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CASE NUMBER: SA-2024-CV-000152
PII COMPLIANT

IN THE TWENTY-EIGHTH JUDICIAL DISTRICT DISTRICT COURT, SALINE COUNTY, KANSAS CIVIL DEPARTMENT

UNITED KANSAS, INC.; LORI BLAKE; JACK CURTIS; SALLY CAUBLE; ADELINE OLLENBERGER; and SCOTT MORGAN, *Plaintiffs,* vs. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; and JAMIE DOSS, in her official capacity as County Clerk and Election Officer for Saline County, Kansas, *Defendants.*	Case No. SA-2024-CV-000152

DEFENDANT SCHWAB'S MOTION TO DISMISS PLAINTIFFS' PETITION FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Defendant Scott Schwab (the "Secretary"), sued exclusively in his official capacity as Kansas Secretary of State, submits this Motion to Dismiss Plaintiffs' Petition for lack of subjectmatter jurisdiction (pursuant to K.S.A. 60-212(b)(1)) and failure to state a claim upon which relief can be granted (pursuant to K.S.A. 60-212(b)(6)).

I. – Introduction

This case is nominally about Plaintiffs' attempt to *mandate* in Kansas the use of so-called "fusion voting," a once common, now largely obscure, practice in which a single candidate is nominated by multiple parties in the same election and is permitted to appear on the same ballot

as the nominee of more than one party. The Kansas legislature, along with all but a handful of other states in the union, outlawed this mode of voting more than a century ago. At its heart, however, the lawsuit—filed on the virtual eve of a major national election—is an effort to inject the court into a major public policy dispute, completely bypass the legislative process, and radically overhaul the State's long-established election procedures. This is emphatically not the role of the judiciary.

The legal theories Plaintiffs advance were squarely rejected by the U.S. Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). As far as the Secretary can tell, they likewise have been rejected by every state supreme court (save one, New York) to evaluate such a claim under its own state constitution. The legal arguments fare no better in Kansas. Indeed, the selection of a specific methodology for conducting elections in this State is a matter that our constitution expressly and exclusively assigns to the legislature. *See* Kan. Const. art. 4, § 1.

This dispute, then, is the province of a coordinate branch. If Plaintiffs wish to change the basic ballot mechanism by which candidates are elected in Kansas, they are free to make their case to legislators in Topeka. But there is nothing remotely *legally* infirm about the current practices, and it is not the place of this Court to dictate a fundamentally new electoral process just because Plaintiffs believe that it might yield "better" or "more moderate" candidates. It is hard to imagine anything more likely to diminish the public's confidence in the integrity of the electoral process or erode the public's respect for the judicial institution itself.

II. – Background on Fusion Voting

Because so few individuals in Kansas today are even familiar with the concept of fusion voting, some brief background on modern anti-fusion laws may be helpful to the Court. There are two primary methods for conducting fusion voting on a ballot:

- ***"Office bloc" approach***: a candidate's name appears only once on the ballot for a particular office, and each of the multiple parties that are nominating such candidate (e.g., Democratic Party, Green Party, and United Kansas Party) are listed next to the candidate's name; and

- ***"Party column" approach***: the cross-nominated candidate appears on as many separate lines of the ballot as he/she has party nominations, so that a voter casts a ballot for a particular candidate under any one of multiple lines, each associated with a different political party.

Working Families Party, 209 A.3d at 293 (Wecht, J., dissenting). Although not entirely clear, it appears that Plaintiffs are calling for a "party column approach." *See* Pet. at ¶¶ 58, 70, and 78.

A. Fusion Voting Has Been Banned By Most States Since the Early 1900s

Kansas' laws prohibiting fusion voting represent the norm across the United States. Roughly forty states prohibit fusion tickets either directly or indirectly. *See Timmons*, 520 U.S. at 357 ("[I]n this century, fusion has become the exception, not the rule.").[1] Only four states— New York, Connecticut, Vermont, and Oregon—permit and use fusion candidacies.[2] And only New York and Connecticut use the "party column" approach.

Fusion bans are deeply rooted in historical efforts to reform the electoral system. Until the late 1800s, there was "no official ballot" or "official list of candidates," and all ballots cast in

[1] Sixteen states (including Kansas) directly prohibit fusion in at least some elections. *See* Del. Code Ann. tit. 15, § 4108; Ga. Code Ann. § 21-2-137; Ill. Comp. Stat. Ch. 10, § 5/7-12(9); Ind. Code § 310-1-15; K.S.A. 25-213(c); Ky. Rev. Stat. Ann. § 118.335; La. Rev. Stat. Ann. § 1280.25; Minn. Stat. § 204B.06; Mo. Rev. Stat. § 115.351; Neb. Rev. Stat. § 32-612(2); 25 Pa. Cons. Stat. Ann. § 2870(f); S.C. Code Ann. § 7-11-10(C); Tenn. Code Ann. § 2-5-101(f)(1); Tex. Elec. Code Ann. § 162.015; Wis. Stat. Ann. § 8.15(7). Four states allow a candidate to accept only one nomination. *See* Iowa Code § 49.39; Mich. Comp. Laws § 168.692; Mont. Code Ann. § 13-10-303; N.D. Cent. Code § 16.1-12-06. Twenty states and the District of Columbia effectively prohibit fusion tickets by requiring that a candidate be registered in the party from which he seeks nomination. *See* Ala. Code §§ 17-16-21, 17-16-14; Alaska Stat. § 15.25.030(14); Ariz. Rev. Stat. Ann. § 16-311(A); Cal. Elec. Code § 8002.5(a); Colo. Rev. Stat. § 1-4-601(2); D.C. Code Ann. § 1-1001.08; Fla. Stat. § 99.021(1)(b); Haw. Rev. Stat. § 12-3(a)(7); Me. Rev. Stat. tit. 21-A, § 334; Md. Elec. Law § 5-203; Mass. Gen. L. ch. 53, § 48; Nev. Rev. Stat. § 293.177; N.H. Rev. Stat. Ann. § 655:14; N.M. Stat. Ann. §§ 1-8-2, 1-8-3, 1-8-18; N.C. Gen. Stat. § 163-106; Ohio Rev. Code Ann. § 3513.07; Okla. Stat. tit. 26, § 5-105; R.I. Gen. Laws § 17-14-1; W. Va. Code § 3-5-7; Wyo. Stat. § 22-5-204.

[2] *See* N.Y. Elec. Law §§ 6-120, 6-146, 9-112(4); Conn. Gen. Stat. §§ 9-242, 9-453(t); Vt. Stat. Ann. § 2474; Or. Rev. Stat. § 254.135.

American elections were either write-in ballots or printed by political parties themselves with no state oversight. *See* Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 Colum. L. Rev. 873, 876 (2000). That meant local party bosses effectively controlled which candidates appeared on party-printed ballots, which facilitated demanding bribes from candidates to be included on the ballot and printing counterfeit ballots of a rival party with substituted names to deceive voters into voting for their opponents. *See* Winkler, *Voters' Rights*, at 883.

The need for reform was brought into sharp relief by the 1888 presidential election, "which was widely regarded as having been plagued by fraud." *Timmons*, 520 U.S. at 356. In the wake of that federal election, and after experiencing their own voting irregularities in local elections, many states, including Kansas, adopted the Australian ballot, an official state-printed ballot that lists all legally nominated candidates in one place and is distributed only at the polling place, to ensure secret voting and one-vote-per-voter. *Id.*; *see also* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 487 (2003).

