ELECTRONICALLY FILED
2024 Oct 22 PM 4:19
CLERK OF THE SALINE COUNTY DISTRICT COURT
CASE NUMBER: SA-2024-CV-000152
PII COMPLIANT

IN THE 28TH JUDICIAL DISTRICT
DISTRICT COURT, SALINE COUNTY, KANSAS
CIVIL DEPARTMENT

UNITED KANSAS INC., ET. AL., *Plaintiffs*, v. SCOTT SCHWAB, KANSAS SECRETARY OF STATE, ET. AL., *Defendants*.	**LEAD CASE** Case No. SA-2024-CV-000152

UNITED KANSAS INC., ET. AL., *Plaintiffs*, v. SCOTT SCHWAB, KANSAS SECRETARY OF STATE, ET. AL., *Defendants*.	**CONSOLIDATED CASE from RENO COUNTY** Case No. RN-2024-CV-000184

Pursuant to K.S.A. Chapter 60

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The undisputed facts in this case establish serious constitutional injuries to ordinary Kansas citizens and their new party trying to promote moderation and compromise in Kansas governance—using the same channels for political association and expression utilized by everyone else. Thus, with nearly 190 pages of briefing already before the Court, Plaintiffs will not respond to every misrepresentation, error, or derisive comment in Defendants' latest submission. Rather, it is now inescapably clear that their entire case rests upon speculation and a disregard for unique features of the Kansas Constitution and clear rulings by the Kansas Supreme Court. And no matter

how many times Defendants invoke *Timmons*—nearly 70 times in the last brief—they fail to grapple with the reality that the unique facts and legal issues here present a very different case than the one decided in *Timmons* nearly 30 years ago.

Standing is no longer in dispute: several weeks after their threshold predictions about the viability of this case were conclusively disproved, Defendants now concede that Plaintiffs are properly before this Court. D. Opp. 19. On the merits, this case is ***not*** "a policy dispute over which mode of voting best serves the public." D. Opp. 69.[1] To the contrary, this is an action to vindicate the constitutionally protected rights of concerned citizens to participate on an equal footing with their fellow Kansans in the democratic process. The question is whether the challenged state conduct complies with the rights to free speech, association, and equal protection guaranteed under the Kansas Constitution. The law and undisputed facts permit only one conclusion: No.

The constitutional burdens are real and onerous; the asserted state interests are either conjectural, insubstantial, or inapplicable in this case; and Defendants do not even attempt to argue that the Anti-Fusion Laws are tailored or necessary to advance such interests. Plaintiffs prevail under strict scrutiny (as required by settled precedent), its *Anderson-Burdick* equivalent (which the severe burdens demand), or even a less rigorous level of *Anderson-Burdick* review (which Defendants propose instead). Below, Plaintiffs identify five cross-cutting factual and legal points demonstrating why this is so, and that Defendants try (but fail) to wish away. Plaintiffs then turn to points raised by Defendants specific to each of the constitutional claims, and explain why they cast no doubt on Plaintiffs' entitlement to summary judgment.

[1] This brief uses the following abbreviations: (i) the Secretary's parallel motions to dismiss filed prior to consolidation (joined by the Saline and Reno County Clerks) ("D. Mot."); (ii) Plaintiffs' consolidated motion for summary judgment and opposition to the Defendants' motions to dismiss ("P. Mot."); and (iii) the Secretary's consolidated opposition to Plaintiffs' summary-judgment motion and reply in support of Defendants' motions to dismiss ("D. Opp.").

TABLE OF CONTENTS

I. Defendants Try to Dodge Five Issues Critical to the Disposition of This Case

Defendants spend much of their brief knocking down straw men—decrying "partisan activists" and academics with an "agenda," and championing "sore loser" laws and restrictions on "party raiding"—but fail to grapple with key factual and legal issues central to the disposition of this case. *E.g.*, D. Opp. 39-42, 49-52, 62-63. Plaintiffs identify here five important issues spanning Plaintiffs' claims about which Defendants, apparently, have little to say: the first three highlighting Defendants' fundamental failure to grasp the nature and severity of the constitutional burdens on Plaintiffs; the fourth their complete misconception of the state interests relevant to this case; and the last a crucial step in the constitutional analysis that Defendants neglect entirely.

(1) The UKP Nominations Were Coercively Revoked by the State: Throughout their brief, Defendants pretend as if Rep. Probst and Ms. Blake "voluntarily" abandoned their UKP nominations and that the State is an innocent bystander in the whole affair. D. Opp. 47. Incorrect. Both candidates were proud to earn their UKP nominations and very much wanted to keep them. Probst Decl. ¶¶ 6, 11-12; Blake Decl. ¶¶ 7, 12-13. If they had their way, each would still remain UKP's nominee, and ballots in the 69th and 102nd House Districts would display their UKP nominations. Probst Decl. ¶¶ 12, 16; Blake Decl. ¶¶ 13, 17. The nominations were revoked—and the Plaintiffs' constitutional rights were severely burdened—because the Secretary applied the Anti-Fusion Laws to prohibit both candidates from retaining the nominations they lawfully earned. The Secretary was crystal clear that, if Rep. Probst and Ms. Blake did not specify which nomination to keep, the Secretary himself would choose which to revoke, the UKP or Democratic Party nomination. Curtis Decl. ¶¶ 12, 14-15 & Exh. B. Only once that coercive pressure was applied, when the only alternative was giving the Secretary free rein to decide their political fate, did Rep. Probst and Ms. Blake reluctantly surrender their UKP nominations. Blake Decl. ¶¶ 17-18

& Exh. C; Probst Decl. ¶¶ 16-17 & Exh. C. The State is therefore the but-for cause of the revocation of the UKP nominations and the attendant constitutional harms.[2]

(2) Endorsing a Candidate Is Not the Equivalent of Formal Party Nomination: Defendants attempt to sanitize their elimination of the UKP ***nominations*** by noting that UKP can ***endorse*** Rep. Probst and Ms. Blake. D. Opp. 26-29, 47-49. Yet, formal party nominations have unique informational, expressive, associational, and legal significance that endorsements entirely lack.

Anyone—an individual, interest group, labor union, editorial board—is free to publicly express support for and provide an "endorsement" to any candidate. Endorsements are sometimes offered to two competing candidates,[3] announced as satire,[4] or even provided by foreign leaders seeking to meddle in our affairs.[5] An endorsement carries no legal significance, and can be freely given and revoked in either the primary or general election context.

A "nomination," on the other hand, is a critical aspect of the electoral process under Kansas law. *See* K.S.A. 25-202; *cf. Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). Only formal parties recognized statewide can nominate candidates, and to do so they must follow the prescribed rules set forth in the Election Code.[6] By law, a party may only designate a single nominee for an office in the general election. K.S.A. 25-302. Voters are bombarded with countless

[2] In admitting that Plaintiffs have standing—and withdrawing their prior argument that Plaintiffs' injuries are not "fairly traceable" to state action—Defendants effectively concede this point.
[3] *E.g.*, Gabriel Sandoval, *Trump endorses Republican rivals in swing state Arizona congressional primary*, Associated Press (July 29, 2024), https://apnews.com/article/arizona-republican-primary-endorsement-hamadeh-masters-trump-0dda9c82bffa95c77411cf7624802283.
[4] *E.g.*, *The Onion' Officially Endorses Joe Biden For President*, The Onion (Oct. 2, 2024), https://theonion.com/the-onion-officially-endorses-joe-biden-for-president/.
[5] *E.g.*, *'Russia backs Kamala Harris': Putin's history of US election 'endorsements'*, Al Jazeera (Sept. 6, 2024), https://perma.cc/H58H-2QJ3.
[6] Kansas also permits candidates without a "party affiliation" to receive an "independent nomination" via signature petitions from qualified voters. K.S.A. 25-303. All such candidates appear on the ballot with the designation "independent."

public endorsements throughout the political campaign, but none of them appears on the ballot. That is the exclusive domain of party nominations. This is "an absolutely critical point" because it is "the last thing the voter sees before he makes his choice." *Cook v. Gralike*, 531 U.S. 510, 531-32 (2001) (Rehnquist, C.J., and O'Connor, J., concurring).

What is more, the only way that a party can retain its recognized status in Kansas is by formally nominating (and then turning out to support) a statewide candidate. K.S.A. 25-302b. If UKP endorses, but is barred from nominating, its preferred statewide candidates in 2026, it will lose its status as a recognized party. That UKP may "endorse" candidates is thus no answer to the severe constitutional burden arising from the revocation of its formal nominations.

(3) Plaintiffs Simply Want to Exercise the Same Political Rights Afforded Everyone in Kansas: Defendants, time and again, misapprehend the actual rights at issue in this case. Plaintiffs do not ask this Court to recognize new rights to use a "discrete mode of voting," D. Opp. 20, "to use governmental mechanics to convey a message," *id.* at 30 (quoting *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011)), to have a "'fair shot' at success," *id.* at 51 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008)), or "to win an election," *id.* at 64 (quoting *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985)). Instead, Plaintiffs are trying to exercise the same opportunities for political expression, association, and meaningful exercise of their votes currently authorized under Kansas law—and universally practiced by other candidates, parties, and voters in the State.

In Kansas, participation in the political process means candidates can earn the nomination of a recognized political party, keep that nomination through Election Day, and have it appear on the ballot. Parties can recruit and nominate candidates to be their standard-bearers, and retain this associational and expressive link throughout the campaign and on the ballot itself. Whenever a

party duly nominates a candidate in a given race, the party's voters have the ability to campaign on behalf of that candidate as the party's standard-bearer, and then use their ballots to register support for both their preferred candidate and their party—without having to express support for another party in order to vote for their preferred candidate. The State itself relies on voters' collective expression of support for a party on their ballots to determine whether the party has sufficient public support to warrant continued recognition and ballot access. P. Mot. 37 (citing K.S.A. 25-302b). Excluding Plaintiffs from these core aspects of the political process ***as afforded under Kansas law*** is clearly a constitutional burden, and a heavy one at that.

(4) Kansas Prohibits the Type of Unregulated "Party" Nominations Allowed in Minnesota That Were Central to the *Timmons* Majority Holding: The state interests credited in *Timmons* and reiterated here by Defendants cannot justify these anti-fusion restrictions because Kansas and Minnesota regulate nominations in fundamentally different ways, and the majority's reasoning was inextricably tied to Minnesota's relaxed nomination rules. P. Mot. 48-49. Defendants ignore this distinction entirely and take it for granted that the *Timmons* state-interest analysis can be applied wholesale to the distinct electoral system in Kansas. They are mistaken.

