No. 25-128,896-A
IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

UNITED KANSAS INC., *ET AL.*,

Plaintiffs – Appellants,

v.

SCOTT SCHWAB, KANSAS SECRETARY OF STATE, *ET AL.*,

Defendants – Appellees

On Appeal from The District Court of Saline County,
Honorable Jared B. Johnson, Judge, District Court
Case Nos. SA-2024-CV-000152; RN-2024-CV-000184

OPENING BRIEF OF APPELLANTS

HARTENSTEIN POOR & FOSTER LLC

SCOTT B. POOR (KS Bar No. 19759)
scottpoor@gmail.com
200 W Douglas Ave, Suite 600
Wichita, Kansas 67202
T: (316) 267 2315
F: (316) 262 5758

Counsel for Plaintiffs-Appellants United Kansas, Jack Curtis, Sally Cauble, Lori Blake, and Jason Probst

SHARP LAW LLP

REX SHARP (KS Bar No. 12350)
rsharp@midwest-law.com
4820 W 75th St
Prairie Village, Kansas 66208
T: (913) 901 0505
F: (913) 901 0419

Counsel for Plaintiffs-Appellants Brent Lewis, Elizabeth Long, Scott Morgan, and Adeline Ollenberger

ORAL ARGUMENT – 30 MINUTES
Served on the attorney general as required by K.S.A. 75-764.

TABLE OF CONTENTS

TABLE OF AUTHORITIES RELIED ON

NATURE OF THE CASE

This case concerns a state constitutional law challenge to Kansas's anti-fusion laws. Anti-fusion laws prohibit a political practice—common throughout the country as well as in Kansas at the time the Kansas Bill of Rights was ratified—wherein more than one political party could nominate the same candidate, whose name would then appear on each party's separate ballot line. Voters can then cast ballots for the candidate on the party line of their choice, after which each party's vote total for the candidate is tallied separately (to allow for a clear accounting of each party's support) and then combined to determine the total votes cast for the candidate.

That can send "an important message . . . to both the candidate and to the major party," especially when a cross-nominated candidate obtains a significant share of votes on a minor party line. *Swamp v. Kennedy*, 950 F.2d 383, 388–89 (7th Cir. 1991) (Ripple, J., joined by Posner and Easterbrook, JJ., dissenting from denial of en banc rehearing). It can also make the difference between winning or losing; "[m]any legendary city, state, and national leaders, including . . . Ronald Reagan, won important elections at least in part because they were able to appear on the general election ballot as fusion candidates." Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683, 683 (1995).

This constitutional challenge is brought by the United Kansas Party ("UKP"), a political party founded in 2023 to reduce partisanship and promote compromise in Kansas politics, along with two party officers, two political candidates nominated by the UKP in

the 2024 election, and four Kansas voters who want to vote for UKP candidates. Plaintiffs bring this lawsuit because the Kansas anti-fusion laws impose a significant burden on the party's ability to nominate its preferred candidates: qualified, serious, and moderate Kansans who have a chance—but no guarantee—of also becoming the nominee of a major party. Like every other recognized party, UKP should have its nominations placed on the ballot. Like all other voters, UKP members should be able to register support for their party when they vote. These associational and expressive acts are central to the political process and universally practiced in every partisan election.

But by categorically prohibiting a candidate from retaining a second nomination, Kansas's anti-fusion laws ensure that UKP will time and again have its nominations excluded because no reasonable UKP nominee would forsake the nomination of a major party, given the legacy advantage in the major party's larger number of registered voters. Thus, Kansas's anti-fusion laws place plaintiffs in an intolerable position: either (1) UKP relinquishes its right as a recognized party to nominate its preferred candidate on the ballot and instead supports a *competing* party in order to help elect the UKP candidate; or (2) nominate a lesser candidate on the UKP line, who will most likely take votes from the moderate candidate actually preferred by UKP, thereby actively hurting UKP's mission of fostering consensus and compromise and instead helping the more extreme candidate.

The district court, however, dismissed plaintiffs' case. It did so on the grounds that the free speech and free association provisions of the Kansas Constitution are supposedly "coextensive with the First Amendment," 2 ROA 239 (speech); 2 ROA 243 (association),

and therefore the court followed federal case law interpreting the U.S. Constitution that applied intermediate scrutiny and upheld Minnesota's anti-fusion laws against a First Amendment challenge. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

The district court's determination that the free speech and association provisions of the Kansas Bill of Rights are coextensive was reversible error. While Kansas courts have looked to federal law when interpreting the Kansas Bill of Rights, material textual and historical differences between the speech and associational guarantees in the Kansas Bill of Rights and the federal Bill of Rights suggest that the Kansas Bill of Rights has a broader scope. This makes the district court's inference—that the federal First Amendment puts a *ceiling* on the speech and association rights protected by the Kansas Bill of Rights—legal error. And there is no basis to dismiss when the fundamental speech and associational rights at issue here, namely the right of members of a political party to select their nominees for public office, are properly analyzed under strict scrutiny.

Indeed, even under less exacting scrutiny, this case still should not have been dismissed. While there is no doubt that *Timmons* upheld Minnesota's anti-fusion law under intermediate scrutiny due to the state's interest in promoting political stability, *see* 520 U.S. at 364–70, *Timmons* was decided in 1997 and constitutional scrutiny must be "based on present circumstances—not the circumstances when the restrictions were originally passed into law." *Cath. Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 429 (5th Cir. 2014). And under present circumstances—where the two-party system is polarized and allowing cross-nominations would encourage cross-partisan cooperation—the intermediate scrutiny

balancing should come out differently, particularly when all the facts of the petition are taken as true (which the district court should have done, but did not).

Accordingly, this Court should reverse the district court's dismissal and remand with instructions to deny the motion to dismiss on plaintiffs' free speech and association claims so that this case can proceed in district court—whether to summary judgment or a trial on the merits as appropriate. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 680, 440 P.3d 461, 503 (2019) (remanding for consideration of merits of dispute after articulating the proper standard of review).

STATEMENT OF ISSUES[1]

I. Whether the constitutional guarantees of speech and association in the United States Constitution put a ceiling on the textually broader guarantees of speech and association in the Kansas Bill of Rights? And, if the provisions are not interpreted in lockstep, whether strict scrutiny should apply due to the severe burden that Kansas's anti-fusion laws place on the core speech and associational rights of members of a political party to select their nominees for public office?

II. Whether, if strict scrutiny applies, the petition alleges a violation of the guarantees of speech and association in the Kansas Bill of Rights?

III. Whether Kansas's anti-fusion laws are constitutional under an *Anderson-Burdick*

[1] While plaintiffs preserve the argument and contention that Kansas's anti-fusion laws were passed to stifle minor party speech and association, 1 ROA 14–15, ¶¶49–52; 1 ROA 2–3, ¶5, plaintiffs do not challenge the dismissal of their equal protection claim in this appeal (claim 3).

intermediate scrutiny analysis when the allegations of the petition are accepted as true and the laws are analyzed under present circumstances?

STATEMENT OF FACTS

I. Fusion voting flourishes in Kansas during a period of intense political competition, but is then banned after the Republican Party swept the 1900 election

1. "Cross-nomination," also known as "fusion voting," refers to the nomination of a candidate for office by more than one political party, whose name then appears on each party's separate ballot line. Fusion voting flourished in the 1800s and early 1900s; it was an inherent feature of elections nationwide that allowed minor parties and their voters to play meaningful roles in state and national politics. *See* 1 ROA 12–13, ¶46. For example, antebellum anti-slavery Whigs and Democrats routinely sought the nomination of anti-slavery minor parties so that anti-slavery voters need not express support for a major party that supported slavery. *Id*.

