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CLERK OF THE SALINE COUNTY DISTRICT COURT
CASE NUMBER: SA-2024-CV-000152
PII COMPLIANT

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

UNITED KANSAS INC. et al.,	
Plaintiffs,	Case No. SA-2024-CV-000152
vs.	consolidated with
SCOTT SCHWAB, et al.,	Case No. RN-2024-CV-000184
Defendants.	

DEFENDANT SCOTT SCHWAB'S (i) REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' PETITION and (ii) RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Scott Schwab (the "Secretary") submits this (i) Reply in support of his Motion to Dismiss Plaintiffs' Petition and (ii) Response in Opposition to Plaintiffs' Motion for Summary Judgment. For the reasons set forth below, the Secretary's Motion to Dismiss should be granted and Plaintiffs' Motion for Summary Judgment should be denied.

I. – Introduction

There is no question here that Plaintiffs' three causes of action find no support in the case law and, in fact, are undercut by *on-point* jurisprudence from the U.S. Supreme Court on at least two of the claims. Nor is there any denying that virtually every State Supreme Court has rejected the identical theories Plaintiffs advance here. The thrust of Plaintiffs' brief, then, is a call to disregard the vast swath of precedent in direct tension with their claims and instead adopt a series of legal positions promulgated almost exclusively by dissenting judges, academics, and political activists. All the while, Plaintiffs urge the Court to afford virtually no deference to the State in

its critical efforts to ensure fair and efficient election administration, safeguard the integrity of the electoral process, and preserve the stability of its political system. Defendants explain herein why there is no sound basis for departing from the well-trodden jurisprudential path.

II. – Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts and Defendants' Own Additional Statement of Undisputed Material Facts

Although Plaintiffs have acknowledged that "[t]he material facts are simple" in this case "and do not require discovery in order to adjudicate the straightforward legal questions at issue," (Pls.' Mot. to Expedite Saline Cnty. Proceedings at ¶ 11, filed 7/18/2024), most of the thirty-seven "facts" they propose represent little more than the opinions, speculation, and conjecture of the individual Plaintiffs, none of which is proper in a summary judgment motion. *See* Kan. Sup. Ct. R. 141(a)(1) (requiring party seeking summary judgment to set forth "the uncontroverted contentions of *fact*"); *see also Friesen-Hall v. Colle*, 270 Kan. 611, Syl. ¶ 4, 17 P.3d 349 (2001) (at summary judgment, party may not rely upon "speculation, surmise, or conjecture"); *Johannes v. Idol*, 39 Kan.App.2d 595, 606, 181 P.3d 574 (2008) ("arguments [that] amount to accusations and speculations . . . are insufficient" for summary judgment). Moreover, rather than *concisely* setting forth individual facts in individually numbered paragraphs, as Rule 141(a) envisions, Plaintiffs frequently spew out long narratives filled with both facts and opinions. Again, improper. Nevertheless, Defendants will respond as best they can.

A. *Plaintiffs' Statement of Undisputed Material Facts*

1. Plaintiff United Kansas Inc. is a moderate political party recognized by the State of Kansas and granted ballot access in accordance with K.S.A. 25-302a. Declaration of Jack Curtis dated August 29, 2024, ¶¶ 4-6 ("Curtis Decl.") (filed herewith).

RESPONSE: Controverted in part, but immaterial. The cited portions of the declaration do not support the assertion that United Kansas Inc. is "a moderate political party." That assertion is argument, not fact, and immaterial to this dispute in any event. By its terms, the statute does not recognize a political party as "moderate." Instead, K.S.A. 25-302a recognizes a political party based on whether it meets certain statutory requirements. Defendants do not dispute, however, that United Kansas Inc. is a political party recognized by Kansas and granted ballot access.

2. Plaintiff Lori Blake is a registered Kansas voter and lifelong resident of Saline County. She has nearly three decades experience as a small-business owner and administrator in the fields of public education, disabilities support, and child-abuse prevention. She served for 13 years on the Southeast of Saline School Board, among other community service. UKP has nominated Ms. Blake as its candidate in the 2024 general election to represent the 69th District in the Kansas House of Representatives (also known as the State House). Additionally, Ms. Blake won the August 6, 2024, Kansas Democratic Party primary election for the same seat, and was certified as the Democratic nominee by the State Board of Canvassers on August 28. She intends to remain a resident of Saline County for the foreseeable future, and if elected to the State House in 2024, to stand again as a candidate of both UKP and the Democratic Party during election years to follow. Declaration of Lori Blake dated August 30, 2024, ¶¶ 2-4 ("Blake Decl.") (filed herewith); Curtis Decl. ¶ 11.

RESPONSE: Uncontroverted. Defendants do not dispute that the declaration makes those assertions.

3. Plaintiff Jason Probst is a registered Kansas voter and resident of Reno County. He is a Member of the Kansas State House, where he has proudly represented the 102nd District since 2017. UKP has nominated Rep. Probst as its candidate in the upcoming Kansas general election for the 102nd District's seat. Additionally, he won the August 6, 2024, Kansas Democratic Party primary election for the same seat, and was certified as the Democratic

nominee by the State Board of Canvassers on August 28. He intends to remain a resident of Reno County for the foreseeable future, and if re-elected to the State House in 2024, to stand again as a candidate of both UKP and the Democratic Party during election years to follow. Declaration of Jason Probst dated August 31, 2024, ¶¶ 2-3 ("Probst Decl.") (filed herewith); Curtis Decl. ¶ 11.

RESPONSE: Uncontroverted. Defendants do not dispute that the declaration makes those assertions.

4. Plaintiff Jack Curtis is a registered Kansas voter affiliated with UKP, and he serves as the Party's Chair. He was previously registered as unaffiliated. Mr. Curtis is a compliance professional in the healthcare industry and has played an active role in Kansas civic life, including years of service in the American Legion Boys State. He intends to remain a registered UKP voter and the Party's Chair for the foreseeable future. Curtis Decl. ¶¶ 2-3.

RESPONSE: Uncontroverted. Defendants do not dispute that the declaration makes those assertions.

5. Plaintiff Sally Cauble is a registered Kansas voter affiliated with UKP, and she serves as the Party's Vice Chair. She was previously registered as a Republican and served on the State Board of Education for 12 years, winning election in 2006 and re-election in 2010 and 2014. She intends to remain a registered UKP voter and the Party's Vice Chair for the foreseeable future. Declaration of Sally Cauble dated August 29, 2024, ¶¶ 2-3 ("Cauble Decl.") (filed herewith).

RESPONSE: Uncontroverted. Defendants do not dispute that the declaration makes those assertions.

6. Plaintiff Adeline Ollenberger is a resident of Saline, Kansas, and a registered Kansas voter affiliated with UKP. She was previously registered as a Democrat. Ms. Ollenberger wishes to vote for Ms. Blake in the forthcoming Kansas election as UKP's nominee, and not of

any other party, to express her support both for Ms. Blake, as her preferred candidate to represent her in the State House, and for UKP, as the party that best represents her interests and ideals. Ms. Ollenberger intends to remain a Kansas resident in the 69th House District and a registered UKP voter for the foreseeable future. Declaration of Adeline Ollenberger dated September 2, 2024, ¶¶ 2, 3, 7 ("Ollenberger Decl.") (filed herewith).

RESPONSE: Uncontroverted. Defendants do not dispute that the declaration makes those assertions.

7. Plaintiff Elizabeth Long is a resident of Hutchinson, Kansas in the 102nd State House District, and a longtime unaffiliated voter who is now registered with UKP. A longtime employee of the Kansas Department of Corrections, she wishes to vote for Rep. Probst in the forthcoming Kansas election as UKP's nominee, and not of any other party, to express her support both for Rep. Probst, as her preferred candidate to represent her in the State House, and for UKP, as the party that best represents her interests and ideals. She intends to remain a registered UKP voter and resident in the 102nd House District for the foreseeable future. Declaration of Elizabeth Long dated August 31, 2024, ¶¶ 2, 3, 9 ("Long Decl.") (filed herewith).

RESPONSE: Controverted in part. The cited portions of Ms. Long's declaration do not state that United Kansas Inc. "best represents her interests and ideals." As for the remainder of the paragraph, it is uncontroverted that the declaration makes those assertions.

8. Plaintiff Scott Morgan is a registered Kansas voter affiliated with UKP who has served on the staffs of Senator Bob Dole and Governor Mike Hayden, was appointed to the Federal Election Commission, ran as a Republican for several state and federal offices, and served two terms on the Lawrence School Board. He ran his own publishing business from 1990 to 2007, and continued to work there as an editor until 2020. He was a registered Republican voter

in Kansas for his entire adult life until the mid-2010s, and was principally unaffiliated in the years after. He is now a registered UKP voter, who feels that UKP "gives people like [him] who no longer feel comfortable with either major party the ability to cast votes on behalf of sensible candidates who can win elections and make problem-solving for the people a priority again[.]" He intends to remain a Kansas resident and registered UKP voter for the foreseeable future. Declaration of Scott Morgan dated August 30, 2024, ¶¶ 2-3, 8 ("Morgan Decl.") (filed herewith).

RESPONSE: Controverted in part. It is uncontroverted that the declaration makes those assertions. However, Mr. Morgan's claim that "UKP 'gives people like [him] who no longer feel comfortable with either major party the ability to cast votes on behalf of sensible candidates who can win elections and make problem-solving for the people a priority again'" is opinion/argument, not fact, and actually contradicted by United Kansas Inc. given that United Kansas Inc. *only* nominates candidates who also have secured the nomination of another political party. Decl. of Laurie Cauble, ¶¶ 5-6; Decl. of Jack Curtis, ¶ 8.

9. Plaintiff Brent Lewis is a registered Kansas voter affiliated with UKP. Mr. Lewis is a U.S. Army veteran and public school educator who had been registered unaffiliated for a number of years prior to the formation of UKP, because in his view "neither major party here in Kansas consistently represents people like [him]." He is "excited by UKP's arrival on the scene," because "UKP offers a home for common-sense voters who value collaboration, compromise and a solutions-oriented approach over fighting ideological battles with the other side." He intends to remain a registered UKP voter for the foreseeable future. Declaration of Brent Lewis dated August 31, 2024, ¶¶ 2-4, 7 ("Lewis Decl.") (filed herewith).

RESPONSE: Uncontroverted. Defendants do not dispute that the declaration makes those assertions in relevant part.

10. UKP was founded in 2023 by a cross-partisan group of local leaders and concerned citizens, based on the belief that most Kansans want to reduce bitter partisanship and rigid ideology in Kansas politics, promote more compromise and consensus, and place emphasis on

real problem solving. Led by Mr. Curtis and Ms. Cauble, UKP was formed to provide a political home for those who believe that there is wisdom on the left and the right but that both major parties must stop indulging extreme and fringe views on their respective sides. With nearly 30% of Kansas voters registered as unaffiliated, UKP's leadership believes that much of the State's electorate likely shares the core concerns and priorities that inspired the formation of this new party. Curtis Decl. ¶ 4; Cauble Decl. ¶ 4; Kan. Sec'y of State, *Election Statistics Data: Voter Registration*, https://sos.ks.gov/elections/election-statistics-data.html (last visited Aug. 30, 2024).

RESPONSE: Uncontroverted that the cited portions of the declarations make these assertions. The current percentage of registered Kansas voters that are unaffiliated with any political party, including United Kansas Inc., is approximately 28.8%.

11. On March 12, 2024, UKP filed more than thirty-five thousand signatures from Kansas voters in support of its petition for formal party recognition. On May 24, 2024, the Secretary of State recognized UKP as a formal political party entitled to ballot access after his office and county election officials reviewed the petition and confirmed that an adequate number of valid signatures had been submitted in accordance with K.S.A. 25-302a. Curtis Decl. ¶¶ 5-6 & Exh. A, thereto.

RESPONSE: It is uncontroverted that United Kansas Inc. was recognized as a political party on May 24, 2024, after having met the requirements in K.S.A. 25-302a, including obtaining more than the minimum number of signatures required. It is also uncontroverted that, having obtained such status, United Kansas Inc. is permitted to nominate candidates in conformance with Kansas law. Whether United Kansas Inc. is "entitled to ballot access," however, is a question of *law*, not a material fact.

12. Evaluating, recruiting, and nominating candidates who best represent UKP's philosophy and advance its key goals is the party's most important function. As part of that process, UKP knows that running a third candidate in a competitive two-way race is a recipe for disaster. The problem is not simply that a third candidate is almost guaranteed to lose. Fielding such a

candidate would also directly undermine UKP's political goals and priorities by taking away votes from whichever viable candidate is more closely aligned with UKP's values of moderation and compromise, therefore helping the candidate with whom the party disagrees most. Nominating an individual who would be a third candidate in a general election would therefore frustrate the entire purpose of UKP by making it harder for moderates to win, and easier for more extreme candidates of the left and right to take office. Curtis Decl. ¶¶ 7-8; Cauble Decl. ¶ 5.

RESPONSE: Controverted. The declarations' assertions contain argument, opinion, and speculation, not fact. While the assertions of Mr. Curtis and Ms. Cauble about the efficacy of third party candidacies may represent their personal beliefs and may be why Mr. Curtis chose to start United Kansas Inc., those assertions, opinions and speculative statements are not *facts* and cannot be support for summary judgment.

13. Because of these political realities, UKP has determined that to advance its goals of political moderation and sensible governance, in most races it must recruit and nominate candidates who are also interested in and capable of securing the nomination of one of the two major parties—candidates like Ms. Blake and Rep. Probst. Curtis Decl. ¶¶ 8-9; Cauble Decl. ¶ 5.

RESPONSE: Controverted. The declaration's assertion that it is a "political realit[y]" that a party must nominate the candidate of another party to advance goals of political moderation and sensible governance is argument, speculation, and opinion, not fact. It is not appropriate for consideration for purposes of summary judgment. Further, these are nothing more than the personal beliefs of Mr. Curtis and Ms. Cauble with which others could disagree.

14. Consistent with its founding principles, UKP intends to pursue this strategy in 2024 and for upcoming elections in 2026, 2028, and beyond. It will nominate moderate candidates who share UKP's collaborative and inclusive approach to politics, eagerly embrace UKP's support, and can also secure a major party's nomination, to avoid producing three-candidate races that increase the chances of electing far-left and far-right extremists. Curtis Decl. ¶ 10; Cauble Decl. ¶ 5.

RESPONSE: Controverted. Statements regarding whether a particular candidate is "moderate," United Kansas Inc.'s "approach to politics," and the likelihood of "far-left and far-right extremists" winning elections are all speculation, opinion, and argument, not fact. They are not appropriate for consideration for purposes of summary judgment.