With the use of single omnibus ballots printed by the government, Kansas, along with many other states, also recognized the need for related reforms as well, including the basic structure of the ballot, registration rules, and provisions designed to ensure that ballots do not become overcrowded or confusing. *See* R. Alton Lee, *Anti-Fusion Laws in Populist Kansas*, Heritage of the Great Plains (Winter 2014); James Gray Pope, *Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States*, 50 Rutgers L. Rev. 473, 484 (1998). These restrictions included requiring a minimum number of signatures for nominating petitions, *see* 1901 Kan. Sess. Laws, Ch. 177, § 3, preventing the use of symbols or emblems by one political party

that might be mistaken for those used by a different party, *id.* § 4, and restricting individuals from receiving two or more nominations for the same office, *id.* § 5.

B. Courts Have Uniformly Rejected Constitutional Challenges To Fusion Bans

In the approximately 135 years since the early enactments against fusion voting first took hold, courts have almost uniformly upheld these laws, reasoning that voters remain free to vote for any candidate they wish and that the laws advance valid state interests in ballot integrity and management, reducing voter confusion, and preventing abuses.

In *State v. Anderson*, 76 N.W. 482 (Wis. 1898), for example, the Wisconsin Supreme Court turned away a state constitutional challenge to a law requiring that a candidate nominated by multiple parties for the same office must appear on the ballot only under "the party which first nominated him." *Id.* at 483. The court found this was a reasonable ballot regulation, explaining that without some policing of a candidate's representation on the ballot, "there would be no limit to its size and it would be so complicated and confusing as to certainly materially impair the freedom of the elective franchise." *Id.* at 486. The fact that the law prevented a political party from nominating its preferred candidate did not render it constitutionally infirm, the court held, because the "individual right of the citizen to vote for the candidates of his choice" was "not impaired" and all candidates had a "reasonable opportunity" to appear "on the official ballot under a party designation." *Id.* at 486-87.

Other state supreme courts likewise found that states have a valid interest in preventing abuses of cross-nominations. In upholding an Illinois fusion ban, the Supreme Court of Illinois explained that "[i]t was well known that minor political parties by exchanges of favors succeeded, by fusions at elections, against a party having a much larger number of voters than either of the parties to the fusion, and whether such combinations were contrary to the public interest was for the General Assembly and not the courts." *People ex rel. McCormick v. Czarnecki*, 107 N.E. 625, 628 (Ill.

1914). The Supreme Court of Missouri similarly emphasized a candidate's ability to manipulate fusion in order to appear to one group of voters to support a particular platform, while appearing to voters of a "different political faith" to support a disparate set of principles. *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 958 (Mo. 1914); *id.* at 975-58 ("[T]here is no scheme so fraught with danger of fraud, deceit, dishonesty, corruption, and all similar attendant ills than what is known as the political fusion."). These courts recognized that a fusion ban serves the state's legitimate goals without infringing on voters' or candidates' rights because it does not preclude any voters from voting for or supporting any candidate they want at the election. *McCormick*, 107 N.E. at 627; *Dunn*, 168 S.W. at 958.[3]

While New York's highest court did invalidate a fusion ban under its state constitution, *see Matter of Callahan*, 93 N.E. 262 (N.Y. 1910)—and it remains one of just two states in which candidates are permitted to appear multiple times on the same ballot as the nominees for multiple parties—*a near-consensus* of other state courts have sustained the constitutionality of these laws under their own state constitutions. *See, e.g.*, *Working Families Party*, 209 A.3d at 270 (rejecting claims that fusion voting prohibition violated plaintiffs' freedom of association, freedom of speech, freedom of assembly, right to vote, and equal protection); *In re Street*, 451 A.2d 427, 429-32 (Pa. 1982) (same); *Ray v. State Election Bd.*, 422 N.E.2d 714, 719 (Ind. Ct. App. 1981) (there is no general right to cross-file petitions); *State v. Wileman*, 143 P. 565, 566-

[3] Prior to Kansas' adoption of an anti-fusion law in 1901, the Kansas Supreme Court interpreted a now-repealed version of the State's Australian Ballot Law and held, *purely as a matter of statutory construction*, that the then-governing law did not prohibit an individual from being cross-nominated by multiple parties and appearing on the ballot separately under the headings of each party. *See Simpson v. Osborn*, 52 Kan. 328, 34 P. 747, 749 (1893). That opinion has little relevance here, of course, since the anti-fusion law did not come into being for another eight years. In fact, our Supreme Court later noted that an 1898 amendment to the Australian Ballot Law had essentially repealed the 1893 version opined upon in *Simpson*. *See Miller v. Clark*, 62 Kan. 278, 62 P. 664, 666 (1900).

67 (Mont. 1914) (law did not interfere with right to vote or "right of naming candidates for public office"); *State v. Superior Court*, 111 P. 233, 234, 237-38 (Wash. 1910) (anti-fusion law did not violate political parties' or candidate's rights); *State ex rel. Fisk v. Porter*, 100 N.W. 1080, 1081 (N.D. 1904) (same); *State ex rel. Bateman v. Bode*, 45 N.E. 195, 196-97 (Ohio 1896). As detailed below, nothing about Kansas' Constitution or our supreme court's jurisprudence yields a different result.

III. – Plaintiffs Lack Standing to Pursue Their Claims

A. Legal Standard Governing Motions to Dismiss for Lack of Standing

"[S]tanding is a component of subject matter jurisdiction," *State v. Ernesti*, 291 Kan. 54, 60, 293 P.3d 40 (2010), and it may be raised at any time by a party or the court. *State v. Patton*, 287 Kan. 200, 205, 195 P.3d 753 (2008). Plaintiffs must demonstrate that they have standing to raise their claims before they can proceed. *League of Women Voters v. Schwab*, 317 Kan. 805, 813, 539 P.3d 1022 (2023) ("*LWV I*"). "Both the general issue of jurisdiction and the more specific issue of standing are issues of law." *Ernesti*, 291 Kan. at 60 (citing *Mid–Continent Specialists, Inc. v. Capital Homes,* 279 Kan. 178, 185, 106 P.3d 483 (2005)).

Defendant is asserting a facial challenge to Plaintiffs' standing to challenge K.S.A. 25-306e. In other words, Defendant is questioning the sufficiency of the Petition's allegations concerning subject matter jurisdiction. *See United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (describing the nature of a facial attack on subject matter jurisdiction). While the Court must accept Plaintiffs' allegations as true when evaluating such a motion at this phase of the proceedings, *Bd. of Cnty. Comm'rs of Sumner Cnty. v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008), Plaintiffs maintain at all times the burden of establishing standing. *Gannon v.*

State, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). If the "court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it." *Chelf v. State*, 46 Kan.App.2d 522, 529, 263 P.3d 852 (2011).

Nor is standing issued in bulk. A "plaintiff must demonstrate standing for each claim he seeks to press." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citation omitted).

B. None of the Plaintiffs Has Sustained a Cognizable Injury

Unlike the U.S. Constitution, the Kansas Constitution contains no "case or controversy" language. However, Kansas courts have adopted such a limitation pursuant to both the Judicial Power Clause in the Kansas Constitution at Article 3, § 1, *see id.* at 812, and the separation of powers doctrine inherent in the State's constitutional framework. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008).

To establish standing in Kansas under its traditional two-part test, a party must demonstrate that (i) it has "suffered a cognizable injury" and (ii) there is "a causal connection between the injury and the challenged conduct." *LWV I*, 317 Kan. at 813 (quoting *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021)). A cognizable injury—i.e., an injury-in-fact—is present when a plaintiff shows that it has already sustained, or will suffer, "some actual or threatened injury as a result of the challenged conduct." *Id.* (quotation and internal alterations omitted).