2. Kansas was no exception, with parties routinely and successfully cross-nominating candidates for state and local office. 1 ROA 13–14, ¶¶47–48. Most prominently, fusion voting allowed a coalition composed of members of the Populist Party and the Democratic Party to win multiple elections in the 1890s and pursue a platform of railroad, usury, interest, and stockyard regulation notwithstanding general Republican dominance of statewide politics in Kansas in the nineteenth century. 1 ROA 13–14, ¶48; see generally Joel Rogers, Kansas & Fusion Voting: The Expansion and Shrinkage of

Democratic Participation & Responsive Representation in the Sunflower State, SSRN, at 6–18 (June 2024).[2]

3. However, after Republicans won the governorship and the Kansas House and Senate in 1900, Kansas banned fusion voting. 1 ROA 14, ¶49; Ch. 177, §§ 5, 6, 1901 Kan. Sess. Laws 316, 318. It did so on the urging of the governor (who prevailed in an election against a fusion candidate) who claimed fusion voting was supposedly a "fraud" and "should not be tolerated" because "[f]usion of principles is impossible." Kansas Senate Journal, 24–25 (1901);[3] see also 1 ROA 14, ¶49. To this day those laws, with subsequent amendments, prohibit a candidate from accepting the nomination of more than one party, K.S.A. 25-306e, from appearing on the ballot as the candidate of more than one party, id., and from appearing more than once on the ballot, K.S.A. 25-613.[4] Since the enactment of these statutes, no independent or minor-party candidate has won a statewide or federal election in Kansas; major-party candidates have won 99.8% of all state legislative races since 1912. 1 ROA 7, ¶26.

II. Kansas's discriminatory anti-fusion laws inhibit political association and speech by plaintiffs in the 2024 election

4. This constitutional challenge against Kansas's anti-fusion laws was brought by a coalition of individuals and organizations whose desired acts of electoral association

[2] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4867863.
[3] *Available at* https://play.google.com/books/reader?id=KI1KAAAAMAAJ&pg=GBS.PA24&hl=en.
[4] Since the filing of this appeal, the Kansas Legislature has further reinforced the statutory anti-fusion restrictions. *See* Kansas HB 2056 (enacted into law on April 10, 2025 without the Governor's signature).

and speech in the 2024 election were prohibited by Kansas's anti-fusion laws, just as the drafters of those laws intended.

5. The political party and party officers plaintiffs: Plaintiff United Kansas Party is a state-recognized political party which earned ballot access under K.S.A. 25-302 and 25-302a. 1 ROA 4, ¶15. An ideologically diverse group of moderate Kansas voters formed UKP in 2023 with the goal of creating a political party that could reduce partisanship and promote consensus and compromise. 1 ROA 6–7, ¶¶22–24. UKP's founders were motivated by the fact that nearly a third of Kansas voters registered as unaffiliated, indicating that a large portion of the electorate likely shares UKP's core concerns and priorities. 1 ROA 7, ¶25. Plaintiffs Jack Curtis and Sally Cauble serve as Chair and Vice Chair of UKP, respectively. 1 ROA 4–5, ¶¶15–16.

6. UKP and its supporters do not seek to nominate mere protest candidates who are destined to lose—and who, even worse, could become "spoilers," pulling votes away from the more moderate of the two major-party candidates and helping to elect the more extreme option. 1 ROA 8, ¶27. Rather, the UKP seeks to play a constructive role by nominating and helping to elect competitive candidates who share its values and its vision of responsible, practical governance and who are qualified to manage these important offices of public trust. 1 ROA 8, ¶¶27–30. UKP intends to keep trying—as best it can—to do so in future elections. 1 ROA 8–9, ¶30.

7. The candidate plaintiffs: Plaintiffs Lori Blake and Jason Probst were two such moderate, competitive candidates. So in March 2024, UKP nominated them as the

party's candidates for the 69th and 102nd District seats in the Kansas House of Representatives in furtherance of these goals. 1 ROA 9–10, ¶¶31–37 (Blake); 5 ROA 9–10, ¶¶31–35 (Probst). Both candidates shared UKP's concerns and priorities, and the candidates welcomed the UKP nominations. 1 ROA 2, ¶2 (Blake); 5 ROA 2, ¶2 (Probst).

8. However, following their victories in the August 2024 Democratic Party primary, Blake and Probst each received correspondence from the Kansas Secretary of State's Office advising them that, pursuant to K.S.A. 25-306e, they (1) must each choose to keep just one of their two nominations (else the Secretary would choose for them) and (2) that each candidate's non-selected nomination would be nullified. 1 ROA 10–12, ¶¶38–45 (Blake); 5 ROA 10–12, ¶¶36–43 (Probst). Although Blake and Probst wished to retain both their UKP and Democratic Party nominations, having no other choice they reluctantly submitted statements to the Secretary indicating that they chose to retain their Democratic Party nominations, so as to keep the ballot line of the more established party with a larger current number of registered voters. 1 ROA 209–10, ¶30. Pursuant to K.S.A. 25-306e, submission of these statements meant that Blake and Probst were "deemed to have declined [the UKP] nomination[s]," and in accordance with K.S.A. 25-613, their UKP nominations were not included on the November 2024 general election ballot. 1 ROA 210, ¶31. Blake and Probst both lost in the general election.

9. The citizen plaintiffs: Plaintiffs Brent Lewis, Elizabeth Long, Scott Morgan, and Adeline Ollenberger are all Kansas residents registered with the UKP who want to promote its candidates and political goals. 5 ROA 5, ¶17 (Lewis); 5 ROA 5, ¶18 (Long);

1 ROA 5, ¶17 (Morgan); 1 ROA 5, ¶18 (Ollenberger). Plaintiff Long is a Reno County resident, 5 ROA 5, who wanted to vote for plaintiff Probst on the UKP line because "when people like me vote on the United Kansas ballot line, we can send a message with our vote," namely that "whether the candidate is on the Democratic or Republican side, they'll know a big share of their votes came from voters like me fed up with partisan politics." 5 ROA 9–10, ¶33. Plaintiff Ollenberger is a Saline County resident who wanted to vote for plaintiff Blake on the UKP line to send "a clear demand for 'a new direction for our politics . . . focused on finding common ground and solving real problems' in lieu of 'partisan posturing and empty promises.'" 1 ROA 10, ¶35.

III. The district court dismisses the consolidated lawsuits brought by plaintiffs to halt enforcement of Kansas's anti-fusion laws

10. In anticipation of the Secretary's actions requiring candidates Probst and Blake to forfeit their UKP nominations, plaintiffs filed two (now consolidated) actions—one in Reno County (where the 102nd District sits) and one in Saline County (where the 69th District sits). 1 ROA 1 (Saline); 5 ROA 1 (Reno). The lawsuits sought declaratory and injunctive relief against the compelled forfeiture and nullification of Blake's and Probst's UKP nominations and their exclusion from the ballot. 1 ROA 24–25; 5 ROA 23–24. They alleged that Kansas's prohibition on fusion voting violated plaintiffs' fundamental rights of free speech, free association, and equal protection guaranteed by the Kansas Bill of Rights. 1 ROA 16–24, ¶¶53–81; 5 ROA 15–23, ¶¶51–79. They further alleged that Kansas anti-fusion laws were designed to stifle competition and that allowing candidates to freely accept nominations from a second political party would encourage

cross-partisan coalition-building and limit polarization. 1 ROA 2–3, ¶5; 1 ROA 6, ¶22; 1 ROA 10, ¶35; 1 ROA 21, ¶71.

11. Defendants-appellees were the relevant state and county officers for enforcing Kansas's anti-fusion laws: Scott Schwab, the Secretary of State of the State of Kansas, 1 ROA 5, ¶20, as well as Donna Patton, the Clerk of Reno County, 5 ROA 6, ¶21, and Jamie Doss, the Clerk of Saline County, 1 ROA 6, ¶21. Both lawsuits were consolidated in Saline County by the Kansas Supreme Court. 1 ROA 189.

12. After cross-briefing on motions to dismiss by defendants, 1 ROA 115–156, and a motion for summary judgment by plaintiffs, 1 ROA 272–351, the district court granted defendants' motion to dismiss and denied plaintiffs' motion for summary judgment. 2 ROA 223. After determining that plaintiffs have standing to pursue their claims, 2 ROA 228–30, the court addressed the appropriate standard of review, 2 ROA 230–34.