15. In furtherance of this strategy and the Party's founding principles and objectives, on May 30, 2024, UKP nominated Ms. Blake and Rep. Probst as its 2024 candidates for the 69th and 102nd District seats in the Kansas State House. Curtis Decl. ¶ 11; Cauble Decl. ¶ 5; Blake Decl. ¶ 6 & Exh. A (August 27, 2024, screenshot of official Secretary of State candidate list); Probst Decl. ¶ 5 & Exh. A (same).

RESPONSE: It is uncontroverted that the United Kansas Party nominated Ms. Blake and Mr. Probst as its 2024 candidates for the 69th and 102nd District seats in the Kansas State House.

16. Ms. Ollenberger wishes to vote for Ms. Blake this November on the UKP ballot line as UKP's chosen nominee. Ms. Ollenberger believes that "with the two major parties so divided and unwilling to work together . . . [w]e need a middle ground in politics to build consensus," and is "hopeful that votes on the UKP ballot line," including hers, "could chart a new direction for our politics: one focused on finding common ground and solving real problems." Ollenberger Decl. ¶¶ 4-7.

RESPONSE: Controverted. The cited portions of the declaration are nothing more than Ms. Ollenberger's personal opinions, arguments, and speculation, not facts. They are thus not appropriate for consideration for purposes of summary judgment.

17. Ms. Long wishes to vote for Rep. Probst this November on the UKP ballot line as UKP's chosen nominee. Ms. Long is "tired of all the battles between the two major parties," and wants to vote for Rep. Probst on the UKP ballot line because "when people like me vote on the UKP ballot line, we can send a message with our vote. Whether the candidate is on the Democratic or Republican side, they'll know a big share of their votes came from voters like me

who are fed up with partisan politics, and want them to work with politicians from both parties to get things done." Long Decl. ¶¶ 4-9.

RESPONSE: Controverted. The cited portions of the declaration are nothing more than Ms. Long's personal opinions, arguments, and speculation, not facts. They are thus not appropriate for consideration for purposes of summary judgment.

18. Ms. Blake was honored to receive UKP's nomination, and the Party considers her an ideal UKP standard-bearer. Like UKP, she is "frustrated by the gridlock our two-party system has created, and the inability, or unwillingness, of both major parties to come together to solve problems." She is encouraged by UKP's focus on nominating competitive, moderate candidates in lieu of non-viable third candidates, because this strategy will allow voters to "convey[ ] a clear and important message" of support for "politics that align with UKP's commitment to moderation and compromise." Blake Decl. ¶¶ 7-12; Curtis Decl. ¶ 11; Cauble Decl. ¶ 5.

RESPONSE: Controverted. The cited portions of the declaration are nothing more than Ms. Blake's personal opinions, arguments, and speculation, not facts. They are thus not appropriate for consideration for purposes of summary judgment. Moreover, nothing in Kansas' anti-fusion ban precluded Ms. Blake from being listed on the ballot as the nominee of the United Kansas Party other than her own decision to choose the Democratic Party nomination over the United Kansas Party nomination.

19. Rep. Probst also gladly welcomed and continues to welcome UKP's support, and the Party considers him an ideal choice as a standard-bearer for the UKP ethos. He shares UKP's concern "that voters in the middle of the political spectrum tend to get ignored both in politics and when it comes to policymaking in Topeka, as elected officials are often punished for being more moderate and open to compromise." He is hopeful that UKP candidacies such as his, by expanding "meaningful electoral choice, will increase voter engagement" and "manifest[ ] public support for moderation and pragmatism" that will "change the incentives in Topeka and make it

more likely that different political factions would look for ways to find common ground." Probst Decl. ¶¶ 6-11; Curtis Decl. ¶ 11; Cauble Decl. ¶ 5.

RESPONSE: Controverted. The cited portions of the declaration are nothing more than Mr. Probst's personal opinions, arguments, and speculation, not facts. They are thus not appropriate for consideration for purposes of summary judgment. Moreover, nothing in Kansas' anti-fusion ban precluded Mr. Probst from being listed on the ballot as the nominee of the United Kansas Party other than his own decision to choose the Democratic Party nomination over the United Kansas Party nomination.

20. On April 12, 2024, Ms. Blake filed with the Secretary of State a Declaration of Intention to run in the August 6, 2024, Democratic primary for the 69th House District seat, in accordance with K.S.A. 25-205. Rep. Probst filed his Declaration of Intent to run in the Democratic primary for the 102nd House District seat on May 1, 2024. No other candidates filed for the Democratic nomination in either House District prior to the June 3 deadline. On August 6, Ms. Blake and Rep. Probst won their Democratic primaries, and on August 28, the State Board of Canvassers certified their victories. Blake Decl. ¶ 5; Probst Decl. ¶ 4.

RESPONSE: Uncontroverted.

21. Ms. Blake and Rep. Probst wish to retain both their UKP and Democratic Party nominations, to publicly campaign and seek support from the voters of the 69th and 102nd House Districts as the formal nominees of both parties, and to serve next term in the State House in order to advance the key priorities for each party. They are confident in their ability to effectively advocate the priorities of both parties, just as any elected official routinely navigates competing interests of key stakeholders and constituents. Blake Decl. ¶ 13; Probst Decl. ¶ 12.

RESPONSE: Controverted. The cited portions of the declaration are nothing more than Mr. Probst's personal opinions, arguments, and speculation, not facts. They are thus not appropriate for consideration for purposes of summary judgment.

22. On June 21, 2024, the General Counsel to the Secretary of State issued a letter to UKP stating that, pursuant to K.S.A. 25-306e and 25-613, the Secretary will prohibit Ms. Blake and Rep. Probst from keeping their UKP and Democratic nominations for the final two months of the election and will permit each of them to have only one nomination on the ballot. *See* Curtis Decl. ¶ 12 & Exh. B.

RESPONSE: Uncontroverted.

23. The General Counsel did not raise any questions as to the validity of either of the existing UKP nominations or the then-forthcoming Democratic nominations; rather, he confirmed that no objections had been filed challenging their legitimacy. *Id.* ¶ 13 & Exh. B.

RESPONSE: Controverted. It is uncontroverted that the General Counsel asserted that "No objection pursuant to KSA 60-308 was filed contesting any of their nominations," referring to the United Kansas Inc. and Republican nominations of J.C. Moore and the United Kansas Inc. and Democratic nominations of Lori C. Blake and Jason Probst. Decl. of Jack Curtis ¶ 13 & Exh. B. However, the General Counsel's letter also asserted that, pursuant to state law, a person's name may only appear on the ballot one time and a person may only appear on the ballot as being nominated by one party. *Id.*

24. Instead, the General Counsel explained that the Secretary would apply Section 25-306e to Ms. Blake and Rep. Probst if they prevailed (as in fact occurred) in their uncontested Democratic primary races. Pursuant to Section 25-306e, the Secretary would require Ms. Blake and Rep. Probst to "file within seven days" after the State Board of Canvassers' certification of the primary results "a written statement, signed and sworn . . . , designating which nomination [he] desires to accept": the UKP or Democratic nomination. *Id.* ¶ 14 & Exh. B (quoting K.S.A. 25-306e). While the General Counsel omitted this language from his letter, the statute further clarifies that "[u]pon filing such a statement, such person shall be deemed to have declined any other nomination." K.S.A. 25-306e.

RESPONSE: Uncontroverted.

25. The General Counsel continued that if Ms. Blake or Rep. Probst "refuse[d] or neglect[ed] to file such statement," the Secretary, "immediately upon the expiration of the seven-day period, shall make and file . . . an election of one nomination for [her/him]." *Id.* ¶ 15 & Exh. B (quoting K.S.A. 25-306e). County Clerks Doss and Patton then "shall print [her/his] name upon the official ballot under the designation so selected, and under no other designation." *Id.* (quoting K.S.A. 25-306e).

RESPONSE: Uncontroverted.

26. The General Counsel advised that these procedures were the required means of effectuating the restrictions set forth in Section 25-613, which states that "the name of each candidate shall be printed on the ballot only once and no name that is printed on the ballot shall be written elsewhere on the ballot." *Id.* ¶ 16 & Exh. B (quoting K.S.A. 25-613).

RESPONSE: Uncontroverted.

27. The General Counsel further explained that this process would occur in "early September" once "the state board of canvassers . . . certif[ies] the results of the [Democratic] primary election" in accordance with K.S.A. 25-3205. *Id.* ¶ 17 & Exh. B.

RESPONSE: Uncontroverted.

28. In fact, the Board of Canvassers met to certify the primary results on August 28, 2024, and certified Ms. Blake's and Rep. Probst's Democratic primary victories in the 69th and 102nd House Districts, respectively. *Id.* ¶ 18; *see* Kan. Sec'y of State, *State Board of Canvassers to Meet* (Aug 20, 2024), https://perma.cc/A6U6-CM48.

RESPONSE: Uncontroverted.

29. On August 28, 2024, Ms. Blake and Rep. Probst each received correspondence from the Secretary of State advising them that they must submit sworn statements by September 4, 2024, designating one nomination, UKP's or the Democratic Party's, each will keep. Otherwise, the Secretary of State, in his sole discretion, will designate a single nomination for each of them. Blake Decl. ¶ 16 & Exh. B; Probst Decl. ¶ 15 & Exh. B. Either way, the Secretary would nullify each candidate's non-selected nomination under K.S.A. 25-306e.

RESPONSE: It is uncontroverted that on August 28, 2024, the Secretary informed Ms. Blake and Mr. Probst via e-mail that each must file sworn statements identifying which party nomination they were accepting in conformance with K.S.A. 25-306e. Nothing in the email messages say anything about the Secretary of State designating a single nomination, but it is uncontroverted that K.S.A. 25-306e requires that if Ms. Blake or Mr. Probst "refuse[d] or neglect[ed] to file such statement, the [Secretary] shall make and file . . . an election of one nomination for such candidate."

30. Although Ms. Blake and Rep. Probst have wished since receiving their UKP nominations in May to run as formal nominees of both UKP and the Democratic Party, and to serve next term in the State House on behalf of both parties, they are barred from doing so. On August 30 and 31, 2024, Ms. Blake and Rep. Probst, respectively, each submitted a signed and sworn written statement to the Secretary, as required, indicating that they chose to retain their Democratic Party nominations, in order to keep the ballot line of the more established party with a larger current number of registered voters. Only because Ms. Blake and Rep. Probst had no other choice in the matter, they reluctantly complied with the Secretary's demand. Leaving such an important decision to the sole discretion of the Secretary, a partisan ally of their electoral opponents, was never an option. Blake Decl. ¶¶ 17-18 & Exh. C; Probst Decl. ¶¶ 16-17 & Exh. C.

RESPONSE: Controverted. Parts of this paragraph (and the corresponding declaration) are nothing more than Ms. Blake and Mr. Probst's personal opinions, arguments, and speculation, not facts. They are thus not appropriate for consideration for purposes of summary judgment. It is further controverted that Kansas law prevents Mr. Probst or Ms. Blake from "serv[ing] next term in the State House on behalf of both parties." Nothing in the cited provisions dictates what political party (or parties) a member of the Kansas House or Senate chamber must claim to represent during his/her service, and Defendants are not aware of any law to the contrary. Finally, Defendants controvert the gratuitous and false implication that the Secretary would make any necessary decision on a partisan basis.

31. Pursuant to Section 25-306e, submission of these statements means that Ms. Blake and Rep. Prost "shall be deemed to have declined [the UKP] nomination[s]."

RESPONSE: Uncontroverted.

32. As the direct result of the official actions taken by Defendants, each of the Plaintiffs suffers injury-in-fact to their interests of free expression, free association, and the equal opportunity to participate in the political process, as described in paragraphs 33-37, below.

RESPONSE: Controverted. The assertions in this paragraph are argument, not fact, and thus inappropriate for consideration for purposes of summary judgment.

33. UKP suffers injury because its valid nominations of Ms. Blake and Rep. Probst are abrogated and excluded from the November ballot, thus depriving it of its right as a recognized Kansas political party to nominate candidates in, and all ability to compete in, the 2024 races for the 69th and 102nd House District seats. UKP is prevented from publicly designating and expressing support for Ms. Blake and Rep. Probst as the Party's formal nominees and standard bearers of its ideals, thus further impairing its ability to promote itself as a viable political party, expand its appeal to and support among Kansas voters, and ultimately achieve its foundational goals of greater moderation and compromise in Kansas governance. The injury is particularly acute because it prevents UKP from performing its most critical task as a political party and the interference occurs at the most critical phase of the political process when

the public is most attuned—during the last two months of a general election campaign, and on the ballot itself. Curtis Decl. ¶¶ 8, 20-21; Cauble Decl. ¶ 6.

RESPONSE: Controverted. This paragraph consists primarily of argument, not fact, and is thus inappropriate for summary judgment. Whether something constitutes an "injury" or a "right" is a legal argument, not a fact. Moreover, Kansas law did not "deprive" the United Kansas Party from "nominating candidates in" the 2024 House races at issue, nor did it "deprive" the United Kansas Party from competing in those races. The United Kansas Party had the same opportunity as any other political party to nominate a candidate for the ballot. The United Kansas Party opted to nominate candidates that it knew were also seeking the nomination of another party. Indeed, one of the United Kansas Party's nominees, J.C. Moore, will appear on the 2024 general election ballot on behalf of that party in House District 26.

34. Ms. Blake and Rep. Probst suffer injury because they have been required—against their will—to forfeit one of the two valid party nominations they each earned and desired to keep. Further, they are prevented from publicly representing themselves to voters as the formal nominees of both UKP and the Democratic Party, both during the campaign and on the November ballot, thus impairing their ability to expand their appeal to and support among Kansas voters, which compounds the difficulty and expense of achieving election. Blake Decl. ¶ 19; Probst Decl. ¶ 18.

RESPONSE: Controverted. This paragraph consists primarily of argument, not fact, and is thus inappropriate for summary judgment. Whether something constitutes an "injury" is a legal argument, not a fact. Moreover, nothing in Kansas law "prevented" them "from publicly representing themselves to voters as the formal nominees of both [the United Kansas Party] and the Democratic Party." Nothing in Kansas law precludes them from informing anyone that they are the nominees of both parties. Kansas law only permits a candidate to appear as one party's nominee on the ballot in any particular race. As for the declarants assertion that their "ability to expand their appeal to and support among Kansas voters" is "impair[ed]" and that being identified by only one party on the ballot "compounds the difficulty and expense of achieving election," these statements represent opinion, not facts, and cannot be considered for purposes of summary judgment.