In Kansas, only nominations from formal parties that have completed the process of earning (and retaining) statewide recognition can appear on the ballot. K.S.A. 25-302, 25-302a. In contrast, a few hundred voters in a Minnesota legislative district can unilaterally anoint themselves a "political party" and nominate someone as the candidate of their "party" on the ballot. *See* Minn. Stat. 204B.07(1). This feature of Minnesota law was a key issue in the *Timmons* briefing and argument,[7] creating apprehension among the majority of freewheeling nominations or frivolous or

[7] This was a central part of Minnesota's argument. *E.g.*, Oral Arg. at 17:05-08 ("[I]t is so easy to get on that general election ballot for nonmajor party candidates, [which] opens the door for this kind of ballot manipulation."); Pet. Br. at 42 (highlighting the state's interest in avoiding "voter

grandstanding candidates from one election cycle to the next based on the issues *du jour*. In their decision, the majority specifically invoked Minnesota's lax nomination regime and the risk of inviting even more groups who are not "bona fide and actually supported" in the electorate onto the ballot. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365-66 (1997). These concerns do not apply in Kansas, which forecloses this risk by requiring tens of thousands of signatures and statewide, formal recognition for party nominations to appear on the ballot. K.S.A. 25-302a. *Timmons* therefore has limited, if any, persuasive value in assessing the state interests in this case.

(5) Regardless of the Standard of Review, This Court Must Assess Whether the Restrictions Imposed by the Anti-Fusion Laws Are "Necessary" and Sufficiently Tailored to Advance the Asserted State Interests: As Plaintiffs have shown, under Kansas precedent the standard of review for each claim is strict scrutiny, which requires not only that the Anti-Fusion Laws serve compelling state interests, but also that that the State prove its restrictions are "narrowly tailored" to advance them. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 663, 669, 440 P.3d 461, 493, 496-97 (2019); P. Mot. 42-43, 58-59, 63. Defendants contend that the *Anderson-Burdick* framework applies instead, but given the severity of the burdens these laws impose on Plaintiffs' fundamental rights, the highest level of *Anderson-Burdick* scrutiny would apply anyway, which like strict scrutiny requires that a challenged restriction be "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

But critically, even if—as Defendants maintain—a more relaxed level of *Anderson-Burdick* review were appropriate, whether that reserved for "minimally burdensome" regulations,

---

confusion," especially "when getting on the ballot is as easy as Minnesota makes it"); Pet. Reply Br. at 17 (emphasizing "Minnesota's policy of allowing easy access to the ballot").

or the intermediate degree of scrutiny applied where the burdens imposed fall somewhere between minimal and severe, *see Graveline v Benson*, 992 F.3d 524, 534 (6th Cir. 2021), *Anderson-Burdick* review still requires an assessment of whether Defendants' purported "interests make it ***necessary*** to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (emphasis added) (citations omitted). Defendants, however, not only miststate the appropriate standard of review, they pretend as if this separate analytical step, the law's necessity and tailoring, simply does not exist.

Here, it is clear that a categorical prohibition on candidates retaining and the ballot displaying two party nominations is in no way tailored or necessary to advance the asserted interests. *See generally* P. Mot. 45-54. As in *Norman*, the anti-fusion restrictions "sweep[ ] broader than necessary to advance" state interests because the state "could avoid [the purported] ills" through alternative means that do not impose gratuitous constitutional burdens. 502 U.S. at 290 (holding unconstitutional a state restriction on using certain party names because the state "could prevent misrepresentation and electoral confusion" by requiring "candidates to get formal permission to use the name from the established party they seek to represent"); *see Graveline*, 992 F.3d at 544 (applying requirement under *Anderson-Burdick* that the state prove "no less restrictive means by which" it could advance asserted interests).

In fact, the U.S. Supreme Court also has made clear that "prominent disclaimers" on the ballot "would eliminate any real threat of voter confusion" "as to the meaning" of "party labels." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454, 456-57 (2008). Kansas law already uses constitutional means to prevent "excessive factionalism" and Defendants' other hypothesized risks by, *inter alia*, utilizing single-winner legislative districts, setting reasonable thresholds for formal party recognition, and limiting expressive ballot nominations only to recognized parties. K.S.A. 25-702, 25-302a, 25-302. Not only could the State lawfully further

heighten the party recognition thresholds, but it could also set a reasonable limit on the number of nominations that a candidate may accept. *See* Or. Rev. Stat. Ann. 254.135(3)(a) (setting limit of three nominations). What the State cannot do is categorically revoke a recognized party's nomination simply because another party also nominates the same candidate. The existence of obvious, less burdensome ways to advance the State's asserted interests is a sufficient reason to rule for the Plaintiffs. *Norman*, 502 U.S. at 290 (electoral restriction deemed unconstitutional because the state had alternative ways to "avoid the[ ] ills" motivating restriction's adoption).

* * *

The Court could stop here: each of the foregoing issues highlights a fatal flaw in Defendants' analysis and illustrates why Plaintiffs should prevail. Viewed together, these issues compel the conclusion that Defendants' application of the Anti-Fusion Laws runs contrary to protections guaranteed in the Kansas Bill of Rights.

II. Revocation of the UKP Nominations Violates the Kansas Bill of Rights

Defendants endeavor to distinguish the cases cited by Plaintiffs, D. Opp. 23-25, but at the end of the day, they cannot explain away the reality that many judges, federal and state, Democratic and Republican, have concluded that anti-fusion restrictions impermissibly limit the exercise of core constitutional rights. *E.g.*, *Murphy v. Curry*, 70 P. 461 (Cal. 1902); *In re Callahan*, 93 N.E. 262 (N.Y. 1910); *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911); *Devane v. Touhey*, 304 N.E.2d 229 (N.Y. 1973); *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305 (3d Cir. 1999); *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996); *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996), *rev'd sub nom Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).[8]

[8] In *In re City Clerk of Paterson*, New Jersey's initial anti-fusion law had been superseded, but the

Defendants then labor to point out the obvious: there is a split of persuasive authority, as other judges have rebuffed legal challenges to anti-fusion laws. *See* D. Opp. 24. Yet, their cases from the turn of the 20th century, failing to grasp the constitutional gravity, have no persuasive value here: those courts did not have to grapple with the time-tested impact of anti-fusion restrictions on minor party activity; some ruled categorically that political parties cannot assert constitutional rights[9] or that individuals do not have a constitutional right to associate;[10] and others gave unchecked deference to the state legislature in matters of electoral regulations.[11]

Regardless of whether this Court applies strict scrutiny to each of the following claims (as required), strict *Anderson-Burdick* scrutiny (due to the severe burdens on Plaintiffs' rights), or instead a lower level of *Anderson-Burdick* review (as Defendants propose), the analytical steps are the same and the Court must actually scrutinize the disputed restrictions—assessing (1) the scope and severity of the constitutional injury, (2) the legitimacy and strength of the state's purported justifications, and (3) the necessity and tailoring of these restrictions to advance those state

court nonetheless clarified that the "Legislature . . . may pass laws to insure the security of the ballot and the rights of voters," but that it "has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office." 88 A. 694, 695 (N.J. Sup. Ct. 1913). As a result, the court had "at least very grave doubts of the power of the Legislature to dictate to the people of the state who shall be their choice, either as a candidate for nomination or as a candidate for election." *Id.* Years later, notwithstanding this clear guidance, the legislature adopted new anti-fusion laws.

[9] *See State ex rel. Shepard v. Superior Ct. of King Cnty.*, 111 P. 233, 238 (Wash. 1910) ("[T]he Constitution takes no concern of political parties."); *e.g., State ex rel. Metcalf v. Wileman*, 143 P. 565, 566 (Mont. 1914); *State ex rel. Mitchell v. Dunbar*, 230 P. 33, 37 (Idaho 1924).

[10] *See State ex rel. Runge v. Anderson*, 76 N.W. 482, 486 (Wisc. 1898) ("Mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care.").

[11] *See State ex rel. Bateman v. Bode*, 45 N.E. 195, 196-97 (Ohio 1896) ("The only question . . . is whether the general assembly has the power to pass an act providing . . . that the name of a candidate for office shall appear but once upon the ticket or ballot prepared by the board of elections. . . . The subject is clearly within legislative discretion."); *e.g., Todd v. Bd. of Election Comm'rs*, 64 N.W. 496, 496 (Mich. 1895); *Dunbar*, 230 P. at 37.

interests. *Burdick*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). In this process, this Court must reckon with more than a century of minor party irrelevance in Kansas since adoption of anti-fusion restrictions, and the now "well settled" principles "that partisan political organizations" enjoy constitutional protection and that the "freedom of association" is an essential political right, *Eu*, 489 U.S. at 224.

In this case about the meaning of the Kansas Constitution and the interaction of various Kansas statutes, the analysis of federal and Minnesota law in *Timmons* offers limited guidance. As noted, critical differences between the cases render certain aspects of the *Timmons* analysis entirely inapplicable here. *Supra* at 4-5; *see* P. Mot. 59-63. Were this case before the U.S. Supreme Court today, the Justices would confront a very different set of facts and legal issues, presented in a different legal landscape, than was encountered by the *Timmons* Court. What is more, the Kansas Supreme Court has been unmistakably clear that federal jurisprudence represents a ***floor***, not a ***ceiling***, when similar questions arise under the Kansas Constitution: the protections guaranteed by the Kansas Bill of Rights "are, at a minimum, coextensive with the First Amendment." *League of Women Voters of Kan. v. Schwab*, 318 Kan. 777, 787, 549 P.3d 363, 372 (2024) ("*LWV II*").

* * *

The Kansas Supreme Court long ago concluded that "each political party has a perfect right to select its candidates as it pleases, and have their names printed under its party heading," as "there is nothing in the law, nor in reason, preventing two or more political parties . . . from selecting the same individuals." *Simpson v. Osborn*, 52 Kan. 328, 34 P. 747, 749 (1893). That this ruling pre-dated adoption of the Anti-Fusion Laws, *see* D. Opp. 34, does not make these statements any less wise or applicable today. The revocation of these UKP nominations clearly contravenes the Kansas Constitution's guarantees of free speech, free association, and equal protection.

A. Defendants Violate Plaintiffs' Freedom of Speech

The undisputed facts clearly show that application of the Anti-Fusion Laws prevents Plaintiffs from freely engaging in core political speech and expressive conduct, imposing a heavy burden on their rights guaranteed by Section 11 of the Kansas Bill of Rights. Defendants fail to rehabilitate any of their asserted interests that supposedly justify this infringement, and they do not dispute that the restrictions are not tailored or necessary to address their imagined problems. Plaintiffs thus prevail under strict scrutiny or even a less demanding form of *Anderson-Burdick*.