13. The court concluded first that "strict scrutiny is not the appropriate standard of review." 2 ROA 232. Instead, the district court applied a standard derived from (1) the reasonableness test articulated in *League of Women Voters of Kan. v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024), for claims brought under Article 5 of the Kansas Constitution (which is not at issue in this case); and (2) the Anderson-Burdick framework that the United States Supreme Court applied in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), to uphold Minnesota's anti-fusion laws against a federal constitutional challenge. 2 ROA 233–34.

14. Applying these standards, the court turned to the "legitimacy and strength" of the interests the State asserted as justification for the anti-fusion laws. 2 ROA 234. With frequent citation to Timmons, 2 ROA 235–38, the district court found that the interests proposed by the State were "legitimate and important," 2 ROA 238, even though it cited little basis in experience or otherwise outside of fraud in the 1888 election for concluding fusion voting might lead to electoral gamesmanship, 2 ROA 224.

15. The court next considered the nature and extent of the burdens the Kansas anti-fusion laws impose on plaintiffs' rights of free speech and association, and equal protection. 2 ROA 238–45. Starting from the premise that the Kansas Constitution provides no greater protection for such rights than the U.S. Constitution, 2 ROA 239, 243, the court again drew on the reasoning of Timmons, and concluded that the burdens of enforcing Kansas's anti-fusion laws on plaintiffs' rights are "not severe," 2 ROA 242, and are "greatly outweigh[ed]" by the "regulatory interests" the State asserted, 2 ROA 245; see also 2 ROA 250–52. The court next held that it was "precluded" even from considering plaintiffs' equal-protection claim because—regardless of any disparate impact the anti-fusion laws in fact have on the rights of parties like UKP, their members, and their candidates—the laws "treat all political parties identically" on their face. 2 ROA 246–47, 249. The court also noted that the result would be the same if it were to apply a balancing analysis to the equal protection claim. 2 ROA 250. The court accordingly dismissed the petition, denied plaintiffs' motion for summary judgment, and entered judgment for defendants. 2 ROA 252.

16. This timely appeal followed. 3 ROA 1.

ARGUMENT AND AUTHORITIES

The district court's dismissal of plaintiffs' free speech and free association claims should be reversed and remanded with instructions to deny the motion to dismiss. **(I)** The associational and speech guarantees of the Kansas and United States Constitutions should not be interpreted in lockstep, and the district court should have applied strict scrutiny given the broader scope of the Kansas Bill of Rights. **(II)** Under strict scrutiny, the motion to dismiss should have been denied.

Moreover, even if less-than-strict scrutiny applies, the motion to dismiss should still have been denied. **(III)** Constitutional scrutiny is meant to be applied based on present (and not past) circumstances, and defendants' mere speculation that the Kansas anti-fusion laws may promote legitimate state interests—speculation that in some instances improperly contradicts the allegations in the complaint—does not suffice to justify Kansas's anti-fusion laws at the motion to dismiss stage.

I. The district court applied the wrong standard of review to plaintiffs' speech and association claims; it should have applied strict scrutiny

The district court applied an incorrect standard of review. The district court should have applied strict scrutiny but did not. Plaintiffs argued in favor of strict scrutiny at the district court, *e.g.*, 1 ROA 226; 2 ROA 84, which the court rejected, 2 ROA 232. De novo review applies. *See Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 282 Kan. 365, 368, 144 P.3d 747, 750 (2006).

The district court did not apply strict scrutiny because it concluded that the free speech and free association provisions of the Kansas Constitution are supposedly "coextensive with the First Amendment." 2 ROA 239 (speech); 2 ROA 243 (association). Accordingly, the district court followed federal case law, namely the U.S. Supreme Court's decision in *Timmons*. *Timmons* held that Minnesota's anti-fusion laws should be analyzed under intermediate scrutiny under the *Anderson-Burdick* test[5] because Minnesota's anti-fusion laws imposed burdens that were, "though not trivial[,] . . . not severe." *Timmons*, 520 U.S. at 363. The Court concluded that the anti-fusion laws did not impose a severe burden on speech and association on the grounds that the Minnesota anti-fusion laws did not limit the ability of party members to engage in other types of political activities, namely the ability to "campaign for, endorse, and vote for their preferred candidate." *Id.* at 363.

The district court erred when it determined that the First Amendment puts a ceiling on the protections of the Kansas Bill of Rights. Material textual and historical differences between the speech and associational guarantees in state and federal law compel the conclusion that the Kansas Bill of Rights has a deliberately broader scope in this context. Therefore, case law interpreting the federal Bill of Rights should not put a ceiling on the speech and associational rights protected by the Kansas Bill of Rights.

---

[5] "Under the *Anderson-Burdick* test, the court first determines the extent of the burden the challenged law places on the right to vote. A severe burden is subject to strict scrutiny. But if the court characterizes the burden as something other than severe, the court weighs the competing interests. This so-called 'flexible' balancing test has led to a wide array of decisions on comparable state statutes." *League of Women Voters of Kan. v. Schwab*, 63 Kan. App. 2d 187, 207, 525 P.3d 803, 821 (Ct. App. 2023), *aff'd in part, rev'd in part*, 318 Kan. 777, 549 P.3d 363 (2024).

And when interpreting the comparatively broader Kansas Bill of Rights, Kansas courts should depart from *Timmons*, not least because the key inference in *Timmons*—that the burden of the Minnesota anti-fusion laws was not severe because of the supposed availability of other methods of engaging in speech and association, *see* 520 U.S. at 362–63—contradicts other, better-reasoned case law suggesting other methods of engaging in speech and association are irrelevant to the free speech and association analysis because courts should not "overlook an unconstitutional restriction upon some" speech and associational "activity simply because it leaves other" speech and associational "activit[ies] unimpaired." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) (Scalia, J.). In short, the Kansas anti-fusion laws should be understood to place a severe burden on fundamental speech and associational rights protected by the Kansas Bill of Rights because they prohibit a party from picking the eligible candidate of its choice—a burden that calls for strict scrutiny.

A. The protections for speech and association in the First Amendment to the United States Constitution should not put a ceiling on the textually broader protections for speech and association in the Kansas Bill of Rights

Kansas courts have the "authority to interpret the Kansas Constitution independently" and "in a manner different from parallel provisions of the [U.S.] Constitution," "which may result in our state Constitution providing greater or different protections." *State v. Albano*, 313 Kan. 638, 644–45, 487 P.3d 750, 756 (2021); *e.g.*, *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058, 1063 (1987); *State v. McDaniel*, 228 Kan. 172, 185, 612 P.2d 1231, 1242 (1980). Any other approach risks imperiling state

sovereignty, as "allowing the federal courts to interpret the Kansas Constitution seems inconsistent with the notion of state sovereignty." *State v. Lawson*, 296 Kan. 1084, 1091–92, 297 P.3d 1164, 1169–70 (2013). To do otherwise would also lead to the underenforcement of core state constitutional rights given that "[f]ederalism considerations may lead the U.S. Supreme Court to underenforce" federal "constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated." *Rivera v. Schwab*, 315 Kan. 877, 923, 512 P.3d 168, 196–97 (2022) (Rosen, J., concurring in part and dissenting in part) (quoting Jeffery J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law, at 175 (2018)).

When interpreting the Kansas Constitution, Kansas courts start with the text: "[T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design . . . ." *Wright v. Noell*, 16 Kan. 601, 607 (1876). Kansas courts will then "look to the historical record, remembering the polestar is the intention of the makers and adopters." *Hodes*, 309 Kan. at 623, 440 P.3d at 471.

Under that standard, Kansas courts will acknowledge "rights that are distinct from and broader than the United States Constitution" and "judicially protect[]" those rights "against governmental action." *Id.* at 624; 440 P.3d at 471. Thus, for example, a "substantial gulf in wording between" provisions in the Kansas and United States

Constitutions "cuts *strongly* against a lockstep interpretation of the Kansas constitutional right." *State v. Hall*, 564 P.3d 786, 791 (Kan. Ct. App. 2025) (emphasis added).