35. Ms. Ollenberger and Ms. Long suffer injury from the abrogation of UKP's nominations and their exclusion from the ballot because they are deprived of the ability to vote (respectively) for Ms. Blake and Rep. Probst, or anyone else for that matter, as the UKP candidate for the 69th and 102nd House Districts. Thus, they are prevented from using their ballots to express their support for UKP and the ideals it represents. Instead, to cast a vote for Ms. Blake or Rep. Probst, they would have to express support on their ballots for a different party, contrary to their beliefs and convictions. Ollenberger Decl. ¶ 7; Long Decl. ¶ 9.

RESPONSE: Controverted. This paragraph consists entirely of legal argument, not fact, and is thus inappropriate for summary judgment. Whether something constitutes an "injury" is a legal argument, not a fact. So are the issues of whether they can use a ballot "to express their support for UKP and the ideals it represents," and whether casting a vote for Ms. Blake or Mr. Probst involves "express[ing] support on their ballots for a different party, contrary to their beliefs and convictions."

36. As Party officials responsible for the operation of UKP's affairs, Mr. Curtis and Ms. Cauble suffer injury as the abrogation and exclusion of UKP's nomination require them to make changes to the operation of the Party, including its plans for campaigning in the fall, the messages to stress, and the expenditures to make. Curtis Decl. ¶ 22; Cauble Decl. ¶ 7.

RESPONSE: Controverted. This paragraph consists primarily of argument, not fact, and is thus inappropriate for summary judgment. Whether something constitutes an "injury" is a legal argument, not a fact.

37. All of the individual non-candidate plaintiffs, Mr. Curtis, Ms. Cauble, Ms. Ollenberger, Ms. Long, Mr. Morgan, and Mr. Lewis, are prevented from freely expressing support for Ms. Blake and Rep. Probst as UKP's nominees, and have to encourage support for another party in order to advocate for the election of the UKP nominees. They also suffer injury, as UKP members, from the impairment of the Party's ability to promote itself, expand its appeal

in the electorate, and achieve the goals that led them to join the Party. Curtis Decl. ¶ 22; Cauble Decl. ¶ 7; Ollenberger Decl. ¶ 7; Long Decl. ¶ 9; Morgan Decl. ¶¶ 9-10; Lewis Decl. ¶¶ 8-9.

RESPONSE: Controverted. This paragraph consists entirely of legal argument, not fact, and is thus inappropriate for summary judgment. Whether something constitutes an "injury" is a legal argument, not a fact. Moreover, nothing in Kansas' fusion voting ban "prevents" any of these individuals from "freely expressing support for Ms. Blake and Rep. Probst as UKP's nominees" or requires them "to encourage support for another party in order to advocate for the election of the UKP nominees." Nor does Kansas law "impair[] the Party's ability to promote itself, expand its appeal in the electorate, and achieve the goals that led them to join the Party." The United Kansas Party and, by extension, its members, can do all of these things regardless of the State's fusion voting prohibition.

B. ***Defendants' Statement of Additional Undisputed Material Facts***

1. J.C. Moore will appear on the General Election ballot as the United Kansas Party in House District 26. *See* https://sos.ks.gov/elections/elections_upcoming_candidate.aspx.

2. Lori Blake could have chosen to appear on the General Election Ballot with the United Kansas Party label.

3. Instead, Lori Blake chose to appear on the General Election Ballot with the Democratic Party label.

4. Jason Probst could have chosen to appear on the General Election Ballot with the United Kansas Party label.

5. Instead, Jason Probst chose to appear on the General Election Ballot with the Democratic Party label.

6. The Secretary of State did not choose the party label that would appear by Jason Probst's and Lori Blake's names on the General Election Ballot.

III. – Standing

In their motion to dismiss, Defendants alerted the court that no Plaintiff had standing because neither Mr. Probst nor Ms. Blake had been officially nominated by more than one political party at the time the lawsuit was filed. (Defs.' Br. at 10-12). This omission meant that K.S.A. 25-306 had not yet been implicated. After Defendants filed their motion, however, both Mr. Probst and Ms. Blake secured the Democratic nomination for each of their respective House districts, and the State Board of Elections certified those results. These results triggered K.S.A. 25-306's prohibition on a candidate being nominated by more than one political party in a particular election. Given that Mr. Probst and Ms. Blake chose to eschew their respective nominations from the United Kansas Party and instead accept the competing nomination of the Democratic Party, Defendants no longer dispute Plaintiffs' standing.

IV. – Plaintiffs' Claims Undermine Article 4, Section 1 of Kansas Constitution

Plaintiffs do not dispute that Article 4, Section 1 of the Kansas Constitution assigns to the legislature the exclusive authority for determining the specific voting methodology to be used in any state election. But they then mischaracterize the Secretary's legal argument by incorrectly suggesting that he is urging the Court to forgo any analysis of their claims under Kansas' Bill of Rights. (Pls.' Br. at 27). The point that the Secretary was making is simply that the analysis of Plaintiffs' claims under those constitutional provisions must be construed *in conjunction with* Article 4, Section 1. In other words, the Secretary is in no way advocating that the Bill of Rights be ignored; he is merely insisting that Article 4, Section 1 not be disregarded in the process, as Plaintiffs' legal theories do.

Proper constitutional interpretation requires reading each provision "in the context of the Constitution as a whole," not as isolated protections and guarantees. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325-26 (2015). Indeed, evaluating constitutional text in the light of its surrounding text—*in pari materia*—is a standard form of interpretive analysis that dates back to the earliest days of this State. *See Martin v. Francis*, 13 Kan. 220, 224 (1874) (Kansas constitutional rights must be construed in the context of the entire document, "without regard to their particular location in the constitution."); *accord* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 61 (2014) (applying same principles to the federal constitution).

Plaintiffs argue that, because they are not advancing a right to vote claim under Articles 4 or 5 of the Kansas Constitution, the "reasonableness" standard that our Supreme Court held must be applied in reviewing constitutional attacks on statutes adopted pursuant to those two articles is entirely irrelevant. (Pls.' Br. at 29). That is incorrect. While Plaintiffs are invoking free speech, freedom of association, and equal protection safeguards under the Kansas Constitution's Bill of Rights, their claims all revolve around the State's restriction on a discrete mode of voting (i.e., fusion voting), a matter on which the same governing document expressly delegates broad discretion to the legislature to regulate in Article 4, Section 1. Plaintiffs' proposed approach would render Article 4, Section 1 a nullity, which makes no sense.

Nor is Plaintiffs' position consistent with Kansas Supreme Court precedent. In *League of Women Voters v. Schwab*, 318 Kan. 777, 549 P.3d 363 (2024) ("*LWV II*"), the Court incorporated the reasonableness standard applicable to claims under Articles 4 and 5 into the standards it adopted for evaluating equal protection and due process challenges to the State's signature veri-

fication requirements. That is why, for example, the Court held that, "[t]o comply with equal protection in the context of providing 'proper proofs' of the right to be a qualified elector, any proper proofs devised by the Legislature must be capable of being applied with *reasonable uniformity* upon objective standards." *Id.* at 383 (emphasis added); *id.* at 384 (correct legal inquiry is whether the "signature requirement (and its implementing regulations and policies) . . . achieve *reasonable uniformity* on objective standards, and does it provide *reasonable notice* of defects and an opportunity to cure?" (emphasis added). It is similarly why the Court held that, "[t]o comply with due process guarantees, any proper proofs devised by the Legislature must include *reasonable notice* to the voter and an opportunity to be heard at a meaningful time and in a meaningful manner by providing an opportunity to contest the disqualification of otherwise valid absentee ballots and to cure deficiencies based on an apparent discrepancy between the voters' signatures and sample signatures available to election officials." *Id.* (emphasis added). In adopting these standards, the Court explicitly rejected the strict scrutiny approach advocated by the plaintiffs. *Id.* at 376, 384.

To simply disregard Article 4, Section 1, as Plaintiffs urge here, would introduce a separation of powers problem. Plaintiffs are effectively seeking to strip the legislature of a core power afforded to it by the Constitution—the determination of the particular mode of voting that will be employed in Kansas elections. Defendants do not contest that the legislature's policy-based judgments in this sphere must comport with other constitutional provisions. *See Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015) ("As a general rule, the legislature may enact legislation to facilitate or assist in the operation of a constitutional provision, but such legislation must be in harmony with and not in derogation of the constitution."). Thus, if the legislature

were to, say, declare that only voters who owned property or were of a certain race could cast ballots in a particular election, the statute obviously could not be sustained and the Court would have a duty to invalidate it.

But when the four factors consistently applied by the Kansas Supreme Court to assess a potential separation of powers concern are taken into account here—(1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time, *id.* at 526—it is apparent that considerable deference must be afforded to the legislature. The specific process by which our elections will be conducted is an issue textually committed to the legislative branch. The process is also one which is inherently policy-laden, with judgments to be made that are beyond the expertise and far outside the proper role of the judiciary. To put the Court in the position of determining whether one voting methodology is "better" than another, or more likely to result in a "socially desirable" candidate or outcome, not only usurps the authority of the legislature, but also deprives the citizenry of a power allocation that it specifically approved at the ballot box. The dispute here, then, is much more than a mere semantical debate over statutory construction. It is a matter that is fundamental to our system of checks and balances. In sum, while the Court must evaluate Plaintiffs' specific claims under the Bill of Rights, its analysis must likewise incorporate the substantial latitude that Article 4, Section 1 explicitly grants to the legislature on this issue.

V. – None of Plaintiffs' Constitutional Causes of Action State a Claim or Have Merit

As for the merits, Plaintiffs' brief endeavors to turn the world upside down. Because the jurisprudence from both the U.S. Supreme Court and nearly every State Supreme Court to have

addressed these issues is squarely against them, Plaintiffs rely almost exclusively on dissenting opinions, commentary from academics and political activists who disagree with those decisions, quotations from other opinions that are wholly divorced from the issues at play here, and public policy arguments regarding the supposed virtues of fusion voting. While the Kansas Supreme Court has never before confronted a challenge to the constitutionality of the State's anti-fusion law, none of Plaintiffs' legal theories for striking the statute down is persuasive.

A. *The Cases Plaintiffs Cite Were Either Overruled or Are Easily Distinguishable*

Right out of the gate, Plaintiffs put their credibility on the line by citing to court opinions that, other than two from New York (one of only a small handful of states where fusion voting is a mainstay of the electoral process), have either been overruled or are so readily distinguishable as to have no value in the case at bar. (Pls.' Br. at 31).

Start, of course, with *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996), which Plaintiffs conveniently omit to mention was overruled by the U.S. Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). Then there is *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996), which not only pre-dated *Timmons*, but also dealt with a state fusion voting ban that applied only to minor political parties and not major parties, a distinction the court found highly significant (and one that does not exist in Kansas). *See id.* at 262 ("minor parties suffered only from the disparate impact of the across-the-board ban" in Minnesota, while Pennsylvania singled minor parties out for prohibitory treatment; "burden that falls unequally on new or small political parties also impinges on associational choices protected by the First Amendment"). In fact, post-*Timmons*, the Third Circuit expressly relied upon the facially discriminatory nature of Pennsylvania's ban

on fusion voting in holding that the law violated minor parties' equal protection rights. *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 308, 312-18 (3d Cir. 1999) (en banc).

As for state cases, the only favorable fusion voting ban challenge unearthed outside New York that did not openly discriminate between major and minor parties is a heavily criticized, constitutionally abrogated, outlier decision from California: *Murphy v. Curry*, 70 P. 461 (Cal. 1902). In that closely divided 4-3 decision, the California Supreme Court—rejecting the contrary views of three state supreme courts in Wisconsin, Ohio, and Michigan: *State ex rel. Runge v. Anderson*, 76 N.W. 482 (Wisc. 1898); *State ex rel. Bateman v. Bode*, 45 N.E. 195 (Ohio 1896); *Todd v. Bd. of Election Comm'rs*, 64 N.W. 496 (Mich. 1895)—concluded that both the federal and California constitutions required allowing political parties to have its nominee placed on the ballot, even if such individual was also nominated by another party. *Murphy*, 70 P. at 463. Plaintiffs neglect to mention, however, that not only does *Timmons* undermine the California Supreme Court's federal constitutional analysis,[1] but California later amended its constitution to specifically authorize bans on fusion voting.[2] *See Spreckels v. Graham*, 228 P. 1040, 1046 (Cal.

[1] The criticism does not stop with *Timmons*. In upholding a fusion voting ban under its own state constitution, the Washington Supreme Court repudiated the California Supreme Court's flimsy reasoning. *See State v. Superior Ct. of King Cnty.*, 111 P. 233 (Wash. 1910). The court noted that California's high court "clearly put itself in the place of the Legislature and determined the law, not upon constitutional grounds, but rejected it as unwise, impolitic, and inexpedient. The case proceeded upon two false theories. . . , the one the inconvenience of the voter, and the other the denial of a right to a political party." *Id.* at 237.

[2] Plaintiffs also conveniently omit the myriad of other state supreme courts that have rejected constitutional attacks on fusion voting bans under their own state constitutions. This non-exhaustive list includes, in addition to those mentioned above: *State v. Dunbar*, 230 P. 33, 38 (Idaho 1924); *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 957-61 (Mo. 1914); *State ex rel. Metcalf v. Wileman*, 143 P. 565, 566-67 (Mont. 1914); *Gardner v. Ray*, 157 S.W. 1147, 1151-53 (Ky. 1913); *People ex rel. Schnackenberg v. Czarnecki*, 100 N.E. 283, 286-87 (Ill. 1912); *State ex rel. Curyea v. Wells*, 138 N.W. 165, 166-67 (Neb. 1912); *Hayes v. Ross*, 127 P. 340, 342 (Utah 1912); *Superior Ct. of King Cnty.*, 111 P. at 235-38; *State ex rel. Fisk v. Porter*, 100 N.W. 1080, 1081 (N.D. 1904).

1924) (noting that *Murphy* had been abrogated by Art. II, § 2½ of the California Constitution, amended in 1908). And the California anti-fusion law enacted pursuant to that state constitutional provision has survived a First Amendment challenge. *See Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018).

Plaintiffs next cite *In re City Clerk of Paterson*, 88 A. 694 (N.J. 1913), a single-judge oral decision examining the scope of a law that did not even prohibit fusion voting, but rather barred voters from nominating a candidate at the primary who was not a member of that party. *Id.* at 695. Grounding his holding entirely in a *statutory (not constitutional) interpretation*, the judge determined that the operative statute did not forbid cross-nomination, and thus ordered that the city clerk place a candidate on the ballot as the nominee of both the Republican and Progressive Parties.[3] *Id.* The New Jersey Supreme Court later expressed skepticism about the reasoning of this never-officially-reported decision, *see Stevenson v. Gilfert*, 100 A.2d 490, 493-94 (N.J. 1953), but the critical point is that it has no bearing on this case. The statute in *Paterson* did not ban fusion voting. Moreover, in contrast to the law at issue in *Paterson*, the prohibition against fusion voting in Kansas imposes no impediment on anyone from voting for their preferred candidate; the statute here simply disallows a candidate from appearing twice on the ballot.