But abstract or inchoate injuries will not suffice. "The injury must pose 'adverse legal interests that are immediate, real, and amenable to conclusive relief.'" *Id.* (quoting *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015)). The "causal connection" component requires Plaintiffs to establish that the alleged injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 682 (cleaned up and citations omitted).

With respect to pre-enforcement challenges, as Plaintiffs here pursue, "[a]n allegation of future injury can satisfy the injury in fact component of the standing inquiry if there is a threatened impending, probable injury." *Id.* (citations omitted). But "[a] high threshold is required to demonstrate standing on a pre-enforcement challenge." *Id.* at 813-14. The threat of harm must be "imminent" and not "speculative or imaginary." *Id.* at 814. Moreover, Plaintiffs can survive a facial challenge to standing only if they can "establish that the statute as applied to [them]" is

unconstitutional. *Cross v. Kan. Dep't of Revenue*, 279 Kan. 501, 507, 110 P.3d 438 (2005).

1. Plaintiffs' Claimed Injuries Are Speculative

The first problem Plaintiffs confront is that any claimed injuries based on Lori Blake receiving multiple nominations is "speculative" at this point and thus cannot form the basis for standing. Plaintiffs alleged that the State's "anti-fusion statutes will abrogate Blake's [United Kansas] nomination and exclude it from the November ballot" because she "*will earn* the Democratic nomination too." Pet. at ¶ 3 (emphasis added); *see also id.* at ¶ 40 (claiming that "if Blake, *as expected*, prevails" in the Democratic primary, he will be subject to K.S.A. 25-306e). But standing must exist *at the time the litigation is commenced* (i.e., upon the filing of the Petition). *FV-I, Inc. ex rel. Morgan Stanley Mortg. Cap. Holdings, LLC v. Kallevig*, 306 Kan. 204, 392 P.3d 1248 (2017). Ms. Blake is not *currently* nominated for the general election by two parties and *may never be nominated by two parties*. At this point, she is only the nominee for United

Kansas. The Democratic Party primary election will take place on August 6, 2024, and the State Board of Canvassers will meet on or before September 3, 2024, to certify the results of said primary. K.S.A. 25-2-3; 306b; 3110. Unless and until Ms. Blake actually prevails in the

Democratic Primary and the State Board of Canvassers certifies the result, Ms. Blake is not the nominee of two parties for the 69th House District and K.S.A. 25-306e is inapplicable.

The fact that Ms. Blake is the sole candidate in the Democratic Party Primary for the 69th District, Pet. at ¶ 33 (claiming that Ms. Blake is "virtually guaranteed to win the Democratic Nomination"), does not render the claimed injury immediate, real, and amenable to conclusive relief so as to confer standing. *Cf. Baker v. Hayden*, 313 Kan. 667, 682 (2021) (fact that plaintiff claimed he would "continue to ask for recordings of public hearings" in the future was not enough to permit standing for such future requests). In fact, even were Ms. Blake to win the primary election, that fact alone would not ensure that she would ever be subject to the K.S.A. 25-306e requirements. Ms. Blake could withdraw her candidacy, otherwise be replaced on the ballot, or find her nomination challenged for unknown reasons that render her ineligible to appear on the ballot. *See* K.S.A. 25-306b(b), (c); 25-308; 25-3904, 3905(a), 3906(a). Indeed, United Kansas might even convince Ms. Blake to use the United Kansas designation, rather than the Democratic Party, on the ballot. *See Timmons*, 520 U.S. at 360 (noting that a political party is "free to convince" a candidate to be the party's nominee rather than another party's nominee). The bottom line is that, unless and until the State Elections Board certifies Ms. Blake as the Democratic Party's nominee, no Plaintiff can claim that K.S.A. 25-306e causes any injury. That lack of injury is, in turn, fatal to Plaintiffs' standing.

2. Plaintiffs Jack Curtis, Sally Cauble, and Scott Morgan Have Not Pled That They Are Even Eligible to Vote in the 69th House District

Plaintiffs theorize that they will be injured if they cannot cast a vote for Ms. Blake on a ballot that includes a United Kansas designation after her name. But Plaintiffs Jack Curtis, Sally Cauble, and Scott Morgan—party officers and registrants of the United Kansas Party—have not pled that they are even eligible to vote in the general election for the 69th District House race.

See Bd. of Cnty. Comm'rs of Sumner Cnty., 286 Kan. at 750-51 (stating that prior to discovery, the factual allegations in a petition must demonstrate standing). Upon information and belief (i.e., a search of the State's voter registration database), the Secretary is aware that none of those three individuals reside in the 69th House District (or in Saline County for that matter), and none is therefore eligible to vote for Ms. Blake regardless of any party label next to her name on the ballot. This means that they cannot assert any injury personal to them involving what is printed on the ballot in the 69th House District. *See Gannon*, 298 Kan. at 1123.

3. United Kansas and the Individual Plaintiffs Lack an Injury-In-Fact Caused By K.S.A. 25-306e

The United Kansas Party and the individual Plaintiffs additionally lack standing because the challenged statute, K.S.A. 25-306e, is not the cause of any alleged injury. *Stoll*, 312 Kan. at 734 (standing requires a showing that the alleged injury is "a result of the challenged conduct"). As noted above, Plaintiffs argue that they will be injured if Ms. Blake's name is not on the ballot with a United Kansas designation. The source of their purported injury, however, is not K.S.A. 25-306e. Assuming Ms. Blake actually secures the Democratic Party nomination, the reason that United Kansas would not appear next to her name on the ballot would be due to *Ms. Blake's own decision* to decline the nomination of the United Kansas Party. Stated another way, in that scenario, *Ms. Blake*, not *K.S.A. 25-306e*, would be the cause of Plaintiffs' alleged injuries. And to the extent Plaintiffs argue that K.S.A. 25-306e causes their injury because Ms. Blake *likely* will choose the Democratic nomination for the ballot rather than the United Kansas nomination,

Pet. at ¶ 41 (claiming that a "rational candidate" would not choose a smaller political party), as the Secretary explained in Part III.B.1 above, such injury is speculative at this point and could change because either (i) Ms. Blake might fail to secure the Democratic Party nomination, possibly due to some heretofore unknown challenge or contingency, or (ii) Ms. Blake could select United Kansas as the party to be included on the ballot, rendering K.S.A. 25-306e irrelevant.

In sum, none of the Plaintiffs have standing to pursue their claims in this case. The Court should thus dismiss the suit for lack of subject-matter jurisdiction under K.S.A. 60-212(b)(2).

IV. – Plaintiffs' Petition Fails to State a Valid Claim

In the event the Court concludes that it does have jurisdiction over Plaintiff's causes of action, an analysis of the governing case law reveals that Plaintiffs wholly fail to state a claim upon which relief can be granted.

A. Legal Standard

In evaluating a motion to dismiss pursuant to K.S.A. 60-212(b)(6), the court's task is "to determine whether the petition states any valid claim for relief." *Williams v. C-U-Out Bail Bonds,* 310 Kan. 775, 784, 450 P.3d 330 (2019). In so doing, the court must assume the truth of all well-pled facts and draw any reasonable inferences in the plaintiff's favor. *Id.*

B. The Mode of Voting Used for Elections is the Sole Province of the Legislature As a threshold matter, the Kansas Constitution expressly assigns to the legislature—and only the legislature—decisions regarding the specific voting methodology to be used in any state election. Kan. Const. art. 4, § 1 ("Mode of voting. All elections by the people shall be by ballot or voting device, or both, *as the legislature shall by law provide*.") (emphasis added); *see also id.* art. 1, § 1 (in "elections of governor and lieutenant governor the candidates for such offices shall be nominated and elected jointly *in such manner as is prescribed by law*") (emphasis added); Our Supreme Court recently reinforced this very point. *See League of Women Voters v. Schwab*, __ Kan. __, 549 P.3d 363, 378 (2024) ("*LWV II*") ("Where popular elections are required—by either statute or by the Kansas Constitution in articles 1 and 2 (or elsewhere)—the mode, form, and rules governing those elections are constitutionally delegated from the people to their free government in concrete constitutional commands.") (citing Kan. Const. art. 4, § 1).