So, while there is no doubt that Kansas courts have looked to federal law when interpreting the relevant provisions of the Kansas Bill of Rights in the past,[6] there are both relevant textual and historical justifications for according to the speech and association provisions of the Kansas Bill of Rights a broader interpretation than their counterparts in the United States Constitution. As such, the U.S. Supreme Court's interpretation of the speech and association provisions of the First Amendment should not put a *ceiling* on the speech and associational rights protected by the Kansas Bill of Rights.

In this context, both the text and history of the Kansas Constitution support interpretations of free speech and associational rights broader than those in the U.S. Constitution. The text of Section 11—recognizing an affirmative right for "all persons [to] freely speak"—counsels against the limited construction sometimes applied to the negative framing of the First Amendment ("Congress shall make no law . . . abridging the freedom of speech."). As the Connecticut Supreme Court has recognized interpreting similar language in the Connecticut Constitution, the differing language "suggests that our state constitution bestows greater expressive rights on the public than that afforded by the federal constitution." *State v. Linares*, 232 Conn. 345, 380, 655 A.2d 737, 754 (1995); *see also*

[6] *E.g.*, *League of Women Voters*, 318 Kan. at 787, 549 P.3d at 372 ("[T]he speech protections afforded by section 11 are, at a minimum, coextensive with the First Amendment."); *Prager v. State*, 271 Kan. 1, 37, 20 P.3d 39, 64 (2001) (U.S. Constitution's and the Kansas Constitution's free speech protections are "generally . . . coextensive" notwithstanding textual differences).

Developments in the Law–the Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1399 (1982) (provisions "phrased in terms of an affirmative individual right" "invite expansive protection for expression" (citing, inter alia, Kan. Const. Bill of Rights § 11)). And Section 3 not only grants an affirmative right ("The people have the right . . .") to "assemble," but also goes further by guaranteeing the "right . . . to consult for the common good" and "instruct . . . representatives," thereby ensuring greater protection of opportunities for collective action in public affairs than provided under federal law. Indeed, Section 3 was not modeled on the First Amendment, but rather it was modeled on the earliest state constitutions, which incorporated associational rights in direct response to pre-revolutionary attempts by the British Crown to suppress the people's use of collective power to influence colonial governance. *See* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1663–94, 1703–08 (2021).

History likewise suggests both provisions should be more protective of speech and associational activity relating to political party nominations and the ballot. Different historical contexts at the time of ratification can justify giving constitutional provisions with *identical texts* differing interpretations based on differing public understandings of the text at the time of ratification. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 82 (2022) (Barrett, J., concurring). In other words, if constitutional provisions are meant to be construed "in consonance with the objects and purposes in contemplation at the time of their adoption," *State ex rel. Stephan v. Finney*, 254 Kan. 632, 655, 867 P.2d 1034, 1049 (1994), then it necessarily follows that differing historical contexts can lead to differing

legal interpretations because words and phrases can have different meanings and understandings at different times, *see Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536, 544 (2015) (court must "consider the circumstances" surrounding Kansas Constitution's "adoption and what appears to have been the understanding of the people when they adopted it"). And here the historical context of the Kansas Bill of Rights differs substantially from the historical context surrounding the First Amendment to the United States Constitution.

When the First Amendment was ratified in 1791, the concept of free speech and association could not have accounted for the expressive value of a party nomination on the ballot; indeed, most votes were by voice and political parties did not exist. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) (plurality); *Ray v. Blair*, 343 U.S. 214, 220 (1952); *see also* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274, 276–77 (2001) (noting Framers' "antipathy toward the blight of . . . parties"). In contrast, by the time the Kansas Constitution entered into force in 1861, political parties were pillars of the political system. Voters used paper ballots (then printed by the parties) to send messages of support for both their parties and the parties' candidates. Cross-nominations were commonplace. *See* Rogers, *supra*, at 5–14; *cf. Simpson v. Osborn*, 52 Kan. 328, 34 P. 747, 749 (1893) ("each political party has a perfect right to select its candidates as it pleases" and "that there is nothing in the law, nor in reason, preventing two or more political parties . . . from selecting the same individuals"). Indeed, the Kansas Constitution was ratified in

the immediate aftermath of the formation and ascent of—and drafted by individuals with deep personal connection to—the most important minor party in American history: the Republican Party, a party that partially owed its existence to cross-nominations and the fusion of new political coalitions. *See* Corey M. Brooks & Beau C. Tremitiere, *Fusing to Combat Slavery: Third-Party Politics in the Pre-Civil War North*, 98 St. John L. Rev. 339, 359–63, 371–73 (2024). It would seem inconceivable that those same individuals would not see cross-nominations as core speech and associational activity.

In short, given that the text and history of Sections 3 and 11 "differ[] from any federal counterpart," this Court should not "simply go lockstep with federal caselaw," and the "measure for deciding when" those Section 3 and Section 11 "protections can be invoked" should "not necessarily mirror federal caselaw." *Hodes*, 309 Kan. at 688, 440 P.3d at 507 (Biles, J., concurring).

B. Strict scrutiny should apply to Kansas's anti-fusion ban because of the severe burden it places on the speech and associational rights of a political party to select their nominees for public office

This Court should conclude that the anti-fusion laws are subject to a heightened level of scrutiny than called for by the federal Constitution for at least two reasons. *First*, *Timmons*'s reasoning is in significant tension with other areas of free speech law such that its full incorporation into Kansas free speech law will likely confuse more than it will clarify. *Second*, the Kansas anti-fusion laws place a severe burden on the fundamental speech and associational rights of a political party to select their nominees for public

office—a prohibition on speech and association for which there are no reasonable alternatives in terms of impact and effectiveness.

1. This Court should not wholesale import Timmons into Kansas law due to Timmons's tension with other areas of free speech and association law

While *Timmons* is necessarily binding as to the level of First Amendment scrutiny that should be applied to anti-fusion laws, *see James v. Boise*, 577 U.S. 306, 307 (2016), this Court need not and should not follow *Timmons* when determining the treatment of Kansas's anti-fusion laws under the textually broader Kansas Bill of Rights.

For one, the Kansas Supreme Court has cautioned against "the wholesale, automatic adoption of federal constitutional jurisprudence" when doing so might not "produce . . . stability in the law for Kansans." *Lawson*, 296 Kan. at 1091, 297 P.3d at 1169. This is just such a situation; *Timmons* is in significant tension with multiple other strands of First Amendment jurisprudence such that its wholesale importation might unsettle other areas of free speech and association law.

For example, *Timmons* considers the availability of other methods of engaging in political speech when determining the burden that anti-fusion laws place on minor parties. *See* 520 U.S. at 362–63. But the standard practice in many free speech cases is the opposite, as the Chief Justice explained in *FEC v. Wisconsin Right to Life*:

> [T]he response that a speaker should just take out a newspaper ad, or use a Web site, rather than complain that it cannot speak through a broadcast communication is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and Web sites are not reasonable alternatives to broadcast speech in terms of

> impact and effectiveness. . . . [W]e [also] disagree with the dissent's view that corporations can still speak by changing what they say . . . . That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices. Such notions run afoul of the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

551 U.S. 449, 477 n.9 (2007) (plurality) (opinion of Roberts, C.J.) (cleaned up). Likewise, *Timmons*'s willingness to condone the use of state power to insulate the two major parties from competition is also in tension with a host of other decisions recognizing the importance of associational and expressive freedom in the political process and the hazards of state-imposed limits.[7]

Indeed, in *Jones*, the majority opinion even went so far as to cite Justice Stevens's *dissent* in *Timmons* both for the proposition that "[t]he members of a recognized political party unquestionably have a constitutional right to select their nominees for public office," 530 U.S. at 576 (quoting *Timmons*, 520 U.S. at 371 (Stevens, J., dissenting)), as well as the proposition that "a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support," *id.* at 575 (quoting *Timmons*, 520 U.S. at 372 (Stevens, J.,

[7] *E.g.*, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215–16 (1986) ("The statute here places limits upon . . . whom the Party may invite to participate in the basic function of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture . . . ˇ); *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("[T]he primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties.").

dissenting)). Needless to say, those are *exactly* the fundamental constitutional rights of speech and association that plaintiffs seek to enforce in this case.