None of these cases, of course, are binding on the Kansas judiciary. Defendants highlight the shortcomings in Plaintiffs' citations simply to underscore that Plaintiffs are categorically incorrect when they insist that Defendants' arguments are contrary to the "the preponderance of relevant, well-reasoned persuasive authority." (Pls.' Br. at 3).

[3] The New Jersey legislature subsequently adopted formal prohibitions on fusion voting. N.J. Stat. Ann. §§ 19:13-4, 19:13-8, 19:14-9, 19:23-15.

B. *Kansas' Prohibition Against Fusion Voting Does Not Violate Plaintiffs' Freedom of Speech*

Plaintiffs spill considerable ink iterating unobjectionable platitudes about the importance of speech in our society and especially our politics. But nothing in Kansas' anti-fusion laws violates Plaintiffs' free speech rights.

1. The Sound Reasoning of *Timmons* Undercuts Plaintiffs' Free Speech Theory

Plaintiffs maintain that a prohibition against the same candidate appearing multiple times on the same ballot on behalf of multiple political parties precludes Plaintiffs from spreading the party's message to voters and forces "voters to espouse positions that they do not support" in the voting booth. (Pls.' Br. at 34, 37). As Plaintiffs acknowledge, the U.S. Supreme Court rejected this very theory in *Timmons*. The Court there held that, although a fusion voting ban prevents a party "from using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate," a party has no constitutionally-grounded speech "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 362-63. Besides, the Court added, "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.* at 363.[4]

[4] Seeking to twist this point, Plaintiffs aver, "Under Defendants' theory, the State could severely limit political contributions since prospective donors are free to create and distribute yard signs and pamphlets and provide their endorsement." (Pls.' Br. at 39). But the point is that the ballot itself is not a forum for expressive conduct. And even it was, it would be a non-public forum at which the State's power to impose viewpoint-neutral regulations is at its zenith. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 461 (2008) (Roberts, C.J., concurring) ("the State controls the content of the ballot, which we have never considered a public forum"); *Lower v. Bd. of Dirs. of Haskell Cnty.*

In an effort to introduce an "unconstitutional conditions" theory into the case, Plaintiffs claim that Kansas' fusion voting ban forces them to "refrain from advocating for the Party's preferred standard-bearer" and to "introduce a third candidate into a statewide race whose presence will undermine the Party's fundamental goals of promoting moderation and defeating extremists." (Pls.' Br. at 40). Not so. Just as in *Timmons*, the challenged law does "not restrict the ability of the [United Kansas Party] and its members to endorse, support, or vote for anyone they like." 520 U.S. at 363. The fact that their preferred candidate may choose to run under the banner of some other political party on the ballot does not mean that they cannot endorse and throw their full support behind that individual. True, the law prevents that candidate from also having the United Kansas Party next to his name on the general election ballot if he opts to accept the nomination of some other party, but the burden on Plaintiffs' rights has been legally adjudged not to be severe in such circumstances. *Id.*[5] The State certainly has not imposed any conditions on Plaintiffs' political participation; they are treated no differently than any other political party or registrant.

Plaintiffs' position is also contrary to the teachings of *Burdick v. Takushi*, 504 U.S. 428 (1992), which is rather ironic inasmuch as Plaintiffs include a quotation from that case in support of their expressive conduct theory (Pls.' Br. at 37), even though the quotation is to an argument

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Cemetery Dist., 274 Kan. 735, 745-46, 56 P.3d 235 (2002) ("In nonpublic fora, the government may restrict access by content or speaker identity, so long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

[5] *Clingman v. Beaver*, 544 U.S. 581 (2005), although it involved a freedom of association claim, is also instructive. In upholding Oklahoma's semi-closed primary system against a First Amendment attack, the Court there held that the fact that a voter who wishes to vote in the Libertarian Party primary must first disaffiliate with any other party is not a severe burden on the voter's rights. *Id.* at 589; *see also id.* at 604 (O'Connor, J., concurring). As Justice O'Connor explained in her concurrence, while the voter might well have a "significant commitment to a major party" and desire to maintain that association, forcing him to forfeit the registration in order to vote in a different party's primary is a burden that is neither "severe" nor "discriminatory." *Id.* at 604.

which the Court repudiated. *Burdick* involved a challenge to Hawaii's prohibition against write-in voting. The plaintiff argued that the law "deprive[d] him of the opportunity to cast a meaningful ballot, condition[ed] his electoral participation upon the waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminate[d] against him based on the content of the message he seeks to convey through his vote." *Burdick*, 504 U.S. at 438. The Court was unpersuaded. It held that the "function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* (citations and internal alterations omitted). That is why, the Court noted, it has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity." *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986)).

Plaintiffs argue that Kansas' fusion voting ban "strip[s]" their candidates "of their status as the official nominees of United Kansas in the final weeks of the campaign" and thus prevents the party, its members, and candidates "from stating whether [candidates] adhere[] to the tenets of the party or whether party officials believe that they are qualified through the vehicle of the party's formal nomination," a "crucial expressive opportunity" that Plaintiffs claim is "afforded all other state-recognized parties, their candidates, and their supporters." (Pls.' Br. at 36). There is no merit to this contention. *Nothing* in the State's ban on fusion voting precludes Plaintiffs from expressing support—financial or otherwise—for the United Kansas Party and its preferred candidates at every stage of the race. The full range of activities available to communicate such support is open to them, (Defs.' Br. at 30), including identifying their preferred candidates as the

endorsed nominees of the party. The fact that those individuals may have another party next to their name on the ballot on Election Day does not undermine those opportunities. (*Id.*)

The case Plaintiffs cite in support of their theory that they are forced to labor under this expressive constraint, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), is of no help to them. That lawsuit challenged an audacious California law that literally prohibited the official governing bodies of political parties from endorsing or opposing candidates in party primaries. *Id.* at 216. It was tantamount to a gag order. Unsurprisingly, the Supreme Court struck down the law as a blatant violation of the parties' free speech and association rights under the First Amendment. *Id.* at 222-29.

The Court acknowledged that, "because splintered parties and unrestrained factionalism may do significant damage to the fabric of government, States may regulate elections to ensure that some sort of order, rather than chaos accompanies the democratic process." *Id.* at 227 (citing *Storer v. Brown*, 415 U.S. 724, 730, 736 (1974)) (internal alterations omitted). But the Court explained that States have little interest in election laws designed "to mitigate *intraparty* factionalism during a *primary* campaign." *Id.* at 227 (emphasis added). The reason: "A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them." *Id.* Moreover, the Court noted, while states certainly have "a legitimate interest in fostering an informed electorate," *id.* at 228, there was no evidence that a ban on party primary endorsements was necessary to prevent fraud, corruption, or undue influence. In short, the Court found no compelling government interests in the law.

Perhaps recognizing that the statute and reasoning in *Eu* are entirely dissimilar to Kansas' restrictions on fusion voting in *general* elections, Plaintiffs next focus on the voters themselves,

suggesting that the challenged law bars voters "from signaling support for their preferred party." (Pls.' Br. at 37). They postulate that a "party's vote share in an election" represents "the collective public expression of support from its adherents," which means the United Kansas Party's exclusion from the ballot in the general election (because its preferred candidate affirmatively opted to run on a different party ticket), prevents voters from engaging in speech on behalf of the United Kansas Party. (*Id.* at 37, 41). But if a *political party* has no "right to use the ballot itself to send a particularized message," as the Court held in *Timmons*, 520 U.S. at 362-63, it is difficult to see how an *individual voter* is endowed with such a right. In fact, the Supreme Court reaffirmed in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011), that the First Amendment does not confer upon voters "a right to use governmental mechanics to convey a message." That is why, the *Carrigan* Court observed, it had previously held in *Timmons* that the ballot itself is not a forum for exercising speech. *Id.*; *cf. Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002) ("A ballot is a ballot, not a bumper sticker.").

Incidentally, were the rule otherwise, a state likely could not restrict write-in votes. *See* K.S.A. 25-213(c). Or maintain "sore loser" laws restricting losing candidates in a primary from reappearing on the general election ballot as an independent or as the nominee of some other party. *See* K.S.A. 25-202(c), 25-305(b). Or limit extraneous messages, slogans, or qualifications on the ballot that a candidate or party might want to include. *See* K.S.A. 25-213(b), 25-619. Or impose registration requirements. *See* K.S.A. 25-2301 *et seq.* Or adopt many of the other array of rules that are critical to ensuring the fairness and integrity of the ballot.

Pennsylvania's Supreme Court recently addressed, and rejected, the identical free speech claim that Plaintiffs advance here. *See Working Fams. Party v. Commonwealth*, 209 A.3d 270

(Pa. 2019). The court found no basis for distinguishing the free speech rights of the party versus those of its supporters and voters. The plaintiffs there were the Working Families Party (which the Commonwealth classified as a "political body" because—like in Kansas—it could not use the primary process to nominate candidates due to its minimal vote haul in the prior election), the party's preferred candidate/nominee, and two voters who desired to vote for the nominee as the candidate of the Working Families Party. *Id.* at 272-73. Because of the Commonwealth's ban on fusion voting, the plaintiffs claimed, *inter alia*, that their freedom of speech and association rights had been contravened under the Pennsylvania Constitution. Despite the fact that Pennsylvania's Supreme Court has generally embraced broader freedom of speech and association rights under its own state constitution than the First Amendment, the court underscored that the context of the dispute—one involving *elections*—was critical to its evaluation of the claims. *Id.* at 285. And in the electoral sphere, the court found the reasoning of *Timmons* to be sufficiently powerful to carry the day. *Id.* at 285-86. After quoting *Timmons* at length, the court concluded:

> We reject [Plaintiffs'] argument that the protections afforded by the Pennsylvania Constitution for speech and associational rights require a different result. Here, [Plaintiffs] and like-minded members of the Working Families Party were able to meet and decide that the candidate who best represented their values was Rabb. They then had to opportunity to participate fully in the political process, culminating in casting their votes for the candidate of their choice. Under these circumstances, their speech and associational rights were not violated. (*Id.* at 286).

The same is true in Kansas and the same result should hold here.[6]

[6] Although they cite no cases in support of the point, Plaintiffs also argue (in a single sentence) that the fusion voting ban *compels* United Kansas Party voters to express support for a different party in order to vote for their own party's nominee. (Pls.' Br. at 37). Untrue. Not only does the ballot not convey a particularized message, but the government is not *compelling* the voter to support or cast a ballot in favor of anyone. The government, in fact, is not compelling any speech at all. Nor does the case law governing the compelled speech doctrine support Plaintiffs' theory. *See, e,g., 303 Creative LLC v. Elenis*, 600 U.S. 570, 588-89 (2023) (government impermissibly compels speech in violation of First Amend-

Plaintiffs further insist that fusion voting must be permitted because the "composition of the ballot" is "the last thing the voter sees before he makes his choice" and thus reflects a critical point in the electoral process. (Pls.' Br. at 38). As the Third Circuit has explained, however, the inclusion of a slogan or party name on the ballot is not speech by the candidate or party. It is merely "a one-way communication confined to the electoral mechanic of the ballot." *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 145 (3d Cir. 2022). The ballot itself, in contrast to public campaigning, "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.* Plaintiffs' only response to this point is that the Third Circuit's analysis is a fact-based argument. (Pls.' Br. at 75). Nonsense. The quoted excerpt was part of the court's *legal reasoning* and was no mere inference based on some factual finding.

Plaintiffs' reliance on a concurring opinion in *Cook v. Gralike*, 531 U.S. 510 (2001), to support their theory is even further afield. In *Cook*, the Supreme Court evaluated a Missouri law requiring a statement to be printed on the ballot next to a candidate's name reading either "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" if the candidate failed to take any one of eight legislative acts in support of a proposed federal term-limits law. *Id.* at 514-15. The Court found the law violative of the First Amendment. The Court held that, although "the Elections Clause grants to the States broad power to prescribe the procedural mechanisms for holding congressional elections," it was not intended to be "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* at 523. And by plastering ballots

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ment when it tries to force speaker to accept a message with which he disagrees); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006) (compelled speech implicated when government seeks to force person to either speak government's message or host or accommodate another speaker's message).

with these "intentionally intimidating" labels, Missouri put its thumb so heavily on the scales against candidates who refused to support a particular initiative that it crossed the constitutional line. *Id.* at 524-25.

The concurrence by Chief Justice Rehnquist (not coincidentally, the *author* of *Timmons*) merely added an observation that Missouri's law was "not only not content neutral, but it actually discriminates on the basis of viewpoint because only those candidates who fail to conform to the State's position receive derogatory labels. The result is that the State injects itself into the election process at an absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice—and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter." *Id.* at 531-32 (Rehnquist, C.J., concurring). Nothing in the *Cook* majority opinion (or the Chief Justice's concurrence) casts doubt on a State's ability to regulate the ballot in a content neutral, non-discriminatory manner, as Kansas (and nearly every other state) does with its ban on fusion voting.

Plaintiffs' reference to campaign finance law jurisprudence is equally inapposite. (Pls.' Br. at 38) (citing *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996)). That case involved a constitutional attack on Federal Election Commission spending limits by political parties. The Court held the First Amendment prohibits imposing any limit on a political party's expenditures that the party makes independently without coordination with a candidate. *Id.* at 618. Plaintiffs highlight a sentence in Justice Kennedy's concurring opinion in which he notes that, "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Id.* at 629 (Kennedy, J., concurring in

part). But he was simply making the point, as reflected in the very next sentence, that "[i]t makes no sense . . . to ask, as [the Federal Election Campaign Act] does, whether a party's spending is made in cooperation, consultation, or concert with its candidate. The answer in most cases will be yes, but that provides more, not less, justification for holding unconstitutional the statute's attempt to control this type of party spending." *Id.* (quotations omitted). In any event, Plaintiffs conveniently neglect to mention that, the very next year, Justice Kennedy fully joined the majority opinion in *Timmons*. He obviously did not think that anything he said in his partial concurrence in the campaign finance case was inconsistent with a ban on fusion voting.