1. This Case Presents a Significant Encroachment on Free Expression

Plaintiffs have explained in detail why the revocation of the UKP nominations imposes a severe burden on free speech. P. Mot. 30-38. The crux of Defendants' rebuttal is that, categorically and without exception, political expression loses constitutional protection if a ballot is involved. D. Opp. 26-31. Defendants twist themselves in knots, *id.* 35-36, trying to evade the simple fact that the Kansas Supreme Court stated several months ago that the "ballot . . . is the core political speech of the voter" under the Kansas Constitution. *LWV II*, 318 Kan. at 810, 549 P.3d at 385. Nor was this a new principle—the Court more than a century ago concluded in *Simpson* that the initial Australian ballot law permitting multiple nominations "enable[d] voters to ***express their real wishes*** by their ballots." *Simpson*, 34 P. at 749 (emphasis added).

Defendants nevertheless insist that this Court disregard *LWV II* and *Simpson* under the premise that the expressive character of the ballot is a novel concept rejected by ***other*** courts. D. Opp. 36-37. Obviously, "[t]his court is duty bound to follow Kansas Supreme Court precedent," especially as to the meaning and scope of the State Constitution. *State v. Belone*, 51 Kan. App. 2d 179, 211, 343 P.3d 128, 151 (2015). And Defendants themselves cite to a federal decision which concludes that the "regulation" of "party labels" on the ballot "affects core political speech." *Rubin*

v. City of Santa Monica, 308 F.3d 1008, 1015 (9th Cir. 2002); *see* D. Opp. 30 (citing *Rubin*). That case identifies yet another federal decision which "invalidated a regulation prohibiting [certain] political party designation[s] . . . , holding that party labels designate the views of party candidates and the regulations therefore hinder 'core political speech.'" *Rubin*, 308 F.3d at 1015 (quoting *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)).

Defendants are correct that the *Timmons* majority described the "primar[y]" function of ballots as "elect[ing] candidates" rather than "political expression." D. Opp. 26 (quoting *Timmons*, 520 U.S. at 362-63). But that is not to say the two are mutually exclusive, as the Kansas Supreme Court recognized in *LWV II*. And the U.S. Supreme Court has since walked back *Timmons*' deprecation of the ballot's expressive role, holding that the "legal effect" of an "expressive activity" "in the electoral process" does not "deprive[ ] that activity of its expressive component, taking it outside the scope of the First Amendment." *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010); *see also id.* at 231 (Thomas, J., dissenting) (agreeing with the majority on this point); *see also* P. Mot. 34, 42 (discussing *Reed*). This correction strikes a sensible balance: no plaintiff can force the state to open up new channels of expression in the political process, such as "write-in votes" or "extraneous messages, slogans, or qualifications on the ballot that a candidate or party might want to include." D. Opp. 30; *see Burdick*, 504 U.S. at 437-39. At the same time, when the state authorizes a specific channel of political expression, such as party nominations on the ballot, courts must consider the "expressive component" when scrutinizing the state's efforts to block its use. *Reed*, 561 U.S. at 195; *see Carrigan*, 564 U.S. at 128 (confirming that "an inherently expressive act remains so despite its having governmental effect"). And as Plaintiffs have stressed, they seek to make no greater use of the ballot as a vehicle for political expression than other voters, parties, and candidates are permitted under Kansas law. P. Mot. 40.

And even before the ballot itself comes into play, the burdens on political expression in the final months of a campaign are onerous: UKP and its voters can no longer advocate and urge support for UKP nominees in the 69th and 102nd Districts because the party no longer has nominees in either race. Curtis Decl. ¶ 20. Instead, to urge support for Ms. Blake or Rep. Probst necessarily requires UKP and its voters to advocate on behalf of the Democratic Party—just as the voters are again required to express support for the Democratic Party to cast their ballot for Ms. Blake or Rep. Probst. Curtis Decl. ¶¶ 21-22. Shorn of their UKP nominations, Ms. Blake and Rep. Probst can no longer truthfully present themselves to voters as the official UKP standard-bearers. Whether construed as impermissibly "compelled" expression or an "unconstitutional condition" on political participation, *see* P. Mot. 40-41, 44-45, the upshot is the same: there are heavy burdens on free expression when UKP and its voters must advocate for a competing party to support candidates who earned and for months held the UKP nomination, and one-time UKP nominees must curtail their free expression on the campaign trail.

For their part, Defendants insist there is no constitutional problem because UKP is free to provide "financial" support to Ms. Blake and Rep. Probst and to identify them "as the endorsed nominees of the party." D. Opp. 28-29. This theory is nonsensical, and if adopted, would permit the state to restrict any kind of political expression as long as targeted individuals and groups could still (i) donate money and (ii) publicly identify which candidates they support. As Plaintiffs have already shown, permitting some forms of expression does not dissipate the injury when the state has prohibited others. P. Mot. 39. And it bears repeating that once the Anti-Fusion Laws are applied, Ms. Blake and Rep. Probst are not "nominees of the [UKP]." D. Opp. 29. Rather, UKP can merely provide a public "endorsement" of the Democratic Party's nominees. *See supra* at 2-3 (explaining the critical differences between nomination and endorsement).

From the moment that the Secretary revoked the UKP nominations in early September until the last UKP voters cast their ballots on Election Day, the Anti-Fusion Laws have cast and will continue to cast heavy burdens on free political expression—one of the most important rights enshrined in the Kansas Constitution.

2. None of the State's Asserted Interests Is Sufficient, Nor Are These Restrictions Necessary

Turning to the question of whether the asserted state interests are sufficient to justify these heavy constitutional burdens, Defendants' position is essentially: *take our word for it*. They ask the Court to accept, uncritically, their assertion of generic interests deemed sufficient in other cases—"avoid voter confusion," "prevent ballot manipulation," etc.—paying no mind to which of these problems realistically could arise under the legal framework in which Kansas elections are conducted, *cf. Burdick,* 504 U.S. at 434-37, or for that matter, whether it is even remotely conceivable that those problems could occur at all. D. Opp. 67.

But that is not how constitutional scrutiny works. It is the responsibility of the Court to "determine the legitimacy and strength" of the interests put forth by the State in the specific factual and legal context of the case at hand. *Burdick*, 504 U.S. at 434. This analysis requires a case-by-case, objective assessment of whether the State's hypothesized evils are "plausible" and whether the disputed restrictions actually "undermine[ ] th[e] proferred state interest[s]," regardless of whether the same "interests" were deemed sufficient in a prior case. *Reform Party*, 174 F.3d at 315-18 (asserted interests insufficient under intermediate tier of *Anderson-Burdick* scrutiny); *see Eu*, 489 U.S., at 226 (asserted interest is insufficient unless State can "adequately explain how" the constitutional burden actually "advances that interest"). Only then can the Court assess whether they are "sufficiently weighty" to justify the constitutional encroachment in dispute. *Norman*, 502 U.S. at 288-89. None of the State's asserted interests crosses this bar: not if the Court follows

binding precedent to apply strict scrutiny and require a "compelling" interest; not if it applies the most rigorous level of *Anderson-Burdick* review; and not even if it instead applies a less demanding degree of scrutiny under *Anderson-Burdick*. P. Mot. 45-54.

Plaintiffs agree that Defendants need not adduce "empirical evidence" conclusively proving their worst fears will come true in the absence of the disputed restrictions. D. Opp. 66. And it is undisputed that the "political system [need not] sustain some level of damage before the legislature could take corrective action." D. Opp. 39 (quoting *Munro*). Rather, the problem with Defendants' asserted interests is that the scenarios imagined by Defendants to justify them are pure fantasy—the products of rank speculation that ignores common sense and safeguards that would prevent their occurrence. This speculation is no more credible than the predictions underpinning Defendants' original standing theory—which they have disavowed after all of those predictions were swiftly proved wrong. D. Opp. 19.

The absence of "any historical evidence that the kind of . . . scenarios set forth in Defendants' [initial] brief have happened," D. Opp. 39, is not dispositive—but it is relevant to assessing "the legitimacy and strength" of the asserted interests. *Burdick*, 504 U.S. at 434. That Defendants have at their ready disposal a sample of thousands of elections across nearly two centuries, P. Mot. 45, 47-48, simply underscores the degree to which Defendants' hypothesized parade of horribles is entirely detached from reality. *See Williams v. Rhodes*, 393 U.S. 23, 33 (1968) (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 for this reason alone, none of Defendants' proposed interests can justify the constitutional injuries here. But this is hardly the only flaw with their asserted interests.

Preventing Voter Confusion: Defendants have no response to the conclusion of the

Timmons ***majority*** that it was "paternalistic" to invoke "voter confusion" to justify anti-fusion restrictions. 520 U.S. at 370 n.13. Nor do they have a response to the Kansas Supreme Court, which reached the same conclusion in *Simpson*. 34 P. at 749 ("The people, on election day, will vote only for the candidates of their choice, and are not likely to be seriously misled by any fraudulent or unauthorized nomination."). Nor have they anything to say regarding the two federal appellate courts that have likewise "rejected arguments invoking the unsubstantiated specter of voter confusion" in similar contexts since *Timmons*. P. Mot. 47 n.30 (citing *Reform Party*, 174 F.3d at 317; *No on E v. Chiu*, 85 F.4th 493, 506 (9th Cir. 2023)).

As a matter of first principles, of course the state has "legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221-22 (1986). At the same time, "[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." *Anderson*, 460 U.S. at 798. That is why courts must critically examine whether a challenged restriction does, in fact, advance such interests in the specific context of each case. *See id.* Revoking UKP's nominations here clearly does not promote any of the interests asserted by Defendants, *see, e.g.*, P. Mot. 47-48, 52-54, and none of the cases cited by Defendants indicates otherwise. *See* D. Opp. 44-45.

All four U.S. Supreme Court decisions Defendants cite—*Tashjian*, *Norman*, *Jenness*, and *Wash. State Grange*—strongly support ***Plaintiffs***. In *Tashjian*, 479 U.S. at 220-22, and *Norman*, 502 U.S. at 290, the U.S. Supreme Court held the challenged restrictions unconstitutional, concluding that the asserted interest in preventing voter confusion was insufficient to justify the burdens on political expression and participation. *Jenness v. Fortson* stands for the uncontroversial proposition that the state can legitimately "avoid[ ] confusion" on the ballot by "requiring some

preliminary showing of a significant modicum of support" before a party earns ballot access. 403 U.S. 431, 442 (1971). It is undisputed that UKP satisfied this requirement—submitting more than 30,000 signatures—as required under Kansas law. *See* D. Opp. 7 (¶ 11). And Defendants' strained attempt to distinguish *Wash. State Grange* is futile: the Court there "refused to credit the 'sheer speculation' that 'voters will be confused as to the meaning' of a party label on the ballot . . . because such conjecture 'depends upon the belief that voters can be misled by party labels,' while settled precedent 'reflect[s] a greater faith in the ability of individual voters to inform themselves about campaign issues.'" P. Mot. 47 (quoting *Wash. State Grange*, 552 U.S. at 454).