2. Strict scrutiny should apply because Kansas's anti-fusion laws place a severe burden on fundamental speech and associational acts for which there are no reasonable alternatives

Even more important than *Timmons*'s inexact fit with other First Amendment cases, however, is the real and significant value of speech and associational acts at issue here to Kansas democracy and the Kansas marketplace of ideas. The Kansas anti-fusion laws interfere with plaintiffs' core speech and associational activities—namely, plaintiffs' ability as members of a political party to select their nominees for public office—activities by plaintiffs that should fall squarely within the Kansas Bill of Rights as "assembl[ing] . . . to consult for their common good . . . and to petition the government," Kansas Bill of Rights § 3, as well as "freely speak[ing], writ[ing] or publish[ing] their sentiments" on Kansas politics, Kansas Bill of Rights § 11. That burden should be considered severe because there are no reasonable alternatives in terms of impact and effectiveness to party nominations for the plaintiffs to communicate to the voters what the party represents and, thereby, attract voter interest and support. Strict scrutiny is therefore appropriate given the severe burden the Kansas anti-fusion laws place on fundamental speech and associational rights.

In reaching the opposite result, 2 ROA 241, the district court seemed to treat plaintiffs as wanting to engage in something similar to the speech at issue in *Burdick*, namely casting a "protest vote for Donald Duck." *Burdick v. Takushi*, 504 U.S. 428, 438

(1992). And it is likely true that any protest vote for a cartoon character is "merely a one-way communication confined to the electoral mechanic of the ballot." 2 ROA 241 (cleaned up). Voting for Donald Duck—assuming for the moment that the public ever becomes aware of the protest vote (a dubious assumption in most instances)—conveys little about the voter's political views or objections to the current political system.

But plaintiffs are challenging Kansas's anti-fusion laws because they *do not want* to cast protest votes that help elect extremist candidates that will further polarize Kansas politics. *E.g.*, 1 ROA 7–8, ¶¶26–27. Indeed, it is the anti-fusion laws that thrust upon UKP a Hobson's choice: run second-choice, hopeless protest candidates or be excluded from the ballot entirely. Therefore, the general ineffectiveness of protest votes as an expressive vehicle helps to *substantiate* the severe burden that the Kansas anti-fusion laws place on plaintiffs' ability to engage in expression and association. In contrast to a hopeless, anonymous, likely never-known protest vote, "a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Jones*, 530 U.S. at 576. The converse is true as well: "being saddled with an unwanted, and possibly antithetical, nominee" can "severely transform" a party and "color" its "message and interfere with" its "decisions as to the best means to promote that message." *Id.* at 579.

Rather than casting protest votes, UKP wants to gather the support of tens of thousands of Kansas voters (an act of association), 1 ROA 6–7, ¶24, nominate moderate candidates with the ability to gather public support (an act of association and speech), 1

ROA 8–9, ¶¶28, 30, and then persuade even more voters to vote the UKP line on the ballot to express support for expanding moderation in Kansas politics (another act of association and speech), 1 ROA 16, ¶56, 1 ROA 17, ¶58. That is also why the individual voter plaintiffs wanted to vote on the UKP party line on a general election ballot: to send a "message with our vote," namely that "whether the candidate is on the Democratic or Republican side, they'll know a big share of their votes came from voters like me fed up with partisan politics," 5 ROA 9–10, ¶33 (Long), as well as to make "a clear demand for 'a new direction for our politics . . . focused on finding common ground and solving real problems' in lieu of 'partisan posturing and empty promises,'" 1 ROA 10, ¶35 (Ollenberger). Those messages constitute "the core political speech of the voter." *League of Women Voters*, 318 Kan. at 810, 549 P.3d at 385.

As a result, contrary to the district court's view—which rejected plaintiffs' claims because, among other things, "the ballot itself" supposedly "cannot inspire any sort of meaningful conversation regarding political change," 2 ROA 241 (cleaned up)—the allegations of the petition demonstrate both how and why cross-nominations "offer the voters a very real and important choice" as well as the ability to "send[] an important message to the candidate." *Swamp*, 950 F.2d at 388–89 (Ripple, J., joined by Posner and Easterbrook, JJ., dissenting from denial of en banc rehearing). Indeed, as the petition further explains, such messages back when cross-nominations were legal in Kansas resulted in the Kansas Legislature listening and pursuing political agendas that had

previously received "scant" attention. 1 ROA 13–14, ¶48; *see generally* Joel Rogers, *supra*, at 6–18.

Likewise, while both the district court, 2 ROA 240, and the *Timmons* majority saw the issue differently, *see* 520 U.S. at 361, neither endorsements, nor campaigning, nor voting on a major party line has remotely comparable expressive or associational value to party nominations. Unlike a party nomination, which "is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support," *Jones*, 530 U.S. at 575 (cleaned up), "[t]here is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union," *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 n.18 (1989). "The ability of the party leadership to endorse a candidate *is simply no substitute* for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580 (emphasis added).

Further, when a candidate is precluded from having a second nomination, explaining victory or defeat—and the corresponding value of a particular speech, endorsement, or donation by plaintiffs—devolves into self-serving punditry and sinuous speculation. And that discourse produces a wide variety of differing views as to why a candidate won or lost, few of which are verifiable, let alone falsifiable. As a result, when a UKP candidate only appears on the ballot with a different party, public campaigning for the candidate and vote casting primarily produces associational and expressive gains for that *other* party—not the UKP. Contrast that with an election free of anti-fusion restraints, wherein voters and

parties can come together at the ballot box to send a clear message to both politicians and the public at large about the popularity of each party, its values, and its policy priorities.

Therefore, the alternatives for speech and association to cross-nomination that the district court credited do not obviate the expressive and associational harm produced by the anti-fusion laws because they "are not reasonable alternatives . . . in terms of impact and effectiveness." *Wisconsin Right to Life*, 551 U.S. at 477 n.9. In other words, "just as" courts "do not permit the government to silence the *New York Times* because the reporters could shout-out their stories in Central Park or publish them on the internet," this Court should not "permit the government to silence" plaintiffs' expression and association here "simply because the[y] . . . have other opportunities for speech." *Cath. Leadership Coal. of Tex.*, 764 F.3d at 430–31. Courts should not "overlook an unconstitutional restriction upon some" speech and associational "activity simply because it leaves other" speech and associational "activit[ies] unimpaired." *Jones*, 530 U.S. at 581.

The district court's brief mention of the non-public forum doctrine, 2 ROA 242, does not alter that conclusion. This is not a more traditional non-public forum case about whether individuals can wear particular t-shirts in the polling place. Rather, it is a case about plaintiffs' "right to associate themselves with others of like-mind, and to voice their political opinions at the ballot box," *Rivera*, 315 Kan. at 949, 512 P.3d at 211 (Biles, J., concurring in part and dissenting in part), by "select[ing] their nominees," *Jones*, 530 U.S. at 576 (cleaned up). That right "means little if [their] party can be kept off the election ballot," *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), as it is placement on the ballot that

"separates a political party from any other interest group," *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting).

Courts can and have applied a more demanding standard of review than mere reasonableness when examining access to the ballot. *E.g.*, *Norman v. Reed*, 502 U.S. 279, 288–89 (1992); *Kim v. Hanlon*, 99 F.4th 140, 155-59 (3d Cir. 2024). And this should be another such situation: the non-public fora doctrine does not license the state to "suppress expression merely because public officials oppose the speaker's view," *Lower v. Bd. of Directors of Haskell Cnty. Cemetery Dist.*, 274 Kan. 735, 746, 56 P.3d 235, 244 (2002) (cleaned up), and the entire point of Kansas's anti-fusion laws was to stifle competition, 1 ROA 14–15, ¶¶49–52; 1 ROA 2–3, ¶5. That too can provide a basis for "exacting scrutiny;" anti-fusion laws are "self-conscious devices that go above and beyond the advantages directly accruing to the two parties by virtue of the single-member geographical district." Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 685(1998).