Scraping the bottom of the barrel, Plaintiffs resort to misrepresenting a decision from the Kansas Supreme Court in *Simpson v. Osborn*, 52 Kan. 328, 34 P. 747 (1893), which pre-dated by eight years the legislature's adoption of a fusion voting ban. (Pls.' Br. at 1, 31-32, 42). As Defendants previously noted (Defs.' Br. at 6, n.3), the Court there merely interpreted the scope of a now-repealed election law statute and held, *purely as a matter of statutory construction*, that the law in place at the time did not proscribe cross-nomination of candidates by multiple parties on the same ballot. *Simpson*, 34 P. at 749. The author of the opinion—Justice Stephen Haley Allen, who had been elected to his seat the year before running on the Populist Party and Democratic Party fused tickets, the first victory for Populists in a Kansas Supreme Court election—wrote: "[T]here is nothing in the law, *nor in reason*, preventing two or more political parties, whether acting through conventions or by petitions, from selecting the same individuals for one or more offices to be filed." *Id.* (emphasis added). Plaintiffs make much ado about Justice Allen's gratuitous dicta observation about the perceived wisdom of the then-extant law. But he obviously had no ability to constrain future legislatures from modifying the law in this area,

which is exactly what happened in 1901. And the notion that *Simpson* "cast[s] grave doubt on the constitutionality of Defendants' actions here," (Pls.' Br. at 32), is utterly devoid of merit.

Plaintiffs, then, are left with a single, out-of-context sentence of dictum from the majority opinion in *LWV II*. (Pls.' Br. at 39-40, 42). Yet as Defendants explained at length in their initial motion, (Defs.' Br. at 33-34), whether a cast ballot amounts to speech by the voter was not even at issue in that case. The Court merely held that *ballot collectors* who return someone else's cast ballot are not "speaking" in that role. *LWV II*, 318 Kan. at 810. Given that our Supreme Court treats the free speech provisions of Section 11 of the Kansas Constitution's Bill of Rights and the First Amendment as "co-extensive," *Prager v. State Dep't of Rev.*, 271 Kan. 1, 37, 20 P.3d 39 (2001); *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)), the idea that the Kansas Supreme Court—with no analysis whatsoever, totally *sub silentio*—repudiated decades of consistent, U.S. Supreme Court precedent[7] and became the first and only appellate court (so far as Defendants are aware) to hold that a voter engages in constitutionally protected expressive conduct simply by voting defies all logic.

In any event, even assuming, *arguendo*, that the *LWV II* majority really did intend to silently cast adrift a mountain of one-sided jurisprudence in that single sentence of dicta (without a whisper of citation) and hold that an executed ballot represents the "speech" of the voter, the State would still be authorized to impose reasonable time, place, and manner restrictions. The fact that the purported "speech" would be in the context of an election ballot would especially

[7] Not to mention state appellate court precedent. *See Working Fams. Party*, 209 A.3d at 66-69 (embracing reasoning of *Timmons*); *Boydston v. Weber*, 307 Cal. Rptr.3d 27, 39-40 (Cal. Ct. App. 2023) (same); *Oettle v. Guthrie*, 189 N.E.2d 22, 26-27 (Ill. App. Ct. 2020) (same); *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134-35 (Idaho 2000).

necessitate rigorous State regulation. *See Ramcharan-Maharajh v. Gilliland*, 48 Kan.App.2d 137, 143, 286 P.3d 216 (2012) ("The state's important interest in regulating ballot access generally is sufficient by itself to justify reasonable, nondiscriminatory ballot-access restrictions.") (citing *Timmons*, 520 U.S. at 364-65); *Timmons*, 520 U.S. at 358 ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); *Burdick*, 504 U.S. at 433 ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."); *id.* at 438 ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."). To the extent a balancing test might be applied, it would tilt heavily in favor of the State. Indeed, the burdens on Plaintiffs are not severe and, as described both in the underlying motion (Defs. Br. at 24-29) and below, Kansas has highly compelling interests for imposing its fusing voting ban.

2. The Kansas Supreme Court Would Embrace the Reasoning of *Timmons* and its Progeny

How do Plaintiffs respond to the complete absence of any case law supporting their novel theory and the overwhelming precedent that refutes it? Not to worry, they insist, the U.S. Supreme Court got it all wrong in *Timmons* (and, presumably, *Burdick* and every other case that undermines their claim) and, besides, Kansas courts are free to disregard this inconvenient jurisprudence. (Pls.' Br. at 31-32, 34-36).

Plaintiffs insist that the Kansas Constitution protects free speech rights far more robustly than does the First Amendment. (Pls.' Br. at 34-36). There is no case law to support this theory. While it is true that the relevant language of Section 11 of our Constitution's Bill of Rights ("all

persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such rights") "may be worded more broadly" than the First Amendment of the U.S. Constitution ("Congress shall make no law . . . abridging the freedom of speech"), the Kansas Supreme Court has consistently treated both provisions as "coextensive." *Prager*, 271 Kan. at 37; *LWV I*, 317 Kan. at 815.

Plaintiffs point to New Jersey and Connecticut as having similar constitutional text as Kansas and which has been construed to confer greater speech protections than the First Amendment. New Jersey is an odd reference for Plaintiffs to make given that New Jersey prohibits fusion voting. *See* N.J. Stat. Ann. §§ 19:13-4, 19:13-8, 19:14-9, 19:23-15. But Plaintiffs again conveniently omit to mention that a broad array of states where courts of last resort have blessed fusion voting bans against state constitutional challenges have free speech safeguards in their state constitutions nearly identical to Kansas'. *See, e.g.*, Ohio Const., art. I, § 11 ("Every citizen may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right."); Mich. Const., art I, § 5 ("Every person shall be free to speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that freedom."); Mo. Const., art. I, § 8 ("That all constitutional government is intended to promote the general welfare, and to secure and perpetuate the blessings of liberty to the people; and to this end, we the people of Missouri do declare that all men have a natural right to think and to express their thoughts freely."); Ill. Const., art. I, § 4 ("The freedom of the press and the right of the people peaceably to assemble and to petition the government shall not be abridged.")

Plaintiffs further argue that Section 11 of the Kansas Constitution's Bill of Rights cannot be interpreted to sanction a ban on fusion voting because that voting methodology was common

in the first few decades after Kansas joined the Union, whereas political parties were not part of the national milieu at the time the First Amendment was ratified. This proves nothing. For one thing, if the Court is going to focus on snapshots in time, it would have been "unfathomable" to the State's Founding Fathers when they adopted the Wyandotte Constitution that anyone other than white males could vote. *See* Kan. Const., art. V, § 1 (1859) ("Every white male person, of twenty-one years and upward, . . . who shall have resided in Kansas six months next preceding any election . . . shall be deemed a qualified elector."); *see also id.* art. VIII, § 1 ("The militia shall be composed of all able-bodied white male citizens."). In fact, racially segregated schools were well entrenched here and even approved by our Supreme Court. *See, e.g., Graham v. Bd. of Educ. of City of Topeka*, 153 Kan. 840, 114 P.2d 313 (1941). Second, the U.S. Supreme Court has repeatedly made clear that states are free to "enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Timmons*, 520 U.S. at 367; *Clingman*, 544 U.S. at 596-97 (State "has an interest in tempering the destabilizing effects of precisely this sort of party splintering and excessive factionalism.").

3. Kansas' Strong Interests in its Fusion Voting Ban Are Sufficient to Overcome Any Minimal Burden on Plaintiffs

Turning next to the State's interests in the fusion ban, Plaintiffs' entire analysis seems to be predicated on an assumption that a strict scrutiny standard must be applied and that the State is entitled to little if any deference in the regulation of its electoral mechanics. There is no basis for that assumption. Even if, notwithstanding the comprehensive analysis and precedent outlined above, the Court concludes that there is an expressive component to the mere act of casting a ballot, a balancing test akin to the *Anderson-Burdick* standard described in Defendants' initial motion (Defs.' Br. at 17) would need to be applied. And given that the burden on Plaintiffs'

speech rights is not severe, if it is burdened at all, a rational basis type review is appropriate.

Preventing Ballot Manipulation. Defendants explained why Kansas has a powerful interest and obligation to keep the ballot free from manipulation. (Defs.' Br. at 24-26). Plaintiffs blithely dismiss this interest, (Pls.' Br. at 48-49), expressly recognized by the Supreme Court majority in *Timmons*, 520 U.S. at 364-65, on the basis that Justice Stevens, in his *dissenting* opinion on behalf of himself and Justices Ginsburg and Souter, found the rationale "entirely hypothetical." *Id.* at 376 (Stevens, J., dissenting). It is a topsy-turvy world when settled U.S. Supreme Court precedent, which the Kansas Supreme Court has historically treated as determinative in the context of free speech, is casually disregarded simply because Plaintiffs disagree with it. So much for evenhanded, predictable, and consistent development of the law.

In any event, Plaintiffs complain that Defendants have not shown any historical evidence that the kind of ballot manipulation scenarios set forth in Defendants' brief have happened here. But that is not how the law works in this area. *Id.* at 364 ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications."). As the Court noted in *Munro*, 479 U.S. at 195-96,

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Accord Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 686 (2021) (State can take measures to prevent harm to its electoral system "even if [it has] had the good fortune to avoid it."). As for Plaintiffs' legislative suggestions as to how they think a fusion voting ban law could be drafted

more narrowly by drafting a statute similar to the one in Oregon, there is no requirement that the Kansas law be narrowly tailored. *See Timmons*, 520 U.S. 363-64 (because burden of anti-fusion voting law is not severe on minor party, State need not show that the ban is narrowly tailored to serve its compelling interests).[8]

Plaintiffs myopically focus only on the interests of minor parties like themselves. More is at stake. In this lawsuit, the Democratic Parties of Reno and Saline Counties may or may not be content with the United Kansas Party's nominees and that party's efforts to cross-nominate the Democratic Party's candidate in the general election. But it is not difficult to imagine an unpopular or controversial minor party seeking to splinter a major political party's base, and thus sabotage the major party's nominee, by simultaneously running the major party's candidate on the minor party's ballot line in the general election. While Plaintiffs and their cadre of law professors might not have a problem with that sort of eventuality, the State indisputably has a legitimate interest in protecting against it.

Plaintiffs additionally resort to policy arguments, citing a law review article opining on why fusion voting can be beneficial to the electorate. Whatever the merits of those contentions, they have no place here. If Plaintiffs think their proposed mode of voting would be such a boon to the public, they can take their case to the legislature. But it is not the Court's role to involve itself in that debate. (Of course, the fact that 42 other states also ban fusion voting suggests that Plaintiffs' proposal is not popular at all, outside the ranks of academia and partisan activists.)

[8] Oregon's law, which allows up to three parties to cross-nominate a candidate on the same ballot, *see* Or. Rev. Stat. Ann. § 254.135(3)(a)(B), (D), (F), would not eliminate the State's interests in avoiding ballot manipulation. *See Timmons*, 520 U.S. at 365 ("Whether or not the putative 'fusion' candidates' names appeared on one or four ballot lines, such maneuvering would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising.").

Facilitating Greater Competition and Voter Choice / Enhancing Voter Confidence and Candidate Accountability / Preserving Stability of Political System. Plaintiffs also deem illegitimate the State's interests in facilitating greater electoral competition and voter choice, enhancing voter confidence and candidate accountability, and preserving the stability of its political system. (Pls.' Br. at 49-54). Defendants detailed why these interests were compelling in their original motion, (Defs.' Br. at 26-27), and Plaintiffs make little effort to refute those rationale—all long-recognized as valid by the Supreme Court—other than to mischaracterize them and offer a history lesson about the formation of the Republican Party in the 1840s and 1850s (a period in which political debate and electoral competition was not exactly as rosy as Plaintiffs suggest, given that the country found itself mired in a bloody civil war soon thereafter).

Regardless, the U.S. Supreme Court has explicitly endorsed as important a state's interest in "guard[ing] against party raiding" of the type that represents the *raison d'etre* of the United Kansas Party. *Clingman*, 544 U.S. at 594. It is the same reason why states have a powerful need to protect against "sore loser" candidacies, specifically, to bolster competition and incentivize parties to identify new standard bearers who best represent that party and not simply blur the distinctions between, and dilute the messages of, competing parties. *Id.* at 594-97. Plaintiffs pejoratively call this "paternalistic." But it is part of the State's important role in ensuring voter confidence and candidate accountability and preserving the stability of its political system. *Cf. Storer*, 415 U.S. at 735 ("The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. . . . . The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively."). And if New York's fusion voting experience is any indication, as noted in Defendants'

underlying motion, (Defs.' Br. at 23), long-term, fusion tends to mostly help extremist groups at the political fringes. Whether such groups are seeking political patronage or just wish to serve the role of a spoiler and splinter one of the major parties, fusion voting can have a deleterious effect on a State's political stability, and the State is well within its rights to prohibit it.

Plaintiffs cite prominently to *Williams v. Rhodes*, 393 U.S. 23 (1968), and its statements about the importance of competition in the electoral process and the need to safeguard against laws that unreasonably prevent third parties from accessing the ballot. (Pls.' Br. at 51). (*Williams* involved an Ohio law that required such a large number of signatures for a new political party to gain access to the ballot, that it made it virtually impossible for the party to qualify, particularly since the threshold was higher for new parties than for established parties. *Id.* at 24-26.) Plaintiffs' pick-and-choose approach to following U.S. Supreme Court precedent is dizzying, but the important point that Plaintiffs overlook is that the Court held unequivocally in *Timmons* that a prohibition on fusion voting does *not* unduly "insulate the two-party system from minor parties' or independent candidates' competition and influence." *Timmons*, 520 U.S. at 367. Fusion voting bans, therefore, are fully compatible with any lessons from *Williams*.

Nor does *California Democratic Party v. Jones*, 530 U.S. 567 (2000), provide Plaintiffs with any traction. That case entailed a freedom of association challenge to California's "blanket primary" law in which all registered voters, including those not affiliated with any political party, had the right to vote for any candidate in a *primary election*, regardless of voters' political affiliation. *Id.* at 570. In other words, the law "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party and, at worst, have expressly affiliated with a rival." *Id.* at 577. This

meant that a party's nominee could be determined by adherents of the opposing party, notwithstanding the party's objection to that candidate. *Id.* at 578. The Supreme Court found this situation antithetical to the First Amendment and a severe burden on political parties because it could force parties to associate with a particular candidate whose politics they did not share and thereby fundamentally change the party's message. *Id.* at 581-82. That holding is eminently logical.[9]

But *Jones* presents the mirror-opposite of this case. The Court's focus in *Jones*, just as it was in *Eu*, was on the *primary election* nomination process. The United Kansas Party confronts no interference from outsiders as to its nominee selection. In Kansas, Plaintiffs—and Plaintiffs alone—are free to select any nominee of their choosing to appear on the ballot, as long as that individual has not already been selected by another party and has not declined the Plaintiffs' invitation to run on their ticket rather than the ticket of some other party. But Plaintiffs' entire *modus operandi*, is on *hijacking another party's candidate*, a scenario that even *Jones* said a state has a valid interest in safeguarding against. *Id.* at 584. That is the exact situation the Court dealt with in *Timmons* and nothing in *Jones* is inconsistent with that.[10]

And as long as Plaintiffs wish to recount the role of political parties in the earliest days of our republic, it is worth quoting at length the opinion of Missouri Supreme Court Justice Waller Graves in upholding his state's fusion voting ban:

[9] Ironically, in rejecting California's asserted interests in the blanket primary nomination process, the Court repudiated the same rationale Plaintiffs here propose for fusion voting, i.e., that it "would 'weaken' party 'hard-liners' and ease the way for 'moderate problem-solvers.'" *Jones*, 530 U.S. at 570, 579-80.