Just as is true of Article 5, § 4, which authorizes the legislature to require "proper proofs" to ensure that the right of suffrage extends only to eligible voters, *LWV II*, 549 P.3d at 380-81, the exclusive delegation to the legislature in Article 4, § 1 necessarily confers upon lawmakers the power to select *any reasonable* mode of voting for state elections. As the Supreme Court made clear in the context of Article 5, § 4, "unless that power is abused the courts may not interfere." *Id.* at 380 (quoting *State v. Butts*, 31 Kan. 537, 555-56, 2 P. 618 (1884)); *see also id.* at 829 (as long as voting is by ballot and the person casting vote may do so in secrecy, Article 4, § 1 empowers legislature to "adopt such reasonable regulations and restrictions for the exercise of the elective franchise as may be deemed necessary") (quoting *Taylor v. Bleakley*, 55 Kan. 1, 13, 39 P. 1045 (1895)); *Sawyer v. Chapman*, 240 Kan. 409, 413-15, 729 P.2d 1220 (1986) (same).

The Kansas Supreme Court explained in *LWV II* that there is no fundamental right to vote under state law divorced from "concrete and specific provisions of the Constitution or statutes." 549 P.3d at 379-80. It is, to the contrary, an "enumerated political right." *Id.* at 380. Given the legislature's broad authority and latitude to regulate in this area, it is difficult to fathom how a voting procedure used in this State *for nearly 125 years*, which is also a critical component of virtually every other state's election infrastructure and has survived—unscathed—constitutional attacks in both the U.S. Supreme Court and almost every state supreme court to address the issue (both described in detail below), can be characterized as unreasonable.

The "statutory interpretive principle that a specific provision controls over a more general one," *id.* at 378, also is important here. Article 4 of the Kansas Constitution—which the electorate adopted by referendum in 1974—long post-dated the general provisions upon which Plaintiffs rely in our State's Bill of Rights. That article, along with Article 5, "more specifically, concretely, and plainly concern voting rights" than does any other provision of the State Constitution. *LWV II*, 549 P.3d 379.

With respect, the Judicial Branch simply has no warrant to afford Plaintiffs the relief they seek here. The decision whether to utilize fusion voting (or, for that matter, rank-choice voting, contingent voting, cumulative voting, all-mail-in voting, advance voting, or any other mode of voting) is constitutionally committed to, and is the sole province of, the legislature. It is a public policy question reserved for legislative determination. The fact that these Plaintiffs deem certain methodologies "better" or "fairer" than the status quo is totally irrelevant. Any suggestion to the contrary would be at odds with the separation of powers that is inherent in our constitutional framework. For that reason alone, Plaintiffs' claims may be dismissed.

C. Plaintiffs' Freedom of Association Claim Must Be Dismissed

Turning to the merits of this dispute, the Secretary first addresses Plaintiffs' freedom of association cause of action in Count II, which Plaintiffs tether to Section 3 of the Kansas Constitution's Bill of Rights. This provision states, "The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances."

1. Standard of Review

Although the Kansas Supreme Court has never specifically addressed the scope of this section, the U.S. Supreme Court has held that the constitutional foundation of the "freedom of association" is found in the First Amendment. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities, protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); *see also NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958) (defining freedom of association as "the right of the members to pursue their lawful private interest privately and do associate freely with others in

so doing"). And at least with respect to free speech rights, the Kansas Supreme Court has construed our own state's constitutional protections as coextensive with the First Amendment.

See League of Women Voters v. Schwab, 317 Kan. 805, 815, 539 P.3d 1022 (2023) ("*LWV I*") (citing *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980)).

2. Statute Must Be Presumed Constitutional

The Kansas Supreme Court has held that a challenged statute "comes before the court cloaked in a presumption of constitutionality." *Leiker v. Gafford*, 245 Kan. 325, 363-64, 778 P.2d 823 (1989). The Court recently reinforced this point in *Matter of A.B.*, 313 Kan. 135, 484 P.3d 226 (2021), where it explained: "This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster. If there is any reasonable way to construe a statute as constitutionally valid, this court has both the authority and duty to engage in such a construction." *Id.* at 138 (quoting *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015)). The party challenging the statute has the burden of proving that the law clearly violates the constitution. *Leiker*, 245 Kan. at 363-64. This burden "is a 'weighty' one." *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 192, 273 P.3d 709 (2012).[4]

3. The U.S. Supreme Court Rejected Plaintiffs' Freedom of Association Claims in *Timmons*

Plaintiffs run into an immediate buzz saw because the U.S. Supreme Court has categorically rejected claims under the federal Constitution that are virtually identical to those that they raise here. In *Timmons*, a so-called "minor political party"—the "New Party"—challenged the constitutionality of Minnesota's anti-fusion laws that prohibited individuals from appearing on the

[4] In *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, Syl. ¶ 2, 440 P.3d 461 (2019), the Kansas Supreme Court held that a presumption of constitutionality did not exist in cases involving suspect classes or fundamental interests. Two years later, however, in *Matter of A.B.*, 313 Kan. at 138, the Court seemed to retreat from that positon and applied that very presumption. This Court need not reconcile that apparent tension here. First, there is no suspect class involved here. Second, the mode of voting selected by the legislature does not implicate any fundamental right. Third, Plaintiffs' claims all fail even in the absence of a presumption of constitutionality.

general election ballot as candidates of more than one political party. 520 U.S. at 354. A local chapter of the New Party filed suit claiming that the Minnesota law violated the party's associational rights under the First and Fourteenth Amendments. When the case reached the Supreme Court, the justices found no merit to this claim.

The Court first noted that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* at 358 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Court then weighed "the 'character and magnitude' of the burden" that "the State's rule imposes on" the minor party's associational "rights against the interests the State contends justify that burden." *Id.* This test—commonly referred to as *Anderson-Burdick* balancing, named after the Court's decisions in *Burdick* and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)—utilizes a sliding scale. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."
Timmons, 520 U.S. at 358. The Court found that any impact Minnesota's anti-fusion law might have on the New Party was relatively light, thereby negating the need for strict scrutiny. *Id.* at 364. "Instead, the State's asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights." *Id.* (quotation omitted). The Court further added that the State need not provide any "elaborate, empirical verification of the weightiness of [its] asserted justifications." *Id.* (citing *Munro v. Socialist Workers Party,* 479 U.S. 189, 195–96 (1986).

The Court then held that a political party has no "absolute[] entitle[ment] to have its nominee appear on the ballot as that party's candidate," and that there is no severe burden on associational rights when that party's preferred individual does not appear thereon. *Id.* at 359. After all, any burden on the minor party's inability to have its first-choice candidate appear as its

nominee on the ballot is a function of the *candidate's* choice to accept a different party's nomination. *Id.*

And the minor party remains "free to try to convince" its preferred candidate to relinquish his/her earlier nomination and accept its nomination instead. *Id.* at 360.