* * *

In short, "[t]he members of a recognized political party unquestionably have a constitutional right to select their nominees for public office," *Jones*, 530 at 576, and anti-fusion laws should be treated as severe impositions on that right that should fall with the heartland of speech and associational activities protected by the Kansas Bill of Rights. Accordingly, the anti-fusion laws should be analyzed under strict scrutiny. *See Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993).

II. This Court should instruct the district court to deny the motion to dismiss because the anti-fusion laws do not withstand strict scrutiny as a matter of law

The determination that strict scrutiny applies justifies reversing and remanding. Here, however, this Court should go farther and instruct the district court to deny defendants' motions to dismiss on plaintiffs' speech and association claims so that this case can proceed in district court—whether to summary judgment or a trial on the merits as appropriate. *See, e.g.*, *Hodes*, 309 Kan. at 680, 440 P.3d at 503. The plaintiffs argued that the Kansas anti-fusion laws fail strict scrutiny at the district court, 1 ROA 317, but the district court did not need to reach the issue given its determination that strict scrutiny did not apply, 2 ROA 231-34. This issue should be reviewed de novo. *See Wachter Mgmt.*, 282 Kan. at 368, 144 P.3d at 750.

The standard of review on a motion to dismiss compels the conclusion that plaintiffs' claims should not be dismissed if strict scrutiny applies; "dismissal is improper" if a petition "state[s] any claim upon which relief can be granted." *Jayhawk Racing Props., LLC v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250, 254 (2021). To survive strict scrutiny in Kansas, defendants must show "(1) . . . a compelling interest; (2) the challenged action actually furthers that interest; and (3) it does so in a way that is narrowly tailored." *Hodes & Nauser, MDs, P.A. v. Kobach*, 318 Kan. 940, 951–52, 551 P.3d 37, 47 (2024).

Any attempt to show Kansas's anti-fusion laws survive strict scrutiny should fail for at least three reasons: (1) the claimed compelling interests are "generic statements of government interest that amount to little more than advancing a commendable goal," *id.* at

952; 551 P.3d at 47, (2) the governments' arguments that the anti-fusion laws further those interests improperly rely on speculation rather than any actual "evidence" that anti-fusion laws actually further the government's goals, *id.* at 953; 551 P.3d at 47–48, and (3) the anti-fusion laws are not "the least restrictive alternative" to accomplish the government's interests, *id.* at 954; 551 P.3d at 48.

Indeed, the primary point of support cited by the district court as potentially justifying the anti-fusion laws was "fraud" in the *1888 election*, 2 ROA 224, without any explanation of how fusion voting (as opposed to any number of other causes) produced that fraud. If anything, the historical record implies that the problems with the 1888 election were not connected to fusion voting because the policy changes prompted by the Kansas Legislature's election reform bill—adopting the Australian ballot and ending the practice of party-printed ballots—did not extend to fusion voting. *See* Rogers, *supra*, at 11. Instead, the legislature consciously continued to authorize fusion for several election cycles. *Id.* at 11-13.

Regardless, however, even assuming for the sake of argument that the problems with the 1888 election can be connected with fusion voting, the district court still did not explain why malfeasance over a decade prior to the enactment at issue supported the sweeping anti-fusion restrictions in the 1901 legislation, particularly given the allegations in the petition suggesting that electoral integrity justifications for the law were pretextual and the real goal of the 1901 legislation was targeting an intervening successful run of Democratic-Populist fusion candidates. *See* 1 ROA 14, ¶49 (noting that the goal of anti-

fusion legislation in Kansas was to "foreclose future opportunities for cross-partisan collaboration that might again threaten [the majority's] political dominance"); *see also* Rogers, *supra*, at 16–18. As a result, even a cursory review of the proffered interests advanced by the state credited by the district court reveals that state has little more than mere speculation that the Kansas anti-fusion laws actually further the state's claimed interests or are appropriately tailored. That is not enough. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) (observing that the Court has "never accepted mere conjecture as adequate to carry a First Amendment burden").

Ballot manipulation: The district court found that Kansas's anti-fusion laws avoided "ballot manipulation" by "preventing candidates from exploiting fusion voting by associating his or her name with popular slogans and catchphrases" or by obtaining multiple lines to "imply[] that they have more widespread support than exists." 2 ROA 235. But other than hypotheticals and perhaps a 1914 case from Illinois, *see* 2 ROA 235 (citing *People ex rel. McCormick v. Czarnecki*, 266 Ill. 372, 379–80, 107 N.E. 625, 629 (1914)), the district court offered no modern evidence that this happens in practice in any of the states (like Connecticut and New York) where fusion is lawful. Further, numerous other measures such as party name and ballot access regulations can more narrowly address the State's claimed concerns without categorically suppressing speech and association. *See, e.g.*, Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 Sup. Ct. Rev. 331, 339 (explaining "reasonable ballot access laws can prevent the

formation of many sham parties").[8] Indeed, as a practical matter, the prospect of a flood of new political parties in Kansas appears particularly low given the already existing barriers to forming a political party and gaining ballot access which are comparatively higher than the Minnesota scheme at issue in *Timmons*.[9]

Gamesmanship/Leeching: The district court determined that Kansas had a "strong interest" in its anti-fusion laws to prevent "gamesmanship at the nomination stage" by minor parties who might try to circumvent the rules for party recognition by nominating a major party's candidate and thereby supposedly leeching on the major party's support when trying to retain ballot access. 2 ROA 236. But, again, the decision cites no evidence that parties engage in such conduct or that Kansas parties as a practical matter could engage in such conduct under Kansas' election laws. For example, UKP nominated both of the candidate plaintiffs before they won their respective major party primaries. 1 ROA 10, ¶34; 5 ROA 9–10, ¶33. Indeed, if anything, it is the Kansas anti-fusion laws that allows the major parties—despite widespread dissatisfaction, 1 ROA 7, ¶25—to leech on minor parties by "go[ing] above and beyond the advantages directly accruing to the two parties

[8] The Supreme Court's discussion of ballot manipulation in *Timmons* included a disclaimer that the Court was neither applying strict scrutiny nor requiring narrow tailoring. *See* 520 U.S. at 365

[9] Only nominations from formal parties that have completed the process of earning (and retaining) statewide recognition can appear on the ballot in Kansas. K.S.A. 25-302, 25-302a. In contrast, a few hundred voters in a Minnesota legislative district can qualify as a "political party" and nominate someone as their candidate on the ballot. Minn. Stat. 204B.07(1).

by virtue of the single-member geographical district." Issacharoff & Pildes, *supra*, 50 Stan. L. Rev. at 685.

But, regardless, to the extent that there is a concern about party leeching there is a simpler and narrower solution that is less burdensome on speech and associational rights: requiring the minor party to have its own ballot line so that it only meets the threshold for retaining ballot access, *see* K.S.A. 25-302b, when enough voters affirmatively vote the eparty's line on the ballot. In such circumstances, the minor party "does not necessarily leech onto the larger party," but instead it "offer[s] the voters a very real and important choice and sends an important message to the candidate." *Swamp*, 950 F.2d at 388–89 (Ripple, J., joined by Posner and Easterbrook, JJ., dissenting from denial of en banc rehearing). Specifically, "if a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party." *Id.*

Competition and Choice: The district court found that Kansas's anti-fusion laws "help to facilitate greater competition and choice." 2 ROA 236. But the petition alleges the opposite: anti-fusion laws stifle competition and were in fact *designed to do so*. 1 ROA 14–15, ¶¶49–52; 1 ROA 2–3, ¶5. The data supports that allegation: major party candidates have won 99.8% of all state legislative races since 1912, 1 ROA 7, ¶26, even though there is wide dissatisfaction in Kansas with the present partisan political options, 1 ROA 7, ¶25. Thus, the competition interest should not be credited when resolving a motion to dismiss, because the district court is supposed to (but did not) ask "if everything the plaintiffs have

pled is true, are they entitled to relief?" *League of Women Voters*, 318 Kan. at 793, 549 P.3d at 376.