[10] This explains why the Court was so careful to note that its state-interests analysis was confined to "*the circumstances of [that] case*." *Jones*, 530 U.S. at 584 (emphasis in original). The Court certainly did not suggest that the interests Defendants have advanced here, and which were explicitly endorsed in *Timmons*, were invalid or unworthy of deference and respect.

> To my mind there 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. It is fraudulent, because fraud is practiced upon the unsuspecting voter by a few political leaders. It is deceitful, because when a candidate of one political faith permits his name to be placed on a ticket under a caption indicating a different political faith, deceit is tolerated and practiced. True it is that the leaders in politics may know that he is not of the political faith indicated by the ticket upon which he permits his name to go, yet the unsuspecting masses are deceived. This is common knowledge. . . . If political parties are born of honest differences of opinion, and the political name is understood as bespeaking given principles, it is a strain upon good morals for a man's name to appear upon two tickets, thus tacitly announcing that it is office he desires rather than the honest upholding of the tenants of his political faith. Such ideas deteriorate citizenship, and ultimately work governmental wrongs. Such practices lead to corruption, with its hordes of attendant evils. To say that the state in the exercise of its police power cannot strike at these evils would be to unsay what we have heretofore said. (*Coburn*, 168 S.W. at 957-58).[11]

The Kansas Legislature was well within its rights to embrace those same interests in adopting its own prohibition on fusing voting.

Voter Confusion. Plaintiffs next criticize the State's desire to avoid voter confusion as another interest in justifying its fusion voting ban. It is true that the Supreme Court majority in *Timmons* did not rely on confusion as a basis for its decision to uphold such laws. *Timmons*, 520 U.S. at 370 n.13. But it is also true that the Supreme Court has recognized time and again that a State has a powerful interest in minimizing potential confusion in the electorate that may flow from the mechanics of election administration. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221-22 (1986) (States have "legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions"); *Norman v. Reed*, 502 U.S. 279, 290

[11] Justice Graves was among the most well respected jurists of his time. He was reportedly one of the candidates being considered by President Woodrow Wilson to replace Justice Joseph Lamar on the U.S. Supreme Court following Lamar's death in 1916, a seat ultimately filled by Louis Brandeis. *"To Fill Supreme Court Vacancy: Several Candidates for Position Held by Late Justice Lamar,"* Alexandria Gazette, Jan. 4, 1916, at 1 (https://www.newspapers.com/article/alexandria-gazette-to-fill-supreme-court/128858920/).

(1992) (States have a legitimate interest in preventing "misrepresentation and electoral confusion"); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest . . . in avoiding confusion, deception, and even frustration of the democratic process[.]"); *accord Lichtenstein v. Hargett*, 83 F.4th 575, 599 (6th Cir. 2023) (State's ban on distribution of absentee ballot applications justified by government interest in minimizing voter confusion, thereby warranting dismissal of case for failure to state a claim); *Rubin*, 308 F.3d at 1017-19 (municipality had important regulatory interest in reducing voter confusion by regulating ballot designations). This interest is thus very legitimate and compelling.

Plaintiffs contend that the Supreme Court minimized the importance of avoiding voter confusion as a state interest in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). Once again, Plaintiffs misrepresent the holding of the case. Read properly, the opinion actually supports *Defendants'* position.

The Court in that case evaluated an unusual election framework in which any individual can run in a jungle primary—regardless of party—and the top two vote-getters advance to the general election. *Id.* at 447-48. Although candidates are free to have their party preference (or independent status) identified on the ballot, the label is meaningless and a "political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference." *Id.* at 447. The key for the Court in upholding this arrangement against a freedom of association challenge was that this primary electoral process does not actually "choose parties' nominees." *Id.* at 453. Its only purpose is to "winnow the number of candidates to a final list of two for the general election." *Id.*

One of the arguments that the *plaintiffs*—not the State—raised was that "voters will be confused by candidates' party-preference designations" and "assume that the parties associate with, and approve of" those candidates, thereby "compel[ling] them to associate with candidates they do not endorse," and "alter[ing] the messages they wish to convey." *Id.* at 454. The Court was unpersuaded. It held that there was "no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* This was particularly true since the voters themselves had adopted this voting methodology via a referendum. *Id.* at 455.

In no way does this holding suggest that the State lacks a compelling interest in minimizing voter confusion on the ballot. Indeed, political parties were essentially not even on the ballot in this jungle primary selection process. If there is any relevant takeaway for this case, it is that the basic theory of injury for Plaintiffs' freedom of association theory may be suspect. Plaintiffs' throwaway line seeking to compare modern elections with the chaotic, fraud-filled free-for-all that was the hallmark of elections prior to the adoption of the Australian (secret) ballot, (Pls.' Br. at 47), is mere fluff and has no merit. At the end of the day, even if the Court disregards the confusion interest, Kansas' other interests are more than sufficiently weighty to justify its fusion voting ban. Plaintiffs' free speech challenge must fail.

C. *The Fusion Voting Ban Does Not Violate Plaintiffs' Freedom of Association Rights*

Plaintiffs devote a relatively small portion of their long-winded brief to their freedom of association claim. (Pls.' Br. at 55-63). This is unsurprising given that both the law (in the form

of an *on-point* U.S. Supreme Court opinion in *Timmons*) and the facts are against them. Still, they soldier on.

Plaintiffs argue that Kansas' fusion voting ban "prevent[s] the [United Kansas] Party, its candidates, and its voters from associating with each other at the most important moments in the political process: formal party nomination and on the ballot itself." (Pls.' Br. at 55). They also claim that the State is "forcibly revoking their United Kansas nominations and excluding them from the ballot." (*Id*. at 1). Plaintiffs' characterization of the facts and the nomination process is simply untrue.

Nothing in the fusion voting prohibition prevents a political party, its candidates, or its voters from associating with each other or nominating one of their own to appear on the ballot. Nor does Kanas "forcibly" revoke nominations. The United Kansas Party nominated Mr. Probst and Ms. Blake as its candidates with no interference from the State. When those two individuals also secured nominations from the Democratic Party, the Secretary gave them the choice as to which party they wished to associate with. Both voluntarily elected to remain on the ballot on the Democratic Party ticket instead of the United Kansas Party. The Secretary did not make that choice for the candidates, nor did he "abrogate" the United Kansas Party's right to nominate a candidate. *See Timmons*, 520 U.S. at 360 ("Respondent is free to try to convince Representative Dawkins to be the New Party's, not the DFL's, candidate.").

Moreover, nothing stands in the way of the United Kansas Party, its candidates, or voters from continuing to campaign on behalf of the party. *See id.* at 361 ("The 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."); *cf. Eu*, 489 U.S. at 224 ("Barring political parties

from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association."). And voters can ultimately vote for Mr. Probst and Ms. Blake, both of whom will be on the ballot come Election Day.

While Plaintiffs half-heartedly propose a strict scrutiny review standard,[12] which is foreclosed by both *Timmons*, 520 U.S. at 363-64, and *Clingman*, 544 U.S. at 591-92, they maintain that the fusion voting ban cannot withstand any level of scrutiny because the State's interests in the law are insufficient. (Pls.' Br. at 56-58). Defendants addressed those arguments both in their opening brief and in Part V.B.3., *supra*, and need not repeat them here. Put simply, Kansas has extremely strong and legitimate interests in the challenged law, none of which Plaintiffs are able to effectively refute.

Stuck with the *Timmons* precedent, Plaintiffs seek to distinguish it and claim that reliance on the decision in this lawsuit would be a "mistake." (Pls.' Br. at 60). None of their theories are persuasive. Plaintiffs first contend that, unlike *Timmons*, where only the associational rights of political parties were at issue, their Petition here is targeted at candidates and voters. It is true

[12] In arguing for the highest level of scrutiny, Plaintiffs claim, "[h]eightened scrutiny here is also consistent with the approach taken by the Kansas Supreme Court and many of its sister courts when evaluating violations of basic political rights." (Pls.' Br. at 58) (citing *State v. Ryce*, 303 Kan. 899, 957, 368 P.3d 342 (2016)). It is not clear what Plaintiffs are referring to with the term "basic political right." Presumably, they are referring to fundamental rights. If so, Plaintiffs are misrepresenting the law. They are effectively asking the Court to strip every constitutional protection in the Bill of Rights of all its unique functions and nuance, and treat all monolithically. But the governing review standard has never been one-size-fits-all. Such a simplistic methodology would twist the meaning of many constitutional provisions and needlessly tie the State's hands. Freedom of speech, freedom of association, and equal protection, for example, have *never* been exposed to strict scrutiny in all circumstances. *See LWV II*, 318 Kan. at 805-06 (equal protection); *City of Wichita v. Griffie*, 318 Kan. 510, 530, 544 P.3d 776 (2024) (speech); *Clingman*, 544 U.S. at 591-92 (freedom of association); *Timmons*, 520 U.S. at 363-64 (same); *Burdick*, 504 U.S. at 433 (freedom of association and right to vote). *See also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 697-98, 700 (2007) ("mere fact of 'fundamentality' does not answer the question of what would be the appropriate standard of review for the right to bear arms" as "many of the individual rights in the Bill of Rights do not trigger strict scrutiny, including many that are incorporated.").

that the only plaintiff in that case was the minor political party. But that distinction is meaningless. The Court's opinion is highly relevant and clearly provides seminal guidance for evaluating the associational rights of candidates and voters. Indeed, it references their rights throughout the opinion. *See Timmons*, 520 U.S. at 363 ("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.* ("Minnesota's laws do not restrict the ability of the New Party and its members to endorse support, or vote for anyone they like"); *id.* at 369 ("the challenged provisions say nothing about the previous party affiliation of would-be candidates but only require that, in order to appear on the ballot, a candidate not be the nominee of more than one party"). Incidentally, in the *Working Families Party* case in which the Pennsylvania Supreme Court, relying explicitly on *Timmons*, rejected the same legal theory Plaintiffs advance here, both the political party and its candidate were named as parties. 209 A.3d at 272.

Plaintiffs further argue that Section 3 of the Kansas Constitution's Bill of Rights provides greater protection for associational rights than the First Amendment. (Pls.' Br. at 60-61). There is no case law to support that proposition and Plaintiffs offer none. Plaintiffs highlight Section 3's language about "the people hav[ing] the right to assemble, in a peaceable manner, to consult for their common good." But nothing in that language suggests a discernible difference from the freedom of association safeguarded by the First Amendment. In support of their radical theory, Plaintiffs naturally resort to a law review article that does not mention fusion voting but proposes "untapped possibilities for how the federal and state assembly clauses could be interpreted in the present." Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1653 (2021). Irrespective of any agenda that Plaintiffs and this author may have, Kansas' prohi-

bition against fusion voting does not, as Plaintiffs suggest, prevent the public from "wielding collective power" or "engaging in collective action." (Pls.' Br. at 60). And any minimal limits on their associational rights that might exist are more than justified by the State's powerful interests in maintaining this electoral feature, as detailed in Part V.B.3.

Plaintiffs alternatively endeavor to dismiss *Timmons* as "poorly reasoned" and unworthy of respect. (Pls.' Br. at 55). They claim that the majority's "principal error was concluding that anti-fusion laws do not severely burden a minor political party's associational right because the party can nominate a lesser choice [candidate] or campaign for [its] preferred candidate and encourage voters to support [that candidate] on another party's line." (*Id.* at 61). But Plaintiffs' preferred candidates *are* on the ballot, and the only reason the United Kansas Party name is not next to the candidates' names is because the United Kansas Party chose candidates who it knew would be nominated by another party, and those candidate then affirmatively elected to accept the nomination of the other party for purposes of ballot party designation. Although Plaintiffs (and their allies in academia) might not like how the Supreme Court's six-justice majority in *Timmons* evaluated the associational burden and balanced the competing interests, the fact that the opinion has been favorably cited on numerous occasions by the Supreme Court over the last twenty-seven years, not to mention the fact that Plaintiffs' legal theory has been repudiated by nearly every State Supreme Court in the country,[13] suggests that the arguments of the *Timmons* dissent were not so compelling after all.

The additional cases that Plaintiffs invoke in their effort to convince the Court to ignore *Timmons* are also largely irrelevant. Take *Kusper v. Pontikes*, 414 U.S. 51 (1973), which found

[13] Tellingly, Plaintiffs do not even attempt to address or distinguish the myriad state cases that, like *Timmons*, found anti-fusion laws constitutional.

that an Illinois statute unconstitutionally infringed upon the right of freedom of association by requiring voters to wait almost *two years* before their requested change in party affiliation would be given effect. *Id*. at 60-61. This incredibly long lag time meant that voters who changed their party affiliation within the twenty-three-month waiting period could not vote in primaries during that block of time. *See id.* at 61 ("The only way to break the 'lock' [was] to forgo voting in any primary for a period of almost two years."). While the Court acknowledged that the State had an interest in preventing party-raiding, the severe burden on voters clearly outweighed that interest. *Id.* The key for the Court was that "[a] prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing the [voter] from participating *at all* in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice." *Id.* at 58 (emphasis added). Nothing about that opinion moves the needle here.

Plaintiffs also cite *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), another non-fusion case that *Defendants* referenced in their underlying motion because it stands for the principle that a political party has no constitutional right to a "fair shot" at success or winning. (Defs.' Br. at 22) (citing *id.* at 205). The case is wholly inapposite here. Indeed, the portion of the decision that Plaintiffs quote focuses on the primary selection process, something that is not even at issue in this dispute. The United Kansas Party had the right to nominate any candidate it wanted, and it did so. That its candidate opted to affiliate with some other party in

the general election—a situation the United Kansas Party brought upon itself by insisting on raiding another party's candidates—does not translate into a freedom of association violation.[14]

Plaintiffs conclude their criticism of *Timmons* decision by claiming "the majority failed to assess the veracity of the asserted state interests or consider whether the laws were at all tailored to those interests, instead upholding the laws by finding the putatively slight burden outweighed by several hypothetical interests arising from a fanciful parade of horribles." (Pls.' Br. at 62-63). This is not an accurate portrayal of the majority's decision. In *Timmons*, the Court specifically addressed Minnesota's interests in banning fusion voting. It considered Minnesota's concern that fusion voting would undermine the State's ballot-access system by allowing minor parties to piggyback onto the popularity of another party's candidate, rather than appealing to the voters on its own agenda, to gain access to the ballot. *Timmons*, 520 U.S. at 366 ("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.") (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983), and *Storer*, 415 U.S. at 733). The Court further explained and recognized states' strong interests in the stability of their political systems. *Id*. at 369-70 ("We conclude that the burden Minnesota's fusion ban imposes on the New Party's associational rights are justified by 'correspondingly weighty' valid state interests in ballot integrity and political stability.").