The two other decisions raised by Defendants are inapposite. In contrast to this case, the Sixth Circuit in *Lichtenstein v. Hargett* was presented with actual, recent experience in Tennessee indicating that a ban on private-party distribution of absentee-ballot applications was needed to prevent "mass confusion" and inadvertent disqualification of voters to cast ballots at their polling places. 83 F.4th 575, 581, 599-600 (6th Cir. 2023). No speculation was required, and the court easily held that avoiding further confusion in this context was a "substantial interest." *Id.* at 600. It is striking that Defendants point to no such experiences here.

And in *Rubin*, the Ninth Circuit rejected a request from a municipal candidate to describe himself as a "peace activist" on the ballot, affirming the city's conclusion that this self-styled designation fell outside of the "short, relatively generic, non-partisan, non-political three word statement[s] of the candidate's profession, occupation, or vocation" allowed under state law. 308 F.3d at 1017-18. His designation was "misleading in the sense that it provides too little information and permits the electorate to engage in too varied a set of inferences, many of which will inevitably be inaccurate," so the court wisely held that the restriction was "reasonably related to the legitimate goal of achieving a straightforward, neutral, non-confusing ballot." *Id.*

In other words, Defendants' cases reaffirm that unfounded and unspecified speculation about confusion falls far short of justifying the real and serious constitutional burdens here.

Keeping Sham Nominations Off the Ballot: The proposed interest in preventing "ballot manipulation" fares no better. D. Opp. 39-40. As noted above, that Defendants cannot point to actual manipulative conduct within the enormous sample of relevant elections begs the question of whether this is indeed a real-world risk constituting a "compelling" or "important" reason to condone the knowing infringement of core constitutional rights. *Supra* at 13-14. While a similar interest was deemed sufficient by the *Timmons* majority, their conclusion was premised upon Minnesota's uniquely liberal nomination laws, which would have allowed various, small groups of voters around the state to masquerade as political parties on the ballot. *Supra* at 4-5. Because Kansas categorically prohibits such nominations and requires statewide party recognition before any nominations can go on the ballot, these same concerns do not apply here. *Id.*

Grasping at straws, Defendants insist they are justified in revoking the UKP nominations here because a hypothetical "unpopular or controversial minor party" in the future might nominate and therefore "sabotage [a] major party's nominee." D. Opp. 40. They do not identify even a single instance in American history of a "sabotage" nomination—either in states like Minnesota where unofficial parties can easily put their name on the ballot, nor in states like Kansas where substantial time and resources would first need to be spent getting a party ballot-qualified—solely for the purpose of trolling an opponent. This is unsurprising because parties do not nominate candidates ***against their will***. A party could never force a second nomination upon a candidate who did not want it. K.S.A. 25-306e (affording candidates an opportunity to decline a second nomination).

Enforcing "Acceptable" Forms of Political Activity: With respect to the remaining interests, Defendants again invoke generic terms that sound unobjectionable—like promoting

"voter choice," "candidate accountability," and "political stability"—and seemingly hope that the Court does not inquire any further. D. Opp. 41-44. But this Court must "determine the legitimacy and strength" of the asserted interests in this case to assess whether they can justify these particular constitutional burdens. *Burdick*, 504 U.S. at 434. A cursory examination reveals at least four fatal issues with these proposed interests.

First, the Anti-Fusion Laws actually ***undermine*** most of these interests. Defendants fail to explain how revoking nominations promotes (rather than restricts) "voter choice": the UKP voters eligible to vote for Ms. Blake and Rep. Probst, Ms. Ollenberger and Ms. Long, were eager to cast their ballots for their party's (one-time) nominees, but do not want to vote for the Democratic or Republican Parties. *See* P. Mot. 8-9, 12, 17 (St. Mat. Fact ¶¶ 6, 7, 16, 17, 35). In election after election under the yoke of the Anti-Fusion Laws, voters throughout Kansas have had little "choice" on the ballot. P. Mot. 53-54. Defendants also fail to explain how revoking nominations promotes "candidate accountability," when doing so makes it harder for candidates to ascertain from what segments of the electorate and in what numbers their support comes. D. Opp. 41. Defendants then fail to explain how discouraging political actors with distinct, but to some degree overlapping views, from engaging in mutually beneficial, consensual cooperation promotes "political stability." *Id.* at 41-42. At its core, Defendants' position seems to be that ***increasing disagreement and polarization*** is a compelling state interest. That is preposterous.[12]

Second, Defendants' entire argument is premised on the idea that the Anti-Fusion Laws

[12] These are but a few of the ways in which the Anti-Fusion Laws undermine the asserted interests. For example, Defendants' initial brief justified their interests on the ground that allowing a minor party's nomination on the ballot in this context "could inflate its support" beyond its "bona fide" resonance with the electorate. D. Mot. 25-26. Yet, as Plaintiffs explained, such inflation is ***exacerbated*** by Anti-Fusion Laws: "Today, the major parties in Kansas together receive 100% of the vote in most races, which grossly exaggerates any plausible estimate of each side's true public support." P. Mot. 54 (citation omitted). On this point, Defendants offer no response.

prevent minor parties like UKP from "*hijacking [a major] party's candidate*." D. Opp. 43 (emphasis original). Again, it is difficult to imagine how minor parties could pull off such a feat since they need candidate consent. Indeed, Defendants conveniently ignore that both Ms. Blake and Rep. Probst were UKP nominees ***first***—willingly holding that distinction for nearly three months before they received their Democratic Party nominations. Blake Decl. ¶ 6; Probst Decl. ¶ 5; Curtis Decl. ¶ 11.[13] And they forget that anti-fusion restrictions prohibit candidates with established ties to minor parties from competing in and winning major party nominations too: this is precisely how Populist Lorenzo D. Lewelling won the Kansas governorship in 1892, not to mention others here and throughout the country, decades ago and in modernity.[14] Defendants' constrained view of how minor parties, their candidates, and their voters participate in the political process runs headlong into the facts of this case and electoral reality.

Third, and relatedly, Defendants all but admit that the underlying purpose of these interests is to minimize the influence of minor parties and insulate two major parties from electoral competition.[15] Defendants fail to identify even a single Kansas case suggesting that this is a

[13] Yet another reason the *Timmons* majority offers little guidance in this case: the candidate at issue was "already another party's candidate" by the time he sought his minor-party nomination, 520 U.S. at 362, which is not true here.

[14] Joel Rogers, *Kansas and Fusion Voting: Democratic Participation and Responsive Representation in the Sunflower State*, New Am. 4-13 (Aug. 21, 2024), https://www.newamerica.org/political-reform/reports/kansas-and-fusion-voting/; *see, e.g.*, Jordan Willow Evans, *New Hampshire Libertarian Candidates Win Democratic Primary Races*, Independent Political Report (Sept. 16, 2022), https://perma.cc/5ADG-LPVK (N.H., Libertarian, Nicholas Sarwark and Richard Manzo); Laura Nahmias & Gloria Pazmino, *The rise of Tish James*, Politico (May 23, 2018), https://subscriber.politicopro.com/article/2018/05/23/the-rise-of-tish-james-433405 (N.Y., Working Families Party, Letitia James); Peter H. Argersinger, *Populists in Power: Public Policy and Legislative Behavior*, 18 J. Interdisc. Hist. 83 (Summer 1987), https:doi.org/10.2307/204729 (Kan., Populist, William A. Harris); Corey Brooks & Beau Tremitiere, *Fusing to Combat Slavery: Third-Party Politics in the Pre-Civil War North*, St. John's L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4831091 (Ind. and Oh., Free Soil, George Julian, Joshua Giddings, and Joseph Root).

[15] Plaintiffs explained why the conception of "competition" embraced by Defendants here is

legitimate (let alone important or compelling) goal for legislative regulation under the Kansas Constitution. This is hardly surprising, given that 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. P. Mot. at 3, 4, 51. Defendants try to sweep this historical context under the rug, D. Opp. 37-38, but the Kansas Supreme Court has made clear that, in discerning the meaning of the Kansas Constitution, "courts consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it." *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536, 544 (2015); *see State v. Albano*, 313 Kan. 638, 645, 487 P.3d 750, 756 (2021) ("In interpreting provisions of the Kansas Constitution, . . . courts look to the historical record" if "the words themselves do not make the drafters' intent clear . . . .").

Countless courts have recognized that the State has a legitimate interest in "ensur[ing] that 'some sort of order, rather than chaos . . . accompan[ies] the democratic processes,'" *Eu*, 489 U.S. at 227 (citation omitted), but that the State may not give "the Republicans and the Democrats . . . a complete monopoly" or eliminate "[c]ompetition in ideas and government policies." *Williams*, 393 U.S. at 31-32; *e.g.*, *Sweezy v. State of N.H.*, 354 U.S. 234, 250-51 (1957); *Anderson*, 460 U.S. at 794; *Norman*, 502 U.S. at 288; *see also* P. Mot. 49-54.

Jenness, which Defendants cite, D. Opp. 45, holds plainly that a state may not use restrictive electoral regulations to disadvantage actors outside of the two major parties in order to "freeze the political status quo." 403 U.S. at 442. Yet that is the undisputed effect of anti-fusion

---

nonsensical: "simply, the presence of additional candidates on the ballot who cannot pose an actual challenge to their major party opponents." P. Mot. 53 n.34. Defendants offer no response, other than to repeat the "topsy-turvy" notion that ***excluding*** new, eager parties from the ballot "facilitat[es] greater electoral competition." D. Opp. 39, 41.

restrictions, both historically, *see* P. Mot. 6, and at this very moment, as the UKP is trying to shake up the status quo and elevate moderate voices to prioritize sensible, effective governance.[16]

Unsurprisingly, Defendants turn to *Timmons* to get them out of this hole, and yet again, their reliance is misplaced. In Kansas, the Democratic and Republican Parties have dominated since the adoption of anti-fusion restrictions: whether measured by victories, vote shares, nominations on the ballot, or any other indicia, minor party activity has wavered between *de minimis* and non-existent. P. Mot. 6. In contrast, the *Timmons* majority relied upon Minnesota's uniquely rich history of minor party activity after adoption of anti-fusion laws, recounting that "Minnesota's Farmer-Labor Party . . . dominated state politics" for a time and won more than 30 statewide and federal races. 520 U.S. at 361 n.9. The majority also credited the risk of "party-splintering and excessive factionalism" made possible by Minnesota's liberal nomination rules, *id.* at 367, which, as noted above, Kansas expressly prohibits. *Supra* at 4-5.