Stability: The district court found that anti-fusion laws promote the stability of the Kansas political system. 2 ROA 237. But the district court did not point to any evidence that anti-fusion laws actually guard against the types of excessive factionalism and instability that a state can legitimately try to regulate, as opposed to merely protecting Republican or Democratic primacy (which is *not* a legitimate state justification for restrictions on speech and association). *See Williams,* 393 U.S. at 32. Accordingly, the district court's speculation that Kansas anti-fusion laws help to avoid dangerous factionalism is not enough to survive strict scrutiny. *See id.* at 33 (rejecting state interest in preventing excessive factionalism because "the experience of many States" made clear this was a "remote danger" that is "no more than theoretically imaginable").

And, as with the competition justification, the allegations of the petition also belie the district court's conclusion that anti-fusion laws decrease polarization and promote stability. The petition, for example, alleges that the anti-fusion laws "prevent . . . collaborative . . . political dynamics." 1 ROA 2, ¶5. Indeed, the entire raison d'être of the UKP is that Kansas politics has become *too polarized* and therefore UKP could "provide a political home for those who believe that there is wisdom on the left and the right but that both major parties must stop indulging extreme and fringe views on their respective side." 1 ROA 6, ¶23; *see also* 1 ROA 6, ¶22 (noting existence of "bitter partisanship and rigid ideology" in Kansas). As a result, plaintiffs want to engage in political speech and

association to elevate "the voices and values of moderates—people who value collaboration, compromise and being solutions-oriented over ideological wars and beating the other side," 1 ROA 10, ¶35; *see also* 1 ROA 21, ¶71 (UKP is dedicated to nominating moderate candidates that will "not increase the likelihood of electing far-left and far-right extremists."). So, again, the question of whether Kansas's anti-fusion laws promote or inhibit polarization—particularly as applied to these plaintiffs—should not be resolved on a motion to dismiss. *See League of Women Voters*, 318 Kan. at 793, 549 P.3d at 376.

Accountability and Voter Confidence: The district court found that Kansas's anti-fusion laws helped to "safeguard the integrity of the nomination process by preventing a candidate from accepting nominations from multiple parties that may have competing platforms," which, in turn, helps to protect "accountability and voter confidence." 2 ROA 237. But the paternalistic idea that a state has any legitimate role in trying to police candidate adherence to party platforms has no place in free speech and free association jurisprudence; a state does not have a compelling interest in "producing nominees and nominee positions other than those the parties would choose if left to their own devices" as that represents "nothing more than a stark repudiation of freedom of political association." *Jones*, 530 U.S. at 582. To the extent individual voters might lack confidence in a candidate's ability to represent the interests of two parties, the solution is simple: they can withhold their support. As with other strategic speech and associational choices, parties and candidates should have to bear the consequences of their own freely made decisions at the ballot box, without state regulation.

Voter confusion: Lastly, the district court found that Kansas's anti-fusion laws help to prevent "voter confusion, at least for a time." 2 ROA 237. But, particularly under strict scrutiny, "a State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu*, 489 U.S. at 228. Judicial rejection is warranted here: the argument that fusion voting would confuse Kansas voters "is meritless and severely underestimates the intelligence of the typical voter." *Timmons*, 520 U.S. at 375–76 (Stevens, J., dissenting); *see also id.* at 370 n.13 (majority opinion) (state's proposed voter confusion interest "plays no part in our analysis today"). The district court provided no explanation as to why Kansas voters—particularly aided by explanations of fusion by both major and minor parties who are trying to win votes—could not understand a ballot with fusion candidates in the same way that their fellow Americans in New York and Connecticut do, or how Kansas voters in the 19th century did. Accordingly, the purported voter confusion interest credited by the district court should not survive strict scrutiny.

* * *

The purported state interests recognized by the district court have two common flaws: they are (1) unsupported by evidence and (2) require the district court to reject the allegations in the petition and draw inferences in the defendants' favor. So, if this Court concludes—as it should—that strict scrutiny applies, this Court should reverse and instruct the district court to deny the motion to dismiss the speech and association claims.

III. Even under intermediate scrutiny, Kansas's anti-fusion laws impose an unconstitutional burden on plaintiffs' speech and associational rights

The district court also erred by upholding Kansas's anti-fusion laws under a hybrid intermediate scrutiny standard of review founded on both federal *Anderson-Burdick* case law and the reasonableness test articulated by the Kansas Supreme Court in *League of Women Voters* for claims brought under Article 5 of the Kansas Constitution. 2 ROA 233–34. Plaintiffs raised the contention that the Kansas anti-fusion laws do not survive under intermediate scrutiny before the district court, 1 ROA 266; 2 ROA 117; 2 ROA 167, ¶13, and the district court rejected that contention, 2 ROA 234-52. The standard of review remains de novo. *See Wachter Mgmt.*, 282 Kan. at 368, 144 P.3d at 750.

The district court's determination that the Kansas anti-fusion laws survive intermediate scrutiny was reversible error for two reasons.

First, the *State v. Butts* reasonableness test that the Kansas Supreme Court used in *League of Women Voters* to evaluate claims brought under Article 5 of the Kansas Constitution should not be applied to claims brought under the Kansas Bill of Rights. Indeed, that is plain from *League of Women Voters* itself, where the Kansas Supreme Court assessed claims under the Kansas Bill of Rights distinctly from the Article 5 claim. *See* 318 Kan. at 805–07, 549 P.3d at 382–83.

Second, Kansas's anti-fusion laws fail intermediate scrutiny under the *Anderson-Burdick* standard when the allegations of the petition are accepted as true. But rather than accepting the plaintiffs' allegations that the Kansas anti-fusion laws were designed to stifle competition and that granting plaintiffs the ability to make and accept cross-nominations

would limit polarization, *e.g.*, 1 ROA 2–3, ¶5; 1 ROA 6, ¶22; 1 ROA 10, ¶35; 1 ROA 21, ¶71, the district court concluded that—on the basis of speculation—Kansas's anti-fusion laws, among other things, increase competition and decrease polarization, 2 ROA 236–37. That too was reversible error, as the district court must "accept all allegations in the petition as true." *League of Women Voters*, 318 Kan. at 807, 549 P.3d at 383–84.

A. The *Butts* reasonableness analysis for claims arising under Article V does not apply to violations of the Kansas Bill of Rights

The district court based its hybrid intermediate scrutiny standard of review on two strands of caselaw: first, the Kansas Supreme Court's *Butts* reasonableness standard from *League of Women Voters* for claims brought under Article 5 of the Kansas Constitution, *see League of Women Voters*, 318 Kan. at 800–02, 549 P.3d at 380–81, and second, the federal *Anderson-Burdick* caselaw for judging impositions on First and Fourteenth Amendment rights in the elections context. And while the district court's erroneous application of the *Anderson-Burdick* test is addressed *infra*, plaintiffs will first show the test from *League of Women Voters* should have had no place in evaluating whether there has been a violation of the Kansas Bill of Rights.

In particular, the reasonableness standard, first articulated in *State v. Butts*, is unique to the context of whether the State has required the "proper proofs" to validate eligibility to vote under Article V. *See League of Women Voters*, 318 Kan. at 800–01, 549 P.3d at 380–81 ("The *Butts* court found that the registration provision did not deprive any citizen of their article 5 right to suffrage but was instead a reasonable regulation . . . ."). Indeed,

League of Women Voters expressly *declined* to apply this standard to other claims arising under the Kansas Bill of Rights in the very same case. *Id.* at 805–07, 549 P.3d at 382–83.

That is why, for example, the Kansas Supreme Court explained that "[s]imply because a law does not violate article 5 does not mean that any regime of proper proofs is permissible," *id.* at 805, 549 P.3d at 382, and then proceeded to remand the claims under the Kansas Bill of Rights for additional consideration, *id.* at 807, 549 P.3d at 383. That remand would have been pointless if the *Butts* standard for Article V suffrage claims also applied to claims under the Kansas Bill of Rights, as the court had already determined that the *Butts* standard was satisfied. *Id.* at 805, 549 P.3d at 382. Accordingly, under the logic of *League of Women Voters*, the district court should not have applied the *Butts* standard for determining violations of the Kansas Bill of Rights.