Moreover, the Court explained, Minnesota's anti-fusion ban (just as is true, incidentally, of Kansas') "applies to major and minor parties alike," and does not prevent the party from endorsing any individual even though he/she may appear as the candidate of another party. *Id.* at 360. Nor does the law preclude any minor parties from developing, organizing, or participating in the election process. *Id.* at 361. Indeed, "[t]he New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *Id.*

The Court pointed out that, while "[m]any features of our political system—*e.g.,* singlemember districts, 'first past the post' elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics," the "Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns." *Id.* at 362. As for the New Party's claim that the anti-fusion law impeded its ability *to use the ballot* to convey to the public that it supported some other party's nominee, the Court underscored that a party has no constitutional "right to use the ballot itself to send a particularized message." *Id.* at 363. "Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* In any event, the Court added, "the New Party is able to use the ballot to communicate information about itself and its candidate to the voters, so long as that candidate is not already someone else's candidate. The party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party

members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." *Id.*

The Court concluded its burden analysis by noting that Minnesota's anti-fusion laws "do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like," "do not directly limit the party's access to the ballot," and "are silent on parties' internal structure, governance, and policymaking." *Id.* The State "reduce[s] the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, [decided that they] prefer that other party." *Id.* Any attendant burdens on "associational rights—though not trivial—are not severe." *Id.*

Meanwhile, the Court found that the State's powerful interests in this regulatory regime greatly outweigh any burden it might have on political parties. Those interests include avoiding voter confusion and overcrowded ballots; preventing party splintering and disruptions of the twoparty system; protecting the integrity, fairness, and efficiency of ballots and election processes; and blocking minor parties from nominating a major party's candidate to bootstrap their way to major-party status. *Id.* at 364-67. In the absence of an anti-fusion law, the Court pointed out, candidates could exploit fusion as a way to attach their names to slogans appealing to various political factions, which "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Id.* at 365.

At the end of the day, the Court reasoned, while states cannot "completely insulate the two-party system from minor parties' or independent candidates' completion and influence," they are free "to enact reasonable election regulations that may, in practice, favor the traditional two-party system, and . . . temper the destabilizing effects of party-splintering and excessive factionalism." *Id.* at 367. In other words, "the Constitution permits the [state's] Legislature to

decide that political stability is best served through a healthy two-party system." *Id.*

4. Kansas Law is Fully Consistent with the *Timmons* Holding

Nothing in the jurisprudence of the Kansas Supreme Court is inconsistent with *Timmons*. Nor do Plaintiffs suggest to the contrary in their Petition. Remarkably, despite repeatedly citing decisions of both the U.S. and Kansas Supreme Courts throughout their Petition, Plaintiffs do not even *acknowledge* the on-point U.S. Supreme Court opinion that completely undercuts their freedom of association cause of action. Given that the relevant text in Section 3 of the Kansas Constitution's Bill of Rights tracks almost perfectly with parallel language in the First Amendment of the U.S. Constitution, and considering that Defendants have unearthed no historical evidence that the Founders of this State intended any different meanings between the two, there is no reason to believe that the former should be deemed to be more protective than the latter.

Plaintiffs nevertheless insist that Kansas precedent calls for the use of "strict scrutiny" to assess the constitutionality of the anti-fusion law. Pet. at ¶ 72. This argument rings hollow and there is no case law to support such a proposition. In *LWV II*, the Kansas Supreme Court declined to impose *any* heightened scrutiny to an election regulation that required "proof" of a voter's eligibility to cast a ballot. Instead, the Court imposed an extremely low bar for reviewing such a legislative enactment, holding that, based on our Constitution's explicit delegation of authority to the legislature to regulate in the election space, a highly deferential "reasonableness" test governed. *LWV II*, 549 P.3d at 381-82.

Here, Kansas' anti-fusion statutes overwhelmingly pass constitutional muster under the *LWV II* "reasonableness" test, given the State's myriad interests undergirding the law. *See* Part IV(C)(5). But even if Kansas courts were to rely upon the same *Anderson-Burdick* balancing test used by the federal courts, the anti-fusion law would also easily survive constitutional challenge for all the reasons set forth in *Timmons*. As the Kansas Court of Appeals has noted, "The state's

important interest in regulating ballot access generally is sufficient by itself to justify reasonable, nondiscriminatory ballot access restrictions." *Ramcharan-Maharajh v. Gilliland*, 48 Kan.App.2d 137, 144, 286 P.3d 216 (2012) (citing *Timmons*, 520 U.S. at 364-65).

It bears noting as well that, with the exception of *California Democratic Party v. Jones*, 530 U.S. 567 (2000), all of the U.S. Supreme Court decisions that Plaintiffs cite in their Petition regarding the freedom of association count, Pet. at ¶¶ 63-73, were also cited in *Timmons*, and the Court there clearly concluded that those cases were fully consistent with its holding sustaining the constitutionality of Minnesota's anti-fusion ballot laws against an associational freedom attack. In *California Democratic Party*, meanwhile, the Supreme Court merely invalidated California's blanket primary on the grounds that it forced a political party to have its nominee determined by adherents of the opposing party. 530 U.S. at 577-79. That is nowhere close to what happens with an anti-fusion law. And the Supreme Court later clarified that a party's associational rights are not contravened by a state requirement mandating the use of a jungle primary in which only the top candidates advance to the general election, thereby rendering largely irrelevant the use of party preferences and labels. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452-58 (2008).

As for Plaintiffs' invocation of Justice Biles' dissent in *Rivera v. Schwab*, 315 Kan. 877, 949, 512 P.3d 168 (2022) (Pet. at ¶ 64), Defendants are unclear as to the point. Justice Biles believed that the legislature could not engage in partisan gerrymandering without running afoul of Section 11 of the Kansas Constitution, which deals with equal protection. But his view did not prevail. Hence, the *dissent*. *See Kobach v. Election Assistance Com'n*, 772 F.3d 1183, 1188 (10th Cir. 2014) ("This is one of those instances in which the dissent clearly tells us what the law is not."). Indeed, the Kansas Supreme Court upheld the constitutionality of the decennial redistricting there. *Rivera*, 315 Kan. at 918; *see also id.* at 892 (rejecting freedom of speech and

association claims in constitutional challenge to redistricting plan) ("Any line drawing, even one that violates equal protection guarantees, does not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly."). Whatever point Plaintiffs intended to make in this paragraph, it does not support their freedom of association claim.

Finally, Plaintiffs contend that "running a third candidate in a competitive two-way race is a recipe for disaster" because such individual "is virtually guaranteed to lose." Pet. at ¶ 26. They lament that third-party candidates tend to "tak[e] away votes from the more closely aligned competitive candidate and therefore help[] the candidate who[m] they disagree with most." Pet. at ¶ 27. But nothing in the Federal or State Constitution establishes an individual's right to a "fair shot" at success of winning. *See N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) (rejecting candidate's theory that New York's delegate selection procedures violate his freedom of association rights by not affording him "a realistic chance to secure the party's nomination."); *Timmons*, 520 U.S. at 362 (While "[m]any features of our political system—*e.g.,* single-member districts, 'first past the post' elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics," the U.S. Constitution "does not require" states to level the playing field by permitting fusion voting "any more than it requires them to move to proportional-representation elections or public financing of campaigns."). It is not the role of the judiciary to micromanage this process. As the Court noted in *Lopez Torres*, "The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product." *Id.* at 208.

