.3d 544, 609 (2014), *rev'd and remanded*, 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016) (noting that "numerous federal, state courts hold change of venue required only when 'the prospects of the defendant not receiving a fair and impartial trial are

[2] It is also worth noting that, by their terms, the Challenged Provisions only apply to actors who do not "hold[] a position as an election official," making it a crime for them to engage in conduct that "gives the appearance" or "would cause another to believe" that they are an election official. K.S.A. 25-2438(a)(2), (a)(3). Because the person targeted by the Challenged Provisions cannot be an election official, anyone who believes that they are is necessarily mistaken.

'reasonably certain,' or 'likely'"); *see also* Black's Law Dictionary (11th ed. 2019) (defining "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain").

Similarly, Appellees (and the Court of Appeals) insert into the Challenged Provisions a safe harbor that simply is not there. *See* Opp. at 4 (arguing it "is not supported by the statute" to contend that someone may be "susceptible to prosecution *even if they actively and openly try to avoid such a mistaken belief by third parties*"). For reasons discussed in prior briefing, this reading of the statute is itself erroneous. Appellants' Ct. App. Merits Br. at 17-20; Appellants' Ct. App. Reply Br. at 11-12.

Appellees' argument that the Challenged Provisions "address . . . indirect and/or subtle conduct *designed to create* a false appearance of election official status," Opp. at 14-15 (emphasis added), is also not supported by the statutory text. Under the definitional statutes passed by the Legislature to which this Court must refer, conduct that is "designed to create" a result is conduct engaged in with the "conscious objective or desire" of causing the result, that is: "with intent." K.S.A. 21-5202(h).

The various canons of statutory construction to which Appellees refer are also unavailing. They cite the axiom that "wrongdoing must be conscious to be criminal," Opp. at 6, but there is no dispute that the conduct the Challenged Provisions criminalize must be conscious—it just need not be *intended to*

produce the prohibited result. Appellees similarly invoke the rule of lenity, which "prohibit[s] a finding that unknowing, innocent mistakes may be prosecuted," *id.,* but again there is no dispute that the conduct at issue must be "knowing." Nor does the rule of lenity permit the Court to rewrite the statute passed by the Legislature. *State v. McCarty*, 482 P.3d 636 (Kan. Ct. App. 2021), *review denied* (Feb. 25, 2022). And, if the Challenged Provisions are interpreted as Appellees argue, they are superfluous because Section (a)(1) *does* prohibit "[r]epresenting oneself as an election official."[3]

The Douglas County District Attorney recognized that Appellants' conduct falls under the Challenged Provisions. Appellees respond by asserting that it would be "dangerous . . . to defer to the Douglas County prosecutor's comments in interpreting the statute," Opp. at 7, but this again is a foil. Appellants do not argue this Court should *defer* to the Douglas County prosecutor, but the fact that she reads the law as Appellants do is certainly

[3] Appellants previously submitted a notice of supplemental authority of the decision in *Texas State LULAC v. Elfant*, No. 1:21-CV-546-LY (W.D. Tex. Aug. 2, 2022). The Fifth Circuit recently reversed that decision. Op., *Tex. State LULAC v. Elfant*, No. 22-50690, 52 F.4th 248 (5th Cir. Oct. 26, 2022). The bases for reversal do not apply here. That case involved a law that applied to voters, *not* directly to the plaintiff organizations. *Id.* at 253. Thus, the court found that "the presumption of a credible threat of prosecution does not apply." *Id.* In a case such as this, where the plaintiffs' conduct is directly implicated by the law, the court acknowledged the presumption *does* apply. *Id. LULAC's* separate conclusion about organizational standing, *see id.* at 250, is directly contrary to controlling precedent. *Kan. Bldg. Indus. Workers Comp. Fund v. State,* 302 Kan. 656, 678, 680, 359 P.3d 33 (2015). But even if it were not, Appellants meet this heighted standard, too. Appellants' Ct. App. Reply Br. at 1-7; Appellants' Suppl. Br. at 2-11.

relevant to evaluating Appellants' fear of prosecution. Appellees spill much ink deriding Appellants' interpretation of the statute as incredible. Yet, the record establishes that members of the Legislature and a Kansas prosecutor share Appellants' view.

III. Appellees' attacks on the League of Women Voters are improper and misplaced.

Appellees improperly attempt to rebut the Kansas League of Women Voters' assertions of injury by pointing to a news article they append to their supplemental brief. The article is outside the record, classic hearsay, and—perhaps even worse—Appellants misread it. Thus, even if the Court could consider it, it does nothing to undermine the Kansas League's standing.