The same logic also demonstrates why the district court was wrong to conclude Article 4's grant of power to the legislature to select the mode of voting also supports application of the *Butts* standard. 2 ROA 231–32. Just as with the Legislature's authority under Article 5 to provide for proper proofs of the right of suffrage, Article 4's grant of authority does not carry with it the authority to violate provisions of the Kansas Bill of Rights. Instead, when exercising that power, the Legislature "still must comply with other constitutional guarantees." *League of Women Voters*, 318 Kan. at 805, 549 P.3d at 382; *cf. Tashjian*, 479 U.S. at 217 ("The power to regulate . . . elections does not justify, without more, the abridgment of fundamental rights."). Thus, neither Article 4 nor Article 5 allows

a court to avoid application of the appropriate level of scrutiny for violations of the fundamental rights set out by the Kansas Bill of Rights.

B. The district court's *Anderson-Burdick* analysis focused too much on the result of *Timmons* and overlooked key distinguishing factors

Even assuming this Court disagrees with plaintiffs and concludes both that (1) the Kansas Constitution protections for speech and association are identical to those provided by the U.S. Constitution and (2) intermediate scrutiny accordingly applies per *Timmons*, that does not automatically establish the constitutionality of Kansas's anti-fusion laws. Defendants still have to demonstrate that its "asserted regulatory interests" in passing its anti-fusion laws are "sufficiently weighty to justify the limitation imposed on" speech and associational rights. *Timmons*, 520 U.S. at 364.

Of course, given that *Timmons* itself upheld Minnesota's anti-fusion laws and observed in dicta that "Constitution does not require . . . the approximately 40 other States that do not permit fusion[] to allow it," 520 U.S. at 370, the district court here understandably concluded that the Kansas anti-fusion laws survive intermediate scrutiny. But while the district court's instinct is *understandable*, it was also *wrong* given key differences between now and *Timmons* as well as the differing procedural postures of the two cases. (*Timmons* was up on summary judgment where the Supreme Court did not have to accept the petition as true, 520 U.S. at 355–56; meanwhile, this appeal reaches this Court on an appeal of a motion to dismiss where it does, *see League of Women Voters*, 318 Kan. at 793, 549 P.3d at 376.)

Key here is the rule that constitutional scrutiny is meant to be judged "based on present circumstances—not the circumstances when the restrictions were originally passed into law." *Cath. Leadership Coal. of Tex.*, 764 F.3d at 429. So, for example, the Voting Rights Act's coverage formula can be constitutional in the 1960s but not the 2010s,[10] affirmative action can be constitutional in 2003 but not 2023,[11] and contribution and disclosure limits keyed into the time necessary to disclose campaign contributions in the 1970s can be constitutional burdens on speech then but not now when "campaign contributions can be reported and made publicly available within minutes, and certainly within 24 hours."[12] In short, application of a constitutional "balancing test" should "rest[] on the specific facts of a particular election system, not on strained analogies to past cases." *Ariz. Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016).

In turn, then, *Timmons*'s conclusion that anti-fusion laws survived intermediate scrutiny in 1997 does not mean that they do as a matter of law in 2025. Circumstances and facts on the ground can change. And since *Timmons* was decided, the assumptions underlying the decision—namely that anti-fusion laws promote political stability and prevent electoral hijinks, 520 U.S. at 364–70, have been belied both by increasing political polarization and instability on the one hand as well as the apparent lack of any evidence

[10] *See Shelby Cnty. v. Holder*, 570 U.S. 529, 551 (2013) (observing that provision of the Voting Rights Act "met th[e] test" for constitutional scrutiny "in 1965, but no longer does").
[11] *See Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 213 (2023); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now . . . racial preferences will no longer be necessary . . . .").
[12] *See Family PAC v. McKenna*, 685 F.3d 800, 813 (9th Cir. 2012).

from any of the states that allow fusion voting that any of the malfeasance imagined by the State would actually occur.

That history is a problem for the State as it attempts to defend its burden on plaintiffs' speech and associational rights. In particular, while the State need not provide "elaborate, empirical verification of the weightiness of the State's asserted justifications" under intermediate scrutiny, *Timmons*, 520 U.S. at 364, that does not mean that *anything goes* and that "even a speculative concern" can be "sufficient *as a matter of law* to justify any regulation that burdens a plaintiff's rights," *Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018) (emphasis added). Just the opposite, in fact: the Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Shrink Mo. Gov't PAC*, 528 U.S. at 392, because if speculation alone was sufficient to justify a moderate burden on speech and associational rights as a matter of law, then the intermediate scrutiny standard called for by *Anderson-Burdick* scrutiny would be wrongly reduced "into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe," *Soltysik*, 910 F.3d at 449.

As explained above, a close look at the proffered interests credited by the district court reveals that the State has little more than mere speculation that the Kansas anti-fusion laws actually further the State's claimed interests. *See supra* Part II. And, worse, that speculation in many instances contradicts the allegations of the petition that must be accepted as true given the procedural posture. *E.g.*, 1 ROA 14–15, ¶¶49–52 (allegations that the anti-fusion laws were designed to—and in fact did—decrease political

competition); 1 ROA 2–3, ¶5 (same); 1 ROA 6, ¶22 (allegations that polarization is high and plaintiffs will aim to decrease political polarization); 1 ROA 10, ¶35 (same); 1 ROA 21, ¶71 (same); *see supra* Part II. Nor, in many instances, does the district court explain—as the tailoring and fit inquiries require—"why less burdensome . . . alternatives would not accomplish the goal[s]" that the anti-fusion laws seek to accomplish (such as restrictions on party name hijinks). *Soltysik*, 910 F.3d at 447.

As a result, this Court should reverse and remand even if intermediate scrutiny applies. *Timmons*—both because the passage of time has resulted in changed factual circumstances as well as the fact that *Timmons* was a summary judgment determination—does not support dismissal of *this petition now*. This Court should reverse and remand so that "both sides could present evidence and arguments supporting their respective positions," *Hodes*, 318 Kan. at 944, 551 P.3d at 42.

CONCLUSION

This Court should reverse the order granting the motion to dismiss and remand with instructions that the motion to dismiss plaintiffs' claims under Section 3 and Section 11 of the Kansas Bill of Rights should be denied.

Respectfully submitted,
HARTENSTEIN POOR & FOSTER LLC

/s/ Scott B. Poor
SCOTT B. POOR (KS Bar No. 19759)
scottpoor@gmail.com
SARAH FOSTER (KS Bar No. 14470)
sarah@smfosterlaw.com
200 W Douglas Ave, Suite 600

Wichita, Kansas 67202
T: (316) 267 2315
F: (316) 262 5758

Counsel for Plaintiffs-Appellants United Kansas, Jack Curtis, Sally Cauble, Lori Blake, and Jason Probst

SHARP LAW LLP
/s/ Rex Sharp
REX SHARP (KS Bar No. 12350)
rsharp@midwest-law.com
RUTH ANNE FRENCH (KS Bar No. 28492)
rafrench@midwest-law.com
4820 W 75th St
Prairie Village, Kansas 66208
T: (913) 901 0505
F: (913) 901 0419

PROTECT DEMOCRACY UNITED

BEAU C. TREMITIERE*
beau.tremitiere@protectdemocracy.org
FARBOD K. FARAJI*
farbod.faraji@protectdemocracy.org
CAMERON O. KISTLER*
cameron.kistler@protectdemocracy.org
2020 Pennsylvania Ave NW,
Suite 163
Washington, DC 20006
T: (202) 579 4582
F: (202) 769 3176

HOLLAND & KNIGHT LLP

JOHN F. WOOD**
john.f.wood@hklaw.com
BRENDAN H. CONNORS**
brendan.connors@hklaw.com
800 17th St NW, Suite 1100
Washington, DC 20006

T: (202) 955 3000
F: (202) 955 5564

Counsel for Plaintiffs-Appellants Brent Lewis, Elizabeth Long, Scott Morgan, and Adeline Ollenberger

**Pro hac vice*

***Applications for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I certify that on the 29th day of May 2025, the foregoing was electronically filed with the Clerk of the Court by using the Court's e-Filing system which will send notification of electronic filing to counsel for all parties of record.

/s/ Rex A. Sharp
Rex A. Sharp