Fourth, and finally, this section in Defendants' brief contains a number of puzzling assertions that require brief rebuttal. Defendants state that minor parties like UKP "wish to serve the role of a spoiler and splinter one of the major parties." D. Opp. 42. This is backwards: that is what happens today when a minor party nominates a third candidate in a race. Hence UKP's founding commitment to avoiding such counterproductive tactics. P. Mot. 11 (St. Mat. Fact ¶¶ 12-13). Defendants also analogize Ms. Blake and Rep. Probst to "'sore loser' candidacies." D. Opp. 41 (quoting *Clingman v. Beaver*, 544 U.S. 581, 594 (2005)). Again, incorrect: each won their UKP and Democratic Party nominating contests, while a "sore loser" is a candidate who tries to get on

[16] Defendants' factual assertion that allowing more than one party to nominate the same candidate "tends to mostly help extremist groups at the political fringes," D. Opp. 42, has no support in the record and should be disregarded. Setting aside the substantive problems with this contention, Defendants disregard the actual facts of this case: the founding purpose of the UKP is to "moderate" politics. P. Mot. 7, 10, 11 (St. Mat. Fact ¶¶ 1, 10, 12, 14 and declarations cited therein).

the ballot by winning one party's nomination after trying, but failing, to secure the nomination from another party. *See Clingman*, 544 U.S. at 596. Thus, a sore loser would be a third candidate playing "the role of a spoiler" who could "splinter one of the major parties." D. Opp. 42. Again, that is why UKP rejects as counterproductive the introduction of third candidates into competitive races. Curtis Decl. ¶¶ 7-10; Cauble Decl. ¶ 5.

Defendants further assert that "party raiding" is the "*raison d'etre* of the United Kansas Party." D. Opp. 41 (quoting *Clingman*, 544 U.S. at 594). Once more, wrong: "party raiding [is] the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Clingman*, 544 U.S. at 596. Nothing of this sort happened here, nor does UKP seek to "manipulate" any other party's primaries. *Id.* Plaintiffs simply want the State to respect UKP's duly given nominations.

* * *

None of the foregoing interests is "compelling," "important," or even "legitimate" in the context of this case. And Defendants do not even attempt to argue that these restrictions are "narrowly tailored" or in any way "necessary" to advance such interests. *Supra* at 5-7. In fairness to them, the broad sweep of these restrictions and the less-burdensome means of advancing their interests make it difficult to muster a credible argument. Thus, Plaintiffs prevail regardless of whether this Court applies the operative strict scrutiny standard, strict *Anderson-Burdick* review, or the laxer *Anderson-Burdick* test Defendants prefer.[17] P. Mot. 54.

[17] Defendants' offhand request in a footnote that the Court subject this claim to a "non-public forum" analysis contradicts their insistence throughout the briefing that *Anderson-Burdick* is the appropriate standard of review. D. Opp. 26-27 & n.4. Indeed, Defendants fail to cite a single case analyzing ballot restrictions under the "non-public forum" rubric. This argument also ignores the fact that the anti-fusion restrictions burden expression here throughout the political campaign, not just on the ballot. Even still, the Anti-Fusion Laws are a quintessential example of "an effort to suppress expression merely because public officials oppose the speaker's view" (namely, UKP's

B. Defendants Violate Plaintiffs' Freedom of Association

By severing the essential associational links among UKP, its candidates, and its voters, Defendants also violate Plaintiffs' rights guaranteed by Section 3 of the Kansas Bill of Rights. Whether the Court applies strict scrutiny (consistent with how Kansas and its sister courts enforce comparable state constitutional rights, and required under *Anderson-Burdick*) or a lesser degree of *Anderson-Burdick* scrutiny (as Defendants propose), the analysis is similar and the outcome is the same: revoking the UKP nominations is an impermissible encroachment on associational freedoms. As Plaintiffs have established, the proposed state interests are "legally insufficient; actually undermined by the Anti-Fusion Laws; insubstantial or speculative; or could easily be advanced through less restrictive means." P. Mot. 43; *see id.* 45-54; *supra* at 13-22. Thus, Plaintiffs focus entirely on the burden inquiry below, eliminating any doubt as to the severity of the constitutional encroachment.

1. This Case Presents Clear and Substantial Encroachments on Free Association

Defendants do not seriously dispute that (i) "picking the right standard bearer is the quintessential associational purpose of a political party"; (ii) "[t]he most important act for a political party is the selection of its standard bearer to be the voice of the party during an election"; (iii) Ms. Blake and Rep. Probst were UKP's chosen standard-bearers in the 69th and 102nd House Districts and the official UKP nominees for roughly three months; (iv) Ms. Blake and Rep. Probst are no longer UKP nominees; (v) UKP will not appear on the ballot in the 69th and 102nd House Districts; and (vi) but-for Defendants' application of the Anti-Fusion Laws, both candidates would

support for candidates capable of winning a second party's nomination), which is prohibited even in non-public fora. *Id.* (quoting *Lower v. Bd. of Dirs. of Haskell Cnty. Cemetery Dist.*, 274 Kan. 735, 745-46, 56 P.3d 235, 244 (2002)).

still remain UKP nominees and UKP voters could freely vote for their party and its nominees on the November ballot. P. Mot. 61; D. Opp. 9-11, 12-16 (¶¶ 15, 18-19, 22, 24-26, 29-34). It is difficult to imagine a more direct and substantial state infringement upon associational freedom.

Defendants' attempts to explain away the constitutional problems here are fruitless. Plaintiffs have already debunked their bogus suggestion that Ms. Blake and Rep. Probst "voluntarily" abandoned their association with UKP. *Supra* at 1-2 (quoting D. Opp. 47). Indeed, Chief Justice Rehnquist himself explained during the *Timmons* oral argument that rational candidates coerced into this same situation necessarily take the major party nomination. In response to a suggestion that the Minnesota candidate should have sought just a minor party nomination, the Chief Justice responded, "I presume he would not have done that if he wanted to be elected," because if "he could only get one," "[h]e would have settled for the [major party]." Oral Arg. at 4:24-5:20, *Timmons*, 520 U.S. 351, https://www.oyez.org/cases/1996/95-1608.

Much of Defendants' remaining argument is essentially that striking UKP's nominations from the ballot has little associational significance. Yet, the ballot is *sui generis* in the political process. The ballot is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216; *see Cook*, 531 U.S. at 531-32 (the "composition of the ballot" is "absolutely critical" because it is "the last thing the voter sees before he makes his choice") (Rehnquist, C.J., and O'Connor, J., concurring). Defendants themselves cite an opinion from Chief Justice Roberts, D. Opp. 26 n.4, which notes that the manner in which "the parties and the candidates are tied together . . . on the ballot" is critical to assessing burdens on "associational rights." *Wash. State Grange*, 552 U.S. at 460 (Roberts, C.J. and Alito, J., concurring). The Chief Justice was unequivocal: "what makes the ballot 'special' is precisely the effect it has on voter impressions" about the associational

link between parties and candidates. *Id.*

Here, all other nominated candidates and their parties retain their associational bond on the ballot—while UKP, Ms. Blake, and Rep. Probst have theirs erased. Unlike supporters of other recognized parties, UKP voters cannot use their ballot to affirm their associational connection with their party and its nominees. Defendants' position that the presence of Ms. Blake and Rep. Probst on the ballot ***as Democratic nominees*** eliminates any associational harm is illogical. D. Opp. 47-48. While it might be ***more*** burdensome if Ms. Blake and Rep. Probst were excluded entirely from the ballot, it does not follow that the exclusion of UKP therefore imposes a ***de minimis*** burden. *See Timmons*, 520 U.S. at 371 (Stevens, J., dissenting) ("The Court's recital of burdens that the statute does not inflict on the Party[ ] does nothing to minimize the severity of the burdens that it does impose."). Rather, it is clear that revocation of the UKP nominations "unfairly [and] unnecessarily burdens the availability of political opportunity" and "limits political participation by an identifiable political group whose members share a particular viewpoint[and] associational preference." *Anderson,* 460 U.S. at 792 (internal citation omitted).

Defendants insist there is no associational issue with requiring UKP to nominate a lesser choice than their preferred standard-bearer if they want to get on the ballot; or limiting UKP to advocate for its priorities without ballot nominations; or making UKP voters support a rival party in order to elect UKP's one-time nominees. D. Opp. 46-52. Yet, such a burden "impinges, by its very nature, on associational choices" and "limit[s] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 793-94. These are textbook associational harms, and severe ones at that.

2. This Court's Interpretation of the State Constitution Is Controlling

In keeping with their approach elsewhere, Defendants insist that the Court carbon copy the

Timmons majority's denial of the Minnesota minor party's federal associational claim. D. Opp. 47-53. Plaintiffs have explained the myriad ways in which this case differs from *Timmons*, reason alone to decline this invitation. *E.g.*, *supra* at 4-5, 17, 19 n.13, 21; P. Mot. 31-32, 34-36, 46-49, 52, 59-63. But more fundamentally, the issue here is the meaning of Section 3 of the Kansas Bill of Rights, and nothing is more "inconsistent with the notion of state sovereignty" than "allowing the federal courts to interpret the Kansas Constitution." *Albano*, 313 Kan. at 644, 487 P.3d at 756 (quoting *State v. Lawson*, 296 Kan. 1084, 1091-92, 297 P.3d 1164, 1169-70 (2013)). As a result, Kansas courts "retain authority to interpret the Kansas Constitution independently of the manner in which federal courts interpret corresponding provisions of the United States Constitution, which may result in our state Constitution providing greater or different protections." *Id.*

While the Kansas Supreme Court has held that other state constitutional rights are "generally . . . coextensive" with their federal counterparts, *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122, 1126 (1980), it has never done so with respect to the freedom of association. Thus, this Court must first "abide by the language" in Section 3, and then, if "the words themselves do not make the drafters' intent clear, . . . look to the historical record." *Albano*, 313 Kan. at 645, 487 P.3d at 756 (quoting *Wright v. Noell*, 16 Kan. 601, 607 (1876)).

Plaintiffs have already explained why both text and history show that Section 3 guarantees robust associational freedom—freedom that is clearly infringed by the revocation of UKP's nominations in this case. P. Mot. 60-61. Defendants respond by asking the Court to ignore the plain text's affirmative grant of rights beyond those enumerated in the federal assembly clause, D. Opp. 49, in direct violation of the Kansas Supreme Court's "presum[ption] that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing," *Albano*, 313 Kan. at 645, 487 P.3d at 756 (quoting *Wright*, 16 Kan. at 607).

Defendants further ask the Court to ignore that Section 3 was modeled on Founding era state assembly clauses understood to guarantee broad avenues for collective political activity free of state interference. And also to ignore that Section 3 was ratified at a time when candidates routinely earned two nominations and that the free exercise of such rights had been a prominent feature of recent elections. And to ignore that Kansans continued to exercise these rights freely for decades after ratification. D. Opp. 48-49; *see* P. Mot. 60-61. Yet, "the court must . . . consider . . . the general surrounding facts and circumstances" of ratification when "ascertaining the meaning of a constitutional provision." *State ex rel. Stephan v. Finney*, 254 Kan. 632, 654, 867 P.2d 1034, 1049 (1994). Accounting for this context, as is required by Kansas law, it is clear that Section 3 ensures that Kansans can freely engage in the associational activity at issue here.