The only arguments that the *Timmons* majority declined to address were the New Party's policy-based arguments concerning the "wisdom of fusion." *Id*. at 370. The Court found that those arguments were best left to the state legislatures. *See id*. ("It may well be that, as support

[14] Plaintiffs audaciously contend that *Timmons* "conflicts with" a host of Supreme Court opinions that pre-date it. (Pls.' Br. at 62). Defendants need not respond to this frivolous point.

for new political parties increases, these arguments will carry the day in some States' legislatures. *But the Constitution does not require Minnesota, and the approximately 40 other States that do not permit fusion, to allow it*.") (emphasis added). Plaintiffs here should likewise make their plea for fusion voting to the legislature, not this Court.

In summary, Plaintiffs have failed to cite any authority, much less any persuasive or binding authority, to defend against Defendants' motion to dismiss the freedom of association claims. *Timmons* is directly on point and clearly and easily disposes of these causes of action. The Court will not make "a mistake" by following *Timmons*' well-reasoned logic, or any of the myriad state court opinions that reached the same conclusion.

D. *The Fusion Voting Ban Does Not Violate Plaintiffs' Equal Protection Rights*

Plaintiffs' final challenge to Kansas' fusion voting ban is an equal protection claim that essentially reiterates their earlier association and free speech arguments. Plaintiffs do not argue that minor parties constitute a "suspect class," but rather claim that the challenged law impacts their fundamental rights. (Pls.' Br. at 63-68). Defendants have thoroughly explained why the statute does *not* infringe upon these rights. The Court can dismiss this cause of action on that basis alone. But Plaintiffs' theory is flawed for three other reasons as well: (a) they fail to demonstrate that the statute treats similarly situated parties differently; (b) they lack evidence that the statute was enacted with discriminatory intent against minor parties or fusion candidates, and (c) any alleged burden they might experience is not severe and the State's interests are sufficiently weighty to justify the law's existence.

1. <u>All Political Parties Are Treated Equally</u>.

As a threshold matter, to assert an equal protection claim, Plaintiffs bear the burden of establishing that the "statute treats 'arguably indistinguishable' individuals differently." *State v.*

LaPointe, 309 Kan. 299, Syl. ¶¶ 5-6, 434 P.3d 850 (2019). Failure to meet this burden precludes the Court from proceeding with an equal protection claim. *State v. Huerta*, 291 Kan. 831, 834, 247 P.3d 1043 (2011). Plaintiffs concede the statute facially treats all parties the same. (Pls.' Br. at 69). No candidate may appear on a ballot more than once and no candidate may have the name of more than one party appear alongside the candidate's name on the ballot. This applies equally to minor and major parties.

Resisting this reality of equality, Plaintiffs attempt to establish different classifications in an effort to manufacture an equal protection claim. Initially, they suggest that the statute burdens minor parties compared to major parties, (Pls.' Br. at 64-65), only to later disavow that assertion. (*Id.* at 68). Plaintiffs then attempt to distinguish between parties that nominate candidates who have also been nominated by another party, and parties that nominate candidates who have *not* also been nominated by another party. (*Id.*) The latter, however, do not even trigger the law's application; they are not engaging in fusion. The bottom line is that the challenged statute draws no distinctions between any political parties. In all aspects of the statute—from the number of parties that may be listed with a candidate on the ballot, the number of times a candidate may appear on the ballot, to even a candidate's choice on which party to include on the ballot—the statute applies entirely even-handedly. Kansas permits all candidates and political parties one—and only one—nomination on the ballot in any particular race. Plaintiffs' failure to establish different classes causes their equal protection claim to "disintegrate[]." *State v. Stallings*, 284 Kan. 741, 751, 163 P.3d 1232 (2007).

The United Kansas Party does not argue that it was denied the opportunity to convince Mr. Probst or Ms. Blake to fly its party banner on the ballot rather than the Democratic Party's.

See Timmons, 520 U.S. at 360 (explaining that a party remains "free to try to convince" a party to choose its nomination over another). Instead, Plaintiffs ask the court to "look beyond the statute" and accept their premise that candidates are unlikely to select minor party-nominations, which they seem to believe constitutes an equal protection violation in and of itself. (Pls.' Br. at 64, 68-70). This is the same "predictive judgment" argument that *Timmons* rejected. *Timmons*, 520 U.S. at 361. Moreover, this premise fails to establish the requisite showing that the anti-fusion law treats similarly situated parties differently. *See Stallings*, 284 Kan. at 751 ("the first step in analyzing an equal protection claim is to determine the nature of the classification").

Notably, Plaintiffs cite no case in which a court invalidated a facially non-discriminatory anti-fusion statute on equal protection grounds. In the few cases they do cite challenging anti-fusion laws on equal protection grounds, the legislative classifications treated, or at least allegedly treated, similarly-situated parties differently. For example, in *Working Families Party*, the Pennsylvania Supreme Court scrutinized an anti-fusion scheme that, although facially precluding cross-nominations for all parties, recognized a "loophole" allowing cross-nomination via write-in votes for state and federal legislative seats. 209 A.3d at 273-274. This loophole purportedly imposed more severe burdens on a minor party attempting to cross-nominate a candidate with a major party compared to a major party attempting to cross-nominate with another major party. *Id.* The Court, however, rejected the equal protection theory because both the anti-fusion statute and the loophole "applie[d] equally to political parties and political bodies[.]" *Id.* at 283.

The dissent in that case, which Plaintiffs here urge this Court to follow, likewise based its equal protection analysis on this loophole and described why it believed a heavier burden fell on minor parties than on major parties. *Id.* at 294-296, 302. Plaintiffs conveniently omit this point

from their analysis of the dissenting opinion. (Pls.' Br. at 66-67). Regardless, what matters here is that Kansas' fusion voting ban does not even arguably impose different burdens on similarly situated parties. There are no textual distinctions or loopholes in our law. Plaintiffs' equal protection claim is less colorable than the one *Working Families Party* repudiated.

The other cases Plaintiffs cite are equally unhelpful. Each involved either facially discriminatory anti-fusion laws or ballot access statutes that effectively precluded parties from accessing the ballot *at all*. *See Reform Party of Allegheny Cnty.*, 174 F.3d at 308 (law permitted major parties to cross-nominate but precluded minor parties from cross-nominating); *Patriot Party of Allegheny Cnty.*, 95 F.2d at 268 (same); *Williams*, 393 U.S. at 25-26 (Ohio laws made it "virtually impossible" for any party besides Republicans and Democrats to *qualify* for the ballot). Indeed, *Reform Party of Allegheny County* even specifically recognized the distinction between nondiscriminatory ("across-the-board") fusion bans and facially discriminatory fusion bans. 174 F.3d at 314-315; *see also Working Families Party*, 209 A.3d at 282-284 (construing the statute in *Reform Party of Allegheny* as a discriminatory ban on fusion voting as opposed to the Pennsylvania statute at issue, which did not discriminate among major and minor parties).

As for the two early 1900s decisions from New York, while they involve fusion voting, they do not support Plaintiffs' equal protection claims. Plaintiffs misstate these cases to imply that the court invalidated general anti-fusion bans on equal protection grounds. Not so. In *In re Callahan*, 93 N.E. 262 (N.Y. 1910), the court invalidated a general fusion voting ban, taking the position that the legislature could not preclude voters from choosing a candidate absent a showing that the choice "contravene[s] common morality." *Id.* at 263. Contrary to Plaintiffs' assertions, the court did *not* reach its decision by finding that the anti-fusion law "discriminat[ed] in

favor of one set of candidates." (Pls.' Br. at 66). This partial quote referred to a hypothetical fusion ban (not the ban before the court) that would have discriminated in favor of major parties, similar to the statute invalidated in *Reform Party of Allegheny County*, which the court explained would violate equal protection. *Callahan*, 93 N.E. at 263.

In *Hopper v. Britt*, 203 N.Y. 144 (1911), the New York Court of Appeals addressed a statute enacted after *Callahan* that complicated fusion voting for voters. Under the law, the ballot was organized such that only one of the cross-nominating parties had its name next to a candidate, while the other parties had a "See Column" designation directing voters to a different portion of the ballot. *Id.* at 147-148. The court held that this arrangement did not give "each voter . . . the same facilities as any other voter" compared to how votes were cast for other candidates. *Id.* at 152. The court was not invalidating a facially nondiscriminatory ban on fusion candidates. Indeed, this was not a challenge to an anti-fusion statute at all.

It is unsurprising that Plaintiffs fail to identify *any* case supporting their argument that a facially nondiscriminatory anti-fusion ban violates equal protection. In the 125+ years that anti-fusion statutes have been in existence, courts have almost universally *rejected* this same equal protection claim. *See, e.g.*, *Working Families Party*, 209 A.3d 270; *Swamp v. Kennedy*, 950 F.2d 283, 385-86 (7th Cir. 1991); *Coburn*, 18 S.W. at 960; *Czarnecki*, 100 N.E. at 285-286; *Anderson*, 76 N.W. at 485-486; *Bode*, 45 N.E. at 196-97; *Todd*, 64 N.W. at 498; *see also Dunbar*, 230 P. at 38 (as long as anti-fusion statute "operates . . . evenly and impartially upon all parties," it is constitutional); *Hayes*, 127 P. at 342 (recognizing "the great weight of authority" for a legislature to enact anti-fusion statutes and holding that the Utah legislature likewise had that authority);

Superior Ct. of King Cnty., 111 P. at 236-37 (discussing cases that raised equal protection claims to anti-fusion statutes and upholding Washington's anti-fusion statute).

Plaintiffs respond that it is "irrelevant" that Kansas' fusion voting ban treats all parties alike because the supposed "reality" is that minor parties will be unable to convince a candidate to select them. (Pls.' Br. at 69). Two problems with this argument: First, the statute applies evenhandedly to all types of parties, meaning Plaintiffs cannot demonstrate that the statute treats anyone differently. Second, the cases upon which Plaintiffs rely involve statutes that impose excessive burdens on candidates or parties obtaining any ballot access *at all*. *See Graveline v. Benson*, 992 F.3d 524, 538 (6th Cir. 2021) (combination of early signature deadline and large number of signatures required for independent candidates to access ballot was unduly burdensome when compared to nomination date for major party candidates); *Bullock v. Carter*, 405 U.S. 134 (1972) (arbitrarily exorbitant fee required to access a party primary rendered it unnecessarily burdensome to get on the ballot); *Lubin v. Panish*, 415 U.S. 709 (1974) (statute contained no alternative means for indigent candidate to access ballot). Kansas' anti-fusion statute does not preclude the United Kansas Party, or any other party, from accessing the ballot. In fact, the United Kansas Party will have a candidate on the ballot in the upcoming General Election's House District 26 race. What Plaintiffs ultimately want, however, is to avoid having to convince candidates to utilize its nomination over another party's nomination, and that is not a burden the law deems severe or affords a legal remedy.

2. Plaintiffs Have Not Shown That Kansas' Anti-Fusion Law Was Enacted With Discriminatory Intent Against Minor Parties or Fusion Candidates.

Even if Plaintiffs could establish that Kansas' fusion voting ban unlawfully discriminates against certain parties—which they can't—they would also have to establish that the law was

enacted with a discriminatory *intent* in order to prevail on an equal protection claim. *Crawford v. Kan. Dep't of Rev.*, 46 Kan.App.2d 464, 468, 263 P.3d 828 (2011). "A discriminatory purpose is not presumed; there must be some evidence showing clear and purposeful discrimination." *Pork Motel, Corp. v. Kan. Dep't of Health and Env't*, 234 Kan. 374, 387, 673 P.2d 1126 (1983) (citations omitted).

Plaintiffs' only attempt at establishing that Kansas intended for the anti-fusion statute to discriminate is a partial quote from a Kansas *governor* in 1901. (Pls.' Br. at 5). A gubernatorial quote obviously cannot establish that the entire legislature acted with discriminatory intent. And even if Plaintiffs had unearthed some comment from a legislator at the turn of the 19th century, it still would not matter. "[O]ne legislator's understanding of the meaning reflects only his or her personal view and is not indicative of legislative intent because there is no evidence or assurance that other legislators shared this opinion." *Davis v. City of Leawood*, 257 Kan. 512, 527, 893 P.2d 233 (1995) (citation omitted); *accord United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (when determining constitutionality of a statute, it would be improper to decide its fate "on the basis of what fewer than a handful of Congressmen said about it."); *Rosensteil v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) ("isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body"). One is also reminded of Justice Scalia's observation about how little can be gleaned from a legislator's vote: "How do they express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like '( ) I have a deeply held view about this; ( ) this is probably desirable; ( ) this is the least of the available evils; ( ) my personal view is the other way, but my constituents want this; ( ) my personal view

is the other way, but my big contributors want this; ( ) I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye''?" *Carrigan*, 564 U.S. at 126. In short, Plaintiffs come nowhere close to establishing discriminatory intent.

3. Even if Anti-Fusion Law Imposed Some Additional Burden on Minor Parties, Deferential Review under *Anderson-Burdick* Balancing Test Would Apply, Not Strict Scrutiny.

Turning to the standard of review, Plaintiffs' equal protection claim should be evaluated under the same standard applicable to their freedom of speech and freedom of association causes of action: either a general reasonableness test or, at worst, the *Anderson-Burdick* balancing test that Defendants described in their underlying motion. (Defs.' Br. at 17). Either way, given that there is no burden on Plaintiffs' equal protection rights from the fusion voting ban, or if there is one, it is clearly not severe, something akin to rational basis review is appropriate. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) ("[M]inimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions.") (citing *Burdick*, 504 U.S. at 434). This is especially true since there is no suspect class at play here. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985) (unless statute imposes classifications based on race, alienage, national origin, or gender, most laws are subject only to rational basis review, the least probing form of equal protection review).