But the Court cannot consider it. It is a misguided attempt to expand the record on appeal, and for that reason alone, it must be rejected. *State v. Bryant*, 285 Kan. 970, 982, 179 P.3d 1122, 1131 (2008); *Edwards v. Anderson Eng'g, Inc.*, 284 Kan. 892, 895, 166 P.3d 1047, 1051 (2007); *see also* Kan. R. App. P. 3.02(d)(4) (noting after appellate record has been transmitted by district court, parties must make formal motion to add documents to appellate record). It is also the "classical definition of hearsay." *State v. Hunter*, 241 Kan. 629, 637, 740 P.2d 559, 565 (1987).

The article also does not say what Appellees claim it says. Specifically, it is *not* proof that Kansas League members are registering voters themselves,

as Appellees contend. Opp. at 7-10. If anything, it further illustrates how the Kansas League has had to fundamentally alter the way it registers and assists voters, for fear of threat of prosecution under the Challenged Provisions. Before the Challenged Provisions, Kansas League members gave prospective voters registration forms to fill out, collected the completed forms, and returned them to county officials. Now Kansas League members—adorned in League sashes to avoid confusion about their affiliation—hand out information on how prospective voters can register to vote *on their own*. This is what is pictured in the article. *See* Opp. Ex. A, p. 2 (showing League member presenting a flyer about how prospective voters can register and participate in election themselves). Indeed, that the reporter *misidentifies* the League's actions as a "registration booth" only further shows how observers are likely to misunderstand Appellants' actions, *even when they do not intend—and work affirmatively to avoid*—that misunderstanding.

Appellees also mischaracterize what the Kansas League has said about the impact of the Challenged Provisions on its activities. Repeatedly, the Kansas League has stated that it has had to cease *or curtail* its activities as a result of the Challenges Provisions. (R. I, 115 ¶ 24) ("The [Challenged Provisions] will *make it harder*, and in *some cases* impossible, for the Kansas League to achieve its mission . . . .") (emphasis added); (R. IV, 2 ¶ 5) ("As a result of [the Challenged Provisions], however, the Kansas League has had to

significantly alter those plans. While the installation celebrating the centennial of the Nineteenth Amendment *is* at the Fair, the Kansas League is *not directly registering would-be voters* at the Fair given the risk of criminal prosecution and penalties arising from the [Challenged Provisions].") (emphasis added). And the Court of Appeals' decision confirms that courts have understood these representations as they have been offered. *See, e.g., League of Women Voters of Kan. v. Schwab*, 62 Kan. App. 2d 310, 313, 513 P.3d 1222, 1226 (2022), review granted (Aug. 26, 2022) ("In the wake of the law's passage, the appellants cancelled *or curtailed* various scheduled events.") (emphasis added); *id.* at 393 ("The appellants *have curtailed* their activities because of this law.") (Hill, J., dissenting) (emphasis added).

The constitutional harm does not end there: as Appellants have repeatedly explained, when they *do* engage in protected activities, it is much harder to find members or volunteers willing to participate. (R. IV, 17-18). This overall *diminution* in the quantum of core political speech is the injury the Appellants have consistently asserted from the commencement of this lawsuit. *See, e.g.*, *Chandler v. City of Arvada*, 292 F.3d 1236, 1241-42 (10th Cir. 2002) (applying "strict scrutiny" in challenges to laws that restrict "the overall quantum of speech available to the election or voting process.").

IV. Appellees' vagueness and overbreadth arguments rely on their atextual interpretation of the statute.

Appellees also fail to persuasively rebut Appellants' claims that the Challenged Provisions are unconstitutionally vague and overbroad. *See* Appellants' Suppl. Br. at 10-12, 13-15; Appellants' Ct. App. Merits Br. at 38-45. With respect to vagueness, Appellees remain unable to explain what conduct lacking constitutional protection is covered by (a)(2) that is not covered by (a)(1) or (a)(3). Appellees unwittingly prove the point, claiming that the Court of Appeals "correctly explained that the conduct prohibited by the statute must be undertaken 'knowing that [the activities] 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.'" Opp. at 16. That, of course, is a near-verbatim recitation of (a)(3) and offers no insight into (a)(2). Appellees likewise make no effort to explain what type of conduct without constitutional implications falls under (a)(3).

CONCLUSION

This Court should reverse the Court of Appeals and temporarily enjoin the Challenged Provisions.

Respectfully submitted, this 9th day of November 2022.

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CERTIFICATE OF SERVICE

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

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