Thus, the revocation of UKP's nominations in this case is a direct abridgement of Plaintiffs' associational freedom, and, as noted above, none of the proposed state interests is compelling or otherwise sufficient, nor are these restrictions tailored or necessary to advance any such interests. Plaintiffs prevail under Section 3 of the Kansas Bill of Rights.

C. Plaintiffs Are Denied Equal Protection

Defendants leap to the erroneous conclusion that because (in their view) the Anti-Fusion Laws do not violate Plaintiffs' rights of free speech or association, Plaintiffs' equal-protection claim necessarily fails too. D. Opp. 53. Not only is their premise mistaken—the violations of Plaintiffs' free-speech and associational rights are plain—their conclusion is too.

Denial of equal protection does not necessarily depend on a determination that protected rights have been violated; it also occurs when the state denies certain groups the equal enjoyment of rights and benefits conferred on its citizens. Thus, while the U.S. Constitution bestows no right to vote in elections for state office, "once the franchise is granted to the electorate, lines may not

be drawn which are inconsistent with the Equal Protection Clause." *Harper v. Va. St. Bd. of Elections*, 383 U.S. 663, 665 (1966); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("When the state legislature vests the right to vote for President in its people . . . equal weight [must be] accorded to each vote" and "equal dignity . . . to each voter."); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

Similarly, while the right to vote in Kansas is constitutionally protected by Article V, rather than the Bill of Rights, *LWV II*, 318 Kan. at 800, 549 P.3d at 380, Section 2 separately protects every citizen's right to equality of suffrage and of participation in the establishment and management of government, *State ex rel. Fatzer v. Urban Renewal Agency of Kansas City*, 179 Kan. 435, 440, 296 P.2d 656, 660 (1956). Thus, as established in *LWV II*, even where the Article V right to vote itself has not been violated, it still may be the case that a voter's ***equal right*** of suffrage, guaranteed by Section 2, is denied. 318 Kan. at 805-07, 549 P.3d at 382-84.

The vice, then, that equal protection defends against in this context is denying certain classes of citizens the equal enjoyment of rights that, once conferred, must be extended in uniform measure to all participants in the democratic process. Even if Plaintiffs had not already shown violations of their fundamental political rights (which they have here), ***the disparate treatment*** accorded them here nevertheless offends principles of equal protection embodied in Section 2, and independently requires judgment in Plaintiffs' favor. As discussed below, Defendants' continued efforts to show otherwise fail.

1. Defendants Impose Disparate Burdens on Plaintiffs' Exercise of Their Fundamental Political Rights

Defendants still maintain that the Anti-Fusion Laws treat all parties and candidates alike, D. Opp. 53-58; *see* D. Mot. 34-36, even though Plaintiffs have already demonstrated the divergent

burdens on various rights of UKP, its candidates, and its voters. P. Mot. 64-65, 68-69; *see also infra* at 31. Defendants' response is unavailing for three reasons.

First, Defendants continue to fixate on the point that the Anti-Fusion Laws appear to treat all parties and candidates the same ***on their face***. D. Opp. 54. Yet that preoccupation ignores the precedents teaching that equal-protection analysis requires a court to "consider the facts and circumstances behind [a] law," not just its text, *Williams*, 393 U.S. at 30, and to "examine in a realistic light the extent and nature of [the law's] impact," *Bullock v. Carter*, 405 U.S. 134, 143-44 (1972) (invalidating uniform filing fee for primary elections due to its impact on indigent candidates); *see also Lubin v. Panish*, 415 U.S. 709, 713-18 (1974) (same); *Graveline*, 992 F.3d at 535-36; P. Mot. 69.[18]

Defendants try to distinguish these precedents on the basis that the laws in these cases made it "virtually impossible" or excessively burdensome for candidates or parties to obtain ballot access at all, whereas (in Defendants' telling) the Anti-Fusion Laws "do[ ] not preclude [UKP], or any other party, from accessing the ballot." D. Opp. 56 (citing *Williams*); *id.* 58 (citing *Bullock*, *Lubin*, and *Graveline*). The attempt fails, for two important reasons. As an initial matter, the pernicious effects of the Anti-Fusion Laws are, if anything, far worse than those of the laws invalidated in these cases: the legal regime here deprives a party of both its first-choice candidate *and* the opportunity to replace that candidate on the ballot. Specifically, once (i) a minor party like UKP nominates a candidate by the prescribed June 1 deadline, K.S.A. 25-205(a), 25-305(a); (ii) that candidate wins a major-party primary held on the first Tuesday in August, K.S.A. 25-203; and (iii)

[18] Relatedly, Defendants remark that the Anti-Fusion Laws are not "trigger[ed]" by political parties that do not nominate candidates also chosen by other parties. D. Opp. 54. The point of this observation is not apparent. As in many equal-protection cases, the durational residency requirements deemed unconstitutional in *Dunn* applied uniformly to all voters, and were "triggered" only by voters that failed to meet them. 405 U.S. at 332 n.1, 334.

that candidate is then coerced into keeping just the major-party nomination, the time will have long passed for the minor party to nominate another candidate, even a second-choice candidate, who can appear for the party on the ballot.

But more fundamentally, Defendants miss the obvious point that the determination a court reaches about a law's severity ***after*** examining its effects cannot dictate the nature of the examination ***before*** it has even begun. Regardless of where the inquiry leads, it must start with a "realistic[ ]" examination of "the extent and nature of [the law's] impact." *Bullock*, 405 U.S. at 143. And as shown by cases such as *Bullock*, *Lubin*, and *Dunn* (discussed *supra* at 29 & n.18), that same searching examination of the law's impact is required regardless of whether it is facially discriminatory or not, Defendants' suggestion to the contrary notwithstanding, D. Opp. 55-56.[19]

Next, Defendants appear to dispute that the Anti-Fusion Laws disparately burden minor parties because *Timmons* supposedly rejected the "predictive judgment" that candidates who receive multiple nominations—when forced to give one up—will opt to retain their major-party nominations. D. Opp. 54-55, 58; *see* P. Mot. 69. *Timmons*, however, did no such thing. *Timmons* cavalierly dismissed as a "predictive judgment" the Eighth Circuit's apt conclusion that *"*without fusion-based alliances, minor parties cannot thrive," 520 U.S. at 361, but it did not confront the

[19] Defendants' assertion that "courts have almost universally *rejected*" equal-protection challenges to facially non-discriminatory anti-fusion laws, D. Opp. 57-58 (emphasis original), is an overstatement, to put it mildly. Eight of the ten cases Defendants cite were decided more than 100 years ago, well before contemporary equal-protection jurisprudence in this area arose in cases such as *Harper*, 383 U.S. at 665-68, and *Williams*, 393 U.S. at 29-31; and (perhaps not coincidentally) only two of these eight, *Bateman*, 45 N.E. at 196-97, and *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 960 (Mo. 1914), involved an actual equal-protection or "equality of suffrage" claim, whereas the other six addressed claimed violations of the right to vote and/or right to free elections. Of the two relatively recent cases that Defendants cite, one, *Swamp v. Kennedy*, 950 F.2d 383, 385-86 (7th Cir. 1991), involved a free-association claim, not an equal-protection challenge. Thus the "universe" to which Defendants refer is reduced to three cases, only one of which, *Working Families Party v. Commonwealth*, 209 A.3d 270 (Pa. 2019), was decided within the last 110 years.

undeniable political realities that all but compel such candidates to choose major party nominations, *see* P. Mot. 69, even if, as the majority glibly remarked, minor parties are "free to try to convince" candidates to choose them instead, 520 U.S. at 360.[20]

Most critically though, Defendants do not attempt to contend at all with the unequal burdens on UKP's freedom of ***speech***, and the realities confronted by UKP voters and candidates whose rights of participation in the political process are also curtailed. As Plaintiffs have noted repeatedly, *supra* at 10-13; P. Mot. 36-38, 56-57, the restrictions here impair UKP's freedom of speech—but not that of other parties—by forcing UKP either to (i) express support for a different party in order to promote its preferred candidates' election; (ii) promote the election of second-choice candidates; or (iii) refrain from voicing support for any candidates at all. Free expression and association of UKP voters, but no other voters, is limited, as they must choose between expressing support for their party or for their preferred candidate when they cast a ballot (or not vote at all). *Id*. 36-37, 57; *see Burdick*, 504 U.S. at 438 (remarking that "[r]easonable regulation of elections *does not* require voters to espouse positions that they do not support"). No matter which choice they make, the strength of their vote is diluted, infringing too on their "equal right to vote." *Dunn*, 405 U.S. at 336; P. Mot. 64-65. The speech and associational rights of UKP candidates, but none others, are diminished because their status as party standard-bearers is annulled, and they cannot truthfully present themselves to the electorate as nominees of a party whose support they vied for, and won. P. Mot. 36-38, 58. To these points, Defendants offer no response.

2. Plaintiffs Need Not Prove Discriminatory Intent to Prevail on This Claim

Defendants next erroneously contend that Plaintiffs' equal-protection claim must fail

[20] Chief Justice Rehnquist spoke more candidly during oral argument, admitting that candidates who "wanted to be elected" "would . . . settle[ ] for the [major party]" nomination. *Supra* at 24.

because they have not "establish[ed]" that the Anti-Fusion Laws "w[ere] enacted with a discriminatory *intent*." D. Opp. 58-60 (emphasis original). As an initial matter, the historical record clearly shows that the animating purpose of anti-fusion restrictions adopted in Kansas and other states was to hinder new political parties and their voters from expanding their influence. *See* P. Mot. 3-7; *see also Timmons*, 520 U.S. at n.6 (Stevens, J., dissenting) (noting that "antifusion laws were passed by States all over the Nation . . . by the parties in power in state legislatures . . . to squelch the threat posed by the opposition's combined voting force" (internal quotation marks and citation omitted)). Fundamentally, though, the State's argument fails because proof of discriminatory intent is *not* an element of equal-protection claims, like Plaintiffs', that are based on infringements of fundamental rights.