Although it is not the function of this Court to pass on the wisdom of fusion voting, Defendants note that the purported virtues of this methodology are overstated. In New York, for example, where it is most widely used, "there is no centrist or moderate party . . . for the 'homeless

political middle.'" Edward B. Foley, "*Fusion or Super-Fusion*," Common Ground Democracy (July 23, 2024), available at https://edwardbfoley.substack.com/p/fusion-or-super-fusion.

"The only additional parties that participate in New York's fusion voting system are further from the center than the two major parties: the Working Family Party, historically to the left of the Democrats, and the Conservative Party, historically to the right of Republicans. Thus, the current practice of fusion voting in New York tends to further polarize, rather than depolarize, electoral competition in state and local races—as the nominees of the two major parties seek to appeal to the two more extreme parties in order to secure their nominations as well." *Id.*

Moreover, it is by no means true that third parties that put in the hard work to appeal to the broader electorate cannot achieve success in the absence of fusion. As the Supreme Court observed in *Timmons* in rejecting the claim that minor parties are unable to prevail, "Between the First and Second World Wars . . ., various radical, agrarian, and labor-oriented parties thrived, without fusion, in the Midwest. One of these parties, Minnesota's Farmer–Labor Party, displaced the Democratic Party as the Republicans' primary opponent in Minnesota during the 1930's." *Timmons*, 520 U.S. at 361 & n.9 (citations omitted). In fact, one year after *Timmons* upheld Minnesota's ban on fusion voting, the State elected as its governor the Reform Party candidate, Jesse Ventura. Just at the federal level, other examples abound as well: Angus King (elected to U.S. Senate from Maine as Independent in 2012, and re-elected in 2018); Joe Lieberman (elected to U.S. Senate from Connecticut under "Connecticut for Lieberman Party" in 2006); Harry Byrd (elected to U.S. Senate from Virginia as Independent in 1970 and 1976).

5. Kansas Has Strong and Legitimate Interests in its Anti-Fusion Law

Kansas has extremely strong and indisputably legitimate interests in maintaining the antifusion law that has been part of the State's election code for nearly 125 years.

First, the State has an obligation to ensure that the ballot remains free from manipulation.

See Timmons, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.") Political party cross-nominations on a general election ballot potentially "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising," *Timmons*, 520 U.S. at 365. For example, "a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases," *id.*, such as the "Low Taxes Party," "Pro-Life Party," or "Middle of the Road Party." The problem could be particularly acute in judicial elections. Imagine a candidate for judgeship being crossnominated by one or more of the "Tough on Crime," "Accountability for Sex Offenders," or "Strict Constructionists" Parties in one of the Kansas counties that elects its judges.

Relatedly, by allowing candidates to appear multiple times on the ballot as the nominee of different parties, fusion voting incentivizes mischief by candidates and parties alike. This could take an array of different forms. To name just a few, a major political party could create multiple minor parties—a relatively easy task given that it need only obtain the signatures of 2% of the total number of votes cast for gubernatorial candidates in the preceding general election, *see* K.S.A. 25-302a—and then have its preferred candidate appear many different times on the same ballot. This would allow the major party to monopolize ballot real estate by working up multiple cross-nominations to promote their preferred message. *See McCormick*, 107 N.E. at 629 ("If the relator can be the candidate of two parties, he can be the candidate of all six parties of the state; and if he has that right every other candidate has the same right[.]"). Similarly, a fringe candidate could attempt to rack up multiple nominations from minor parties by obtaining the bare minimum of signature petitions with little support from the general electorate. Yet that approach could suggest

to voters that the candidate has much wider support than he really does, because he appears on the ballot so many times.[5]

Worse still, a minor political party could effectively circumvent the rules for attaining major political party status—which requires the receipt of at least 5% of the total votes cast for all candidates for governor in the preceding general election, *see* K.S.A. 25-202(b)—and thus be able to nominate their candidates in a primary election (versus having to convene a delegate or mass convention, which the party must fund itself), and avoid the loss of recognition rules. *See* K.S.A. 25-302b. To accomplish this objective, a minor party with very little chance of receiving sufficient support to be anointed a major party could inflate its support by cross-nominating the major party's candidate. It could impact the nomination stage as well as "voters who might not sign a minor party's nominating petition based on the party's own views and candidates might do so if they viewed the minor party as just another way of nominating the same person nominated by one of the major parties." *Timmons*, 520 U.S. at 366. The State has a strong interest in procedures that avoid, or at least minimize the potential for, such gamesmanship. *See id.* ("The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support.")

Second, anti-fusion laws help facilitate greater competition and voter choice. Fusion voting disincentivizes minor parties from identifying new standard-bearers who best represent that party, and instead incentivizes them to nominate candidates who already have the backing of a major

[5] This is not a wild-eyed hypothetical. In the absence of anti-fusion laws in New York, former New York City Mayor Fiorello LaGuardia ran under *nine* different party labels during his political career. In 1941 alone, he was cross-nominated by four separate parties. *See* Celia Curtis, Comment, *Crossendorsement by Political Parties: A "Very Pretty Jungle"?*, 29 Pace L. Rev. 765, 791-92 (2009). Under Plaintiffs' theory, ballots might look like NASCAR vehicles, festooned with endorsements.

political party. Allowing minority parties to simply select already-popular candidates of major parties "decreases real competition." *Swamp*, 950 F.2d at 385; *see also Timmons*, 520 U.S. at 368 n.13 (describing how California's allowance of cross-nominations led to Earl Warren being the gubernatorial nominee of both major parties, thereby "stifl[ing] electoral competition and undermin[ing] the role of distinctive political parties."). This case, in fact, underscores the point. Plaintiffs freely acknowledge that the United Kansas Party was "founded with a clear understanding that . . . only two candidates will be viable in a given election," and that it will thus restrict itself to "recruit[ing] candidates who are also interested in and capable of securing the nomination of one of the two major parties." Pet. at ¶ 28; *see also* Pet. at ¶ 30 (United Kansas will only nominate candidates who "can also secure a major party's nomination, so as to avoid producing three-candidate races.")

Third, Kansas has "a strong interest in the stability of [its] political system." *Timmons*, 520 U.S. at 366. While that interest does not authorize measures that "completely insulate the two-party system" from "competition and influence" of minor parties, it does empower the State "to enact reasonable election regulations that may, in practice, favor the traditional two-party system" and "temper the destabilizing effects of party-splitting and excessive factionalism." *Id.* at 367. Kansas makes it relatively easy for minor parties to access the ballot, *see* K.S.A. 25302a, and any restrictions on fusion voting are applied evenhandedly to all parties across the board. *See* K.S.A. 25-306e. Kansas has employed this voting methodology for nearly 125 years, and the State's electorate is familiar with, has relied upon, and put their faith in the same during that time. There is nothing in any of the Kansas constitutional provisions that Plaintiffs cite in their Petition that necessitate a disturbance of this practice.

Fourth, fusion voting tends to blur the distinction between parties, which diminishes voter confidence and candidate accountability. As one jurist noted, "People may rationally believe that in a party system, each party should have a distinct ideology, platform, and the like, and it seems arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party." *Swamp*, 950 F.2d at 387 (Fairchild, J., concurring). Voters, in turn, may well believe that a candidate who is the representative of one distinct party ideology is more likely to represent those interests fully than a candidate who is the nominal standard-bearer for multiple parties, and further think, with good reason, that "one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election." *Id.*

In this vein, anti-fusion laws help safeguard the integrity of the nomination process by preventing a candidate from accepting nominations from multiple parties that may have competing, if not contradictory, platforms. Although a candidate may benefit from drawing on another party's base or using the cross-nominations to promote the breadth of that candidate's principles, such support comes at the expense of voters' confidence in their knowledge of the candidate's stances on the issues and/or the political parties' platforms.