Plaintiffs naturally advocate strict scrutiny review, (Pls.' Br. at 70-72), a position which is in direct conflict with the jurisprudence in this area and makes no sense. *See* Part IV, *supra*. Plaintiffs suggest that strict scrutiny must be applied because a "fundamental right" is implicated, (Pls.' Br. at 64, 70), although they are cagey as to what exactly that right is. If the right at issue

is voting, our Supreme Court has explained that there is no fundamental right to vote under state law divorced from "concrete and specific provisions of the Constitution or statutes." *LWV II*, 549 P.3d at 379-80. If the right at issue is freedom of association, the U.S. Supreme Court rejected the notion of evaluating anti-fusion laws under strict scrutiny. *Timmons*, 520 U.S. at 363-64. And if the right at issue is some other sort of unequal ballot access theory, the federal courts have consistently held that equal protection challenges to ballot access laws should be evaluated under the *Anderson-Burdick* balancing test. *See, e.g.*, *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015); *Fish v. Schwab*, 957 F.3d 1105, 1121-1122 (10th Cir. 2020); *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 235 (5th Cir. 2020); *Marcellus v. Va. Bd. of Elections*, 849 F.3d 169, 180, n.2 (4th Cir. 2017); *Indep. Party of Fla. v. Fla. Sec'y of State*, 967 F.3d 1277, 1281 (11th Cir. 2020).

Plaintiffs urge the Court to disregard all of these cases, (Pls.' Br. at 70), a refrain which borders on the frivolous and must be a little tiring for the Court at this point. The Kansas Supreme Court clearly held in *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022), that it is guided by U.S. Supreme Court precedent on the Fourteenth Amendment's Equal Protection Clause in examining equal protection claims under Section 2 of the Kansas Constitution's Bill of Rights because the protections afforded under each are "co-extensive." *Id.* The fact that the federal appellate courts are lined up unanimously on their interpretation surely warrants similar deference from the Kansas Supreme Court.

Plaintiffs attempt to circumvent this overwhelming precedent by partially quoting a Sixth Circuit decision that said the U.S. Supreme Court has not applied *Anderson-Burdick* to a "pure equal-protection" challenge to ballot access. (Pls.' Br. at 70) (citing *Green Party of Tenn.*, 791

F.3d at 692).[15] The term "pure equal-protection" is unclear and Plaintiffs provide no clarity as to what they believe it means. But their legal argument is unfounded in any event. Indeed, the U.S. Supreme Court has held that *Anderson-Burdick* balancing applies to claims "that a state law imposes [a burden] on a political party, an individual voter, or a discrete class of voters." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). *Accord Burdick*, 504 U.S. at 433-34 (the fact that State's election code "creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny"); *id.* at 434 (Court must "weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights."); *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (holding that *Burdick* "emphasized that [*Anderson-Burdick* balancing] applies to *all* First and Fourteenth Amendment challenges to state election laws") (emphasis in original).

Plaintiffs' further insist that the anti-fusion law imposes a more "severe" burden on minor parties like United Kansas than major parties because the former lack a viable "path" to victory given the "insuperable barrier" they face. (Pls.' Br. at 71). False. No political party—major or minor—is precluded from accessing the ballot by this even-handedly applied statute. The statute "reduce[s] the universe of potential candidates who may appear on the ballot as the party's

[15] The full quotation is: "While the Supreme Court has not yet applied this test to ballot-access challenges on pure equal-protection grounds, our cases hold that the *Anderson–Burdick* test serves as a single standard for evaluating challenges to voting restrictions." *Green Party of Tenn.*, 791 F.3d at 692 (citation omitted). "Further, many federal courts of appeals have applied the *Anderson–Burdick* balancing test to both First Amendment and Equal Protection Clause challenges to ballot-access laws." *Id.* (citations omitted).

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, themselves prefer that other party." *Timmons*, 520 U.S. at 363. This is simply not a severe burden. *Id.*; *see also S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 757 (4th Cir. 2010) (sore loser law that precluded an attempted fusion candidate who lost the major party primary from appearing on the ballot using minor party nominations was not a severe burden); *State ex rel. Blankenship v. Warner*, 825 S.E.2d 309, 323 (W. Va. 2018) (sore loser law precluding a minor party from placing the candidate that it wanted on the ballot was not a severe burden); *id.* at 320 ("These unrecognized parties simply cannot nominate as their candidate any of a few individuals on account of voluntary choices made by those individuals alone. That is quite different from a law that "directly hampers the ability of a party to spread its message.") (citations and internal alterations omitted).

Meanwhile, the cases upon which Plaintiffs rely so heavily are readily distinguishable as all involved statutes that effectively barred candidates or minor parties from accessing the ballot *at all*. (Pls.' Br. at 70-72). *Green Party of Tennessee*, for example, analyzed a ballot access law that required "minor parties to obtain 5% of the total number of votes cast for governor in the last gubernatorial election to retain ballot access beyond the current election year." 791 F.3d at 693. "In contrast, statewide political parties [i.e., major parties] are given four years to obtain the same level of electoral success." *Id.* This meant that a major and minor party could receive the same number of votes in the same race, yet the minor party would lose its ballot access while the major party retained access. The court unsurprisingly found an equal protection violation from such facially differential treatment under the statute. *Id.* at 694-95.

Similarly, in *Graveline*, another Sixth Circuit case Plaintiffs cite whose continuing viability is likely in doubt in the wake of that court's recent decision in *Lichtenstein*, 83 F.4th at 586-87, the divided court examined a ballot access law that mandated independent candidates secure an extraordinarily large number of voter signatures from the citizenry, with at least 100 of those signatures obtained from registered voters in at least half of Michigan fourteen congressional districts. *Graveline*, 992 F.3d at 529. And the signatures had to be obtained within 180 days of the filing deadline, which meant the process to secure ballot access needed to begin in late January. *Id.* The majority concluded that the combination of the early filing deadline and the substantial signature requirement represented a severe burden on independent candidates. *Id.* at 537. Whatever the merits of the court's reasoning, the bottom line is that its focus was on the statute's potential to prevent independent candidates from accessing the ballot under any circumstances. That is a far cry from the issues in the United Kansas Party's lawsuit.

Plaintiffs' assertion that minor parties have not "won a statewide or federal election in Kansas" in more than a century, (Pls.' Br. at 72), is likewise irrelevant and does not demonstrate that the State's *anti-fusion law* imposes a severe burden. There is no "constitutional right to win an election," but instead only a "constitutional right to run for office and to hold office once elected." *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985). The U.S. Supreme Court does not even guarantee someone "a realistic chance to secure a party's *nomination*." *Lopez Torres*, 552 U.S. at 205 (emphasis added). If Plaintiffs' rationale were accepted, it would call into question whether Kansas' basic election framework constitutes a severe burden *on a recognized major party* given that the Democratic Party has only prevailed in one attorney general election since 1979, two insurance commissioner elections (both by the same candidate) since 1899, and

one secretary of state election ever. No independent candidate has ever won those statewide. It is obviously not the role of the Court to involve itself in this type of dispute.[16]

Even if the failure to win an election somehow could signify a constitutional burden—a slope that no court with respect for the separation of powers wants to ski—that would not mean the anti-fusion statute imposes such a burden. Unlike provisions with quantifiable requirements, such as signature counts or petition timelines, a candidate's electoral success hinges on various non-statutory factors, including popularity, funding, and policies. This is another reason why cases that analyze ballot access burdens, like *Graveline*, do not equate to assessing the impact of laws on electoral success. Indeed, the Supreme Court acknowledges that "[m]any features of our political system—*e.g.*, single-member districts, 'first past the post' elections, and the high costs of campaigning—might make it difficult for third parties to succeed in American politics" but still do not represent severe burdens. *Timmons*, 520 U.S. at 362.

Lastly, Plaintiffs maintain that the State's interests justifying the fusion voting ban are unsubstantiated. But as Defendants have previously explained, a State has no legal obligation to produce "elaborate, empirical verification of the weightiness of [its] asserted justifications." *Id.* at 364. Here, Kansas has articulated numerous important, legitimate, and compelling interests to justify its anti-fusion statute. These interests are more than sufficient to satisfy any minimal

[16] The only case Plaintiffs cite for this theory is *Graveline*, 992 F.3d at 542-43, which focuses on *qualifying for the ballot*, not on *winning an election* post-qualification. The court there noted that an independent candidate had never qualified for the ballot in the 35 years since the statutory scheme's inception and used that fact as evidence that the scheme imposed a severe burden on ballot access. *Id.* *Graveline* does not suggest, however, that failure to *win* an election illustrates that *a ballot access* law is severely burdensome. Such a claim is nothing more than an indirect challenge to ballot access laws, which courts have upheld due to the compelling state interests in such statutes, so long as the laws are reasonable and nondiscriminatory. *Timmons*, 520 U.S. at 351-352, 363-369.

burden a nondiscriminatory anti-fusion statute imposes. Accordingly, Plaintiffs' equal protection claim fails.

VI. – Plaintiffs' Misstate the Law in Criticism of Defendants' Brief

For their final point, Plaintiffs contend that Defendants have disputed properly pled facts and are asking the Court to accept the truth of material outside the Petitions. (Pls.' Br. at 72-75). Plaintiffs maintain that the Court cannot consider any of the State's asserted interests in its fusion voting ban in the absence of a drawn-out discovery process where evidence can be gathered on those interests. Every state interest, Plaintiffs argue, is a disputed fact, assumption, or contested finding. Nonsense. With one exception, the points about which Plaintiffs complain involve *state interests* that require no empirical evidence to support, and the case law quotations represent legal analogies that courts drew to bolster their reasoning; they were not *factual findings*.[17]

In challenges to election laws that do not impose severe burdens, courts do not require "elaborate, empirical verification of weightiness" of a state's interest supporting its election laws. *Timmons*, 520 U.S. at 363; *see also Crawford*, 553 U.S. at 194-96 (fact that Indiana had *never* had a reported case of in-person voter fraud did not preclude Indiana from enacting a statute that *only* prevented that type of voter fraud). This is particularly true with respect to ballot access provisions, where courts have "never required a State to make a particularized showing of the existence of voter confusion, ballot crowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S.at 194-95 (collecting

[17] Defendants acknowledge that the assertion in their motion that "few individuals in Kansas today are even familiar with the concept of fusion voting" and that "most voters have never even heard of it and would find the concept . . . bewildering" is a statement of fact, not a state interest." (Pls.' Br. at 74) (citing Defs.' Br. at 2, 28). While the Court would likely make the same finding if it spoke to virtually any random group of citizens in the State, Defendants will retreat from that one specific factual point. Nevertheless, there is no question that the anti-fusion voting statute prevents voter confusion, and that state interest is entirely legitimate.

cases); *see also Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (explaining that in election law challenges where strict scrutiny does not apply, a state is not required to "justify reasonable and nondiscriminatory rules, but instead, need only "articulate its asserted interests," which is "not a high bar"). And when an overwhelming majority of states have enacted similar laws, as is the case with fusion voting bans, courts also give that "broadly shared judgment . . . respect." *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 16 (2018) (citation omitted).

Plaintiffs' attempt to discredit Kansas' interests is a clear attempt to get into "endless court battles over the sufficiency of the 'evidence' marshaled by a State" in support of its ballot access laws, which courts are loathe to do. *Munro*, 479 U.S. at 195. Plaintiffs' position would require Kansas' "political system [to] sustain some level of damage before the legislature could take corrective action." *Id.* But the State is "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96. This is particularly true for the interests the State has identified in this case, including the need to avoid voter confusion, prevent ballot manipulation, exercise reasonable control over the number of parties on the ballot to avoid it becoming a billboard, preserve stability in the political system, and enhance voter confidence.

These state interests, and the explanations as to how the anti-fusion law supports them, are not "disputed facts." They are *legal arguments* that numerous courts have endorsed. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 732 (1999) (Scalia, J. concurring) ("Whether the government's asserted basis for its challenged action represents a

legitimate state interest" is "a question of law"); *Caruso v. Yamhill Cnty. ex rel. County Comm'r*, 422 F.3d 848, 861 (9th Cir. 2005) (sufficiency of state interest "presents a question of law").

Plaintiffs are simply wrong that cases like *Jones v. Bordman*, 243 Kan. 444, 759 P.2d 953 (1988), have any applicability here. (Pls.' Br. at 75). Courts obviously cannot take judicial notice of contested factual findings from another proceeding to exclude expert testimony, which is what *Jones* addressed. 243 Kan. at 459. But citing other court holdings that recognize as valid the same state interests in support of anti-fusion statutes, as Defendants assert here, is *not* asking the court to adopt contested factual findings. Defendants are merely relying on *legal holdings* of other courts. It is nothing short of absurd to label many of the interests with which Plaintiffs take issue as "factual disputes," such as Kansas seeking to prevent ballots from becoming billboards, avoiding voter confusion, and pointing out that casting a ballot in a booth alone does not inspire meaningful conversation with someone else.

Unless Plaintiffs are arguing that Kansas somehow occupies a unique role in our republic such that our voters—and our voters alone—can have a meaningful conversation with themselves when voting alone, or that Kansas lacks an interest in precluding voter confusion or allowing its ballot to become a political billboard, it is unclear why Plaintiffs are making this argument. The interests that Kansas advances regarding anti-fusion statutes are "proposition[s] about the state of the world," rather than "proposition[s] about these litigants or about a single state." *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). Anti-fusion statutes either promote confidence, prevent ballot manipulation, and help preserve stability in the political system, or they don't; there is no way they could serve those interests in 42 other states and not in Kansas."

Id. "Functionally identical laws cannot be valid in [Kansas] and invalid in [42 other states]," depending on which political scientist testifies or which attorneys argue a case. *Id.*

All of the issues in this case are either undisputed facts or legal propositions. However, if this Court disagrees with that proposition for some reason—and there is no reason it should—then Plaintiffs' motion for summary judgment should be denied so that Defendants have the opportunity to engage in meaningful discovery. *See* K.S.A. 60-256(f).

VII. – Conclusion

At the end of the day, this case presents a policy dispute over which mode of voting best serves the public. The Kansas legislature made that decision 123 years ago and the public later enshrined in our State constitution the broad latitude that the legislature must be afforded on that issue. This dispute belongs at the Capitol in Topeka, not in this courtroom. Moreover, the U.S. Supreme Court and nearly every State Supreme Court to address the issue has expressly rejected the claims that Plaintiffs advance here. Although Plaintiffs mock Defendants for relying on that virtually unanimous case law, there is a reason for the uniformity: Plaintiffs' claims have no legal merit. There are no constitutional flaws with the anti-fusion statute that has been in place—and gone unchallenged—in Kansas for more than three quarters of its history. Defendants thus urge the Court to respect the separation of powers principles at play in this case, grant the Defendants' motion to dismiss for failure to state a claim, and deny the Plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 1, 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.

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