It is by now axiomatic that to sustain an equal-protection claim alleging discrimination on the basis of race, nationality, sex, or other suspect or disfavored classifications, "proof of . . . discriminatory intent or purpose is required." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-74 (1979). The same is true for claims of selective prosecution. *Wayte v. United States*, 470 U.S. 598, 608 (1985). But just as firmly rooted is the rule that disparate burdens on the exercise of fundamental rights invite the closest judicial scrutiny, regardless of whether the laws imposing those burdens were enacted with a discriminatory purpose. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (statute that "significantly interferes with the exercise of a fundamental right . . . cannot be upheld [under the Equal Protection Clause] unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests").[21]

[21] The relevant precedents are numerous, and unequivocal. *See, e.g.*, *Zablocki*, 434 U.S. at 383-91 (disparate burden on exercise of fundamental right held unconstitutional, without proof or discussion of discriminatory purpose); *Shapiro v. Thompson*, 394 U.S. 618, 629-38 (1969) (same);

Applying the same equal-protection principle, the U.S. Supreme Court has routinely invalidated state laws that disparately infringed on the same fundamental political rights at issue in this case—without requiring proof, or even raising the issue, of discriminatory intent. *E.g.*, *Dunn*, 405 U.S. at 334-60 (striking down durational voter-residency requirement without regard to discriminatory purpose); *Williams*, 393 U.S. at 30-31 (same, holding that election laws making it "virtually impossible" for minor parties to obtain ballot access impermissibly "place[d] substantially unequal burdens" on the rights to vote and associate); *Reynold v. Sims*, 377 U.S. 533, 561-71 (1964) (same, in holding that malapportionment of state legislative districts denies "opportunity for equal participation by all voters in the election of state legislators"); *Bullock*, 405 U.S. at 142-49 (same, where "impact" of uniform candidate primary filing fees "f[ell] with unequal weight" on voters and candidates without means); *Lubin*, 415 U.S. at 713-19 (also invalidating candidate filing fees relying on equal-protection analysis in *Bullock*).[22]

Defendants rely on cases that do not support their position. They involved claims of selective enforcement, and discrimination against members of an allegedly disfavored class, not disparate burdens on the exercise of fundamental rights. D. Opp. 58-59. Therefore they fall within the separate line of cases emerging from *Arlington Heights* and *Wayte*. Here, however, the Anti-Fusion Laws disparately burden the fundamental rights of UKP, its members, and candidates. Proof of state animus against these Plaintiffs is simply not a prerequisite for determining that their

Douglas v. California, 372 U.S. 353, 355-58 (1963) (same).

[22] Even if the appropriate standard of review in this case were a version of *Anderson-Burdick* review rather than strict scrutiny, the point would remain the same. "Under *Anderson-Burdick*, it is not necessary for a plaintiff to show discriminatory intent" to establish an equal-protection violation, given the fundamental nature of the constitutional rights implicated in such cases. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 & n.9 (11th Cir. 2019); *see also Graveline*, 992 F.3d at 534-46 (invalidating ballot-access measures on equal-protection grounds without a showing of intentional discrimination); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692-95 (6th Cir. 2015) (same).

rights to equal protection have been denied.

3. Strict Scrutiny, or Strict *Anderson-Burdick* Review, Is Required—But Plaintiffs Prevail Under Less Stringent *Anderson-Burdick* Review Too

As Plaintiffs have shown, because the Anti-Fusion Laws infringe on Plaintiffs' fundamental constitutional rights of free speech, association, and the equal right to vote—established in Kansas and federal precedent—principles of equal protection require strict scrutiny. P. Mot. 64.[23] Even if the *Anderson-Burdick* framework applied to Plaintiffs' equal-protection claim (which it does not, P. Mot. 70), given the severe deprivations of Plaintiffs' rights the most rigorous level of *Anderson-Burdick* review must be employed, which itself is the functional equivalent of strict scrutiny. *Id.* 71. However, regardless of the standard of review applied, Plaintiffs prevail—even under a lower tier of *Anderson-Burdick* review. *Id.* 72.

Defendants do not argue that enforcement of the Anti-Fusion Laws survives either form of strict scrutiny. *See* D. Opp. 60-65. Instead, they fixate on the notion that no more than a relaxed level of *Anderson-Burdick* review is required.[24] Their analysis is misguided for three reasons.

First, Defendants point out that in the past, federal courts of appeals have relied on the *Anderson-Burdick* framework to resolve equal-protection challenges to ballot-access laws. D. Opp. 61. Yet the U.S. Supreme Court has never done so, and (a point Defendants do not contest) this Court need not follow the lower federal courts. P. Mot. 70. The cases cited by Defendants, D.

[23] Defendants point to the holding of *LWV II* that in Kansas the right to vote is protected by Article V and not the Bill of Rights, D. Opp. 61, but Plaintiffs have clearly and consistently explained, P. Mot. 29, 64-65, 67, that they are ***not*** claiming a violation of their Article V right to vote, and seek instead to uphold their "equal right to vote," a "fundamental political right" protected by the Fourteenth Amendment of the U.S. Constitution, *Dunn*, 405 U.S. at 335-36; *Williams*, 393 U.S. at 30-31, and therefore also protected by Section 2, *see LWV II*, 318 Kan. at 805, 549 P.3d at 383.

[24] Defendants also suggest in passing that an even more lenient "general reasonableness test" should apply, D. Opp. 60, but as shown below, that idea lacks any foundation in either the Kansas Constitution or the decisions of the Kansas Supreme Court. *Infra* at 37-39.

Opp. 62, do not support their position. *Burdick* involved claims that a ban on write-in votes violated rights of free speech and association, not equal protection. 504 U.S. at 430, 432. The plurality in *Crawford v. Marion County Elections Board* rejected an across-the-board attack seeking to invalidate in all its applications, as a "burden[ ] [on] the right to vote," a voter-identification law whose "application to the vast majority of voters" the plurality found "was amply justified." 553 U.S. 181, 187, 203-04 (2008) (plurality opinion). Defendants also point out that *Timmons* applied *Anderson-Burdick* review to the plaintiff party's free-association claim, D. Opp. 61, but no equal-protection challenge was presented in *Timmons*, either. *See* 520 U.S. at 355-56. In short, under Kansas precedent, an equal-protection claim such as this one challenging restrictions that intrude upon fundamental constitutional rights, demands the application of strict scrutiny. P. Mot. 64.

Second, acting on the erroneous assumption that the *Anderson-Burdick* rubric applies, Defendants next attempt to make light of (or avoid acknowledging altogether) the numerous and varied respects in which the Anti-Fusion Laws encroach on the exercise of Plaintiffs' rights, in the apparent hope of avoiding the most demanding level of *Anderson-Burdick* review. D. Opp. 62-64. To this end, Defendants remark that it "is simply not a severe burden" to reduce by a "few individuals" the pool from which a party may select a nominee. D. Opp. 62-63 (quoting *Timmons*, 520 U.S. at 363). As Plaintiffs have discussed, however, *Timmons*' spurious reasoning on this point is inconsistent with numerous other U.S. Supreme Court precedents according a party's choice of candidate the constitutional dignity it is due, *see* P. Mot. 61-62 & n.41 (and cases there cited)—precedents this Court must take into account when addressing this equal-protection claim under Section 2, *LWV II*, 318 Kan. at 805, 549 P.3d at 383.[25]

[25] The additional cases Defendants cite, D. Opp. 63, are distinguishable. Under the "sore loser" law challenged in *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010), once the party's nominee was disqualified, the party still had an

Defendants also repeat their refrain that the Anti-Fusion Laws do not preclude any party "from accessing the ballot," D. Opp. 58, 62, and attempt to distinguish precedents in which the federal courts applied the highest degree of *Anderson-Burdick* scrutiny as cases involving ballot-access measures that (in Defendants' words) effectively barred any ballot access "at all," *id.* 63-64. As Plaintiffs have already shown, though, the challenged laws in these cases at least hypothetically permitted independent candidates to obtain ballot access if they could collect a sufficient number of voter signatures, and minor parties to retain access based on their vote totals in prior elections. *Graveline*, 992 F.3d at 529-30, 536-39; *Green Party of Tenn.*, 791 F.3d at 689-90, 693-95. In contrast here, once the nomination of a minor party like UKP has been abrogated, the party faces a legal barrier, not just a practical hurdle, that categorically excludes it from the ballot. *Supra* at 29-30.[26]

Finally, it also bears remarking once again that the claims in this case encompass much more than the free-association rights of a single political party. While the burden on UKP of abrogating its nominations and revoking its access to the ballot are severe, to arrive at the correct

---

opportunity at least to nominate a second-choice candidate who could appear on the ballot, *id.* at 759, whereas here Kansas law denies UKP even that alternative, *see supra* at 29-30. In addition, no claim was made (as is made here) of infringement on the *candidate's* rights. *Id.* at 755. Although such a claim was raised in *State ex rel. Blankenship v. Warner*, 825 S.E.2d 309, 317-18, 319 (W. Va. 2018), the aggrieved "sore loser" candidate did not seek the support of two parties simultaneously because he wanted to associate with and represent both groups of voters, but only sought his minor-party nomination *after* suffering defeat in the Republican Party primary. *Id.* at 312. The burden here on the associational rights of Ms. Blake and Rep. Probst, who from the beginning aligned with UKP and sought its nomination, is far greater than in *Blankenship*.

[26] Defendants dispute the significance (though not the accuracy) of the historical record showing that, since the enactment of anti-fusion restrictions more than a century ago, minor parties in Kansas have enjoyed none of the political fortune they routinely experienced in the decades before. D. Opp. 64-65; *see* P. Mot. 6-7 & nn.13-14, 70. Defendants rhetorically scoff that Plaintiffs have no constitutional right to "win" elections, D. Opp. 64, and Plaintiffs claim no such right. Rather, Plaintiffs cite these electoral statistics because they vividly illustrate the unequal "availability of political opportunity," *Graveline*, 992 F.3d at 536 (quoting *Anderson*, 460 U.S. at 793), on a playing field steeply tilted against parties like UKP by the Anti-Fusion Laws.

standard of review, the Court must also assess the nature and extent of the burdens on UKP's freedom of speech, on its candidates' freedom of speech and association, and its voters' rights of free speech, free association, and equality of suffrage. *E.g., Graveline*, 992 F.3d at 535-44 (evaluating burdens of ballot-access requirements on independent candidates and voters). Plaintiffs have meticulously cataloged these additional burdens on Plaintiffs' rights and demonstrated the extreme degree to which the Anti-Fusion Laws invade each one of them. P. Mot. 20-21, 36-38, 56-58, 64-65, 67; *supra* at 10-13, 23-31. Defendants fail even to address them.

Thus, strict scrutiny, or, equivalently, the highest level of scrutiny under *Anderson-Burdick*, is required. As noted, Defendants venture no attempt to argue that the Anti-Fusion Laws can withstand such scrutiny, and instead seek shelter in the (supposed) safe harbor of a less exacting standard of *Anderson-Burdick* review. But, given the conjectural nature of the state interests Defendants assert and the deficient tailoring to those interests, these restrictions would not pass muster even if subjected to a less searching degree of *Anderson-Burdick* analysis. P. Mot. 72. Accordingly, Plaintiffs' equal-protection claim, on its own merit, must prevail.

III. Enforcing the Bill of Rights Does Not Undermine Article IV or Offend the Separation of Powers

Finally, recognizing that the Anti-Fusion Laws could not endure any appreciably robust level of judicial scrutiny, Defendants refashion their groundless argument that only the most lenient standard of review should apply to Plaintiffs' claims.