Fifth, fusion voting invites significant voter confusion, which the State has a compelling and powerful interest in avoiding. *See Timmons*, 520 U.S. at 364. This is a highly unusual mode of voting—indeed, at least forty states outlaw it—and few voters outside a handful of states even have any familiarity with the concept. While *Timmons* did not rely on voter confusion as a basis for its holding, *id.* at 370 n.13, basic common sense reflects that, outside of the handful of states that have been using this mode of voting for a century, most voters have never even heard of it and would find the concept of a candidate's name appearing on multiple lines of the ballot somewhat bewildering. And the confusion would not be confined to how to cast a ballot or why the same

candidate's name appears multiple times. Voters are also likely to be confused by what positions a party and candidate actually stand for, whether the cross-nominated candidate will be more faithful to the issues and positions of one party versus another. As one court described it, absent the kind of ban that Kansas has had for well more than a century, "an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters. Because the candidate would be presented by the different parties as representing the particular views and preferences of each party, it would be difficult for voters to distinguish between the parties." *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991); *accord Anderson*, 76 N.W. at 486-87.

In sum, just as was true in *Timmons*, Kansas' powerful regulatory interests in maintaining its ban on fusion voting clearly outweigh any minor burdens on Plaintiffs' associational rights. Count II of Plaintiffs' Petition, therefore, must be dismissed.

D. Plaintiffs' Free Speech Claim Must Be Dismissed

Plaintiffs next claim that the State's anti-fusion law violates their rights to free speech under Section 11 of the Kansas Constitution's Bill of Rights. There is no merit to this argument.

1. Standard of Review

As noted earlier, the Kansas Supreme Court has construed our own state's constitutional free speech protections under Section 11 as coextensive with the First Amendment. *See LWV I*, 317 Kan. at 815. And given the complete absence of any interference of the anti-fusion laws on Plaintiffs' speech rights, there is no need here to explore whether, in certain circumstances, the Kansas Constitution might afford greater safeguards than its federal counterpart. As with the freedom of association claim, the *Anderson-Burdick* balancing test governs this claim. *See Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 140-43 (3d Cir. 2022) (applying *Anderson-Burdick* to First

Amendment attack on ballot content rules).

2. Kansas' Anti-Fusion Laws Do Not Violate Plaintiffs' Free Speech Rights

Nothing in the challenged laws here interferes with Plaintiffs' free speech rights. Neither K.S.A. 25-306e nor K.S.A. 25-316 restricts a minor party's access to the ballot in any way. The party, having qualified for minor party status, has a right to nominate a candidate of its choice on the general election ballot, and that candidate will appear on the ballot as long as (i) he/she has not already been nominated as the candidate of some other party and (ii) the candidate does not decline the minor party's nomination. A candidate's affirmative choice to forego the minor party's nomination does not translate into a free speech injury to the party (or anyone associated with the party).

Furthermore, nothing in Kansas' anti-fusion laws precludes (or even impedes) Plaintiffs from expressing support for or associating with the United Kansas Party's preferred candidate. They are free to create and distribute yard signs and pamphlets, produce advertisements, offer financial support, and engage in any other form of advocacy, including touting United Kansas' official endorsement. There are no restrictions on Plaintiffs' speech or expressive conduct; their communication with the electorate is essentially uninhibited. The fact that their candidate might not appear on a separate ballot line under their party's banter because he accepted an alternative nomination from some other party in no way means that their speech rights have been violated. The U.S. Supreme Court, in fact, rejected the same theory in *Timmons*, noting that anti-fusion laws do not contravene the First Amendment given that the party is still able to "communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." *Timmons*, 520 U.S. at 363; *accord Working Families Party*, 209 A.3d at 286 (rejecting free speech challenge to anti-fusion law under Pennsylvania constitution where minor

party and its supporters "were able to meet and decide . . . the candidate who best represented their values," and "then had the opportunity to participate fully in the political process, culminating in casting their votes for the candidate of their choice").

In addition, the law is well settled that there is no right "to use the ballot itself to send a particularized message" because ballots are not "forums for political expression." *Id.* Plaintiffs thus have no constitutionally protected right to express any message from their preferred party's placement on the ballot. As the Third Circuit recently explained, "[f]or ballots to be effective tools for selecting candidates and conveying the will of voters, they must be short, clear, and free from confusing or fraudulent content. This necessarily limits the degree to which the ballot may—or should—be used as a means of political communication." *Mazo*, 54 F.4th at 144; s*ee also Timmons*, 520 U.S. at 365 (characterizing ballots as forums for political expression "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising"); *Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r*, 422 F.3d 848, 851, 856 (9th Cir. 2005) ("[T]he fact that the ballot is 'crucial' to an election does not imply that [initiative proponent] therefore has a First Amendment right to communicate a specific message through it."); *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992) (ballots are "State-devised form[s]" that are "necessarily short" and thus not suitable "for narrative statements by candidates").

Another flaw in Plaintiffs' free speech theory is that ballots are cast in secret. In contrast to core political speech, which necessarily involves some interactive nature between the speaker and the recipient (not necessarily simultaneously, but at least at different points in time), the ballot "is a one-way communication confined to the electoral mechanic of the ballot." *Mazo*, 54 F.4th at 145. That is why the ballot, unlike, say, "leafletting, petition circulating, or even the wearing of

political clothing at the polling place, cannot inspire any sort of meaningful conversation regarding political change." *Id.* In other words, the ballot itself provides no "potential to spark direct interaction and conversation" about which candidate is chosen. *Id.* at 143.

Even if Kansas' anti-fusion restrictions do trigger free speech rights, however, they are perfectly constitutional. A polling place is a non-public forum, which means that the State is empowered to impose content-based restrictions on speech therein, "including restrictions that exclude political advocates and forms of political advocacy." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 12 (2018). And the government is vested with even more flexibility to regulate the ballot itself since the ballot is not a forum for any political expression at all. *Timmons*, 520 U.S. at 363. The fact that individuals lack a right to wear campaign literature inside the polling place because "[c]asting a vote is . . . a time for choosing, not campaigning," and that a state may "decide that the interior of the polling place should reflect that distinction," *Minn. Voters All.*, 585 U.S. at 15, undermines Plaintiffs' claim that they possess a freedom of speech right to dictate the contents of the ballot. Kansas' compelling interests in maintaining its ban on fusion voting, which Defendants discussed at length in Part IV.C.5, *supra*, further cements the claim's invalidity.

Plaintiffs next suggest that they are "compelled to express support for a different party" when casting a vote for their preferred candidate who does not have the United Kansas label next to her name on the ballot. Pet. at ¶ 58. This makes no sense. The casting of a vote via a secret ballot does not send any sort of expressive message. That is why the Supreme Court rejected a First Amendment challenge to a Hawaii law that banned write-in votes. *See Burdick*, 504 U.S. at 441-42. It is also why the Third Circuit turned away a First Amendment free speech attack on a New Jersey law that denied candidates the right to use certain political slogans on the ballot next to their name. *See Mazo*, 54 F.4th at 132-33, 144-54. To repeat the teaching of *Timmons* once again: a party has no "right to use the ballot itself to send a particularized message, to its candidate

and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363.