Defendants previously advanced an argument that judicial review of voting "methodolog[ies]" adopted under Article IV of the Kansas Constitution is precluded so long as those laws are "reasonable." D. Mot. 13-15. Plaintiffs have now debunked that argument, P. Mot. 27-30, and Defendants abruptly forsake it, D. Opp. 19, but now also contend, to the same effect, that the Kansas Supreme Court requires courts to apply "a 'reasonableness standard' . . . [when]

reviewing constitutional attacks on statutes adopted pursuant to" Articles IV and V, *id.* 20, 22. Like its precursor, this transparent attempt to weaken the long-settled scrutiny of laws that infringe on constitutional rights is refuted—not supported—by the case the State relies upon, *LWV II.*

LWV II upheld the signature-verification law at issue as a "reasonable effort" by the Legislature to "provide . . . for proper proofs" of voter eligibility, as required by Article V, section 4 of the Constitution. 318 Kan. at 802-04, 549 P.3d at 381-82. But, as already discussed, P. Mot. 28-29, the Court did not end its analysis there, as it presumably would have done if Defendants accurately stated the law. Instead, notwithstanding the reasonableness of the signature-verification requirement under Article V, the Court proceeded separately to evaluate whether it "compl[ied] with other constitutional guarantees, such as those of equal protection and due process." 318 Kan. at 805-07, 549 P.3d at 382-84.

Perceiving as much, Defendants contend that *LWV II* "incorporated [a] reasonableness standard" from Articles IV and V into its equal-protection and due-process analyses. D. Opp. 20-22. Yet again, *LWV II* shows the opposite. The Kansas Supreme Court did not impose a one-size-fits-all standard of reasonableness review for all constitutional challenges to election laws. Rather, it explained that reasonable uniformity and reasonable notice of defects to voters were required "[t]o comply with equal protection [and due process] *in the context of providing 'proper proofs' of the right to be a qualified [voter]*." 318 Kan. at 805-06, 549 P.3d at 383-84 (emphasis added). Nor did the Court suggest that it was incorporating this supposed standard from Articles IV and V. Rather, it based its equal-protection holding on a string of U.S. Supreme Court precedents requiring that infringements of the citizen's equal right to vote be "close[ly], "carefully," and "meticulously scrutinized." 318 Kan. at 805-06, 549 P.3d at 383; *see Dunn*, 405 U.S. at 336; *Harper*, 383 U.S. at 667; *Reynolds*, 377 U.S. at 562; *see also LWV II*, 318 Kan. at 806, 549 P.3d

at 384 (citing federal precedents, not Article IV or V, in support of the due-process analysis).[27]

Nor does applying heightened constitutional scrutiny "nulli[fy]" Article IV, "strip" the Legislature of its authority, or otherwise offend the Constitution's separation of powers. D. Opp. 20-22. While the separation of powers leaves the "determination of . . . appropriate policy" to the Legislature, *Sierra Club v. Mosier*, 305 Kan. 1090, 1112, 391 P.3d 667, 684 (2017), when the question becomes the "constitutionality of the [statutes configured] by the legislature [to] express or promote [a] policy," "that most basic question is left to the courts," *Gannon v. State*, 306 Kan. 1170, 1205-06, 402 P.3d 513, 536 (2017). Indeed, as the Kansas Supreme Court has avowed time and again, "it is the duty of [the] court[s] to safeguard the [C]onstitution," *State v. Davidson*, 314 Kan. 88, 90, 495 P.3d 9, 12 (2021), and "the basic rights reserved thereby to the people," *Hodes & Nauser*, 309 Kan. at 682, 440 P.3d at 503. Courts "are not at liberty to surrender, or to ignore, or to waive" that duty, *Gannon v. State*, 303 Kan. 682, 745-46, 368 P.3d 1024, 1063 (2016), even when exercising that duty "serves as a check on the activities of another branch of government," *Gannon v. State*, 298 Kan. 1107, 1160, 319 P.3d 1196, 1231 (2014). The Court must decline the State's thinly veiled invitation to abdicate its duty on this occasion, as well.

IV. This Case is Ready for a Grant of Summary Judgment to Plaintiffs

As the foregoing sections make readily apparent, summary judgment should be entered for Plaintiffs because the pleadings, briefs, and evidence of record "show that there is no genuine issue

[27] Defendants flinch from the implications of their own argument when they acknowledge that a law permitting only voters of a certain race to cast ballots could not be sustained, D. Opp. 21-22—the reason being, of course, that all laws discriminating on the basis of race are subject to strict scrutiny under Section 2. *Farley v. Engelken*, 241 Kan. 663, 669-70, 740 P.2d 1058, 1063 (1987). Thus, a law requiring more rigorous proof of eligibility from voters of one race than of others—no matter how "reasonable" the proof requirements themselves might be—would unquestionably be subject to strict scrutiny and struck down. So too, here, the Anti-Fusion Laws burden fundamental rights and must weather strict scrutiny. P. Mot. 42-45, 58-59, 64.

as to any material fact and that [Plaintiffs are] entitled to judgment as a matter of law." K.S.A. 60-256(c)(2). Plaintiffs briefly make several additional points below that underscore the procedural fitness of this action for summary judgment.

A. Defendants Do Not Dispute the Material Facts of the Case

First, Defendants' response to Plaintiffs' statement of material facts, D. Opp. 2-18, confirms there are no genuine issues of material fact requiring trial. Defendants expressly concede 17 of Plaintiffs' 37 statements of material fact, D. Opp. 3-7, 9, 11-15 (¶¶ 2-6, 9-10, 15, 20, 22, 24-29, 31); effectively concede the thrust of three more while disputing only minor details, arguing they were not set forth in precisely the same terms in Plaintiffs' declarations or constitute a conclusion of law, *id.* 1-2, 5, 7 (¶¶ 1, 7, 11); and controvert another only as incomplete, not inaccurate, *id.* 12 (¶ 23).

Defendants do not contest that another 10 of Plaintiffs' statements accurately reflect the Plaintiffs' declarations explaining the personal reasons, beliefs, and aspirations that led them to form, join, and stand as candidates for UKP; Defendants merely argue that these statements are opinions and/or argument not appropriate for consideration on summary judgment. *Id.* ¶¶ 8, 12-14, 16-19, 21, 30. While, to the contrary, these explanations by Plaintiffs are relevant to assessing the nature and severity of the burdens on their constitutionally protected rights, the parties' disagreement on this point raises an issue of law, not a question of fact requiring trial.

Defendants purport to dispute Plaintiffs' remaining six statements explaining the nature of their injuries due to Defendants' enforcement of the Anti-Fusion Laws, but they do so on the principal basis that what constitutes an "injury" is a question of law; they do not dispute as a factual matter Plaintiffs' descriptions of the harms they have suffered. *Id.* ¶¶ 32-37. Moreover, the legal point Defendants raise, whether valid or not, is now moot. Defendants "no longer dispute

Plaintiffs' standing," D. Opp. 19, and thus concede that Plaintiffs have suffered legally cognizable injuries due to Defendants' challenged conduct. *See Hodes & Nauser, MDs, P.A. v. Stanek*, 318 Kan. 995, 1002, 551 P.3d 62, 70 (2024) (reciting standing test).

B. Defendants' Statement of Additional Facts Presents No Genuine Issue for Trial

Second, Defendants' Statement of Additional Undisputed Material Facts, D. Opp. 18, also presents no genuine issue of material fact requiring trial. In short, Defendants assert that Ms. Blake and Rep. Probst "could have chosen to appear on the General Election Ballot with the [UKP] label," that they instead "chose to appear . . . with the Democratic Party label," and that the Secretary did not make the selection for them. *Id.* (¶¶ 2-6). That much is undisputed, but only so far as it goes, as it overlooks the critical (and undisputed) facts that both candidates wished to keep both their Democratic Party and UKP nominations; did not wish to choose one over the other; were coerced by the Secretary pursuant to the Anti-Fusion Laws to give up the UKP nominations; and chose their Democratic Party nominations to keep the ballot line of the more established party with a larger current number of registered voters. P. Mot. 12-15 (St. Mat. Fact ¶¶ 18-19, 21-30, and testimony and evidence cited therein).[28]

C. Properly Construed, Defendants' Extra-Pleading Assertions Present No Obstacle to Summary Judgment

Third, Plaintiffs already highlighted a number of factual contentions and assertions raised in Defendants' motion to dismiss that contravene the pled facts in Plaintiffs' petitions and therefore

[28] Defendants also assert that "J.C. Moore will appear on the General Election ballot as the [UKP candidate] in House District 26." D. Opp. 18 (¶ 1). That too is true, so far as it goes, because Mr. Moore, after receiving his UKP nomination, lost his bid for the Republican Party nomination in the August 5, 2024, Republican primary, *see* P. Mot. 6 n.13 (2024 official primary results), and thus (to use Defendants' term) did not "trigger" the Anti-Fusion Laws. D. Opp. 54. In any event, this fact is immaterial to Plaintiffs' entitlement to judgment.

may not be considered in the adjudication of that motion. P. Mot. 72-75. Defendants respond that these contentions and assertions should not be understood as proposed factual findings but instead as articulations of the state interests underlying the Anti-Fusion Laws, and as legal arguments regarding the legitimacy of these interests "that require no empirical evidence to support." D. Opp. 66-68. Construing Defendants' various contentions and assertions accordingly, they present no impediment to awarding Plaintiffs summary judgment.[29]

CONCLUSION

This Court should GRANT Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

HARTENSTEIN POOR & FOSTER LLC

/s/ Scott 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 United Kansas, Jack Curtis, Sally Cauble, Lori Blake, and Jason Probst

SHARP LAW LLP

/s/ Rex A. Sharp
REX A. SHARP (KS Bar No. 12350)
rsharp@midwest-law.com
RUTH ANNE FRENCH-HODSON (KS Bar No. 28492)

[29] So construed, Defendants' assertions also give no call for discovery. Anyway, their bare-bones request-in-the-alternative for discovery fails to meet the requirements of K.S.A. 60-256(f) (party seeking discovery to oppose summary judgment must "show[ ] by affidavit or by declaration . . . that, for specified reasons, it cannot present facts essential to justify its opposition"). *See Lathrom v. Erickson*, 2008 WL 2510583, *5, 185 P.3d 972 (Kan. Ct. App. June 20, 2008) (Table).

rafrenchhodson@midwest-law.com
4820 W 75th St
Prairie Village, Kansas 66208
T: (913) 901 0505
F: (913) 901 0419

UNITED TO PROTECT DEMOCRACY

BEAU C. TREMITIERE*
beau.tremitiere@protectdemocracy.org
FARBOD K. FARAJI*
farbod.faraji@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 Brent Lewis, Elizabeth Long, Scott Morgan, and Adeline Ollenberger

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I certify that on the 22nd day of October 2024, 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