Plaintiffs attach great importance to one sentence from the Kansas Supreme Court's *LWV II* decision, which they have taken out of context. Pet. at ¶ 59. One of the claims in that case was a free speech challenge to the State's ballot collection restrictions, K.S.A. 25-2437, which prohibit individuals from returning to the election office more than ten completed ballots of other voters during any single election cycle. The plaintiffs there alleged that this limitation interfered with their free speech rights. In turning away this argument, the Court explained that a ballot delivery restriction "does not regulate something that the Plaintiffs use to speak and thereby target or burden that speech. Unlike the ink that a party uses to create written speech, or the money or people that a party uses to create oral speech, the delivery of completed ballots is not a speech input." *LWV II*, 549 P.3d at 385 (quotations and internal alterations omitted). "Ballot deliverers," the Court added, "are no more engaged in speech than is the postal service when it delivers packages." *Id.*

In distinguishing between the activities of the ballot collectors/deliverers and the voters from whom the ballots are collected/delivered, the Court noted that "the advance ballot is the core political speech of the voter, not the [plaintiff], and one does not 'speak' in this context by handling another person's 'speech.'" *Id.* Plaintiffs make much more of this sentence than is warranted. The Court was merely highlighting the different positions for First Amendment purposes occupied by the voter casting the ballot and the individuals collecting the ballot and returning it to the election office. The Court was in no way intending to convey any disagreement with *Timmons* (and, as far as Defendants can tell, virtually every other court to address the issue) that the ballot itself is not a forum of expression. Indeed, that point was not even remotely at issue at *LWV II*. And if the ballot itself really represents core political speech, that would mean the State is effectively powerless to adopt any regulations governing the ballot's content, an unimaginable

scenario that would wipe away vast swaths of election law jurisprudence and introduce massive uncertainty to this area of law. It is inconceivable that the Kansas Supreme Court intended such a revolutionary impact from one sentence of less-than-precisely drafted *obiter dictum*. In short, Plaintiffs' free speech claims fail to state a claim.

E. Plaintiffs' Equal Protection Claim Must Be Dismissed

Finally, Plaintiffs maintain in Count III that Kansas' anti-fusion laws contravene their right to equal protection under Section 2 of the Constitution's Bill of Rights.

1. Standard of Review

The Kansas Supreme Court has made clear that it is "guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when . . . called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights." *Rivera*, 315 Kan. at 894. The two provisions are construed to provide identical rights. *Id.*

2. Kansas's Anti-Fusion Laws Do Not Violate Equal Protection

"Equal protection requires similarly situated individuals be treated alike." *LWV II*, 549 P.3d at 383 (quotation omitted). "It does not require that all persons receive identical treatment, but only that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Id.* (quotation omitted). Kansas' anti-fusion laws treat all political parties identically. A major party can no more cross-nominate candidates on the general election ballot than a minor party. Neither K.S.A. 25-306e nor K.S.A. 25-613 makes any distinction between the two. This equal treatment across-the-board undermines any equal protection challenge. While Plaintiffs complain of the law's impact on minor parties like United Kansas, *see* Pet. at ¶¶ 26-28, in many ways, major parties are more impacted by the fusion ban than minor parties because major parties, in light of their superior resources, could more effectively exploit fusion to their advantage.

Regardless, the fact that all parties must play by the same rules underscores that there is nothing constitutionally problematic with Kansas' regulatory scheme.

Furthermore, if this Court applies the *Anderson-Burdick* balancing test to equal protection challenges to ballot access laws, which is the standard federal courts apply, *see Indep. Party of Fla. v. Fla. Sec'y of State*, 967 F.3d 1277, 1281 (11th Cir. 2020) (applying *Anderson-Burdick* to ballot-access challenge under the Equal Protection Clause), Kansas' anti-fusion law easily survives that crucible. Kansas' law imposes virtually no burden on minor parties, *Timmons*, 520 U.S. at 363 (burdens on anti-fusion law on minor party "are not severe"), whereas the State's myriad interests in maintaining this regulatory law are compelling, *see* Part IV.C.5, *supra*, are amply "weighty to justify the limitation imposed on [Plaintiffs'] rights." *Id.* at 364.

The type of state laws that courts have invalidated on equal protection grounds in the context of minor parties' access to the ballot invariably involve statutes that either prevent, or make it unduly burdensome, for a minor party to stake out any real estate on the ballot. *See, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down Ohio law that required a new political party to file a petition signed by voters totaling 15% of the number of ballots cast in the last preceding gubernatorial election as a prerequisite to recognition); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (declaring unconstitutional an Illinois law that required independent candidates and new political parties to obtain a much higher, and burdensome, number of signatures in Chicago than in other parts of the State); *cf. Anderson*, 460 U.S. at 786-806 & n.7 (striking down on First Amendment grounds state law that required independent candidates to file paperwork no later than March 20 of election year—nearly 7½ months before the general election—in order to appear on ballot). Similarly, laws that treat major and minor parties discretely often face tough judicial scrutiny. *See, e.g., Reform Party of Allegheny Cnty. v.*

Allegheny Cnty. Dep't of Elections, 174 F.3d 305 (3d Cir. 1999) (en banc) (invalidating Pennsylvania law that permitted major political parties to cross-nominate candidates in a general election, but prohibited minor parties from doing so). But anti-fusion laws that are applied evenhandedly nearly always survive constitutional challenges. *See* Part II.B., *supra*.

Plaintiff United Kansas Party, like every other minor party in Kansas, faces virtually no barrier at all to ballot access. The only reason that United Kansas might not appear on the ballot in November is because it affirmatively chose to nominate a candidate who it believes will also be nominated by the Democratic Party, and that candidate in turn opted to have her name listed on the general election ballot as the nominee of the Democratic Party rather than United Kansas. That is not a constitutional injury. *See Anderson*, 76 N.W. at 486 ("Mere party fealty and party sentiment . . . are not the subjects of constitutional care."). Just as is true of the federal Constitution, the Kansas Constitution "does not require that [the State] compromise the policy choices embodied in its ballot-access requirements to accommodate the [United Kansas Party's] fusion strategies." *Timmons*, 520 U.S. at 365.

V. – Conclusion

It is more than a little ironic that Plaintiffs' demand for greater factionalism in both our politics and on our ballots—which they claim is not only *beneficial*, but *required* by the Kansas Constitution—represents the very thing that President George Washington famously warned our young country against in his Farewell Address back in September 1796.[6] As the Supreme Court

[6] Interestingly, Washington never actually publicly read his address. Instead, he arranged for his speech to be published in *Claypool's American Daily Advertiser*, a Philadelphia newspaper, on September 19, 1796. His remarks were then widely reprinted in newspapers throughout the country. *See* U.S. Dep't of State, Archive, available at https://2001-2009.state.gov/r/pa/ho/time/nr/14319.htm.

explained, while a State cannot regulate its elections in a way that completely insulates the twoparty system from any influence by minor parties or independent candidates, *Timmons*, 520 U.S. at 367, it is certainly free to embrace the positon of "'the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government.'" *Id.* at

368 (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974) (citing The Federalist No. 10 (James Madison))).

This lawsuit cannot withstand Defendants' motion to dismiss. Not only do Plaintiffs lack standing, but their claims encroach on a subject that is textually committed under the Kansas Constitution exclusively to the legislative branch. The judiciary simply has no say in this policy dispute. Even if the Court deemed it proper to enter that fray, however, not a single one of Plaintiffs' constitutional causes of action against the State's anti-fusion laws—freedom of association, freedom of speech, and equal protection—state a claim upon which relief can be granted. For these reasons, Defendants' motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 5, 2024, I electronically filed a copy of the above with the Clerk of the District Court by using the eFlex filing system, which will transmit a copy to all counsel of record. In addition, I e-mailed a copy to all counsel who have entered an appearance in the case and are not members of the Kansas Bar.

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